

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

No. 8547 of 2009

BETWEEN

ENVIRONMENT EAST GIPPSLAND INC

Plaintiff

and

VICFORESTS

Defendant

SEVENTH AFFIDAVIT OF VANESSA ELIZABETH BLEYER

Date of document:	23 February 2010	
Filed on behalf of:	Plaintiff	
Bleyer Lawyers Pty Ltd		Ph: 9600 4224
Level 1, 550 Lonsdale Street		Fx: 9600 4225
Melbourne 3000		Code: 101385
Em: vanessa@bleyerlawyers.com.au		Ref: Vanessa Bleyer

I, **VANESSA ELIZABETH BLEYER**, Solicitor, of Level 1, 550 Lonsdale Street, Melbourne in the State of Victoria make oath and say as follows:

1. I am the Principal of the law practice Bleyer Lawyers Pty Ltd and have the care and conduct of this proceeding on behalf of the Plaintiff ("EEG"). I am authorised to make this affidavit on behalf of EEG.
2. I make this affidavit from my own personal knowledge save where otherwise stated, and in my professional capacity.
3. I refer to the affidavit sworn by me on 22 February 2010 and filed herein on behalf of EEG. The last exhibit in that affidavit is marked "VEB-28". As a result, the first exhibit in this affidavit is marked "VEB-29".

Square-tailed Kite

4. On 19 January 2010, I spoke to Dr Rohan Bilney on the telephone. Dr Bilney said, among other things, that he had observed a Square-tailed Kite at Brown

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Mountain. I asked Dr Bilney if he was qualified to prepare an expert report on the Square-tailed Kite. Dr Bilney said that he did not consider himself an expert on the Square-tailed Kite for the purpose of preparing an expert report for filing in a Court proceeding. I asked Dr Bilney if he could prepare a document describing his observations of the Square-tailed kite at Brown Mountain.

5. After speaking to Dr Bilney on 19 January 2010, I made some inquiries regarding the Square-tailed Kite and discovered that:

- (a) it is listed as threatened under the *Flora and Fauna Guarantee Act 1988* (Vic);
- (b) it is referred to in the East Gippsland Forest Management Plan in part 3.3 under the heading “conservation guidelines – birds” as follows:

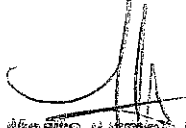
“Diurnal raptors. (Square-tailed Kite, White-bellied Sea-Eagle, Grey Goshawk, Peregrine Falcon and Little Falcon). All known nest sites will be included in Special Managements Sites with a 250-m radius around the site. Timber harvesting, road construction and fuel-reduction burning will be avoided in this area during the breeding season. At other times harvesting and road construction will be permitted to within 100 m of nest trees. Visitors will be discouraged and sites will not be publicised.

Now produced and shown to me and marked “**VEB -29**” is a true copy of the first page of the *Flora and Fauna Guarantee Act 1988 – Threatened List – July 2009* and page 3 of the document which includes the Square-tailed Kite.

Now produced and shown to me and marked “**VEB-30**” is a true copy of part 3.3 of the East Gippsland Forest Management Plan.

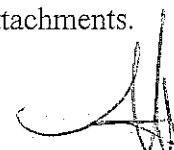
6. On 4 February 2010, Dr Bilney provided me with a copy of a document that he said he produced in response to my request. Now produced and shown to me and marked “**VEB-31**” is a true copy of the document.

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7. On 4 February 2010, I contacted Dr Stephen Debus by telephone. Dr Debus informed me that he is an expert on the Square-tailed Kite.
8. On 4 February 2010, I sent a letter to Dr Debus requesting that he prepare an expert report for filing in this proceeding. I sent the letter by email and by postal mail. Some of the attachments referred to in the letter were sent to Dr Debus by email. One of the attachments referred to in the letter was sent to Dr Debus by postal mail. Now produced and shown to me and marked "VEB-32" is a true copy of the letter and the emails referred to in this paragraph 8.
9. On 8 February 2010, I had an email exchange with Dr Debus regarding when he expected to complete his report. Now produced and shown to me and marked "VEB-33" is a true copy of the emails exchanged.
10. On 9 February 2010, I sent a letter to the Defendant's solicitors which said to the effect that it had recently been brought to our attention that a Square-tailed Kite had been identified at Brown Mountain and that we were in the process of obtaining an expert report in respect of that species which would be filed in this proceeding. The letter is marked "RVH-12" and exhibited to the affidavit sworn by Rebecca Veronica Howe on 19 February 2010 and filed in this proceeding on behalf of the Defendant ("Ms Howe's affidavit").
11. On 11 February 2010, I received an email from Dr Debus at about 6:28pm wherein Dr Debus says that a draft report is attached to the email for my "perusal and any revision" I require. I received the 11 February email on the morning of 12 February 2010. Now produced and shown to me and marked "VEB-34" is a true copy of the 11 February email and its attachments.

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12. On Friday, 12 February 2010, after receiving the 11 February email referred to at paragraph 10 above, I sent an email to Dr Debus at about 9:26am, informing Dr Debus that I cannot review the report and asking him to provide his final report to us. Now produced and shown to me and marked "VEB-35" is a true copy of the email.
13. On Friday, 12 February 2010, I left the office at about 4:30pm as I was travelling interstate for business. On Monday, 15 February 2010, I was interstate for business. On Tuesday, 16 February 2010, I returned to the offices of Bleyer Lawyers in Melbourne. Intermittently throughout the course of the day and in between a number of conferences with clients of Bleyer Lawyers, I checked emails that had been sent to me since I left the office on Friday, 12 February 2010. One such email was an email from Dr Debus sent at about 5:00pm on Friday, 12 February 2010. As a result, I received Dr Debus' report on 16 February 2010. Now produced and shown to me and marked "VEB-36" is a true copy of the email and its attachments.
14. I served Dr Debus' report on the Defendant's solicitors on 17 February 2010 as deposed to in paragraph 19 of Ms Howe's affidavit.

Giant Burrowing Frog

15. On 8 February 2010, I spoke to Dr Graeme Gillespie on the telephone. Dr Gillespie told me he had been meaning to raise the Giant Burrowing Frog with me, as he did not understand why Dr Meredith had left it out of his critical habitat report (which is marked "JR-39" and exhibited to the affidavit of Jill Redwood sworn 28 August 2009 and filed herein on behalf of the Plaintiff). Dr Gillespie told me he had forgotten to raise it with me until this telephone call.

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Dr Gillespie told me he had not found a Giant Burrowing Frog at Brown Mountain but considered the coupes to be perfect habitat and since this species was more endangered than the Large Brown Tree Frog Dr Gillespie said he was raising the issue with me now.

16. After speaking to Dr Gillespie on 8 February 2010, I made some inquiries regarding the Giant Burrowing Frog and discovered that:

- (a) it is listed as threatened under the *Flora and Fauna Guarantee Act 1988* (Vic); and
- (b) an action statement has been made for the Giant Burrowing Frog which provides, among other things, that "Within Victoria only 26 adult frogs, one juvenile frog and three groups of tadpoles have been recorded at 24 localities (Atlas of Victorian Wildlife 1993) scattered over a large area of central and eastern Gippsland".

Now produced and shown to me and marked "VEB -37" is a true copy of the page 4 of the *Flora and Fauna Guarantee Act 1988 – Threatened List – July 2009* which includes the Giant Burrowing Frog.

Now produced and shown to me and marked "VEB-38" is a true copy of the action statement for the Giant Burrowing Frog.

17. On 10 February 2010, I sent a letter to Dr Gillespie requesting that he prepare an expert report for filing in this proceeding. Now produced and shown to me and marked "VEB-39" is a true copy of the letter.

18. On 10 February 2010, I sent a letter to the Defendant's solicitors which said to the effect that it had recently been brought to our attention that the Giant Burrowing Frog was relevant to Brown Mountain and that we were in the

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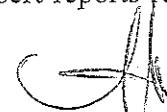
process of obtaining an expert report in respect of that species which would be filed in this proceeding. The letter is marked "RVH-13" and exhibited to the Ms Howe's affidavit.

19. I spoke to Dr Gillespie by telephone on 22 February 2010. Dr Gillespie told me to the effect that he should be in a position to provide me with a report on the Giant Burrowing Frog tomorrow, 24 February 2010.

Proposed amended statement of claim

20. The receipt of Mr McCormack's report on the new crayfish species (which was filed in this proceeding and served on 21 December 2009), and the outcome of his surveys in relation to the Orbost Spiny Crayfish suggested to me that it may be necessary for the Plaintiff to amend its statement of claim to reflect the findings in his expert report. For various reasons including that we had not been able to file and serve all expert reports on 21 December 2009 which were contemplated at that time, Counsels' availability and the intervening Christmas and New Year period, no action was taken about proposed amendments between 21 December 2009 and early January 2010. In addition, it seemed to me prudent to wait and see whether any of the other expert reports that were contemplated at that time also suggested there should be amendments to the statement of claim.
21. I refer to paragraphs 8, 12 and 13 of Ms Howe's affidavit which deposes to the dates on which the further expert reports were served on the Defendant, being expert reports relating to the Greater Glider and Yellow-bellied Glider, the Long-footed Potoroo and Hollow-bearing trees. The expert reports referred to

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in those paragraphs of Ms Howe's affidavit were the expert reports that were contemplated as at 21 December 2009.

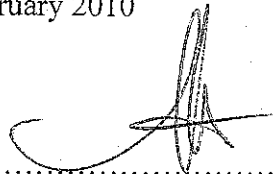
22. Ms Mortimer SC was on leave from about Christmas 2009 until 18 January 2010 and as deposed above I received a telephone call from Dr Bilney about the Square-tailed Kite on 19 January 2010. Mr Niall was in Darwin appearing at an inquest between 17 January and 18 February 2010. Ms Mortimer SC was then in Samoa in relation to another case from 12 February 2010 and did not return to chambers until today 23 February 2010. Ms Knowles was briefed for the Plaintiff on 18 January 2010.
23. Due to the matters set out in paragraphs 4 to 23 inclusive of this my affidavit, proper consideration was not able to be given to necessary amendments to the statement of claim until the last part of January and the first part of February 2010.
24. On 18 February 2010, I sent a letter to the Defendant's solicitors which attached a proposed amended statement of claim and inquired whether the Defendant consented to the filing of it. The letter is marked "RVH-17" and exhibited to Ms Howe's affidavit.

Sworn at Melbourne in the State of Victoria

This 23rd day of February 2010

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Before me:



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