

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMON LAW DIVISION

No. 8547 of 2009

BETWEEN

ENVIRONMENT EAST GIPPSLAND INC

Plaintiff

and

VICFORESTS

Defendant

## SECOND AFFIDAVIT OF REBECCA VERONICA HOWE

Date Sworn: 24 February 2010

Filed on behalf of the Defendant

**HWL Ebsworth Lawyers**

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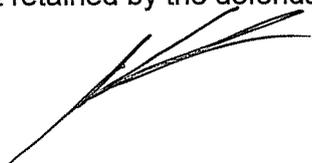
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Ref: JAK:RVH:AK:182227

I, **REBECCA VERONICA HOWE** of Level 21, 570 Bourke Street, Melbourne in the State of Victoria, Solicitor, make oath and say as follows:

1. I am a solicitor with the firm of HWL Ebsworth Lawyers and subject to the supervision of my principals, I have the care and conduct of this action on behalf of the Defendant. I am authorised to swear this affidavit on behalf of the Defendant. I make this affidavit from my own knowledge, except where otherwise stated.
2. I have sworn one other affidavit in this Proceeding on 19 February 2010 (**first Howe Affidavit**). The last exhibit in the first Howe Affidavit was "**RVH-19**", accordingly the first exhibit in this affidavit will be "**RVH-20**".
- I. **Discussions with Professor Ferguson**
3. I refer to paragraph 14 of the first Howe Affidavit deposing the substance of a conversation I had with Professor Ferguson on 3 February 2010. Professor Ferguson is the forestry science expert retained by the defendant in this Proceeding.



4. On 22 February 2010 I telephoned Professor Ferguson to inquire about his availability to review the expert material filed by the Plaintiff in relation to the Square-tailed Kite. On 22 February 2010, HWL Ebsworth was in receipt of expert material in relation to the Square-tailed Kite but not in relation to the Giant Burrowing Frog. I said: *"I would like to get an indication of your work load over the next few weeks as there are a few developments which have occurred while you were away. The plaintiff has put us on notice that it intends to file expert material in relation to the Square-tailed Kite and the Giant Burrowing Frog and also is seeking to amend its Statement of Claim. While you were away I sent you a copy of the kite report filed by the Plaintiff. Are you still appearing at the Bushfires Royal Commission this week?"* He said: *"I have received the information you sent me regarding the kite but I haven't had a chance to look at it in detail. I am no longer required to appear at the Bushfires Royal Commission so I can start work on a supplementary report."*

I believe the matters Professor Ferguson told me to be true.

5. On 24 February 2010, at about 11.43 am, I telephoned Professor Ferguson. I said: *"I just want to touch base with you since our conversation the other day. The Plaintiff's application for leave to amend its Statement of Claim is being heard tomorrow. The Plaintiff anticipates filing material in relation to the frog today so I could get it to you tomorrow. When would you be in a position to finalise the supplementary report?"*. He said: *"Rebecca, unfortunately there has been a major complication. Last night my wife was taken to hospital suffering from a suspected stroke. They think it is only a minor stroke, but she is in hospital and I am not sure when she will be discharged. I haven't done any work on the supplementary report and any work I do on it hinges on her. Even if she were discharged from hospital shortly, I don't think I could look at anything before Monday."*

I believe the matters Professor Ferguson told me to be true.

## II. Prejudice to the Defendant

6. The trial of this proceeding was fixed for hearing by orders made by Justice Osborn on 23 October 2009. The Defendant requires the expeditious determination of the proceeding. The Plaintiff has since 14 September restrained the Defendant from:

- (a) felling or cutting trees or parts of trees in the coupes numbered 840-502-0015 and 840-502-0019 in the Bendoc Forest Block at Brown Mountain in the State of Victoria (**the coupes**);
- (b) taking or removing timber from the coupes;



- (c) constructing access roads in or to the coupes to facilitate the activities referred to in 6 (a) and 6 (b); and
- (d) engaging in other works in the coupes to facilitate the activities referred to in 6 (a) and 6 (b).

(the injunction).

7. A delay of the trial is not realistic. The injunction was granted on the basis that there would be an expeditious trial and determination of this Proceeding.
8. Orders and arrangements have been put in place for this Honourable Court to sit in Sale. The Defendant has already put in place a number of logistical arrangements for its legal representatives, witnesses and instructors to make themselves available for the orderly conduct of the Proceeding in Sale. Enquires made by me at the Registry of the Court at Sale reveal that there are no further sittings of the Supreme Court scheduled for 2010. It follows that the prejudice to the Defendant cannot be remedied by delaying the trial of the Proceeding.
9. I crave leave to refer to the affidavit of Vanessa Elizabeth Bleyer sworn on 23 February 2010 (**Ms Bleyer's Affidavit**). In paragraphs 4, 15 and 20 of Ms Bleyer's Affidavit she confirms that the Plaintiff knew about:
  - (a) the new crayfish species "Brown Mountain Taxon" on 21 December 2009.
  - (b) the Square Tailed Kite on 19 January 2010;
  - (c) the Giant Burrowing Frog on 8 February 2010.

However, the Plaintiff did not advise the Defendant about the necessity to amend its Statement of Claim until 18 February 2010.

10. Rule 63.17 of the *Supreme Court (General Civil Procedure) Rules 2005* provides:

"...

- (2) *a party who amends a pleading or other document by leave shall, as the Court otherwise orders, pay the costs of and occasioned by the amendments.*"

11. The Defendant is concerned that the Plaintiff, being an incorporated association, incorporated in Victoria pursuant to the *Associations Incorporation Act 1981* (Vic) and being community based, non profit association run by volunteers does not have sufficient assets to satisfy the order for costs pursuant to Rule 63.17.



12. It is apparent from the financial report for the Plaintiff for the year ended 30 June 2008 that the Plaintiff's assets comprised investments totalling \$10,715.76 and liabilities of \$11,000 and recorded a loss of profit of \$3,684.47. It is unlikely that the costs thrown away by the amendment, should leave be granted to the Plaintiff to amend its pleadings could be satisfied from the Plaintiff's assets, based on its financial position for the year ended 30 June 2008. Now produced and shown to me and marked "RVH-20" is a true copy of the financial reports of the Plaintiff for the year ending 30 June 2008 ("RVH-20" is also exhibit "CM-13" to the affidavit of Cameron MacDonald sworn on 31 August 2009).

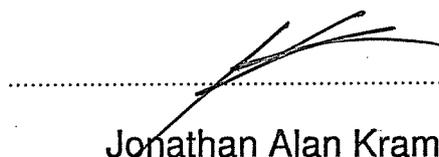
SWORN at MELBOURNE

on

24 February 2010

Before me:

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) \_\_\_\_\_  
Rebecca Veronica Howe

  
\_\_\_\_\_  
**Jonathan Alan Kramersh**  
Level 21, 570 Bourke Street Melbourne  
An Australian Legal Practitioner  
(within the meaning of the  
Legal Profession Act 2004)