

1 MR REDD: Your Honour, may I just read in some transcript  
2 corrections from yesterday's evidence?  
3 HIS HONOUR: Yes.  
4 MR REDD: And I have mentioned these to my learned friend  
5 Ms Knowles, and they are not contentious.  
6 HIS HONOUR: Just wait a moment while I find my transcript.  
7 Yes.  
8 MR REDD: Your Honour, page 713 of the transcript at line 14.  
9 HIS HONOUR: Yes.  
10 MR REDD: The reference to why, W-H-Y, should be just capital  
11 letter Y.  
12 HIS HONOUR: Line?  
13 MR REDD: Line 14 of page 713.  
14 HIS HONOUR: Yes.  
15 MR REDD: And the same is true on the next page, page 714 at  
16 line 6, where it reads W-H-Y, it should indicate the  
17 capital Y.  
18 HIS HONOUR: Yes.  
19 MR REDD: On page 719, at lines 12 and 13, Mr Spencer is  
20 recorded as saying "It's not listed in the form for a  
21 guarantee", and we think that should be "It's not  
22 listed in the Flora and Fauna Guarantee Act".  
23 HIS HONOUR: Yes.  
24 MR REDD: And finally on page 746, at line 4, when Mr Niall  
25 was cross-examining, we think he said "So is the  
26 process", as opposed to "so is the possess".  
27 HIS HONOUR: Yes.  
28 MR REDD: That's all, Your Honour.  
29 HIS HONOUR: Thank you. Yes.  
30 MR REDD: Could Mr Spencer be recalled to the witness box,  
31 please.

1 HIS HONOUR: Just perhaps before that happens, I read  
2 Mr Miezis' witness statement last night, and I wanted  
3 to raise paragraphs 90 and 91 with counsel at the  
4 conclusion of Mr Spencer's evidence. So, Ms Mortimer,  
5 I think I need just to discuss with you what that means  
6 in terms of this proceeding.

7 MS MORTIMER: I understand, Your Honour.

8 HIS HONOUR: Yes. Yes, would you recall Mr Spencer,  
9 please.

10 <LACHLAN RAYMOND SPENCER, recalled:

11 HIS HONOUR: Yes, Mr Niall.

12 MR NIALL: Yesterday just before we finished, Mr Spencer, I  
13 was asking you some questions about some minutes of the  
14 meeting of 7 April 2009?---Yes.

15 Do you have a copy of those in front of you?---Yes.

16 Now, it's the case, isn't it, that they are minutes prepared  
17 by you?---They are notes prepared by me.

18 And when you say they are notes prepared by you, you are  
19 seeking to distinguish those from minutes, are  
20 you?---These are not the formal minutes of the meeting.  
21 Upon your request yesterday I checked my notes and that  
22 these were prepared following the second meeting  
23 outlined in this set of notes because even though the  
24 first meeting was called by DSE, no minutes were ever  
25 prepared, so I typed up my notes by way of reference,  
26 but as not being the chair of the meeting they are not  
27 the official minutes per se.

28 And they accurately record your notes of the meeting, do they  
29 not?---That's correct.

30 And that's equally true of the meeting of 7 May which starts  
31 on page 4?---That's correct.

1 I tender those, if Your Honour pleases.

2 HIS HONOUR: Yes.

3

4 #EXHIBIT 52 - Typed notes of the meeting of threatened  
5 species management of 07/04/2009 and 07/05/2009.

6 MR NIALL: And you know, don't you, that those notes, typed  
7 notes prepared by you were distributed to some of the  
8 participants at the two meetings for the purposes of  
9 distribution?---For the purpose of confirming my  
10 understanding of what was said at the meetings, yes.

11 Would you have a look at this document did, please. Now,  
12 that's an email that you received on 27 May 2009  
13 enclosing or attaching a copy of the notes that you  
14 have just given evidence about, which had a brief edit  
15 from Mr Potter, is that correct?---That appears to be  
16 correct, yes.

17 And following that you didn't get any corrections to the  
18 notes from the participants who received that email,  
19 did you?---Sorry, I am just reviewing - I noted when I  
20 read my version of the notes last night that there was  
21 a note of someone wanting to make edits, but if this is  
22 the finalised version it doesn't seem to contain those  
23 notes.

24 Well, apart from the brief edit from Mr Potter which is  
25 referred to in that email, you are not aware of any  
26 other changes to your notes, are you?---I am not aware,  
27 though the version I had which was emailed to Mr Potter  
28 had in it "Ryan Incoll wished to make comment." I am  
29 just looking for that now in the version you provided  
30 to me. And I can assume that Mr Potter has  
31 incorporated those comments into these notes.

1 I tender the email of 27 May, if Your Honour pleases.

2 HIS HONOUR: Yes.

3

4 #EXHIBIT 53 - Email of 27/05/2009.

5

6 MR NIALL: And yesterday I asked you some questions about  
7 your handwritten notes, and some handwritten notes have  
8 been produced in relation to that call. Do you have a  
9 copy of those in front of you?---No.

10 Could the witness be shown - be provided a copy together with  
11 Your Honour? Now, Mr Spencer, is that a photocopy of  
12 your handwritten notes of the meeting of 7  
13 April?---Yes.

14 I tender that, if Your Honour pleases.

15

16 #EXHIBIT 54 - Handwritten notes of meeting 07/04/2009.

17

18 MR NIALL: Now, looking at these - have you had a chance to  
19 look at those notes overnight, Mr Spencer?---No, I  
20 haven't.

21 It would be fair to say that the principal issue for  
22 discussion on 7 April 2009 at that meeting was the  
23 survey results for the arboreal mammals that had been  
24 undertaken both by EEG and DSE, correct?---That was not  
25 the intent of the meeting. It certainly was part of  
26 the discussion, but not the sole intent of the meeting,  
27 no.

28 When you say it was part of the discussion, it was the  
29 principal subject of discussion on 7 April, wasn't  
30 it?---The principal subject of discussion was in  
31 regards to what is the policy when stakeholders or

1 environmental groups provide evidence of the trigger  
2 species in the forest, and as a case study the Brown  
3 Mountain identifications was discussed at some length  
4 in relation to what is the process that should be  
5 followed.

6 So this was simply a case study, was it, Mr Spencer?---The  
7 meeting wasn't arranged to resolve the issue of Brown  
8 Mountain per se, it was about determining a way forward  
9 for future findings.

10 Now, you just said to His Honour that the subject matter was  
11 where, I think your words were, where an environmental  
12 group does a survey. Now, by 7 April the Department  
13 of Sustainability had done a survey, or a number of  
14 surveys, had they not?---Yes.

15 And those surveys conducted by DSE had confirmed that the  
16 trigger level for the presence of arboreal mammals had  
17 been reached in coupes 15 and 19, is that not  
18 right?---They certainly suggested those levels were  
19 present.

20 When you say "suggested those levels were present", there was  
21 no doubt that those survey results confirmed the  
22 presence of arboreal mammals at above the trigger  
23 levels?---Certainly one of the three surveys indicated  
24 that.

25 Well, how many survey results do you need before it stops  
26 suggesting something and establishes something?---It's  
27 a case by case on surveying technique, but I am not -  
28 I am sure it's species by species as well, and I don't  
29 - can't provide you with a definitive answer on that.

30 But the position as far as you knew was that the trigger  
31 level based on DSE's own study had been reached for

1 arboreal mammals, correct?---Certainly one of the three  
2 surveys had indicated that the trigger level had been  
3 met, yes.

4 And you knew that the trigger level was set out in the  
5 management plan, correct?---The East Gippsland Forest  
6 Management Plan, yes.

7 Could Mr Spencer be shown volume 1 of the agreed document,  
8 please. And if you go to page 370, you will see the  
9 start of the East Gippsland Management Plan?---Yes.

10 And you are familiar with that document?---Yes.

11 And if you go over the page, 408?---Yes.

12 There's a reference to guidelines for the conservation of  
13 featured species, do you see that?---Yes.

14 And you turn over two pages to 410?---Yes.

15 And you will see that arboreal mammals for each of the  
16 following occurrences, approximately 100 hectares of  
17 suitable habitat, will be included in the SPZ, do you  
18 see that?---Yes.

19 And you know, or you knew as at April 2009, the occurrences  
20 in relation to the greater glider had been reached,  
21 according to DSE?---According to one of three surveys  
22 that threshold appeared to be met, yes.

23 And in relation to yellow bellied glider, that had also been  
24 reached, correct?---Again, yes.

25 And in those occurrences, the forest management plan required  
26 that 100 hectares of suitable habitat be included in  
27 the SPZ, did it not?---The forest management plan  
28 requires, as stated here, that 100 hectares -  
29 approximately 100 hectares of suitable habitat is  
30 included in the SPZ, yes.

31 And there's no lack of clarity in relation to that, is

1           there?---I think if only read in isolation there's  
2           clarity in that prescription.    Though in that section  
3           there's preceding descriptions about how the guidelines  
4           could be used.

5   As at 7 April, you knew what the guideline required, and  
6   VicForests, or the representative of VicForests, which  
7   included yourself, Mr Potter and Mr MacDonald, was  
8   using the 7 April to persuade DSE why it should not  
9   apply, isn't that right?---That's not correct.

10   Can we go to your handwritten notes, please, and you will see  
11   over on the second page, right in the middle of the  
12   page, there's an asterisk with the words "very high  
13   density on any scale", do you see that?---Yes.

14   And over on page 5, there's a reference to SH, do you see  
15   that?---Yes.

16   See SH?---Yes.

17   And that's a note representing what Mr Henry had said?---Yes.

18   And he told the meeting this, that is what had occurred is  
19   "genuinely a rare density", didn't he?---That's what  
20   the notes say, yes.

21   And you recall him saying that, don't you?---As I stated  
22   yesterday, I don't specifically recall Steve saying  
23   that, but as I have taken the note I am sure he did.

24   Now, over on page 4?---Yes.

25   There's an asterisk in the middle and it says "Can we really  
26   not follow the management plan", do you see  
27   that?---Yes.

28   And who said that?---I have no idea.

29   You have no idea who said that?---No.

30   Was it a DSE person or a VicForests person?---I do not know.

31   VicForests at this meeting, that is you, Potter and

1           MacDonald, were trying to work out a situation where  
2           VicForests didn't need to follow the management plan,  
3           correct?---I disagree completely.

4   Well, why do you disagree with that?---The management plan -  
5           the discussion was around what the management plan was  
6           requesting us to do, and around DSE's establishing what  
7           the intent of what was a 15 year old prescription in  
8           the landscape, and there was some discussion in regards  
9           to how the intent of the management plan would be  
10          applied, but certainly there was discussion between DSE  
11          and VicForests and that it wasn't that VicForests  
12          didn't want to apply the management plan because  
13          VicForests, as I stated elsewhere in these minutes,  
14          must follow the management plan.    It was around how  
15          DSE would interpret the application of the management  
16          plan in this situation.

17   HIS HONOUR:     It must follow the management plan because  
18                    both the allocation order and the TRP require it to  
19                    comply with the management guidelines specified in the  
20                    FMP, is that right?---That's right.

21   Yes?---Though the discussion was regards to oftentimes DSE  
22                    interpret the guidelines for us as action statements  
23                    which have been created after the management plan and  
24                    other information comes to hand to provide further  
25                    direction to VicForests.    That's what that note is in  
26                    reference to, that in not following the management plan  
27                    as a black and white document, but taking into account  
28                    some of the additional caveats in the management plan,  
29                    especially in the start of the fauna section, that's  
30                    what that was in discussion about, and what was the  
31                    reaction to people who would read it in only its black



1 and white for one paragraph within the plan.

2 MR NIALL: You knew that if DSE created a special protection  
3 zone in accordance with the management plan, based on  
4 these survey results, DSE could not log coupes 15 and  
5 19? VicForests could not log 15 and 19?---That's not  
6 true.

7 Well, how could they?---VicForests wasn't aware of where the  
8 special protection zone, should it be required, would  
9 it be placed. The words say "Approximately 150 in  
10 suitable habitat." The exact location of that was  
11 unclear to VicForests.

12 Well, you knew that the location of the arboreal mammals had  
13 been in coupes 15 and 19?---Yes.

14 And over on the last page of the minutes, of your handwritten  
15 notes, there's a reference to "need to place 100  
16 hectares of reserve, 400 by 100 hectare reserve", do  
17 you see that?---Yes.

18 Well, it was clear to you that the reserve of 100 hectares  
19 would be placed over the coupes in which the arboreal  
20 mammals were found?---That's not true.

21 Well, where did you think they would be?---I am unsure. And  
22 one of the purposes of the meeting was to determine  
23 what the intent of the words "100 hectares of suitable  
24 habitat" actually meant; whether it was suitable  
25 habitat in the vicinity, very exactly where it was  
26 found, therefore it was unclear to VicForests where  
27 that reserve would be placed if it was required.

28 So where the management plan says "Where there's an  
29 occurrence", which on the material shows it to be  
30 extremely rare occurrence, where that occurrence  
31 occurs, you don't have to create the SPZ there but you

1 can do it somewhere else, is that right?---It can be  
2 the case, yes.

3 And in what circumstances could that occur?---The DSE can  
4 evaluate the implication of their guideline, but it  
5 doesn't - unless it specifically says it must be in  
6 that location, there inherently has to be an  
7 interpretation of where they place them. And many of  
8 the guidelines are on that vein of finding suitable  
9 habitat in the vicinity to ensure the most appropriate  
10 habitat is protected. It is not clear.

11 Well, in this particular guideline, what circumstances would  
12 you create a SPZ different from the place in which the  
13 high density was observed?---You would have to ask the  
14 DSE.

15 HIS HONOUR: What do you say about the statement "rich  
16 mammal sites, well documented sites that are  
17 particularly rich in mammal species will be included in  
18 the SPZ or SMZ wherever practical." Wasn't Mr Henry  
19 telling you that this was particularly rich in mammal  
20 species?---My understanding of that is that that is  
21 mammals in addition to those referred to in the  
22 arboreal mammal section above, though again you would  
23 have to clarify with the DSE.

24 MR NIALL: Now, below on page 4 "Can we really not follow the  
25 management plan", someone said "What floodgate does  
26 this open", do you see that?---Yes.

27 And there's reference to Yalmy Road, Survey Road coupe, Cabon  
28 coupe?---Cabon, yes.

29 Cabon coupe. They were all references to coupes in which  
30 surveys of mammals had been undertaken already, aren't  
31 they?---That's my understanding.

1 And they'd been undertaken by EEG, hadn't they?---I can't  
2 confirm one way or the other.

3 And what was happening at this meeting was that VicForests  
4 were saying that if we have to give up our coupes for a  
5 SPZ for arboreal mammals in these two coupes, what will  
6 happen in relation to all the other potential  
7 sites?---No, that's a misinterpretation of the notes.

8 Well, what was the interpretation of "what floodgate does  
9 this open"?---The discussion was regarding to - the DSE  
10 provide additional interpretation to the management  
11 plan on issues through documents such as the management  
12 procedures and other guidance, and the reference to  
13 floodgates opening is would there be concern if people  
14 perceived that additional prescriptions had been given  
15 that may be perceived to be in contrast to the  
16 prescriptions within the management plan, and would  
17 there be a concern that people would say that the  
18 management plan loses its value if interpretations were  
19 had. And I guess VicForests' stance was that in the  
20 discussion regarding that - when plans are 15 years old  
21 and are superseded by other documents, that this  
22 already happens, and that is the reference to the  
23 floodgate. The Yalmy Road surveys are a further  
24 discussion which was not connected with that.

25 Well, you have got a good memory of that now, don't you,  
26 Mr Spencer?---I have a good memory of the general  
27 discussion - - -

28 Well, you have got a good memory of what the floodgate was  
29 about, and that it had nothing to do with Yalmy Road  
30 and Survey Road, is that right?---That's my  
31 understanding.

1 But you have got no recollection of who asked the question  
2 "Can we really not follow the management plan"?---I  
3 remember the thrust of the discussion, not who said  
4 which bits, no.

5 Now, the bottom line at this meeting was that VicForests was  
6 lobbying DSE not to provide a SPZ in response to the  
7 surveys?---That's not correct.

8 Can you go to page 5, which is the next page, and you will  
9 see in the middle of the page there's a reference to  
10 Adrian, do you see that?---Yes.

11 And that's Adrian Moorrees?---Moorrees, yes.

12 And he is a DSE employee?---Yes.

13 Do you know what he does at DSE?---I am not sure of his exact  
14 title, though he is a senior biodiversity staff member  
15 in Melbourne.

16 And he suggested that spotlight surveys should be done in the  
17 park to demonstrate the lack of rarity of this density,  
18 do you see that?---That's what the notes say, yes.

19 So here is Mr Moorrees trying to undermine the validity of  
20 the survey, wasn't he?---You will have to ask  
21 Mr Moorrees that question.

22 Well what was the context in which he said that?---I believe  
23 it was said in regards to the context of the current  
24 validity of the management action, but I really  
25 unfortunately - I don't know.

26 What do you mean it concerned the validity of the management  
27 action?---I guess it was supporting the theory in  
28 regards to was this truly rare or not, but I am very  
29 vague on recalling that statement.

30 He was supporting VicForests' view that "We need to work out  
31 ways of how to get around these survey results", wasn't

1 he?---I disagree.

2 Have a look on the next page, this is the last page, there's

3 a reference to "amend the forest management plan", do

4 you see that?---Yes.

5 "Need analysis of reserved areas to see if these

6 densities"?---Yes.

7 See that? And if you go to your handwritten notes - your

8 typed notes on page 3, it's said at the top of that dot

9 point "Need an analysis of reserved areas to see if

10 these densities exist throughout the reserves and

11 therefore are not rare, then amend the forest

12 management plan", do you see that?---Yes.

13 So the idea there was that someone would do some surveys in

14 the park, the reserved areas, correct?---Yes.

15 Would establish that densities weren't rare, correct?---They

16 would establish one way or the other.

17 Well that was the purpose of it, wasn't it, to establish that

18 they are not rare?---If that's what they established

19 through finding not rare, that it was abundant.

20 And then amend the plan?---The plan is currently being

21 amended so - - -

22 Well just look - - - ?---It would feed into the forest

23 management plan amendment.

24 Just look at the top dot point, Mr Spencer. It says "Need

25 an analysis if exists and therefore not rare, then

26 amend the forest management plan", do you see

27 that?---As would be good forest management planning,

28 yes.

29 Well, why wasn't complying with the management plan good

30 forest management practice?---This discussion is not

31 regarding the individual compliance of the management

1 plan, it's regarding the application of a section of  
2 the management plan and how applicable it is.  
3 VicForests had hit a hurdle with these surveys and wanted to  
4 get over that hurdle either by undermining the surveys  
5 or amending the management plan, correct?---VicForests  
6 required clarity in regards to what the management plan  
7 was requiring in regards to these surveys.  
8 Now, staying on that page, that last page of your handwritten  
9 notes?---Yes.  
10 You say "Someone said need to place 100 hectares of reserve,  
11 400 by 100 hectares of reserve, issue is the EPBC."  
12 Now, you know the EPBC is a reference to the  
13 Environment Protection Biodiversity Conservation  
14 Act?---That's correct.  
15 And that's a Commonwealth Act?---Yes.  
16 Designed to protect the environment?---I am not very  
17 familiar, but I believe so.  
18 Well, what was the issue about that Act that was being  
19 discussed?---My understanding was the link between the  
20 EPBC's requirement to comply with State legislation,  
21 and that if it was seen that we needed to be sure that  
22 we complied with the management plan, so that we  
23 continued to comply with the EPBC.  
24 Was there a fear that avoiding this prescription would  
25 contravene the EPBC Act?---There was no discussion of  
26 avoiding the prescription, there was discussion of  
27 ensuring the prescription complied with the management  
28 plan so it complied with the EPBC, that's my  
29 understanding.  
30 And a little below there's a reference to Brown Mountain  
31 "prescription, trigger level met, create the SPZ, DSE

1 create the SPZ", do you see that?---Yes.

2 And that I suggest was a pretty straightforward application  
3 of the management plan, do you agree with that?---Yes,  
4 the question was where the SPZ may be created if the  
5 trigger level was met.

6 So the question was not whether there would be an SPZ but  
7 where it would be, is that right?---This is a  
8 description of the sequence should the trigger level be  
9 met.

10 Where else could it be?---Sorry?

11 Where else could the SPZ be?---You would have to ask the DSE,  
12 it's not explicit in the prescription within the  
13 management plan where the hundred hectares would be  
14 located, it is not clear and we would require - and the  
15 DSE would need to create it as stated in those notes.

16 And then the last dot point on that page says "There's no  
17 legislative regulatory requirement for VicForests to  
18 respond to the trigger points"?---That's correct.

19 So if a trigger point is reached in relation to any  
20 prescription, including an action statement, there's no  
21 legislative regulatory requirement for VicForests to  
22 respond, is that your evidence?---That's not what that  
23 says, no.

24 Well, what trigger points are being referred to  
25 there?---Well, the trigger point above requires DSE to  
26 create areas within the SPZ. VicForests cannot create  
27 SPZ, therefore there's no requirement for VicForests to  
28 respond; it requires DSE to respond.

29 You say VicForests can't create a SPZ, is that your  
30 evidence?---That's correct.

31 Is there anything to stop VicForests from not logging an area

1           where a trigger level has been reached?---Sorry, can  
2           VicForests just not undertake its operations? Is that  
3           what you are asking?

4           Yes, if a trigger level is met, yes?---Surely VicForests can  
5           not undertake its operations at any time, but is it  
6           required to, is what is being stated here.

7           Well let's just take that one step at a time. Firstly you  
8           accept that VicForests has the option of not logging  
9           where a trigger level is met?---VicForests has the  
10          option of not logging in any area at a cost.

11          And one of the circumstances in which it would not - could  
12          stop logging is if a trigger level was met?---It could  
13          be.

14          But that's never been a reason for VicForests not to log, has  
15          it?---Well, the trigger level has only been met once,  
16          as you said, so that's this case, and we are yet to  
17          harvest in this area, so I would say we have held off  
18          logging until direction has been given.

19          Directions been given by whom?---The DSE.

20          Well, when did you hold off logging?---Well, we haven't  
21          harvested yet, so - - -

22          So are you saying that you are not harvesting until  
23          VicForests - until DSE gives you a direction?---And DSE  
24          provided us that direction.

25          So your answer is, or your evidence is, I should say, that  
26          although the trigger point was reached, VicForests  
27          would not refrain from harvesting these two coupes  
28          unless DSE put in an SPZ?---That's not correct.

29          Well, in what circumstances would VicForests refrain from  
30          harvesting these two coupes based on this trigger  
31          level?---If directed by DSE that they were reviewing



1 the application of the procedure that required them to  
2 act, VicForests would not harvest until they had  
3 confirmed what their action is, which in this case was  
4 the creation of a reserve outside the coupes and the  
5 direction was given that we were able to harvest.  
6 And in the absence of an SPZ or a direction from VicForests,  
7 the reaching of that trigger level would never, on this  
8 prescription, would never stop VicForests from  
9 harvesting, is that right?---If the reaching of the  
10 trigger level requires DSE to act, VicForests will  
11 engage with DSE in regards to what their action would  
12 be, and when they have given guidance that they have  
13 followed their action and that it doesn't affect the  
14 harvesting, then VicForests would proceed.  
15 Well, just put DSE out of the equation for the moment and  
16 just concentrate on what VicForests would do. If  
17 VicForests is satisfied that a trigger level is reached  
18 in relation to a particular coupe, or coupes 15 and 19,  
19 under this particular prescription it would not itself  
20 not harvest?---That's not correct.  
21 Well, has it turned its mind to whether it should harvest  
22 independently of what DSE says?---I'm sorry?  
23 Has it turned its mind to the question of whether it should  
24 harvest 15 and 19 independently of what DSE says?---It  
25 requires DSE's direction if the trigger level has been  
26 met.  
27 Now, there was a subsequent meeting on 7 May?---Yes.  
28 And I just want to ask you a few questions about that, if I  
29 may. Have you got the minutes there?---Yes.  
30 Or the notes, I should say?---Yes.  
31 You and Mr Potter attended for VicForests and DSE was

1 represented by Incoll, Henry and Arnold,  
2 correct?---That's correct.

3 Now, under the heading of "Purpose", it says "Move towards an  
4 agreed protocol, need to get out of the reactive corner  
5 that we are currently in." Do you see that?---Yes.

6 What was the "reactive corner"?---The reactive corner's in  
7 regards to identification of a threatened species by  
8 individuals or organisations outside the DSE.

9 And why does that place VicForests in a corner?---Because if  
10 VicForests needs to hold its harvesting just before it  
11 occurs, that's disruptive and costly to our processes.  
12 So we would prefer to have a clearer mechanism or  
13 create a mechanism so that that's unlikely to happen.

14 Well, why wasn't the situation that if it receives  
15 information from environmental groups or the public  
16 about the presence of threatened species, that it might  
17 go and try and find out for itself whether the species  
18 are there, why wouldn't it do that?---This meeting and  
19 this sequence of meetings was completely about what was  
20 the appropriate process should we be given information  
21 by members of the public or groups regarding endangered  
22 species and trying to provide clarity regarding what  
23 was the appropriate course of action.

24 But why is it a problem if you get information that  
25 threatened species are present in a coupe?---It's not a  
26 problem in terms of what we receive, it's a problem  
27 regarding clarity, what we should do about it.

28 So it's a problem if you actually have to do something about  
29 it, is that your evidence?---No, it's that there is not  
30 clarity currently regarding the process of verifying  
31 and addressing those findings.

1 Well a little bit below, under the heading "Comments", you  
2 say, at about four paragraphs down: "It is possible to  
3 estimate the resource likely to be applied to address  
4 politically motivated coupe surveys", do you see  
5 that?---Yes.

6 What's "politically motivated" mean in that  
7 context?---Politically motivated in that context is the  
8 potential that surveys are used as a means to disrupt  
9 legal harvesting operations, and the potential that  
10 some surveys may not be legitimate.

11 Well, legitimate, by "legitimate" you mean accurate?---That's  
12 correct.

13 So if they are accurate there's no problem with them, is that  
14 right?---If they are verified there is no problem.

15 We will come to verification in a minute. But you then go  
16 on - the notes go on to say "The pressure created from  
17 surveys will not go away, it has taken a long time to  
18 use mammal surveys as a technique to limit harvesting  
19 operations", see that?---Yes.

20 Now, that's VicForests's perspective, isn't it?---That's not  
21 correct.

22 Well, whose perspective is that?---Well, it was the  
23 perspective of someone at the meeting, I believe that  
24 was someone from DSE. But again I am not 100 per cent  
25 sure.

26 Well, you see these surveys as a technique to limit  
27 harvesting operations, don't you?---Potentially, yes,  
28 sorry.

29 You don't see them as a technique to try and work out whether  
30 threatened species are present in coupes that  
31 VicForests is about to log?---They may also be that.

1 And if they were that, that's an entirely legitimate process,  
2 isn't it?---As I said, if there is a verified finding  
3 and actions need to be taken, then that's what we must  
4 do.

5 And the purpose of this meeting was to try and work out how  
6 they might be verified?---The purpose of this meeting  
7 was the process to be undertaken should the public or  
8 other groups provide techniques, yes, including  
9 verification.

10 Now, you say - I beg your pardon, I said that a number of  
11 times. Below "Pre harvest discussion paper" there's  
12 reference to a discussion paper prepared by Mr Henry,  
13 would you have a look at this document, please? Now,  
14 that's a copy of the discussion paper that was  
15 distributed at the meeting of 7 May, wasn't it?---It  
16 appears to be, yes.

17 I tender that, if Your Honour pleases.

18  
19 #EXHIBIT 55 - Discussion paper relating to pre harvest flora  
20 and fauna surveys.

21 MR NIALL: Now, did you read that, Mr Spencer, at the  
22 time?---Yes.

23 If you go under the heading "Background", at paragraph 3 it  
24 says "Some FFG action statements include prescriptions  
25 for the protection of species and community locations  
26 or habitat in the vicinity of the record", do you see  
27 that?---Yes.

28 And that's your understanding, isn't it?---Yes.

29 And it says in the next paragraph "Application of these  
30 prescriptions is often on a site by site basis as  
31 initiated by discovery of the species"?---I'm sorry,

1           the next paragraph, yes.    Yes.

2        "And in some cases there's a prescribed ceiling."    And then

3           the next paragraph it says:  "There is currently no

4           requirement to undertake surveys for significant

5           species and communities in proposed or approved

6           coupes"?---Yes.

7        And that's DSE - VicForests' position, isn't it?---This is a

8           discussion paper written by the DSE, but we agree with

9           that.

10       Yes.    Now, the next paragraph says:  "The absence of pre

11        harvest survey process exposes DSE and VicForests to

12        the prospect of inadvertent damage or destruction of

13        significant species sites, or advertent damage if a

14        report of a species present has been made.    Negative

15        publicity and accusations of breaches of our own

16        guidelines and possible legal challenges to timber

17        harvesting."    Do you see that?---Yes.

18        And the author says "Pre harvest survey process would

19        decrease the risk of inadvertent damage."    Now, do you

20        agree that the absence of a pre harvest survey process

21        exposes VicForests to the prospect of inadvertent

22        damage or destruction of significant species

23        sites?---Potentially.

24        And do you agree that if VicForests has a report of a species

25        present, then there might be the risk of advertent

26        damage, do you agree with that?---I'm sorry, I don't

27        understand.

28        Well, if VicForests has a report that a species is present,

29        and it proceeds to log, then it has the prospect of

30        damage which it knows will occur?---If there's a

31        verified report that there's a species present,

1 VicForests will comply with the management plan of the  
2 action statements and apply its prescriptions.

3 I am not talking about compliance with action statements, I  
4 am talking about - and this paragraph is talking about  
5 - damage or destruction of significant species  
6 sites?---I'm sorry, I understand the question to be if  
7 VicForests knew that a specie was there and ignored  
8 that.

9 Yes?---Is that the question?

10 Yes?---If VicForests chose to break the action statement and  
11 the management plan, there may be consequences but I  
12 don't understand, is that the question?

13 No, I understood your evidence to be that mere - take the  
14 arboreal mammals - mere presence of a species is not  
15 enough, it has to result in the creation of an SPZ, is  
16 that right, in order to trigger a prescription?---If  
17 there's a prescription and it needs to be applied,  
18 VicForests will wait for it to be applied and then  
19 continue, as was the case with the arboreal mammals.

20 Well, let's take the arboreal mammals on coupes 15 and 19.  
21 Now, would you agree that if VicForests logged coupes  
22 15 and 19 tomorrow, there would be the prospect of  
23 damage or destruction of a significant species site for  
24 those two species of glider?---I am not quite clear -  
25 exactly clear what "significant" means in terms of the  
26 question. I am clear that if we logged tomorrow we  
27 would adhere to the prescriptions.

28 I am not asking about prescriptions, I am simply asking you  
29 about the effect that logging will have on some  
30 animals. And do you agree that if VicForests logs 15  
31 and 19 tomorrow, there's a prospect of damage or

1 destruction of a significant species site for the two  
2 species of glider?---I'm sorry, I am not in a position  
3 to say is that a significant specie site. There's too  
4 much interpretation in the question, I'm sorry.

5 Well, you are not in a position to know because you don't  
6 have the expertise to identify a significant specie  
7 site for the gliders?---That's correct.

8 Did VicForests, or after getting this report on or before 7  
9 May, has it ever made any enquiries about whether  
10 coupes 15 and 19 are significant species sites for the  
11 two gliders?---Certainly we have made enquiries with  
12 the DSE in regard to how the prescriptions will be  
13 applied.

14 But has it made its own enquiries other than speaking with  
15 DSE about whether coupes 15 and 19 are a significant  
16 specie site?---No, not outside DSE.

17 And has it asked DSE whether 15 and 19 are a significant  
18 specie site?---I haven't been involved in such a  
19 discussion, no.

20 HIS HONOUR: Well, you have been told by Mr Henry that it's  
21 very rare, that's what the notes say?---Certainly it  
22 indicates Mr Henry said that it's rare.

23 Yes.

24 MR NIALL: Just turning back to the - and what Mr Henry  
25 suggested as a proposed method of reducing the risk was  
26 a pre harvest survey process, correct?---Amongst other  
27 proposals.

28 Yes. Let's just concentrate on Mr Henry's proposal. He  
29 said "Proposed method. Survey should target species  
30 and communities which have a prescriptive requirement."  
31 Do you see that?---Yes.

1 "And secondly are known to or are likely to occur in the same  
2 forest type and geographic area"?---Yes.  
3 "And able to be detected using readily applicable  
4 method"?---Yes.  
5 "And surveys should target coupes which are likely to support  
6 the surveys that have not been previously harvested and  
7 are in forest types which are likely to be  
8 controversial", do you see that?---I see that in the  
9 notes, yes.  
10 Now, in relation to the first three points, prescriptive  
11 requirements, known or likely to occur, and readily  
12 applicable, Mr Henry identifies the long footed  
13 potoroo, do you see that, under species with  
14 prescriptive requirements?---Yes.  
15 Orbost spiny crayfish?---Yes.  
16 Powerful owl and sooty owl?---Nests and re sights, yes.  
17 And the quoll?---Den sites, yes.  
18 And the giant burrowing frog?---Yes.  
19 In relation to each of those species, I suggest, that they  
20 have got prescriptive requirements, they are known or  
21 likely to occur in the same forest type as the four  
22 Brown Mountain coupes, and they are able to be detected  
23 using a readily applicable method, which has a  
24 reasonable likelihood of detecting the species if  
25 present, do you agree with that?---I am not aware of  
26 the readily detectable, but I agree with the other  
27 parts of the question.  
28 Well, go over on to page 3, under triage of species and  
29 community target survey, the author says: "The species  
30 involved are those for which there is a reasonably  
31 quick and reliable survey method", and he identifies



1           those, see that?---Yes.

2       And he doesn't bold the quoll or the giant burrowing frog, do  
3           you see that?---Yes.

4       Now, in relation to the quoll, are you aware of the evidence  
5           that Dr Belcher gave in this proceeding that there is a  
6           relatively simple method of surveying which if  
7           conducted at the right time of the year would indicate  
8           presence to a degree of accuracy between 70 and 80 per  
9           cent, are you aware of that evidence?---No, I am not,  
10          though the prescription is not in regards to the quoll  
11          itself, it's in regards to den sites, which I believe  
12          Mr Henry was suggesting are difficult to locate.  
13          There is no prescription in regards to the quoll per  
14          se.

15       So if you see a quoll in the site, it doesn't have the  
16          protection, but if you see a latrine it does, is that  
17          right, is that your understanding?---I would need the  
18          management plan in front of me to read that, so the  
19          prescriptive prescription is my understanding is for  
20          the latrine site.

21       Well, the position was that at all events on 7 May is that  
22          Mr Henry had suggested a pre harvest survey process  
23          which would decrease the risk of inadvertent damage and  
24          proposed a model, do you agree with that?---He proposed  
25          that that may be one road that the DSE and VicForests  
26          or VicForests may go down in preparing what was the  
27          purpose of this group was to develop for senior  
28          management and the government something to define the  
29          way forward in regards to applying the prescriptions.  
30       And that model he suggested as one of them, hasn't been  
31          accepted by VicForests, has it?---That model was one of

1           many, and it has yet to be - the best avenue is yet to  
2           be decided by the DSE and/or VicForests.  
3        It's not been accepted by VicForests to date, has it?---It's  
4           certainly not our policy at the moment, no.  
5        And it's not been accepted by DSE to date?---That's my  
6           understanding.  
7        Now, going back to the notes of 7 May, just a couple more  
8           questions, if I may, under the heading - have you got  
9           that, Mr Spencer?---Yes.  
10       Under the heading "Background:   prescriptions have  
11           increasingly moved from management plans to action  
12           statements.   There is no specific legal requirement to  
13           undertake surveys.   They have been undertaken in the  
14           past in response to stakeholder issues.   This is  
15           ultimately so harvesting can be undertaken."   What is  
16           meant by that?---What's meant by that is if there are  
17           surveys in areas of park or identification of species  
18           in areas that are away from harvesting, there's not  
19           necessarily immediate response, though if harvesting is  
20           to continue a verification of the survey result is  
21           needed in a timely manner, therefore what's being  
22           stated there is that the mechanism to trigger surveys  
23           being undertaken by DSE has been in only response to  
24           areas where harvesting - where there is a time pressure  
25           to respond.  
26        And over on the next page, page 6, under the heading  
27           "Response to fauna detection", the topic being  
28           addressed is what will be credible report which would  
29           trigger further investigation, is that right?---That's  
30           correct.  
31        So a non credible record would be a sighting, is that

1 right?---That's what this is indicating, yes.

2 And so the process was that if it was merely a sighting it  
3 would not be credible and DSE would respond re lack of  
4 information, is that right?---Would not respond, yes.

5 Would not respond or would respond?---That it wasn't a  
6 verified sighting if it was not credible, therefore  
7 this is considering that sightings alone would not be  
8 considered a verified sighting and therefore would not  
9 trigger a response.

10 All right. And then in order to be treated as a credible  
11 report it needed to be documented with survey  
12 techniques, grid references, date, time, who the  
13 observer was, and if survey at least one kilometre on a  
14 track or the bush. So that would need to be the  
15 starting point for a credible report, is that  
16 right?---This was the discussion at the time, yes.

17 And over on the next page, it says "Proposed process, can  
18 there be a cut-off prior to harvesting to remove the  
19 need for a pre harvest survey?" In terms of the impact  
20 on the species of animals, the cut-off prior to  
21 harvesting is of no significance, is it? Sorry, I  
22 withdraw that. Just going on to - the need for a  
23 cut-off prior to harvesting is entirely a question of  
24 logging logistics and convenience, is it not?---About  
25 certainty of harvesting, that's correct.

26 And then it's said the proposed process, would the  
27 stakeholder indicate high density area; (2) distribute  
28 correspondence; (3) DSE review report density sighting  
29 for credibility check. If not credible, as you have  
30 just said, DSE will respond and that's the end of it.  
31 If credible, survey needs to be undertaken. And if

1           credible, harvesting put on hold?---Yes.

2       So the process was that even with a credible report, a survey  
3           would need to be undertaken?---That was what was being  
4           proposed, yes.

5       What would be the purpose of a survey?---To confirm the  
6           findings of the report.

7       So if you had a giant burrowing frog which had been seen in a  
8           coupe and it was documented with all the survey  
9           techniques, grid references, date, time, who the  
10          observer was, where it was, that would simply prompt a  
11          survey by DSE, is that right?---Clearly this discussion  
12          was at a broad high level above specific species which  
13          the purpose of the meeting was to build a framework and  
14          then detail down to the issues you are reaching.    The  
15          broad approach in four dot points was that this would  
16          be the approach.    It may not be applicable to all  
17          species at all times, and that work is yet to be  
18          undertaken.    So I can't specifically reference the  
19          frog, but the broad approach was that was the intent.

20       Well, the reference to a survey needing to be undertaken,  
21          what I suggest is that's not about confirming the  
22          sighting, it's about replicating a sighting, isn't  
23          it?---That's certainly the broad approach being  
24          indicated in this proposed process, yes.

25       So in order to get protection for a giant burrowing frog  
26          under this process, it would need to be observed at  
27          least twice, is that right?---Again, this is not a  
28          species-specific approach, this is a general approach  
29          which may not be applicable to all species, but the  
30          discussion was at a high level framework level.    So to  
31          answer your question on a specific species is very

1           difficult.

2       And at the high level, the purpose of those processes was to

3           make it as hard as possible to establish presence of a

4           threatened fauna in a - - - ?---That's not correct.

5       Attached to that document is a table which sets out the

6           advantages and disadvantages of surveying, do you see

7           that?---Yes.

8       And surveying all coupes under "Advantages", it said

9           "Comprehensive", do you see that?---Yes.

10      And I won't read them, but it sets out the advantages.    And

11           under "Disadvantages" it's very expensive, species

12           return, low value for money, hard to withdraw once

13           started, time consuming, risk of reduced resources

14           available, may not be comprehensive, not broad scale,

15           landscape species still exposed to new report, do you

16           see that?---I'm sorry, the last three dot points don't

17           relate to all coupes.

18      Okay, they might relate - - - ?---I'm sorry, without the

19           lines it's difficult.

20      Yes.    But the point is that this is a table starting with

21           all coupes being surveyed and going down to the bottom

22           which is "no survey, all coupes harvest", do you see

23           that?---Yes.

24      And it starts with "very expensive, risk of reduced resource

25           available" right down to "no survey", which provides in

26           the second column as an advantage it's cheap and it's

27           got more certainty with VicForests?---It includes a

28           number of options.    I don't think it's sequential down

29           from a lot to less, because you will note the third one

30           has as much survey as the first one.

31      Well, certainly - let's just compare targeted triage versus

1 no survey?---Certainly that's the sequence, yes.  
2 Well, let's just compare those for one minute. You have got  
3 targeted triage and the disadvantages or the advantages  
4 are set out, that there's species targeted, high  
5 quality species distribution data, but the  
6 disadvantages are that it's time consuming, risk of  
7 reduced resource availability, not targeted at logging  
8 coupes, costly, still exposed to political risk. Now,  
9 comparing targeted triage - - - ?---I'm sorry, again  
10 you are mixing the two paragraphs.

11 HIS HONOUR: Yes.

12 MR NIALL: Well, where does targeted triage stop?---Where the  
13 break is. So it stops at "risk of reduced resource  
14 availability". Sorry, the headings in the left are  
15 centered, not at the top.

16 HIS HONOUR: Well, I take "all coupes" to relate to the  
17 entries down in advantages down to "relatively quick",  
18 which is the first line relating to targeted  
19 triage?---That's correct.

20 And then I take "broad scale monitoring" to commence - - -  
21 ?---At "high quality species distribution".

22 "High quality species distribution data", and under the  
23 heading "Re courses", 50 to 200 per year, and then  
24 "Responsive" is the bottom line?---That's correct.

25 Yes.

26 MR NIALL: Now, just a simple point there, Mr Spencer, is  
27 that the process VicForests has chosen is not to  
28 survey, correct?---Apparently VicForests is under the  
29 status quo as this discussion has not come to  
30 conclusion, that's correct.

31 The status quo is no survey?---That's correct.

1 And that's because it's cheap and it's got more certainty for  
2 VicForests?---You can't relate what we are doing today  
3 with this table, as no decision or finalisation of this  
4 discussion has been come to.

5 HIS HONOUR: At the moment aren't you in the bottom  
6 line?---We are, yes.

7 Yes. At the moment what happens is responsive to specific  
8 issues as they may arise?---That's correct.

9 Yes. What does "bust uncertainty" mean?---Most, I'm sorry.  
10 It should be "most uncertain"?---I would have thought so.

11 Yes, I wondered about that. And "10 to 30 coupes per year  
12 potentially", it could be that high? The responsive  
13 approach could still require 10 to 30 coupes per year  
14 to be addressed?---That's what we were theorising, that  
15 was an estimate.

16 Yes.

17 MR NIALL: And in terms of the responsive approach,  
18 VicForests is itself not conducting surveys, is  
19 it?---VicForests staff are not conducting surveys, no.

20 HIS HONOUR: Well, the targeted triage category likewise  
21 estimates perhaps 20 coupes per year, but it seems to  
22 envisage six person days per coupe specifically, is  
23 that right?---That's correct.

24 I see, yes.

25 MR NIALL: Now, do you have a copy of your slide pack,  
26 Mr Spencer?---I do.

27 It's Exhibit L, Your Honour. Can you go to slide 41,  
28 please?---Yes.

29 And this relates to coupe 19, is that right?---Yes.

30 And the purpose of this slide is to demonstrate pictorially  
31 how the coupe overlay process intersects with data on

1 the GIS?---That's correct.

2 And in this particular intersection it's a lace goanna, do  
3 you see that?---Yes.

4 And it says it was seen - - -?---Yes.

5 And I will ask you to accept that the record indicates that  
6 it was seen in November 2001. You will see that from  
7 page 14?---2000.

8 2000 and 2001, there were two sightings, I beg your  
9 pardon?---Yes.

10 Now, but only one seems to be on the GIS at slide 41. So is  
11 it the position that the current position is that the  
12 overlay process uses detections of species which are  
13 simply based on a sighting and are up to 10 years  
14 old?---The overlay process identifies hits within the  
15 threatened fauna layer, some of which are well older  
16 than 10 years old and have been collected by a variety  
17 of mechanisms, including sightings, call play-backs and  
18 other methods, that's correct.

19 This one seems to be seen?---That's certainly what this  
20 appears to say, yes.

21 So that suggests that the coupe overlay process as it's  
22 currently done will look at detections which are simply  
23 a sighting, including sightings which are a decade old,  
24 but will not look at current records unless they are  
25 verified, is that right?---The coupe overlay process  
26 checks the threatened fauna layer provided by the DSE.  
27 What the DSE include in that is up to the DSE. We use  
28 it to identify where there are hits with that layer.

29 And if you go to slide 53 - - -

30 HIS HONOUR: So if the DSE adjudged that a sighting is  
31 sufficient evidence, then you would proceed on that



1 basis, is that right?---That's correct.

2 Yes, all right.

3 MR NIALL: But then why did you spend all that time on 7 May  
4 trying to work out a protocol for what would be  
5 accepted and not accepted?---Because there's - I guess  
6 the actions, the sightings within the threatened fauna  
7 layer don't necessarily trigger an action. Some of  
8 the sightings which are old and have been only call  
9 play-backs, when provided to DSE as a part of the TRP  
10 process, they evaluate the relevance of that sighting  
11 and provide us direction in regards to the application  
12 of the prescriptions or otherwise. Because the  
13 threatened fauna record contains such a variety of  
14 known sightings that some of them are very historic.  
15 In regards to the process on May 7, we are trying to  
16 address what happens if it is not on that threatened  
17 fauna layer and it's very recent, and it needs a timely  
18 response due to the imminent commencement of  
19 harvesting. That there isn't a clear process.  
20 Whilst when we use this layer it's the TRP approval  
21 process which we have mentioned takes some months and  
22 provides opportunity to discuss the validity and the  
23 reaction and what is the appropriate prescription. A  
24 sighting just before harvesting needs a timely  
25 response, and that's what this was discussing.  
26 In terms of coupe - well, if it needs a timely response, then  
27 why erect such a complex system of  
28 verification?---Well, this is a simplification we were  
29 attempting.  
30 Well, a simplification from the current system?---It's not an  
31 easy - it's not an easy issue to deal with in regards

1 to a simple process. So while this may appear  
2 complex, it is - we were proposing what may be a clear,  
3 transparent and simple process.

4 Well, have a look at slide 53, please?---Yes.

5 And this relates to coupe 26, at the northern end of the  
6 block?---Yes.

7 And this is a reference to a diamond dove, which it appears  
8 was seen in February 1999, and you get that from map 14  
9 on the agreed - - -?---Yes.

10 And as I understood the reason this chart was made was to  
11 show how detailed the process is and how careful the  
12 process is and how seriously VicForests takes records,  
13 is that not right?---This process shows the desktop  
14 analysis involves field captured data that's captured  
15 over some time, to demonstrate that, the power of  
16 undertaking spatial desktop analysis in the process,  
17 yes.

18 So the desktop analysis captures a diamond dove seen in  
19 February 1999, but it didn't capture the hair tube that  
20 was discovered in January 2009 and which had been  
21 verified by Dr Triggs, is that right?---If the DSE  
22 hasn't included into their layer - and the layers from  
23 DSE are not fixed, they provide us updates regularly  
24 and we have a process of managing those updates. But  
25 if that hair tube information wasn't deemed by DSE to  
26 be included in this layer, then no, it hasn't picked it  
27 up because it wasn't available information through this  
28 process.

29 So VicForests would be happy to rely on 1999 data, but it's  
30 not interested in seeing whether there's any more  
31 recent relevant data in relation to the coupes?---We

1 are happy to rely on the data provided by the  
2 regulator.

3 And if you go to 63, there's a reference there to - I have  
4 asked you some questions about the SMA, but right at  
5 the top in the middle there are two dots or two hits  
6 for the threatened fauna, slide 63, do you see  
7 that?---Yes.

8 And if you look at map 14 of the agreed maps, the more  
9 northern one of those appears to be a powerful owl,  
10 October 1979?---Yes.

11 And again VicForests examined that record but didn't turn its  
12 mind to the fact that Dr Bilney had heard a powerful  
13 owl and a sooty owl in January 2009, is that  
14 right?---In relation to that record, it was provided to  
15 DSE as part of the approval process, and DSE have  
16 confirmed that there was no action for VicForests to  
17 take in regards to the powerful owl, that powerful owl  
18 sighting. VicForests can only respond when there's a  
19 prescription to apply.

20 Why can it only respond when there's a prescription, why  
21 can't it respond when it gets information about the  
22 presence of a threatened species?---We can respond by  
23 discussing with DSE what our obligations are, we can't  
24 create additional prescriptions within DSE documents.

25 But VicForests could decide not to log, could it not?---It's  
26 not VicForests' role to decide the rules which we work  
27 within, it's our role to apply them.

28 Now, I want to ask you now about a different topic, and that  
29 is the sighting of the long footed potoroo in August  
30 2009 and your involvement in that process. Now, as I  
31 read your affidavit you don't refer to it - -

1            -?---Excuse me - - -  
2    Your involvement in that process, is that right?---That's  
3            correct.  
4    All right.    But Mr MacDonald refers to - his affidavit  
5            refers to various steps that you - or the involvement  
6            that you had.    Now, you know that the DSE was provided  
7            with a video footage of 5 seconds and a still photo of  
8            what was said to be a long footed potoroo in coupe 15,  
9            do you know that?---Yes.  
10   And you also knew, didn't you, that on 25 August a Mr Trotter  
11           of the DSE had attended the site where the photo was  
12           said to have been taken and confirmed the location of  
13           that site, do you know that?---Prior to the last three  
14           weeks I actually did not know that, I'm sorry.  
15   Now, your first involvement, as I understand it, was the 8th  
16           September when you were asked to review some maps for a  
17           proposed SMZ and retained potoroo habitat, is that  
18           right?---Some maps regarding to a proposed SMZ which  
19           contained retained habitat, yes.  
20   Now, could the witness be shown exhibit or attachment CM 42  
21           to the affidavit of Mr MacDonald?---Thanks.  
22   Does Your Honour have a copy?  
23   HIS HONOUR:    I do.  
24   WITNESS:    Sorry, what number was that?  
25   MR NIALL:    42?---Yes.  
26   Now, that's an email that you sent at 5.20 pm on 8  
27           September?---That's correct.  
28   At that point you had been provided with two proposed maps,  
29           hadn't you?   And I suggest the first of those ones was  
30           CM 39 - - -?---Sorry, I agree I was provided with those  
31           two maps, I am just checking the sequence of events.

1 Yes, I believe so.

2 And the second of the maps which had come from DSE is at CM  
3 40?---Yes.

4 So you had been asked by Mr MacDonald, had you, to look at  
5 the two versions of the proposed habitat  
6 prescriptions?---Yes.

7 Now, going to your email, that deals with the DSE response.  
8 But can I take you to CM 39, which was the one that  
9 VicForests had been prepared. Now, this had been  
10 prepared - CM 39?---Yes, sorry, I am just confirming  
11 what I was looking at. Yes.

12 Now, Mr MacDonald says in his affidavit that this was  
13 prepared by Larissa Murray?---Yes, now I understand  
14 what I am looking at, yes.

15 And she's a forester employed by VicForests?---Formerly  
16 employed, yes.

17 She's no longer there?---That's correct.

18 And she doesn't have any training or qualification in  
19 relation to the ecology of the potoroo, does she?---No,  
20 not that I understand.

21 And do you know that she'd been asked by Mr MacDonald to  
22 prepare a map representing a proposed SMZ?---I can only  
23 assume that from the fact that the map was prepared by  
24 her.

25 Now, you will see the map contains a 100 metre buffer on  
26 Brown Mountain Creek, do you see that?---Yes.

27 And that was what was proposed to be the retained LFP  
28 habitat, wasn't it?---The problem with this map is it's  
29 unclear that that's the intent, but one can interpret  
30 that.

31 Well, that's the interpretation you made, isn't it? Because

1           you say in your email on 8 September that - at the  
2           bottom: "It could appear to me that there is capacity  
3           to make an FMZ that is larger than 150 hectares by  
4           incorporating existing park and then focusing the LFP  
5           retained habitat in the gullies with 100 metre buffer  
6           and park areas", do you see that?---My comment is on  
7           the DSE proposal, not on the VicForests map.

8       Yes, but your proposal or your suggestion is to focus the LFP  
9           retained habitat in the gullies with 100 metre  
10          buffer?---As defined in the action statement.

11       Well, there's a 100 metre buffer set out in the action  
12          statement, is there?---No, but the action statement  
13          clearly defines that the lower slopes and hydrology  
14          should be preferred for retained habitat where  
15          possible.

16       We will come to that, but I just want to ask you some  
17          questions about this 100 metre buffer. By this stage,  
18          which is September, VicForests had agreed to the  
19          imposition of a 100 metre buffer, hadn't it?---I  
20          believe so.

21       It did that in June 2009?---I believe so.

22       And did you know that Mr Long had made an assessment of the  
23          impact of 100 metre buffer, a rough assessment of the  
24          impact of the impact of 100 metre buffer as early as  
25          January 2009?---No, I didn't know that.

26       But certainly by June 2009 VicForests already knew that it  
27          was committed to 100 metre buffer, correct?---I believe  
28          so.

29       And so there was a real advantage in putting the LFP retained  
30          habitat in that buffer, wasn't there?---It's certainly  
31          sound forest management planning to use multiple

1 purposes for reserves, and throughout the management  
2 plan and all forest management planning the concept of  
3 multiple use reserves is well engrained. Yes, if a  
4 buffer was already there, and I believe the action  
5 statement for the long footed potoroo outlines that if  
6 reserves already exist they should be used, utilised  
7 for the retained habitat. Therefore to adhere with  
8 the action statement and the intent, the use of the  
9 buffer is completely appropriate.

10 HIS HONOUR: Well, can I just say that as I read CM 39, the  
11 normal special management zone as tagged at the bottom  
12 of 160 hectares, appears to be the whole of the yellow,  
13 is that right or not? The whole of the area - -  
14 -?---It's certainly what appears to be. The map is  
15 very difficult to interpret.

16 Well, that seems to be about the right area though, doesn't  
17 it?---Up towards the ridge there, yes.

18 So what's labelled as a zone is what's hatched as yellow,  
19 even though that appears to - no, I won't go any  
20 further. That appears to be what's labelled as a  
21 zone, and then in addition there's a 100 metre special  
22 management zone in terms of colour, being the buffer,  
23 is that right?---Not in addition, inclusive of.

24 I see, thank you. Yes.

25 MR NIALL: What this map represents, doesn't it, Mr Spencer,  
26 is that firstly you have 160 hectare special management  
27 zone which is all of the yellow hatching,  
28 correct?---That's certainly what it appears to  
29 represent, yes.

30 And logging can - I withdraw that. And within that there  
31 is also delineated by the buffer what was intended to

1 be retained potoroo habitat?---As per the prescription,  
2 that's what this certainly appears to represent, though  
3 admittedly badly.

4 And the consequence of that would be that there could be  
5 logging in the SMZ but not in the retained  
6 habitat?---As per the prescription in the action  
7 statement, yes.

8 So what this was showing was that the 100 metre buffer, there  
9 would be no logging, correct?---Broadly that's what it  
10 appears to be showing.

11 But logging could occur in the rest of the SMZ,  
12 correct?---With the limitations outlined within the  
13 action statement.

14 And in response to that, DSE suggested CM 40,  
15 correct?---Sorry, my understanding is that there were a  
16 number of responses from the DSE from different  
17 sections, one of those was CM 40.

18 But that was the one that you had to look at on 8 September,  
19 wasn't it?---Certainly - yes.

20 Because it's attached - - -?---Yes.

21 As exhibit attachment 3. So - - -

22 HIS HONOUR: CM 40 and the other plans broadly of that  
23 format have Legges Road in the wrong place, is that  
24 right?---No, that's not correct. The incorrect is the  
25 streams - the map streams don't run as far to the west  
26 up Brown Mountain as is indicated in the map. Is that  
27 where your confusion lies?

28 No, it's not. If you look at CM 40 and you look at the  
29 contours?---Yes.

30 Coming back from the stream, it's quite clear that what you  
31 have just said is not right, isn't it?---Sorry, you are



1 correct, now that I recall. The alignment of Legges  
2 Road was updated in more recent roading layers, and you  
3 will note that VicForests is using the most recent, but  
4 the DSE person has used the old alignment, Legges Road  
5 is incorrect, I'm sorry. You are correct.

6 MR NIALL: And you can see that more clearly on CM 41,  
7 Mr Spencer, because CM 41, as Mr MacDonald says in his  
8 affidavit, tried to superimpose the coupe boundary on  
9 the DSE diagram, and that would have Legges Road  
10 running through the coupe?---That's correct.

11 And we know that not to be the case?---Yes, that's correct.  
12 I'm sorry.

13 But for the purposes of your response to that suggestion, the  
14 location of Legges Road wasn't material, I suggest.

15 And if you go to your email, you say - - -?---Sorry,  
16 which was my email again, 39?

17 42?---Yes.

18 "Had a look at alternate version", two key points, and the  
19 alternate version is the one that we have just been  
20 looking at. I am not sure why it doesn't utilise  
21 existing park to the north, but it includes extensive  
22 areas of mid to late '90s regrowth. Proposed LFP  
23 retained habitat as mapped also includes areas of 1990s  
24 harvesting, which I am sure they will be viewed well.  
25 An LFP retained habitat 90 metre stream buffer also  
26 extends well up the slopes beyond what the permanent  
27 stream extends. This appears contrary to the intent  
28 of the action statement, prescription will remain in  
29 the lower slopes. And that refers to what you said a  
30 few moments ago in your evidence, wasn't it, that you  
31 say that there's a very clear prescription in the

1 action statement?---I didn't say there's a very clear  
2 prescription. There is a prescription that provides  
3 clear guidance in some respects.

4 Could the witness be shown volume 2 of the agreed bundle,  
5 please. Could you go to page 554?---Yes.

6 That's what you are referring to regarding the relevant  
7 prescriptions in the action statement?---That's  
8 correct.

9 And is the relevant passage you are talking about paragraph  
10 5?---Yes.

11 And it says "The retained habitat will include the best LFP  
12 habitat in SMZ", do you see that?---Yes.

13 "Which will generally be in gullies and on lower sheltered  
14 slopes"?---Yes.

15 What assessment did you make - I withdraw that. You don't,  
16 as you have said to His Honour, have any qualifications  
17 or experience in ecology of the long footed potoroo, do  
18 you?---No, that's correct.

19 You don't have any expertise in determining what's the best  
20 LFP habitat, do you?---That's correct.

21 And it does not say, does it, that the best habitat will  
22 always be in a gully and a lower sheltered slope?---No,  
23 it says it generally will be.

24 Yes. And that it would obviously, I suggest, need to be a  
25 question of looking at the site, would it not?---No  
26 doubt, yes.

27 And that would be a question on which you would require  
28 expertise, would it not?---That's correct.

29 So when you said in your email of 8 September that the DSE  
30 proposal appears contrary to the intent of the action  
31 statement, prescription or remaining on the lower

1 slopes, you had no basis for that, did you?---I had a  
2 clear basis that it says "generally gullies and on  
3 lower slopes". The maps that we are looking at were  
4 desktop bases. This is the first time this  
5 prescription was being applied in a forest. And what  
6 we were working on with these maps was trying to  
7 discover the intent of the prescription and how it's to  
8 be applied in the forest. And unfortunately these  
9 things are not necessarily easily applied on the  
10 ground, and if the first thing you do is walk out into  
11 the forest without direction as to how it may be  
12 applied, it can lead to confusion and to an inefficient  
13 process. What we were working at here, admittedly  
14 well removed from the forest, was the concept of how  
15 this prescription should be applied in the forest in  
16 this case. And yes, the guidance I was using was that  
17 it says that we should use generally gullies. It also  
18 says that where possible - I will look for it - "these  
19 areas will retain their existing reservation and zoning  
20 status." It can include part of the reserve, areas  
21 that are already reserved. So I am suggesting that in  
22 terms of a desktop exercise to meet the intent of what  
23 the prescription says, that was my reading of the  
24 prescription.

25 Let's be perfectly clear, Mr Spencer. The reason that you  
26 went for the gullies and the 100 metre buffer was  
27 because VicForests had already committed to it, was it  
28 not?---As I have said, it is good forest management  
29 practice that if there's already a reserve that the  
30 basis of reserving is to use that as a starting point.  
31 Multiple use reserves are sound forest management

1 practice, and yes, that clearly is the starting point  
2 for any consideration.

3 The starting point was the 100 metre buffer, correct?---No,  
4 the starting point was considering, as I have noted in  
5 my email, the existing reserves which included the  
6 buffer and the associated parks adjacent to the coupes.  
7 At 8 September did you think you'd better obtain some advice  
8 about trying to identify the best LFP habitat?---The 8  
9 September was about working with DSE to come up with  
10 the concept of the interpretation so that field  
11 inspection can be undertaken, as clearly with the DSE,  
12 at this point it was about how is the prescription to  
13 be interpreted. And often with these prescriptions,  
14 especially on their first placement in the forest, it  
15 requires some consideration as to what the intent was,  
16 because it's not clear cut, no doubt.

17 All right. Well, can you go to CM 46, please. Now, this  
18 is an email that's saying it is the most recent as 9  
19 September 3.52 from you to Lee Miezis, and I want you  
20 to turn over the page and you say - this is an email  
21 from you at 11.44: "Lee", that's Lee Miezis,  
22 correct?---That's correct.

23 "Thank you for the updated map. I think the general  
24 approach of where the SMZ have retained habitat located  
25 is good. However, I do not believe that it is the  
26 action statement"?--- I'm sorry, which number, I'm  
27 sorry? Is it 46?

28 CM 46. And over on the second page?---I'm sorry.

29 Is your email 9 September 2009 at 11.44?---I'm sorry, yes, my  
30 mistake.

31 And there's a reference to the updated map. Now, I just

1 want to try and identify the reference to the updated  
2 map that you are referring to. Was that attached in  
3 that exhibit of the fold-out map?---No, the fold-out  
4 map is a map created by the DSE, the A4 map is the map  
5 created by VicForests.

6 Going to your email, you say "Thank you for the updated  
7 map"?---Yes, I'm sorry, my mistake, yes.

8 Okay. So what you have got as at 9 September 2009 at 11.44  
9 is two proposals. The first one is the DSE proposal  
10 which is the A3?---Yes.

11 And the second one is the VicForests proposal which is the A4  
12 within that exhibit, is that right?---That's another  
13 proposal, yes, that's correct.

14 And what you are doing, going back to your email, in points  
15 1, 2 and 3, is you are responding to the DSE map, and  
16 then you go on to say "The attached map has been  
17 prepared to highlight the above issues", do you see  
18 that?---I'm sorry, I was distracted, I'm sorry.

19 I am just trying to identify the two proposals as at 9  
20 September at 11.44. Firstly there's the DSE updated  
21 map?---Yes.

22 The A3?---Yes.

23 And you also say in your email that you attach a map, the  
24 attached map has been prepared?---Yes.

25 So if we look at firstly the DSE map, which is the A3?---Yes.

26 And you say "The action statement prescription says within  
27 each SMZ at least one third will be protected."

28 Looking at the map, is your point there that the buffer  
29 zone is outside of the SPZ?---The SMZ?

30 The SMZ, I beg your pardon?---That's correct.

31 All right. And then you say "When the long footed potoroo

1 retained habitat is included in the SMZ it's 220  
2 hectares"?---That's correct.  
3 "One-third would require 73.3"?---Yes.  
4 "On the map provided the long foot retained habitat is 51".  
5 So does that mean you would need to reduce the  
6 SMZ?---Well, you can take two approaches. You can  
7 include - increase the retained habitat or decrease the  
8 SMZ. If you have been complying with the requirement  
9 to follow recognised landscape features such as ridges,  
10 spurs and watercourses.  
11 But if you increased the long footed potoroo retained  
12 habitat, which you said was one option, what would be  
13 the problem with that?---There is no problem, and my  
14 map in fact does that.  
15 And then you say: "The proposed long footed retained habitat  
16 contains ... (reads) ... is unlikely to be an issue  
17 for potoroos. However, considering public perception  
18 I would suggest that recent harvesting not be included.  
19 The attached map has been prepared to highlight the  
20 above issues." Now, again at this point, no one at  
21 VicForests has tried to find out what would be the best  
22 LFP retained habitat, have they?---Considering the  
23 backward and forward on the concept, no one had been  
24 sent to the field at this stage, no.  
25 Why are you trying to work out the concept and the mapping  
26 before you even identify what the best habitat  
27 is?---It's a large area, some 200 hectares, which will  
28 take a considerable amount of field work walking around  
29 it. To target where people are to look and assess the  
30 habitat, we need to firstly determine what we are  
31 asking people to look at, and I guess common process is

1           that we agree between the two organisations as to what  
2           the concept is so that we can best leverage value out  
3           of driving the considerable distance and spending  
4           considerable time in the forest in Brown Mountain.

5           That's what we were doing.

6   HIS HONOUR:     Mr Niall, I think we will give Mr Spencer a 5  
7           minute break.   He has been going for over an hour and  
8           a half.

9           (Short adjournment).

10   MR NIALL:    Mr Spencer, could you go to Exhibit CM 46,  
11           please?---Yes.

12           And your email at 11.44.   Got that?---Yes.

13           And the purpose of your email was to comment on a map that  
14           Mr Miezis had sent you?---Yes.

15           That map was an update on the earlier DSE version which - -  
16           -?---I wouldn't characterise it as an update, I would  
17           characterise it as a different proposal.

18           Well, one of the differences between the map attached to your  
19           email and the earlier DSE proposal was that the western  
20           lateral protections had been removed?---That's correct.

21           Does Your Honour have it?   And the western lateral extension  
22           of the retained habitat would have eaten into the coupe  
23           into an area that was not covered by the existing 100  
24           metre buffer, correct?---Portions of it may have, yes.

25           And so that the western extension up the slope, or along  
26           those lines, would have resulted in a loss of  
27           harvestable area to VicForests compared to its current  
28           position of just the 100 metre buffer,  
29           correct?---Clearly, yes.

30           And the purpose of this exercise from your point of view was  
31           to minimise the impact of the proposed habitat zone on

1 planned harvesting, will it not?---The purpose of the  
2 exercise was to appropriately apply the prescription by  
3 balancing the needs of harvesting, yes.

4 From your perspective, bearing in mind that you have no  
5 ecological experience or knowledge, was to minimise the  
6 impact of the proposed habitat zone on the planned  
7 harvesting?---Our perspective was about determining how  
8 we best apply the prescription within the action  
9 statement.

10 And it would be best applied from your perspective by  
11 minimising any loss of timber area?---Clearly, yes.

12 Now, if you could have a look at that A3 again, so you have  
13 persuaded at least Mr Miezis to abandon the western  
14 extension, and his version had simply the 100 metre  
15 buffer, correct?---Though we note that the version  
16 provided, the alternate version I would say not a  
17 replacement, provides 100 metres on either side of the  
18 stream as alternate to the first version which had only  
19 one side of the stream. Yes, it doesn't have  
20 extensions up the left-hand mapped gullies, that's  
21 correct.

22 Now, the effect of that, if it was introduced, that is the  
23 DSE, this particular version of the DSE proposal, would  
24 be that the yellow strip would be there would be no  
25 logging, correct?---Yes.

26 And that is already the case given the buffer that had been  
27 agreed, correct?---Yes.

28 And the first thing that would be logged would be the middle  
29 of the SMZ?---Sorry, the first thing?

30 Well - - -?---There was a harvesting coupe within the middle  
31 of the SMZ, yes.



1 Right smack bang in the middle is coupe 15, isn't it?---On  
2 the east of the park, yes.

3 On the west of the park; west of the yellow buffer?---Yes,  
4 between the park in the west and the buffer in the east  
5 there's a coupe, yes.

6 So in this particular SMZ, the only proposed logging area is  
7 coupe 15 and a little bit of coupe 26 to the  
8 top?---That's correct.

9 So on the current - and as I understand the evidence the  
10 current proposal is to log 15 and 19, and 26 and 27 are  
11 not currently scheduled, is that your  
12 understanding?---That's my understanding, yes.

13 So the first thing that would be logged would be the very  
14 heart of the SMZ so created?---The prescription allows  
15 for two-thirds of the SMZ to be harvested, and that  
16 adhering to that prescription coupe 15 could be  
17 harvested, and if so - so it would comply with the  
18 action statement, then yes, we would harvest that  
19 coupe.

20 And you don't see any difficulty of creating that gap in the  
21 middle of the SMZ?---Again, I didn't create the action  
22 statement, or have the expertise to do so. Though  
23 those with the expertise in relation to the potoroo  
24 have created a prescription which allows harvesting  
25 within two-thirds of an SMZ created around a potoroo  
26 finding. Therefore, using the knowledge of the DSE  
27 creating the species-specific action statement,  
28 VicForests can only take guidance in regards to the  
29 prescription that we are given. So no, if the experts  
30 of the long footed potoroo created an action statement  
31 which allows harvesting, then no, I don't see any

1           difficulty in it.

2       Now, you say in your email of 9 September that there's an  
3           attached map, CM 46?---Yes.

4       And over on the first page of that exhibit it appears that  
5           you didn't attach the map and you do so at 3.52 on the  
6           9th?---No, I believe that what 3.52 is saying, that  
7           there was a first map attached to the email at 11.44,  
8           then I had a discussion with Lee on the phone where he  
9           suggested some amendments, and I attached the map  
10          meeting those requirements.

11       I see.    So you attached the map at 11.45, I think, and some  
12          time between 11.45 and 3.52 you had a discussion with  
13          Miezis?---And the map was amended, and then the amended  
14          map is the one we are looking at here.

15       Yes.    I'm sorry, at 11.45 you say sorry, didn't attach map,  
16          correct?   Which is at the bottom of the first  
17          page?---My understanding of the sequence is the first  
18          email was written at 11.44, which I emailed it.    I  
19          didn't attach the map so I sent a second email with the  
20          map attached at 11.45 with just the annotation "Sorry,  
21          I didn't attach the map" and had the map attached.  
22          Then following that I had a discussion with Lee and I  
23          forwarded yet another map to him at 3.52, which is the  
24          map attached to this exhibit.

25       Which is the VicForests A4 map and the exhibit, is that  
26          right?---Yes, that's correct.

27       And you say "The attached map should now meet all  
28          requirements in excess"?---Yes.

29       Now, in excess of what?---The attached map shows a special  
30          management zone that not only has a third as required,  
31          but will have approximately half protected from

1 harvesting, therefore my statement is that in excess of  
2 the requirements of the action statement there will be  
3 extensive protection.

4 But at that point no one had determined whether it was the  
5 best habitat for the LFP?---Again, this wasn't an  
6 exercise of finalising the special management zone,  
7 this was working on the assumption that there may be a  
8 sighting in one of the coupes because there had been  
9 one put forward, and that if that was the case how  
10 would this new prescription, which hasn't been used  
11 before, would it be applied. Because there are a  
12 number of conflicting values to adhere to to apply this  
13 prescription.

14 What are the conflicting values?---Well, if we look here, it  
15 says that the boundaries need to follow landscape  
16 features and watercourses. Then it also says that  
17 there should be approximately 150 hectares. It says  
18 at least a third, but then also says 50 hectares. It  
19 states that it should generally be in the gullies,  
20 though also the best habitat, as you mentioned. And  
21 it should - and it can include existing reserves as  
22 possible. When putting those factors together, they  
23 don't always align, and we note that's why there's a  
24 309 hectare FMZ proposed instead of a 150 hectare  
25 proposed.

26 But you would accept that the purpose of the action statement  
27 is to protect the species, is it not?---It certainly  
28 is, but prescriptions need to be applied in the forest,  
29 and therefore the interpretation of them is important.

30 If you would go to the next exhibit, CM 47?---Yes.

31 Now, this is an email from Mr Miezis to you and Mr MacDonald,

1 and it says "BES has recommended another option for LFP  
2 protection for consideration." Now, BES is the  
3 biodiversity and environmental section of the DSE,  
4 isn't it?---Biodiversity and Ecological Services, yes.  
5 And they are the experts on matters ecological?---They are  
6 the ecological section of the DSE, yes.  
7 And they have recommended another option, and it's attached,  
8 and Miezis said "I have played around with 150 metres  
9 and 100 metres off creek. I think option 2 works  
10 best, 48 hectares retained habitat, but I want to hear  
11 your thoughts before I go back to BES to discuss."  
12 Now, when Mr Miezis says "option 2 works best", he was  
13 saying option works best for you, that is VicForests,  
14 wasn't he?---Just one moment. That sequence doesn't  
15 match with my recollection, but I could be wrong. You  
16 would have to ask Mr Miezis, but I would assume it's  
17 considering the best option of applying the  
18 prescriptions. Which must be a balance, no doubt.  
19 Well, you'd had discussions with Mr Miezis, hadn't you?---I  
20 did discuss with Mr Miezis, and Mr Miezis was trying to  
21 balance the needs of the prescriptions and the needs of  
22 harvesting.  
23 And if you look at the attachment over the next page, you  
24 will see that version 1 had 43 hectares and version 2  
25 had 48 hectares, do you see that?---Yes, I see that.  
26 It's the case, isn't it, that the 43 hectare version cut into  
27 the two coupes more than the 48 hectare version?---I'm  
28 sorry, but I really could not describe this map. Even  
29 in discussions with Lee I really struggled to interpret  
30 this map at the best of times in black and white and in  
31 colour, and I would really struggle - I am really

1           sorry, but I can't explain what this map represents  
2           other than taking a guess.

3   Now, you met at DSE on 21 September, didn't you?---Sorry,  
4           which meeting are you referring - - -

5   You met with Mr Smith, Ms McLean and Mr Miezis of the  
6           DSE?---Yes, that's correct.

7   Mr Potter and yourself.   And that was discussed, the LFP,  
8           wasn't it?  The retained habitat in relation to this  
9           coupe, or these coupes?---That was to discuss the  
10          number of proposals put forward, yes.

11   Now, following that email of Mr Miezis of 16 September, CM  
12          47, you spoke to Mr Vaughan and a Jason Hellyer, didn't  
13          you?---The outcome of the meeting was that we have gone  
14          through a theoretical exercise and we have determined  
15          what the intent of the prescription was, and that at  
16          that point we should have practitioners visit the site  
17          and confirm the theoretical proposal undertaken to that  
18          date.

19   By "practitioners", you mean foresters, don't you?---No,  
20          staff from VicForests and from DSE.

21   Well, who is Jason Hellyer?---Jason Hellyer is a senior  
22          forester harvesting for VicForests.

23   Would you have a look at this email, please.   You sent an  
24          email on 25 September to Mr Vaughan and Mr Hellyer  
25          about this topic?---Yes.

26   And you said "As discussed over the phone we need to do some  
27          ground trooping to minimise the impact of this proposed  
28          habitat zone on planned harvesting", didn't you?---Yes.

29   And that's what this whole exercise was about, as far as you  
30          were concerned, wasn't it?---This exercise is about  
31          applying the prescription with balance, and meeting the

1 requirements of the action statement whilst minimising  
2 the effect on harvesting.

3 When you say "with balance", you mean to minimise the impact  
4 on planned harvesting, don't you?---The application of  
5 many of these prescriptions can be interpreted in many  
6 ways and still meet the objective of the action  
7 statement. VicForests engages with DSE, yes, by the  
8 purpose of it being able to demonstrate the  
9 prescriptions and the intent and I guess the inherent  
10 protection that that implies with minimising  
11 harvesting, yes.

12 And when you say a balance, you mean minimise harvesting  
13 proposed habitat. And when you earlier in your  
14 evidence referred to clarity about management  
15 prescriptions, you also meant minimising the impact on  
16 VicForests, didn't you?---No, clarity - no, I  
17 disagree.

18 I tender that email, if Your Honour pleases.

19

20 #EXHIBIT 56 - Copy email to Barry Vaughan and Jason Hellyer  
21 from Mr Spencer.

22 MR NIALL: As Your Honour pleases. And you asked Mr Hellyer  
23 to try and find some mature forest adjacent to the  
24 coupe that could be included in a retained habitat in  
25 order to reduce the impact within the coupe, didn't  
26 you?---What I asked Mr Hellyer to do was up until this  
27 point the exercise of creating a proposed special  
28 management zone if required was a complete theoretical  
29 desktop exercise, and it appeared to me from looking at  
30 the data that the areas of logging history, and it  
31 didn't equate to necessarily where they were, and the

1 age of the logging history, there was often  
2 inaccuracies as to where the harvested and unharvested  
3 forest was. And as we have touched upon, there was a  
4 desire to have the core protection outside harvested  
5 area within the gullies, so what we asked Jason to do  
6 was to go and confirm, using the more updated  
7 procedures we currently use, where the harvesting was  
8 and where it was not, so that we wouldn't be working  
9 solely off the map but some sort of ground troop,  
10 including where the streams were and where the  
11 harvesting was.

12 And you told him to find that, not for the purposes of  
13 helping the potoroo, but to reduce the impact of the  
14 prescription on the coupe, didn't you?---To improve our  
15 ability to understand how we applied the prescription,  
16 yes.

17 Would you have a look at this, please. Now, this is an  
18 email from Mr Hellyer to a Mr Jones on 28 September.  
19 It says: "Attached is the current situation regarding  
20 Brown Mountain from Lachie. We need to work with DSE  
21 to come up with a proposed area of exclusion. On the  
22 attached map is the first proposal. Lachie suggests  
23 trying to confirm logging history on the ground but if  
24 there's more mature forest in the adjacent coupe to  
25 include that in the proposal and reduce the impact  
26 within the coupe." Do you see that?---Yes.

27 And that's exactly what you told Mr Hellyer, didn't  
28 you?---That we need to confirm on the ground what is  
29 actually there, yes.

30 Why?---Clearly applying the prescriptions we need to meet the  
31 prescriptions, but our desire is to undertake

1 harvesting, therefore to have that balance of ensuring  
2 we meet the prescription but allowing the harvesting  
3 area requires an analysis of what's on the ground.  
4 That's what I told Jason and that's what Jason looked  
5 for, yes.

6 And Mr Hellyer says "I have had a brief look at aerial  
7 photographs which don't look that promising regarding  
8 extra area of mature forest", do you see that?---In  
9 regards to the area in question, I asked him about  
10 whether it was harvested or not. He - it's some time  
11 ago, but he was referring to it appeared harvested, and  
12 that the logging history was incorrect.

13 And it wasn't looking that promising because you were  
14 struggling to find some alternative areas outside the  
15 coupe, that's right, isn't it?---The prescription had  
16 to be applied, it was difficult in determining how that  
17 was to be applied in this area.

18 Why don't you just retain a potoroo expert and get them to  
19 map the area around the detection site?---That's not  
20 the prescription, it's not required of us. And  
21 retaining an area around the habitat site would not  
22 meet the prescription, therefore that is why we have  
23 not done that.

24 Well, why not?---We can do a world of other things other than  
25 what's required in the prescription, though that does  
26 not assist us in applying the prescription.

27 Why would not retaining an expert in potoroo habitat to  
28 identify the best habitats surrounding the detection  
29 site be in accordance with the action statement?---In  
30 the end the special management zone is not created by  
31 VicForests. We provide an input. VicForests



1 retaining a habitat specialist, it's inconsistent with  
2 the requirement of DSE to create SMZ, therefore we  
3 haven't done it.

4 HIS HONOUR: Does that mean that in your view it's for DSE  
5 to provide the expertise in relation to potoroo  
6 habitat?---And that's why this email suggests that Tony  
7 Mitchell visit the forest, who is from Biodiversity and  
8 Ecological Services, to provide an input.

9 Yes. Can I just ask you, the questions you were asked about  
10 logging history, as I understand Mr Miezis' map, the  
11 two arms of buffer that go up the slope, as it were, on  
12 either side of coupe 15?---Yes.

13 About previously logged areas as mapped?---Yes, that proposal  
14 does not consider logging history at all. It includes  
15 logging history in the proposed retained habitat.

16 Yes?---And that's the proposal from the Biodiversity and  
17 Ecological Services of the DSE.

18 But have a look at the very last map that Mr Niall has  
19 produced, that is CM 47. Well that's the one attached  
20 in fact to the last exhibit we looked at?---Yes.

21 Is it the definition of the arms up the slope that you were  
22 talking about when you suggest trying to confirm  
23 logging history on the ground?---That's correct. And  
24 also if we look at the map this way, I am talking about  
25 the areas next to - or that are unclear as to why they  
26 wouldn't be harvested if they were harvested.

27 Just hold that up again?---I'm sorry, in here.

28 Show counsel that?---This section here, where it's unclear,  
29 and the logging history looks unusual.

30 I see, yes, thank you. Yes, Mr Niall.

31 MR NIALL: But it was clear - it's obvious, is it not, that

1           there'd been no logging history within 15 and 19?---15  
2           and 19 are one option.    There are many options.  
3   HIS HONOUR:     I think that's - yes, Mr Niall.  
4   MR NIALL:    They are the only questions I have, Your Honour.  
5           I tender that email, if Your Honour pleases.  
6  
7   #EXHIBIT 57 - Email from Hellyer to Jones, 28/09/2009.  
8  
9   MR NIALL:    If Your Honour pleases.  
10   <RE-EXAMINED BY MR REDD:  
11   Mr Spencer, do you recall you were asked some questions about  
12       the forest management plan concerning the conservation  
13       guideline relevant to arboreal mammals?---Yes.  
14   So do you have volume 1 of the agreed book before you?  You  
15       can put the other folders away, if you like?---Yes.  
16   And if you could turn to page 369 of that volume?---Yes.  
17   You will see that's the first page of the forest management  
18       plan for the East Gippsland FMA?---Yes.  
19   And if I take you now to page 410 of the agreed book, which  
20       is page 30 of that plan?---Yes.  
21   You will see at the top of that page is the conservation  
22       guideline that Mr Niall took you to related to arboreal  
23       mammals, do you see that?---Yes.  
24   Now, Mr Niall took you to the first line there that referred  
25       to creation of a SPZ, and he suggested to you that  
26       there's no lack of clarity in that, is there?  And my  
27       recollection of your answer was "If only reading in  
28       isolation it's clear, however, there are other things  
29       preceding that".  What other matters in this plan did  
30       you think were relevant?---In my opinion back on page  
31       408 which is the commencement of the guidelines for

1 conservation for featured species.

2 Yes?---It discusses the intent of the guidelines in relation  
3 to the guidelines are intended as tools to help devise  
4 a network of protected habitat creating all forest  
5 fauna in FMA - - -

6 And you are reading that, I take it, from the first paragraph  
7 on that page, 408, are you?---Yes. I guess I am -  
8 this sets out that it takes into - they need to take  
9 into account the contribution of national parks and  
10 other reserves and similar things. So that there is  
11 broader considerations when a broad guideline such as  
12 "approximate" and where it is located in the SMZ is not  
13 iron clad.

14 What's your understanding of the last sentence in the  
15 paragraph beneath the three dot points on that page, do  
16 you see the paragraph I mean?---The initiate an orderly  
17 process?

18 No, underneath that dot point, that's the third dot point,  
19 there's a paragraph without any dot points immediately  
20 beneath, do you see that?---Commencing "The  
21 guidelines"?

22 Yes, the last sentence of that paragraph, what is your  
23 understanding of what that means?---That some species  
24 have trigger levels, but the guidelines need to be  
25 reviewed over time as more information comes to hand,  
26 that's my understanding of that. And that when we -  
27 if species that were unknown become more known, that  
28 the guidelines may be changed.

29 You can put that volume to one side if you like, we don't  
30 need to go back to it. There was a question again in  
31 the context of the arboreal mammals, the

1 gliders?---Yes.

2 That Mr Niall put to you, which was along the lines of if  
3 VicForests logged coupes 15 and 19 tomorrow, there will  
4 be damage to a site of significance, I think, for the  
5 gliders?---Yes.

6 Do you recall the question to that general effect being put  
7 to you?---Yes.

8 And my recollection of your answer was "We would log in  
9 accordance with the prescriptions". What are  
10 prescriptions you are referring to when you say  
11 that?---In regards to arboreal mammals?

12 Well, in regards to your answer to Mr Niall's question, you  
13 said "We would log in accordance with the  
14 prescriptions". So what prescriptions - - - ?---The  
15 prescriptions within the management plan in regards to  
16 the arboreal mammals that says there will be inclusion  
17 of an area within the SPZ. It doesn't - as DSE have  
18 reviewed that and deemed that that area is included in  
19 the park SPZ that we can harvest, because there's no  
20 further action for VicForests.

21 And if coupes 15 and 19 were to be, say, logged tomorrow,  
22 what prescription would be applied by  
23 VicForests?---Well, with those coupes there's  
24 additional prescriptions as outlined in the management  
25 procedures in regards to retention of habitat trees  
26 within the coupe, otherwise standard prescriptions  
27 would apply, as planned of course the 100 metre buffer  
28 at the bottom of the slope will be excluded from  
29 harvesting.

30 Yes. Your Honour, I don't have any further questions for  
31 Mr Spencer.

1 HIS HONOUR: Thank you. Yes, thank you, Mr Spencer, you  
2 are excused.

3 <(THE WITNESS WITHDREW)

4 (Witness excused.)

5 HIS HONOUR: Ms Mortimer, I wondered if before we came to  
6 the next witness I could just come back briefly to the  
7 matter I flagged with you this morning. Now, it may  
8 be that just exactly what DSE has and has not been  
9 provided with is a matter that can be explored in due  
10 course.

11 MS MORTIMER: Yes, Your Honour.

12 HIS HONOUR: But at the end of this case I will have heard  
13 evidence from five or six witnesses about the potaroo,  
14 and I simply wanted to say to you that although there's  
15 an order for witnesses out of court, it would be open  
16 to me to authorise the release of the exhibits,  
17 including the SIM cards, or copies of the SIM cards,  
18 witness statements and transcript relating to the long  
19 footed potaroo to DSE. So I would have to hear from  
20 Mr Waller about that, but I am concerned that there's a  
21 sense in which this appears to be a procedural rather  
22 than a substantive answer to the evidence as it now is,  
23 if I can put it that way.

24 MS MORTIMER: I'm sorry, Your Honour, this appears to be -  
25 what does Your Honour refer to?

26 HIS HONOUR: Mr Miezis' position - - -

27 MS MORTIMER: I understand.

28 HIS HONOUR: Appears to be a procedural rather than a  
29 substantive answer, response to the state of the  
30 evidence about the potaroo.

31 MS MORTIMER: I understand, Your Honour, yes.

1 HIS HONOUR: I don't require you to respond at the moment,  
2 but that has the potential for a variety of  
3 unsatisfactory outcomes from both parties' point of  
4 view.

5 MS MORTIMER: I accept that, Your Honour.

6 HIS HONOUR: Yes, so I just ask you in particular to  
7 reflect upon it, and Mr Waller can reflect upon it  
8 also. But what I am saying is that despite the order  
9 for witnesses out of court, which might otherwise be  
10 thought to preclude giving Mr Miezis in particular  
11 evidence that has been led in this case, you need to  
12 consider whether there isn't some artificiality about  
13 the situation which is created if DSE or the only  
14 representative of DSE that comes before the court in  
15 effect says "I haven't seen and DSE hasn't seen the  
16 evidence which has been presented to the court."

17 MS MORTIMER: I understand what Your Honour is saying.

18 HIS HONOUR: And I don't want to be taken to be urging a  
19 course or suggesting a way forward, I was just troubled  
20 by it.

21 MS MORTIMER: No, I accept that, Your Honour.

22 HIS HONOUR: And I think you both need to reflect on it,  
23 because as I said, I am not sure exactly what the  
24 implications are, but on one view it has potentially  
25 unsatisfactory implications from both sides' point of  
26 view.

27 MS MORTIMER: It's certainly a matter I was proposing to  
28 explore in some detail with Mr Miezis, Your Honour.

29 HIS HONOUR: Yes, I see. You may wish to do that via  
30 cross-examination, and that may be in one sense the  
31 most sensible course. But I am just drawing to your

1 attention the nature of the DSE response as it appears  
2 to be foreshadowed or stated in those paragraphs.

3 MS MORTIMER: Yes, Your Honour. And my submission to Your  
4 Honour just then included that I propose to explore  
5 with Mr Miezis in particular whether paragraph 90 was  
6 accurate.

7 HIS HONOUR: Yes, I see, thank you.

8 Yes, Mr Waller?

9 MR WALLER: Your Honour, I have just provided my learned  
10 friend, Mr Niall, who I understand is cross-examining  
11 Mr MacDonald, with some documents that I wanted to take  
12 Mr MacDonald to in examination-in-chief.

13 HIS HONOUR: Yes.

14 MR WALLER: I also haven't yet had a chance to discuss with  
15 Mr MacDonald - I'm sorry, with Mr Niall some objections  
16 that have been put forward in relation to Mr MacDonald.  
17 I am hopeful that we can resolve most if not all of  
18 those, and what I wanted to suggest was if we were to  
19 break now for an early lunch, but resume at, say, a  
20 quarter to two, would that be convenient to Your  
21 Honour?

22 HIS HONOUR: Yes, it would be. We will adjourn until  
23 1.45.

24 LUNCHEON ADJOURNMENT

25  
26  
27  
28  
29  
30  
31

1 UPON RESUMING AT 2.00 PM:

2 HIS HONOUR: Yes, Mr Waller.

3 MR WALLER: If Your Honour pleases. Your Honour, the next  
4 witness is Mr Cameron MacDonald. The plaintiff has  
5 served on us a list of objections in relation to  
6 Mr MacDonald's four affidavits, and it may be  
7 convenient if Your Honour is provided a copy of that.

8 HIS HONOUR: Yes.

9 MR WALLER: Now, Your Honour, happily many of these have been  
10 resolved, but there are still one or two that are in  
11 issue. Just so that Your Honour knows the position,  
12 beginning with Mr MacDonald's affidavit of 31 August,  
13 we - and does Your Honour have copies of Mr MacDonald's  
14 affidavits?

15 HIS HONOUR: I have a copy of the most recent one in front  
16 of me. But I will just have to - - -

17 MR WALLER: We have in court working copies for Your Honour  
18 if necessary.

19 HIS HONOUR: Well, that would be perhaps the quickest way  
20 to do it.

21 MR WALLER: We can hand to Your Honour a folder which  
22 contains the first three affidavits and the exhibits  
23 thereto.

24 HIS HONOUR: Yes.

25 MR WALLER: Which were filed in relation to the interlocutory  
26 application, and Your Honour already has the principal  
27 affidavit filed on 27 November.

28 HIS HONOUR: Yes.

29 MR WALLER: Your Honour, in relation to the first affidavit  
30 of Mr MacDonald sworn on 31 August, the plaintiff has  
31 objected to various paragraphs set out in the table.



1 The defendant presses paragraphs 41 and 42, and indeed  
2 paragraph 44 together with the Exhibit CM 12, and  
3 proposes to call some additional oral evidence in  
4 respect of those matters as well.

5 Your Honour, paragraph 43 is not pressed, and  
6 paragraph 46 is no longer pressed.

7 In respect of the next affidavit of 2 September  
8 2009, paragraphs 7, 8, 9 and 10 are no longer pressed.  
9 Paragraph 11 is pressed. Paragraph 12 and Exhibit CM  
10 17 are no longer pressed. And in respect of paragraph  
11 17, last sentence, and paragraph 9, those paragraphs or  
12 sentences are no longer pressed.

13 HIS HONOUR: Yes.

14 MR WALLER: In respect of the affidavit of 14 September 2009,  
15 paragraph 4 is no longer pressed, paragraph 5 is  
16 pressed together with Exhibit CM 19. And the  
17 remaining paragraphs to which objection is taken are no  
18 longer pressed. That's 6, 7, 8, 9 and 10.

19 HIS HONOUR: Yes.

20 MR WALLER: And in respect of Mr MacDonald's most recent  
21 affidavit, objection is taken or concern is raised  
22 concerning sentences within paragraphs 98 and 103. If  
23 they were being tendered to prove the truth of their  
24 content, Your Honour, those sentences are adduced to  
25 prove that they were received by the witness but not  
26 otherwise.

27 HIS HONOUR: Yes.

28 MR WALLER: And on that basis that objection I understand has  
29 been resolved. So really, Your Honour, it leaves to  
30 be resolved paragraphs 41 and 42 and 44 of the first  
31 affidavit, together with Exhibit CM 12. Paragraph 11

1 of the second affidavit. Paragraph 5 of the third  
2 affidavit.

3 HIS HONOUR: Yes.

4 MR WALLER: Now, if Your Honour's got the first affidavit, 31  
5 August, to hand, Your Honour will see paragraph 41,  
6 Mr MacDonald swears under the heading "Commercial  
7 significance of coupes 15 and 19: Based on my  
8 knowledge and experience in the timber industry, I  
9 estimate that coupes 15 and 19 will produce 12,000  
10 cubic metres of D plus sawlog at 300 cubic metres of  
11 sawlog per hectare with a total area to be harvested  
12 across these two coupes to be approximately 40  
13 hectares." Objection is taken on the basis of  
14 relevance and unqualified opinion, noncompliance with  
15 Order 44 and other principles related to expert  
16 evidence. Alternatively on the basis that it's lay  
17 opinion not based on without identifying what the  
18 witness saw, heard or otherwise perceived.

19 Could I say first that it's submitted that Order  
20 44 does not apply to a witness who is effectively the  
21 plaintiff, or representing the plaintiff. And  
22 although Mr MacDonald - I'm sorry, I should say a  
23 party, but here of course it's the defendant.  
24 Mr MacDonald, although no longer employed with  
25 VicForests, was certainly employed by VicForests at the  
26 time he made that affidavit, and he is being called in  
27 this proceeding by virtue only of his employment in  
28 that capacity.

29 Order 44, rule 44.02(2) provides: "This order  
30 does not apply to the evidence of a party who would if  
31 called as a witness at the trial be qualified to give

1 evidence as an expert in respect of any question in the  
2 proceeding."

3 HIS HONOUR: Yes.

4 MR WALLER: And the rationale of course, Your Honour, is that  
5 Order 44 is aimed at establishing independence and  
6 objectivity of an expert witness, but where the witness  
7 is a party then obviously that independence and  
8 objectivity may not exist, but provided the witness is  
9 otherwise qualified to give the evidence, then there is  
10 no impediment. What I proposed to do in-chief with  
11 Mr MacDonald was to ask him to elaborate on the  
12 knowledge and experience he refers to in paragraph 41,  
13 and also to elaborate on how he arrived at those  
14 estimates.

15 HIS HONOUR: Yes.

16 MR WALLER: Paragraph 42, which is objected to in the same  
17 fashion, Mr MacDonald says: "If VicForests is  
18 prevented from harvesting these coupes, VicForests  
19 would need to harvest 120 hectares of other forest type  
20 to produce the same volume of D plus sawlog at 100  
21 cubic metres a hectare." That follows on from  
22 paragraph 41 and we would press that as well, and say  
23 that the objections should not be upheld.

24 We say the relevance of these matters is obvious,  
25 that it goes without saying of course that VicForests  
26 being set up as a commercial entity is charged by the  
27 establishing order or the establishing order to  
28 operate commercially. Your Honour was taken to this  
29 document in opening, and perhaps after that as well,  
30 and Your Honour will recall clause 3 of the  
31 establishing order which is at page 1 of the first

1 volume of the agreed book, provides that: "The  
2 functions of VicForests are to undertake the sale and  
3 supply of timber resources in Victoria in State forests  
4 and related management activities as agreed by the  
5 treasurer and the minister on a commercial basis;  
6 secondly, (b) to develop and manage an open and  
7 competitive sales system for timber resources; and  
8 thirdly, pursue other commercial activities as agreed  
9 by the treasurer and minister, and that for the  
10 purposes of performing its functions VicForests may,  
11 among other things, enter into contracts and  
12 agreements, employ staff, and do all such other things  
13 necessary or convenient to be done for or in connection  
14 with or is incidental to the performance of its  
15 functions; (5) VicForests must operate its business or  
16 pursue its undertakings as efficiently as possible  
17 consistent with prudent commercial practice; (6)  
18 VicForests must be commercially focused and deliver  
19 efficient sustainable and value for money services."  
20 So those matters are clearly before the court.

21 What Mr MacDonald seeks to do here is to speak  
22 more directly to the value that would be obtained from  
23 harvesting these particular coupes, and of course Your  
24 Honour has heard much so far about the precautionary  
25 principle and its ambit, and indeed its application,  
26 and Your Honour has heard from a range of biodiversity  
27 experts who have sought in speaking to the  
28 precautionary principle to weigh in the balance what  
29 they readily concede in almost every case, if not every  
30 case, were solely conservation values.

31 Your Honour knows that VicForests' position is

1 that the risk-weighted assessment requires the  
2 consideration of a broad range of values, not limited  
3 simply to conservation values, including social and  
4 economic values that arise in connection with the  
5 harvesting of timber, or indeed decisions not to  
6 harvest timber. And this evidence goes to that, so  
7 that Your Honour has more particular evidence beyond  
8 the more general matters referred to in the  
9 establishing order, and from which Your Honour could  
10 draw inferences about the commercial activity being  
11 undertaken by VicForests; that is to say, that timber  
12 has a value, that VicForests is in the business of  
13 operating a commercial business, that if it was unable  
14 to operate its business in respect of a particular  
15 coupe it would not be able to achieve commercial value.  
16 Those matters in a sense Your Honour can take as given,  
17 but what is being sought to be done here is to speak  
18 more particularly about two of the four coupes in  
19 question.

20 So, Your Honour, that's what we say about 41 and  
21 42. I don't know whether Your Honour wants to hear  
22 Mr Niall in relation to those or to hear the balance of  
23 what we say?

24 HIS HONOUR: I think you should address 44 as well.

25 MR WALLER: Yes. Now, 44, Your Honour, is a table that is  
26 exhibited as CM 12, which Mr MacDonald will give some  
27 oral evidence if necessary to explain its source or  
28 provenance, and to explain in particular how the  
29 particular figures referred to are arrived at or  
30 derived, and in particular in relation to the figures  
31 in the top table, the difference between milled or

1 price, harvest cost, haul cost, and margin, and what  
2 those reflect. He has given evidence in paragraph 44  
3 that that table represents the lost revenue and margin  
4 to VicForests were it not able to harvest coupes 15 and  
5 19. So it's putting a dollar sum on the statement  
6 that - it's seeking to put a dollar figure on the  
7 amount of loss that VicForests would incur or suffer if  
8 it were not able to harvest those two coupes.

9 Your Honour, these affidavits have been before  
10 the court, as it were, or this affidavit has been  
11 before the court since 31 August, and the objection in  
12 terms of its admissibility for trial was received on or  
13 about 26 February, it may have been later, and we are  
14 seeking to press it, and indeed to supplement it also  
15 by calling some further oral evidence from Mr MacDonald  
16 as well. So, Your Honour, that's what we say about  
17 those particular paragraphs.

18 HIS HONOUR: Yes.

19 MR NIALL: If Your Honour pleases, those three paragraphs and  
20 Exhibit CM 12 are not admissible on the basis firstly  
21 they are not relevant to an issue that arises on the  
22 pleadings, and secondly, are not in admissible form.

23 Can I deal firstly with the question of the  
24 pleadings. As I understand my learned friend's  
25 submission, it was based on a general observation that  
26 VicForests is a commercial entity, and secondly, he  
27 said it was relevant to the precautionary principle.

28 Now, Your Honour, the precautionary principle  
29 arises on a particular way on the pleadings, and can I  
30 firstly take Your Honour to the amended statement of  
31 claim, and in particular paragraph 74.

1 HIS HONOUR: Thank you. Yes.

2 MR NIALL: And Your Honour will see at paragraph 74 under the  
3 heading "Failure to take a precautionary approach",  
4 there is in respect of each species a plea that a  
5 precautionary approach was required to be taken, and  
6 that there'd been a failure to take that precautionary  
7 approach. And that proceeds through to paragraph 83  
8 in relation to each of the relevant species, including  
9 the ones that were added.

10 Your Honour will also see in paragraph 104, that  
11 "By reason of the matters pleaded in (a) through to (d)  
12 any timber harvesting will be unlawful." And I direct  
13 Your Honour's attention to paragraph (d): "The failure  
14 of VicForests to take into account ... (reads) ...  
15 and the precautionary principle." That's how the  
16 matter is raised on the amended statement of claim.

17 The answer to that in the defence, if Your Honour  
18 has the defence to the amended statement of claim, is  
19 very specific and has two prongs. Does Your Honour  
20 have the defence to the amended statement of claim?

21 HIS HONOUR: Yes.

22 MR NIALL: And if Your Honour goes to paragraph 74, the first  
23 strand of the defence is that it does not admit the  
24 allegations in paragraph 74, and says that "the  
25 precautionary approach is vague and imperfect, it does  
26 not create obligations actionable at law." And then  
27 in relation to each species it puts an affirmative  
28 case. So, for example, in relation to 75, which  
29 relates to the large brown tree frog, it says - it  
30 refers to "repeat 74", and says in the alternative that  
31 "if it is required to take the precautionary approach

1 that it has complied with the precautionary approach by  
2 reason of the stream side buffer." And in respect of  
3 each species it has identified the particular matter on  
4 which is relied to establish compliance with the  
5 precautionary approach. And in relation to 104  
6 there's a bare denial.

7 That pleading refers to buffers and trees and  
8 protected areas. There is nowhere to be seen in the  
9 pleading any allegation that the precautionary  
10 principle required a risk-weighted analysis, there is  
11 no pleading that VicForests applied the risk-weighted  
12 analysis, and there's no pleading of any material facts  
13 which would support a case that says "if we don't",  
14 that is VicForests don't, "log there will be economic  
15 consequences of this particular type."

16 Now, had that pleading been made, we would have  
17 responded to it, and we would have required particulars  
18 in relation to it, because the question of economic  
19 consequences for logging of a particular coupe is a  
20 matter which is greatly complex in respect of which  
21 there could be considerable evidence, including expert  
22 evidence, and in our submission if it's to be, as our  
23 friends currently suggest, a positive defence, then it  
24 should have been pleaded.

25 Now, that's the pleading, and as a result of the  
26 status of the pleadings there's been no discovery by  
27 the defendant of the primary documents which would  
28 support a finding of fact that there were economic  
29 consequences in these four coupes. They haven't  
30 discovered the contractual documents, they haven't  
31 discovered the other documents which would surround the



1 commercial arrangements, and they haven't discovered  
2 the relevant profit and loss documents in relation to  
3 either generally or in these particular coupes. I  
4 think they have discovered an annual report, but  
5 nothing that would descend into any detail which would  
6 enable a contest on the economic consequence of four  
7 coupes.

8 Now, of course the profit and loss that we do  
9 have is at a global basis, and it records for the 2009  
10 year a loss in the millions, and in 2008 a profit of  
11 about \$500,000. So the question of what an economic  
12 consequence might be is not something to be assumed,  
13 but it's a matter to be pleaded, appropriate discovery  
14 to be given, and appropriate evidence to be adduced.

15 Now, my learned friend correctly says, Mr Waller  
16 correctly says that the material in paragraphs 41  
17 through 46 have been in the affidavit since 31 August,  
18 but of course, Your Honour, in our submission those  
19 matters, if properly proved, might have been relevant  
20 to the balance of convenience on an interlocutory  
21 injunction application, but they are not relevant to  
22 the question of where the final relief would go on this  
23 statement of claim.

24 HIS HONOUR: Yes.

25 MR NIALL: The pleadings came after the - the interlocutory  
26 injunction was done on a writ generally endorsed, and  
27 there was no defence. Now, in our submission, it does  
28 require a pleading to descend into quite specific  
29 detail about the economic consequences, and it would  
30 require discovery. Now, none of that has occurred, in  
31 our submission, 41, 42 and 44 do not arise on the

1 pleadings and are irrelevant.

2 In terms of, if Your Honour finds that it is  
3 relevant, in our submission 41 and 42 are objectionable  
4 in form but could be cured by some oral evidence. 44  
5 is entirely objectionable, in our submission.

6 The table that is said to have been produced  
7 calculating lost revenue and margin is completely  
8 conclusionary. If Your Honour goes to Exhibit CM 12 -  
9 - -

10 HIS HONOUR: Yes.

11 MR NIALL: Your Honour will see it's described as "Commercial  
12 significance". Now, there's in the left-hand column a  
13 number of items, no documents have been discovered in  
14 relation to that. There's a figure of average  
15 passing. Well, no documents have been discovered in  
16 that. You assume that the sawlog volume is the  
17 assumption that Mr - or the opinion that Mr MacDonald  
18 expresses in paragraph 41 in the total. We are  
19 completely at a loss as to how these figures are  
20 arrived at. It's not explained in the affidavit.  
21 The primary documents are not in evidence, and one  
22 assumes that to the extent there is a reference to a  
23 margin, that would require analysis of the contractual  
24 documents, the revenue and the expenses in respect of  
25 these particular coupes.

26 Now, none of that has been discovered, and in our  
27 submission to simply have a witness say "Well, I have  
28 done a calculation based on lost revenue and margin" is  
29 of so little probative value with no underlying  
30 material or reasoning exposed, that it ought be  
31 excluded under section 135 of the Evidence Act on the

1 basis that its probative value is substantially  
2 outweighed by the danger that the evidence might be  
3 unfairly prejudicial, be misleading or confusing, or  
4 cause or result in undue waste of time."

5 Now, each of those matters could be fairly said  
6 to apply to paragraph 44 and the exhibit. It's an  
7 unsubstantiated, unexplained assertion of some what  
8 apparently are contractual documents.

9 Now, underlying attachment CM 12 there must be  
10 documents including contractual documents, invoices,  
11 receipts and the like.

12 HIS HONOUR: I am not sure about that.

13 MR NIALL: Well - - -

14 HIS HONOUR: We don't know.

15 MR NIALL: We don't know. But one can safely assume that  
16 it's based on documentary evidence. And to the extent  
17 that it's summarised, in our submission it's hearsay,  
18 or second, it's trying to prove the contents of a  
19 document by secondary means. Because the documents -  
20 there must be - and maybe it's a failing of the way  
21 that the evidence is expressed in paragraph 44. In  
22 our submission it would appear to be a replication of  
23 what appears in another document without proving the  
24 primary document, namely, the invoices, the profit and  
25 loss accounts, or the contractual arrangements.

26 So in our submission, those three paragraphs in  
27 the exhibit are inadmissible and ought be not received  
28 into evidence. If Your Honour pleases.

29 HIS HONOUR: Yes. Mr Waller, do you want to reply?

30 MR WALLER: Your Honour, the issue about the extent and  
31 application of the precautionary principle has been on

1 the table, as it were, during the course of this trial.  
2 Witnesses of my learned friend have been cross-examined  
3 on the basis that they have not taken into account  
4 other than conservation issues in the balance. The  
5 expert report of Professor Ferguson which was filed on  
6 time on 29 January this year, makes it plain in that  
7 report, and in particular dealing with the  
8 precautionary approach, that the proper definition does  
9 involve an assessment of risk-weighted consequences of  
10 various options, and Professor Ferguson goes on to say,  
11 in section 4 where he applies the precautionary  
12 approach, he says in particular under the heading  
13 "Risk-weighted consequences" on page 18 of his report,  
14 having dealt with the various options put up for  
15 various protected areas and core protection areas, he  
16 says: "The remaining issue is to assess which option  
17 is commensurate with the other impacts in terms of the  
18 risk-weighted consequences involved. Whichever option  
19 is chosen, the impacts involve foregoing volume for the  
20 foreseeable future that could otherwise have been  
21 harvested on the areas concerned. The foreseeable  
22 future; because the zoning will not be reversed while  
23 the species remains endangered, the losses of area and  
24 volume to the timber industry and dependent communities  
25 are therefore immediate and irreversible because of the  
26 species and log grades involved and the nature of the  
27 allocation order."

28 HIS HONOUR: Well, that's almost self-evident, isn't it?

29 MR WALLER: Well, yes, we would say it is, and we don't want  
30 a situation though, Your Honour, that - - -

31 HIS HONOUR: In the sense that if they can't be logged they

1 can't be logged.

2 MR WALLER: Well, if they can't be logged they can't be  
3 logged. But not only can they not be logged, but that  
4 has economic consequences both for VicForests for  
5 harvesting or haulage contractors, for employment in  
6 the area, and that those consequences need to be  
7 weighed in the balance at the same time as weighing the  
8 biodiversity or conservation consequences. That's the  
9 risk-weighted consequences or analysis that the  
10 precautionary principle speaks to.

11 Your Honour heard that many of the witnesses that  
12 were called as experts by the plaintiff did not define  
13 the precautionary principle to involve that aspect at  
14 all, or if they did freely admitted that they did not  
15 take into account anything other than conservation  
16 issues in drawing their conclusion as to whether the  
17 precautionary approach had been properly applied.

18 To the extent that the defence doesn't spell out  
19 in terms these matters, then the defence could be  
20 regularised, and it would be in a sense bringing the  
21 defence into conformity with the evidence and the way  
22 in which the case has proceeded, and the witnesses of  
23 the plaintiff have been cross-examined to adopt perhaps  
24 an approach of our learned friends when they sought to  
25 amend their statement of claim to bring it into  
26 conformity with the evidence. In that way the  
27 pleadings would not be the master but the servant of  
28 the evidence, and it's not unusual for pleadings to be  
29 amended or fleshed out or fine-tuned having regard to  
30 the way the evidence has proceeded, provided no  
31 prejudice is caused to the other party.

1           To the extent that any prejudice was said to  
2 arise, we would of course be prepared to accommodate  
3 that by not requiring any cross-examination necessarily  
4 on the material provided today, that that take place  
5 immediately. But we are talking about matters of very  
6 narrow compass in relation to the economic consequences  
7 of not logging coupes 15 and 19, in circumstances where  
8 of course they haven't been logged, so we are not  
9 talking about empirical data necessarily of moneys  
10 actually lost, but moneys that would be lost. And  
11 Mr MacDonald would explain how those estimates have  
12 been arrived at. He would also explain by reference  
13 to coupe 20, which was recently harvested, what profit  
14 was achieved from harvesting coupe 20, and give  
15 evidence about the similarity or comparability of the  
16 quality of timber harvested on coupe 20 and that which  
17 exists on coupe 15 and 19. So that Your Honour had  
18 some evidence to flesh out what perhaps does go without  
19 saying, that not logging, a decision not to harvest 15  
20 and 19, would have economic consequences. And Your  
21 Honour then has some evidence about what those  
22 consequences are.

23           We would apprehend that the position of the  
24 plaintiff would not be prejudiced because we would  
25 anticipate a submission being made that: what price  
26 do you put, how do you value a particular endangered  
27 species? Is it by reference to money that's made in a  
28 harvesting process? But the precautionary principle  
29 does require this risk-weighted analysis, and we say  
30 that's always been on the table, it was defined in  
31 those terms by Mr MacDonald in his first affidavit of

1           31 August, and it was reiterated by Professor Ferguson,  
2           we have cross-examined on that basis, and we seek  
3           simply to make it good through the evidence of  
4           Mr MacDonald that the loss would have at least in his  
5           estimation some real economic consequence.

6                     For that reasons we press those paragraphs, and  
7           if necessary we seek to adduce further evidence from  
8           Mr MacDonald to supplement those paragraphs.    If Your  
9           Honour pleases.

10   HIS HONOUR:     Yes.

11   (RULING FOLLOWS)

12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31

1 (FOLLOWING RULING)

2 HIS HONOUR: Then we come to paragraph 11 of the second  
3 affidavit, is that right?

4 MR WALLER: Yes, Your Honour and it may be that what Your  
5 Honour has said picks that up as well.

6 HIS HONOUR: Here we are.

7 MR WALLER: Your Honour, I can't press that in light of Your  
8 Honour's ruling.

9 HIS HONOUR: Yes. What's the third one?

10 MR WALLER: It is to the effect that in the event that  
11 VicForests experiences a production shortfall, it won't  
12 be able to make up that shortfall.

13 HIS HONOUR: Yes.

14 MR WALLER: And the final objection was paragraph 5 in the  
15 affidavit of 14 September.

16 HIS HONOUR: Yes.

17 MR WALLER: And, Your Honour, that similarly I think suffers  
18 from some of the aspects that Your Honour dealt with in  
19 relation to CM 12.

20 HIS HONOUR: Yes.

21 MR WALLER: So for those reasons then, Your Honour, I think  
22 we have resolved various objections and all of the  
23 paragraphs referred to in that table will no longer be  
24 pressed.

25 HIS HONOUR: Yes.

26 MR WALLER: As part of the evidence of Mr MacDonald, save for  
27 98 and 103 in the limited way that I have mentioned  
28 earlier in his most recent affidavit.

29 HIS HONOUR: Yes.

30 MR WALLER: So that being the case, Your Honour, I would call  
31 Mr MacDonald.



1 HIS HONOUR: Yes.

2 <CAMERON ALISTAIR MacDONALD, sworn and examined:

3 MR WALLER: Mr MacDonald, could you restate your full name,  
4 please?---Cameron Alistair MacDonald.

5 And what is your current address?---39A Howard Street,  
6 Thornbury.

7 And what is your current occupation?---I am the chief  
8 operating officer for HVP Plantations.

9 And, Mr MacDonald, how long have you held that  
10 position?---For one week.

11 And prior to holding, to assuming that position, what was  
12 your position before that?---I was the Director of  
13 Strategy and Corporate Affairs at VicForests.

14 And in that capacity as Director, Strategy and Corporate  
15 Affairs at VicForests, have you sworn a number of  
16 affidavits in this proceeding?---I have.

17 Yes. In fact have you sworn four affidavits?---That's  
18 correct.

19 Yes. Do you have copies of those affidavits in front of  
20 you?---All bar three. My third affidavit.

21 That's the one of 14 September?---That's correct, yes.

22 Perhaps if we can provide you with the document. That  
23 folder contains the first three of your affidavits  
24 which would include the one you are missing. Now,  
25 Mr MacDonald, in your absence there's been discussion  
26 in court about various paragraphs of your affidavit.  
27 I don't need to trouble you, but parts of those  
28 affidavits will no longer be pressed. Are there any  
29 matters in any of your affidavits, though, that you  
30 wish to correct as inaccurate?---No, I do not.

31 Those affidavits are otherwise true and correct in every

1 aspect?---Yes.

2 Your Honour, I tender then those four affidavits and the  
3 exhibits to those affidavits excluding those paragraphs  
4 and exhibits referred to in the plaintiff's table of  
5 objections.

6 HIS HONOUR: Yes.

7

8 #EXHIBIT M - Four affidavits of Cameron MacDonald, and  
9 exhibits.

10 MR WALLER: Your Honour, I have no further questions.

11 HIS HONOUR: Thank you, Mr Waller.

12 <CROSS-EXAMINED BY MR NIALL>:

13 Mr MacDonald, can I take it from your affidavit that you have  
14 got no qualifications in zoology or ecology?---Not  
15 specifically, no.

16 When you say "not specifically", do you have a qualification  
17 in zoology?---No.

18 Do you have a qualification in ecology?---No.

19 You don't have any experience or training in relation to the  
20 ecology of the particular species on the photo board to  
21 your right, do you?---No.

22 And nor do you have any experience or training in relation to  
23 the ecology of any other threatened species, is that  
24 right?---Not in Victoria, no.

25 Have you got some experience or training in relation to  
26 threatened species outside of Victoria?---In Tasmania.

27 And what does that training consist of?---I was a warranted  
28 forest practices officer under the Tasmanian Forest  
29 Practices Code.

30 And how did you get that?---It was through on the job  
31 training managed by the Forest Practices Board in

1 Tasmania.

2 And how long did that training take?---It would have taken  
3 three weeks over a 12 month period.

4 Is that three weeks full time?---That's correct, yes.

5 Was that residential or attending during the day?---Generally  
6 residential for block periods.

7 And it didn't include any of the species on that photo  
8 board?---No.

9 Now, VicForests, where you were employed for a number of  
10 years, its annual report in 2009 records that it spent  
11 about \$10 million that year on wages. Does that  
12 accord with your understanding?---I would have thought  
13 the figure would be closer to \$13 million.

14 And a similar figure for the previous year?---Correct.

15 And it doesn't employ any professional zoologists or  
16 ecologists, does it?---No.

17 Have you got a copy of your affidavit there, Mr MacDonald?  
18 Could you go to Exhibit CM 23. I am not sure, I think  
19 that's exhibited to your third affidavit. Yes, it's  
20 the fourth affidavit, the 27 November, CM 23. Do you  
21 have that?---Organisational structure?

22 Yes. Now, would it be fair to say - it appears that there  
23 were four areas within VicForests at the time, is that  
24 right?---There's probably I would say three main areas,  
25 there's the strategy and corporate affairs group, the  
26 sales and planning group, and then the regions which  
27 manage the operational execution of our tactical plan,  
28 and there are two regions.

29 And what are those two regions?---Central Highlands and East  
30 Gippsland.

31 Is it the case that VicForests' operations extend mainly to

1 the sort of central and eastern part of  
2 Victoria?---That's correct, to the east of the Hume  
3 Highway.

4 And to the west of the Hume Highway, who is responsible for  
5 what VicForests does on the eastern(sic) side of the  
6 Hume Highway?---It's fair to say that harvesting in  
7 native forest has pretty much been scaled down in the  
8 west of the State. DSE does manage some harvesting  
9 operations for red gum along the Murray, but - in the  
10 Riverina, but essentially most of the main native  
11 forest harvesting occurs in the east of the State.

12 Now, going back to your structure, it would be fair to say  
13 that there are quite a number of professional staff in  
14 that structure that you have exhibited?---That's  
15 correct.

16 And a number of those people have degrees in  
17 forestry?---That's correct.

18 And a number of them have professional qualifications in  
19 other areas such as forest science?---Yes.

20 Well, what other areas are there that have people with  
21 technical or professional qualifications?---There's the  
22 business services area which obviously has professional  
23 accountants, our staff in our HR department, and I just  
24 put on (indistinct) services area where there are  
25 people with degrees in other disciplines.

26 But no one with ecology or conservation degrees?---Not to my  
27 knowledge, no.

28 Now, in paragraphs 21-31 of your last affidavit, I ask you to  
29 go to that, please, under the heading "Relationship  
30 between VicForests and DSE", it would be fair to say  
31 that your evidence is really that VicForests is

1 responsible for forest, sustainable forest harvest and  
2 sale on the one hand?---Correct, yes.

3 And DSE is responsible for ecology and conservation as it  
4 applies to forests on the other?---I would categorise  
5 DSE as having a broader role than that, they are also  
6 responsible for fire management on public land.

7 Is it your evidence that VicForests doesn't have  
8 responsibility for ecology and conservation as it  
9 applies to forests?---Yes.

10 Now, you say in paragraph 22 of your affidavit, or you refer  
11 to the annual report, and you identify a paragraph by -  
12 where you say that "We are responsible for sustainable  
13 harvest and sale". Now, I want to ask you some  
14 questions about this concept of sustainable harvest and  
15 sale. What that means from VicForests' perspective is  
16 maintaining a yield of sawlogs and pulpwood over time,  
17 doesn't it?---That's one element.

18 What other elements are there?---We need to ensure that our  
19 operations do not result in a detrimental impact to the  
20 environment over time, so that our operations can be  
21 carried out in perpetuity without having a detrimental  
22 impact on other values in the forest.

23 But in terms of your operations being carried out in  
24 perpetuity, what VicForests is about is maintaining a  
25 level of production of sawlog and pulpwood, is it  
26 not?---That's the principal driver of the business, but  
27 there are other empiricals we need to take into  
28 consideration.

29 Well, let's just focus on this principal driver, and an  
30 aspect of that is forest inventory?---Yes.

31 And that means identifying the stands of forest that can be

1 harvested?---Within the allocation order that's  
2 provided by DSE.

3 Within the allocation order, I understand. And the second  
4 important aspect is the logging itself, or the  
5 harvesting itself?---Yes.

6 And that includes the construction of logging tracks?---Yes.  
7 And construction of roads where required?---Yes.

8 And it also includes the actual harvesting operation  
9 itself?---That's right, and making sure that those  
10 operations are conducted in accordance with all the  
11 relevant regulations.

12 And you know, don't you, that this proceeding concerns four  
13 coupes on Brown Mountain, numbers 15, 19, 26 and  
14 27?---Yes.

15 And you are familiar with those coupes?---With two of the  
16 four coupes.

17 Which two are you familiar with?---Coupes 15 and 19.

18 All right. Now, the method of logging for those coupes  
19 would be using machine to chop the trees down?---Or  
20 manually falling.

21 A bit of both; is it a combination of both manual falling and  
22 mechanical harvest?---In those coupes, given the size  
23 of the trees, a lot of those trees would be manually  
24 felled, because they would be too large for a  
25 mechanised harvesting machine.

26 And certainly the topography of 15 and 19 would be amenable  
27 to mechanical harvesting, do you agree with  
28 that?---Parts of, yes.

29 Parts of. So after the trees are felled, that are going to  
30 be felled, the coupe is then burnt?---Yes.

31 That's called a regeneration burn?---Yes.

1 And that uses - what's the accelerant that's used to burn the  
2 coupe?---It's basically a fuel-based accelerant,  
3 principally diesel.

4 Yes. It's jellied petroleum is used?---Yes.

5 That's commonly known as napalm, is that right?---It's not  
6 the term I use, but - - -

7 What term do you use?---I just use, you know, a fuel-based  
8 accelerant, so - - -

9 And that's usually done by air, is it?---It depends on the  
10 coupe, it's also done by hand by people hand lighting  
11 the coupe.

12 Are you familiar with coupe 20?---Yes.

13 And that was done by aerial burn, was it not?---Yes.

14 And you would expect 15 and 19 to be aeriually burnt?---That  
15 will be a decision that will be made operationally on  
16 the ground depending on the coupe itself.

17 And the use of this accelerant produces a very hot burn,  
18 doesn't it?---It aids an ignition rather than - I mean  
19 once a fire starts in a coupe the fuel in the coupe  
20 itself will determine - and how dry that fuel is will  
21 determine how much heat is generated, not necessarily  
22 the accelerant, that's just there to get the fire  
23 going.

24 The aim is to burn from the perimeters inward?---That's  
25 generally the technique that's used.

26 And that process also produces a hot burn, doesn't  
27 it?---That's correct.

28 And the reason that you want a hot burn is to try and  
29 encourage regeneration?---Yes.

30 And those hot burns would tend to be significantly higher  
31 than what I will call a usual forest fire that might go

1 through an area of a forest?---That's probably  
2 debatable, particularly given the fires, the bushfires  
3 of last year.

4 But the general proposition is that the hot burn that's been  
5 conducted through these operations will be higher than  
6 what would be ordinarily expected in a forest  
7 fire?---No, the intent is to actually replicate what  
8 happens in nature where you get wild fires. Eucalypt  
9 forests have evolved over time based on a disturbance  
10 periodically through catastrophic wild fire.

11 Well, 15 and 19, they are known as wet forest, aren't  
12 they?---Correct.

13 Or damp forest?---Wet forest. Wet to damp.

14 And you couldn't expect hot wild fire through that sort of  
15 damp forest, would you?---On a - you know, history  
16 shows that on a 3 to 400 year period most eucalypt  
17 forests will have a stand-changing fire occur.

18 And that would be in nature somewhere between 3 to 400  
19 years?---Yes.

20 Now, after the burn is undertaken, there's seeding as part of  
21 sustainable forestry?---Yes.

22 Now, His Honour has heard that the prescriptions will require  
23 some retention of seed trees, are you familiar with  
24 that process?---Yes.

25 And that's keeping some trees in the coupe to naturally drop  
26 seed on to the ground that's been left bare,  
27 correct?---Yes.

28 Now, are you familiar with the altitude of coupes 15 and  
29 19?---Roughly, yes.

30 Roughly. It's about 700 metres?---Yes.

31 And you are aware that at that level of altitude, self



1 seeding from seed trees doesn't produce a very good  
2 production of trees?---It is generally - we generally  
3 supplement that with additional sowing from the air,  
4 yes.

5 And this additional sowing from the air, VicForests chooses  
6 the seed that's to be used?---According to the  
7 prescriptions.

8 Yes. And what are the prescriptions?---The prescriptions  
9 are specified that seed needs to be collected from  
10 areas similar to the geographic location of the coupe  
11 that will be sown.

12 What sort of radius, do you know?---I am not familiar with  
13 that.

14 And in this area of East Gippsland is there a common mix for  
15 seed trees, aerial seeding?---It's based on a formula  
16 based on the predominant - the species mix on the coupe  
17 that's harvested.

18 There's selection to produce more productive species in the  
19 seeding process?---No.

20 Now, after seeding goes on, and the trees develop, after  
21 about 20 or 30 years there's a thinning process usually  
22 employed?---Possibly, but that's not necessarily across  
23 the board.

24 It's not universal, but it regularly happens?---There's  
25 significant thinning that occurs in East Gippsland.

26 And the purpose of thinning firstly is to - well, the process  
27 of thinning I should say is to remove the  
28 understorey?---No, it's to remove the less dominant  
29 eucalypt species in the coupe.

30 By "less dominant", do you mean the ones that have grown the  
31 best in the period of 30 years, they are retained, and

1 the ones that are less robust are removed?---That's  
2 right. It's aiming to produce better quality sawlogs  
3 into the future, so you are retaining the better  
4 quality stems.

5 Yes. And that's not species-specific, is it?---Not  
6 specifically. I am not across the prescriptions for  
7 thinning, so I couldn't answer that question.

8 But the point of the exercise is to allow for maximum growth  
9 of biomass, isn't it?---No, the intention is to  
10 maximise the production of sawlog in those coupes.

11 And that's done mechanically?---Yes.

12 With a bulldozer, is it?---No, with a specialised machine  
13 which has been developed for thinning small stems.  
14 It's critical that you avoid damage to the retained  
15 trees so that they grow on to produce sawlogs in the  
16 future.

17 But it removes understorey?---Not specifically, no. It  
18 removes eucalypt species.

19 Well, "not specifically", but as part of the process does it  
20 also remove understorey?---Well, it doesn't remove  
21 understorey, no.

22 Well, does it damage the understorey?---Yes.

23 So is what's left - what percentage of trees would be left,  
24 Mr MacDonald?---It's more done on a basal area which is  
25 the - because it's square metres - square metre of  
26 trees per hectare, so it's less about the number of  
27 stems, more about the basal area of the trees and the  
28 stand.

29 Yes. And that's really what - one part of forest science,  
30 trying to work out how many tree stems you should  
31 retain in a given area of forest?---Yes.

1 Now, during that process of after logging, seeding and  
2 thinning, does VicForests irrigate?---No.  
3 Has that been considered?---No.  
4 Is it likely to be considered given prognostications about  
5 global warming and things?---No.  
6 Does it fertilise?---No.  
7 Does it provide any guards or protection against foraging  
8 animals, rabbits and things like that?---Not generally,  
9 no.  
10 Now, after all that is done, the timber is then harvested on  
11 a rotational basis, that's right, isn't it?---Yes.  
12 And you would expect that the rotational system for an area  
13 of East Gippsland like Brown Mountain would be 60  
14 years?---No, it would be longer in East Gippsland.  
15 What rotation do you say?---It can be from 80 to 120 years.  
16 All right. Going back to your affidavit, if you go to  
17 Exhibit 26, please, which is the document you refer to  
18 in paragraph 30 - would you go to Exhibit 26. Have  
19 you got that?---Yes.  
20 And that's called a joint sustainable harvest level  
21 statement, it's a combined statement of VicForests and  
22 DSE, is that right?---Yes.  
23 And if you go to - are you familiar with this document?---I  
24 have read this document, yes.  
25 And one of the things that this document looked at is whether  
26 you could reduce the period of time for harvesting  
27 rotation, isn't it?---That was one of the variables  
28 that was examined, yes.  
29 Yes. And it was found that if you reduce it it didn't make  
30 much difference to the outcome, is that right?---Yes.  
31 And if you would go to page 28, there's a reference to

1 appendix 1, harvest stage used in model?---Yes.

2 And East Gippsland, and mountain mix species, that has a 60

3 year harvest, does it not?---Yes.

4 And isn't that saying that that was the intended rotation for

5 these species in East Gippsland?---In this modelling,

6 yes.

7 But this is the current modelling, isn't it; or is it the

8 reduced model?---That was the model - this was the

9 model used in the Jossel(?) analysis, yes.

10 And it's the current model that's used, isn't it?---Well, not

11 - I mean, VicForests does its own modelling.

12 Well, what does it use?---It uses a similar software package,

13 but we also - VicForests also incorporates into that

14 the model, an economic overlay for harvest and haul

15 costs.

16 But is it not the case that that document suggests that 60

17 years is the rotational period expected for mountain

18 ash in East Gippsland, mountain mix species in East

19 Gippsland?---Yes.

20 Are you saying that's wrong?---No, my recollection was that -

21 as you can see, there are a variety of rotations links,

22 so - - -

23 But you accept now that for Brown Mountain it would be

24 expected to be 60 years?---Yes.

25 And the aim of the exercise, I take it, is to get a better

26 harvest the second time around and so on?---Could you

27 rephrase that?

28 Well, you harvest in year one, you go through all this

29 process of regeneration, thinning - seeding and

30 thinning. I take it that through that process of

31 selection the aim is to get a better return the second

1 time it's harvested rather than the first?---It's  
2 certainly a high proportion of sawlog in the next  
3 harvest.

4 And so the process goes on?---Yes.

5 Each time improving the quality of sawlogs?---And hopefully  
6 the volume as well.

7 Yes. And it would be fair to say in that rotational  
8 structure that once VicForests logs old growth, it will  
9 never be the same, would you agree with that?---That  
10 depends what happens into the future. I mean, those  
11 stands may not be harvested again for a variety of  
12 reasons.

13 But the expectation is that it will be harvested and  
14 harvested in 60 years?---Yes.

15 Now, I want to ask you some questions about DSE's role, and  
16 you refer to some extracts from its annual report.

17 You accept DSE's responsibility includes conservation  
18 and ecology protection?---Yes.

19 And two ways that's done is through the reserve  
20 system?---Yes.

21 That's one way; and the second way is through limitations and  
22 prescriptions?---Yes.

23 Now, I want to ask you some questions about the reserve  
24 system. You know that there was an ALP policy in 2006  
25 to increase the amount of reserve system in old growth  
26 forests?---Yes.

27 And that had the potential to significantly reduce the  
28 available of harvestable timber to VicForests, didn't  
29 it?---Certainly impacted the area available, yes.

30 And VicForests' response was that reserves should not be  
31 increased, is that right?---No, the policy was - from

1 VicForests' perspective the policy is given so we are  
2 required to implement government policy.  
3 It didn't seek to lobby the government not to increase the  
4 area of reserves?---Beyond the 41,000 or?  
5 Well, the announcement was 41,000, was it?---That's right.  
6 Well beyond that, did you seek to prevent it being  
7 increased?---We sought to ensure that the final reserve  
8 system, there was the best outcome for VicForests in  
9 terms of the areas that were set aside.  
10 And that it should be limited, the reserve system should be  
11 limited to areas that don't affect logging, or are less  
12 suitable for logging?---No, not necessarily.  
13 VicForests didn't participate in a process to try and  
14 identify areas which it thought were less suitable for  
15 logging?---We were consulted by the industry transition  
16 task force which was appointed by the government to  
17 implement a policy.  
18 And did you recommend or seek to identify areas that were  
19 less attractive to logging that should be included in  
20 the reserve?---We put forward a proposal that met the  
21 government's criteria for the reserve design.  
22 Yes. Well, your priority was that if there was to be  
23 increased reserve it should be limited to areas that  
24 don't affect or have less effect on logging, is that  
25 right?---It's not - it was less about the effect on  
26 harvesting, it was whether there would be a better  
27 outcome for VicForests, given that policy was going to  
28 be implemented.  
29 The better outcome for VicForests is losing stands of timber  
30 that are difficult to harvest?---It's not about  
31 difficulty, it's - from our perspective it was about

1 the quality of sawlog that we could harvest in the  
2 areas that were made available.

3 And it was also the position of VicForests that any loss of  
4 sawlogging, available sawlogs, should be offset and  
5 other areas of land should be opened up to it, is that  
6 not right?---Well, the government made a commitment in  
7 that policy that there be no net loss of resource, and  
8 they had indicated that part of that may be for areas  
9 that were previously in special management zones to be  
10 rezoned.

11 So anything that was taken away into the new reserve system,  
12 VicForests would get back as an offset, is that  
13 right?---Not a one-to-one offset, but if in creating  
14 reserves meant that some special management zones which  
15 were set aside for a certain value, that that value was  
16 now going to be incorporated into that 41,000 hectares  
17 of new reserves, then that special management zone  
18 could in effect be rezoned to general management zone  
19 because the value that it was created for was now  
20 catered for in the new reserve system.

21 Now, you knew in late 2008 that there was - that logging in  
22 Brown Mountain was an area of controversy, didn't  
23 you?---I only became aware when we started harvesting  
24 coupe 20.

25 And that was in October or November 2008?---In October 2008.  
26 And you, from that point at least you knew there was quite a  
27 lot of opposition to logging in Brown Mountain?---Yes.  
28 And the question of whether Brown Mountain should be logged  
29 was discussed in December 2008 between DSE and  
30 VicForests?---Yes.

31 And did you attend a meeting on 1 December 2008 with DSE to

1 discuss alternatives to harvesting Brown Mountain?---I  
2 can't recall. There were a range of meetings which  
3 were held with DSE, including the Wilderness Society,  
4 discussing which areas would be harvested, and I can't  
5 recall the date.

6 Well, without the Wilderness Society for a moment, just with  
7 DSE, you attended some meetings in December 2008 about  
8 harvesting Brown Mountain with DSE?---I attended a -  
9 we had a field trip up to Brown Mountain in late  
10 November 2008 with the chief of staff from the minister  
11 for the environment's office, and DSE and Ian Gioss(?)  
12 to discuss that.

13 And after that meeting on 1 December, at a meeting with DSE  
14 VicForests was asked to identify possible exchanges  
15 from proposed reserves, wasn't it?---Yes.

16 And VicForests advised on 3 December that it would agree to  
17 include Brown Mountain in the old growth reserve if  
18 part of the Big River reserve was excluded?---Yes.

19 So its position was, if Brown Mountain gets reserved, we want  
20 Big River, is that right?---Yes.

21 And how big is the area of Big River that VicForests had its  
22 eye on?---I can't recall the area off the top of my  
23 head.

24 It was substantially bigger in acreage than Brown  
25 Mountain?---It was larger in - the area was larger, but  
26 the sawlog yield per hectare was lower.

27 How did you select Big River reserve?---Over a range of  
28 variables we took into consideration, and one of the  
29 key drivers, VicForests has contracts with customers  
30 which have specific - which specify species and grade  
31 that VicForests need to supply to those customers. So



1 on making this decision as to whether we would accept  
2 an exchange of a different area as a substitute for  
3 Brown Mountain, we had to ensure that we met our  
4 contractual commitments to our customers and also to  
5 our contractors. So that was the process we went  
6 through to assess what options that we would consider  
7 as being appropriate on a commercial basis to consider  
8 such an exchange.

9 So in considering whether Brown Mountain or Big River was to  
10 be the place logged, VicForests didn't take into  
11 account conservation values between those two areas,  
12 did it?---On the basis that - no, we didn't.

13 It took into account solely the financial impact of either  
14 having Brown Mountain or Big River?---Financial and  
15 also our contractual obligations to third parties.

16 And it was happy to trade off Brown Mountain provided it got  
17 Big River?---That was - we were asked to consider that  
18 and that was our position, yes.

19 And VicForests didn't do any ecological surveys or assessment  
20 of habitat during that process of trade off, did  
21 it?---No.

22 Now, ultimately VicForests said Big River or Brown Mountain,  
23 no other trade offs would be acceptable, is that  
24 right?---Yes.

25 And ultimately VicForests proceeded with Brown Mountain.

26 Now, the effect of logging in Brown Mountain is that  
27 the area of forestry operation is totally encased in  
28 reserves, is it not?---Yes.

29 And that from an ecological perspective is very undesirable,  
30 is it not?---I don't believe so.

31 Because it means that you are carrying out a logging

1 operation wholly inside a reserve, do you agree with  
2 that?---It is wholly inside a reserve, but it's  
3 connected - there are road networks in the area, so I  
4 don't believe harvesting is an issue from that  
5 perspective.

6 From your perspective you don't think having a reserve  
7 entirely - having logging entirely encased in a reserve  
8 is undesirable?---No.

9 Now, you go on to say in paragraph 31 of your statement that  
10 your team is responsible for consultation with the DSE  
11 concerning its review or issuing of action statements  
12 under the Flora and Fauna Guarantee Act. Now, how  
13 many people in your team, were in your team in relation  
14 to that exercise?---There's two.

15 You and who else?---Ross Potter, who is the manager of  
16 resources, and Mike Ryan, who is the forest scientist.  
17 And he is a - Mr Potter is a forester?---Yes.

18 Now, what was the purpose of that consultation so far as you  
19 were concerned, Mr MacDonald?---VicForests is a key  
20 stakeholder in the process, as other stakeholders are  
21 also engaged or consulted in these processes.

22 What's your understanding of action statements, what purpose  
23 do they have?---They specify - they are a comprehensive  
24 document that outlines the current status of a  
25 particular species, the factors that potentially  
26 threaten their long-term survival, and measures that  
27 are required to be implemented to the extent possible  
28 to ensure the survival of that species going forward.

29 And what contribution does VicForests make to that  
30 process?---DSE provides drafts of the action statement  
31 for our feed-back.

1 Yes. And the feed-back that VicForests gives is to try and  
2 avoid logging prescriptions, do you agree with that,  
3 no.

4 Tries to minimise the effect of action statements, the effect  
5 that action statements have on logging  
6 operations?---Yes.

7 And it tries to negotiate with DSE about the content of  
8 action statements?---Yes.

9 And its perspective is that action statements should not  
10 limit forestry operations, would you agree with  
11 that?---No.

12 Because VicForests sees the method of conservation being  
13 limited to the reserve system, does it not?---No.

14 And it argues that the reserve system is the method by which  
15 species should be conserved at landscape level and that  
16 there's no need for additional prescriptions outside  
17 those reserves, do you agree with that?---No.

18 When you and your team, or you and Mr Ross Potter consult  
19 with DSE about action statements, you don't bring any  
20 ecological or specific knowledge about the species, do  
21 you?---Our staff have an understanding, essentially a  
22 degree in forest science gives you a breadth of  
23 exposure across a range of disciplines within forest  
24 management, including ecology and zoology. So our  
25 staff have an understanding which is then expanded on  
26 through their roles in - for instance Ross Potter has  
27 been within the department and VicForests for a number  
28 of years and has significant experience in that area,  
29 has been involved in the development of the forest  
30 management plan, so I believe that our staff have the  
31 capability and experience to be able to provide input

1           into those processes.

2       But the input that VicForests seeks to provide is to try and  
3           negotiate action statements so that they don't  
4           interrupt its business?---No, we seek to ensure that  
5           the action - that we put forward our perspective in  
6           terms of how the action statements can be implemented  
7           practically on the ground, particularly in relation to  
8           our operations, work in the field.

9       All right.    Then in paragraph 33 of your affidavit, you deal  
10           with some correspondence which concerns some species,  
11           including the long footed potoroo, do you have that in  
12           front of you?---Yes.

13       Now, that letter records an agreement was reached between  
14           VicForests and DSE about the long footed potoroo in  
15           July 2008, is that right?---From DSE's perspective,  
16           yes.

17       Was there an agreement or wasn't there?---I wasn't involved  
18           in this process, so I only commenced in the role  
19           Director of Strategy and Corporate Affairs in the  
20           August.

21       So you don't know whether there was an agreement or  
22           not?---It's outlined in DSE's letter as an agreement.

23       Are you aware of any letter from VicForests to say there  
24           wasn't an agreement on the long footed potoroo?---We  
25           wrote back raising some concerns that we had with the  
26           process.

27       Well, that was in response to the draft action statement,  
28           wasn't it?---Yes.

29       And you deal with that in paragraph 34, where it's said that  
30           you received a draft copy of an action statement, in  
31           July 2008.    And in 36 you extract your response, do

1           you see that?---Yes.

2       And VicForests' response to that was to complain about the  
3           cost that the action statement was going to have for  
4           its business?---No, we don't refer to the cost there,  
5           we talk about the revenue per hectare that is generated  
6           from harvesting stands in East Gippsland, just to put  
7           forward the commercial impact of decisions to set aside  
8           areas for the long footed potoroo.

9       So is it the case that you get a draft action statement in  
10           relation to potoroo, and the response from VicForests  
11           is "Well, this is going to cost us a lot of  
12           money"?---No, we are just putting that there to make  
13           sure that for the record that DSE understands the  
14           commercial impact of the decision it's made.

15       Now, you say that the results of DSE's research and the  
16           effects of timber harvesting, clearly there was no  
17           observable relationship between forest aged class and  
18           presence, therefore VicForests would support further  
19           research into the impacts of timber harvesting.   Now,  
20           that was September 2008.   What has VicForests done  
21           about further research into the impacts of timber  
22           harvesting?---Nothing at this stage.

23       So although it would support further research, it hasn't  
24           actually done anything since September 2008?---We also  
25           do research into the impact of harvesting on rain  
26           forest buffers, but that research has been in abeyance.  
27           The impact of the fires last year has meant that both  
28           DSE and VicForests' attention has been diverted  
29           elsewhere.   So even research we are currently  
30           undertaking has been suspended as a result.

31       And then in the next paragraph you say that there's a

1 commercial value about every hectare that's lost, and  
2 you go on to say that "Further research needs to be  
3 undertaken to determine whether reservation within SMZs  
4 is required and whether a review of the existing  
5 reserves is appropriate." Has VicForests undertaken  
6 that research?---No.

7 Has it asked DSE whether it's undertaken that research?---No.  
8 So is it the case that in September 2008 VicForests' response  
9 to a draft action statement is, it's going to cost us a  
10 lot of money, research shouldn't be done, but nothing  
11 has been done in relation to research?---As I said,  
12 2009 was an extraordinary year in terms of the impact  
13 of the bushfires and a lot of things haven't been done  
14 in the last 12 months as a result.

15 Now, if you go to Exhibit CM 27, which is the letter to  
16 Dr Pollard from the DSE, do you have that in front of  
17 you?---Yes.

18 Now, if you go to page 2 of the letter, it says, under "Long  
19 footed potoroo", a new reserve system will be  
20 established, and then about - the fifth dot point it  
21 says: "The revised protection measures result in a  
22 gain of 1210 hectares as available and merchantable  
23 forest in East Gippsland for timber harvesting." Now,  
24 how did the potoroo prescription result in a gain of  
25 1200 hectares?---My understanding was that there were  
26 actually 22,500 hectares that had been set aside for  
27 long foot potoroo reserves and that area was deemed to  
28 be in excess of that that was required. This is in  
29 terms of area in state forest.

30 So as a result of this agreement, in relation to the long  
31 footed potoroo, it actually resulted in VicForests

1 being able to log more forest rather than less, is that  
2 right?---More in East Gippsland and less in the  
3 northeast of the state.

4 And it says above, immediately above that "A special  
5 management zone will be established ... (reads) ...  
6 detected long footed potoroo sites outside of the core  
7 protected area. Prescriptions to be applied are  
8 provided in attachment 3." If you go over to  
9 attachment 3, which is the last document attached to  
10 that exhibit, now, this was August 2008 - I'm sorry,  
11 July 2008, and some of these items were incorporated in  
12 the revised action statement in 2009. Do you know why  
13 item 13 was not included?---No.

14 Do you know why this agreement differs in any respects to the  
15 appendix in the action statement?---No.

16 Now, I want to move now to 2009, and paragraph 38 of your  
17 affidavit. Now, you refer in paragraph 38 to an email  
18 from Wayne Long on 8 January. Now, by 8 January what  
19 was thought to be an Orbost spiny crayfish had been  
20 found in Brown Mountain Creek, hadn't it?---A suspected  
21 sighting of an Orbost spiny crayfish, yes.

22 And that sighting had come either directly or indirectly from  
23 Jill Redwood from EEG, hadn't it?---Yes.

24 And that sighting got communicated up to Mr Long, and Mr Long  
25 sent you an email on 8 January, which is Exhibit 30.  
26 Can you go to that, please. Now, you were copied in  
27 the email chain from Mr Long on 8 January at 11.14,  
28 correct?---Yes.

29 And if we see the email chain starts on the next page, on 7  
30 January, where Stephen Henry tells Barry Vaughan that  
31 there's been the detection of the spiny - what was

1 thought to be the spiny crayfish in Brown Mountain  
2 Creek. And over on Mr Henry's email in the  
3 second-last paragraph, he says, the second sentence:  
4 "Past practice for other species such as the long  
5 footed potoroo has been for the species prescription to  
6 be applied as an interim measure until a decision of  
7 the validity of the record is made." Mr Henry said:  
8 "In this case I will recommend that DSE first confirms  
9 the identity of the specimen and checks the site."  
10 Now, when you got this email on 8 January, you knew  
11 that the prescription for a detection of a spiny Orbost  
12 crayfish was a 100 metre buffer over the creek, is that  
13 right?---I wasn't aware at that stage.

14 Well, you found out on the 8th?---Yes.

15 And what had happened between the 7th and the 8th was that  
16 someone at DSE had - someone had VicForests had mapped  
17 a proposed buffer for the Brown Mountain Creek of 100  
18 metres, correct?---Yes.

19 And if you go over to the third and last page of that  
20 exhibit, there's a map which contains a buffer in the  
21 shaded - over Brown Mountain Creek, do you see  
22 that?---Yes.

23 Now, that map says 14 August 2008 down the bottom. Are you  
24 able to explain that date to His Honour?---No, but I  
25 imagine that that map would have been produced as part  
26 of the preparation for harvesting of coupe 20.

27 So a 100 metre buffer had already been designed as part of  
28 coupe 20 preparation, had it?---No, I'd imagine what's  
29 happened is they have taken a map that was created on  
30 14 August and then superimposed the sighting and the  
31 buffer on that map.



1 I understand. And what's a "cary fish buffer map", up the  
2 top right-hand corner, are you able to assist  
3 there?---No.

4 Going back to the email, Mr Long told you that there's the  
5 mandatory buffer, that he'd spoken to Steve Henry, and  
6 he said "The Walk has almost been completed. However,  
7 even if applied, the crayfish buffer would have had  
8 minor impact in this instance once rain forest buffers  
9 and associated operational issues were applied." Now,  
10 what Mr Long was talking about there on 8 January about  
11 minor impact was the minor impact on forestry  
12 operations, wasn't he?---On coupe 20.

13 Yes. So he had done at least some analysis that the impact  
14 on coupe 20 would be minor?---Yes.

15 And he went on to say "A similar situation was likely to  
16 occur on the other proposed coupes located further down  
17 Brown Mountain Creek", see that?---Yes.

18 He said "This could only be confirmed definitively by field  
19 survey marking activities". But the position on 8  
20 January was that VicForests had the expectation that  
21 the 100 metre buffer would have a minor impact on its  
22 operations, do you agree with that?---Only on coupe 20,  
23 which was already completed.

24 Well, what's Mr Long saying about the similar situation on  
25 the other proposed coupes?---I am not - the similar  
26 situation would - depending on the location, if there's  
27 any rainforest along Brown Mountain Creek, that may  
28 result in a mandatory buffer anyway on that creek.

29 How long has Mr Long been a forester in East Gippsland?---A  
30 long time, I am not sure exactly how long.

31 He is very experienced in these things?---Yes.

1 And he has made an assessment that a 100 metre buffer is  
2 going to have a minor impact and a similar situation on  
3 the other coupes, hasn't he?---I wouldn't draw that  
4 inference from that.

5 What inference would you draw?---That there would have to be  
6 a 100 metre buffer potentially on Brown Mountain Creek.  
7 It was known to you on 8 January that a 100 metre buffer was  
8 not going to be a big deal for VicForests?---No, that's  
9 not the case.

10 Now, going back to your affidavit, it's clear that on 13  
11 January the crayfish was apparently incorrectly  
12 identified, and that no need for the buffer. In  
13 paragraph 42 you say that on 27 January you received a  
14 phone call from Lee Miezis who had received some  
15 information about gliders detected in Brown Mountain.  
16 What did he tell you?---That there'd been surveys  
17 completed by people associated with environment in East  
18 Gippsland which indicated there were elevated levels of  
19 the greater glider and the yellow bellied glider.

20 And you were provided a copy of the survey on 28 January,  
21 weren't you?---Yes, I was.

22 Now, that survey recorded high concentration of arboreal  
23 mammals and the presence of a sooty owl and a powerful  
24 owl, didn't it?---Indicated there was a sooty owl and  
25 powerful owl in the area, but certainly sightings of  
26 the arboreal mammals, yes.

27 Not only sightings of the arboreal mammals, there was a very  
28 high concentration of arboreal mammals, wasn't  
29 there?---Yes.

30 And what was the significance of that as far as you  
31 understood it?---It required a trigger - under the

1 conservation guidelines it required DSE to review the  
2 sightings to determine whether an SMZ would be  
3 declared.

4 Yes. So it, as far as you were aware, if DSE confirmed the  
5 concentration, an SPZ would be declared?---No, they are  
6 conservation guidelines, so they are guidelines only,  
7 DSE's then required to take that into consideration and  
8 balance both the conservation issues with the potential  
9 impact on timber production.

10 Now, on 29 January, which is the next exhibit, CM 33, that's  
11 an email that Mr Vaughan sent to all staff of  
12 VicForests, and he says in the second paragraph:

13 "Contrary to the ... (reads) ... the greater yellow  
14 bellied gliders are not endangered, however the  
15 management plan does contain a unique conservation  
16 guideline for a number of arboreal mammals in order to  
17 conserve areas of particularly high concentrations of  
18 these animals." Now, he doesn't say there that if  
19 there are the particularly high concentration, the SPZ  
20 may or may not be created, does he?---He doesn't say  
21 that the creation of the zone would be mandatory  
22 either.

23 Now, he refers to particularly high concentrations of these  
24 animals. As at 29 January did you turn your mind to  
25 the significance, apart from the management plan, but  
26 the significance of this concentration of arboreal  
27 mammals?---No, I didn't.

28 So it was only relevant to you to the extent that it might  
29 trigger an SM?---From my perspective it was something  
30 that was going to be investigated further by DSE.

31 Now, you know, don't you, that in early February EEG advised

1 the DSE that hair tubing had yielded a potoroo hair on  
2 the edge of coupe 19?---I can't recall that to be  
3 honest.

4 Do you remember becoming aware that EEG had advised DSE that  
5 hair tubing had yielded a potoroo?---No, I remember  
6 there was a sighting, video footage of a sighting on  
7 Yalmy Road, but I can't recall the hair tubing, no  
8 Would you look at this document, please. I would ask you to  
9 look at those two emails, please. Have you seen that  
10 before, Mr MacDonald?---No.

11 You knew, didn't you, around 6 or 7 February that - I am  
12 sorry, I picked the wrong one up - that Stephen Henry  
13 had been advised about the hair tubing, and that, three  
14 paragraphs from the bottom, you knew that Henry was of  
15 the view that an interim SMA would include two proposed  
16 coupes on either side of Brown Mountain Creek?---No.

17 No one ever told you that?---As I said earlier, February 7  
18 was the Black Saturday fires, there was significant I  
19 guess activities going on at that time related to that  
20 which certainly had taken up most of my role at the  
21 time. So I wasn't aware of this sighting.

22 Well, this was an email on 3 February. You weren't told  
23 anything about it?---In the letter - I mean that whole  
24 week was - given the fire threat was known early in the  
25 week, that whole week was focused on preparing for the  
26 fire weather conditions on that Saturday, so that was  
27 pretty much taking up all my time that week, so no, I  
28 hadn't spoken to Lee Miezis or (indistinct).

29 I tender that, if Your Honour pleases.

30 HIS HONOUR: Yes. Exhibit 58 - - -

31 MR WALLER: Your Honour, I apologise for rising late, but

1           Your Honour there's no basis, it's submitted, to tender  
2           this.    It may be that it can be put to Mr Miezis.

3   MR NIALL:   I am content if that's marked for identification,  
4           Your Honour.

5   HIS HONOUR:    I accept that.

6  
7   #EXHIBIT 58(MFI) - Email.

8  
9   MR NIALL:    Would you have a look at this document, please.

10           Now, this is an email to you, Mr MacDonald, from  
11           Michael Theobald who is based in Orbost, and he was  
12           telling you there that the commencement of a two week  
13           potoroo survey hair tubing was marked as Monday 9  
14           February.    So you were aware at least by the 12th that  
15           there was to be a survey for potoroos, correct?---Yes.

16           And the reason there was a survey for potoroos, I suggest,  
17           was because a hair tube result had been delivered to  
18           DSE in early February?---My understanding was that  
19           there had been diggings found in the area which were  
20           identified as potentially long footed potoroo diggings,  
21           hence the desire to do hair tubing.

22           Is your evidence that the reason for the survey was that  
23           someone had seen some diggings?---That's my  
24           understanding, yes.

25           Well, who had seen it?---I can't recall, I believe it may  
26           have been part of the survey work by Environment East  
27           Gippsland.

28           Now, so there is at this point in time, on 12 February, a  
29           final survey had not been taken place due to fires, now  
30           that's the survey for arboreal mammals?---Yes.

31           And that there's to be a two week potoroo survey,

1 correct?---Yes.

2 And Mr Theobald said it's business as usual in East Gippsland  
3 for VF, and the two coupes will be lost if not started  
4 by Feb's end. So VicForests was very keen to commence  
5 harvesting as soon as possible?---Yes.

6 And was keen to get these surveys out of the way?---We were  
7 keen to get some resolution as to whether the  
8 harvesting could be undertaken or not.

9 I tender that, if Your Honour pleases.

10

11 #EXHIBIT 59 - Email of 12/02/2009.

12

13 MR NIALL: Now, do you know Dr Triggs?---No.

14 Do you know who she is?---No.

15 Do you know that there's an expert the DSE uses for  
16 identification of hair from species?---I know people at  
17 the Arthur Rylah Institute that are involved, but not  
18 personally, no.

19 You knew that DSE was conducting some surveys in relation to  
20 the arboreal mammals and also in relation to the  
21 potoroo, and you also knew, didn't you, that Mr Vaughan  
22 was going to go along on 5 February, is that  
23 right?---Yes.

24 Now, Mr Vaughan doesn't have any experience in animal  
25 surveys, does he?---He may have when he was working in  
26 New South Wales, I am not sure.

27 You don't know whether he does or whether he doesn't?---No.

28 He's never told you that he had particular expertise in  
29 surveying animals, did he?---No.

30 Arboreal mammals?---No.

31 And the reason he wanted to go on this survey was to try and

1           ensure that the methodology was sound?---Yes.

2       But he didn't tell you he had any expertise in the

3           methodology to be employed in a survey of arboreal

4           mammals, did he?---No, hence he wanted to go and see

5           what methodology was actually used.

6       Well, how would he know whether it was sound or not?---We

7           were also going to reference - obtain documentation on

8           the methodology used in New South Wales.

9       So he was going to check up on DSE, was he?---And familiarise

10          himself with the process.

11       He didn't trust DSE?---No, it was more about familiarising

12          himself with the process.

13       Why did he say, as you say in paragraph 49 of the affidavit,

14          that he wants to go so he is comfortable that the

15          methodology is sound?---Well, as the regional manager

16          he is responsible for the operations in his area.

17          This obviously was - the potential outcome from this

18          was to have a significant impact on the performance of

19          his region in that year, and he felt it was important

20          that he was across the issue.

21       And Mr Spencer says helpfully that he can get the New South

22          Wales methodology?---Yes.

23       And he needed to do that because there was no experience

24          within Victoria in DSE about methodology for these

25          things, was there?---Not that I was aware of, no.

26       And you know, as you say in paragraph 50, that there were

27          surveys on 28 January, 5 February and 12 March, and you

28          say in paragraph 53 - I'm sorry, and in paragraph 52

29          you say on 15 February you were updated on the long

30          footed potoroo survey work.     So you knew that these

31          surveys were being undertaken.     And then in paragraph

1           53 you say "The results of the surveys that were  
2           conducted by DSE were not published until August 2009."  
3           See that?---Yes.  
4           Now, when did you first see the report?---In August 2009.  
5           You'd never seen a draft report before then?---No.  
6           But you'd been told what the results were, weren't you?---I  
7           was told what the results indicated, yes.  
8           That the results indicated in excess of the trigger point for  
9           arboreal mammals?---Yes. On one of the (indistinct).  
10          Yes. And what were you told in relation to the  
11          potoroo?---That there had been no - that there had been  
12          cameras placed out in the area and they'd captured no  
13          footage of a long footed potoroo.  
14          Were you told in March that non detection of long footed  
15          potoroos must be treated with caution?---I can't recall  
16          being told that in March.  
17          When were you told that?---I do remember reading it in the  
18          report in August 2009.  
19          Were you told in March that the species, that is the potoroo,  
20          can be very difficult to detect?---I was aware of that  
21          already prior to March 2009.  
22          Were you told that there was the presence of diggings which  
23          are strongly suggestive of the specie's  
24          presence?---Yes.  
25          And were you told that the forest type was assessed as good  
26          quality habitat for long footed potoroos?---Whether it  
27          was at that time or later when I read the report, I  
28          can't recall.  
29          Were you told at the time that it's plausible, according to  
30          the DSE, that the species may be present at the  
31          site?---Given that there was already a confirmed



1 sighting in the area, I accepted that there was a  
2 likelihood that the species was present.  
3 But you weren't told in March that Mr Henry wanted to put an  
4 interim SMA based on a hair tube result?---No.  
5 Now, you say in your affidavit that - in paragraph 57 - that  
6 as a result of the survey results which I have just  
7 asked you about, you understood that DSE would need to  
8 make a decision as to whether a special protection zone  
9 would be declared, see that?---Yes.  
10 And that was simply in relation to the arboreal mammals, was  
11 it?---Yes.  
12 So you didn't consider that any decision needed to be made by  
13 DSE in relation to the potoroo?---At that stage I was  
14 unaware that there'd been a confirmed sighting, so - -  
15 -  
16 So you didn't think that anything that had been observed by  
17 the DSE staff in relation to the potoroo, that didn't  
18 warrant any further action as far as you were  
19 concerned?---No.  
20 And over on paragraph 60 you say that Brown Mountain is an  
21 elevated area, that April to September are generally  
22 not suited?---Yes.  
23 And you say "By late March I knew that based on VicForests  
24 practice harvesting will not be planned." And for  
25 that reason you were not actively following up the DSE  
26 at this stage to find out whether it had determined  
27 that a SPZ or any other prescriptions were necessary.  
28 And then the next step in the chronology is that in  
29 early June 2009 you had a discussion with Lee Miezis  
30 about prescriptions, was that the process that was  
31 adopted?---Yes.

1 So between March and June 2009 the SPZ and the gliders have  
2 gone off your radar?---Yes.

3 And you weren't actively following up the DSE at that  
4 stage?---No.

5 And the ball was in DSE's court as far as you were  
6 concerned?---Yes.

7 And that's truthful evidence, is it, Mr MacDonald?---Yes,  
8 again to reiterate, basically we were dealing with the  
9 after effects of the bushfires, so it's - yes, my  
10 attention was diverted elsewhere.

11 So this had gone off your desk, effectively?---Effectively,  
12 yes.

13 Now, can you remember receiving an email from Mr Vaughan on  
14 13 March concerning the Brown Mountain survey results?  
15 If I could ask you to have a look at that document,  
16 please. Do you have that in front of you?---Yes.

17 Do you remember getting that on 13 March?---I was actually  
18 driving that day, I'd been up in the central highlands  
19 in the fire effected area, but Barry rang me to discuss  
20 his concerns and the fact that he was going to compose  
21 this email and send it to Lee.

22 And then no doubt you would have read it when you got back to  
23 the office?---Yes.

24 And this is an email from Vaughan to Miezis after the surveys  
25 and after Vaughan knew that the trigger point had been  
26 reached for arboreal mammals, correct?---Yes.

27 And what Mr Vaughan wanted to do was to get to Miezis and  
28 ensure that no prescriptions would be in place that  
29 would reduce availability of timber?---No, that wasn't  
30 Barry's intent. Barry's intent was to - he had some  
31 issues with the process that he wanted to put forward

1 to Lee Miezis in terms of - - -

2 Let's go through those, in the last sentence of the first

3 paragraph he says "Before this translates into a

4 further loss of resource available I would like to

5 raise a number of concerns". So he is saying before

6 any prescription's in place, here are my problems,

7 isn't it? That's right?---Yes.

8 And the first one is that he attacks the management plan,

9 doesn't he?---No, he is just raising an issue with the,

10 I guess the clarity of the terminology in that.

11 He says it's unclear and outdated, correct?---Yes.

12 So the first thing he does is say that the plan's no

13 good?---No, he is just saying the plan is outdated.

14 And the second thing he does is that the methodology that was

15 adopted was no good?---No, he is just saying that there

16 were some issues that he had with the methodology

17 itself.

18 And the third thing he says is that the motive for the survey

19 was antilogging, see that, the third dot point?---Yes.

20 Do you agree that the study that DSE took was motivated by

21 antilogging sentiment?---Well, it was motivated by

22 people who didn't support harvesting that area, yes.

23 You don't think it was appropriate for DSE to do the

24 survey?---I was not uncomfortable with DSE doing the

25 survey.

26 And then he says "The bottom line, Lee, is that landscape

27 decisions should be made on a landscape level." And

28 what he is referring to there is reserves, isn't

29 he?---No, he is looking at making sure that you don't

30 look at point locations or point sightings for species,

31 that you make sure that you - at a landscape level

1 ensure that there's sufficient habitat for the species  
2 across all their natural range.

3 And his last sentence is "I look forward to your support on  
4 this issue", and he was asking for Lee Miezis to  
5 support VicForests on this, wasn't he?---Yes.

6 And you knew the contents of this email before it was  
7 sent?---As I said, I was in the car driving at the  
8 time, Barry gave me an overview of what he intended to  
9 put forward.

10 And there's nothing in that email that you disagree with, is  
11 there?---There's - I wouldn't say that I would have  
12 worded it in this way, but - - -

13 But the sentiment you agree with?---Not so much the  
14 sentiment, but there are concerns that Barry's raised  
15 in this email that I agree with.

16 Is there anything you disagree with?---No.

17 I tender that, if Your Honour pleases.

18

19 #EXHIBIT 60 - Email Barry Vaughan to Miezis, 13/03/2009.

20

21 MR NIALL: Would you have a look at this document, please.

22 Now, this is an email chain, and I would ask you to go  
23 to page 4, please. Have you got that,  
24 Mr MacDonald?---Sorry, which - - -

25 Page 4?---Yes.

26 An email dated 19 March 2009 from you to Mr Vaughan and  
27 Mr Potter?---M'mm.

28 Do you see that?---Yes.

29 Now, you told Barry that you'd had a conversation that  
30 morning, 19 March, with Lee Miezis, hadn't you?---Yes.

31 And you said it was a positive discussion, yes?---Yes.

1 And it was a tricky situation for both parties. What was  
2 tricky, Mr MacDonald?---That obviously this issue had  
3 been - gained some elevated - had been elevated to the  
4 media and the Federal - there was a review last year of  
5 the EPBC Act, and there were concerns at the Federal  
6 Government level that the states were not meeting their  
7 obligations under the regional forest agreement.

8 And you put the position to Miezis on that day that two of  
9 the three surveys were below the trigger levels, that  
10 there was an argument to waive the SPZ, and Lee Miezis  
11 told you he was "nervous about ... (reads) ... EPBC  
12 issues with the Feds given Bob Brown will enter the  
13 fray." Do you remember that?---Yes.

14 And you said that you might harvest the area anyway "given we  
15 have TRP approval", see that?---Yes.

16 So you told Lee Miezis on 19 March that you didn't care about  
17 the survey results, and you might harvest the area  
18 anyway, is that right?---I put that position to him to  
19 see what his response was, yes.

20 Why did you do that?---Just to understand what his position  
21 was.

22 How far you could push?---Just to see what DSE's response  
23 would be if we did that.

24 And how far you could push?---I was just testing the water,  
25 yes.

26 Were you serious that you were going to log it because you  
27 had TRP approval?---No.

28 And Lee put the position that you would be in breach of the  
29 SFTA because TRP approval is conditional on compliance,  
30 he told you that?---Yes.

31 And you said that if it goes into the SPZ under the RFA there

1           must be a swap, see that?---Yes.

2       And you then asked Larissa, that's Larissa Murray, to look in  
3           to try and identify some coupes to swap for the two in  
4           Brown Mountain, correct?---Looking at SMZs that could  
5           be swapped, not necessarily coupes per se.

6       And a few moments ago in your evidence you said that by late  
7           March you knew that nothing much was going to happen,  
8           that you weren't actively following up the DSE, and  
9           pretty much it had gone off your desk, remember giving  
10          that evidence?---Yes.

11       In fact on 19 March you were threatening to log the area,  
12          weren't you?---Yes.

13       Well, that doesn't sound like a person who is not actively  
14          following up the DSE, does it?---I said before that  
15          late March, and this is mid-March.

16       So you were actively following up in mid-March but not late  
17          March?---This is one email in a day in a month when I  
18          am doing any number of things.    So I wouldn't say that  
19          one email would indicate that I was spending the  
20          majority of my time on this issue.

21       It wasn't a particularly big issue for you to tell Lee Miezis  
22          that you were going to log a coupe in breach of the  
23          forest management plan?---As I said previously, I was  
24          seeing what Lee's reaction would be to that.

25       Is that something that you regularly tell him?---Look, it's -  
26          the relationship with VicForests and DSE often involves  
27          tension and we - I in that role with Lee would not  
28          necessarily be in agreement on issues, and so we had  
29          conversations like this.

30       Why didn't you refer to this email in your affidavit,  
31          Mr MacDonald?---Which affidavit?

1 Well, any of the four affidavits, Mr MacDonald?---I can't  
2 recall.

3 When you swore your affidavit on 27 November last year,  
4 having done three earlier ones, did you look for  
5 relevant emails?---Yes, we have been through a process  
6 of discovery, yes.

7 Did you look for relevant emails?---In the main, yes.

8 Well, what about this one, why didn't it feature in your  
9 affidavit?---I am not sure.

10 The reason it didn't feature in your affidavit, I suggest, is  
11 because it's inconsistent with the story you are trying  
12 to tell in paragraph 61 and 62, isn't it?---As I said,  
13 by late March, and this is more mid-March, so I don't  
14 think it's inconsistent with 61.

15 What about paragraph 57, where you say as a result of the  
16 surveys you understood that DSE would need to make a  
17 decision as to whether an SPZ would be declared, and  
18 that VicForests couldn't harvest in this area and DSE  
19 determines - you didn't tell - you didn't say in the  
20 affidavit that VicForests was trying to persuade Lee  
21 Miezis not to make an SPZ, did you?---No.

22 You didn't think it was relevant?---No.

23 Your whole affidavit between paragraphs 53 to 62 is trying to  
24 convey the impression that this was all DSE's  
25 responsibility and had nothing to do with VicForests,  
26 isn't that right?---No, I am saying it had nothing to  
27 do with VicForests because there's a stakeholder in  
28 this process. But the principal decision-making rests  
29 with DSE.

30 But you didn't think it was appropriate to say that in the  
31 affidavit?---There were - I think I made it clear in

1 terms of a letter that I'd sent to Jill Redwood that  
2 the principal decision-making process for zoning  
3 decisions was DSE's.

4 Now, you asked Larissa Murray to find some coupes, didn't  
5 you?---No, to find some SMZs.

6 Could you have a look at the first email in that chain which  
7 is 20 March 2009. It's an email from Murray to  
8 Potter. She says "I think we need to stress to Lee  
9 that existing reserves must be working well in that  
10 area to get high arboreal levels. Also think we need  
11 to question the methodology and location of transects."  
12 Do you see that?---Yes.

13 And these are the points that Ms Murray was making in order  
14 to rebut the survey, wasn't it?---No, she was just  
15 putting her opinions forward to as to how the results  
16 should be interpreted.

17 Yes. And she goes on, a few paragraphs down she says "I  
18 have nominated a few coupes that could be good." Now  
19 stopping there, this was what you had asked her to do,  
20 wasn't it, to identify a few coupes that could be  
21 swapped?---Yes.

22 And she says "Haven't had a great deal of time to come up  
23 with them, but have decided to target high conservation  
24 value areas because the Greens are targeting high  
25 sawlog value areas." So she's looking deliberately  
26 for high conservation value coupes, isn't she?---She's  
27 looking at areas that would have high sawlog values.

28 Well, she's not saying that at all, Mr MacDonald. She's  
29 saying "I am targeting high conservation values",  
30 doesn't she?---Yes.

31 And the reason she was saying that was that if there was to



1 be a game of swap, you wanted to identify high  
2 conservation values which would make it harder for them  
3 to keep Brown Mountain, correct?---Yes.

4 And she goes on to say "However, in saying all of that, all  
5 of the coupes I have targeted would not require huge  
6 adjustments to the reserve boundaries in which they lie  
7 except maybe Dingo Creek. However, it is largely  
8 logged anyway." Now, the reference to Dingo Creek is  
9 an area in a reserve?---I am not familiar with Dingo  
10 Creek.

11 Well, if you go to the attachment, it is the last map, see  
12 that?---Yes.

13 And that's East Gippsland, and there's a reference to  
14 "proposed Dingo Creek icon area", do you see  
15 that?---Yes.

16 And that appears, according to Ms Murray, that it's been  
17 largely logged, that it's going to be included in the  
18 icon reserve, is that right?---Yes.

19 And what Ms Murray was doing was trying to find high  
20 conservation value areas in the existing icon reserve  
21 area to swap for Brown Mountain as part of this  
22 process, correct?---I think you need to look at - go  
23 back to the email and look at the fact that she has  
24 high conservation value in apostrophes as areas - as a  
25 - not the fact that they are high conservation value  
26 but they are a type of forest which would have a  
27 commensurate proportion of sawlog in them that would  
28 represent a reasonable swap.

29 Well, in the same sentence she refers to areas with high  
30 sawlog value. Why doesn't she say "I have targeted  
31 high sawlog value"?---She could have said that.

1 Well, because she wasn't saying high sawlog value, she was  
2 targeting high conservation value?---No, I believe she  
3 would have been targeting high sawlog value to be a  
4 fair swap.

5 If you would turn over to the next page, please. Mr Potter  
6 sent you an email on 20 March at 2.23, and what  
7 Mr Potter is giving you is some arguments to take back  
8 to DSE about why it shouldn't apply the management  
9 principle and the management plan, isn't it?---Yes.

10 And you will see that there are some extracts, I won't take  
11 you to those, various parts of the managements plan.  
12 And over on the next page, immediately below - or the  
13 bolded area, in bold Mr Potter says "No area within the  
14 Brown Mountain area is further than about 1.5  
15 kilometres from thousands of hectares of reserve." Do  
16 you see that?---Yes.

17 And the point was being made there was that, well, these  
18 arboreal mammals can go anywhere, wasn't it?---No, it's  
19 indicating that there would be sufficient habitat in  
20 the surrounding areas for those mammals, particularly I  
21 guess as the food source for powerful owl and sooty  
22 owl.

23 But the fact was, and you knew it by March, that this was an  
24 extremely rare occurrence, the concentration of  
25 arboreal mammals that had been found?---I would say it  
26 was a high density, I wouldn't say it was an extremely  
27 rare occurrence.

28 No? Well, how frequent do you think it would be?---Well, I  
29 don't believe that there's enough survey work done to  
30 necessarily to determine how - you know, how do you  
31 define "rare"? To define rare you would need to do a

1 lot more survey work than had been undertaken.  
2 What basis have you got for saying that it's not  
3 rare?---Well, the basis for that, the trigger levels  
4 was the work that was done in the early '90s, and using  
5 the highest density that they detected during those  
6 surveys back in the early '90s, and there's been  
7 limited survey work done since. So in my opinion it  
8 doesn't necessarily mean that that's necessarily rare,  
9 it is just that was based on survey work done  
10 previously in that area.  
11 You think it's commonplace, do you? You think it's  
12 commonplace for - - - ?---No, I don't believe it's  
13 necessarily commonplace, but I don't think - - -  
14 But you won't accept that it's rare?---No, I don't believe it  
15 quantifies as rare, because I don't believe there's  
16 been sufficient survey work to determine what is  
17 exceptional or rare.  
18 Well, what is the frequency rate of this level of  
19 concentration of arboreal mammals in East  
20 Gippsland?---Well, these levels were detected once in  
21 the 1990s and on the Coast Range Road.  
22 So they'd been detected once in the 1990s, and they'd been  
23 detected once in 2009, correct?---And there had been  
24 limited survey work done in between.  
25 But you are not prepared to accept that they are rare?---No,  
26 I will accept they are high, though.  
27 And you say, or Mr Potter told you "To maintain the  
28 conservation guideline for arboreal mammals in this  
29 area is absurd given the enormous level of protection  
30 currently offered." Did you agree with that  
31 proposition?---This needs to be considered in light of

1 the fact that the forest management plan was developed  
2 in 1995 in East Gippsland, and subsequent to that there  
3 was an extensive process undertaken with the regional  
4 forest agreements which were developed in the late '90s  
5 which have made some of the requirements of the forest  
6 management plan redundant because they were superseded  
7 with a far superior reserve system.

8 Well, with a far superior reserve system, but you are not  
9 able to identify anywhere in the reserve system where  
10 there's this concentration of arboreal mammals, are  
11 you?---No.

12 But your evidence to His Honour is that it's far  
13 superior?---The reserve system.

14 For these particular animals, Mr MacDonald?---No, what I said  
15 was that the reserve system post the RFA was superior  
16 to the reserve system at the time that the management  
17 plan was completed in 1995.

18 Coming back to this document, under the heading "Summary",  
19 Mr Potter said, well, in reading the plan, DSE is the  
20 authority to both create any reserves or remove  
21 reserves depending on the specific situation. And the  
22 point that Mr Potter was raising is that we either need  
23 to not have it applied or we need to amend the  
24 management plan, correct?---The position we came to is  
25 that it shouldn't apply in this case.

26 Well, if it had to apply you needed to amend the management  
27 plan?---On my reading of it - I mean, because amending  
28 the management plan is not a simple process from our  
29 perspective, it was more about not having that  
30 guideline apply in this instance.

31 Well, apart from - well, you got this information from

1 Mr Potter with the assistance of Ms Murray, and what  
2 did you do with it?---By my recollection the main point  
3 - the main use of this information is when I wrote to  
4 Jill Redwood in the middle of April in response to  
5 further surveys that had been undertaken by Environment  
6 East Gippsland.

7 So you did nothing on this topic until you wrote to Jill  
8 Redwood, is that right?---That's my recollection, yes.

9 HIS HONOUR: Should that bundle be Exhibit 61?

10 MR NIALL: Yes, if Your Honour pleases.

11

12 #EXHIBIT 61 - Bundle of emails 00/03/2009.

13

14 MR NIALL: So is it your evidence that in the middle of March  
15 2009 you were actively following up DSE, but you  
16 stopped by late March?---I wouldn't say I stopped  
17 completely, but it wasn't a principal issue that I was  
18 dealing with.

19 Your Honour, is that a convenient time?

20 HIS HONOUR: How long do you think you are going to be?

21 MR NIALL: I will be no more than an hour, Your Honour.

22 MR WALLER: Your Honour, I mentioned to my learned friends  
23 earlier that Mr MacDonald who is no longer, as Your  
24 Honour knows, employed by VicForests has a real  
25 preference to conclude today if possible. He has got  
26 a business engagement I understand in Myrtleford  
27 tomorrow. He was going to drive back to Melbourne and  
28 then with a colleague drive for three hours to  
29 Myrtleford tomorrow. He is content, I understand, to  
30 complete his evidence today if that were possible, but  
31 of course we don't wish to inconvenience others, Your

1 Honour, Your Honour's associates and of course those  
2 preparing the transcript and our learned friends. But  
3 I just raise that concern because Mr MacDonald had  
4 brought it to my attention. If it were possible to  
5 finish Mr MacDonald today that would indeed be  
6 preferable, but on Mr Niall's estimate that may not -  
7 that would take us to a quarter past five.

8 HIS HONOUR: Yes. Mr Niall, I think you can keep going  
9 for the moment.

10 MR NIALL: If Your Honour pleases. Now, you attended a  
11 meeting on 7 April 2009 for the purposes of discussing  
12 threatened species management, didn't you?---Yes.

13 And that's Exhibit 54, Your Honour. What was the purpose of  
14 that meeting as far as you understood, Mr MacDonald?  
15 52, Your Honour, I'm sorry?---The attempts to look at  
16 whether there were - or that changes were necessary to  
17 the pre harvest survey process to incorporate  
18 assessment of habitat for rare and endangered species.

19 And there was a good deal of discussion at that meeting on 7  
20 April about the surveys of arboreal mammals on Brown  
21 Mountain, wasn't there?---There was, yes.

22 I beg your pardon?---Yes.

23 And at that meeting you attended as well as Mr Potter and  
24 Mr Spencer?---Yes.

25 And you and your colleagues from VicForests forcefully put  
26 the view that an SPZ shouldn't be created as a result  
27 of the survey results, didn't you?---There was a lot of  
28 things discussed at that meeting. I can't recall that  
29 being a specific item that we discussed.

30 Well, was the question of an SPZ as a result of the survey  
31 results discussed?---Look, it was nearly 12 months ago,

1 I mean a range of things were discussed, but the  
2 principal point of the meeting was to discuss pre  
3 harvest surveys.

4 Well, the particular context in which it had arisen on 7  
5 April was the Brown Mountain results, was it  
6 not?---Yes. There was two elements to it, there was  
7 Brown Mountain results but there was also a concern on  
8 behalf of the minister for environment about the fact  
9 that these surveys were being conducted by third  
10 parties showing elevated levels of arboreal mammals,  
11 and he wanted both the DSE and VicForests to consider  
12 how they would address that for pre harvest surveys.

13 And your position was that no SPZ should be created?---Yes.  
14 And if there was to be one you should swap it for another  
15 SPZ?---Under the regional forest agreement we had that  
16 option, yes.

17 And during that meeting you were told, weren't you, that the  
18 density of animals, arboreal mammals that had been  
19 found was quite rare, and that it was unlikely to find  
20 other areas containing this density within East  
21 Gippsland, you were told that, weren't you?---Yes.

22 But you didn't believe it?---It is not that I didn't believe  
23 it, it was also discussed at that meeting that it was  
24 20 years since DSE had done a comprehensive survey, so  
25 they didn't have a lot of data to, as I said earlier  
26 that, you know, it gives weight to definitions of rare  
27 or high or extreme.

28 You weren't prepared to accept on 7 April, just as you are  
29 not prepared to accept today, that the concentration of  
30 arboreal mammals was rare, is that right?---It was  
31 high, but I am not saying it was necessarily rare, no.

1 And you were told that the density trigger in the management  
2 plan had never been applied before, weren't you -  
3 hadn't you been told that?---I can't recall.

4 Well, are you aware of any other occasion when it had been  
5 applied?---No.

6 Did you turn your mind to the ecological significance of an  
7 aggregation of arboreal mammals that had been  
8 found?---I shared the view of others that a high  
9 reading is not necessarily a bad thing, it indicates  
10 that there are significant numbers of those animals in  
11 that area.

12 Well, when you say it's not a bad thing, what do you mean by  
13 that?---That it indicates a viability, if you like, of  
14 those arboreal mammals in that area.

15 Yes. And did you think about what might happen if there's  
16 logging throughout the coupes, two coupes, in which  
17 those arboreal mammals lived?---I was looking at it in  
18 the context of a small area available for harvesting in  
19 a significant area of conservation reserves with the  
20 national parks either side of the area in question.

21 But the fact is, is it not, that the arboreal mammals had  
22 chosen to be concentrated on coupes 15 and 19?---I  
23 would argue that there's probably similar levels of  
24 those animals in surrounding national parks in similar  
25 habitat.

26 Well, where are they? Where are they?---In similar forest  
27 types in reserve systems in that area.

28 And what do you base that on?---That those animals are found  
29 in - that those animals don't, they are tenure blind,  
30 if you like, they will be found wherever that habitat  
31 is available.



1 Where in reserves are they found in that concentration?---I  
2 can't point to that.

3 Mr Henry told you - you know who Mr Henry is, don't  
4 you?---Yes.

5 And you know that he told you at that meeting that the  
6 concentration of arboreal mammals was genuinely a rare  
7 density, didn't he?---I remember him saying it was a  
8 very high density, yes.

9 And that it was genuinely rare, didn't he?---I can't recall  
10 whether he used the word "rare".

11 Did you have any reason to disagree with Mr Henry?---Not that  
12 it was a high reading, no. I mean, the facts were  
13 there.

14 He didn't say it was high, he said it was genuinely rare,  
15 didn't he?---I can't recall him using the word "rare".

16 Well, the notes that Mr Spencer took record him saying that  
17 it's genuinely a rare density. Have you got any  
18 reason to believe that that's not an accurate record of  
19 what he said?---I can't recall the word "rare" being  
20 used. That's my recollection of the meeting.

21 Now, could Mr Spencer be shown exhibit - I beg your pardon,  
22 Mr MacDonald be shown Exhibit 52, please. Now, these  
23 are the typed notes that Mr Spencer made at that  
24 meeting. Could you just have a look at those to  
25 yourself. Have you seen those before,  
26 Mr MacDonald?---Yes, I have, yes.

27 When did you see them?---During the discovery process.

28 Now, over on the second page under the heading "Forest  
29 management plan", it is said that it is not clear what  
30 the forest management plan requires with respect to  
31 zoning changes. And then over on the next page it

1           says "Needed an analysis of reserved areas to see if  
2           these densities exist throughout the reserves and  
3           therefore are not rare, then amend the forest  
4           management plan."    Do you see that?---Yes.  
5    Was that your idea?---It was discussed at the meeting and I  
6           am not sure - I'd struggle to attribute that to - so I  
7           can't recall whether that was my suggestion or not.  
8    Now, was it something that VicForests thought was a good  
9           idea?---Yes.  
10   Which was to survey in reserved areas in order to provide a  
11          justification to amend the management plan so it didn't  
12          need to apply to Brown Mountain, that was the  
13          purpose?---No, the purpose was to actually identify  
14          whether these - I guess from our perspective this  
15          process identified that there hadn't been a lot of  
16          monitoring work done in the last 20 years and that  
17          there was significant areas of forest that had been set  
18          aside in reserves and it would be good to understand  
19          what the - across a range of different species what  
20          their population levels were like in the reserve  
21          system.  
22   Why wouldn't it make more sense to do a study in areas that  
23          are to be logged?---You could do it across the board.  
24   Well, why was it chosen that an analysis of reserved areas be  
25          undertaken?---Because if they - on the basis that if  
26          those populations of those animals are sufficient in  
27          the reserve system, then the requirement to reserve  
28          more areas from timber production is not required.  
29   The reason you thought it was a good idea, because it was a  
30          no lose situation for you, wasn't it?---No, it was  
31          working on the basis that decision-making should be

1           made on the best available information, and we  
2           identified where there was a gap in the current  
3           information set.

4       That is, if there's a high population in reserved areas, then  
5           you can justify amending the management plan,  
6           correct?---That would be one outcome.

7       And if there wasn't a high area - in reserved areas, well you  
8           could just forget about that, do you agree with  
9           that?---Not necessarily forget about it, but I mean  
10          this is about having information that adds to the  
11          quality of the decisions that are made.

12       But if you did a survey in areas to be logged, you would know  
13          whether logging was going to have - firstly, whether  
14          there were high concentrations of arboreal animals, and  
15          secondly, whether logging might interfere with them,  
16          wouldn't you?---We would need to do that sort of  
17          monitoring over a longer period of time to establish  
18          that.

19       Well, so this wasn't an idea of monitoring over time, this  
20          was just trying to find some evidence to justify  
21          amending the management plan, wasn't it?---But it was  
22          to determine whether a conservation guideline in a 1995  
23          management plan which had been superseded by the  
24          regional forest agreement process, was still  
25          appropriate.

26       This was all about finding a way for avoiding the management  
27          prescription in the management plan, wasn't it?---No,  
28          this was - the view of VicForests was that the  
29          management plan is 15 years old and was out of date,  
30          and that a series of events had superseded the  
31          management plan which required that some of the

1 guidelines in the management plan were - required  
2 review.

3 And this meeting of 7 April at which you attended with Potter  
4 and Spencer, was another example of you actively  
5 following up DSE on the SPZ question, wasn't it?---No,  
6 this was specifically in response to a request from the  
7 minister for environment to look at the process of pre  
8 harvest surveys.

9 Now, I want to take you to early June now. Now, in  
10 paragraph 62 you say that in early June Miezis had  
11 telephoned you and told you that DSE was considering  
12 whether to declare an SPZ, and he asked you whether  
13 VicForests would put forward any modifications. Do  
14 you remember when in June?---No.

15 Mr Miezis says in his statement that he rang you on 16 June,  
16 and told you that DSE was intending to allow  
17 harvesting, subject to modified prescriptions. Did he  
18 tell you that?---We discussed about what - my  
19 recollection is he asked me what we would put forward  
20 in terms of prescription, which triggered a series of  
21 emails to Barry Vaughan.

22 Well, he told you that they are not going to stop you  
23 logging, but you need to come up with some  
24 prescriptions, is that right?---No, my recollection was  
25 that I was asked to look at what prescriptions we would  
26 look to put in place.

27 Did you have a discussion with Miezis as to what those  
28 prescriptions might be?---We discussed about the option  
29 for specifically habitat trees, but I think it was  
30 Barry Vaughan that put forward the position about the  
31 expanded stream side buffer.

1 And he did that in the email 16 June at 1.52 which is set out  
2 at paragraph 65, is that right?---That's correct.  
3 Now, by this stage, at 16 June, VicForests already knew that  
4 a 100 metre buffer would have minimal impact on its  
5 harvesting in 15 and 19, didn't it?---No.  
6 In relation to the arboreal mammals, which this whole  
7 discussion had been about, do you know why Mr Vaughan  
8 chose 100 metres?---I think it was taken on the basis  
9 that 100 metres was the guidelines required under the -  
10 for the protection of the Orbost spiny crayfish.  
11 Well what's that got to do with mammals? What's that got to  
12 do with mammals?---Well, there were two elements to  
13 that, one is the density of the arboreal mammals was  
14 greatest closest to Brown Mountain Creek, so it's where  
15 the density of the arboreal mammals was greatest. And  
16 the 100 metres was the buffer that would be applied if  
17 an Orbost spiny crayfish was confirmed in Brown  
18 Mountain Creek.  
19 Who told you that the concentration was greatest near the  
20 creek?---Barry Vaughan.  
21 And he was going on his appearance on the survey on 5  
22 February, was he?---I believe so, yes.  
23 Now, I won't be a moment, Your Honour.  
24 HIS HONOUR: Mr Niall, I think I might give everyone a  
25 short break, and we will tell the court staff that we  
26 are going to keep the building open, and we will  
27 proceed on and seek to finish the witness by about  
28 half-past 5. We will take a break first.  
29 MR NIALL: Your Honour, in my submission that is onerous.  
30 In my submission it would be reasonable to adjourn the  
31 matter off until tomorrow morning. It's been a long

1 day, a normal full day. It's now 4.30, and  
2 cross-examining a lead witness for the, or a  
3 significant witness for the defendant in my submission,  
4 a reasonable period of time would be to 4.30 and then  
5 to complete the cross-examination in the morning would  
6 not be unreasonable.

7 HIS HONOUR: Well, Mr Niall, I said at least since the last  
8 directions hearing that was held in Melbourne that I  
9 would be prepared to sit on late on occasion if it was  
10 necessary to do so to accommodate particular witnesses.  
11 And what Mr Waller has said to me on the face of it  
12 justifies sitting on.

13 MR NIALL: If Your Honour pleases.

14 HIS HONOUR: I have just said to you that I am going to  
15 give you a break, I am going to give you about 10  
16 minutes or so, so I am not going to force you just to  
17 keep going. I am going to give the witness a short  
18 break, but I think that if the estimate you gave me a  
19 little while ago is correct, then you have about  
20 three-quarters of an hour to go, and the sensible  
21 course is to take a break and then to come back. If  
22 when we come back that's still the order of your  
23 estimate, then I am inclined to go on; in other words,  
24 we have got a reasonable prospect of completing by  
25 half-past 5. I don't think that that is unduly  
26 onerous provided you get some sort of a break at this  
27 point.

28 MR NIALL: If Your Honour pleases.

29 HIS HONOUR: And that's what I am going to do.

30 (Short adjournment).

31 MR NIALL: If Your Honour pleases. Now, Mr MacDonald, you

1           said a few moments ago that the reasons for the 100  
2           metre was that it was consistent with the crayfish, and  
3           that's where the mammals appeared to be concentrated,  
4           correct?---Yes.

5           And you say that because that's what Mr Vaughan told you, is  
6           it not?---Yes.

7           Would you have a look at this document, please.    Now, this  
8           is an email from Mr Henry to Mr Vaughan of 23 June, in  
9           which he says "Barry, further to our discussion last  
10          week please find attached map showing the location.  
11          Greater gliders were reasonably evenly spread along the  
12          transect but appear to be a bit more concentrated on  
13          the lower slopes within about 200 metres from the  
14          creek."    I won't read the last two paragraphs.    And  
15          attached to it is a map which shows, if you are looking  
16          at the map, Mr MacDonald, shows the recordings of the  
17          greater glider and the yellow bellied glider on various  
18          dates, do you see that?---Yes.

19          And it is the case that the observations of those animals are  
20          evenly spread through coupe 15?---I would suggest  
21          there's a higher concentration towards Brown Mountain  
22          Creek.

23          Mr Henry says a bit more concentrated within about 200 metres  
24          from the creek, do you see that?---Yes.

25          So to the extent that the 100 metres was based on the fact  
26          that the concentration was near the stream and within  
27          the 100 metre mark, it's inaccurate, isn't it?---No, I  
28          mean I was - that was based on Barry's opinion having  
29          done - been on one night, one of the three surveys, and  
30          I don't think that his view is discounted by this  
31          email.

1 You don't think that it's discounted, do you?---Mr Henry  
2 indicates that it's been more concentrated on the lower  
3 slopes within about 200 metres of the creek.  
4 And you think that's consistent with them being within the  
5 100 metre buffer, do you?---I think that supports the  
6 decision to have a 100 metre buffer.  
7 So notwithstanding looking at this map, and this spread of  
8 arboreal mammals, you think that 100 metres was  
9 appropriate to protect the habitat of the gliders?---In  
10 the context that there were also additional  
11 prescriptions for retaining trees throughout the coupe,  
12 so there was two elements to the additional  
13 prescriptions, both the 100 metre buffer and the  
14 additional retained habitat trees on the coupe.  
15 I tender that, if Your Honour pleases.

16

17 #EXHIBIT 62 - Email of Stephen Henry 23/06/2009.

18

19 MR NIALL: Now, over on paragraph 75, you start to give some  
20 evidence about the sighting in August 2009 of the  
21 potoroo, and you say that Lee Miezis forwarded you an  
22 email, and did that email include the - or as you say  
23 the email included the video footage of 5  
24 seconds?---Yes.

25 And you'd spoken to Mr Miezis that day, hadn't you?---I  
26 believe so, yes.

27 Yes. Well, what did you talk about?---Lee informed me that  
28 they had this footage and that that would obviously  
29 trigger a review by DSE of the authenticity of the  
30 sighting and then it would require action to be taken  
31 according to the action statement for long footed



1 potoroos.

2 He told you, did he, that it would require their application,  
3 he told you that on the 26th?---From my recollection I  
4 think Lee indicated that they were going to send some  
5 staff out to identify the sight where the camera had  
6 been located, or where it was allegedly located.

7 And you sent Mr Miezis an email that afternoon. Have a look  
8 at this document, please. What did you send to  
9 Mr Miezis?---If I can recall I asked one of our  
10 operational planning foresters in Orbost to design an  
11 SMZ for a long footed potoroo based on the sighting in  
12 the - based on the alleged sighting of the potoroo.  
13 And that reserve would be consistent with the new  
14 action statement.

15 Well, if you have a look at - and is that what you sent to  
16 Mr Miezis?---Yes, by my recollection, yes.

17 Now, did he tell you - he told you that they were sending  
18 someone out to verify the sight?---Yes, I believe  
19 that's the case, yes.

20 Did he tell you that had happened?---I can't recall.

21 Well, do you recall him ever telling you that it  
22 happened?---Yes.

23 When did he tell you?---I think possibly either that day or  
24 in the subsequent days.

25 So that day or in subsequent days, a short time thereafter,  
26 he told you that they'd sent someone out and that they  
27 had verified the location?---Yes.

28 You asked, according to paragraph 76 - I'm sorry. And he  
29 told you that they had verified the location?---I can't  
30 recall whether it was on that day or on subsequent  
31 days.

1 So within a short period of time of the 26th you had had a  
2 copy of the video of 5 seconds, correct?---Yes.  
3 You had had confirmation from Mr Miezis about the location at  
4 which it was taken?---Yes.  
5 And you didn't seek to obtain any information about whether  
6 the animal conveyed - the animal portrayed in the  
7 footage was a long footed potoroo, did you?---No,  
8 because that was - well, it was being alleged at the  
9 time, so - it was being alleged as a long footed  
10 potoroo, and I accepted that.  
11 So you accepted, what, within a few days of the 26th August  
12 that there had been a potoroo within one of the coupes  
13 - within coupe 15?---You need to remember that at this  
14 time we were going through injunction hearings for this  
15 case, so this matter was being discussed at the time,  
16 there was evidence being lodged to that effect as well.  
17 So I was getting information from a range of sources at  
18 that time, so - - -  
19 Well, in none of your affidavits that were filed before the  
20 injunction, or in the application, do you say that  
21 you'd received confirmation from DSE about the location  
22 of the sighting, do you?---I don't believe so, no.  
23 Why didn't you do that?---I am not sure. I mean, that's six  
24 months ago, I am not sure why I didn't.  
25 It was a pretty important fact, wasn't it, whether there was  
26 a potoroo in coupe 15?---From our perspective it was  
27 more a matter of whether we could accommodate an SMZ  
28 and still conduct harvesting in that coupe, which we  
29 believed we could.  
30 Well, that process started when you asked Larissa Murray on  
31 26th to design a special management zone, didn't

1           you?---Yes.

2       And you told her that day - I withdraw that.     Did you tell

3           her that day, on paragraph 76, when you asked her to

4           design it, that you wanted the 100 metre buffer as the

5           retained habitat?---I asked her to explore whether that

6           would be consistent with the requirements of the action

7           statement.

8       And it was your intention that the retained habitat would be

9           the 100 metre buffer?---Yes.     If that was consistent

10          with the action statement.

11       And that was - - -?---Which I believed it was.

12       And that's what Ms Murray produced for you?---Yes.

13       Now, how did you say that that was consistent with the action

14          statement?---The action statement said that the -

15          talks about - is silent on whether a linear or a

16          circular reserve around the sighting area, or in fact

17          it's silent on the shape of the reserve.     But it talks

18          about it being on lower slopes and in moist gullies.

19       What it talks about, is it not, Mr MacDonald, that it be the

20          best habitat for the LFP?---Yes.     But then gives

21          guidance as to what that might be in terms of being in

22          moist gullies on lower slopes.

23       Did you ask anyone to try and identify the best habitat

24          within coupe 15 to contain the retained habitat?---I

25          asked Larissa to prepare a draft based on the

26          requirements of the action statement.

27       But you didn't ask her to identify what might be the best

28          habitat?---Well, that be - by including the best

29          habitat you are being consistent with the action

30          statement, so.     And given that the 100 metre buffer

31          was on the lower slopes and included a moist gully, I

1           felt that that was consistent with the action  
2           statement.

3       Now, can I go to your first affidavit of 31 August.    Do you  
4           have that there with you?---Yes, I do, yes.

5       Well, that's dated 31 August.    Now, you know that the writ  
6           was issued on 25 August?---Yes.

7       And that the injunction was heard before Justice Forrest on 1  
8           and 2 September?---Yes.

9       And so you swore this the day before the application came on  
10           for hearing, correct?---Yes.

11       And VicForests' position on the injunction was that it  
12           proposed to log the coupes the following week?---Yes.

13       And you were present in court during the injunction?---Yes.

14       And over in paragraph 23 you say "Subject to weather  
15           conditions VicForests currently intends to commence  
16           harvesting in coupes 15 and 19 next week."  
17           Correct?---Yes.

18       And was that the position of VicForests?---Yes, subject to  
19           any delays that might be caused either by weather or by  
20           regulatory requirements.

21       Well, you say subject to weather.    You don't say subject to  
22           regulatory requirements, do you?---No, it's unwritten,  
23           I guess, regulatory requirements can change at any  
24           time.    And take precedence over operations.

25       What regulatory requirements?---Such as the sighting of a  
26           long footed potoroo that would trigger a special  
27           management zone.

28       Well, you don't say in paragraph 23 "Subject to sighting of a  
29           long footed potoroo", do you?---No, but it could be  
30           subject to a number of - - -

31       And have a look at paragraph 38, under "Long footed potoroo".

1           It says: "I am informed by Lee Miezis and believe that  
2           on 24 August" he sent two emails to Redwood and Lincoln  
3           seeking all footage captured, that Redwood telephoned  
4           Miezis and said she would have to speak to her lawyers  
5           and was reluctant to provide.    Sent a further email  
6           seeking reconsideration, and that he had not received a  
7           response.    And you say "I note the alleged location  
8           used by Mr Lincoln to take the footage as marked in  
9           Exhibit ASL 1 was within 100 metres."    And you say  
10          that "If DSE determined to create a special management  
11          zone, then due to the increased buffer no further area  
12          would need to be protected."    Did Miezis tell you that  
13          the 100 metres was all you would ever be required to  
14          protect?---No, but I forwarded Lee, as you have  
15          indicated, I forwarded Lee our proposed special  
16          management, or the special management zone that we  
17          proposed and drafted on August 26, and Lee indicated  
18          that wasn't inconsistent with the action statement and  
19          was one definitely had a possibility for the shape of a  
20          final reserve.

21          It was one possibility, was it not?---Yes.

22          And it was unsettled, that question, was it not?---Yes.

23          Then why did you not say in that affidavit that the question  
24          of what the special management zone would look like had  
25          not been settled?---I could have used different  
26          wording, yes.

27          Well what wording should you have used, Mr MacDonald?---At  
28          that stage there was no other proposed reserve except  
29          for the proposal we put forward, or that I was aware  
30          of, and Lee had indicated that wasn't inconsistent with  
31          the action statement, and that he would see no issue

1 with that potentially being the final reserve. So I  
2 took that as being an indication that that was - it was  
3 a strong likelihood that that could be the final design  
4 for this SMZ.

5 Now, you don't say that it will be a strong likelihood, you  
6 will say that no further area of coupe would need to be  
7 protected?---M'mm.

8 And you didn't think it was appropriate to say that that  
9 issue had not been settled, and that other areas might  
10 need to be protected?---That was the wording I chose at  
11 the time.

12 And you didn't say in that affidavit that Miezis had  
13 confirmed with you that the location of the camera shot  
14 was within coupe 15, did you?---No.

15 Why not?---It may not have - that may not have been confirmed  
16 with me by 31 August. I can't recall when Lee  
17 actually passed that information on to me.

18 A few moments ago you said it was within a few days?---Well,  
19 it was within a period of time after that day.

20 How long?---I am not sure, I can't recall.

21 Well, you know His Honour Justice Forrest heard the  
22 injunction on 1 and 2 September?---Yes.

23 And you know he reserved for a number of weeks?---Yes.

24 It was well within that period that you knew that the  
25 location had been confirmed, wasn't it?---Possibly. I  
26 mean, I can't recall, there was a lot going on at that  
27 time.

28 You know perfectly well that you knew that the sight had been  
29 confirmed before His Honour gave judgment on the  
30 injunction, don't you?---I can't recall.

31 You withheld that information from the court because you

1 thought it would not help your case, correct?---No.  
2 You don't say in your paragraph 38 or anywhere else in the  
3 affidavit that DSE are in the process of trying to  
4 verify the area, do you?---No.  
5 Why not?---I didn't - at that time I obviously didn't believe  
6 that was relevant to the affidavit I was swearing.  
7 You say in paragraph 38 that Redwood wouldn't give Miezis the  
8 footage, correct?---Yes.  
9 And the purpose you put that in your affidavit was to convey  
10 the impression that the sighting could not be verified,  
11 correct?---I was just putting forward that there was  
12 still information we were seeking to verify the  
13 sighting.  
14 You put it in your affidavit to show or demonstrate that the  
15 sighting could not be verified, correct?---I put it in  
16 there to indicate that we were still - DSE was still  
17 awaiting information to verify the claim.  
18 But you did not disclose the information you did have about  
19 verification, correct?---That's not in my affidavits,  
20 no.  
21 You knew that you had - VicForests had a lot of information  
22 relevant to the logging of coupes 15 and 19, didn't  
23 you?---In what respect?  
24 Well, VicForests is the organisation that's going to conduct  
25 the logging, correct?---Yes.  
26 It's got all the information about the coupes?---Yes. In  
27 relation to harvesting.  
28 It's been - you have been in telephone and email  
29 communication with Mr Miezis about the topic of the  
30 potoroo?---Yes.  
31 But you didn't think it was appropriate to put any of that

1 information in your affidavit, did you?---No, I felt at  
2 the time it was the plaintiff that was alleging the  
3 sighting of the potoroo so it wasn't appropriate for me  
4 to necessarily discuss that.

5 So if you had relevant information you didn't need to  
6 disclose it to the court, is that right?---I put  
7 forward the information that I felt was relevant to the  
8 defence's case.

9 And you know that VicForests argued the injunction on the  
10 basis that there was no serious question to be tried  
11 about the potoroo in that coupe, didn't you?---We  
12 argued that the alleged sighting could be accommodated  
13 by an SMZ and that the harvesting could still be  
14 undertaken in coupe 15.

15 Now, I want to take you back to paragraph 23 of your  
16 affidavit?---First affidavit?

17 Yes. You say subject to weather conditions you are going to  
18 log, right? Correct?---Yes.

19 It's an unqualified statement, is it not, apart from the  
20 weather?---Well, the weather was the only thing that's  
21 referred to as a potential factor that might stop  
22 harvesting.

23 What enquiries did you make when you swore this affidavit  
24 about the readiness of 15 and 19 to be logged?---I  
25 discussed that with Barry Vaughan.

26 And what did he tell you?---Because the coupes had been  
27 planned for harvesting the previous summer, they were  
28 effectively ready to harvest subject to completing the  
29 pre harvest check list.

30 Is that the only enquiry that you did?---Yes.

31 And subject to completion of the pre harvesting check



1 list?---And also ensuring that the buffers - the  
2 prescriptions that had been agreed to with the DSE had  
3 been implemented in terms of the 100 metre stream side  
4 buffer, and marking of additional habitat trees in the  
5 coupe.

6 Well you don't say in paragraph 23 "Subject to completion of  
7 the check list", do you?---No, but the weather  
8 conditions - the weather conditions are highlighted  
9 because that's a variable outside of our control.

10 Well what about the check list?---As I mentioned, the coupes  
11 had been planned to be harvested the previous summer,  
12 so a lot of the work had already been completed, and at  
13 that stage that wasn't seen as an impediment in those  
14 timeframes to complete that.

15 Did you have a look on the CIS system as to whether the  
16 coupes were ready to be logged?---No.

17 Why not?---I didn't access the CIS system, normally I relied  
18 on operational staff to give me that information.

19 Did you ask Mr Vaughan to access the system?---No, I asked  
20 Barry to indicate whether they could start harvesting.

21 And he told you, did he, subject to completion of the coupe  
22 check list?---He wasn't specific about the pre coupe  
23 check list, but I am aware that that is an operational  
24 procedure that we complete prior to harvesting, that  
25 Barry indicated that the coupes were ready to commence  
26 harvesting and the contractors were available to start.

27 Well, did he tell you that the coupe planning check list  
28 hadn't been completed or didn't he?---No, but I took  
29 that as being something that would be completed as a  
30 matter of course.

31 Aren't they completed prior or at least as far as can be done

1 prior to harvesting?---Some of the coupe check list has  
2 got to be completed with the harvesting contractor  
3 because it deals with risk assessment for things like  
4 aerial hazards, limbs that are hung up in trees and the  
5 like. So essentially it gets completed as close as  
6 possible to commencement of harvesting.

7 Well how long did that take to complete? Or would have taken  
8 to complete?---I am not across the actual time it would  
9 have taken to complete that.

10 Well, could it have taken a day?---Possibly, yes.

11 And if there would problems it could have taken longer than a  
12 day?---Yes.

13 It could have taken some weeks?---It would be unusual for it  
14 to take that long.

15 But it's possible?---Only if there was an issue that was -  
16 that became apparent during the pre harvest survey.

17 Well, why didn't you tell the court in paragraph 23 that  
18 issues could have become apparent, and until that had  
19 been completed you wouldn't know whether you were ready  
20 to log immediately?---Because it's unlikely that would  
21 have been the case. As I mentioned, these coupes had  
22 been scheduled for harvesting the prior year and were  
23 ready to - in a state of readiness for harvesting to  
24 commence.

25 Now, you know, don't you, that there was a lot of work in  
26 late 2008 and 2009 about settling the boundaries of the  
27 ALP reserves?---Yes.

28 And you know that when you - then in August, that one of  
29 those reserves was known as the ALP reserve Goongerah  
30 North?---Yes.

31 And that was in the area of Brown Mountain?---Yes.

1 And Mr Spencer has told His Honour that DSE told him in  
2 December 2008 in relation to coupe 15 that portion of  
3 coupe lies within ALP reserve Goongerah North must not  
4 be harvested until these reserves have been finalised.  
5 Did you know that DSE had told VicForests that in  
6 December 2008?---No.  
7 Did you make any enquiries about that?---No.  
8 You knew in August 2008 that the ALP reserves hadn't been  
9 settled, didn't you?---Which year?  
10 August 2009?---No, they were settled - in my understanding,  
11 because I'd been involved in the - with the industry  
12 transition task force, my understanding was the  
13 reserves were finalised.  
14 Your understanding was that the reserves were  
15 finalised?---Yes.  
16 Did you check in relation to the Goongerah North ALP  
17 reserve?---Not specifically, no.  
18 Mr Spencer has given evidence to His Honour that on 5 June he  
19 updated CIS in relation to coupe 15, and it says  
20 "VicForests will not harvest the coupe until icon  
21 reserve boundary is modified. VicForests will not  
22 harvest any area within approved reserve." Did you  
23 know that he'd updated the CIS on that basis?---No.  
24 Did you ask him?---No.  
25 And on the same day he made the same annotation for coupe 26,  
26 did you know that?---No.  
27 And his evidence to His Honour at page 766 was that unless  
28 and until the completion of the boundaries of the new  
29 reserves had happened, there was no operative approval  
30 for coupe 15, did you know that?---I knew that - I'd  
31 been having separate conversations with Lee Miezis

1 through the finalisation of the reserves, the ALP  
2 election reserves proposal, and that coupe 15 was from  
3 Lee's perspective ready to harvest.

4 So Miezis told you it was ready to harvest, did he?---And Lee  
5 would have given - if there were any requirements in  
6 the CIS system, Lee would give the final approval for  
7 that to take place, and following the announcement of  
8 the lifting of the moratorium on those coupes by the  
9 minister for environment on August 21, Lee had  
10 indicated to me that we would be in a position to be  
11 able to harvest those coupes.

12 When did he tell you that?---On or around the announcement by  
13 the minister.

14 21 August?---Yes.

15 But you know that the reserve boundaries were not settled  
16 until October or November 2009, don't you?---Well, they  
17 weren't put before parliament for the legislation to be  
18 passed, but the boundaries from my understanding had  
19 already been finalised, because they required to be -  
20 those boundaries had to be actually field surveyed  
21 prior to the legislation going before the parliament.

22 Now, it's the position, Mr MacDonald, that Mr Spencer has  
23 told the court in his position - in his understanding  
24 that coupes 15 and 26 were not eligible to be logged in  
25 August?---No, that was Mr Spencer's position in June  
26 when the TRP was finalised. Mr Spencer was not  
27 involved at all in the finalisation of the 2006 ALP  
28 election policy reserves, that was purely something  
29 that I'd been involved in with the assistance of  
30 Mr Potter, and it was something that I hadn't disclosed  
31 to Mr Spencer in terms of when the all clear would be

1           given to harvest coupes 15 and 26 - and 19.

2    You didn't discuss it with Mr Spencer?---No, I didn't believe

3           it was appropriate to discuss it with him until we'd

4           been - I'd been given the clearance from DSE.

5    When was that?---That was at the time when the minister made

6           his announcement on or around 21 August.

7    Mr MacDonald, the position is that DSE had told VicForests

8           and VicForests had agreed not to log coupe 15 and 16

9           until the boundaries had been settled, and that didn't

10           happen until October or November 2009, do you agree

11           with that?---No.

12   And that your evidence in paragraph 23 that you currently

13           intend to commence harvesting in coupes next week, did

14           not disclose to the court the true position in relation

15           to the ALP reserved boundaries?---It did, and I

16           disagree.    The minister had effectively gone to the

17           public and issued a press release saying that

18           harvesting could commence in those coupes.    And a

19           minister would not do that unless he was comfortable

20           that all the requirements for harvesting those coupes

21           had been met.    So I disagree with that position.

22   Well, the fact is, Mr MacDonald, that the legislation didn't

23           get into the parliament until February, did it?  Didn't

24           pass parliament until February?---I thought it was

25           November, but I didn't follow that closely.

26   You knew that the minister was announcing a policy, but that

27           it needed to be implemented including through

28           legislation?---That didn't prevent operationally things

29           happening on the ground, so.    Because these areas were

30           not - I mean, what the legislation did was actually put

31           areas into reserve, it didn't actually cover areas that

1           were outside the reserves, which included coupes 15 and  
2           19.

3       It's the fact that discussions continued between VicForests  
4           and DSE about the boundaries in September, October, is  
5           it not?---In relation to the?  
6       The boundaries of the ALP reserve?---No.

7       Now, it's true, is it not, that in relation to the long  
8           footed potoroo, that there was a hair detection in  
9           February, a video in August, and another video in  
10          September?---I was aware of the video in August.

11       You were aware of the video in September?---No.

12       No one's told you that there are two videos?---I was aware  
13          that there possibly was a second video, but I haven't  
14          seen any evidence to that effect.

15       And you knew at least by the time that you read the DSE  
16          survey in August, on your evidence, 2009, that it was  
17          plausible that the potoroo was present, and that there  
18          were diggings strongly suggestive of potoroo, you knew  
19          all of those things, didn't you?---I knew that there  
20          were diggings, yes.

21       And the process of developing the SMZ and the protected  
22          habitat was totally centered around the 100 metre  
23          buffer, wasn't it?---That was the position that  
24          VicForests was putting forward, yes.

25       And it put forward that position because it was beneficial to  
26          its logging arrangements but had nothing to do with the  
27          conservation or ecology of the potoroo?---No, we felt  
28          that was - VicForests believes that is consistent with  
29          the action statement.

30       VicForests hasn't retained any expert to try and identify  
31          habitat of the - best habitat of the potoroo around

1 coupe 15 and 19, has it?---The experts are used to  
2 develop the action statements which practitioners, like  
3 people from VicForests, implement on the ground, and we  
4 have done that.

5 So where an action statement says "Best potoroo habitat", it  
6 is really just a forester who can make that judgment,  
7 in your view, is it?---But it's more specific than  
8 that, it talks about on lower slopes and in moist  
9 gullies, which VicForests believes is consistent with  
10 the 100 metre buffer being the retained habitat.

11 And you know nothing about the second video sighting of the  
12 potoroo?---Look, in discussions with our legal team  
13 they raised that there was the possibility of a second  
14 video, I recall.

15 MR WALLER: Your Honour, I caution my learned friend not to  
16 elicit matters that might be covered by privilege in  
17 this way.

18 HIS HONOUR: Yes.

19 MR NIALL: I will be careful of that. I don't want any  
20 communications between you and your lawyers or  
21 VicForests lawyers, I am just asking you whether you  
22 have seen the video that is exhibited to the affidavit  
23 of Ms McLaren?---No.

24 And is it the position that if the injunction was lifted  
25 tomorrow, VicForests would be in a position to log  
26 coupes 15 and 19?---Tomorrow or - - -

27 Yes?---No.

28 Next week?---VicForests would probably not harvest, given  
29 that we are now in mid - late March. It's unlikely  
30 that VicForests would start harvesting in a high  
31 elevation area like that because the likelihood is that

1 with seasonal factors that the days are shortening, the  
2 likelihood is wet weather is increasing, that  
3 harvesting wouldn't commence until next September at  
4 the earliest.

5 Subject to weather permitting?---Yes.

6 It's in a position to harvest?---And obviously with  
7 resolution of the issues in this case, yes.

8 And in relation to gliders, you knew that the prescriptions  
9 had been exceeded in the management plan?---On one of  
10 the three nights that the surveys were undertaken.

11 And there's no doubt about the accuracy of that, is  
12 there?---No.

13 And you are not aware of any analysis by VicForests of what  
14 that means from an ecological perspective?---It's based  
15 on a guideline from a management plan in 1995.

16 And VicForests is not interested in complying with it?---It's  
17 not a matter of being interested in complying, it's  
18 about the management plan and looking at a balance  
19 between conservation and timber production, and we have  
20 a view in this case that an SPZ is not warranted.

21 Now, in relation to owls, you know that there's been - owls  
22 have been heard in the area, both sooty owl and  
23 powerful owl?---Yes.

24 And VicForests hasn't taken any steps in relation to those  
25 sightings to determine whether any steps are necessary  
26 to preserve - - -?---They are not sightings per se,  
27 they are from - they are - I guess calls of those  
28 species have been heard, and again they haven't  
29 triggered any requirements under action statements or  
30 action plan.

31 And that's because is it your understanding that the powerful



1 owl management areas has already been reached up to the  
2 maximum?---Or exceeded.  
3 Or exceeded. And the same for the sooty owl?---Yes.  
4 You know, don't you, that in relation to the SOMAs, the sooty  
5 owl, that many of those are based on modelling rather  
6 than actual presence?---Yes.  
7 And is it not the intention to replace those modelled SOMAs  
8 with actual SOMAs once sooty owls have been  
9 detected?---I am not that familiar with the  
10 prescriptions, no.  
11 And the same position with the powerful owl, the POMAs, that  
12 a number of the areas that are currently POMAs are  
13 based on modelling rather than sightings or actual  
14 presence?---I am not familiar with that.  
15 Now, in relation to the quoll, are you aware that Dr Belcher  
16 has given evidence that the coupes are a suitable  
17 habitat for a quoll?---Yes.  
18 And that the habitat - that destruction of the habitat is  
19 likely to have an adverse impact on the quoll?---I am  
20 aware that's his opinion.  
21 Has VicForests obtained any expert evidence - expert opinion,  
22 I'm sorry - has obtained any expert opinion in relation  
23 to those issues concerning the quoll?---No, we comply  
24 with - there's a regulatory framework that we are  
25 required to comply with, and we believe we are  
26 complying with that.  
27 It doesn't see any duty or obligation for it to go and  
28 conduct surveys or determine whether or not quolls are  
29 present in the coupes they harvest?---We are confident  
30 that the framework that's been put in place to manage  
31 the spotted quoll is adequate in terms of the areas

1           that are set aside in reserves for that species.

2       And is it the same position with the frogs, that is the large  
3           brown free frog and the giant burrowing frog?---I can't  
4           really comment on those two species.

5       What about the kite, is it your position that the sighting of  
6           the kite doesn't create any ecological concerns for  
7           VicForests?---Given my role has changed, I haven't -  
8           and I am aware that the kite was raised as an issue  
9           recently.    But I haven't looked into that.

10      You haven't looked into that.    It's fair to say that  
11           VicForests doesn't evaluate at all the ecological risks  
12           of harvesting in these four coupes?---VicForests  
13           believes that the framework in place in Victoria is a  
14           very good framework that's been based on a bottom up  
15           approach for setting aside areas to - reserves for rare  
16           and endangered species, and we are confident that  
17           system is robust.

18      And you know that in respect of a number of those endangered  
19           species that are on the photo board, that there are  
20           prescriptions which are operated in circumstances where  
21           there's a detection of the animal?---Yes.

22      And your position is that VicForests has no obligation to try  
23           and determine whether or not the species are present in  
24           the coupes that it harvests?---That's not a current  
25           requirement under the regulatory framework in which we  
26           operate.

27      Don't you think that it would be cautious and appropriate for  
28           VicForests to evaluate the ecological risks caused by  
29           the possible presence prior to it harvesting particular  
30           coupes?---Again I just reiterate that the framework in  
31           Victoria is (indistinct), and I believe in terms of the

1           precautionary principles the right approach taken is to  
2           actually set aside areas as reserves for these species  
3           prior to making areas available for timber harvesting,  
4           and I believe those measures are adequate.

5       Well, the position is that there are reserves, but there are  
6           also prescriptions that exist outside of reserves, are  
7           there not?---Yes.

8       And aren't they a necessary part of the conservation and  
9           ecology of threatened species?---Yes.

10      And you don't think that it's appropriate for VicForests to  
11           try and work out whether the threatened species are  
12           present or are likely to be present in the particular  
13           coupes that it logs?---I think that issue is  
14           problematic and I think it's demonstrated by DSE having  
15           97 camera nights - 97 days of camera observations in  
16           this area did not detect a long footed potoroo. It  
17           has been detected subsequently, but I think that  
18           highlights the issue of trying to detect whether mobile  
19           species are present in an area. It's a difficult  
20           process, hence the process of the framework in Victoria  
21           is about actually setting aside a habitat in advance of  
22           harvesting.

23      You don't think it's appropriate to undertake any assessment  
24           of whether threatened species are present in coupes  
25           prior to logging?---You could go and do a survey today  
26           and not detect anything, you could go back tomorrow and  
27           you might detect a species. It's a very difficult  
28           process.

29      Was it appropriate to look or not?---Under the current frame  
30           - it's not about whether it's appropriate. The  
31           framework is about setting aside areas in advance of

1 harvesting to protect those species, and I believe  
2 that's adequate.

3 Well, in addition to setting aside prior to harvesting, it's  
4 also the fact that you have action statements designed  
5 to preserve and protect habitat, is it not?---Yes.

6 And part of that, does it not, suggest that it would be  
7 appropriate to try and work out whether these  
8 threatened species are present in coupes before  
9 VicForests chops them down?---No, the action plan just  
10 provides guidelines if you happen to detect a species.  
11 It doesn't talk about doing pre harvest surveys.  
12 They are the only matters I have, if Your Honour pleases.

13 <RE-EXAMINED BY MR WALLER:

14 Mr MacDonald, you were asked some questions some time ago  
15 about events in December 2008, where VicForests said to  
16 the DSE that if Brown Mountain gets reserved then  
17 VicForests wanted Big River, do you remember those  
18 questions?---Yes.

19 And you said, it was put to you that that would result in  
20 VicForests obtaining a substantially bigger area. And  
21 you said "But a smaller yield". Do you remember  
22 that?---Yes.

23 What yield were you referring to in that answer?---The yield  
24 of sawlog per hectare.

25 And on what basis do you say that Big River, though  
26 substantially bigger in area, would produce a smaller  
27 yield of sawlog timber?---It was on the basis that from  
28 VicForests' perspective that if there was an exchange  
29 that we were no worse off in terms of total yield to  
30 sawlog that VicForests would recover.

31 HIS HONOUR: Is that the Big River south of

1 Mount Bogong?---Yes.

2 Yes. And so it's part of the northeastern area you referred  
3 to earlier, is that right?---Big River?

4 Yes, you referred to some - you referred to the northeast and  
5 as I understood it - - -?---I think I was talking about  
6 the northeast in the context of the long footed  
7 potoroo, where we actually lost in the finalisation of  
8 the long footed potoroo reserves, we actually lost an  
9 area. I think that was where I used - made a  
10 reference to the northeast of the state.

11 Yes. I thought that in effect the reserve resolution might  
12 have altered the balance between the northeast and the  
13 area we are concerned with?---Okay.

14 Is that right or not?---No, the Big River is sort of more to  
15 the south of Brown Mountain, yes.

16 I see, yes.

17 MR WALLER: Mr MacDonald, are you able to quantify in  
18 percentage terms how much better the yield of sawlog  
19 timber is in Brown Mountain as opposed to Big  
20 River?---No, I can't quantify in percentage terms, but  
21 it was - I guess it was a significant variation.

22 No further questions, Your Honour.

23 HIS HONOUR: Yes. Yes, thank you, Mr MacDonald, you are  
24 excused.

25 MR NIALL: Before the witness is excused, I asked the witness  
26 or cross-examined the witness about a document that was  
27 attached to an email which has not been discovered.

28 HIS HONOUR: Yes.

29 MR NIALL: And I would ask that be produced. It's the email  
30 which is Exhibit 63, and it's a document which refers  
31 to "As discussed PDF". We have not been able to find

1           that in the discovery, and I would ask that that be  
2           produced, if Your Honour pleases.

3   MR WALLER:   Your Honour, we will make enquiries.

4   HIS HONOUR:   I don't think in fact Exhibit 63 was tendered,  
5           but that's the email that says "Subject as discussed"  
6           of 26 August 2009, is that right?

7   MR NIALL:    Yes, it is, Your Honour.    I apologise.

8   HIS HONOUR:    You can tender that.    And you are calling for  
9           the PDF file that's attached.

10  MR NIALL:    That's so, Your Honour, yes, if Your Honour  
11           pleases.

12  HIS HONOUR:    Right.

13  MR WALLER:    Your Honour, we will make enquiries about that  
14           overnight, but we would ask that Mr MacDonald be  
15           excused.

16  HIS HONOUR:    Yes, Mr MacDonald, you can step down and  
17           travel onwards, and I will just stay with counsel for a  
18           moment.

19   <(THE WITNESS WITHDREW)

20   (Witness excused.)

21  HIS HONOUR:    Well, Mr Waller we have Mr Squires and  
22           Mr Miezis tomorrow, is that right?

23  MR WALLER:    Yes, I think in reverse order.    I think it was  
24           Miezis first and then Squires.

25  HIS HONOUR:    Yes.

26  MR WALLER:    But certainly both of them are available  
27           tomorrow, and Mr Miezis is travelling from Melbourne -  
28           sorry, from Ballarat to attend, and Mr Squires is  
29           travelling from Orbost.    So he is less inconvenienced,  
30           but they are both available tomorrow.

31  HIS HONOUR:    At 10 o'clock?

1 MR WALLER: As Your Honour pleases.

2 MS KNOWLES: Your Honour, I can indicate to you that I will  
3 finish Mr Miezis tomorrow.

4 HIS HONOUR: Yes.

5 MR WALLER: That suits us, Your Honour.

6 HIS HONOUR: Yes.

7 MR WALLER: We are in our learned friends' hands.

8 HIS HONOUR: Yes, if Mr Miezis is coming from Ballarat, he  
9 probably won't complain about being told that it's a  
10 10.30 start.

11 MR WALLER: No, Your Honour, that's fine.

12 HIS HONOUR: Yes. And Mr Niall can have a somewhat less  
13 gruelling St Patrick's Day than today.

14 MR NIALL: If Your Honour pleases.

15 HIS HONOUR: We will adjourn until half-past 10 tomorrow.

16 ADJOURNED UNTIL 10.30 AM WEDNESDAY 17 MARCH 2010

17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31