

FORM 5A

Rule 5.02(1)

WRIT

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

and

Plaintiff

VICFORESTS

Defendant

Date of document:	25 August 2009	
Filed on behalf of:	Plaintiff	
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TO THE DEFENDANT

TAKE NOTICE that this proceeding has been brought against you by the plaintiff for the claim set out in this writ.

IF YOU INTEND TO DEFEND the proceeding, or if you have a claim against the plaintiff which you wish to have taken into account at the trial, YOU MUST GIVE NOTICE of your intention by filing an appearance within the proper time for appearance stated below.

YOU OR YOUR SOLICITOR may file the appearance. An appearance is filed by—

- (a) filing a "Notice of Appearance" in the Prothonotary's office, 436 Lonsdale Street, Melbourne, or, where the writ has been filed in the office of a Deputy Prothonotary, in the office of that Deputy Prothonotary; and
- (b) on the day you file the Notice, serving a copy, sealed by the Court, at the plaintiff's address for service, which is set out at the end of this writ.

IF YOU FAIL to file an appearance within the proper time, the plaintiff may OBTAIN JUDGMENT AGAINST YOU on the claim without further notice.

THE PROPER TIME TO FILE AN APPEARANCE is as follows—

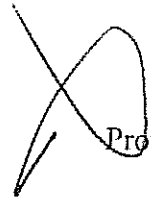
- (a) where you are served with the writ in Victoria, within 10 days after service;
- (b) where you are served with the writ out of Victoria and in another part of Australia, within 21 days after service;

- (c) where you are served with the writ in New Zealand or in Papua New Guinea, within 28 days after service;
- (d) where you are served with the writ in any other place, within 42 days after service.

IF the plaintiff claims a debt only and you pay that debt, namely, \$ and \$ for legal costs to the plaintiff or the plaintiff's solicitor within the proper time for appearance, this proceeding will come to an end.

Notwithstanding the payment you may have the costs taxed by the Court.

FILED 25 August 2009


Prothonotary

THIS WRIT is to be served within one year from the date it is filed or within such further period as the Court orders.

GENERAL ENDORSEMENT

Introduction

1. By its proceeding the Plaintiff alleges that:
 - (a) the Defendant proposes to undertake imminently certain forestry operations on Brown Mountain in East Gippsland Victoria (**the proposed Brown Mountain Forestry Operations**);
 - (b) the proposed Brown Mountain Forestry Operations are unlawful in that, if they are undertaken, they will not comply with the Allocation Order under the *Sustainable Forests (Timber) Act 2004* (Vic) or the Timber Release Plan for the East Gippsland forest management area; and
 - (c) the proposed Brown Mountain Forestry Operations will not comply with the Allocation Order or the Timber Release Plan for the East Gippsland forest management area because they will not comply with:
 - (i) the Code of Practice for Timber Production 2007;
 - (ii) the Flora and Fauna Guarantee Act;
 - (iii) the East Gippsland Forest Management Plan.
2. The Plaintiff seeks:
 - (a) injunctions both interim, interlocutory and final to restrain the Defendant from undertaking the proposed Brown Mountain Forestry Operations; and
 - (b) declaratory orders that the proposed Brown Mountain Forestry Operations are unlawful.

Parties

3. The Plaintiff (**EEG**) is:
 - (a) an Association incorporated under the *Associations Incorporations Act 1981* (Vic);
 - (b) capable of suing in its own name.

4. The Defendant (**VicForests**):
 - (a) is a State body under s 14 of the *State Owned Enterprises Act 1992* (Vic);
 - (b) was declared to be a State business corporation on 28 October 2003;
 - (c) is a body corporate capable of being sued in its own name;
 - (d) has as its principal function undertaking, on a commercial basis, the sale and supply of timber resources in Victorian State forests;
 - (e) is the person who will undertake, whether by itself, its servants, agents or contractors, any forestry operations in the Brown Mountain forestry coupes as described in paragraph 14 below (**the Brown Mountain forestry coupes**).

Standing

5. At all material times, EEG has had amongst its objects and purposes:
 - (a) the promotion of conservation values and environmental awareness about East Gippsland;
 - (b) the promotion of sustainability in environmental, economic and social matters;
 - (c) the making of representations to Government regarding land use and management; and

- (d) the undertaking of research.
6. At all material times, in furtherance of its objects and purposes, EEG has:
- (a) carried out research including by means of surveys in State forests;
 - (b) produced newsletters, articles, and other written information about the environment of East Gippsland particularly forests;
 - (c) made submissions to Government;
 - (d) responded to Government invitations, at both State and Commonwealth level to comment on environment related matters;
 - (e) been represented on Committees established by Government concerned with the environment including the Regional Forest Agreement Consultative Committee; and
 - (f) conducted guided walking tours and camps in East Gippsland including in the forest at Brown Mountain, and the Brown Mountain forestry coupes.
7. At all material times, EEG has had standing to bring this application.

THE REGULATION OF FOREST OPERATIONS IN VICTORIA

The Allocation Order

8. On or about 29 July 2004, the Minister for the Environment acting pursuant to s 13 of the *Sustainable Forests (Timber) Act 2004* (the **Sustainable Forests Act**) made an allocation order (the **Allocation Order**).
9. On or about 21 March 2007, the Minister amended the Allocation Order.
10. The Allocation order:

- (a) allocates timber resources to VicForests by reference to numbers of different forest stands in forest management areas throughout Victoria; and
 - (b) includes an allocation of timber resources to VicForests in the “East Gippsland” forest management area; and
 - (c) by reason of the matters in sub-paragraph (b) above, includes an allocation of timber resources in the Brown Mountain area.
11. By s 15(1)(c) of the Sustainable Forests Act, the Allocation Order is required to state *“the conditions to which VicForests is subject in carrying out its functions under the allocation order, including any applicable performance measures and standards”*.
12. It is a term of the Allocation Order that in undertaking authorised activities VicForests is required to comply with the conditions and standards prescribed in:
- (a) the Code of Practice described in paragraphs 16 to 18 below;
 - (b) Management Guidelines specified in Forest Management Plans described in paragraphs 19 to 21 below;
 - (c) Management Procedures for Timber Harvesting and Associated activities; and
 - (d) the Utilisation Procedures for all Commercial Harvesting.

The Timber Release Plan

13. On 9 June 2009, the Secretary to the Department of Sustainability and Environment approved a Timber Release Plan (the **Timber Release Plan**) identifying by map and coupe number the areas of forest in the East Gippsland forest management area that were the subject of release.

14. The Timber Release Plan has approved timber harvesting of coupe numbers 840-502-0015, 840-502-0019, 840-502-0026 and 840-502-0027 on Brown Mountain, comprising the Brown Mountain forestry coupes.
15. On or about 21 August 2009, the Minister for Environment and Climate Change (**the Minister**) by media release announced that VicForests would be permitted to log the Brown Mountain forestry coupes.

The Code of Practice

16. On a date presently unknown to EEG, the then Minister for Water, Environment and Climate Change made, approved and published a Code of Practice entitled "Code of Forest Practices for Timber Production 2007" under the *Conservation, Forests and Lands Act 1987 (Vic)* ("**the Conservation Act**") (**the Code**).
17. The Code:
 - (a) regulates timber harvesting and associated activities;
 - (b) requires each specific timber harvesting operation to be conducted in accordance with an approved Forest Coupe Plan; and
 - (c) includes "mandatory actions" which are "actions to be conducted in order to achieve each operational goal", where an operational goal "states the desired outcome or goal for each specific area of timber production operations" (page 7 of the Code).
18. At all material times the Code required, by way of mandatory action, that:

- (a) the Timber Release Plan must “be consistent with this Code of Practice and with the relevant forest management plan” and “minimise impact on biodiversity...” (page 14 of the Code);
- (b) forest coupe plans “be prepared in accordance with this Code of Practice, the relevant Forest Management Plan and any other relevant prescriptions or procedures, prior to the commencement of a timber harvesting operation” and “exclusion areas must be protected from timber harvesting operations and associated activities in accordance with relevant Flora and Fauna Guarantee Act Action Statements, the relevant Forest Management Plan and relevant legislation” (page 15 to 16 of the Code);
- (c) “forest management planning and all forestry operations must comply with measures specified in relevant Flora and Fauna Guarantee Action Statements and Flora and Fauna Guarantee Orders” (page 21 of the Code);
- (d) the following matters be addressed when developing and reviewing [coupe] plans and be adhered to during operations:
 - (i) application of the precautionary principle to the conservation of biodiversity values, consistent with monitoring and research to improve understanding of the effects of forest management on forest ecology and conservation values;
 - (ii) “consideration of the advice of relevant experts and relevant research in conservation biology and flora and fauna management at all stages of planning and operations”;

- (iii) “use of wildlife corridors, comprising appropriate widths of retained forest, to facilitate animal movement between patches of forest of varying ages and stages of development, and contributing to a linked system of reserves; and
- (iv) “providing appropriate undisturbed buffer areas around significant habitats”,

(page 21 of the Code).

East Gippsland Forest Management Plan

- 19. On a date presently unknown to EEG, the Secretary made the East Gippsland Forest Management Plan (**the East Gippsland FMP**).
- 20. Chapter 2 of the East Gippsland FMP is entitled “forest management strategy” and creates forest management zones. The zoning scheme divides State forest of East Gippsland into three zones (giving a descending hierarchy of protection from logging) including special protection zones (“**SPZ**”) that “will be managed for conservation” and from which “timber harvesting will be excluded” (part 2.3 of the East Gippsland FMP).
- 21. The East Gippsland FMP requires that in the event that densities of Yellow-bellied Gliders and Greater Gliders reaches the levels prescribed the Secretary must declare the area in which they are found to be a SPZ. Section 3.4 of the FMP states:

“For each of the following occurrences, approximately 100 ha of suitable habitat will be included in the SPZ:

...

Greater Glider and Common Brushtail Possum - >2 individuals per ha, >10 per km, or >15 per hour of spotlighting.

Yellow-bellied Glider - >0.2 per ha, >5 per km, or >7 per hour of spotlighting.

...

substantial populations of the above species that are isolated or in unusual habitat.

Action Statements

22. Under s19 of the Flora and Fauna Guarantee Act, the Secretary “must prepare an action statement for any listed taxon or community of flora or fauna... as soon as possible after that taxon... is listed”.
23. At all material times there has been an action statement for each of the following species:
 - (a) Long footed Potoroo (*Potorous longippes*);
 - (b) Spot-tailed Quoll (*Dasyurus maculatus*);
 - (c) Orbost Spiny Crayfish (*Euastacus diversus*); and
 - (d) the Sooty Owl (*Tyto tenebricosa*).
24. There was an action statement for the Long-footed Potoroo made in 1994 and an action statement made in 2009. The action statement made in 1994 provides that:
 - (a) it “*is one of the rarest mammals in Australia*” (page 1);
 - (b) “*Populations of Long-footed Potoroos in State forest are potentially threatened by habitat loss or fragmentation caused by logging and associated road construction*” (page 2); and

- (c) *“Given the rarity of Long-footed Potoroos, and the lack of any information which suggests that they respond positively to fire or logging in the long term, areas supporting the species should be protected from fire and logging until more conclusive information is available”* (page 3).
25. The action statement made in 2009 provides that additional protection areas should be established where long-footed potoroos have been detected in the State forest outside the core protection area (page 8).
26. The action statement for the Spot-tailed Quoll provides that:
- (a) *“In considering any impact of logging on Spot-tailed Quolls, the amount of protected and retained habitat across the landscape is important”* (page 4);
- (b) *“a standard habitat protection prescription of a 500 ha Special Protection Zone (SPZ) and a 1000 ha Special Management Zone (SMZ) [must be implemented] for all confirmed Quoll records in State forest throughout Victoria, up to targets specified in individual”* FMPs (page 8); and
- (c) Site protection for Quolls *“will be prioritised according to habitat quality, current reservation status of the site, linkage to other reserves and the presence of complementary values”* (page 8).
27. The action statement for the Orbost Spiny Crayfish provides that:
- (a) *“Timber harvesting, which occurs in several of the catchments inhabited by the crayfish, has the potential to affect detrimentally crayfish populations by altering the run-off and flow characteristics of the stream, the amounts of organic debris entering the stream, the temperature regimes, the amount and rate of sediment entering the stream, and by increasing primary productivity in the stream, with*

each factor liable to be more acute the closer the logging activity comes to the waterway” (page 2); and

- (b) *“Linear Reserves consisting of an undisturbed buffer of approximately 100m on each bank of the stream for one kilometre upstream and downstream of the detection site will be established at all sites on public land where Orbost Spiny Crayfish are recorded” (page 4).*

28. The action statement for the Sooty owl provides that:

- (a) *“Sooty Owl Management Areas (SOMAs): Where clear-fell or seed-tree systems are used, each SOMA will comprise 500ha of forest to be managed as a Special Protection Zone (SPZ)”;*
- (b) *“Sooty Owl Management Areas (SOMAs): Where selective harvesting is used, manage areas of approximately 1000ha to maintain habitat capable of supporting adequate populations of terrestrial and arboreal prey mammals to support breeding owls. SOMAs based on specific records will comprise 3ha SPZs around the records plus SMZs of about 1 000ha which will allow for modified timber harvesting practices that retain sufficient levels of habitat trees. SOMAs based on habitat modelling will comprise solely the approximately 1 000ha SMZs. Special Management Zone Plans will be prepared specifying the prescriptions to be applied within SMZs for Sooty Owl and will become part of the relevant Regional prescriptions”;* and
- (c) *“All confirmed nesting and roosting sites utilised recently and frequently (based on reliable observation or physical evidence such as pellets or wash) located outside SOMAs will be protected by a 3ha SPZ around the site and a 250-300m radius (or equivalent linear area) SMZ buffers around identified localities, unless*

they are already protected. In these cases, habitat for foraging is provided in areas excluded from timber harvesting by general prescription including wildlife corridors, steep areas and unmerchutable areas and areas protected for other management purposes”,

(page 5).

29. VicForests, in undertaking any forestry operations, is required to comply with action statements because:
 - (a) it is required to comply with the Allocation Order and the Timber Release Plan;
 - (b) each of the Allocation Order and the Timber Release Plan requires as conditions, that VicForests comply with the Code and the East Gippsland FMP;
 - (c) the Code and the East Gippsland FMP require compliance with the Flora and Fauna Guarantee Act and the Action Statements made thereunder.
30. Contrary to the statutory duty in s 19 of the Flora and Fauna Guarantee Act, the Secretary to the Department of Sustainability and Environment has failed to prepare an Action Statement for the Large Brown Tree Frog.
31. The absence of detailed protective prescriptions in relation to timber harvesting for the Large Brown Tree Frog requires a precautionary approach to be taken by VicForests in timber harvesting operations to be conducted in areas which are potential habitat for the Large Brown Tree Frog.
32. VicForests has failed to take a precautionary approach in timber harvesting operations to be conducted in the Brown Mountain forestry coupes which are the subject matter of this proceeding and which are potential habitat for the Large Brown Tree Frog.

Lawful Forestry Operations

33. By reason of the matters set out above, and ss 45 and 46 of the Sustainable Forests Act, at all material times, VicForests in undertaking lawful forestry operations is required to comply with and observe, inter alia:
- (a) the Code;
 - (b) Action Statements made under the Flora and Fauna Guarantee Act; and
 - (c) Management Guidelines in Forest Management Plans.
34. By reason of the matters set out above, and s 5 of the Sustainable Forests Act, at all material times, VicForests in undertaking lawful forestry operations is required to comply with and observe the principles of ecologically sustainable development including specifically:
- (a) The objective of protecting biological diversity and maintaining the ecological processes and life support systems; and
 - (b) The principle that if there are 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 (the precautionary principle).

The Brown Mountain forestry coupes are actual or likely critical habitat for five listed species

35. Since 29 June 2000, the following species have been listed as threatened species pursuant to the Flora and Fauna Guarantee Act:

- (a) Long-footed Potoroo (*Potorous longippes*);
 - (b) Spot-tailed Quoll (*Dasyurus maculatus*);
 - (c) Sooty Owl (*Tyto Tenebricosa*);
 - (d) Powerful Owl (*Ninox strenua*);
 - (e) Orbost Spiny Crayfish (*Euastacus diversus*); and
 - (f) Large Brown Tree Frog (*Litoria Littlejohni*).
36. On 29 January 2009, EEG requested the Minister for Environment and Climate Change to make an Interim Conservation Order pursuant to s 26 of the Flora and Fauna Guarantee Act (the **ICO Application**) to conserve the critical habitat on Brown Mountain, including the Brown Mountain forestry coupes, of the following species:
- (a) Long footed Potoroo (*Potorous longippes*);
 - (b) Spot-tailed Quoll (*Dasyurus maculatus*);
 - (c) Powerful owl (*Ninox strenua*);
 - (d) Sooty Owl (*Tyto Tenebricosa*); and
 - (e) Orbost Spiny Crayfish (*Euastacus diversus*).
37. By no later than 15 April 2009, the Minister had been provided with copies of the following expert reports:
- (a) *Arboreal Survey Mt Brown*, Rohan Bilney 27 January 2009;
 - (b) *Report on nocturnal survey for arboreal mammals and forest owl species*, Lincoln and Copp 24 February 2009;
 - (c) *Report on nocturnal survey for arboreal mammals and forest owl species*, Lincoln and Calle 9 March 2009; and

- (d) *Report on nocturnal survey for arboreal mammals and forest owl species*, Calle and Lincoln 13 March 2009.
38. Between January and March 2009 in part in response to the ICO Application and material supplied by EEG, the Department of Sustainability and Environment conducted a survey of arboreal mammals, in proposed logging coupes 840-502-0015 and 840-502-0019 on Brown Mountain.
39. The DSE survey found, among other things, that:
- (a) “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 Guidelines – Arboreal Mammals” within the *East Gippsland Forest Area Management Plan*”; and
- (b) in relation to the Long-footed Potoroo, the report also noted “the presence of diggings which are strongly suggestive of the species presence” and that “some diggings of this type were seen in the study area, and the forest type was assessed as good quality habitat for Long-footed Potoroos.”
40. On or about 12 August 2009, the Minister was provided with a copy of a final Report entitled “Assessment of Critical habitat of Six Species Under the Flora and Fauna Guarantee Act in the Bonang-Goongerah Area, East Gippsland, Victoria” by Dr Charles Meredith (**the Meredith Report**).
41. The Meredith Report assessed the ecological values of the area of land linking the Errinundra and Snowy River national parks and was provided in support of the ICO Application.
42. The Meredith Report found:

- (a) that there is a strong case to be made that the area identified on the map which accompanied the ICO Application, which area includes the Brown Mountain Forestry Coupes, meets the criterion for a declaration of critical habitat under the Flora and Fauna Guarantee Act in respect of:
- (i) the Long-footed Potoroo (p 22);
 - (ii) the Orbost Spiny Crayfish (p 40); and
 - (iii) the Large Brown Tree Frog (p 44);
- (b) that there is a case to be made that the area identified on the map which accompanied the ICO Application, which area includes the Brown Mountain Forestry Coupes, meets the criterion for a declaration of critical habitat under the Flora and Fauna Guarantee Act in respect of the Sooty Owl (p 31).
43. As at 24 August 2009, the Minister had not made a decision as to whether or not he would declare the area the subject of the proposed Brown Mountain Forestry Operations to be critical habitat for the Long-footed Potoroo, the Sooty Owl, the Large Brown Tree Frog, the Orbost Spiny Crayfish or any of those listed species.
44. By no later than 15 April 2009 VicForests:
- (a) was aware of the ICO Application; and
 - (b) had been provided with copies of the reports referred to in paragraph 37 above.
45. By a letter dated 19 August 2009, the Plaintiff by its lawyers sought from the Minister an undertaking to prevent logging on Brown Mountain until a decision is made by the Minister on the ICO Application.

46. By a letter dated 20 August 2009, an officer of the Department of Sustainability and Environment responded on behalf of the Minister that the Meredith report was currently under consideration.
47. By a letter dated 21 August 2009, the Plaintiff by its lawyers again sought from the Minister an undertaking to prevent logging on Brown Mountain until a decision is made by the Minister on the ICO Application.
48. Save for the media release referred to in paragraph 15 above, the Plaintiff has not received any response to its letter dated 21 August 2009.
49. On or about 21 August 2009, a Long-footed Potoroo was photographed within the Brown Mountain forestry coupe numbered 840-502-0015.

The Brown Mountain Forestry Operations are not lawful

50. By reason of the media announcement made by the Minister on 21 August 2009 and referred to in paragraph 15 above, together with the contents of the Timber Release Plan referred to in paragraph 14 above and the communications referred to in paragraphs 44 to 47 above, it is likely that:
 - (a) forestry operations in the Brown Mountain forestry coupes are imminent; and
 - (b) the Minister does not intend to stop VicForests undertaking those operations.
51. By reason of:
 - (a) the actual, and likely, presence of the Long-footed Potoroo in the Brown Mountain forestry coupes;

- (b) the likely presence of the Large Brown Tree Frog, the Orbost Spiny Crayfish and the Sooty Owl in the Brown Mountain forestry coupes;
- (c) the fact that the Brown Mountain forestry coupes form part of an area comprising critical habitat for listed species namely the Long-footed Potoroo, the Large Brown Tree Frog, the Orbost Spiny Crayfish and the Sooty Owl;
- (d) the requirement in 3.4 of the East Gippsland FMP to declare a Special Management Zone for Greater Gilders and Yellow-bellied Gliders within the Brown Mountain forestry coupes;
- (e) the failure of VicForests to take into account, apply or consider:
 - (i) the principles of ecologically sustainable development and the precautionary principle as applied to the matters set out in this Writ;
 - (ii) scientific evidence including the Meredith Report and the Reports referred to in paragraph 37 above;
 - (iii) the fact that the ICO Application had been made but not determined by the Minister.

any forestry operations in the Brown Mountain forestry coupes will be unlawful.

52. The unlawfulness arises because, by reason of the matters set out above, any forestry operations in the Brown Mountain forestry coupes will be in breach of:

- (a) the Code of Practice;
- (b) the Flora and Fauna Guarantee Act;
- (c) the Sustainable Forests Act; and
- (d) the East Gippsland FMP.


53. Unless restrained the Defendant threatens to undertake forestry operations in the Brown Mountain forestry coupes.

Relief Sought

54. The Plaintiff seeks:

- (a) Injunctions, both interlocutory and final, to restrain the Defendant from undertaking any forestry operations in the Brown Mountain forestry coupes; and
- (b) Declaratory orders that any forestry operations in the Brown Mountain forestry coupes are unlawful.
- (c) Such further or other orders as the Court sees fit.

DATED 25 August 2009


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Bleyer Lawyers Pty Ltd
Solicitors for the Plaintiff

1. Place of trial—
Melbourne
2. Mode of trial—
before a Judge of the Court sitting alone
3. This writ was filed—
for the plaintiff by Bleyer Lawyers Pty Ltd of 1/550 Lonsdale Street, Melbourne 3000
4. The address of the plaintiff is—
Lot 2 Bonang Highway, Goongerah 3888
5. The address for service of the plaintiff is—
c/ Bleyer Lawyers Pty Ltd, Level 1, 550 Lonsdale Street, Melbourne 3000
6. The address of the defendant is—
Level 7, 473 Bourke Street, Melbourne 3000