

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

No. 8547 of 2009

BETWEEN:

ENVIRONMENT EAST GIPPSLAND INC

Plaintiff

AND

VICFORESTS

Defendant

AFFIDAVIT OF CAMERON MACDONALD

Date of document: 31 August 2009

Filed on behalf of: The Defendant

Prepared by:

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I, **CAMERON MACDONALD**, of Level 7, 473 Bourke Street, Melbourne, in the State of Victoria
Director, make oath and say:

1. I am authorised to make this affidavit on behalf of VicForests. I make this affidavit from my own knowledge unless otherwise indicated. Where I depose to matters from information and belief, I believe those matters to be true.
2. I am the Director – Strategy and Corporate Affairs, at VicForests.

VicForests

3. VicForests was established by an Order of the Governor in Council dated 28 October 2003 (**the Establishing Order**) pursuant to s 14 of the *State Owned Enterprises Act 1992* (Vic). Now produced and shown to me and marked **CM1** is a copy of the Establishing Order.
4. Pursuant to clause 3(3) of the Establishing Order, VicForests is required to:
 - (a) undertake the sale and supply of timber resources in Victorian State forests, and related management activities, as agreed by the Treasurer and the Minister, on a commercial basis;
 - (b) develop and manage an open and competitive sales system for timber resources; and
 - (c) pursue other commercial activities as agreed by the Treasurer and the Minister.


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5. Pursuant to clauses 5 – 7 of the Establishing Order, VicForests must:
 - (a) operate its business or pursue its undertakings as efficiently as possible consistent with prudent commercial practice;
 - (b) be commercially focused and deliver efficient, sustainable and value for money services; and
 - (c) operate in a framework consistent with Victorian Government policy and priorities.
6. VicForests commenced trading on 1 August 2004 as part of the forest industry reform introduced by the Victorian Government. Under the *Our Forests Our Future* policy reform, the sustainable harvest and commercial activity in Victorian forests was divided between two entities. VicForests undertook responsibility for the commercial management and sale of timber resources in Victorian State forests and the Department of Sustainability and Environment (DSE) became responsible for forest management.

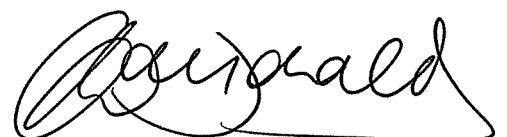
Timber allocation to VicForests

7. The process for timber allocation to VicForests is explained in a DSE fact sheet titled 'Timber Allocation under the *Sustainable Forests (Timber) Act 2004*'. Now produced and shown to me and marked **CM2** is a copy of the fact sheet.
8. For convenience, the fact sheet explains that in 2004 the government introduced a new framework for timber allocation, in which the Minister for Environment provides VicForests with an Allocation Order that is published in the Government Gazette.
9. The Allocation Order describes the timber resources available to VicForests for the next 15 years, with a review every 5 years.
10. The Order identifies the forest stands where VicForests can conduct harvesting activities, specifies the permitted activities and lists the conditions under which they can occur. These activities include sawlog and residual log harvesting and commercial thinning.
11. The initial Allocation Order was made on 29 July 2004. Now produced and shown to me and marked **CM3** is a copy of the Allocation Order to VicForests order dated 29 July 2004.
12. For convenience I note that page 7 of the Allocation Order contains a map that shows the East Gippsland Forest Management Area of which the Brown Mountain Creek catchment is part.
13. Brown Mountain Creek is a catchment of approximately 450 hectares on the edge of the Errinundra Plateau in East Gippsland. With the exception of about 50 hectares at the northern end of the catchment (which is part of the Gap Scenic Reserve), the area is State forest and has been designated a "General Management Zone" by the DSE pursuant to the East Gippsland Forest Management Plan.



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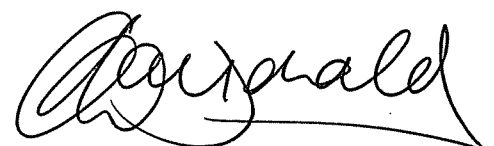
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14. The zoning scheme divides State forest into three zones:
 - (a) Special Protection Zone (SPZ) to be managed for conservation, with timber harvesting excluded. It forms a network designed to complement conservation reserves (parks etc.);
 - (b) Special Management Zone (SMZ) to be managed to conserve specific features, while catering for timber production under certain conditions; and
 - (c) General management Zone (GMZ) to be managed for a range of uses, with timber production as a high priority.
15. Now produced and shown to me and marked **CM4** is Chapter 2 of the East Gippsland – Forest Management Plan that explains the DSE's forest management strategy and zoning scheme. This document is available for download from the Victorian Government website www.dse.vic.gov.au
16. After an allocation order has been gazetted by the DSE, VicForests develops a Timber Release Plan in accordance with Part 5 of the *Sustainable Forests (Timber Act) 2004* (Vic). The Timber Release Plan contains all proposed harvesting activities for up to five years.
17. The Secretary to the DSE approved VicForests' Timber Release Plan on 30 July 2004. It has since been periodically amended.
18. Relevantly, by letter dated 5 July 2007 the Secretary to the DSE approved amendments to the Timber Release Plan that, amongst other things, had the effect of allocating new coupes for harvesting to VicForests within the East Gippsland Forest Management Area. The added coupes included coupes **840-502-0015** and **840-502-0019**.
19. Now produced and shown to me and marked **CM5** is a copy of the letter dated 5 July 2007 from the Secretary to the DSE.
20. By letter dated 5 June 2009 from the Secretary to the DSE to VicForests, the Secretary approved a new Timber Release Plan. In that letter the Secretary approved the allocation of new coupes for harvesting to VicForests within the East Gippsland Forest Management Area. The added coupes included coupes **840-502-0026** and **840-502-0027**.
21. Now produced and shown to me and marked **CM6** is a copy of the letter dated 5 June 2009 from the Secretary to the DSE.
22. The four coupes described in the amendment and new Timber Release Plan above are the coupes the subject of the writ filed by the plaintiff in this proceeding.
23. Subject to weather conditions, VicForests currently intends to commence harvesting in coupes **840-502-0015** and **840-502-0019** next week. VicForests has no plans to harvest in the other coupes the subject of the writ in the foreseeable future.



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24. Now produced and shown to me and marked **CM7** is a map prepared by VicForests titled 'Brown Mountain Land Status and Harvesting History' which shows the coupes approved by the DSE for harvesting in the Brown Mountain catchment area.

Conservation issues in the Brown Mountain catchment area

25. In August 2009 the DSE published a report titled *Surveys for arboreal mammals, Long-Footed Potoroo and Spiny Crayfish in proposed logging coupes 840-502-0015 and 840-502-0019, Brown Mountain Creek Catchment, Brodribb Forest Block, Errinundra Plateau – January – March 2009 (the DSE survey)*.
26. Now produced and show to me and marked **CM8** is a copy of the DSE survey.
27. For convenience I note that the DSE survey concluded that no long-footed potoroos or Orbost-spiny crayfish were detected.
28. On 21 August 2009 the Victorian Minister for Environment and Climate Change issued a media release concerning the Brown Mountain Area.
29. Now produced and shown to me and marked **CX9** is a copy of the media release dated 21 August 2009.
30. For convenience, I note that the media release relevantly states:

Mr Jennings said an area containing a number of contentious timber harvesting coupes around Brown Mountain Creek, to the east of Brown Mountain, would remain available to harvesting as they did not meet the standard of old growth warranting inclusion in the reserve.

He said VicForests would be allowed to recommence timber harvesting at Brown Mountain under modified conditions designed to provide greater protection to the area.

Mr Jennings said the significant additional habitat protection measures, including extra wide 100 metre streamside buffers and the protection of hollow-baring habitat trees identified by biodiversity officers, would be put in place at Brown Mountain Creek area even though no threatened species were found during fauna surveys of the area.

"Biodiversity experts conducted a series of surveys in the area to determine if any threatened species were present," he said.

"The surveys conducted by DSE staff included specific surveys for Long-footed Potoroo and Orbost Spiny Crayfish. They found no threatened species, despite claims to the contrary."

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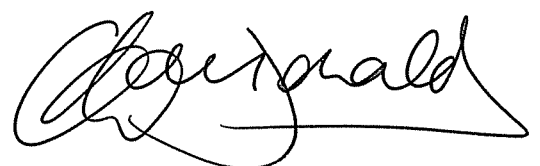
"In this case DSE found that suitable habitat for the gliders was already adequately protected and that creating a Special Protection Zone was not required," Mr Jennings said.

"I am confident that the extra streamside buffers, which represent a five-fold increase in the usual buffer width will provide significant protection to the populations identified by the surveys as the majority of animals were found within 100 metres of the creek."

31. In 2007 the DSE published the *Code of Practice for Timber Production 2007 (the Code)*. The Code was prepared under Part 5 of the *Conservation, Forests and Lands Act 1987 (Vic)*. Now produced and shown to me and marked **CM10** is a copy of the Code.



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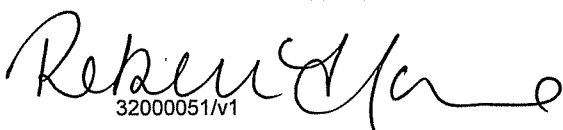
32. For convenience, I note that pursuant to clause 2.2.2 of the Code, VicForests is obliged to apply the precautionary principle when developing and reviewing plans and must adhere to the precautionary principle during operations. The precautionary principle is defined on page 78 of the Code in the following terms:

***Precautionary principle** – when contemplating decisions that will affect the environment, the precautionary principle requires careful evaluation of management options to wherever practical avoid serious or irreversible damage to the environment; and to properly assess the risk-weighted consequences of various options. When dealing with threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.*

33. Clause 2.2.1 of the Code requires that a 20m buffer strip be applied to permanent streams. On or about 16 June 2009 VicForests sent an email to the DSE in which it offered to increase the buffer strip to 100m. I was carbon-copied into this email.
34. Now produced and shown to me and marked **CM11** is a copy of the email sent by VicForests to the DSE dated 16 June 2009 together with the DSE's response dated 18 June 2009.
35. For convenience, I set out the email from VicForests to the DSE below (omitting formal parts):
- Cameron MacDonald has asked me to consider what habitat retention strategies, above the normal forest code and management practices exclusions, VicForests would implement at 840-502-0015. Given that the arboreal mammal population appeared to be more concentrated around the lower slopes and stream side, VicForests will in response to this request, extend the stream side buffer from 20 to 100 m. This action is also consistent with the management plan for the spiny crayfish, even though no confirmed records exist for this site.*
36. VicForests will apply the 100m buffer when it commences harvesting in coupe 840-502-0015 and coupe 840-502-0019.
37. The total buffer area that VicForests will apply to the Brown Mountain Creek equates to 50 ha and is marked on exhibit CM7 to this affidavit.

Long-footed potoroo

38. I am informed by Lee Miezis (Director, Forests, at the DSE) and believe that:
- (a) on 24 August 2009 Lee Miezis sent two emails to Jill Redwood and Andrew Lincoln seeking all footage captured in the vicinity of Brown Mountain Creek in order for DSE to fully assess the plaintiff's claim that harvesting shall cease;
 - (b) Jill Redwood telephoned Lee Miezis on the evening of 24 August 2009 and said that she would have to speak to her lawyers and was reluctant to provide the footage;
 - (c) Lee Miezis sent a further email to Jill Redwood on August 25th asking that she forward the DSE's request to her lawyers for their consideration; and


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(d) as of today's date, Lee Miezis has not received a further response.

39. I note that the alleged location of the camera used by Mr Lincoln to take the footage, as marked in exhibit ASL-1 to his affidavit, was within the 100m buffer area that VicForests will apply to coupe 840-502-0015.
40. I am also informed by Lee Miezis and believe that if the DSE determined to create a Special Management Zone of 150ha pursuant to the *Action Statement for Long-Footed Potoroo No. 58 (revised in 2009)* (which forms exhibit VEB13 to Vanessa Bleyer's affidavit sworn on 24 August 2009), then due to the increased buffer of 100m already agreed to by VicForests, no further area of coupe 840-502-0015 would need to be protected from harvesting.

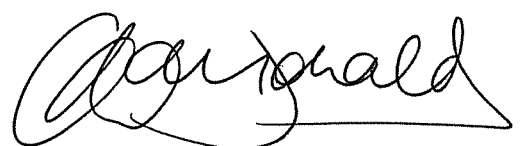
Commercial significance of coupes 840-502-0015 and 840-502-0019

41. Based on my knowledge and experience in the timber industry, I estimate that coupes 840-502-0015 and 840-502-0019 will produce 12,000m³ D+ sawlog @ 300m³ D+/ha with the total area to be harvested across these two coupes to be approximately 40 ha.
42. If VicForests is prevented from harvesting these coupes, VicForests would need to harvest 120 ha of other forest types to produce the same volume of D+ sawlog @ 100m³/ha.
43. Approximately two-thirds of the contracting workforce that normally work in East Gippsland have relocated to the Central Highlands to undertake salvage operations as a result of the recent bushfires. As a result, and based on my knowledge and experience, I estimate that VicForests would only be able to harvest 60 ha of alternative forest types which would leave a shortfall of 6,000m³ for VicForests to meet its 2009/10 financial year contractual commitments.
44. VicForests has prepared a table calculating the lost revenue and margin to VicForests were it not able to harvest in coupes 840-502-0015 and 840-502-0019. Now produced and shown to me and marked **CM12** is the table produced by VicForests.
45. Exhibit CM11 contains commercially sensitive information that is not in the public domain. Accordingly, I request that this Honourable Court order that this exhibit be kept confidential and that access to it be restricted to the external solicitors and counsel acting for the parties.
46. Based on my knowledge and experience, I estimate that if VicForests were prevented from proceeding with its proposed harvesting then the harvest contractor would forego \$163,620 in revenue and the haulage contractor \$56,860 as a result of not harvesting and delivering the 6,000 m³ of sawlog.



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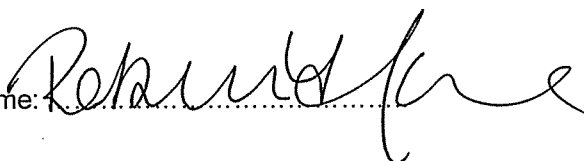
- 47. Now produced and shown to me and marked **CM13** is a copy of the Financial Report for the plaintiff for the year July 2007 – July 2008.
- 48. For convenience I note that the report states that the plaintiff has financial assets of \$10,715.76, a liability of \$11,000 and made a loss in financial year 2007/08 of \$3,684.47.

Sworn at Melbourne in the State of Victoria

This 31st day of August 2009

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Before me:



Rebecca Veronica Howe
Level 21, 570 Bourke Street, Melbourne
An Australian Legal Practitioner
(within the meaning of the
Legal Profession Act 2004)