

IN THE SUPREME COURT OF VICTORIA

AT SALE

No. 8547 of 2009

COMMON LAW DIVISION

BETWEEN

ENVIRONMENT EAST GIPPSLAND INC

Plaintiff

and

VICFORESTS

Defendant

WITNESS STATEMENT OF LEE ALEXANDER MIEZIS

Filed on behalf of the Defendant

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LEE ALEXANDER MIEZIS of Level 3, 8 Nicholson Street, East Melbourne, in the position of Director Forests, Forests and Parks Division, Victorian Department of Sustainability and Environment (**DSE**) will state:

I. QUALIFICATIONS, EXPERIENCE AND ROLES AT DSE

A. Tertiary Qualifications

1. In 1997 I graduated from the University of Melbourne with a Bachelor of Forest Science (Honours).
2. In 2006 I graduated from Charles Sturt University with a Master of Business Administration.

B. Experience in forest science before joining DSE

3. I have worked in forestry since I graduated from the University of Melbourne in 1997.
4. From June 1997 to February 1998 I was an Inventory Officer in the Hunter Region for State Forests of NSW based in Bulahdelah NSW.
5. From February 1998 to October 2000 I was the Forest Manager, Narrandera Forestry Centre, Riverina Region, for State Forests of NSW based in Narrandera NSW.

6. From October 2000 to February 2001 I was a Market Analyst in the Marketing Division of State Forests of NSW based in Pennant Hills/Deniliquin NSW.
7. From February 2001 to March 2002 was an Australian Specialist at the World Forest Institute based in Portland, Oregon, USA.
8. From March 2002 to September 2003 I was a Project Manager for State Forests of NSW based in Deniliquin NSW.
9. From September 2003 to January 2005 I was the Marketing Improvement Manager, Commercial Services Division, for Forests NSW based in Pennant Hills NSW.

C. Roles and responsibilities within DSE

10. I joined DSE in January 2005 as a Forest Utilisation Coordinator, Parks and Forests Division, based in Ballarat.
11. From August 2006 until February 2008 I was the Manager Forest Regulation, Natural Resources Division based in East Melbourne and Ballarat. My primary duties included the administration of forest product licenses (commercial, domestic firewood and non-timber), including risk management, delivery of corporate objectives and statutory obligations. I was also responsible for the development and implementation of systems to regulate and manage timber harvesting operations in Victorian State forests.
12. From February 2008 to December 2008 I was the Acting Director, Forest Resources, within the Natural Resources Division based in East Melbourne.
13. I am currently employed as Director Forests, Forests and Parks Division based in East Melbourne. I have held this position since December 2008. I report to Dr Peter Appleford who is the Executive Director, Forests and Parks Division. In this role my duties and responsibilities include:
 - (a) policy and program delivery related to the sustainable management of Victoria's State forests and the regulation of forestry activities;
 - (b) providing high level strategic advice and resolution strategies on policy and program management issues facing forest management in Victoria;
 - (c) providing advice to other divisions and government departments, the Executive Director, Secretary to DSE and Minister of Environment and Climate Change (**Minister**) on policy and program matters; and
 - (d) representing DSE and the Victorian Government on State and national committees.

II. DOCUMENT MANAGEMENT AT DSE

14. In this witness statement I produce documents, including correspondence between VicForests and DSE. These documents are maintained on electronic and/or hardcopy records. I have access to these records.

III. TIMBER RELEASE PLAN AND ALLOCATION ORDER

15. The Forests and Parks Division of the DSE is responsible for preparing and amending the Allocation Order for approval by the Minister. Once an Allocation Order is approved and is published in the Victoria Government Gazette, VicForests is able to prepare a Timber Release Plan (TRP) in respect of an area to which the Allocation Order applies.
16. An Allocation Order allocates timber in State forests to VicForests for the purpose of harvesting and/or selling timber resources. It describes the forest stands to which VicForests has access, the extent and location of those forest stands, the total available area of each forest stand, and the area of each forest stand available for timber harvesting in each of the three 5-year periods of the Allocation Order. The Allocation Order also describes the conditions to which VicForests is subject in carrying out its functions under the Allocation Order.
17. The Allocation to VicForests Order 2004 (**the 2004 Allocation Order**) was made by the Minister for Environment on 29 July 2004. The 2004 Allocation Order covers the period from 1 August 2004 to 31 July 2019.
18. An amendment to the 2004 Allocation Order was made by the Minister for Water, Environment and Climate Change on 21 March 2007 (**the 2007 Allocation Order Amendment**), following a review of the allocation of timber resources conducted as a result of fire in 2003 and 2006/7, which had a significant impact on timber resources in the State.
19. The 2004 Allocation Order and the 2007 Allocation Order Amendment were prepared based on the area of State forest that was available for timber harvesting. Those areas of State forest set aside in the comprehensive, adequate and representative (CAR) reserve system (of which special protection zones are a component), established for the biodiversity conservation, and the protection of threatened species, natural and cultural values, or which are otherwise unavailable for timber harvesting were excluded in the preparation of the 2004 Allocation Order and the 2007 Allocation Order Amendment.
20. My role in relation to a TRP is to review TRP documentation for compliance with the *Sustainable Forests (Timber) Act 2004* prior to it being submitted for approval to the Secretary to DSE or delegate.
21. The Secretary to DSE approved the East Gippsland Forest Management Area Timber Release Plan (**2004 TRP**) on 30 July 2004. The 2004 TRP has been changed periodically.
22. On 4 June 2007, I was forwarded a copy of a letter dated 1 June 2007 from Dr David Pollard, Chief Executive Officer of VicForests, to Peter Harris, Secretary to DSE. In this letter, Dr Pollard advised the

Secretary that VicForests had prepared a proposed change to the 2004 TRP and was submitting it for approval. For convenience, I note that part of that letter reads:

“In November 2006, the Government announced plans for the establishment of a number of old-growth and icon reserves in the East Gippsland FMA covering approximately 41,000 ha. Most of the areas identified for reservation contained coupes which had been gazetted in the 2004 Timber Release Plan. To allow for the unavailability of these coupes, VicForests proposes a change to the Timber Release Plan (TRP) for the East Gippsland FMA for the period 2004/05 – 2008/09. VicForests have [sic] followed the process outlined in the VicForests’ TRP Instructions for Development, Endorsement and Modification (version 2) and DSE’s Wood Utilisation Planning Guidelines to develop, endorse and approve the changes to the TRPs.

The proposed changes to the TRP have been endorsed by DSE regional staff and are now submitted to you for approval. Details of the proposed TRP changes, including tables listing each coupe and associated information, are attached. Digital copies of the maps associated with these coupes have been sent to Lee Miezis, Manager Forest Regulation, DSE.

...

All coupes that form part of the reviewed TRPs will comply with the conditions and standards in the following documents and datasets:

- *The Code of Forest Practices for Timber Production, Revision No. 2, 1996. Department of Natural Resources and Environment.*
- *The Code of Practice for Fire Management on Public Land, (Revision 1), 2006. Department of Sustainability and Environment.*
- *Management Guidelines as specified in the Forest Management Plan for the North East, 2001. Department of Natural Resources and Environment.*
- *The Management Procedures for Timber Harvesting Operations and Associated Activities in State Forests in Victoria, 2005. Department of Sustainability and Environment.*
- *Utilisation Procedures for all commercial harvesting managed by VicForests, 2006. VicForests.*
- *DSE Revised Allocation Order (2007) Full Extent datasets for East Gippsland FMA.*
- *Forest Management Zoning from the East Gippsland Forest Management Plan.*
- *Specific spatial datasets nominated by regional DSE staff and accessed via DSE’s Corporate Geospatial Data Library.”*

Now produced and shown to me and marked "**LAM-1**" is a true copy of the letter from Dr Pollard to Peter Harris dated 1 June 2007.

23. For convenience, I note that attachment 3 to the letter exhibited as "**LAM-1**" sets out that coupe 840-502-0015 (**Coupe 15**) and coupe 840-502-0019 (**Coupe 19**) within the East Gippsland Forest Management Area (**East Gippsland FMA**) were included in the submission to the Secretary to DSE for addition to the 2004 TRP.
24. At this time, the internal DSE guideline which specified the process for review and approval of a proposed TRP was entitled "*Wood Utilisation Planning Guidelines incorporating the TRP Endorsement and Approvals Process August 2005*" (**TRP Guidelines 2005**). Now produced and shown to me and marked "**LAM-2**" is a true copy of the TRP Guidelines 2005.
25. For convenience, the TRP Guidelines 2005 require DSE to:
 - (a) assess whether VicForests has prepared the proposed change to an approved TRP in accordance with relevant legislation, plans, policies and procedures; and
 - (b) assess whether economic, environmental and cultural values have been identified and are adequately protected.
26. On 5 July 2007, the Secretary approved the change to the 2004 TRP (**2007 Changes to the 2004 TRP**). The new coupes added to the 2004 TRP included Coupe 15 and Coupe 19. A notice of approval was published in the Victoria Government Gazette on 5 July 2007.
27. On 5 July 2007, Peter Harris wrote to Dr Pollard advising Dr Pollard that the 2007 Changes to the 2004 TRP had been approved. For convenience, I note that part of that letter reads

"I have approved this change on the understanding that timber harvesting and associated management activities will be in accordance with the requirements of the following documents (as amended):

- *The Sustainability Charter for State Forests in Victoria, 2006*
- *The Code of Forest Practices for Timber Production, Revision No. 2, 1996*
- *The Code of Practice for Fire Management on Public Land, Revision No. 1, 2006*
- *Management guidelines as specified in the Forest Management Plan for the East Gippsland Forest Management Area, 1995*
- *The Management Procedures for Timber Harvesting Operations and Associated Activities in State Forests in Victoria, 2005*
- *The 2007 Salvage Harvesting Prescriptions".*

Now produced and shown to me and marked "LAM-3" is a true copy of the letter from Peter Harris to Dr Pollard dated 5 July 2007.

28. On 19 May 2009, I was forwarded a copy of a letter dated 15 May 2009 from Dr Pollard to Peter Harris, Secretary to DSE. In this letter, Dr Pollard advised Peter Harris that VicForests had prepared a proposed new TRP for the East Gippsland, Tambo and North East Forest Management Areas FMAs (**the 2009 TRP**) and was submitting it for approval. For convenience, I note that part of that letter reads:

"This letter provides VicForests' proposed 2009/10 East Gippsland, Tambo and North East Timber Release Plans for your consideration and approval, following review by DSE regional staff.

The proposed changes have been developed in accordance with the:

- *DSE Guidelines for the Review and Approval of Timber Release Plans 2008; and*
- *VicForests Instruction; Timber Release Plan Development, Approval, Changes and Modifications Version 4.*

All coupes have been:

- *Reviewed by the DSE regional review process. DSE comments for each coupe have been recorded in the Coupe Information System. VicForests have [sic] recorded responses to DSE comment following the DSE regional review process;*
- *Checked against forest stands in the Allocation Order – 2007 amendment. The intended management actions are described in the attached Allocation Order Pre-harvest Exceptions Reports; and*
- *Consulted with relevant stakeholders.*

The planning of the proposed TRP changes and the operations on the amended TRP coupes will comply with the conditions and standards in the following legislation, regulations, documents and datasets:

- *The Code of Practice for Timber Production, 2007. Department of Sustainability and Environment;*
- *The Code of Practice for Fire Management on Public Land, (Revision 1), 2006. Department of Sustainability and Environment;*
- *The Management Procedures for Timber Harvesting Operations and Associated Activities in State Forests in Victoria, 2007. Department of Sustainability and Environment;*
- *Utilisation Procedures for all commercial harvesting managed by VicForests, 2007. VicForests;*

- *DSE Revised Allocation Order (2007) Full Extent datasets for East Gippsland FMA, Tambo FMA, Central FMA, Dandenong FMA and Central Gippsland FMA;*
- *Forest Management Zoning from the East Gippsland Forest Management Plan, Central Highlands Forest Management Plan, Gippsland Forest Management Plan and North East Forest Management Plan; and*
- *Spatial datasets as set out in appendix 3 of DSE's Guideline for the review and approval of a Timber Release Plan as well as an specific spatial datasets nominated by regional DSE staff and accessed via DSE's Corporate Geospatial Data Library.*

Additionally, VicForests will ensure that any necessary permits, plans or permissions from statutory authorities will be in place before any operations commence and that all operations comply with relevant legislation and regulations during the conduct of those operations”.

Now produced and shown to me and marked “**LAM-4**” is a true copy of the letter dated 15 May 2009 from Dr Pollard to Peter Harris.

29. For convenience, I note that the schedule of coupes attached to the letter exhibited as “**LAM-4**” sets out:
- coupe 840-502-0026 (**Coupe 26**) and coupe 840-502-0027 (**Coupe 27**) within the East Gippsland FMA were new coupes included in the submission to the Secretary to DSE for inclusion in the 2009 TRP; and
 - Coupe 15 and Coupe 19 within the East Gippsland FMA were included in the submission to the Secretary to DSE for carry over from the 2004 TRP to the 2009 TRP.
30. At this time, the internal DSE guideline which specified the process for review and approval of a proposed TRP was entitled “Guidelines for the Review and Approval of a Timber Release Plan 2008 Version 2” (**TRP Guidelines 2008**).

Now produced and shown to me and marked “**LAM-5**” is a true copy of the TRP Guidelines 2008.

31. For convenience, the TRP Guidelines 2008 require DSE to:
- review a proposed TRP as prepared by VicForests and provide advice on the identification and planning for the protection of values within coupes (or parts thereof) proposed for inclusion in the TRP and on forest management activities within or adjacent to those coupes; and
 - verify a proposed TRP as prepared by VicForests is consistent with the Allocation Order, the Code of Practice for Timber Production 2007 and the Code of Practice for Fire Management on Public Land, Revision No. 1, 2006.
32. On or around 4 June 2009 I reviewed documentation for Dr Peter Appleford, Executive Director, Forests and Parks as delegate of the Secretary to DSE to approve the 2009 TRP and I formed the view that the

there were no impediments to Coupe 26 or Coupe 27 being included in the 2009 TRP and Coupe 15 or Coupe 19 being carried over from the 2004 TRP to the 2009 TRP.

33. On 4 June 2009 I recommended to Dr Appleford that the 2009 TRP should be approved. However, 11 coupes proposed by VicForests for inclusion in the 2009 TRP were not endorsed for inclusion in the 2009 TRP because they occurred within areas proposed for inclusion in the new and expanded conservation reserve system in East Gippsland (referred to in more detail in section IV below) and a further 8 coupes were not endorsed because the forest type was not included in the 2007 Allocation Order Amendment.
34. On 5 June 2009, Dr Appleford, Executive Director, Forests and Parks as delegate of the Secretary to DSE approved the 2009 TRP. The new coupes in the 2009 TRP included Coupe 26 and Coupe 27. A notice of approval was published in the Victoria Government Gazette on 9 June 2009.
35. On 5 June 2009, Dr Appleford wrote to Dr Pollard advising Dr Pollard that 2009 TRP had been approved. For convenience, I note that part of that letter reads:

“I have approved the 2009-2014 TRP based on the understanding that timber harvesting and associated management activities will be conducted in accordance with the requirements of the following documents (as amended):

- *The Sustainability Charter for State Forests in Victoria, 2006;*
- *The Code of Practice for Timber Production, 2007;*
- *The Code of Practice for Fire Management on Public Land, Revision No. 1, 2006;*
- *Management guidelines as specified in relevant Forest Management Plans;*
- *The Management Procedures for Timber Harvesting and Associated Activities in Victoria’s State forests, 2007; and*
- *The Fire Salvage Harvesting Prescriptions, 2008”.*

Now produced and shown to me and marked “**LAM-6**” is a true copy of the letter from Dr Appleford to Dr Pollard dated 5 June 2009.

36. DSE provides VicForests with access to spatial data which enables VicForests to generate mapped information and identify remotely particular features and characteristics of the forest estate. The provision of spatial data to VicForests by DSE is governed by an agreement dated 23 January 2008 and entitled “*Subject Agreement – Access and Management of Data relating to Forest Management Planning and Regulation*” (**Data Agreement**).

Now produced and shown to me and marked "LAM-7" is a true copy of the Data Agreement dated 23 January 2008.

37. Pursuant to the Data Agreement, one of the spatial datasets that DSE provides VicForests access to is entitled "THFAU100". This spatial dataset contains records and information, collated and curated by DSE, relating to threatened fauna contributed from a variety of sources. This dataset indicates where threatened fauna has been located and subsequently recorded in the *Atlas of Victorian Wildlife* database maintained by the DSE.
38. DSE does not routinely undertake pre-logging coupe surveys.
39. On 16 July 2009, a five-yearly review of the Allocation Order was completed by the Minister in accordance with section 18(1) of the *Sustainable Forests (Timber) Act 2004*. Based on this review, the Minister has determined that the Allocation Order be amended under section 17 of the *Sustainable Forests (Timber) Act 2004*. This amendment is currently being completed by DSE and will be submitted to the Minister for approval.

Now produced and shown to me and marked "LAM-8" is a copy of the document entitled Allocation to VicForests Order 2009 Review (**the Review**).

40. For convenience, I note that on page 21 of the Review, DSE's audit of VicForests' compliance with the conditions of the Allocation Order for coupes harvested in 2007/08 showed that VicForests had complied with the *Code of Practice For Timber Production 2007*.

IV. NEW AND EXPANDED CONSERVATION RESERVES

41. In November 2009 DSE published a brochure titled "*Protecting East Gippsland's old growth and iconic forests*" to accompany the introduction of the Parks and Crown Land Legislation Amendment (East Gippsland) Bill 2009 into the Victorian parliament. For convenience, I note that on page 1 of the brochure it states:

"The Victorian Government has worked with key stakeholders to make sure that expanding Victoria's national parks and conservation reserve system enhances protection of the natural environment without impacting on employment in local communities.

The result is that more than 45,000 hectares, 4,000 hectares more than originally proposed, will now be added to East Gippsland's national park and conservation reserve system. This will provide greater protection, more diversity of forests and habitat types and enhanced connectivity between parks and reserves.

The additions include:

- 16,000 hectares to the Snowy River National Park, including the Yalmy and a link to the Errinundra National Park that incorporates the summit of Brown Mountain.
- 11,000 hectares to the Errinundra National Park, including the iconic Goolengook forest.
- 850 hectares to the Croajingolong National Park, including rare lowland old growth forest.
- 300 hectares to the Martins Creek Nature Conservation Reserve, which links to the expanded Snowy River National Park.
- A new 7,500 hectare Tara Range Park, linked to the expanded Snowy River National Park.
- More than 9,500 hectares of new and expanded nature conservation reserves across East Gippsland, representing the diversity of old growth forest and habitat in the region.

Consolidation of some existing parks and reserves in East Gippsland will also occur.”

Now produced and shown to me and marked “**LAM-9**” is a copy of the brochure entitled “*Protecting East Gippsland’s old growth and iconic forests*”.

42. The Parks and Crown Land Legislation Amendment (East Gippsland) Bill 2009 (Vic) passed through the legislative council of the Victorian parliament on 8 December 2009.
43. Coupes 840-502-0015, 840-502-0019, 840-502-0026 and 840-502-0027 (collectively **the Brown Mountain forestry coupes**) are not included in the announced new and expanded conservation reserves in East Gippsland.

V. THREATENED SPECIES AND THE BROWN MOUNTAIN COUPES

A. *Orbost Spiny Crayfish*

44. On or about 8 January 2009 I reviewed an internal DSE memorandum from Ryan Incoll, Group Manager, Biodiversity, Statewide Services, to Janine Haddow, Executive Director, Natural Resources Division, and Kimberley Dripps, Executive Director, Biodiversity and Ecosystem Services, concerning an alleged detection of the Orbost Spiny Crayfish in the Brown Mountain Creek.

Now produced and shown to me and marked “**LAM-10**” is a copy of the memorandum dated 8 January 2009.

45. The reason I became involved with this issue was because program delivery related to the sustainable management of State forests and the regulation of timber harvesting, including relationship management with VicForests, rests with me. For convenience I set out the contents of the memorandum below:

“... ”

RECOMMENDATIONS

1. *That Action Statement prescriptions for Orbost Spiny Crayfish be applied as an interim measure until the validity of the record can be determined.*
2. *That DSE confirm the specimen to be an Orbost Spiny Crayfish and if so, conduct further survey to confirm the presence of the species at the reported location.*
3. *If the site is confirmed, a Special Protection Zone be created in accordance with the prescription.*

COMMENTS

4. *On 6 January 2009, advice was received (via a phone message) from Jill Redwood of Environment East Gippsland that an Orbost Spiny Crayfish (*Euastacus diversus*) had been collected from Brown Mountain Creek on the Errinundra Plateau in East Gippsland. The Orbost Spiny Crayfish is listed as threatened under the Flora and Fauna Guarantee Act 1988.*
5. *On 7 January 2009, Jill stated the collection point was at approximately 6559E 58745N GDA. The stated collection point is close to three timber harvesting coupes approved on the current Timber Release Plan. Coupe 840-502-0020 (The Walk) is part way through being harvested. Coupes 840-502-0019 and 840-502-0015 are scheduled for harvesting once Coupe 840-502-0020 is complete.*
6. *Timber harvesting at Brown Mountain Creek is highly politically sensitive. Coupe 840-502-0020 'The Walk' has been the subject of recent timber harvesting protests led by Ms Redwood and an ongoing campaign to stop timber harvesting in this area (including the threat of future protests when timber harvesting recommences in the area). The position taken by DSE and by the Minister to date is that all three coupes in General Management Zone [sic] and are being legally harvested by VicForests. Three coupes are critical to meeting legal timber supply obligations to the timber industry in East Gippsland. Ms Redwood has expressed her dissatisfaction with this position.*
7. *The Orbost Spiny Crayfish Action Statement requires that a linear reserve be established around detection sites on public land. This comprises an undisturbed buffer of approximately 100 m on each side of the stream for 1 km upstream and 1 km downstream of the detection site. The buffers are to be incorporated into a Special Protection Zone where they are identified in State forest. The buffer otherwise required by timber harvesting prescriptions would be 20 m on each side of Brown Mountain Creek.*

8. *These measures are to be reviewed once 20 sites have been located. Currently there are 13 separate locations for the species (excluding this site).*
9. *The application of the prescription would not affect the coupe currently underway (coupe 840-502-0020 The Walk). Application of the prescription will reduce the harvestable area of coupes 840-502-0019 and 840-502-0015 by approximately 15% (by area).*
10. *DSE needs to be satisfied that this record is legitimate by confirming the species identification of the specimen and the presence of the species at the stated collection point.*
11. *Identification of Euastacus species is difficult. The specimen was identified by Ms Jo Edwards, who has worked on freshwater crayfish with Dr Jason Coughran of Southern Cross University and Robert McCormack who is a NSW based authority on freshwater crayfish. DSE has spoken directly to Ms Edwards and she is confident of the identification.*
12. *The specimen died while on the possession of the conservation group and it has been preserved. It will be delivered to DSE Orbost office on 9 January 2009 and the identity confirmed by Andrew Murray (DSE Orbost) when he returns from leave on 13 January 2009.*
13. *If the identification of the specimen is confirmed, DSE will undertake field surveys at the reported site during the week starting 12 January 2009. However, the species is difficult to capture and a negative survey result does not mean the species is absent. The crayfish is confined to the upper Brodribb River catchment and adjacent areas on and about the Errinundra Plateau in East Gippsland. While it has not previously been recorded in Brown Mountain Creek or from elsewhere in the Deddick River catchment, the site is close to other records and is in similar habitat so the record is plausible. If the crayfish is not located during DSE surveys, a suitable response will be determined by DSE in consultation with VicForests.*
14. *Past practice for records of this type has been to apply the species prescription as an interim measure until DSE is satisfied that the record is valid.*
15. *VicForests at Orbost have been advised of the report and the likely interim prescriptions and have made provisions for it to be applied. DSE has undertaken to resolve the matter as soon as possible and minimise unnecessary impacts on VicForests' operations. It is anticipated that the matter will be determined prior to start of harvesting of coupe 840-502-0019 in approximately three weeks.*
16. *A permit is required to survey for FFG-listed fish, which includes crayfish. DSE has requested that Jill Redwood provide evidence of the survey permit obtained by the conservation group.*
17. *DSE is unaware of media interest in this issue."*
46. *On 13 January 2009 I received an email from Ryan Incoll stating that Andy Murray (who is a DSE officer based in Orbost) had identified that the specimen provided from Brown Mountain Creek was not the*

Orbost Spiny Crayfish (*Euastacus diversus*) but the Bidawal Spiny Crayfish (*Euastacus bidawalus*) and that there are apparently 4 to 5 diagnostic features that separate the two species and that Andy Murray was confident of the identification. The email also stated that the Bidawal Spiny Crayfish is a relatively common species found in East Gippsland and South-eastern NSW (it is not a threatened species under the *Flora and Fauna Guarantee Act 1988* (Vic)). In his email, Ryan Incoll stated that no crayfish survey work will be undertaken by DSE and there are no additional prescriptions required for Orbost Spiny Crayfish, interim or otherwise, at coupes in Brown Mountain Creek area.

Now produced and shown to me and marked "**LAM-11**" is a copy of the email dated 13 January 2009.

47. On 28 January 2009, I received an email from Ryan Incoll that stated that advice received on 27 January 2009 was that a further Orbost Spiny Crayfish specimen had been reportedly located at Brown Mountain Creek and that photographs of the specimen are reported to have been provided to DSE and steps will be taken to verify the photographs.

Now produced and shown to me and marked "**LAM-12**" is a copy of the email dated 28 January 2009.

48. On 1 February 2009 Jo Edwards sent an email to Andy Murray and Stephen Henry at DSE that concerned a second crayfish said to have been found at Brown Mountain Creek. Simon Smith, who was then the Acting Executive Director of Biodiversity and Ecosystem Services at DSE, responded to this email on 25 February 2009. I saw this correspondence some time in late February 2009.

Now produced and shown to me and marked "**LAM-13**" is a copy of Jo Edwards' email dated 1 February 2009 together with DSE's response dated 25 February 2009.

49. For convenience, I set out the relevant parts of DSE's response to Jo Edwards' email below:

*"The specimen of spiny crayfish to which you refer was keyed out as a *Euastacus bidawalus* (Bidawal Spiny Crayfish) using the key of G.J. Morgan "Freshwater Crayfish of the genus *Euastacus* Clark (Decapoda, Parastacidae) from Victoria", published in 1986 in *Memoirs of the Museum of Victoria* 47 (1): 1-57) ...*

...

*Photographs of the second specimen were sent to DSE Orbost office; however, the diagnostic feature which the key uses to distinguish between the *E. diversus* (Orbost Spiny Crayfish) and *E. bidawalus*, namely the presence of marginal squamal spines, were not sufficiently clear in the photos to enable positive identification. These photos were also sent to Dr Jason Coughran (Southern Cross University) who agreed that a definitive identification could not be made on the basis of the photos.*

...

Given the uncertainty over the presence of the Orbost Spiny Crayfish, timber harvesting will not occur in the subject coupes until the department completes a crayfish survey in Brown Mountain Creek. These surveys will occur when staff return from fire fighting duties.”

50. The surveys referred to in this letter were conducted on Brown Mountain during January – March 2009 as part of broader surveys being conducted for arboreal mammals (which I refer to in greater detail below). The surveys did not detect any presence of Orbost Spiny Crayfish.

51. I was also informed about a third alleged detection of the Orbost Spiny Crayfish at Brown Mountain on 10 January 2009. A memorandum of background information on Brown Mountain Creek Fauna from Ryan Incoll that was sent to me on 5 February 2009 explains that:

“Environment East Gippsland reported record of 2nd suspected OSC specimen on 10th January. EEG was to provide photographs to DSE and return specimen to stream. DSE did not receive photographs.”

Now produced and shown to me and marked “**LAM-14**” is a copy of Ryan Incoll’s email to me dated 5 February 2009 together with its attached memorandum.

52. There have not been any confirmed detections of the Orbost Spiny Crayfish in the Brown Mountain creek area and as a result the prescriptions in the relevant action statement have not been implemented.

B. DSE surveys on Brown Mountain from January to March 2009

53. On or about 27 January 2009 I received a telephone call from Ryan Incoll advising me that the Environment East Gippsland (**EEG**) was claiming that owls and high levels of arboreal mammals had been detected in the Brown Mountain area, and that EEG was of the view that a Special Protection Zone was necessary.

54. In that conversation I advised Ryan Incoll that the claims made by EEG needed to be verified so that we can determine whether or not prescriptions needed to be implemented and that DSE should undertake its own surveys. We agreed that he would instruct Stephen Henry to undertake the surveys.

55. On 27 January 2009 I was carbon-copied into an email from Jill Redwood to Stephen Henry and Tony Mitchell. The email attached a report by Dr Rohan Bilney.

Now produced and shown to me and marked “**LAM-15**” is a copy of this email (without attachment).

56. On or about 27 January 2009 I advised Cameron MacDonald, Director Strategy and Corporate Affairs at VicForests, that DSE would be conducting surveys at Brown Mountain Creek to verify the report provided by EEG. Cameron MacDonald advised that there were no plans for harvesting that week and that he would discuss the matter with Barry Vaughan, VicForests’ Regional Manager, East Gippsland.

57. On 28 January 2009, I forwarded a copy of Jill Redwood's email to Cameron MacDonald for his information.

Now produced and shown to me and marked "**LAM-16**" is a copy my email to Cameron MacDonald dated 28 January 2009.

58. On 28 January 2009 I received an email from Cameron MacDonald that forwarded advice from Barry Vaughan to Michael Theobald

59. For convenience, I set out part below of that email:

"...

As you are aware, there have been a number of alleged engendered [sic] wildlife sightings at Brown Mountain which are currently under investigation by Steve Henry's team. Taking a precautionary approach to this new information, I would request that you do not commence either the Jasmine Road or Brown Legge coupes before 11 February. In addition, could you place a 100m buffer on the stream where the spiny crayfish are thought to reside, which will cover the scenario of a positive ID of this species

..."

Now produced and shown to me and marked "**LAM-17**" is a copy of the email dated 28 January 2009.

60. On 30 January 2009, I received an email from Cameron MacDonald that had a media release attached to it.

61. For convenience, I set out below part of that media release:

"...

Harvesting in these areas will not commence until the surveys have been undertaken and the status of the claims is verified.

..."

Now produced and shown to me and marked "**LAM-18**" is a copy of the email dated 30 January 2009 and the attachment.

62. On 3 February 2009 Wil Blackburn forwarded me an email that Stephen Henry had sent to Ryan Incoll.

Now produced and shown to me and marked "**LAM-19**" is a copy of this email.

63. For convenience I note that in his email, Stephen Henry stated that he had been advised by Jill Redwood that hair tubing by members of EEG had detected a Long-footed Potoroo on the western edge

of proposed Coupe 19. Stephen Henry also recommended that the prescription in the Long-footed Potoroo action statement be applied as an interim measure and that DSE undertake survey work to attempt to confirm the record.

64. After I received this email I spoke to Wil Blackburn and asked him to advise Ryan Incoll to extend the surveys being undertaken at Brown Mountain Creek to include the Long-footed Potoroo.
65. At this stage I did not consider any further action was required because VicForests had stated that it would not recommence timber harvesting at Brown Mountain Creek until the surveys were complete and the claims made by EEG verified.
66. On 5 February 2009, I received the memorandum of background information on Brown Mountain Creek Fauna from Ryan Incoll that I refer to in paragraph 44 above.
67. In summary, by this stage DSE had received information concerning alleged detections of Orbost Spiny Crayfish, the Long-footed Potoroo and Sooty and Powerful Owls as well as a high numbers of arboreal mammals at Brown Mountain Creek. As a result, DSE had determined to conduct survey work on Brown Mountain to verify the presence of a high density population of arboreal mammals, and also to detect the presence of any Orbost Spiny Crayfish or the Long-footed Potoroo. I was advised by Ryan Incoll that it was not necessary for DSE to conduct surveys to verify EEG's call back detection of the owls, because under the relevant action statements, even if these call backs were confirmed no further action would be required. Any owls heard during spotlight surveys would be recorded. For convenience, I set out below the relevant part of Ryan Incoll's memorandum to me of 5 February 2009 on this issue:

"...

Sooty Owls & Powerful Owls

...

<p><i>Forest Management Plan Prescription</i></p>	<p><i>Forest Management Plan prescriptions have been superseded by Action Statements.</i></p> <p><i>Action Statements required establishment of Sooty Owl Management Areas and Powerful Owl Management Areas. The requirement for establishment of SOMAs and POMAS have been achieved in East Gippsland, but are under review at present as part of the EGFMA plan review process. The prescriptions for any detections of either species in Brown Mountain Creek catchment will be met by a combination of the existing reserves in the area [Errinundra National Park, The Gap Scenic Reserve and SPZ 840-7] and the election promise icon reserve to the west of Legge Rd).</i></p> <p><i>Nest or roost sites detected outside protected areas</i></p>
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	<p><i>require an SPZ of 3 ha around the site and a further 250-300m radius (or equivalent linear area) SMZ. No roost or nest sites are known from this area at present.</i></p> <p><i>No additional prescriptions are required if new non breeding or non roost records of Sooty Owls and Powerful Owls are located.</i></p>
...	...
<i>Current DSE survey plans</i>	<i>DSE has no plans to undertake owl call back surveys. Owls heard during spotlight surveys for gliders will be recorded.</i>

...”

68. Between January and March 2009 there were severe bushfires across parts Victoria. As a result, the surveys at Brown Mountain Creek took longer than they otherwise might have. I sent an email to Ryan Incoll on 13 February 2009 outlining a discussion I had had with Cameron MacDonald concerning finalising the surveys. For convenience I set out the contents of the email below:

“Re: Brown Mountain Creek – surveys on hold due to fires

Thanks Ryan –

I discussed with VF. They have asked:

- *Whether we have one person we can spare and they will supplement with survey crew with their own people; or*
- *Whether we can get externals to do surveys (they can pay).”*

Now produced and shown to me and marked “**LAM-20**” is a true copy of the email I sent Mr Ryan Incoll on 13 February 2009.

69. In the end DSE did not arrange for external parties to conduct the surveys.
70. On 4 February 2009 I reviewed a Ministerial briefing on the fauna values at Brown Mountain, which the Minister subsequently noted on 25 February 2009.

Now produced and shown to me and marked “**LAM-21**” is a copy of the Ministerial briefing signed by the Minister on 25 February 2009.

71. On 10 March 2009 Ryan Incoll sent to me by email a summary of the latest fauna survey results that DSE had received from EEG and the Flora and Fauna Research Collective – East Gippsland. These surveys did not concern any alleged detection of threatened species within the Brown Mountain forestry

coupes. For convenience, I set out below that part of Ryan Incoll's email concerning Brown Mountain Creek:

"Also, an update on Brown Mountain Creek:

- *the third spotlight survey is planned for Thurs evening 12 March*
- *the first period of potoroo surveys using remote cameras did not detect Long-footed Potoroo*
- *the survey for crayfish has not been undertaken but can be completed quickly, plans are for this to be done next week*
- *all of these results are preliminary and should not be distributed or discussed."*

Now produced and shown to me and marked "**LAM-22**" is a copy of Ryan Incoll's email to me dated 10 March 2009 together with its attachment.

72. On 13 March 2009, I received an email from Ryan Incoll forwarding me an email from Stephen Henry regarding the results of spotlighting at Brown Mountain Creek on 12 March 2009. For convenience, I set out below part of Stephen Henry's email concerning the detection of the Long-footed Potoroo and Orbost Spiny Crayfish and whether or not a high density population of arboreal mammals had been detected,:

"...

The number of both Greater Gliders and Yellow-bellied Gliders detected along this route on both these occasions thus exceeds the threshold (> 10/km of transect for Greater Gliders and >5/km of transect for Yellow-bellied Gliders) for application of the prescription in the East Gippsland Forest Management Plan. The prescription requires the creation of approx 100 ha of SPZ around the site.

As previously advised the first round of remote camera survey targeting Long-footed Potoroos did not detect any of that species. The cameras were set again and will be retrieved (sic) early next week.

Survey for Orbost Spiny Crayfish will also occur next week.

...."

Now produced and shown to me and marked "**LAM-23**" is a copy of the email dated 13 March 2009.

73. On 27 April 2009 I received from Ryan Incoll a final copy of the 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*" by Stephen Henry and Tony Mitchell. For convenience, I set out below the conclusions of this report:

“CONCLUSIONS

The survey program produced the following key results:

1. *Sufficient Greater Gliders and Yellow-bellied Gliders were detected to achieve the thresholds for a high density population of these species as stipulated in the “Conservation Guideline – Arboreal Mammals” within the East Gippsland Forest Management Plan.*
2. *No Long-footed Potoroos were detected.*
3. *No Orbost Spiny Crayfish were detected.*

Spotlight surveys were conservative estimates of the numbers of animals actually present. The consistent detection of high numbers of Greater Gliders and Yellow-bellied Gliders confirms that the site supports a high density population.

Given the relatively short amount of time available for the surveys of Long-footed Potoroo and the presence of nearby records and suitable habitat, it is possible that a more intensive and longer survey may record the species at the site.

Further survey may also detect Orbost Spiny Crayfish, however, the habitat was considered to be sub-optimal for the species.”

Now produced and shown to me and marked “**LAM-24**” is a copy of the 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*” by Stephen Henry and Tony Mitchell.

74. Between April 2009 and June 2009 consideration was given to relevant matters in the East Gippsland Forest Management Plan (1995) based on the detection of a high density population of arboreal mammals by DSE at Brown Mountain Creek. During this period, I kept Cameron MacDonald informed that DSE was yet to make a decision on whether or not a Special Protection Zone would be created. At this time VicForests had commenced salvage harvesting after the bushfires.
75. On 14 May 2009 I reviewed a memorandum to Dr Appleford recommending that he sign an attached reply to Jill Redwood concerning harvesting in the Brown Mountain forestry coupes. For convenience I set out the background section of this memorandum below:

“BACKGROUND

2. *Ms Redwood wrote to the Minister for Environment and Climate Change, and the Treasurer on 23 April 2009 following receipt of a letter from Mr Cameron MacDonald, Director of Strategy and Corporate Affairs at VicForests (Attachment 1). Mr McDonald wrote to Ms Redwood in response*

to threatened species surveys undertaken in East Gippsland. The Minister has delegated this email to you for response.

3. *Ms Redwood has previously written to the Minister alleging that harvesting activities being undertaken by VicForests in the Brown Mountain Creek area are in breach of the Code of Practice for Timber Harvesting 2007 (the Code). As her concerns relate to operational issues the correspondence was referred to VicForests for investigation and response.*
4. *Ms Redwood has now written to the Minister voicing her dissatisfaction with VicForests response.*
5. *Ms Redwood has raised to [sic] three key issues:*
 - *That VicForests is undertaking an unauthorised operation as a consequence of it conducting timber harvesting operations in areas that are alleged to contain rare or threatened species.*
 - *That VicForests has breached the Code by failing to address the conservation of biodiversity.*
 - *That pre-logging surveys should be undertaken.*
6. *There is no evidence that VicForests has conducted an unauthorised operation or has breached the Code. VicForests harvesting operations are in accordance with the approved Timber Release Plan.*
7. *DSE is working with VicForests to improve current process relating to the identification of threatened species and response to survey reports from members of the public.”*

Now produced and shown to me and marked “**LAM-25**” is a copy of the memorandum to Dr Appleford dated 15 May 2009, together with the signed letter from Dr Appleford to Jill Redwood dated 15 May 2009.

76. DSE ultimately determined not to create a Special Protection Zone at Brown Mountain Creek but to allow timber harvesting to occur under modified prescriptions on the basis of the surveys it undertook in January – March 2009.
77. On or about 16 June 2009, I advised Cameron MacDonald that DSE was intending to allow timber harvesting to occur at Brown Mountain Creek under modified prescriptions.
78. On 16 June 2009, I received an email from Barry Vaughan at VicForests advising me that he had been asked by Cameron MacDonald to consider the additional habitat retention at Brown Mountain Creek and that he agreed to a 100 metre stream side buffer.

Now produced and shown to me and marked “**LAM-26**” is a copy of the email dated 16 June 2009.

79. On 18 June 2009, I sent an email to Barry Vaughan advising him that Cameron MacDonald and I had also discussed the retention of additional habitat trees identified in consultation with DSE at Brown Mountain Creek.

Now produced and shown to me and marked “**LAM-27**” is a copy of the email dated 18 June 2009.

80. On 18 June 2009, I received an email from Barry Vaughan stating that he agreed with habitat trees being identified in consultation with DSE at Brown Mountain Creek but that he preferred not to impose an additional standard on habitat tree retention.

Now produced and shown to me and marked “**LAM-28**” is a copy of the email dated 18 June 2009.

81. The modified habitat tree prescriptions were not finalised until September 2009. I sent an email to Dr Paul Smith, Director, Biodiversity Policy and Programs at DSE, and Brooke Colbert, Environmental Advisor to the Minister, advising them of the agreed modified habitat tree prescriptions on 14 September 2009.

Now produced and shown to me and marked “**LAM-29**” is a copy of my email dated 14 September 2009 to Dr Smith and Brooke Colbert.

82. DSE informed the Minister of its decision not to create a Special Protection Zone and allow timber harvesting at Brown Mountain Creek under modified prescriptions in a briefing note that was sent to the Minister on 18 June 2009. This briefing note was signed by the Minister on 29 June 2009.

Now produced and shown to me and marked “**LAM-30**” is a copy of the Ministerial briefing dated 18 June 2009 together with its three attachments.

83. For convenience, I set out below the recommendations contained in the Ministerial briefing note, and also the section subtitled ‘Intended course of action’:

“RECOMMENDATIONS

1. *That you note the results of fauna surveys undertaken at Brown Mountain.*
2. *That you note that in this case and following consideration of all relevant matter, the Department of Sustainability and Environment does not intend to create a Special Protection Zone at Brown Mountain. Timber harvesting will be allowed under modified prescriptions.*
3. *That you note the attached media release regarding this decision (Attachment 1).*
4. *That you note that the Department is assisting VicForests to develop a process for the conduct of pre-harvesting surveys and is developing a decision framework to assist in responding to*

other flora and fauna surveys conducted by members of the public in timber harvesting areas. It is intended that this decision framework be made publicly available.

...

Intended course of action

49. *The intention of the conservation guideline for arboreal mammals is to ensure that suitable habitat is protected to support high density populations, by including it in a Special Protection Zone.*
50. *Suitable habitat to support a high density population of Greater Gliders and Yellow-bellied Gliders is extensively represented in areas in close proximity to the Brown Mountain that are already excluded from timber harvesting (including in the new and expanded conservation reserves) and the creation of a Special Protection Zone will have a material impact on timber production in the area.*
51. *A decision to not create a Special Protection Zone at Brown Mountain (and to allow further timber harvesting) will impact on the high density population of Greater Gliders and Yellow-bellied Gliders. However, it will not affect the conservation status or viability of either species, as both are common throughout East Gippsland.*
52. *Considering all relevant matter, the Department does not intend to create a Special Protection Zone at Brown Mountain. In this case, the application of conservation guideline for arboreal mammals would not allow the strategic intent of the East Gippsland Forest Management Plan to be achieved, which is to conserve natural values but allow for a viable timber industry.*
53. *To better achieve this balance and minimise impacts on the high density population of Greater Gliders and Yellow-bellied Gliders at the site, the Department intends to allow timber harvesting to occur at Brown Mountain to occur [sic] under modified prescriptions, namely:*
 - *A 100 metre buffer along Brown Mountain Creek, where most animals were found during the survey that was conducted.*
 - *The protection of hollow-bearing habitat trees identified by biodiversity officers of the Department (where it is safe to do so).*
54. *Subject to your comment on this decision, the Department intends to:*
 - *Formally advise Environment East Gippsland (as proponents of the survey) and VicForests of the decision.*
 - *Make the survey report available to the public on request.*

- *Assist VicForests in the development of a process for the conduct of pre-harvesting surveys.*
- *Continue to develop a decision framework to assist in responding to other flora and fauna surveys conducted by members of the public in timber harvesting coupes.*

55. *It is anticipated that this decision framework will be prepared in consultation with stakeholders and be made publicly available.”*

84. The Minister issued a press release concerning harvesting in Brown Mountain on 21 August 2009.

C. *Another alleged detection of the Long-footed Potoroo*

85. On 24 August 2009 I received an email from Stephen Henry that forwarded an email to him from Andrew Lincoln concerning an alleged detection of a Long-footed Potoroo in Coupe 15. I sent an email concerning this issue the same day. For convenience I set out the correspondence below:

From Stephen Henry to Lee Miezis on 24 August 2009 at 7:00am:

“Mick/Lee/Craig,

Please note attached a report of a Long-footed Potoroo photographed in one of the proposed logging coupes at Brown Mountain.

I was informed of this record by Jill Redwood at about 3.00pm yesterday. The photo was apparently taken early Friday morning.

We have not yet had time to verify the location of the record as per past process.

I am in Melbourne for the next two days attending the biodiversity forum, but can be contacted on my mobile (or leave a message on it).”

From Lee Miezis to Dr Andrew Haywood (Manager, Forest Monitoring and Reporting at DSE) on 24 August 2009 at 1:55pm:

“Andy –

Need your guys to verify this site where it is claimed. Can you have them take a photo from the same perspective as this. Location described in report.”

Now produced and shown to me and marked “**LAM-31**” is a copy of this email correspondence.

86. Later that day I sent an email to Andrew Lincoln and Jill Redwood requesting all footage (still images and video) taken at the camera location and other camera locations at Brown Mountain Creek and offering to pay for any costs associated resulting from sending the footage to me.

Now produced and shown to me and marked "**LAM-32**" is a copy of my email to Andrew Lincoln and Jill Redwood dated 24 August 2009.

87. In another email I sent later that day to Andrew Lincoln and Jill Redwood I explained that the reason I requested the complete footage was for verification of their claims.

Now produced and shown to me and marked "**LAM-33**" is a copy of my email to Andrew Lincoln and Jill Redwood dated 24 August 2009 sent at 4:52pm.

88. Later that day I had a telephone conversation with Jill Redwood in which she told me that she would not release the complete footage to me without clearance from her legal advisors. The following day I sent an email to Jill Redwood regarding this issue, which for convenience I set out below:

"Hi Jill,

Further to our conversation yesterday, I understand that you are not willing to release footage to the Department without clearance from your legal advisers. I ask that you send my request to your advisers as a matter of priority and that you provide the all [sic] footage (still images and video) taken at this camera location and other camera locations at Brown Mountain Creek for the duration of the camera being located in and/or adjacent to the coupes in question.

This along with the field visit by my staff will enable full and proper verification of the report you have made. I trust you understand that the Department cannot act on the reporting until it is verified."

Now produced and shown to me and marked "**LAM-34**" is a copy of my email to Ms Jill Redwood dated 25 August 2009.

89. On 25 August 2009, I was provided with a copy of an email by Dr Andrew Haywood that was sent to him from Gary Trotter. This email stated that in Mr Trotter's opinion, the site of the reported Long-footed Potoroo was at Brown Mountain Creek as was claimed by Mr Andrew Lincoln. Attached to this email were a number of photographs of the site.

Now produced and shown to me and marked "**LAM-35**" is a copy of the email and two attachments from Gary Trotter to Dr Haywood dated 25 August 2009.

90. DSE has not been provided with the footage and stills requested concerning the alleged Long-footed Potoroo detection at Brown Mountain Creek.
91. DSE requires a verified detection to implement the adaptive management prescriptions of an action statement and that as March 2010, DSE has been unable to verify the detection of the Long-footed Potoroo at Brown Mountain Creek.

D. Matters under the Flora and Fauna Guarantee Act 1988 (Vic)

92. On 6 October 2009 I received by email advice from Dr Smith that:

- (a) the target of 75 sites for the Spot-tailed Quoll in the relevant action statement has been met;
- (b) on a conservative estimate, there are about 100 separate Spotted Owl Management Areas in East Gippsland;
- (c) there are about 180 records of Powerful Owl nesting sites in East Gippsland.

Now produced and shown to me and marked "LAM-36" is a copy of the email from Dr Paul Smith to me dated 6 October 2009.

93. To my knowledge:

- (a) there has been no recommendation made to the Secretary of DSE, nor has the Secretary formed the opinion that, the harvesting of the Brown Mountain Creek coupes by VicForests is likely to threaten the survival of a listed taxon or community of flora or fauna or a critical habitat;
- (b) the Secretary has not required VicForests to consult with the Secretary within the meaning of s 7(2) of the *Flora and Fauna Guarantee Act 1988* (Vic) prior to VicForests commencing harvesting in the Brown Mountain Creek coupes.

Signed: Lee Alexander Miezis

Dated: March 2010