
TRANSCRIPT OF PROCEEDINGS

SUPREME COURT OF VICTORIA

CIVIL JURISDICTION

SALE

MONDAY 1 MARCH 2010

BEFORE THE HONOURABLE JUSTICE OSBORN

B E T W E E N

ENVIRONMENT EAST GIPPSLAND

Plaintiff

- and -

VICFORESTS

Defendant

MS D. MORTIMER SC with MR R.M. NIALL and MS P.C. KNOWLES
appeared on behalf of the Plaintiff.

MR I.G. WALLER SC with MR H.L. REDD appeared on behalf of the
Defendant.

1 MS MORTIMER: If it please the court I appear with my learned
2 friends Mr Niall and Ms Knowles on behalf of the
3 plaintiff.

4 HIS HONOUR: Yes, Ms Mortimer.

5 MR WALLER: May it please the court I appear with my learned
6 friend, Mr Redd, for the defendant.

7 HIS HONOUR: Yes, Mr Waller.

8 MS MORTIMER: If Your Honour pleases, before I start the
9 opening on behalf of the plaintiff can I just indicate to
10 Your Honour how we have the court set up and a couple of
11 issues about the proposed court setup for the trial.

12 HIS HONOUR: Yes.

13 MS MORTIMER: Your Honour will see to Your Honour's right a
14 screen. During my opening there will be a power point
15 placed onto that screen with some photographs which will
16 be proven during the evidence. I understand my learned
17 friends' experts may use - or witnesses may use that
18 screen.

19 What we are proposing, Your Honour, if it's
20 convenient and appropriate in Your Honour's view is when -
21 Your Honour will see the size of the witness box.

22 HIS HONOUR: Yes.

23 MS MORTIMER: When the witnesses are to give evidence,
24 particularly the experts, we were going to suggest that
25 they be given a seat and a small table in the dock so that
26 there's actually some room for them. They are all working
27 with folders, quite a lot of folders, and it may become
28 unwieldy in the witness box.

29 We have checked, Your Honour, with the transcript
30 operators and transcript is confident they can set that
31 space up if Your Honour thinks that's appropriate.

1 Perhaps that's just something I'll leave with Your Honour
2 to consider. Those of us at the Bar table, we have no
3 difficulty with that, Your Honour.

4 HIS HONOUR: Yes. We will look at that after the court rises.
5 But in principle that should be workable.

6 MS MORTIMER: If Your Honour pleases.

7 HIS HONOUR: I think that in any event we might want to rotate
8 the witness box so (indistinct).

9 MS MORTIMER: Yes, Your Honour.

10 HIS HONOUR: I will look at that later.

11 MS MORTIMER: If Your Honour pleases. Your Honour, if I may
12 begin?

13 HIS HONOUR: Yes.

14 MS MORTIMER: Your Honour, to an outsider, in our submission,
15 it is tempting to characterise this case as a case about
16 trees and trees alone and whether they should be cut down.
17 In our submission, and it's part of the plaintiff's case,
18 that would be to see this forest as really only what it
19 would become after logging, which is, in our submission, a
20 kind of a farm maintained, established and cared for, for
21 the purpose of growing particular kinds of commercially
22 valuable trees.

23 Your Honour, the plaintiff's case will focus on
24 seeing this forest as an eco system, as something that
25 grows, lives, decays and regenerates on its own cycles for
26 the general benefit of all the flora and fauna species who
27 use and depend on it, and an eco system where the
28 relationships between those flora and fauna to others
29 within the eco system are complex and poorly understood.

30 So, although, Your Honour, it's true that in this
31 case Your Honour will hear a lot about trees, Your Honour

1 will hear more in the plaintiff's case about habitat as a
2 broad concept and about the ecological functioning of
3 species within that habitat.

4 The plaintiff's case, Your Honour, will be that the
5 aim of the suite of legislative and regular tree
6 protections which are in force in this state for the
7 protection of and conservation of (indistinct) diversity
8 and of threatened species, that that suite of regulation
9 is not intended to turn tracts of forest into islands
10 where there are isolated populations of species where
11 inevitably those populations will lack the genetic
12 diversity, the optimal breeding conditions and the habitat
13 range to flourish and to recover.

14 Because, Your Honour, we are dealing in this case
15 with species that are on a path to extinction. That is
16 the reason they are listed. So, this is not a
17 circumstance, in our submission, where one is dealing with
18 the preservation of a robust species. One is dealing with
19 a species that needs extra attention and whose populations
20 need to be recovered to sustainable levels.

21 Your Honour, we submit the plaintiff will take the
22 actual language of the suite of legislation and regulation
23 and the actual language in that legislative scheme uses
24 phrases such as "flourishing across their natural range
25 guaranteeing the survival and flourishing of the species,"
26 "protecting high quality habitat," and "protecting the
27 species themselves."

28 The plaintiff will rely on that language, Your
29 Honour, and base its submission to Your Honour that that
30 language means what it says. It is not aspirational and
31 in the context in which it appears it is intended to be

1 enforceable. The plaintiff will then submit to Your
2 Honour that VicForests logging of Brown Mountain is
3 inconsistent and incompatible with the scheme of
4 protection that is established.

5 Your Honour, we do not dispute that native forest
6 logging involves very different and frequently competing
7 interests over state forests. But what we will point to,
8 Your Honour, and what we will seek to demonstrate in this
9 case is that in the case of the logging of old growth
10 forest, which is habitat for many of the threatened
11 species - well, for many threatened species, the
12 resolution of this competition on the ground under its
13 present administration by VicForests favours logging in a
14 way that the legislative and (indistinct) tree scheme does
15 not envisage and does not allow.

16 Your Honour, to give a brief outline of the parties
17 to this case beginning with the plaintiff and the opening
18 I'm giving now about the plaintiff, Your Honour, comes
19 from the evidence of Ms Jill Redwood.

20 HIS HONOUR: Yes.

21 MS MORTIMER: Environment East Gippsland, Your Honour, began
22 its life in 1982 as an unincorporated association called
23 "Concerned Residents of East Gippsland." It was
24 incorporated in August 1991 as Environment East Gippsland.
25 So, Your Honour, it is an organisation longstanding in our
26 submission and an organisation which has a particular
27 focus on East Gippsland.

28 Its objects include promoting conservation values
29 and environmental awareness about East Gippsland,
30 promoting sustainability in environmental, economic and
31 social terms, making representations to government about

1 land use and management and undertaking research that's
2 relevant to those matters.

3 Environment East Gippsland, Your Honour, produces
4 newsletters, it carries out surveys on state forests, it
5 contributes articles to other publications and it makes
6 contributions to media debates about forest issues. It
7 runs ecology camps, Your Honour, the evidence will show at
8 Brown Mountain so that the very area, Your Honour, with
9 which this case is concerned is an area in which
10 Environment East Gippsland engages in particular
11 activities. It runs these camps, the evidence will show,
12 Your Honour, that are attended by about 100 people with
13 just as many people turned away, and it takes groups
14 through a walk which covers both coupes 15 and 19 in this
15 proceeding and in fact is some of the walk on which Your
16 Honour will be taken on the view.

17 Environment East Gippsland, Your Honour, makes
18 submissions to government both state and federal and the
19 evidence will show often it is invited by government both
20 state and federal to comment on relevant environmental
21 issues.

22 Your Honour, it is not an organisation which is
23 heavily funded by government, state or federal, but the
24 evidence discloses it's received occasional and very
25 modest pieces of funding over its lifetime. What it does
26 in relation to pursue its objectives, Your Honour, it does
27 on the basis of the contribution of its members, its
28 fundraising and relies on its own resources.

29 Environment East Gippsland, Your Honour, has about
30 420 members and about 500 people on its email list which
31 in other words is no mean feat for a small locally based

1 environment group and no mean feat to sustain that over a
2 period of 20 years. Its members, in our submission, Your
3 Honour, are passionate about and committed to the
4 preservation of their local forest environment and the way
5 in which they believe the regulatory structure in this
6 state intends and requires that environment to be
7 protected.

8 Your Honour, the defendant in this case, VicForests,
9 was established in 2003 and prior to this, the Department
10 of Natural Resources and Environment was responsible for
11 logging in Victoria, and the history of this is traced in
12 Professor Ferguson's report to be tendered on behalf of
13 the defendant. No doubt my learned friend will open on
14 that a little more, Your Honour. I propose just to take
15 Your Honour in opening to the Order-in-Council which
16 establishes VicForests and for that I need Your Honour to
17 go to the agreed book of documents Vol.1, if Your Honour
18 might, and fittingly, Your Honour, p.1.

19 HIS HONOUR: Yes.

20 MS MORTIMER: Your Honour will see there an Order-in-Council
21 dated 28 October 2003.

22 HIS HONOUR: Yes.

23 MS MORTIMER: The Governor acting pursuant to s.14 of the State
24 Owned Enterprises Act and establishes VicForests under
25 Clause 3, and Your Honour will see in Clause 3 paragraph 2
26 that the purpose of establishing VicForests is to create a
27 statutory body to undertake two things, the management of
28 timber resources and State forests on a commercial basis
29 and the sale of timber resources in Victorian State
30 forests on a commercial basis.

31 Its functions are then set out in the following

1 paragraph and the powers that it is given to perform its
2 functions in the next paragraph. It is then required to
3 act, if I might summarise paragraphs 5 to 7, on a
4 commercial basis within Victorian Government policy.

5 Your Honour will see that it is an Authority that is
6 governed by a board of directors and that is established
7 in Clause 4 and there are a number of other provisions
8 that I don't need to take Your Honour to.

9 If Your Honour goes to p.4 of the agreed documents
10 Your Honour will see by Clause 2 there that VicForests is
11 declared to be a State business corporation under s.17 of
12 the State-Owned Enterprises Act.

13 Your Honour, no doubt in this proceeding our learned
14 friends might make something of the commercial focus of
15 VicForests pursuant to its functions and purposes under
16 this and it is no part of the plaintiff's case to quarrel
17 with that, but our submission is that the operations that
18 VicForests performs and the planning of those operations
19 require the performance of a number of functions and
20 duties that at times may directly bring into conflict some
21 of its commercial aims but that is the nature of the
22 resource, in our submission, that VicForests is given
23 charge of. It is a community resource. It belongs to all
24 the Victorian community and under this legislation
25 VicForests are giving privileges on behalf of the State to
26 exploit it, and that exploitation is in our submission
27 regulated not only in ways that will advance the
28 productivity and commercial interests of the products that
29 come out of it but in ways that will balance the need to
30 protect the very resource and the species that depend on
31 that resource.

1 HIS HONOUR: I see that 3.7 says that: "VicForests must operate
2 in a framework consistent with Victorian Government policy
3 and priorities" so even though the preceding statement of
4 purpose and functions and the imperatives in sub-clauses 5
5 and 6 are commercial, there is nevertheless an
6 acknowledgement that those functions are to be carried out
7 in the context of a broader framework.

8 MS MORTIMER: Yes Your Honour. Even with a document which
9 creates it. That is so, in our submission.

10 Now Your Honour the other persons that Your Honour
11 may encounter in this proceeding, if I might just give
12 Your Honour a brief description of some of those. Firstly
13 there is the Department of Sustainability and Environment
14 and the Secretary to the Department of Sustainability and
15 Environment, and that is an office which is created
16 pursuant to s.6 of the Conservation (Forests and Lands)
17 Act. May I ask Your Honour to turn up that legislation
18 for a moment.

19 HIS HONOUR: Yes.

20 MS MORTIMER: Your Honour will see that by s.6(1) the Secretary
21 to the department is to be a body corporate and Your
22 Honour will see as we move through the legislative scheme
23 that the Secretary to the department has a number of
24 important roles in this scheme.

25 I will start again, Your Honour. May I ask Your
26 Honour to go to s.10. Section 10(1) recognises that the
27 functions the Secretary has to perform are to be found in
28 a variety of pieces of legislation, so rather than this
29 Act setting out the Secretary's functions, the scheme
30 recognises that they are to be picked up from various
31 pieces of legislation.

1 The Secretary has a broad power of delegation. May
2 I draw Your Honour's attention to s.11(2) which is the
3 delegation power of any of the Secretary's powers,
4 functions or duties conferred or imposed under this Act or
5 any other Act and Your Honour will see one of the
6 objections of the Delegation F is VicForests or an
7 employee of VicForests.

8 And Your Honour I should have just picked up the
9 definition in s.10 of relevant law and just worked that
10 through for Your Honour, and Your Honour will see s.10(1)
11 the functions of the Secretary include functions conferred
12 by relevant law, and in s.3 relevant law is defined by
13 reference to in particular an Act specified in Schedule 1
14 p.83.

15 HIS HONOUR: Yes.

16 MS MORTIMER: And amongst the Acts listed there is the Flora
17 and Fauna Guarantee Act and the Forests Act and the
18 Sustainable Forests Timber Act (2004) and they are really
19 the three other pieces of legislation that are relevant in
20 this proceeding.

21 The next person that Your Honour will encounter
22 through the evidence in this case is the Minister
23 responsible for the environment. The minister has at least
24 two important statutory roles and played a factual role in
25 the context of this proceeding.

26 HIS HONOUR: Yes.

27 MS MORTIMER: The minister has obligations in relation to the
28 making of allocation orders, that is allocating timber
29 throughout the State of Victoria to VicForests, and I will
30 take Your Honour to that legislation later in a little
31 detail.

1 The minister has obligations under the Flora and
2 Fauna Guarantee Act, particularly in relation to listings
3 of threatened species and the making of action statements.
4 I withdraw that. I think that is the Secretary.

5 The minister has the obligation of making forests -
6 the Forest Practices Code. In factual sense, Your Honour,
7 the interest of the minister in this matter is revealed by
8 - it is the fact that it was the minister who announced
9 the immediate resumption of logging at Brown Mountain
10 in August 2009, by media release, which was the trigger
11 for this proceeding.

12 The last category of people that Your Honour is
13 going to encounter in the evidence in terms of the role
14 that they play in the harvesting process is of course the
15 logging contractors and the harvesting process itself,
16 Your Honour, is frequently if not always contracted out by
17 VicForests to logging contractors and that will be apparent
18 from many of the agreed documents in the evidence before
19 Your Honour.

20 For Your Honour's purposes the role the contractors
21 play is most likely to be raised in relation to the
22 retention of trees in coupes because the evidence will
23 show that the practice on the ground is to allow the
24 logging contractors to select the so-called habitat trees
25 to be retained in coupes.

26 HIS HONOUR: Yes.

27 MS MORTIMER: And that the logging contractors also select what
28 Your Honour will hear are called seed trees which are the
29 trees designated to assist the regeneration of a coop and
30 Your Honour will see from the evidence that on the ground
31 what happens is that trees are chosen to try and serve

1 both purposes, that is a tree is chosen as both a seed
2 tree and a habitat tree.

3 Now Your Honour may I take Your Honour to some maps
4 to try and explain the area in issue and ask Your Honour
5 to go to the map book which is an agreed set of maps.

6 HIS HONOUR: Yes.

7 MS MORTIMER: I want to take Your Honour first to Map 3 or the
8 map on p.3, the one that is headed East Gippsland FMA
9 Forest Management Zones Post November 2009.

10 HIS HONOUR: Yes.

11 MS MORTIMER: And I will just point out a couple of perhaps
12 really fairly obvious features from that, Your Honour.
13 Your Honour will see Brown Mountain towards the north of
14 the East Gippsland Forest Management Zone, and Orbost to
15 the south west and Cann River to the south east and the
16 parts in light pink and dark pink are the parts that are
17 not available for harvesting, broadly, and the parts that
18 are in green and are in yellow are available for
19 harvesting. The parts that are in yellow the evidence will
20 show are subject to special prescriptions before they can
21 be harvested.

22 Your Honour, may I ask Your Honour to go the map on
23 p.5. Your Honour will hear some evidence mostly from
24 VicForests about the way the forest is divided up. Your
25 Honour, reading the way the forest is divided up for
26 logging is a little like reading a street directory. It
27 will be our case and may not be the subject of any
28 dispute, Your Honour, that it has very little or no
29 ecological or conservation function and it doesn't purport
30 to represent the division of habitat for species but it is
31 a means of dividing the forest up for harvesting and

1 harvest management purposes.

2 HIS HONOUR: But it does appear to be by reference to natural
3 features.

4 MS MORTIMER: Yes Your Honour, I accept that, I accept that.

5 But Your Honour, whether that is for the convenience of
6 the manner in which machinery can get in or not may not be
7 anything that matters particularly much, Your Honour.

8 Your Honour will hear about the following divisions
9 in forest management and I am going to start at the
10 largest and go to the smallest so on this map Your Honour
11 is looking at the East Gippsland Forest Management area.
12 Your Honour, I have to confess that the statutory basis
13 for the declaration of a forest management area is
14 something that I am yet to discover. I am sure it is there
15 somewhere but it is certainly the case that Victorian
16 State Forest is managed on the basis of a broad division
17 into forest management areas and for each of those forest
18 management areas there is under the Forests Act, Your
19 Honour, a power to make what is called under that Act
20 "Working Plans" but what is now known as Management Plans
21 so there is a management plan for each forest management
22 area.

23 Moving down to the smaller divisions, Your Honour,
24 within the East Gippsland Forest Management area, as we
25 understand it the next division in size is something
26 called a district which is not shown on this map, Your
27 Honour, but when I take Your Honour to the Timber Release
28 Plans Your Honour will see that the Timber Release Plans
29 which are the plans that go over often a five year, about
30 a five year period are based on divisions into forestry
31 districts and it is through that division at that level of

1 particularity that VicForests nominates what timber
2 resources it wants to access from each district.

3 The relevant district, Your Honour, for this
4 proceeding is Bendoc.

5 HIS HONOUR: Yes.

6 MS MORTIMER: Below that, Your Honour, in terms of size are
7 forest blocks and that is what this map shows, Your
8 Honour, and the one that is highlighted in green in the
9 middle, 840 is the Brodribb Forest Block and Your Honour
10 will see from the numbers on this map that it is at that
11 level that one starts to understand the coop numbering, so
12 those first three numbers are the first three numbers of a
13 coop. Brodribb, I not pronouncing it right. It is
14 Brodribb.

15 Now Your Honour, this forest block within those
16 sizes, there are further divisions into what are called
17 compartments and Your Honour will see that if Your Honour
18 turns the page to the map on p.6.

19 HIS HONOUR: Yes.

20 MS MORTIMER: Now we are looking only at the Brodribb Forest
21 Block and we are looking at the compartments within that
22 so Your Honour will see that the Brown Mountain Forest
23 Area is within compartment 502, and Your Honour that
24 explains the second segment of figures in the coop
25 numbers, 502.

26 HIS HONOUR: Yes.

27 MS MORTIMER: In terms of what within that compartment is
28 available for logging, can I ask Your Honour to go to Map
29 8. I have skipped over the pre November 2009 version of
30 what is on Map 8. Perhaps just pausing there to explain
31 why there are those two sets of maps. Your Honour will see

1 at least twice in this bundle that there are pre November
2 2009 maps and post November 2009 maps. That is because
3 in November 2009 the State Government announced the
4 reservation of further forest in this area and that is
5 indicated on for example Map 8 by the dark pink, so if
6 Your Honour looks at the map on p.8 the darker pink areas,
7 and compares it - and 502, so the Brodribb Forest Block is
8 a good example, Your Honour.

9 HIS HONOUR: Yes I see.

10 MS MORTIMER: On p.7 it was basically green and then on p.8 a
11 lot of it has been reserved.

12 So if one looks at that map on p.8, Your Honour,
13 Your Honour can see that it is only the Brown Mountain
14 area and one other area within the Brodribb Forest Block
15 which remain available for logging.

16 Just pausing on that map for a moment. What Your
17 Honour will see in the evidence in our submission, and
18 what is critical to understand is that many of the
19 reserved areas have been logged so looking at a map like
20 this that shows lots of pink bits, lots of reserved bits
21 doesn't necessarily tell the whole story about the quality
22 of the habitat in that area for the species who are
23 dependent on it. It certainly does tell you that that
24 area is not supposed to be logged again but it doesn't
25 tell you anything about the quality of the habitat that
26 has been reserved.

27 What Map 8 shows, Your Honour, and it will be the
28 plaintiff's case, is that Brown Mountain is now an island
29 available for logging within otherwise reserved areas
30 despite it having some of the last remaining old growth
31 stands in this area and, despite these four coupes

1 providing high quality habitat for a number of threatened
2 species.

3 Your Honour, the evidence will also show that Brown
4 Mountain has been a very contentious area over a long
5 period of time, perhaps due in large part to the
6 activities of the plaintiff. But whatever the reason -
7 and it will be our submission, Your Honour, that it
8 doesn't matter, the plaintiff's case will be that there
9 has been a stubborn refusal to recognise the conservation
10 values of Brown Mountain and a refusal which is
11 inconsistent and incompatible with the legislative and
12 regulatory scheme.

13 Your Honour, I want to take you now on these maps
14 and, in particular, to the Brown Mountain coupes and just
15 make the point that I've already made but perhaps in a
16 little bit more detail, Your Honour. The evidence will
17 show that each of these coupes contains old growth forest
18 and there is a definition of "old growth forest" - there
19 are many definitions, Your Honour, perhaps the most
20 convenient one to take Your Honour to is in the East
21 Gippsland Forest Management Plan and that is in Vol.1 of
22 the agreed documents.

23 HIS HONOUR: Just before you do that, if I look at Plan 8 I see
24 that 15, 19, 26 and - - -

25 MS MORTIMER: 27 that is, Your Honour.

26 HIS HONOUR: - - - 27 are each part of the ground mountain TRP,
27 is that right?

28 MS MORTIMER: Timber release plan, yes, Your Honour.

29 HIS HONOUR: Are they the four coupes currently designated
30 under that plan?

31 MS MORTIMER: They are. Your Honour, they are the four coupes

1 in this area so the timber release plan Your Honour will
2 see covers the whole of the East Gippsland forest
3 management area.

4 HIS HONOUR: Yes, I understand.

5 MS MORTIMER: If Your Honour looks - this will become a little
6 clearer, Your Honour, when we go to some of the other
7 maps, but that little triangle, Your Honour, that 26 is at
8 the head of and 27 is at the base of, the rest of it has
9 been logged.

10 HIS HONOUR: I see. Is there a - - -

11 MS MORTIMER: There's a map that shows that, Your Honour, on
12 map 11.

13 HIS HONOUR: Yes, I see.

14 MS MORTIMER: I was about to take - I can take Your Honour to
15 that now.

16 HIS HONOUR: No, that's all right. I was really also looking
17 for - just from something like map 12 to give me an idea
18 of the topography of the triangle, as you call it, and
19 there's a ridge running north north west to south south
20 east, is that right?

21 MS MORTIMER: Yes, Your Honour.

22 HIS HONOUR: Is the peak - - -

23 MS MORTIMER: The creek runs through the middle of - between 15
24 and 19, Your Honour.

25 HIS HONOUR: Of these tops, which one is named Brown Mountain
26 or are they all?

27 MS MORTIMER: As we understand it, Your Honour, the peak is
28 outside those coupes but I'll have that checked.

29 HIS HONOUR: Yes, the peak is outside the coupes but the peak
30 is - - -

31 MS MORTIMER: Which is the peak, is that Your Honour's

1 question?

2 HIS HONOUR: Yes, next to the label there and under "road", is
3 that right or not?

4 MS MORTIMER: I'm sorry, Your Honour. Next to the - - -

5 HIS HONOUR: The red designation there and under "road".

6 MS MORTIMER: Yes.

7 HIS HONOUR: Would seem to have the highest contour, is that
8 right?

9 MS MORTIMER: Yes. Your Honour, we'll find that out for Your
10 Honour.

11 HIS HONOUR: That's the point from which rivers are flowing in
12 four directions, so it looks like the high point, apart
13 from the contour.

14 MS MORTIMER: To the west, Your Honour. There's a high point
15 to the west, the west of Leggs Road there's a 960 there.

16 HIS HONOUR: I see. And is that Brown Mountain?

17 MS MORTIMER: Yes, Your Honour.

18 HIS HONOUR: I understand.

19 MS MORTIMER: But Your Honour is perfectly correct. There are
20 a number of ridges around these areas.

21 HIS HONOUR: No, but it's still helpful to me. The coupes are
22 across and on either side of the watercourse flowing
23 north, effectively, is that right?

24 MS MORTIMER: Yes, Your Honour.

25 HIS HONOUR: And that, in turn, is between a ridge running
26 north-south on the western side and generally north-south
27 on the eastern side?

28 MS MORTIMER: Yes, Your Honour.

29 HIS HONOUR: Thank you.

30 MS MORTIMER: So that stream that runs through the middle is
31 Brown Mountain Creek and, Your Honour, the evidence will

1 show, for example, that all these coupes in that sense are
2 catchments for that creek. I think Your Honour might hear
3 in particular from Dr McCormack that 27 is perhaps an
4 important catchment for that creek.

5 HIS HONOUR: Yes.

6 MS MORTIMER: If Your Honour pleases. May I ask Your Honour
7 just to go back one map to map 11. This is the map, Your
8 Honour, that best demonstrates the logging history in this
9 compartment and Your Honour will see that much of the area
10 has been quite recently logged, that is in the last 20 to
11 30 years and one of the most recent coupes to be logged is
12 the coop to the south of coop 19, Your Honour, that is in
13 the dark blue and Your Honour will see on some other maps
14 that I'll take Your Honour to, shortly, that's called coop
15 20. That is a coop that for the plaintiff's case assumes
16 some significance.

17 HIS HONOUR: Yes, because it demonstrates an after situation,
18 is that right?

19 MS MORTIMER: Precisely, Your Honour. Your Honour, perhaps
20 I'll just - rather than taking Your Honour to the
21 reference in the East Gippsland Forest Management Plan to
22 "old growth", I'll just give Your Honour the reference.
23 So, it's at the agreed documents at pp.403-404 of Vol.1.

24 HIS HONOUR: What is there?

25 MS MORTIMER: The definition of "old growth" because each of
26 these coupes contain old growth forest.

27 HIS HONOUR: I might just look at that.

28 MS MORTIMER: Vol.1 p.403-404.

29 HIS HONOUR: Yes, I have it.

30 MS MORTIMER: Your Honour will see a heading halfway down the
31 page defining "old growth forest" and a reference to a

1 number of people who developed a definition of the one in
2 italics: "Old growth forest is forest which contains
3 significant amounts ... (reads) ... the effect of which is
4 now negligible". So "negligible disturbance", Your
5 Honour. Because, of course, disturbance might be natural,
6 Your Honour, it might be by wild fire or whatever.

7 HIS HONOUR: It might have a road through it.

8 MS MORTIMER: It might have a road through it, yes.

9 HIS HONOUR: That wouldn't necessarily preclude the forest from
10 being old growth forest on either side of the road.

11 MS MORTIMER: It wouldn't, Your Honour, that's so. It may have
12 a number of other consequences but it wouldn't preclude
13 that classification, that's right, in our submission, Your
14 Honour.

15 HIS HONOUR: I suppose it might depending on what damage the
16 road had done but, in any event, yes, but enough of that,
17 I understand.

18 MS MORTIMER: Your Honour, I want to go now to another map
19 which is not in the agreed book but was the map tendered
20 on behalf of VicForests at the injunction application and
21 which is a schedule to Forest J's judgment. May I hand up
22 a copy of that to Your Honour, a colour version. There's
23 a black and white version which isn't very helpful but
24 that's a schedule.

25 HIS HONOUR: Yes, thank you.

26 MS MORTIMER: Your Honour, this is somewhat of a close-up of
27 the area in question and may I just ask Your Honour to
28 ignore the four references to "not an any current
29 schedule" or "not scheduled". That was something that was
30 relevant for the purposes of the injunction but the
31 evidence is, Your Honour, that coop 26 at the top and coop

1 27 at the bottom are on the timber release plan and the
2 evidence will show, Your Honour, that as at August 2009
3 VicForests intended to harvest immediately 15 and 19 and
4 had no immediate plans for 26 and 27 and that is why on
5 the injunction application only 15 and 19 needed to be the
6 subject of an injunction application.

7 Your Honour will see also on this map a reference up
8 the top to a coop that was thinned in 2001 and 2002 and
9 there will be some evidence about thinning and the
10 plaintiff will rely, Your Honour, on that process as one
11 of the subsequent disturbances and modifications that
12 occurs once a forest has been logged. One of the reasons,
13 Your Honour, that I wanted to go to this map in opening
14 was to pinpoint for Your Honour the location of coop 20 to
15 the south of coop 19.

16 Your Honour, the plaintiff's case about why coop 20
17 is important is this: Coop 20 is the most recently logged
18 coop of the Brown Mountain old growth forest. It's
19 immediately adjacent and south of one of the coupes that
20 is in issue in this proceeding and its harvesting and
21 burning has had an effect on the surrounding coupes.

22 For reasons, Your Honour, which will become apparent
23 through this opening, the plaintiff's case is that logging
24 of these forests forever changes the role and function of
25 forest and the landscape and so logged forest which enters
26 the forest harvesting and management process will on the
27 plaintiff's case never be the same again and that has a
28 great many consequences for the species who depend on it.

29 Coop 20, Your Honour, enables Your Honour to see the
30 aftermath of logging in the immediate next year's and it
31 demonstrates the following things, in our submission: it

1 demonstrates the consequences of the clear fell logging
2 technique and the consequences of clear fell logging is
3 something about which many of the plaintiff's experts
4 express opinions for each of the species that they deal
5 with and it's also something that Dr Meredith expresses
6 opinions about generally in relation to critical habitat.

7 The second thing that coop 20 demonstrates, in our
8 submission,, is how habitat tree prescriptions operate on
9 the ground, that is what the actual implementation of
10 these prescriptions produces.

11 The third thing that coop 20 demonstrates, in our
12 submission, is how differently what is retained in a coop
13 will function after logging from how it functioned before
14 logging. So those trees that are kept, it will be the
15 plaintiff's case, are now isolated, they stand, in our
16 submission, Your Honour, a bit like little skyscrapers in
17 the middle of a cleared field, so they don't operate any
18 more as part of an eco system, so that if one's to look at
19 this from the perspective of a yellow-bellied glider or a
20 greater glider, there they are effectively sitting with a
21 spotlight on them in their tree hollow standing in the
22 middle of an empty field with no coverage around them.

23 So whether gliders firstly will like that enough to
24 continue to use those trees, Your Honour, the evidence
25 will show that the powerful owls and the sooty owls might
26 well like that. It would be much easier for them to
27 identify their prey perhaps but difficult for the quolls
28 to use those trees to climb up and investigate hollows
29 because they then become themselves exposed when they're
30 looking for their prey. More difficult for gliders to
31 move between trees. All those kinds of consequences, in

1 our submission, can be vividly demonstrated by examining
2 what has happened in coop 20.

3 In terms of species on the ground, Your Honour, the
4 way that a species like a potoroo is able to move from one
5 coop to another or move across a coop like coop 20 is
6 vividly demonstrated and the ease with which foxes and
7 other introduced predators can hunt those areas compared
8 with the unlogged areas is also evident. Your Honour, it
9 will be our case that it is fairly self-evident that some
10 of the species like the frogs really, firstly, aren't
11 going to survive a burn and, secondly, aren't going to be
12 able to use coupes like that at all.

13 Coop 20 still provides, in our submission, Your
14 Honour, a good example of what a coop looks like after
15 it's burnt, although it has greened up and it's certainly
16 not as dramatic as it was in some of the photos that Your
17 Honour will see in evidence.

18 I want to turn now, Your Honour, to say a little bit
19 about each of the species and we have some pictures, Your
20 Honour, to assist. But before I go to each of those
21 species, I want to take Your Honour to the process of
22 listing under the Flora and Fauna Guarantee Act, so if
23 I can ask Your Honour to have to hand the Flora and Fauna
24 Guarantee Act, Your Honour will see in s.10 of the Act
25 that "The Governor and Council on the recommendation of
26 the Minister ... (reads) ... or appeal the whole or the
27 part of the list". Sub-section (3) makes as a pre-
28 condition to the minister making that recommendation that
29 there be a recommendation from a committee and "the
30 committee" is defined in s.3 to mean the scientific
31 advisory committee which is established under s.8 of the

1 Act.

2 May I just draw Your Honour's attention to the
3 membership of that committee, s.8. It's an advisory body
4 and under s.8(3) it has some government scientific
5 officers, some scientists on the staff of the Victorian
6 Education Institution and scientists independent of
7 government. Each must be knowledgeable in the sciences of
8 flora or fauna conservation and ecology. Then sub-s.(5)
9 sets about trying to ensure a representative kind of
10 membership on that committee. Sub-section (8) of s.8
11 provides for issues about conflict of interest.

12 The listing, if one goes back to s.10, Your Honour,
13 sub-s.(7) of s.10 requires the minister only to have
14 regard to nature conservation matters. Now the
15 eligibility criterion - the broad eligibility criterion is
16 set out in s.11(1). "The taxon or the community must be
17 in a demonstrable state of decline ... (reads) ... which
18 are likely to result in extinction".

19 So, each of the species that Your Honour will be
20 hearing about in this proceeding, aside from the gliders -
21 and I'll come to those in a moment - has been found to be
22 in a demonstrable state of decline which is likely to
23 result in extinction or to be significantly prone to
24 future threats which are likely to resolve in extinction.

25 May I also draw Your Honour's attention while we're
26 there to sub-s.(3) of s.11 because this scheme provides
27 not only for the identification of threatened species but
28 the threatening processes for such species and a
29 potentially threatening process is defined as one that, if
30 in the absence of appropriate management, poses or has the
31 potential to pose a significant threat for the survival or

1 evolutionary development of a range of flora or fauna.
2 That, Your Honour, is a matter that is of some
3 considerable relevance in this proceeding because the loss
4 of hollow-bearing trees has been listed under this Act as
5 a potentially threatening process.

6 The regulations to the Flora and Fauna Guarantee Act
7 provide a little more detail about the criteria which are
8 to be applied. I'll just give Your Honour the reference
9 and we'll have to hand those up to Your Honour on a
10 separate occasion. It's Regulation 5 and Schedule 1 to
11 the Flora and Fauna Guarantee regulations and what they
12 set out, Your Honour, is the different levels of threat
13 and Your Honour will see in a lot of the evidence that
14 these species are classified, some of these species are
15 classified at different levels - vulnerable, threatened,
16 endangered and, essentially, the higher the classification
17 the closer to extinction the species is said to be.

18 The listings for these species can be found in the
19 agreed book of documents, Your Honour, starting at p.526
20 and I'll take Your Honour to that just to highlight the
21 ones that are there and then I'm proposing to provide Your
22 Honour with an updated list to be inserted into the agreed
23 book. If I can take Your Honour first to the list that is
24 there, that's in Vol.2 at p.526.

25 Your Honour will see there in the gazettal in 2000
26 of the list and if I can take Your Honour to the following
27 pages just to highlight the species that are present in
28 this version: p.529, dasyurus maculatus (tiger quoll) and
29 euasticus diversus (Orbost crayfish). Your Honour will
30 have to pardon my Latin.

31 HIS HONOUR: You'd expect maculatus to be a spotted quoll.

1 MS MORTIMER: It is, Your Honour, and that's why it's name is
2 now spot-tail quoll. Tiger quoll I think was a bit of an
3 anachronism or a colloquialism.

4 HIS HONOUR: Then the next one we're looking at?

5 MS MORTIMER: The next one is on p.530 about halfway down.

6 HIS HONOUR: We had two on this page, did we?

7 MS MORTIMER: Yes, I'm sorry, Your Honour. We had euasticus
8 diversus.

9 HIS HONOUR: Yes, and then the - - -

10 MS MORTIMER: So just the two, the quoll and the crayfish on
11 p.529.

12 HIS HONOUR: Yes, I see.

13 MS MORTIMER: Then on p.530 about halfway down the page,
14 heleioporus australiacus, the giant burrowing frog. Then
15 on the next page, Your Honour, p.531 just before halfway
16 down the page, ninnox strenua (powerful owl). Then on the
17 next page, p.532, Your Honour, up the top, second entry
18 potorous longipes (long-footed potoroo). Then on p.533,
19 Your Honour, a few entries above the heading
20 "communities", tyto tenibricosa (sooty owl).

21 Then, Your Honour, on p.534 Schedule 3 the list of
22 potentially threatening processes, about halfway down:
23 loss of hollow-bearing trees from Victorian native
24 forests. Your Honour, the ones that are not on there are
25 not on there because they were not listed as at June 2000
26 and they have been listed since that date. Now rather
27 than provide Your Honour with - because they were all then
28 individually gazetted after that rather than as a
29 compilation. What we propose to do is to provide Your
30 Honour with the DSE threatened list as at July 2009 which
31 contains all the species, but not the threatened process.

1 Your Honour, what I have had my learned junior do is mark
2 up for Your Honour on that all the other species.

3 HIS HONOUR: I see.

4 MS MORTIMER: So the two that are going to be in here that are
5 not otherwise in there are the Square-Tailed Kite which is
6 on p.3 about four or five entries down.

7 HIS HONOUR: Yes.

8 MS MORTIMER: And the large Brown Tree Frog which is on p.4.
9 Victoria Little Johnny, if Your Honour pleases. That is
10 the list, Your Honour, and now if I might just open with a
11 little bit about each of the species and I am going to do
12 this mostly by way of the action statements Your Honour,
13 because they provide a convenient spot to see a
14 description.

15 If I can turn first to the Long-Footed Potoroo which
16 Your Honour will find the action statement for in the
17 agreed book of documents at p.542.

18 HIS HONOUR: Yes.

19 MS MORTIMER: Perhaps if I can just ask Your Honour to go first
20 to p.535 to explain what has happened with the action
21 statements for this species. There was an action
22 statement for the Long-Footed Potoroo originally which is
23 the version that appears at p.535 of the agreed book of
24 documents in 2003. That was made in 2003 and the action
25 statement was significantly and materially revised and
26 published in 2009 and that is the one that is currently
27 applicable and that starts at p.542.

28 HIS HONOUR: Yes.

29 MS MORTIMER: Your Honour will see the description there of the
30 Long-Footed Potoroo, that it is a medium sized terrestrial
31 rat kangaroo of the marsupial family, that it is not

1 particularly big and it is not particularly heavy, 2.2
2 kilograms, average weight of 1.7. Morphologically similar
3 to the Long-Nosed Potoroo but with distinguishing features
4 - and this may become an issue, Your Honour, in some of
5 the evidence. It is larger, it has a longer thicker tail
6 and proportionally longer hind feet. So that is how one
7 sets about telling the difference between those two kinds
8 of potoroos.

9 Discovered, Your Honour will see in the next
10 paragraph, relatively recently with two dead individuals
11 near Orbost, sent for identification.

12 Its distribution, if Your Honour looks at the next
13 sub-heading. There are two sub-populations, one in East
14 Gippsland and the other straddling the Great Dividing
15 Range.

16 The evidence will show that the population that is
17 straddling the Great Dividing Range is the one that has
18 been more closely studied than the one in East Gippsland.
19 Population in East Gippsland, the action statement says is
20 known from more than 60 separate sites within an area of
21 approximately 160,000 hectares and the action statement
22 gives the boundaries of that.

23 Your Honour will see a record has been found at Cape
24 Conron which suggests it has perhaps a slightly larger
25 range in East Gippsland than previously thought.

26 Over the page at p.543, in terms of the statement
27 about the geographic range, it is then qualified in the
28 action statement. Within these broad areas of distribution
29 potoroos are likely to occur in only a relatively small
30 proportion of the area, and then there is then some
31 reference to some modellings that are done and the action

1 statement says that most of them occur within our State
2 forests.

3 The statement then goes on to describe the habitat
4 of the potoroo and sets out that its primary habitat is
5 wet forest, damp forest and Riparian Forest on the Great
6 Dividing Range and in East Gippsland, and the kind of
7 preferred sites, Your Honour can see at the bottom of the
8 first column. Preferred sites appear to be characterised
9 by sheltered aspects with moist soils supporting a mixed
10 species over-storey and a dense under-storey and that the
11 animals shelter in this dense vegetation during the day
12 and forage in adjacent areas at night. Your Honour will
13 see some good examples of that kind of dense under-storey
14 on the view on Wednesday.

15 There is then a reference to them having been
16 detected in eight year regrowth and no doubt that is an
17 aspect of the evidence that the defendants will emphasise,
18 Your Honour. What they feed out is then set out under
19 Life History and Ecology. They are fungivores. Your
20 Honour will see in the next paragraph they give birth to a
21 single young, so this is a species with, in that sense, a
22 pretty limited reproductive capacity. The statement then
23 goes on a little further down that paragraph to say, "The
24 dispersal behaviour of the Long-Footed Potoroo is very
25 poorly understood."

26 Your Honour that is a matter that might come to some
27 prominence when we get to the evidence about the records
28 of the potoroo and what if anything one can deduce from
29 the finding of a particular potoroo ten years ago and what
30 that record tells you about whether that is an area in
31 which it is still likely to be found or what it tells you

1 about how it might use that area.

2 The range of the potoroo Your Honour, that is
3 another important issue down the bottom of p.543. "Long-
4 Footed Potoroos have home ranges from about 14 hectares to
5 more than 100 hectares."

6 Over the page, Your Honour, the conservation status
7 of the species, p.544, "Endangered under the Commonwealth
8 Classification and Threatened in Victoria under the FFD
9 Act."

10 There is then some discussion about the threats to
11 the Long-Footed Potoroo and one of the things that Your
12 Honour will see from the evidence is that some - this is
13 one of the species, Your Honour, and there is a big range
14 in terms of the species that Your Honour will be dealing
15 with in this case - in the intensity with which they have
16 been studied and the potoroo is called a features species
17 under the East Gippsland Forest Management Plan.

18 It is a pretty cute looking creature Your Honour,
19 and it has been the subject of a bit of research, whereas
20 Your Honour will hear from the evidence that some of the
21 other species don't even have an action statement and
22 really haven't been the subject of much study whatsoever.
23 But the potoroo is not doing, when one engages in a
24 comparative exercise, too badly in terms of it being
25 studied.

26 The threatening processes that are identified are
27 that it is vulnerable to predation by foxes. Your Honour
28 can see that at the bottom of the first paragraph under
29 'threats' and it is also vulnerable to habitat disturbance
30 as a result of timber harvesting and fire.

31 One of the things that is noted in the next

1 paragraph, Your Honour, is that there has been some
2 difficulty finding it again in areas where it had
3 previously been detected and the action statement makes it
4 clear that there could be a couple of explanations for
5 that. It could have disappeared or it could be something
6 to do with the survey techniques.

7 At the top of p.544, Your Honour, the primary
8 habitat requirements of the Long-Footed Potoroos appear to
9 be a diverse and abundant supply of fungi and dense cover
10 in a forested environment to provide shelter and
11 protection from predators.

12 Climate change gets a mention Your Honour, perhaps
13 as Your Honour might see often in these documents with a -
14 we just don't know about that.

15 There is then a summary of the major threats to the
16 potoroo as predation, habitat destruction and degradation
17 from timber harvesting and fire.

18 Your Honour, if I just might pause there to make
19 some opening remarks about predation because it may be
20 said against the plaintiff, predation has got nothing to
21 do with logging and the evidence that Your Honour will
22 hear, in our submission, is that it has a lot to do with
23 it and the evidence is clear, in our submission, that the
24 making of roads, the construction of sneak tracks and the
25 logging of forests, the clearing of under-storey all make
26 predation by foxes much easier and the foxes prefer to be
27 able to run along a track, run through cleared areas, that
28 is their preferred mode of travel, and they do not travel
29 well through densely under-storied forest so that
30 predation remains - although one can say that the
31 principal act responsible for the killing of the potoroo

1 in that sense is the fox, it will be the plaintiff's case
2 that timber harvesting facilitates that predation.

3 Your Honour, if I can turn to say something about
4 the next species, the next species is the spot-tailed
5 quoll. Your Honour will find the action statement for that
6 at p.555 of the book.

7 HIS HONOUR: I see that after predation there is a discussion
8 of habitat disturbance, timber harvesting in particular.

9 MS MORTIMER: Yes there is, Your Honour. Perhaps I ought to
10 say something now about the structure of the way I am
11 going to open this to you.

12 HIS HONOUR: There is an express statement, "Timber Harvesting
13 and Road Increased Access for Predators such as Foxes."

14 MS MORTIMER: Yes there is, Your Honour, there is. Your Honour,
15 I am proposing to come back in some detail to the action
16 statements when I am dealing again with the issues about
17 the obligations we say they impose and the breaches of
18 those obligations.

19 HIS HONOUR: Yes.

20 MS MORTIMER: If we can go now to the quoll at p.555. Your
21 Honour, the quoll is the largest marsupial carnivore on
22 mainland Australia and grows up - weighs up to 7 kg for
23 the males and for the females up to 4 kg.

24 HIS HONOUR: Yes.

25 MS MORTIMER: They are, as their name suggests, spotted, and no
26 other quoll species in Australia has a spotted tail so
27 that is one of their distinctive characteristics. They
28 have a nice big jaw because they are a carnivore, Your
29 Honour.

30 They occur in Eastern Australia and Tasmania though
31 the Tasmanian species is said to be quite genetically

1 distinct.

2 HIS HONOUR: Yes.

3 MS MORTIMER: Turn the page to p.556 and the action statement
4 says that "At the time of European settlement the spot-
5 tailed quoll had a broad distribution in southern,
6 central, eastern and north-eastern Victoria at a range of
7 altitudes."

8 Your Honour, in our submission the evidence will
9 show that the quoll is one of the species that has been
10 the most badly affected by the coming of European
11 settlement in Victoria of the ones that we are dealing
12 with and the action statement says that it "survives now
13 in discrete areas, Eastern Victoria, South Gippsland, the
14 Otway Ranges and South Western Victoria" but the evidence
15 Your Honour will hear is that the populations in the
16 Otways and in Mount Eccles are functionally extinct, and
17 Your Honour will hear some evidence about what that means
18 so that in that sense this action statement, on the
19 evidence Your Honour will hear, is out of date about the
20 distribution of quoll populations and the evidence Your
21 Honour will hear is that the East Gippsland population is
22 really now one of the last remaining functional
23 populations for the quoll.

24 The habitat requirements of the quoll, Your Honour,
25 down the bottom under the heading "habitat" obviously
26 needs forests, moves over large distances, and structural
27 complexity of the habitat appears to be particularly
28 important, again with the species favouring areas with a
29 dense over-storey and under-storey, abundant rocks, large
30 hollow bearing trees, rocky escarpments and fallen logs
31 for den sites.

1 The other feature of this species, Your Honour,
2 which will become important in the evidence, is that areas
3 with a high density of mammal prey items are also
4 utilised. That is at the top of the second column on
5 p.556.

6 HIS HONOUR: Yes.

7 MS MORTIMER: The next comment Your Honour, in fact from one of
8 our witnesses' papers, "Prey densities and den site
9 availability appear to be key features influencing habitat
10 utilisation."

11 The range - and this is where we can see, Your
12 Honour, that these are animals that need large ranges -
13 two to four and a half thousand hectares for males, 600 to
14 1200 hectares for females with the size of the home range
15 related to habitat quality.

16 What Your Honour will hear from Mr Belcher is that
17 you may have several males within a habitat range
18 overlapping with the habitat of one female.

19 Your Honour will see in the next paragraph a little
20 about their diet. They are carnivorous, they are
21 scavengers. About halfway down that paragraph, Your
22 Honour, they are arboreal and terrestrial. They are an
23 adept climber, hunting for prey in tree hollows and
24 canopies. One of the features is, Your Honour, that they
25 hunt during the day, especially for possums in tree
26 hollows.

27 While the poor little things are sleeping, gliders
28 or possums, up comes the quoll into the hollows and it
29 sees what it can get. They have, Your Honour - and this
30 is another issue that will become important in the
31 evidence - they have a relatively short life span with a

1 maximum five to six years observed in captivity and
2 perhaps only four to five years in the wild.

3 So when we come, Your Honour, to the evidence about
4 the usefulness of records from 20 years ago that is the
5 kind of evidence that in our submission will demonstrate
6 that historic records may be of little use in predicting
7 where quolls are now.

8 Your Honour, if one turns over the page to the
9 second paragraph on p.557 the action statement says,
10 "There are no population or density estimates for quolls
11 available. Your Honour will hear some population estimates
12 from Dr Belcher and they are in the hundreds, Your Honour.
13 That is across Victoria.

14 There are two features that this action statement
15 identifies, that they are a species that occurs at low
16 density, this is in that second paragraph, and they
17 require very large areas because of the size of the home
18 range.

19 Down the bottom, Your Honour, under the heading
20 "Decline and Threats" Your Honour will see that they
21 probably were always a rare species and there has been a
22 decline of at least 50 per cent in the range of the
23 species due to clearing and fragmentation of habitat,
24 direct or indirect persecution, competition from
25 introduced predators, fire and disease.

26 It will be our evidence that there will be three key
27 threats for the quoll. They are habitat clearing, the
28 fragmentation of habitat and the disturbance of habitat.

29 The recommendation from the scientific advisory
30 committee for this species, Your Honour, can be found on
31 p.558 about halfway down the page. Some of the action

1 statements, Your Honour, include this material and some
2 don't but this one helpfully does. There were three
3 factors for the quoll that the advisory committee
4 identified. It's in a demonstrable state of decline which
5 is likely to result in extinction. It is significantly
6 prone to future threats which are likely to result in
7 extinction and it is very rare in terms of abundance or
8 distribution.

9 Your Honour, also on that page under the heading
10 "habitat clearing fragmentation disturbance", that's where
11 we get the three key threats and they are explained in the
12 rest of those paragraphs in the action statement. I won't
13 take Your Honour through all of that detail but this is
14 another species, Your Honour, if one turns the page at
15 559, just above the heading "poison baiting programs"
16 where the action statement itself recognises that timber
17 harvesting and forest management activities may also
18 increase accessibility of forest by foxes.

19 Your Honour, I note the time, is it convenient to
20 have a short break? Does Your Honour propose to sit to
21 4.30?

22 HIS HONOUR: Thereabouts, yes. Yes, we'll take a short break.

23 (Short adjournment.)

24 MS MORTIMER: Your Honour, I think I had finished all I needed
25 to say about the quoll and I'm moving now to the Orbost
26 spiny crayfish which Your Honour will find the action
27 statement for this species at p.566 of the agreed book of
28 documents. A couple of things that I just want to point
29 out about this. It's one of several small freshwater
30 crayfish and Your Honour will see in the first paragraph
31 of the action statement that one of the ways in which this

1 crayfish is to be distinguished from the other euasticus
2 is by the arrangement number and location of various
3 spines on the exoskeleton and so that when Your Honour
4 comes to hear from Dr McCormack about his identification
5 of the new species as against this species Your Honour
6 will hear some evidence about all these little spines and
7 markings on the crayfish's body.

8 Your Honour will see that this is also a species
9 that's been relevantly recently discovered or located in
10 1956 and then rediscovered in 1991 on the basis of a
11 single specimen in a creek and then some records in Ellery
12 Creek. Your Honour, Ellery Creek is one of the creeks in
13 the Bodribb River catchment. Your Honour will see a
14 little further down in that paragraph that although there
15 was one other population found in a place called yandown
16 Creek, that's the only known site outside the Brodribb
17 River catchment. So that this is a species, in our
18 submission, Your Honour, the evidence will show, that is
19 very localised and even more so when we get to the new
20 species.

21 Over the page, Your Honour, at p.567 up the top, the
22 action statement talks about the diet of the crayfish,
23 primarily aquatic and semi-aquatic vegetation and
24 invertebrates and fungi and bacteria. It's current
25 conservation status is rare and Your Honour will see that
26 this action statement in the middle of that page
27 reproduces the opinion of the scientific advisory
28 committee, that it is significantly prone to future
29 threats which are likely to result in extinction and very
30 rare in terms of abundance or distribution. Your Honour,
31 the evidence about this species will particularly focus on

1 its rareness in terms of abundance and distribution.

2 We then go on to the threatening processes, Your
3 Honour, in particular - because again that the tie between
4 its limited distribution and its habitat the action
5 statement at the top of the second column on 567
6 identifies localised catastrophic events as a particular
7 including sediment pulses, so that again any species like
8 this with a very small range; a localised catastrophic
9 event is dangerous for it. Rounding, Your Honour, will see
10 in that paragraph can cause an increase in sedimentation
11 and a decline in water quality and Your Honour will hear
12 from Dr McCormack that the water quality for these species
13 is a particularly important matter and that is what the
14 action statement in the next part goes on to say.

15 It starts with the proposition that an incremental
16 decline in habitat quality may result in the decline of
17 the species and then deals in the following paragraph with
18 timber harvesting, in particular, and looking at the flow-
19 on effects of timber harvesting, that what alters in the
20 area is the run-off, the flow characteristics of the
21 stream, the amounts of organic debris in the stream and
22 temperature regimes. Your Honour will hear quite a bit of
23 evidence from Dr McCormack about the importance of
24 temperature to these particular species.

25 Your Honour, I think that's all I want to say by way
26 of introduction to this species and I want to turn now to
27 the new species of crayfish which on the plaintiff's case
28 is not only a significant discovery in an ecological sense
29 but a significant issue in terms of protection in this
30 proceeding.

31 Your Honour will be aware that Dr Rob McCormack in

1 his report discusses that while he was conducting surveys
2 for the purpose of this proceeding about the Orbost spiny
3 crayfish, it is his opinion that he has discovered what he
4 believes to be an entirely new species of crayfish in the
5 Brown Mountain Creek. In his opinion, the species is
6 quite distinct from the Orbost spiny crayfish and quite
7 distinct from some of the more common listed species.

8 Your Honour, the evidence will show that it is yet
9 to be officially recognised but Dr McCormack has applied
10 to the relevant authorities for it to be called the Brown
11 Mountain crayfish. It's his opinion that this new species
12 has an extremely limited distribution and Your Honour will
13 be able to see that from his report and that it is his
14 opinion that it will clearly be eligible for listing under
15 the FFG Act on that basis alone because, as far as he can
16 see, it is going to be - it's at present confined to Brown
17 Mountain Creek and to a particular area in Brown Mountain
18 Creek.

19 Your Honour will hear that in his opinion the 100
20 metre buffer zone that is proposed will definitely provide
21 the species with some protection but he has real concerns
22 about the matters that the action statement raises which
23 are matters about changes in temperature, additional
24 sedimentation and any changes to water quality and his
25 evidence will show to Your Honour, in our submission, that
26 this is a species that is very susceptible to quite small
27 changes in water temperature and quite small changes in
28 water quality. It will be the plaintiff's case that
29 logging in coupes 19 and 15 and 27, in particular, is
30 likely to cause such changes.

31 I want to turn now to the giant burrowing frog and

1 Your Honour will find the action statement for that at
2 p.600 of the book. Your Honour, the giant burrowing frog
3 is, as its name suggests, a large robust species with a
4 maximum body length of 100 millimetres. It has a
5 particular and distinctive call which is set out in the
6 action statement and I won't attempt to imitate that, Your
7 Honour, but that is one of the ways by which it is
8 identified.

9 The action statement makes it clear that records of
10 this species are confined to the coastal slopes of the
11 Great Dividing Range below a particular altitude, below
12 1,000 metres, and there's some opinion that the species
13 may be composed of two disjunct populations. All
14 Victorian records of the species come from eucalypt forest
15 and the species appears to use small flowing streams as
16 breeding sites. Records of several individuals
17 substantial distances from water indicate that the species
18 uses a wide range of forested environments and it appears
19 to be absent from clear farmland and maybe dependent on
20 aspects of forest habitat for feeding, sheltering and
21 suitable breeding sites.

22 So, Your Honour, one of the things that the evidence
23 will show about this species is it may be, Your Honour, a
24 natural tendency to think - to associate frogs with water
25 courses and to think that if you protect a stream you're
26 going to be protecting the habitat of frog species but the
27 evidence will show with this species and even more with
28 the large brown tree frog that that is not the case.

29 Over the page at p.601 the reasons for the
30 conservation status of this species have to do with the
31 numbers that have been recorded and its distribution. So,

1 only 26 adult frogs, one juvenile frog and three groups of
2 tadpoles have been recorded. So, numerically, extremely
3 small and extremely scattered and, despite quite a bit of
4 surveying, Your Honour can see in that next paragraph,
5 only nine individuals recorded during these surveys so the
6 species is naturally rare.

7 Again, down the bottom of that column, Your Honour,
8 on p.601, some discussion about its use of flowing streams
9 for breeding sites and, again, just like the crayfish,
10 Your Honour, a recognition that the fluctuations of stream
11 conditions caused by things like timber harvesting and
12 roading may not be within the tolerance of these tadpoles
13 resulting in reduced recruitment to the adult population.

14 Your Honour, may I pause there to use that as an
15 example of another aspect about the assessment, the impact
16 of activities on threatened species that the plaintiff
17 will emphasise and it's this: that the protection of
18 these species is not simply about protecting existing
19 individuals, it's about ensuring that you create and
20 maintain an environment in which they can successfully
21 breed. So the breeding success will depend on the habitat
22 quality and it will also depend on the existence of a
23 sufficient population to ensure that breeding success. So
24 that protection of individuals doesn't necessarily achieve
25 very much at all: it might achieve something but that the
26 aim of habitat protection and good quality habitat
27 protection, maintaining good quality habitat protection is
28 to ensure breeding success because one of the key things
29 about these species is that their populations are not just
30 to be maintained but they are to be recovered. So you
31 have to take actions that's likely to increase their

1 breeding success, not decrease it.

2 The conservation objectives are then set out. One of
3 the things that Your Honour will hear from Dr Gillespie
4 and which is noted in this action statement at the top of
5 the second column of p.601 is that third point there, that
6 there is really not very much understanding at the present
7 time about the distribution, habitat, abundance, breeding
8 biology and general ecology of this frog. Not a lot is
9 known so some of the detail about how these species will
10 react when their environment has changed is completely
11 unknown. That is the kind of thing in our submission Your
12 Honour that will engage the precautionary principle and I
13 will turn to that later.

14 Your Honour, the next species to deal with is the
15 other frog, the large brown tree frog. Your Honour, there
16 is no action statement for this species but there is a
17 summary of its ecology in Dr Gillespie's report and I am
18 taking what I say from that.

19 It belongs to a group of tree frog species found in
20 South Eastern Australia. It is not as big as the giant
21 burrowing frog and Your Honour can see from the picture it
22 is light brown or cream and it has got a broad undivided
23 dark strip down its back. Its range is along the eastern
24 side of the Great Dividing Range at 1000 metres above sea
25 level. It also, Your Honour, is an uncommon species with
26 only 279 records in New South Wales and 79 in Victoria and
27 Dr Gillespie's opinion is that the distribution of this
28 species is disjunct and little is known about its
29 fecundity.

30 One of the features of this species is that it is
31 not found in streams. Where it is found, based on the

1 records at least, and particularly the observations of
2 tadpoles, breeding sites in stationary water bodies which
3 form throughout the forest so that when you are looking at
4 these coupes, Your Honour, it will be part of our case
5 that the buffer and that area is not likely to be
6 protecting the habitat for this species because the
7 habitat for this species is likely to be throughout the
8 coupes in small pools of water.

9 One of the things that this species has in common
10 with the giant burrowing frog and most amphibians, it will
11 be the plaintiff's case, is that it tolerates a relatively
12 narrow temperature range, that it is very sensitive to
13 levels of environmental moisture so that the drying of the
14 forest which can occur even when adjacent coupes are
15 logged but certainly which occurs when a coop is logged,
16 and the burning of a forest would be completely toxic to
17 any individual species but also would prevent re-
18 colonisation because the forest would just be much drier
19 so that this is a population that in our submission is
20 particularly unlikely to re-colonise logged forest.

21 Turn to the next species, Your Honour, which is
22 Sooty Owl and Your Honour will find the action statement
23 for that at p.571 of the agreed documents. The Sooty Owl
24 is the smallest of the two owls that we are dealing with
25 and Your Honour can see what it looks like from the
26 picture.

27 It occurs in Australia and New Guinea and Your
28 Honour can see about halfway down the second paragraph on
29 p.571 of the action statement that there is a sub-
30 population eastern Victoria that occurs from near
31 Melbourne east and north-east of the border with New South

1 Wales and within that the Sooty Owl is numerically rare,
2 one to 9 individuals per 100 square kilometres.

3 Over the page, Your Honour, some of the particular
4 features of this species. Page 572 the first full
5 paragraph. "It is sedentary, it is strongly territorial.
6 It occupies a large home range. It roosts in dense
7 shrubby vegetation, tree hollows, caves, ledges and
8 crevices on rock faces and it nests in large tree hollows
9 and occasionally in caves. It may breed every year but it
10 has a variable breeding season. It lays only one clutch of
11 one or two eggs." Again Your Honour, this is the kind of
12 species that with disturbance is likely to have a
13 significant effect on its breeding success.

14 It feeds on arboreal mammals such as the sugar
15 glider and the ring-tailed possum and Your Honour will
16 hear evidence that in the area with which we are concerned
17 it particularly feeds on greater gliders and on yellow-
18 belled gliders.

19 Your Honour will see further down on that page that
20 it occurs in what is called closed forests, rain forests,
21 tall open forests and some open forests so it does occur
22 across a range of classes and in East Gippsland in the
23 first dot point Your Honour can see the range of forests.

24 Down the bottom of that page Your Honour, it favours
25 wetter sites in gullies and mid slopes with many dead
26 hollow-bearing trees and with under-storey and middle-
27 storey plants such as the wattles and tree ferns.

28 Your Honour there is an estimate of its population
29 size in Eastern Victoria. The second column on p.572 about
30 a quarter of the way up from the bottom. Population size
31 in Eastern Victoria may be at the order of 400 to 900

1 breeding pairs. So again not a species whose population
2 in this area is numerically particularly large.

3 Over the page, p.573. It is presently listed as
4 "threatened" in Victoria. That is our understanding of the
5 position and you can see from the part dealing with its
6 conservation status that the action statement says that
7 "Clearing and logging of its habitat has probably removed
8 or modified a significant proportion of its former
9 habitat".

10 The action statement then goes on to talk about one
11 of the other things that happens when you start to isolate
12 populations - about halfway down. "The probable
13 population decline has left the sooty owl more susceptible
14 to catastrophic events such as extensive wildfire. That
15 the habitat may now be fragmented and that exposes the
16 sooty owl to threats of reduced dispersal opportunity and
17 genetic isolation."

18 The statement goes on to say, "It is estimated that
19 hollows suitable for owls do not form even in the fastest
20 growing eucalypts until they are at least 150 to 200 years
21 of age."

22 Your Honour, just pausing there. That fact about the
23 age of trees in which suitable hollows form will assume
24 some considerable importance for a number of the species
25 in this case because the evidence will show that that kind
26 of period of time well exceeds logging rotations so once a
27 forest becomes part of a harvesting system it does not get
28 left long enough again for hollows to form that are useful
29 to any of these species. Your Honour can see down the
30 bottom of that paragraph the determination of the
31 Scientific Advisory Committee about the two features for

1 sooty owl.

2 I turn now to the other owl in this proceeding, the
3 Powerful Owl. Your Honour will find the action statement
4 for that at p.589.

5 Your Honour, this is a very large bird, 60 to 65
6 centimetres, the largest owl found in Australia. It has a
7 particularly characteristic cry and Your Honour will see
8 from the evidence that one of the key survey techniques
9 used to try and find these owls is what is called a call-
10 back where a recording is played. Because they are so
11 territorial a recording is played and they call back and
12 it is from that call-back that they are able to be
13 identified.

14 HIS HONOUR: This is the only one of these species that I have
15 seen personally, but I have.

16 MS MORTIMER: You are step ahead of me, Your Honour. Never
17 know what might happen on Wednesday though.

18 HIS HONOUR: You are more likely to see - - -

19 MS MORTIMER: Not a nocturnal species, I accept that.

20 HIS HONOUR: You can sometimes walk up pretty close in the
21 daytime. I think they are nocturnal in part but in the
22 daytime they will sit in the tree and if you are lucky
23 enough to find them you can walk up to them almost.

24 MS MORTIMER: They certainly are a species with, as Your Honour
25 can see from the little map on that page with the dots on
26 it on p.589, a species with a relatively wide distribution
27 across the State of Victoria, and again a species that the
28 action statement records on the second page about halfway
29 down, "preys mainly on arboreal or semi-arboreal
30 marsupials and the gliders get a bit of a thrashing from
31 this species as well."

1 The reasons for its conservation status, the second
2 column on p.590 of the action statement, Your Honour.
3 "Again principally loss of habitat. Past permanent loss of
4 habitat has likely led to an overall reduction in numbers
5 and fragmentation of the original continuous population
6 into a series of small residual populations each of which
7 is at risk of becoming locally extinct."

8 This is another species, Your Honour, where there
9 may be small clusters of them in areas of forest where
10 there has been fragmentation around that forest and what
11 that gives rise to is this phenomenon of local extinction.

12 Again Your Honour, a hollow-dependent species for
13 its roosting and breeding and Your Honour can see from the
14 figures that are given in that next paragraph in the
15 action statement some interesting figures, that of the 21
16 nest trees observed all were senescent, no, about 50 per
17 cent were senescent and all ranged between 350 and 500
18 years of age so the lack of suitably large hollows is a
19 particular limiting factor for this species, and that
20 paragraph goes on to note the other particular limiting
21 factor which is prey density and I will deal with that a
22 little bit and give Your Honour some figures about that
23 when I get to deal with the gliders which is right now
24 Your Honour.

25 I am going to turn to give Your Honour a bit of a
26 brief description about each of the gliders starting with
27 the greater glider. Obviously Your Honour, no action
28 statement for these creatures because they are not
29 endangered. They feature in this case, Your Honour,
30 because of their importance as prey to three of the
31 species that we are dealing with, the quoll and two owls.

1 The greater glider, Your Honour, is a cat sized
2 nocturnal arboreal gliding marsupial. It comes from the
3 same family as the ring-tailed possum and it occurs in wet
4 tall forests and tall or productive dry forests on the
5 coast of Eastern Australia and it occurs all the way up to
6 Cape York.

7 During the day it sleeps in its hollows, again in
8 large old trees, again in hollows that don't form until a
9 tree is about 120 years of age. Feeding at night. Now this
10 is a species that feeds on eucalypts and prefers younger
11 eucalypt leaves. There is no dispute on the evidence in
12 this case and it is admitted by VicForests that this
13 species occurs in high densities in the Brown Mountain
14 area and that is no coincidence because the evidence is
15 they are most abundant in old growth forest.

16 Each individual may use between four and 18 dens in
17 its home range, so again - initial impressions can be
18 misleading. An uninformed person looking at this kind of
19 evidence might think, maybe you have to leave one or two
20 trees up, but an individual will use between four and 18
21 hollows in its home range. That is one glider, so in terms
22 of the number of trees and the number of hollows one only
23 has to start doing the maths to figure out how many
24 hollows are needed in a particular area, and they need to
25 change those dens, the evidence will show, for a number of
26 reasons, because the dense can get a bit loaded up with
27 parasites, so they need to change to free themselves from
28 that. They need to reduce predation risks by moving
29 around and they need to keep accessing young eucalypt
30 leaves in different areas.

31 Your Honour, this species is the preferred prey for

1 both the sooty owl and the powerful owl and it is about 51
2 per cent of the biomass of the spot-tailed quoll. It is
3 about 70 per cent of the diet of the powerful owl and
4 about 43 per cent of the diet of the female sooty owl.

5 Your Honour the evidence will show a pair of
6 powerful owls may take up to one glider a night so that
7 four to 500 gliders per annum would be required to sustain
8 a pair of powerful and sooty owls in their home range.

9 If I can turn now to the yellow-bellied glider. This
10 is a larger glider and this has a different feeding
11 pattern, Your Honour. It specialises in fat and nectar
12 feeding. It ranges from the South Australian Victorian
13 border right up to Cape York. It also sleeps in family
14 groups in tree hollows, again the same kinds of tree
15 hollows but when it comes out to feed it is feeding on
16 flowering eucalypts, insects and sap so that when nectar
17 is not available sap is an important source of it, and
18 when we go on the view on Wednesday into Coop 15 Your
19 Honour will see a yellow-bellied glider sap tree on the
20 view. There is a photo of that same sap tree in
21 Dr Smith's report.

22 This is a species that although it is not listed in
23 Victoria it is listed in South Australia as endangered and
24 it is listed in New South Wales as vulnerable but this is
25 a species again where the old growth forests in East
26 Gippsland are a stronghold for it and the evidence shows
27 in our submission that perhaps it is the core population
28 within Australia for this species.

29 The species occurs at low densities and has large
30 home ranges up to 20 to 85 hectares and as I have said,
31 they are also prey for quolls, sooty owls and powerful

1 owls.

2 Your Honour if I turn to the next species which is
3 the last species which is the square-tailed kite. There
4 is no action statement for this species and so the facts
5 that I am opening with are drawn from Dr Deavis' report.

6 It is a medium-sized brown and reddish soaring hawk
7 with a prominent white cap and Your Honour can see pale
8 windows in the outer wings and prominent banded wing tips.
9 It characteristically sails low over and around the tree
10 canopy with its wingtip feathers widely separated.
11 Square-tailed kites breed as solitary well dispersed pairs
12 in defended territories and they build a stick nest in a
13 living tree within a forest or woodland, so this is a
14 species that requires dense forest in order to build its
15 nest, live trees not dead trees.

16 They breed annually. They lay a single clutch of
17 two to three eggs in the spring. So, again, fairly
18 limited breeding possibilities and the average for
19 fecundity, according to Dr Devis, is less than one young
20 per pair raised per year. Your Honour, it's listed as
21 "threatened" under the FFG Act and the reason for its
22 listing and its main threat now becoming a familiar catch
23 cry, Your Honour, is "loss of habitat for foraging and
24 nesting" and "decline in habitat quality through
25 clearing".

26 If I can just to wrap up on the listing issues take
27 Your Honour very briefly to the action statement for the
28 loss of hollow-bearing trees which is at p.579. Your
29 Honour, of course, this is a peculiarly Australian problem
30 because, as the action statement recognises, it's a
31 peculiar feature of many Australian fauna that they are

1 hollow dependent and dependent on hollows that form only
2 after trees are a certain age and need a variety of sizes.

3 Your Honour sees down the bottom of that first page
4 on 579 a brief description of hollow-bearing trees, as
5 they're usually the oldest and largest members of their
6 communities and that often have values beyond the hollows
7 they contain that cannot be provided by younger trees by
8 virtue of their age, size, form, root development and
9 ability to sequester resources from surrounding vegetation
10 and the action statement goes on to describe all those
11 values. The action statement then also recognises that
12 when they do eventually collapse or fall they then provide
13 a different kind of resource for different kinds of fauna
14 on the forest floor used by ground-dwelling animals and
15 Your Honour will hear, for example, that that's the kind
16 of circumstance in which spot-tailed quolls make use of
17 large trees which have fallen.

18 Over the page, Your Honour, at p.580 Your Honour
19 will see the importance of these kinds of trees. Hollows
20 are considered essential for 16 species of mammal, 44
21 species of bird and the action statement goes on to
22 describe the kinds of uses to which hollows are put:
23 shelter, roosting and nesting. It then goes on to set out
24 at the bottom of that first column on p.580 that there are
25 several studies that suggest a shortage of hollows is
26 limiting the abundance of some fauna species. So, that's
27 one of the reasons it's described as a threatening
28 process.

29 Your Honour, with that quick tour around the
30 evidence of how the species got listed and why and what
31 their features are, I want to turn now to take Your Honour

1 through - or to start to take Your Honour through some
2 aspects of the legislative scheme but before I do that -
3 no, Your Honour, I might go straight to that, if Your
4 Honour pleases. So, may I ask Your Honour to have to hand
5 four pieces of legislation and two of them are not
6 particularly important and I'll start with those. The
7 Conservation Forests and Land Act, Your Honour, if I might
8 just start with that. That's got some relevance but not a
9 huge amount, so can I ask Your Honour to turn to that.

10 Section 4 of that Act, Your Honour, describes the
11 object of the Act to set up a legislative framework to
12 enable the minister to be an effective conserver of the
13 state's lands, waters, flora and fauna and that's the
14 object on which we focus for the purposes of this
15 proceeding. Your Honour will see - and this is the first
16 indication of it - that the emphasis in the language in
17 all these parts of the legislative scheme and the
18 subordinate instruments is on outcomes. It's not, in our
19 submission, on aspirations. This language, the object is
20 for the minister to be an effective conserver, i.e.
21 conduct to designed to produce a particular outcome.

22 In our submission, that kind of focus reflects an
23 important difference between the two sides of this case
24 and our case, we will submit, focuses on actual protection
25 for actual members of the species and places where they
26 are or are likely to be and VicForests' case focuses on
27 planning, often desktop planning based on records, often
28 records that are out of date or whose currency is unknown,
29 protecting at a desktop level habitat which may or may not
30 be where the species now occurs. We will submit the
31 plaintiff's focus is a more consistent fit with the

1 language used throughout the statutory scheme.

2 What is the key tool, Your Honour, that the Act
3 looks at to ensure that the minister can become an
4 effective conservator of the state's lands? Well, under
5 this, Your Honour, it's the promulgation of codes of
6 practice and Your Honour will see that in ss.31 through to
7 38. So, by s.31 of this Act the minister may make codes
8 of practice which specifies standards and procedures for
9 the carrying out of any of the objects or purposes of a
10 relevant law and Your Honour will remember that I took you
11 to the definition of "relevant law" and to Schedule 1
12 which picks up the references to the three other pieces of
13 legislation with which we're concerned: the FFG Act, the
14 Sustainable Timbers Act and the Forests Act.

15 I draw Your Honour's attention now to s.39. Section
16 39 is an important section. Compliance with the code of
17 practice is not required unless the code of practice is
18 incorporated in or adopted by a relevant law; a condition
19 specified in an authority given under a relevant law. So
20 that, for example, Your Honour will see when we get
21 through the scheme that the code of practice is picked up
22 in the sustainable Forest Timbers Act, so that's how 39A
23 will work in relation to the Forest Practices Code and the
24 Forest Practices Code is picked up in the allocation order
25 and the timber release plan and they are conditions
26 specified in an authority given under a relevant law.

27 One of the things that this demonstrates, in our
28 submission, Your Honour, which is important is that a code
29 of practice could be promulgated by the minister and a
30 deliberate choice made not to make it enforceable. It
31 could sit there as a guidance or some kind of aspiration

1 or some kind of aim but what s.39 makes clear is that
2 there must be a conscious legislative or executive
3 election to make it enforceable.

4 HIS HONOUR: Yes, if that election is made you say it becomes
5 enforceable.

6 MS MORTIMER: Enforceable, that's so, Your Honour. One of the
7 weaknesses we would point to in the defendant's argument
8 about this is the presence of s.39.

9 HIS HONOUR: I see by s.5 that the Crown is bound - the Crown
10 in all its capacities so far as the legislative power of
11 parliament permits.

12 MS MORTIMER: Yes, Your Honour, that is so.

13 Your Honour, those are the only provisions of that
14 piece of legislation I want to draw Your Honour's
15 attention to at the moment and the other less important
16 piece of legislation in terms of volume is the Forests
17 Act. Really, the only matter I want to draw Your Honour's
18 attention to in the Forests Act is s.22 because s.22 of
19 the Forests Act is the source of power in the
20 Secretary of the Department of Sustainability and
21 Environment to make management plans. There's a little
22 disconformity, Your Honour, in the language but it's not
23 anything that, as I understand it, makes any difference as
24 between the parties. Section 22 talks about working plans
25 but it's very clear that, for example, the East Gippsland
26 Forest Management Plan is specifically identified to be a
27 working plan under s.22.

28 HIS HONOUR: Yes, I see.

29 MS MORTIMER: Your Honour, if I might go now in a little bit
30 more detail to the Flora and Fauna Guarantee Act because
31 this is one of the pieces of legislation, apart from the

1 listing process that I've taken Your Honour to, upon which
2 we rely for sources of obligations. Your Honour will see
3 from the purpose in s.1 of this Act - the purpose is to
4 establish a legal and administrative structure to enable
5 and promote the conservation of Victoria's native flora
6 and fauna and to provide for a choice of procedures which
7 can be used to manage conservation and threatening
8 processes.

9 The Act then, after the definitions, Your Honour,
10 sets out a series of objectives and the point we make
11 about the language in s.4(1) of those objectives is that
12 they are outcome focused. There are a number of points,
13 Your Honour. Firstly, that they are outcome focused and
14 that they talk about outcomes for these species. They
15 talk about survival, they talk about flourishing,
16 retaining their potential for evolutionary development in
17 the wild, they talk about ensuring genetic diversity.
18 These are factual outcomes, in our submission.

19 The second matter that we point to about the
20 language in that provision is that it's very strong and
21 the word "guarantee", Your Honour, is a very strong word
22 to be used, in our submission, in a statute of this kind
23 and it's not only used in the objectives, it's used in the
24 title of the Act but it is the strongest of language and
25 that, in our submission, counts towards, when one looks at
26 sub-s.(2) of s.4, characterising that as an enforceable
27 obligation with real content. That is reinforced, Your
28 Honour, by the language that I took Your Honour to in the
29 purpose provision, s.1, where it is said that the purpose
30 of the Act is establish a legal structure to promote
31 conservation.

1 What sub-s.(2) of s.4 does, Your Honour, is to
2 impose a mandatory duty on certain persons to do certain
3 things. The duty is imposed on a public authority and
4 that is defined in s.3 to be a body established for a
5 public purpose by or under any Act. It is our submission
6 that VicForests is a public authority by reason of s.14 of
7 the State-owned Enterprises Act and the order in council
8 to which I have taken Your Honour, the content of which
9 demonstrates that it is established for a public purpose
10 and I don't understand that to be a contentious
11 proposition as far as the defendants are concerned but no
12 doubt my learned friend will inform Your Honour of that.

13 The Secretary to the Department of Sustainability
14 and Environment, in our submission, is also a public
15 authority for the purposes of s.4 and that proposition,
16 Your Honour, can be made good by looking back at the
17 sections to which I took Your Honour in the Conservation
18 Forests and Land Act that was s.6 and s.10.

19 Your Honour, it is plain that there may be many
20 statutory bodies that are in theory captured by that
21 obligation in s.4(2) but, in our submission, that doesn't
22 diminish its enforceability, it simply means that it will
23 bite hard on some public authorities like VicForests and
24 it will not bite hard, for example, on a public authority
25 that's running a library. It doesn't diminish the nature
26 of the obligation but it does affect its content in that
27 sense, in our submission.

28 Your Honour, we would submit that when one looks at,
29 for example, the Secretary to the Department of
30 Sustainability and Environment, one of the ways that the
31 Secretary performs its functions under this is to make

1 those action statements so that the making of action
2 statements is part of the Secretary being administered so
3 as to have regard to flora and fauna conservation and
4 management objectives in this Act.

5 So there is a clear link, in our submission, between
6 conduct, for example, that the Secretary has to engage in
7 under this Act and the performance of that statutory duty.
8 Similarly, the making of a critical habitat determination
9 under s.20 and the making of a conservation order under
10 s.26 are also matters that go to satisfying the
11 performance of that obligation.

12 Your Honour, the plaintiff's case in relation to
13 VicForests and this obligation is this: that in the
14 management of timber resources in state forests including
15 in its decision making about logging and the carrying out
16 of that logging, VicForests must be administered in a way
17 which has regard to those conservation objectives in s.4.
18 So when Your Honour comes to assess how VicForests has
19 planned and plans to carry out its logging of these
20 forests in Brown Mountain we submit Your Honour must
21 measure what they have done and what they propose to do to
22 see, for example, whether they have paid any attention to
23 the fact of whether their conduct will guarantee that the
24 quoll survives and flourishes and retains its potential
25 for evolutionary development; have they paid regard, for
26 example, to whether their conduct will conserve present
27 populations of sooty owls or powerful owls in East
28 Gippsland? Have they paid attention to how their conduct
29 will manage the maintenance rather than the loss of enough
30 hollow-bearing trees to ensure active and flourishing
31 populations of gliders both for the gliders' own sake and

1 because of their status as prey, so this is in our
2 submission not an empty exercise. It is an exercise in
3 looking at both the past conduct of VicForests and the
4 future conduct of VicForests to see whether in reality the
5 way that it is planning and carrying out its timber
6 harvesting is designed to achieve those objectives or not.

7 Your Honour, the defendant says, as we understand
8 it, that those provisions have no enforceable content and
9 in our submission that is a remarkable proposition even at
10 a construction level when one looks at the language that
11 is used in s.4. That is a proposition which deprives the
12 word "guarantee" of any meaningful work to do and although
13 it is a proposition that operates on what is clearly a
14 statutory the effect of the defendant's submission is that
15 it can disregard that duty with no legal consequences for
16 it, and we submit that Your Honour should not prefer a
17 construction that achieves that outcome, given the purpose
18 and subject matter of this Act.

19 The other parts of this legislative scheme that
20 I just want to draw your attention to are the parts that
21 deal with the action statements and that is at s.19. The
22 responsibility for the preparation of action statements
23 falls on Secretary to the department and it is a mandatory
24 obligation, supposedly to be performed as soon as possible
25 after the taxon is listed.

26 It still hasn't been fulfilled in relation to the
27 Kite which was listed in 2000 and it still hasn't been
28 fulfilled in relation to the Large Brown Tree Frog which
29 was listed in 2003.

30 The significance of that, Your Honour, in our
31 submission - apart from being a reasonably significant

1 neglect of a statutory duty - is that the obligations in
2 the Forest Practices Code about compliance with action
3 statements can't be triggered in relation to those two
4 species because there isn't one, so Your Honour will not
5 see as part of the plaintiff's case on the Kite and the
6 Large Brown Tree Frog a failure to comply with an action
7 statement because that is not available because of the
8 non-performance of this duty.

9 Your Honour, the legislative scheme in this Act does
10 not attach any consequence to persons in relation to
11 action statements and the way that action statements are
12 enforced on the ground in timber harvesting is through the
13 Code of Practice and perhaps I will just draw Your
14 Honour's attention to that right now so that we can see
15 the link immediately and Your Honour will find that in the
16 agreed book of documents Vol.1 at p.130.

17 Your Honour, I am going to come back to the Code of
18 Practice in some detail but I will show you this link
19 right now. If Your Honour looks at p.130 under the
20 heading "Mandatory actions" the second mandatory
21 action - - -

22 HIS HONOUR: Page 130?

23 MS MORTIMER: Of the agreed book of documents, yes. Vol. 1 Your
24 Honour.

25 HIS HONOUR: I see.

26 MS MORTIMER: Under the heading "Mandatory actions" second
27 paragraph. "Forest Management Planning," so that addresses
28 - that is the first stage at which it must be addressed -
29 "and all forestry operations must comply with measures
30 specified in the relevant flora and fauna guarantee action
31 statements.

1 HIS HONOUR: Yes.

2 MS MORTIMER: And flora and fauna guarantee orders. That phrase
3 "Flora and fauna guarantee orders" is not a statutory
4 phrase but we understand it to refer to interim
5 conservation orders under the Act. That is not something
6 that Your Honour needs particularly to worry about in this
7 case. It is the first part of it that matters.

8 Your Honour, just going back to s.19 to look at what
9 action statements are supposed to contain and Your Honour
10 has already seen some examples of them, they must do two
11 things, s.19(2).

12 It is a good page, that, Your Honour, I am going to
13 come back to it. It has got a lot on it.

14 HIS HONOUR: Yes.

15 MS MORTIMER: Section 19(2) "The action statement must do two
16 things. It has to set out what has been done to conserve
17 and manage the taxon and it must set out what is intended
18 to be done. The provision then says it may include
19 information on what needs to be done so the Act makes a
20 distinction between what is intended to be done under the
21 action statement and what needs to be done and the latter
22 perhaps being a broader category than intention, is only
23 discretionary.

24 But our point about that language and that structure
25 is this Your Honour that once an action statement elects
26 to identify what needs to be done then it becomes just as
27 binding as all the rest of it so again it is a bit like
28 compliance with the code of practice. You could have an
29 ineffective scheme, in our submission, if you elected not
30 to set out what needs to be done but once you do elect to
31 set out what needs to be done then that part of the action

1 statement becomes just as binding as the other.

2 The next power that it is important note in part
3 because of some of the evidence in this case in the
4 factual history is s.20. Section 20 gives a power to the
5 Secretary to determine that the whole or any part or parts
6 of the habitat of any taxon or a community is critical to
7 the survival of that taxon or community, and Your Honour
8 it was a request by Environment East Gippsland to the
9 Secretary in early 2009 under s.20 which provided the
10 foundation for an argument that was made to the Secretary
11 about the critical nature of the habitat in this area to a
12 number of species and it is that which was supported by
13 Dr Meredith's critical habitat report.

14 The chronology which I will hand up before we rise
15 today, the chronology shows that while that application by
16 environment East Gippsland supported by the report of
17 Dr Charles Meredith, while that was under consideration,
18 that was what EEG was told, the State Government and
19 VicForests announced these forests would be logged within
20 weeks. So in the face of a detailed report from a well-
21 recognised expert in this State, the State Government, in
22 our submission, cast aside a moratorium on logging and
23 while telling Environment East Gippsland that it was
24 considering this report, endorsed VicForests' decision to
25 log the same area and VicForests made it very clear it was
26 going to do so.

27 We submit it is simply not possible in that context
28 to suggest that VicForests determination to log 15 and 19
29 immediately in August 2009 is consistent with its
30 obligations under s.4(2) of the FFG Act, let alone the
31 other aspects of this legislative scheme to which I will

1 come. It is, Your Honour, a stubborn refusal to
2 acknowledge the force of Dr Meredith's report and the
3 force of the evidence about this area.

4 Your Honour, as I open this case today environment
5 East Gippsland is still waiting for the Secretary to tell
6 it what the Secretary has decided about whether this area
7 is critical habitat or not, and of course Your Honour,
8 without the injunction granted last August, whether it was
9 critical habitat would not have mattered.

10 The next piece of legislation that I need to turn to
11 and the most important piece perhaps - equally important
12 piece with the FFG Act is the Sustainable Forests Timber
13 Act (2004).

14 Your Honour I note the time. I am not going to get
15 through what I want to say about this Act by way of
16 opening in five or 10 minutes, so if this is a convenient
17 time, Your Honour.

18 HIS HONOUR: Yes it is.

19 MS MORTIMER: Before we adjourn my learned friend has kindly
20 reminded me that I had spoken about a chronology and
21 I might just hand that up before we adjourn.

22 Your Honour, I have also been reminded that there is
23 a matter of some importance to my client about whether it
24 is able to publish the transcript of proceedings in this
25 matter on the internet but that is a matter I will raise
26 with my learned friend perhaps and I might address Your
27 Honour on that.

28 HIS HONOUR: I think access is being sought by the Government
29 Solicitor as well, or by some other arm of government so
30 I will - - -

31 MS MORTIMER: We will take it up and we will see whether we

1 have any difficulties with that and we will raise it with
2 Your Honour in the morning.

3 HIS HONOUR: Yes. I don't have any real difficulty with that
4 sort of publication in principle. It may be that it
5 shouldn't be so published until the parties have had some
6 opportunity to check its accuracy. In other words it
7 shouldn't be directly streamed out, as it were.

8 MS MORTIMER: Podcast or something.

9 HIS HONOUR: Because it may be that there are matters of
10 terminology and other aspects of evidence in this case
11 that are of some difficulty to the transcript writers. It
12 is not a case in the ordinary run of the mill from their
13 point of view and even if the technology is functioning
14 well, which I would expect it to, it may be a case in
15 which they are presented with some challenges, but having
16 said that perhaps it is a matter you can discuss with
17 Mr Waller. Pardon me a moment.

18 The Victorian Government Solicitors sought access
19 for an unspecified arm of government so it would seem that
20 there is interest in it. I must say, subject to fair
21 sharing of costs considerations and things of that nature
22 I don't myself have a problem with the dissemination of
23 the transcript.

24 MS MORTIMER: Your Honour, again with that condition neither do
25 we, and of course the basis on which certainly my client
26 would publish it would be firstly once it had been
27 determined to be accurate by the parties, and secondly in
28 its entirety.

29 HIS HONOUR: Yes. I think you can discuss that with Mr Waller.
30 I think provided there is some period of delay then it is
31 unlikely to be something that causes problems I think we

1 start from the point that justice is intended to be open,
2 these courts are intended to operate in an open fashion
3 and there will be people who are interested in this
4 proceeding who can't easily come to the Sale courthouse
5 and in those circumstances I don't have a great problem
6 with publication of the transcript provided the parties
7 have each had an opportunity to consider their position,
8 and provided some sort of protocol is worked out whereby
9 there is some opportunity to correct things.

10 It won't be necessary to correct the position of
11 commas, the structure of sentences, that sort of thing,
12 but what ought to be carefully addressed are any mistakes,
13 any slips in effect which materially change the meaning of
14 the transcript.

15 MS MORTIMER: We accept that, Your Honour.

16 HIS HONOUR: That is always the difficulty in criminal trials
17 that if you get people - in one sense the sensible thing
18 is to give the jury the transcript but in another sense
19 unless it has been checked fairly carefully it may be
20 taken to say something that it is not meant to say and
21 every so often words such as "not" are omitted, which
22 reverse the meaning of particular statements.

23 I wouldn't have a particular fear that that sort of
24 thing is going to happen in this case but I think that
25 some of the scientific nomenclature and the like might be
26 difficult and that in fact suggests to me that it would be
27 useful to provide the transcript writers with the reports
28 of each of the expert witnesses so that when you call them
29 in fact the transcript writers have those reports because
30 that will mean that will mean that they then have a
31 reference in terms of difficult scientific terms, local

1 names, things of that nature, and it is likely to make
2 things easier and it may be that the transcript operator
3 who is in court at present could have some discussions
4 with the instructing solicitors on each side as to what
5 sort of material is most useful and how it might most
6 usefully be provided, because I think particularly if the
7 transcript is to be published, the quid pro quo is that
8 you make it easy for the transcript writer.

9 MS MORTIMER: We have no difficulty with that, Your Honour,
10 whatsoever.

11 HIS HONOUR: Unless there is anything further I think we will
12 adjourn until ten o'clock tomorrow morning.

13 MS MORTIMER: Your Honour, we're happy to resume at ten, but
14 perhaps for the remainder of the trial when we're into
15 evidence if we could start at 10.30, Your Honour.

16 HIS HONOUR: Yes, if you both agree that's going to make it
17 easier for people to get here.

18 MS MORTIMER: It is partly that and it's partly because we're
19 all working in hotel rooms and things, Your Honour, and it
20 just means that there is a little bit more time needed
21 sometimes in the morning.

22 HIS HONOUR: You might be working in hotel rooms but I can tell
23 you that your average travel time to court, I'm prepared
24 to wager, is going to be significantly less than it would
25 be in town.

26 MS MORTIMER: I accept that, Your Honour.

27 HIS HONOUR: If that's what you would like I'm happy to
28 accommodate you.

29 MS MORTIMER: Obviously, Your Honour, if we start to run short
30 of time we'll contract it back to ten o'clock, if it looks
31 like that's going to be - - -

1 HIS HONOUR: Yes, and we can be reasonably flexible. If you
2 want to start at 10.30 tomorrow I'm happy to start at
3 10.30. Is that what you prefer?
4 MS MORTIMER: It is important, Your Honour, we make sure we
5 finish our opening so I think it's sensible to start at
6 ten tomorrow.
7 HIS HONOUR: Yes, and then because we're looking to have the
8 view.
9 MS MORTIMER: All day Wednesday, Your Honour, we'll be occupied
10 by the view.
11 HIS HONOUR: Yes. What time would you anticipate we should
12 meet in Orbost on that day?
13 MS MORTIMER: I think the proposal is 11 a.m. at the moment,
14 Your Honour.
15 HIS HONOUR: I see.
16 MS MORTIMER: It is about a three-hour drive.
17 HIS HONOUR: From here?
18 MS MORTIMER: Yes, and then, Your Honour, it's about an hour
19 and a half from Orbost. We will give you, Your Honour, a
20 schedule tomorrow rather than whispering at the Bar table
21 at the moment. It is quite a long drive, that's a fair
22 statement, Your Honour, and it's quite a way from Orbost,
23 at least an hour, perhaps a bit more.
24 HIS HONOUR: I think we will proceed on the basis that we will
25 expect to leave Sale at about eight in the morning.
26 MS MORTIMER: Yes, I think that would be safe, Your Honour.
27 HIS HONOUR: And from then on we will be in your hands.
28 Tomorrow we will sit from ten on. We will have the view
29 whether or not Mr Waller is entirely finished his opening.
30 I will trust him to have opened those matters that are
31 most relevant to the view, and then from Thursday onwards

1 we will sit from 10.30 but as I have said previously, if
2 we need to sit a little later than the time we normally
3 would sit in town, I'm prepared to do that to accommodate
4 particular witnesses, provided the accommodation is not
5 too extended.

6 MS MORTIMER: We appreciate that, Your Honour. Thank you.

7 HIS HONOUR: Unless there is anything else, we will adjourn
8 until ten o'clock tomorrow.

9 ADJOURNED UNTIL TUESDAY 2 MARCH 2010