

1 MS MORTIMER: Your Honour, Ms Knowles has some transcript
2 corrections.

3 HIS HONOUR: Yes.

4 MS KNOWLES: Your Honour, could I commence with page 833, I
5 beg your pardon, 770, at line 17, the reference 5
6 should be 15, for 15 and 19. Page 770 line 17.

7 HIS HONOUR: Yes, the reference to?

8 MS KNOWLES: "Not logging 15 and 19 until the reserve
9 boundaries", it currently reads "not logging 5". 5
10 should be 15.

11 HIS HONOUR: Yes.

12 MS KNOWLES: And page 833, line 24, it currently reads "which
13 I am sure they will be viewed well", the text of the
14 email is "which I am sure will not be viewed well."

15 HIS HONOUR: Yes.

16 MS KNOWLES: Page 845 line 27, "ground trooping" should be
17 "groundtruthing".

18 HIS HONOUR: Yes.

19 MS KNOWLES: Page 847 line 9, again "some sort of
20 groundtruthing" rather than "ground troop".

21 HIS HONOUR: Yes.

22 MS KNOWLES: Page 866 at line 15, at the beginning of the
23 line "passing" should be "pricing", "There's a figure
24 of average pricing".

25 HIS HONOUR: Yes.

26 MS KNOWLES: Page 880 at line 4, Mr MacDonald's evidence "I
27 would categorise DSE" rather than "I would categories".

28 HIS HONOUR: Yes.

29 MS KNOWLES: At the bottom of page 882 at line 30, "those hot
30 burns would tend to be significantly hotter" rather
31 than "higher".

1 HIS HONOUR: Yes.

2 MS KNOWLES: Page 887 at line 9 "Jossel" should be the acronym
3 JOSHL, in reference to the joint sustainable harvesting
4 analysis.

5 HIS HONOUR: Yes.

6 MS KNOWLES: And at 903, line 28, "I hadn't spoken to Lee
7 Miezis or (indistinct)". Mr Niall's recollection is
8 that it was "anyone", but we are not entirely sure.

9 HIS HONOUR: 903?

10 MS KNOWLES: Line 28.

11 HIS HONOUR: And what did you believe it is?

12 MS KNOWLES: That the "(indistinct)" is "anyone", but it might
13 be that it's perhaps best to leave it. "I hadn't
14 spoken to Lee Miezis or" - the context was whether or
15 not - - -

16 HIS HONOUR: We will put "anyone(?)"

17 MS KNOWLES: Thank you, if Your Honour pleases. And the last
18 one on page 907 at line 9, that the trigger point had
19 been reached "on one of the survey nights" for
20 "(indistinct)".

21 HIS HONOUR: Yes.

22 MS KNOWLES: If Your Honour pleases.

23 HIS HONOUR: Thank you.

24 MS MORTIMER: Your Honour, there's one other matter arising
25 from yesterday. Yesterday towards the end of the day
26 my learned friend Mr Niall called for the attachment to
27 Exhibit 63. Exhibit 63 was the email from Cameron
28 MacDonald to Lee Miezis on 26 August 2009 that said "as
29 discussed". Your Honour, that attachment has been
30 produced and it's agreed between the parties that what
31 I am about to hand up should be substituted for Exhibit

1 63.

2 HIS HONOUR: Yes.

3 MS MORTIMER: If Your Honour pleases.

4 HIS HONOUR: Yes, thank you. That's very similar to a map

5 I have previously seen, is it not?

6 MS MORTIMER: It is, Your Honour.

7 HIS HONOUR: Yes. Yes, thank you.

8 Yes, Mr Redd?

9 MR REDD: Your Honour, we call Mr Lee Alexander Miezis.

10 HIS HONOUR: Yes.

11 <LEE ALEXANDER MIEZIS, affirmed and examined:

12 MR REDD: Mr Miezis, your full name is Lee Alexander

13 Miezis?---That's correct.

14 And are you currently the Director, Forests, in the Forests

15 and Parks Division at the Victorian Department of

16 Sustainability and Environment?---That's correct.

17 And is your work address level 3, 8 Nicholson Street, East

18 Melbourne?---That's correct.

19 Mr Miezis, for the purpose of attending court today, have you

20 been subpoenaed?---Yes, I have.

21 And have you prepared a witness statement of the evidence you

22 wish to give in this proceeding?---Yes, I have.

23 And do you have a copy of that witness statement with

24 you?---Yes.

25 So if you could just get that up on the witness box there.

26 Now, are there a couple of corrections you would like

27 to make to that statement?---That's correct.

28 Did you have a correction to paragraph 13C?---Yes, I do.

29 If you could turn to that part of your statement, please.

30 And what is the correction you would like to make to

31 that paragraph?---There is a typo with "the Minister of

1 Environment and Climate Change", it should be "the
2 Minister for Environment and Climate Change".
3 And can you please make that amendment to the statement in
4 front of you. Have you got a pen?---No, I don't.
5 We will get you one?---Thank you.
6 Could you initial in the margin next to that, please. Did
7 you also have a correction you wished to make to
8 paragraph 81 of that statement?---Yes, I do.
9 And what is the correction to that paragraph you would like
10 to make?---Brooke Colbert has been described as the
11 environmental adviser, it should be environment
12 adviser.
13 Yes. Could you please make that amendment and again initial
14 in the margin. Thank you. Now, if you turn now to
15 Exhibit LAM 6 to that statement. Now, Mr Miezis, is
16 that a letter from Dr Peter Appleford to Dr David
17 Pollard dated 5 June 2009?---Yes, it is.
18 And is the attachment to that letter a complete copy of that
19 attachment?---No, it's not. Upon review I have
20 realised that it's not a complete attachment.
21 Yes, we will have handed to you a document, and Your Honour's
22 associate already has a copy of this replacement
23 exhibit as does my learned friend.
24 HIS HONOUR: Yes.
25 MR REDD: Mr Miezis, could you please identify the document
26 that's been handed to you?---Yes.
27 What is that?---It is a timber release plan approval
28 document.
29 And is that the attachment that should appear behind the
30 first two pages of the existing Exhibit LAM 6?---Yes,
31 it is.

1 Is that hole-punched there, the copy that you have been
2 handed?---Yes.

3 If you could please insert that into your folder because that
4 will eventually become the exhibit. If you could turn
5 now, please, to Exhibit LAM 30, and our apologies that
6 the cover sheet to that exhibit incorrectly describes
7 that Exhibit LAM 2, but it is in fact Exhibit LAM 30.
8 Now, that exhibit does not currently have any
9 attachments to it, does it?---No, it does not.

10 Okay, I will hand up to you another document, a copy of which
11 has been provided to my learned friend and also to Your
12 Honour's associate. Can you identify the document
13 that's just been handed to you?---Yes, this is a
14 briefing note from Forests and Parks Division for the
15 minister - to the Minister for Environment and Climate
16 Change.

17 And the copy that's been handed to you has some attachments
18 to it. Is it in this form that the briefing note went
19 to the minister?---That's correct.

20 If you could please then replace Exhibit 30 with the document
21 that's been handed to you. And, Mr Miezis, if you
22 could go back to your witness statement at the
23 beginning of that folder?---Sorry, I have mistakenly
24 removed two documents.

25 All right, we will give you a moment just to regularise that.
26 Now, Mr Miezis, having made those two amendments to
27 your statement and having corrected those two exhibits,
28 is that statement a true and accurate account of the
29 evidence you wish to give in this proceeding?---Yes, it
30 is.

31 If you could please turn to the last page of the statement,

1 you will see there is a space for you to sign it.
2 Could you please sign and date the statement where
3 marked. I tender that statement, Your Honour.
4 HIS HONOUR: Yes.
5 MR REDD: Perhaps we could have that version marked as the
6 exhibit and then if the witness could retain it in the
7 witness box?
8 HIS HONOUR: Yes.
9 MR REDD: So, Mr Miezis, if you could hand that to His
10 Honour's associate, and that will be marked as an
11 exhibit, and then that will be returned to you.
12
13 #EXHIBIT N - Statement of Mr Miezis and exhibits.
14
15 MR REDD: Mr Miezis, while your statement is just being
16 marked as an exhibit, if the witness could be shown
17 folder 2 of Mr MacDonald's affidavits, sworn on 27
18 November 2009, and I am going to take Mr Miezis to
19 Exhibit CM 47 of that folder. Now, Mr Miezis, if you
20 could turn to - you'll see there's tabs on the side of
21 that folder, one of which is labelled CM 47?---Yes.
22 Could you just read that email to yourself and have a look at
23 its attached map. Have you done that?---Yes.
24 Yes. Now, are you able to explain what it is the map
25 attached to the email is demonstrating?---This was
26 various options if we were able to, or are able to
27 verify the presence of the long footed potoroo within
28 this area.
29 Yes?---This was exploring the various options for the
30 implementation of the requirements under the action
31 statement for the creation of a special management zone

1 and retained habitat within that.

2 And how many options are depicted on that map?---There are
3 three. Various buffer widths along Brown Mountain
4 Creek and its tributaries.

5 Perhaps if you could just explain each option as best you
6 can, if you say there are three options on that
7 map?---Certainly.

8 It might assist the court?---There's an option there that
9 looks at a 100 metre buffer, if you like, along the
10 Brown Mountain Creek and to its tributaries as the
11 retained habitat, and version 2, if you like, is the
12 150 and the 200 metre buffer, two variants on the same
13 issue but both looking at retained habitat as buffers
14 along water bodies.

15 Is it the case for all three of the options depicted on that
16 map, that all three of them have buffers extending
17 westward on the two streams depicted?---That's correct.
18 Right. And so as I understand your evidence, the difference
19 between the three versions you have indicated on this
20 map is the width of the buffer, is that right?---That's
21 correct.

22 With one being 100 metres, one being 150 and one being
23 200?---That's correct.

24 Yes?---With various designs to try and - to achieve the
25 approximately 50 hectares.

26 Yes, all right. I have no further questions for Mr Miezis.

27 <CROSS-EXAMINED BY MS MORTIMER:

28 Mr Miezis, I will just follow up with that first. So is it
29 your evidence that on this option there were
30 calculations done about the position - how you get to
31 the 50 hectares, correct?---Yes.

1 And so if you are using a 200 metre buffer to get to the 50
2 hectares, it's a shorter buffer?---That's correct.
3 Wider and - - -
4 Wider and shorter?---Yes.
5 And just pursuing that option for a moment, where do we see
6 the wider and shorter? Am I correct that it just goes
7 down the western side of Brown Mountain Creek and then
8 one northwest and one southwest up the tributaries, and
9 that would be the 200 metre option, is that
10 right?---It's difficult working from a black and white
11 version, but certainly on the western side it comes out
12 a lot further than the others, and is a - yes,
13 basically goes down the tributaries.
14 And so on that option the lighter hatched - hatching that we
15 see, for example, to the north, would not be part of
16 that option?---No.
17 HIS HONOUR: Just explain that to me again?---The 200 metre
18 one sort of to the northern tributary to the west of
19 Brown Mountain Creek follows that, then on to the
20 eastern side of Brown Mountain Creek and down the
21 northern tributary to the west of Brown Mountain Creek.
22 I had thought that what the 200 metre buffer did was to add
23 two strips, one on the eastern side and one on the
24 western side of the previously drawn 150 metre buffer,
25 is that right?---Again, it's quite difficult for me to
26 look at the black and white version. But looking at
27 this, it does come out further on Brown Mountain Creek
28 itself and still does go down the tributaries. But
29 only the tributaries to the west of Brown Mountain
30 Creek.
31 Mr Miezis, the difference between version 1 and version 2 is

1 only 5 hectares?---That's correct.

2 Yes?---Because version 1 extends further, further north.

3 What I am putting to you is that can't be right, can it? The

4 reason it's only a 5 hectare difference is that the

5 only difference between version 1 and version 2 are the

6 north-south strips that are added in version 2 to what

7 is version 1, isn't that right?---No, the difference

8 between version - well, version 1 extends further north

9 up to the solid black line, it extends further south to

10 the southern end.

11 And as I understand it version 1 is the cross-hatched 100

12 metre buffer, is that right?---I do believe the

13 cross-hatch is indicating the SMZ, I think it does go

14 across the darker area in the middle.

15 Well, I will try again. Do you see the label 100 metre

16 buffer?---Yes.

17 Yes. Do you see that the outer ambit of that buffer - -

18 -?---Yes, sorry, you are correct.

19 Appears to reflect a cross-hatched section?---Yes.

20 Is that right?---That is correct, so that - yes, you are

21 correct, the cross-hatch is the - - -

22 And so the whole of that 100 metre buffer gives you a reserve

23 of 43 hectares, is that right?---I believe so.

24 Yes. Is that right or not?---Yes.

25 Yes. Which happens coincidentally to be about the area of

26 coupe 15, as I understand it. So that looks right to

27 the eye?---Yes.

28 Now to get a 5 hectare addition, what you do is add strips to

29 that, don't you?---Yes.

30 You don't subtract from it?---No, you are correct. You add

31 a further buffer along the - to the east and to the

1 west.

2 Yes. And that logically must be right because it's only a 5
3 hectare difference?---Yes, that's right.

4 Yes. Well, that's certainly the way I read it. Do you
5 understand that the 43 hectares includes the 150 metre
6 buffer strip, or is it just the 100 metre buffer?---No,
7 it's just the 100.

8 Yes?---I don't believe that a total area has been calculated
9 on the 150.

10 Right. So the two figures relate respectively to the 100
11 metre buffer and the 200 metre buffer?---I believe
12 that's correct.

13 Yes, thank you. That's much clearer to me, thank you.

14 MS MORTIMER: And, Mr Miezis, this option where we see the
15 solid black part in the middle of coupe 15 from Legges
16 Road to the east, indicates the part that would still
17 be available for harvesting, correct?---That's correct.
18 It's the area within the special management zone.

19 And that little black bit that you can see right down to the
20 south that's just poking out on to the map, that is
21 coupe 27, correct?---Sorry?

22 You see a little solid black bit down the bottom?---Down
23 here?

24 Yes?---Right down the bottom?

25 That's coupe 27, isn't it?---I believe so.

26 And then the solid black bit up the top is coupe 26, isn't
27 it?---Yes.

28 HIS HONOUR: Or more accurately parts of?---Parts of.

29 MS MORTIMER: Parts of, yes, I'm sorry, Your Honour. Thank
30 you, Mr Miezis.

31 HIS HONOUR: And the 200 metre buffer does not precisely

1 align with, but takes the buffer generally to a point
2 on the slope where the contours appear to flatten out,
3 is that fair? Do you see what I am saying? That
4 immediately to the west of the capital "V" for "Version
5 1"?---Yes.

6 The slope plainly flattens compared with to the east of that
7 contour down to the creek?---Yes.

8 Yes. So it might be said that although it doesn't precisely
9 follow the contours, on the face of it there's some
10 topographical sense in the 200 metre buffer, at least
11 on that side of the creek?---That's correct. In
12 creating things like this we seek to use interesting
13 topographic features which are easily identifiable in
14 the field.

15 Yes?---It's not precise because it was a - we are looking at
16 options here.

17 It's a conceptual document?---That's correct.

18 But on one view the concept there is to come back up that
19 initial slope above the creek?---That's correct.

20 Yes, all right. Yes?

21 MS MORTIMER: Mr Miezis, can I just ask you to look back at
22 the email that was sent attaching this, and given the
23 answers you have just given to His Honour do the
24 figures in that - are the figures in that email
25 correct? Because that seems to suggest that what's
26 being shown is 150 and 100, and I think you have now
27 said to His Honour that you understand that one figure
28 represents 100 and one represents 200?---That's my
29 understanding, yes.

30 So what you say in the email is wrong?---Sorry, I don't
31 follow your - - -

1 Well, as I understood your evidence to His Honour, when we
2 look at the map, 43 hectares refers to the 100 metre
3 buffer, and option 2, which is the 48 hectares, refers
4 to the 200 metre buffer; that's what you have told His
5 Honour?---Yes, I believe that's correct.

6 But now this email says that they are the 150 and 100 metre
7 buffers?---No, it says, I have played around with the
8 100 and 150 versus previous options, I am guessing we
9 would have been playing around with various designs of
10 100 and 150 buffer.

11 So when you talk about "I think option 2 works best", option
12 2 is actually not either the 150 or the 100, it's the
13 200?---I believe so.

14 That's how we should understand the email, is it?---From my
15 recollection, yes.

16 All right, thank you. Now, Mr Miezis, can you go to
17 paragraph 13 of your statement, please. I just want
18 to ask you a little bit about your roles and
19 responsibilities. Now, you set out in paragraph 13
20 four of your roles, duties and responsibilities. You
21 don't set out that one of your duties and
22 responsibilities is to be a contact person between DSE
23 and VicForests, but that is part of your role, isn't
24 it?---It is, yes.

25 And indeed it's quite a significant part of your role, isn't
26 it?---I would say it's part of my role. I have staff
27 that work on that part of the, if you like,
28 relationship management.

29 And if I were to suggest to you that the evidence in this
30 case is disclosing that a lot of the communications
31 between VicForests and DSE occur between you and

1 Mr MacDonald, you wouldn't disagree that that reflects
2 often what the situation is in practice?---No, that's
3 correct.

4 And you are a forester and he is a forester,
5 correct?---That's correct.

6 And you don't have any qualifications in zoology, biology or
7 ecology?---No, I don't.

8 And you rely on other members of DSE for that kind of
9 expertise?---That's correct.

10 Now, I want to ask you just some questions about some other
11 people that we are coming across in the evidence,
12 Mr Miezis. You have given evidence in paragraph 13
13 that Dr Appleford is the executive director, and you
14 report to him, is that right?---That's correct.

15 And Dr Appleford reports to Mr Peter Harris who is the
16 secretary of the DSE, is that right?---No, Dr Appleford
17 reports to Greg Wilson, who is the secretary of the
18 department. Greg commenced in - late last year, I
19 believe.

20 All right. I should have asked the question in context
21 then, Mr Miezis. So at the time that you are giving
22 evidence about in this - what you are giving evidence
23 about in this witness statement, Dr Appleford reported
24 to Peter Harris, is that right?---Yes.

25 And Ryan Incoll, what's his position? I withdraw that and I
26 will try and ask them in context. What was his
27 position at the time of the events that you are giving
28 evidence about?---He is the group manager, biodiversity
29 in Gippsland for our state-wide services.

30 Group manager, biodiversity, Gippsland. Now, biodiversity
31 is a branch or a subset of DSE, is that right?---There

1 is a biodiversity and ecosystem services division.
2 State-wide services is in effect a service delivery arm
3 based in - across regional Victoria.
4 So biodiversity ecosystem?---And ecosystem.
5 And ecosystem, and that is the acronym BES, is it?---That's
6 correct.
7 And the people that operate within BES are often qualified
8 conservation biologists or zoologists, is that
9 right?---That's correct.
10 So that when within DSE we are trying to understand where the
11 conservation biologists or zoologists, botanists are
12 based, is it correct to understand them generally at
13 least to be based within BES?---That's correct.
14 And you said that Mr Incoll was the manager for BES
15 Gippsland?---No, he is not a - he doesn't work for BES.
16 We have a service delivery, so we have a core set of
17 policy divisions, if you like, that are
18 Melbourne-based, and we have two service delivery arms:
19 state-wide services and the land and fire services.
20 Ryan works within the state-wide services branch, and
21 he is the biodiversity person for that state-wide
22 services branch in Gippsland.
23 And he clearly also has a principal role in dealing with
24 VicForests, is that right?---He would deal with them on
25 a day-to-day basis. I don't know the specifics of how
26 he deals with them.
27 All right. And Tony Mitchell, what role did he have at the
28 time of the events you are giving evidence
29 about?---Tony was based in Orbost, I believe he
30 ultimately reported through Ryan's group. I don't
31 think it was a direct report though.

1 And Jason Hellyer?---I do not know Jason Hellyer.
2 Do not know? He may be a VicForests employee?---I do not
3 know.
4 Can I ask you a question about the emails, Mr Miezis, because
5 a lot of the evidence that we have seen in this
6 proceeding, sometimes we see people who the evidence
7 has identified as being employees of VicForests with a
8 DSE domain name. Can you explain how that
9 happens?---I would say it's just the way our IT systems
10 work. We all work - we have a central government IT
11 service delivery, CenITex. I am not sure how they
12 ultimately assigned domain names, if you like.
13 So as far as you know the explanation if we see, for example,
14 Mr MacDonald with a DSE acronym or one of the other
15 VicForests people with a DSE acronym, is that
16 ultimately it's something to do with the way the
17 Victorian Government's computer systems are set up, and
18 it may be that VicForests can access a domain through
19 DSE?---It is an IT issue, that's as far as I can give
20 evidence on that.
21 Okay, thank you. And Wil Blackburn, who was he, what
22 position did he have at the time of the events you are
23 giving evidence about?---He is a senior policy officer
24 within my branch.
25 And senior policy officer means he is one of the people
26 responsible for providing advice and information to the
27 minister, is that right?---Through me, yes.
28 So he reports to you?---Not directly, he reports to a policy
29 manager.
30 But we are going to see some emails, Mr Miezis, where
31 Mr Blackburn asks you for information, and it appears

1 from the chain that you provide that information and he
2 then passes it on to the minister, or is that not
3 right?---He would not pass things directly on to the
4 minister, no.

5 You would do that?---That's correct. Sorry, I correct
6 myself, it will be through Peter Appleford.

7 So Mr Blackburn might make the initial enquiries, and you
8 might respond to them, but however it was collated it
9 would then go back through you to Mr Appleford and then
10 to the minister, is that right?---That's correct.

11 And Adrian Moorrees, what position did he hold at the time of
12 all this?---He is in Biodiversity and Ecosystem
13 Services. In the biodiversity policy and programs
14 branch.

15 And is he a qualified zoologist or ecologist, do you
16 know?---I am not aware of his qualifications.

17 And Natasha McLean, what position did she hold at the time of
18 these events?---I believe the manager of threatened
19 species in communities, again within the biodiversity
20 policy and programs branch.

21 And when you say she's the manager, that would seem to
22 suggest that's a reasonably senior position, is that
23 right?---It's a direct report to the director of that
24 branch.

25 Now, I want to ask you now about the Arthur Rylah Institute.
26 That is an institute that operates within DSE and
27 therefore within the Victorian Government, is that
28 right?---It is attached, if you like, to Biodiversity
29 and Ecosystem Services. So the director of the Arthur
30 Rylah Institute reports to the executive director of
31 Biodiversity and Ecosystem Services.

1 And the Arthur Rylah Institute provides expert zoology,
2 biology, botanist advice to a range of government and
3 non government organisations?---Primarily they are a
4 group of researchers, they are a research institution.
5 But they also provide advice to a range of government and non
6 government organisations?---I believe they do.
7 And some of the people who are at Arthur Rylah that we may
8 see in the evidence, and if I just run through them and
9 you can tell me whether they are at Arthur Rylah,
10 Mr Miezis. Lindy Lumsden?---I believe Lindy is, yes.
11 Ryan Chick?---I believe Ryan is, yes.
12 Andrew Murray?---I believe Andrew works in biodiversity
13 state-wide services.
14 Right, thank you. Nick Clemmann?---I believe he is with
15 BES.
16 BES?---Sorry, ARI.
17 ARI?---Yes.
18 Richard Loyn?---Is with ARI.
19 Jenny Nelson?---I believe with ARI.
20 Thank you. And is Andrew Murray related to Larissa Murray,
21 do you know?---I do not know.
22 Just a couple of other questions about DSE, Mr Miezis.
23 Prior to the creation of VicForests, DSE undertook
24 logging throughout the State of Victoria,
25 correct?---Through an arm called Forestry Victoria,
26 that was pre my time with the department.
27 Within DSE?---Yes.
28 So that the logging done in East Gippsland prior to the
29 creation of VicForests was done by DSE,
30 correct?---Forestry Victoria.
31 And it's still the case that logging to the west of the Hume

1 Highway is done by DSE, correct?---That's correct.
2 You say in paragraph 14 that you have produced documents, and
3 when you were preparing this witness statement,
4 Mr Miezis, did you make a thorough search to ensure
5 that you produced everything that you thought would be
6 relevant to the matters you were giving evidence
7 about?---Yes.
8 I want to ask you some questions now about the TRP process,
9 and you deal with that in paragraphs 15 to 40 of your
10 witness statement?---Yes.
11 And can I get you to go, please, to paragraphs 27 and 28 to
12 start with. Now, what you are recounting there is a
13 process that occurred a few years - a couple of years
14 before the events with which this proceeding is
15 concerned whereby there were some amendments to the
16 timber release plan, correct?---That's correct.
17 And those amendments were to the 2004 timber release plan,
18 which as I understand it was due to expire about 30
19 July 2009?---That's correct.
20 Correct? And that's why some months before 30 July 2009 a
21 new TRP proposal process was commenced?---That's
22 correct.
23 And Mr Spencer has given some evidence that that's certainly
24 from VicForests' perspective a process that takes quite
25 a long time?---Yes.
26 And your evidence at paragraph 28 is that there is - if you
27 look at the letter that went - the letter that you
28 extract from Dr Pollard to Peter Harris refers in the
29 third dot point to a review by the DSE regional review
30 process, do you see that?---That's correct.
31 What's that process?---Before a timber release plan is

1 submitted formally for approval, it's provided to our
2 regions for review. The review is conducted by a
3 cross section of local staff representing the various
4 disciplines, if you like, within DSE, forest
5 management, fire management, biodiversity.

6 And do you know who reviewed the TRP plans that included
7 these coupes?---I don't know the specifics - - -

8 At a regional level?---It was - ultimately the review is
9 signed off at this time by what was then the regional
10 director.

11 Who was?---Neville Penrose.

12 We haven't seen in this proceeding any documents that appear
13 to be authored by Mr Penrose. Do you know whether
14 there are any?---We searched and if they are not
15 provided then we would have been unable to locate them.
16 A lot of the approvals were done by an on-line system
17 called the coupe information system, so comments and
18 approvals were done electronically.

19 Can Mr Miezis be shown the affidavit of Lachlan Spencer,
20 please. 27 November 2009, Exhibit K. I may not need
21 to trouble Your Honour's associate, we may have a clean
22 one here. No, it's disappeared. We haven't
23 forgotten the 10 documents for Your Honour, for the
24 final submissions. Just the affidavit and I am then
25 going to ask Mr Miezis to go to exhibit LRS 44. We
26 don't have a copy for the witness, I apologise. But
27 we do have LRS 44. Now, what Mr Spencer deposes to in
28 paragraph 103 is that, and in 102, he talks about the
29 land and fire review - I'm sorry, Mr Miezis, do you
30 have paragraphs 102 and 103 of Mr Spencer's
31 affidavit?---It seems to stop at 15. I have got a

1 second affidavit.

2 I'm sorry, yes, yes. Your Honour, I can provide a clean
3 copy, and I only need the witness to look at that. If
4 there are some markings on the rest of the affidavit,
5 Mr Miezis, don't look at them, just look at that clean
6 page, please?---Sorry, paragraph?
7 102 and 103. Have you got those?---Yes.
8 You will see that Mr Spencer there is describing the
9 approvals - the review by the land and fire review,
10 that's the one you have just been talking about,
11 correct?---The land and fire review, or land and fire
12 services did not exist in 2007, we were - DSE was
13 operating under a regional structure at that time.
14 No, we are now talking about 2009?---Sorry, in 2009 that
15 would be correct, sorry.
16 Yes, yes. And what Mr Spencer then does in paragraph 103 is
17 produce what is LRS 44, and can I ask you to go to
18 that. I will just show you this copy, LRS 44, which is
19 a very short computer generated table. And that on
20 Mr Spencer's evidence is the extent of the comments
21 from the DSE land and fire review, and it appears to us
22 to be the extent of the comments from the DSE regional
23 review process. Have you got any basis to disagree
24 with that?---It's a long process that involves a lot of
25 discussion. I am not intimately familiar with what
26 happens at the regional level, but ultimately it
27 culminates at an end point, a comment, and this is
28 reflecting that end point.
29 All right, thank you. Now, can I ask you to go to paragraph
30 29 of your affidavit, please. And that's where you
31 produce Exhibit LAM 4, which is the one that you have

1 as I understand it just updated in terms of - no, I
2 withdraw that. You produced Exhibit LAM 4, and that
3 is the request for approval sent by VicForests to
4 Mr Harris, the secretary for the DSE, correct?---That's
5 correct.

6 And that document, Mr Miezis, is sent on the 15th, or it's
7 dated 15 May, and received a couple of days after that,
8 in 2009. And it's right, isn't it, that quite a bit
9 had happened as at 19 May 2009, Mr Miezis, in relation
10 to these four Brown Mountain coupes, and particularly
11 coupes 15 and 19? Between the start of 2009 and 19 May
12 2009 there'd been quite a few developments?---That's
13 correct.

14 About these coupes, hadn't there?---That's correct.

15 And according to paragraph 32, you were the person in DSE
16 responsible for providing information to Dr Appleford
17 that would form the basis of his decision to approve or
18 not approve the TRP, that's correct, isn't it?---I
19 review the documentation, yes.

20 You were the person responsible, Mr Miezis, weren't you, for
21 providing that information?---That's correct.

22 Yes. And your evidence in paragraph 32 is that you reviewed
23 all the documents and you provided that information to
24 Dr Appleford on 4 June 2009, correct?---That's correct.

25 Now, what you don't say in that paragraph, Mr Miezis, is what
26 you actually did to form that view. You say that you
27 reviewed documentation and you formed a view. What
28 did you actually do on 4 June to form that view,
29 Mr Miezis?---I have a briefing note that's submitted to
30 me for review. I look at the various documents that
31 are associated with that. There was no apparent

1 impediment to the coupes being included within the TRP.
2 Who prepared your briefing note?---It would have been my
3 manager of forestry standards and compliance.
4 Who's that?---In 2009 that would have been - - -
5 In May 2009?---It would have been Scott Arnold, I believe.
6 And how long was the briefing note?---I don't recall.
7 Had to deal with all the coupes that were submitted for
8 proposal in the TRP, didn't it?---Yes, it did.
9 Do you have any memory that it dealt specifically with coupes
10 15, 19, 26 and 27?---Consideration would have been
11 given to the outcomes of the regional review. There
12 would have been no - possibly no explicit reference to
13 those coupes.
14 You don't remember any explicit reference to those
15 coupes?---No.
16 And I have already shown you Exhibit LRS 44 which had I think
17 about a line each referencing the proposal - proposed
18 icon reserves and nothing else?---Yes.
19 Do you have any recollection of anything else being said to
20 you in that briefing note about these coupes?---Not
21 that I recall. I would have to reference the briefing
22 note.
23 You haven't produced that, have you?---It's the same briefing
24 note.
25 Pardon?---I'm sorry - no, I haven't.
26 And how long did you take on 4 June to form that view,
27 Mr Miezis?---I don't recall specifics.
28 And you then say - your evidence is that there were no
29 impediments to coupe 26 or 27 being included or coupes
30 15 and 19, does that remain your evidence?---Yes.
31 That's the view you formed on 4 June?---Yes.

1 Let me go through with you, Mr Miezis, the things that you
2 knew by 4 June 2009. You had received information
3 from Mr Henry - you know who Mr Henry is, don't
4 you?---Yes.
5 Who is he?---A biodiversity officer in East Gippsland, based
6 at the Orbost - - -
7 Qualified zoologist?---I believe so.
8 PhD in Zoology, in fact?---I believe so.
9 And you had received information and opinion from him and
10 Mr Incoll about glider densities reported by EEG as
11 early as January 2009?---That's correct.
12 You received that?---That's correct.
13 And you'd been told by Mr Incoll about hair tubing, which had
14 been identified by Barbara Triggs as a long footed
15 potoroo, and you'd been told that in early
16 February?---I don't recall specifics, but - - -
17 I will take you to the specifics in a moment, but you don't
18 recall having that information - - - ?---There was a
19 lot of information coming in about those areas at that
20 time.
21 You do recall?---I recall information, I don't recall the
22 specifics, so I don't - - -
23 And you - - - ?---I do know there was hair tubing, I believe
24 in February there was a report.
25 And you knew who had verified that the hair was the hair of a
26 long footed potoroo, you knew that was Barbara
27 Triggs?---I don't recall the specifics, but - - -
28 Do you know who Barbara Triggs is?---No.
29 You don't know that she's an expert that DSE uses to identify
30 hairs including long footed potoroo and quoll
31 hairs?---No, that's outside of my responsibilities.

1 And you knew by 4 June, thirdly, that there had been surveys
2 by both EEG and DSE detecting sooty owls and powerful
3 owls in these coupes, in and around these
4 coupes?---That's correct.

5 You knew that? And you knew that those surveys, had, in
6 terms of the EEG survey, been done by one of Victoria's
7 current leading experts on sooty owls, Dr Bilney?---I
8 don't know the specifics of Dr Bilney, no.

9 You didn't know anything about Dr Bilney?---I heard the name
10 a lot, but I don't know of his specific qualifications.
11 Prior to 4 June had you made any enquiries about who he was
12 and what his qualifications were?---No, I would have
13 referred that on to the biodiversity people.

14 Mr Henry might have told you about Dr Bilney's work, do you
15 think?---I can't recall.

16 And fourthly you knew that EEG had made an application to the
17 minister for an interim conservation order and an
18 application to your secretary, Mr Harris, for a
19 critical habitat declaration, and they had been made in
20 January 2009, and you knew that before 4 June, didn't
21 you?---That's correct.

22 And you knew from what EEG had said in those applications,
23 particularly the one to your secretary, that it was
24 going to be relying on a report from Dr Charles
25 Meredith, you knew that, didn't you?---Yes.

26 And do you know who Dr Charles Meredith is?---He works for
27 Biosis.

28 He is an independent, fully qualified ecologist, isn't he,
29 Mr Miezis; do you know that?---Yes.

30 And you have attended a meeting with some people from
31 VicForests on 7 April 2009 specifically discussing the

1 contentious nature of Brown Mountain harvesting, hadn't
2 you?---That's correct.

3 And you said a lot of things at that meeting, but one of the
4 things that the evidence revealed, you said to
5 VicForests, was that the issue about the detections of
6 threatened species was their issue, do you remember
7 saying that?---In an operational sense, yes, it is.

8 And you had been telling EEG since about mid-April 2009 that
9 VicForests had to go away and prepare a response to
10 EEG's survey results, do you remember telling EEG
11 that?---Not the specifics, but that sounds - - -
12 I will show you this document.

13 HIS HONOUR: As at 5 June 2009, did you still believe that
14 in an operational sense the detection of threatened
15 species was a matter for VicForests?---At a coupe
16 level, yes.

17 I see. So what happens is that they get their approvals,
18 but it's subject to compliance with the forest
19 management plan?---Yes.

20 And in particular?---That's correct.

21 And compliance with action statements under the Flora and
22 Fauna Guarantee Act, as you understand it?---There's a
23 series of conditions, that's correct.

24 A series of conditions. And you say that the effect of
25 those conditions is that it's for them to respond if
26 threatened species are detected?---The process of the
27 TRP is one of vesting ownership, if you like, of timber
28 resources into VicForests, so divesting from the crown,
29 investing into VicForests. The decision when and if
30 indeed it harvests those coupes rests with VicForests.

31 I see. So your recommendation on 5 June is made within that

1 sort of understanding of how the process works, is that
2 right?---That's correct. In accordance with the
3 Sustainable Forest Timber Act, a TRP is for the vesting
4 of timber resources.

5 I see. Yes, thank you. Yes?

6 MS MORTIMER: I will come back to that in a moment,
7 Mr Miezis. I will just get you to look at this email
8 first, please. And let's start the chain at the
9 start. There's an email, if you go to the second
10 page, there's an email from Jill Redwood of Environment
11 East Gippsland dated 7 April 2009, see that?---Yes.

12 Talking about whose responsibility it is to stop logging and
13 manage threatened species, do you see that?---Yes.

14 That's what she is asking you about?---Yes.

15 And she is asking you for an unambiguous answer. And then
16 at the top of that page, but you really need to see the
17 bottom of the first page to get the chain, you respond
18 to Ms Redwood on April 9, at 9.52 am, saying DSE's the
19 land manager and responsible for maintaining forest
20 management zoning, timber resources are vested in
21 VicForests. On approval ownership of the timber
22 resources transfers from the crown to VicForests for
23 the purposes of harvesting and selling. A condition of
24 the TRP that VicForests comply with, amongst other
25 things, the forest management plan, and it's a
26 responsibility of all persons in conducting activities
27 in state forests to ensure the conditions on that
28 activity are met. And that in a nutshell, Mr Miezis,
29 is what you have just explained to His Honour, isn't
30 it?---That's correct.

31 And Ms Redwood then says "Thanks, that helps explain." And

1 she asked you if anything positive came out of the
2 meeting yesterday, and though the chronology is a day
3 out, Mr Miezis, that appears to me to be the meeting of
4 7 April 2009 that you had along with Mr Arnold and
5 Mr MacDonald and a few others, you would agree with
6 that?---That's correct.

7 And that's why you are saying to her on 15 April that the
8 "meeting went ahead, good debate", VF was going to go
9 away and prepare a response to the survey result.
10 And, Mr Miezis, that accords with what you said really
11 to VicForests at that meeting, the thrust of which was
12 "it's your responsibility, go and do
13 something"?---That's correct.

14 I tender that, if Your Honour pleases.

15 HIS HONOUR: Yes.

16

17 #EXHIBIT 64 - Emails between Mr Miezis and Ms Redwood,
18 00/04/2009.

19 MS MORTIMER: And so when, Mr Miezis, in your witness
20 statement you said that there were no impediments
21 despite the six matters that I have taken you to, is it
22 fair to say that what you mean by that is that the
23 responsibility had been transferred to VicForests so
24 far as DSE had been concerned, for all those matters
25 that had been building up and weren't resolved?---The
26 approval of a timber release plan is conditional on if
27 you like compliance with the allocation order and the
28 code of forest practices, that's what the Sustainable
29 Forest Timber Act says. There's only certain matters
30 that you can consider up-front in relation to the code
31 of forest practices, because a timber release plan is

1 potentially being approved five years prior to the
2 conduct of harvesting. We look at forest management
3 zoning: are coupes within the general management zone?
4 Which is the area that's available for timber
5 harvesting. We look at the records that we maintain
6 of threatened species and that we make available. We
7 consider matters such as other forest management
8 activities that might be - you know, for example, car
9 rallies in terms of the timing or the proposed timing
10 of harvesting. So in terms of those matters, there
11 were no impediments. We then placed conditions upon
12 the approval, and again as I said before the decision
13 on whether or not harvesting occurs in those areas, in
14 accordance with those conditions, rests with
15 VicForests.

16 And it's fair to say then that all - - -

17 HIS HONOUR: You said up to five years before. Aren't
18 they in effect 15 year approvals with five year - -
19 -?---No, the process is, there is an allocation order
20 that is created. An allocation order is effectively
21 the identifications of forest stands that are available
22 to VicForests, it's not defined at a coupe level.

23 Yes?---It's quite a broad description.

24 Yes?---And it's based upon the area of public land that's
25 available for timber harvesting.

26 Yes?---There's then - the forest stands are described and an
27 area allocated against each of those forest stands.

28 Yes?---A maximum area in each of three 5 year periods. A
29 timber release plan, once an allocation is - an
30 allocation order is created or made, is then prepared
31 by VicForests. As I was saying to you earlier, Your

1 Honour, the purpose of the timber release plan is to
2 vest timber resources in a defined geographic area, a
3 coupe, into VicForests.

4 And that would be a five year - - - ?---That's up to five
5 years, yes.

6 And so you say that when that happens it could be five years
7 before it's logged?---Yes.

8 And in a sense you say the process envisages that there's an
9 on-going series of operational conditions requiring an
10 on-going assessment of the situation as the facts may
11 emerge in that period of time?---That's correct. We
12 look at these issues at two levels. At quite a
13 strategic level, if you like.

14 Yes?---Through land use determination, creation of parks and
15 reserves, through forest management zoning.

16 Yes?---And then we have a series of adaptive processes, if
17 you like, that change as new information becomes
18 available. And amongst that adaptive process is
19 forest management zoning, which can change through
20 time. VicForests can only ever harvest as a condition
21 of - as required in the code of forest practices in the
22 general management zone. So it needs to continually
23 consider changing information through time. It must
24 comply, it's required to comply as a condition.

25 Yes?---So whether - the timing of the harvesting, as you
26 said, it may not be harvested until five years after
27 the approval, or it may not be harvested at all.

28 Yes, I see. Yes, thank you.

29 MS MORTIMER: And so, Mr Miezis, all those matters I put to
30 you about - if we go back to the gliders and the
31 potoroo hair tubes and the owls and all those things -

1 would come under the rubric that you have just
2 described to His Honour of changing information over
3 time that needed to be addressed properly, lawfully by
4 VicForests as it moved from - as soon as it was vested
5 with those resources if it actually wanted to harvest
6 them?---There are two matters I guess happening at this
7 time, one was the expansion of the conservation reserve
8 system in East Gippsland, which obviously rested with
9 the Minister for Environment and Climate Change, and
10 then there was the approval of the timber release plan.
11 So there was almost two parallel processes going on at
12 the same time.

13 We will come to some issues about the reserves, Mr Miezis.

14 But really the effect of your evidence is that at an
15 operational level when the resources vest through the
16 decision of the secretary in VicForests, whatever
17 issues about threatened species have built up are then
18 matters that VicForests has to deal with before it
19 harvests?---At an operational level, that's correct.

20 At an operational level?---At strategic levels, for example
21 the changing of the forest management zoning based on
22 that rests with the department.

23 So it's not that DSE then is hands off, but it certainly is
24 that there's a perceptible shift of responsibility to
25 those that are conducting the operations in the
26 forest?---We will continue to for example update action
27 statements, we will continue to conduct research, we
28 will look at zoning, we will look at creation of new
29 reserves, so those things are continuous. So in that
30 respect, yes, we do have an on-going role at that
31 strategic land management level.

1 Thank you. Now, I want to ask you some questions about the
2 reserves, and the new reserves, and Brown Mountain in
3 particular, Mr Miezis. Can you go to paragraph 41 of
4 your statement, please. Now, that's where you start
5 to describe the process by which the State Government
6 began to implement the election promise it had made in
7 2006 about protecting extra old growth and icon forests
8 in East Gippsland, correct?---This describes a brochure
9 that was prepared to accompany the bill.

10 That's right. And that's the culmination, the bill was the
11 culmination of the decision-making process?---That's
12 correct.

13 About the reserves, correct?---That's correct.

14 And that started because there was an election promise in
15 2006, and this was seen by the government to be the
16 fulfillment of that promise, correct?---That's correct.

17 And until that legislation was passed by the Victorian
18 Parliament, Mr Miezis, it's right, isn't it, that
19 nobody could be completely certain about where the
20 reserves would be until the parliament passed that
21 legislation?---That's correct. There were lines on a
22 map that accompanied the 2006 commitment, and we had
23 agreed with VicForests that there was in effect a
24 moratorium on timber harvesting within those areas.
25 But we also knew that the date or any information upon
26 which those maps was put on the - those lines were put
27 on the map wasn't as good as it should have been, and
28 we commenced a process of reviewing that.

29 There was a little bit more to it than that, wasn't there?

30 There was a bit of negotiation and argy-bargy between
31 the government and VicForests and conservation groups

1 about where the lines should be drawn on the map,
2 wasn't there?---There was an industry transition task
3 force appointed, if you like, to talk with stakeholders
4 to validate the work that we were undertaking.

5 There was a lot of political toing and froing between the
6 government and VicForests and the timber industry on
7 the one hand, and conservation groups on the other,
8 about where the lines should be drawn on the map?---If
9 you are referring to - by government departments'
10 involvement, I wasn't party to what may have happened
11 by - in the minister's office. But certainly I was
12 involved in discussions with a number of the peak
13 environment groups, with VicForests, with the industry
14 transition taskforce, that's correct.

15 You weren't party to what was going on in the minister's
16 office, Mr Miezis, is that your evidence?---No, I was
17 not party to everything that may have occurred in the
18 minister's office.

19 Now, you did prepare some briefing notes, didn't you?---Yes.
20 And you prepared a briefing note on 13 March 2009 to go to
21 the minister, didn't you?---Yes.

22 I will show you this document. Are you familiar with
23 that?---I am familiar with the contents, yes.

24 And you knew about this briefing to the minister, didn't
25 you?---At that time I would have been reporting to
26 Janine Haddow, and believe would have had to have
27 reviewed this document prior to it going. I can't see
28 the text at the bottom.

29 No, neither could we, Mr Miezis. I am not sure why we can
30 see the MBR number and the page number but we can't see
31 who prepared it, which is what you would usually see in

1 those two very indistinct lines at the bottom, that's
2 right, isn't it?---That's correct, yes.

3 Yes. Now, what this briefing note talks about is this
4 process of political toing and froing that I was just
5 suggesting was occurring, doesn't it?---It talks about,
6 yes, a lot of the negotiations, the issues that were
7 involved that we were working through.

8 And it particularly talks about whether Brown Mountain should
9 get into the reserves or not, doesn't it?---That's
10 correct.

11 And it was a proposal by conservation groups, as is recorded
12 in paragraph 13 of the briefing note, that Brown
13 Mountain should go into the reserve system,
14 correct?---That's correct.

15 And if you go to paragraph 23, it was so seriously considered
16 by the minister and DSE that people from DSE and
17 VicForests and the conservation groups went out to
18 visit the coupes at Brown Mountain in November 2008,
19 correct?---That's correct.

20 And there was a meeting shortly after that, paragraph 24,
21 between DSE and VicForests discussing alternatives for
22 harvesting at Brown Mountain, and VicForests was asked
23 to identify some other coupes, part of the trade-off
24 process, isn't it, Mr Miezis, that was being
25 contemplated?---Yes. It was a double - two-pronged
26 election commitment, if you like, to add new areas into
27 the reserve system while ensuring no net loss of
28 resources of jobs. So there was trade-offs and
29 negotiations around what may go in and what may not,
30 and - - -

31 And VicForests' position is reflected accurately in paragraph

1 25 of that briefing note, isn't it?---That's correct.
2 VicForests put the position that the eastern edge of
3 Brown Mountain - I'm sorry, of the Big River reserve
4 would be what they were willing to consider as a
5 trade-off.
6 Four times larger than Brown Mountain?---I believe so, yes.
7 That's what the briefing note says?---Yes.
8 And that's right, isn't it?---Yes.
9 And there was then some debate through - the end of December
10 2008 about the volumes, and in fact the initial volumes
11 that VicForests claimed it would get out of Brown
12 Mountain could not be independently verified, and
13 lesser volumes were independently verified, and that's
14 what this briefing note says, isn't it,
15 Mr Miezis?---That's correct.
16 VicForests was putting forward information to the minister as
17 part of this process that was not correct, wasn't it,
18 Mr Miezis?---My recollection that the debate, or the
19 discussion around the volume of timber that was coming
20 out of Brown Mountain was - originally started at
21 around the volume estimates that were included within
22 the coupe plan prepared by VicForests, which were lower
23 than they were stating was coming out of the area, and
24 particularly the proportion of pulpwood to sawlog. On
25 1 December, I believe, and my recollection is that they
26 presented some alternative numbers which we did seek to
27 have them independently verified.
28 And what paragraph 28 of this briefing note records is that
29 the audit result showed that while The Walk - that's
30 coupe 20, did you know that's the name for coupe
31 20?---I know The Walk, yes.

1 Did produce a large volume and proportion of sawlog, the
2 proportion of sawlog to pulpwood was significantly less
3 than that claimed by VicForests on 27 November 2008.
4 And DSE relied on the audited data not VicForests'
5 data, correct?---That's correct.

6 The position of VicForests is again confirmed in paragraph
7 29, that Big River is the only trade-off, and
8 discussions continued, as this briefing note records,
9 right through the period when coupe 20 was harvested,
10 that's what paragraph 33 says, do you agree with
11 that?---Yes, that's correct.

12 And this briefing note, as I read it, Mr Miezis, is a record
13 of events and information for the minister, but it
14 doesn't appear to ask the minister to make a decision
15 or record a decision at this time, is that right?---No,
16 it's a brief that's prepared for noting.

17 And the minister - are you able to tell His Honour that this
18 actually did go to the minister?---There's generally
19 another sheet on top of these that the minister would
20 have signed. Given that it has been approved by
21 Janine Haddow I would assume it did, but I can't swear
22 to that.

23 No reason to doubt that it went to the minister, have
24 you?---No.

25 HIS HONOUR: Do you say you prepared this note?---If I
26 didn't prepare it I certainly would have reviewed it.
27 Yes, it says in paragraph 39 "the brief was prepared within
28 Natural Resources Division with information supplied by
29 VicForests, Parks Victoria and the East Gippsland
30 area"?---Yes, and I was part of Natural Resources
31 Division at that time, reporting directly to Ms Haddow.

1 Yes. So do you say at the time you believed this to be an
2 accurate briefing note?---Yes.

3 And you still do?---Yes.

4 Yes, thank you.

5 MS MORTIMER: I tender that, if Your Honour pleases.

6
7 #EXHIBIT 65 - Briefing note to the minister dated 13/03/2009.

8
9 HIS HONOUR: Ms Mortimer, I think I will give the witness a
10 short break.

11 MS MORTIMER: If Your Honour pleases.

12 HIS HONOUR: It's a little close in here.

13 MS MORTIMER: Very stuffy, Your Honour.

14 HIS HONOUR: It's not meant to be a trial by ordeal.

15 MS MORTIMER: No, if Your Honour pleases.

16 (Short adjournment)

17 HIS HONOUR: Yes, Ms Mortimer.

18 MS MORTIMER: As Your Honour pleases. Now, Mr Miezis, I was
19 asking you some questions about the development of the
20 final identification of the boundaries to the new
21 reserve system, and we'd just gone through that March
22 2009 briefing note. The announcement by Minister
23 Jennings about the icon reserves and the fact that
24 Brown Mountain was not to be included wasn't made until
25 21 August 2009 by media release, that's right, isn't
26 it?---That - the 21 August media release related to the
27 outcomes of the DSE surveys, and - - -

28 Yes, and that Brown Mountain would be available for
29 harvesting?---And that Brown Mountain would be
30 available for harvesting, that's correct.

31 And the implication is that it hadn't made it into the

1 reserve proposal?---It was never in the reserve
2 proposal, that's correct.

3 And as far as we are aware, Mr Miezis, between March 2009 and
4 21 August 2009, there's no other public statement that
5 indicates that Brown Mountain had not made it into the
6 reserve system; are you aware of any?---No, there was a
7 lot of work going on I guess looking at options and, as
8 you pointed out earlier, discussions around potential
9 trade-offs, if you like.

10 And it's fair to say, isn't it, Mr Miezis, that what that
11 reflects is that what went into the reserve system and
12 whether Brown Mountain went in or out was essentially a
13 political decision?---No. The department made
14 recommendations. We used a series of criteria in
15 terms of recommending the - and it was largely the old
16 growth component of the reserves that we were
17 discussing here. The icon reserves that were
18 announced in 2006 changed very little. The old growth
19 reserves, we updated our old growth modelling and we
20 used a number of criteria in terms of ultimately
21 developing a recommended option. One of those
22 criteria was about 50 per cent of the area of the
23 reserve having old growth forest within it, and Brown
24 Mountain did not meet that criteria, it contained about
25 30 per cent.

26 Let me try this question another way then, Mr Miezis. That
27 briefing note that I have just taken you through in
28 some detail, if VicForests had accepted what was
29 described as a trade-off, Brown Mountain would have
30 been in the reserves, that's the effect of that, wasn't
31 it?---No, because the same discussions were also

1 happening with the environment groups. Now, when the
2 trade-off that was proposed by VicForests was put to
3 representatives of the Wilderness Society, Victorian
4 National Parks Association, and the Australian
5 Conservation Foundation, they were not willing to
6 accept that trade-off. Their position was both should
7 go into the reserve.

8 And ultimately it was a decision that was made by the
9 executive of the State government, wasn't it?---It was
10 ultimately passed by the parliament of Victoria.

11 Well, before that, the form in which the bill was presented
12 to parliament was based on a decision made by the
13 executive government, correct?---That's correct, based
14 on a recommendation from the department and work
15 undertaken by the industry transition taskforce
16 appointed by the Minister for Agriculture and the
17 Minister for Environment and Climate Change.

18 And you are aware, aren't you, Mr Miezis, that on 21 August
19 2009, Minister Jennings posted a twitter saying he
20 couldn't get Brown Mountain over the line, are you
21 aware of that?---I am aware of that.

22 And what that meant was that he couldn't get Brown Mountain
23 over the line in cabinet, didn't it?---I don't know
24 what he meant by it.

25 You don't? Is that how you understood it?---He had - we had
26 made a recommendation, and there was a twitter. I - -
27 -

28 How did you understand that twitter, "Couldn't get Brown
29 Mountain over the line"?---To be honest I haven't
30 actually thought about what he meant by it.

31 Over what line, Mr Miezis? Over the political line?---I do

1 not know.

2 Now, before the press release on 21 August by Minister
3 Jennings, you had a conversation with Cameron
4 MacDonald, didn't you, about Brown Mountain?---I had a
5 number of conversations with Mr MacDonald about Brown
6 Mountain.

7 In the week or two before the public media release on 21
8 August you had a conversation with Cameron MacDonald
9 about Brown Mountain, do you remember that conversation
10 or not?---Again I had a number of conversations with
11 Mr MacDonald, and - - -

12 All right. Well, let me read this, this is from paragraph
13 67 of Mr MacDonald's fourth affidavit, what
14 Mr MacDonald's evidence to the court has been: "Some
15 time in the first week of August 2009, on a date I
16 cannot presently recall, Lee Miezis telephoned me and
17 told me that the Minister for Environment and Climate
18 Change would be making an announcement that the
19 moratorium on harvesting in Brown Mountain would be
20 lifted on the basis that VicForests would implement a
21 streamside buffer and put in place modified habitat
22 tree prescriptions." Now, Mr MacDonald you accept is
23 right about you calling him in the first week of August
24 to give him that news?---That would have been about
25 right. We needed VicForests' agreement, if you like,
26 to implement prescriptions that were over and above the
27 existing regulatory framework.

28 And is he right about the content of what you told him? I
29 will just read it to you again: "Told me that the
30 Minister for Environment and Climate Change would be
31 making an announcement that the moratorium on

1 harvesting in Brown Mountain would be lifted on the
2 basis of buffer and prescription". That's an accurate
3 account of what you told him, is that right?---It would
4 have been. The briefing that we put to the minister
5 on our recommendations that harvesting - or that he
6 note that we were intending to permit harvesting, we
7 weren't going to allow - or we weren't going to create
8 a special protection zone, and that decision rested
9 with the department, not with the minister. It was
10 signed on about 29 June, so the time's about right.

11 And that's a briefing note that I think the evidence shows
12 was dated 18 June?---That's correct.

13 2009. And you say it was signed off by the minister on 29
14 June, is that right?---Yes, that's correct.

15 And, Mr Miezis, what happened between 29 June and the first
16 week of August that it couldn't be firstly told to
17 VicForests sooner and announced publicly sooner?---I do
18 not know.

19 You don't know?---No.

20 Got no explanation for that?---No. The briefing note went
21 up, we didn't have - we would have had I believe
22 probably verbal advice that the minister had accepted
23 our decision.

24 And at that time, that conversation that you had with
25 Mr MacDonald, the streamside buffer was being put in
26 place because of the possibility of the crayfish
27 detection, wasn't it?---It was put in because the
28 advice we got through the surveys was that the bulk of
29 the arboreal mammals were on the lower slopes and
30 gullies, so we'd put a buffer - it was - - -

31 So the streamside buffer was for the crayfish and the

1 arboreal mammals, correct?---It was a precautionary
2 measure, if you like, because through our surveys we
3 had not found - - -

4 It was directed at those two species?---It was directed at
5 the arboreal mammals. We had not found the crayfish
6 in our surveys.

7 So had nothing to do with the crayfish, is that your
8 evidence?---That's correct.

9 Streamside buffer, your evidence is as at 21 August 2009, had
10 absolutely nothing to do with the Orbost spiny
11 crayfish?---It was targeted at the arboreal mammals.
12 And didn't have anything to do with any other crayfish that
13 might be in that creek, is that your evidence?---No.
14 Through our surveys the only crayfish we found were the
15 - excuse my pronunciation - the bidawalus.

16 Bidawalus?---Bidawalus, yes.

17 Did you know the bidawalus is on the DSE threatened advisory
18 list?---The advice that I received was that it was not
19 a threatened species - - -

20 It's not a listed threatened species. Did you know it's on
21 the DSE advisory threatened list?---No.

22 Do you know if anybody knew that at the time, that it was
23 discounted as something that should be protected by the
24 streamside buffer?---I am not aware of what others may
25 have known or not known.

26 And the habitat tree prescriptions were also in place for the
27 arboreal mammals, correct?---That's correct.

28 So as at your conversation with Mr MacDonald in the first
29 week of August, and as at the minister's press release
30 on 21 August, the streamside buffer was not at all
31 about the long footed potoroo, was it, Mr Miezis?---No.

1 We had not found long footed potoroo in our surveys.
2 And the minister's press release on 21 August in fact said
3 that no long footed potoroo had been found?---That's
4 correct.

5 Is that right? And that I suggest to you, Mr Miezis, is not
6 a fair and accurate reflection of the state of
7 knowledge of DSE at that time, do you disagree with
8 that statement?---It's a reflection of the findings of
9 the surveys that we conducted.

10 It is not a fair and accurate reflection of DSE's state of
11 knowledge on 21 August 2009, is it?---Again it's a
12 reflection of the surveys that we conducted. We had
13 not verified location of any long footed potoroo within
14 those coupes.

15 And it's not a fair reflection of VicForests' state of mind
16 about the long footed potoroo on 21 August either, is
17 it?---I can't comment - - -

18 And none was found, that absolute kind of
19 statement?---VicForests would have been informed of the
20 findings of our survey, or were informed of the
21 findings of our surveys.

22 I suggest to you it is not a fair reflection for two reasons,
23 Mr Miezis, and I will take you through them. The
24 first is the hair tubing finding in February, and the
25 second is a fair reading of the DSE survey, and I will
26 take you through both of those. Hair tubing. Can
27 you go, please, to Exhibit LAM 19 to your statement.
28 Now, this document - Your Honour, this document was
29 yesterday marked, as I understand it, (MFI)58, but,
30 Your Honour, it need not be marked as MFI, because it
31 actually is part of Mr Miezis' statement. And this is

1 an email from - if you start at the chain, Mr Miezis -
2 Stephen Henry to three people in DSE, Ryan Incoll, Wil
3 Blackburn and Natasha McLean, forwarded to you shortly
4 after it was received, correct?---Yes.

5 And what that tells you on 3 February 2009 is that the hair
6 tubing identification was done by Barbara Triggs, do
7 you see that in the first paragraph of Mr Henry's
8 email?---Yes.

9 Got that?---Yes.

10 And then Mr Henry tells those three people and then you that
11 the animal was detected within 100 metres of Brown
12 Mountain Creek, and he gives a grid reference, do you
13 see that?---Yes.

14 And to this day, Mr Miezis, nobody has challenged that
15 statement of Mr Henry's, have they?---In response to
16 this email, we instructed the surveys to be extended to
17 the long footed potoroo.

18 I understand that, Mr Miezis. Now, if you would answer my
19 question: to this day nobody has challenged that
20 statement of Mr Henry, have they?---That the detection
21 - no.

22 That the animal was detected - - -?---By Barbara Triggs - - -
23 Within 100 metres of Brown Mountain Creek at that grid
24 reference, the western side of proposed coupe 19, that
25 has never been challenged as factually incorrect, has
26 it?---It is reflecting what Barbara - where Barbara
27 Triggs - I'm sorry, where Jill Redwood has reported the
28 animal being detected.

29 He is doing more than that. He is reporting that, and I am
30 suggesting to you that nobody has ever challenged it.

31 Now, are you in a position to say that's ever been

1 challenged?---No, I am not. We instructed the surveys
2 to be conducted in response to this alleged detection.
3 Well, it's not an alleged detection, Mr Miezis. What's
4 "alleged" about it?---Well, we have been - we have not
5 verified, we put the surveys in to verify the finding.
6 No, you put the surveys in, I suggest, to duplicate it, and
7 you couldn't duplicate it. That's the correct
8 analysis of what you did, isn't it?---No, we put the
9 surveys in to verify the alleged threatened species
10 detections in the area.

11 DSE has always accepted hair tubing with grid locations like
12 this in the past, and you know that, don't you?---In
13 the time that I have been involved in this, no, we
14 haven't.

15 In the two findings that were made of the long footed potoroo
16 to the west of Legges Road, how were they made?---It
17 was before my time, I am not aware.

18 Do you accept they were in 2001, that's before your time, is
19 it?---That's correct.

20 So you don't know whether they were made by hair tubing or
21 not?---No.

22 It's quite possible they were, you can't discount it?---Hair
23 tubing is to my understanding a way of detecting the
24 long footed potoroo, and that's sort of - that
25 technology has evolved now to largely the use of remote
26 cameras.

27 It was the completely orthodox way of detecting the long
28 footed potoroo before camera surveys, wasn't it?---My
29 understanding is, yes, it is.

30 And it was a completely orthodox way of detecting the quoll
31 as well, wasn't it?---Again, I am not as familiar with

1 the quoll.

2 And indeed when DSE first proposed these surveys in March,
3 February and March, it proposed using both hair tubing
4 and cameras because it recognised hair tubing as an
5 orthodox method of detection, that's right, isn't
6 it?---It's a method that's used, yes.

7 And so here we have a detection with grid references placed
8 in a coupe, and then the hair identified by the only
9 person in the State of Victoria or New South Wales that
10 does this, what more verification did you need,
11 Mr Miezis?---We had a report of a grid reference. We
12 had no knowledge of whether that was an accurate grid
13 reference. We had a long footed potoroo detection, we
14 needed to verify it before we implemented the
15 requirements of the action statement. That's how we
16 work. We verify - - -

17 Did anybody go and check the grid reference?---I am not
18 aware.

19 I suggest to you that they didn't, and that's because
20 Mr Henry is reporting it as an accurate grid reference,
21 and everybody has acted on that basis. Nobody said to
22 Mr Henry "Go and check it, it's not accurate", have
23 they?---We instructed Mr Henry to undertake surveys in
24 the area to verify the alleged detection.

25 You did not instruct Mr Henry to go and check that grid
26 reference, did you?---No.

27 And what Mr Henry says in this email, in about the fifth or
28 sixth paragraph, is that in this case the interim SMA,
29 having described what the special management area
30 should be, he then talks about a proposed special
31 management area including the two proposed coupes on

1 either side of Brown Mountain, and that, Mr Miezis, is
2 a reflection of the understanding of the person on the
3 ground responsible for the administration of this
4 scheme about what was supposed to happen at the time in
5 February 2009, namely, an interim SMA, that's right,
6 isn't it?---It's Mr Henry's view of a design of an SMA,
7 yes.

8 Interim, that is - - - ?---An interim SMA, yes.

9 Precautionary, that's right, isn't it?---Until we are able to
10 verify the sighting, yes.

11 That's right. So you are supposed to put it in
12 place?---Yes.

13 So you don't cause inadvertently any damage to the species,
14 correct?---That's how it's been done, yes.

15 And what he says the action statement requires is in the next
16 paragraph, that "a minimum of 50 hectares of the best
17 long footed potoroo habitat would be protected from
18 disturbance", and he is right that that's what the
19 action statement means, isn't he, Mr Miezis?---My
20 understanding is yes, that's what the action statement
21 says. It gives a set of criteria when you are looking
22 at the design.

23 And in fact he refers over the page to the DSE convention
24 that is to apply the prescription as an interim measure
25 and undertake surveys to attempt to confirm the record,
26 correct?---Yes.

27 Then he says this, Mr Miezis: "The presence of long footed
28 potoroos in this area is expected." And he goes on to
29 describe the findings to the west of Legges Road. And
30 what that says to you, I suggest, Mr Miezis, is that
31 again the person on the ground at Orbost wasn't

1 surprised at all that there were long footed potoroos
2 in this area, that's what he means, isn't it?---Yes,
3 there's been records nearby. It's a forest type that
4 is potentially the habitat of long footed potoroo.
5 Now, this was forwarded to you by Mr Blackburn, and as far as
6 we can discover there are no emails onwards from you
7 about this on that day, is that right?---That's
8 correct.
9 In the next chain - the next in the chain about this is this
10 document, as far as we can tell, Mr Miezis. If you go
11 to the second page just to start the email chain in
12 order, Mr Miezis. What it starts with on 6 February
13 2009 is an email from Ryan Incoll to you - I'm sorry,
14 to Stephen Henry - recounting something that you have
15 said: "Lee has said that it is probable that interim
16 prescriptions for the long footed potoroo will be
17 applied." Did you say that?---Yes.
18 "And he", that's you, "will discuss with senior VicForests
19 either today or tomorrow and will inform us of
20 outcome." Now, the next email in the chain is between
21 Stephen Henry and Ryan Incoll, Mr Henry responding to
22 Mr Incoll's email, giving some description about the
23 gliders. And while we are on this, Mr Miezis, I will
24 just take you through what Mr Henry says about that,
25 because the timing of this was the day after, as I
26 understand it, the second of the DSE surveys. So the
27 surveys were underway by now, and Mr Henry is reporting
28 on those, and he is saying that - in the second
29 paragraph: "The results from the Legges Road sights
30 the greater gliders were basically exactly the same as
31 in our survey last week, and in Rohan Bilney's survey

1 for EEG." So that he is letting everybody know on 6
2 February 2009, isn't he, Mr Miezis, that there's a
3 level of consistency between the EEG survey and the DSE
4 survey so far, correct?---That's correct.

5 He then makes some qualifications about the survey results
6 from that last night's survey. He says: "The
7 batteries were running out during our second survey
8 with fewer gliders, but the batteries are running out",
9 then he says, "but the place was alive with yellow
10 bellies." That's not a phrase, Mr Miezis, that seems
11 to have found its way into any of the summary of the
12 surveys, or into any of the reports to the ministers,
13 or into any of the briefing notes "alive with yellow
14 bellies", do you agree with that?---No, it hasn't.

15 Doesn't make an appearance again after Mr Henry says it, does
16 it?---No, we reported on the findings of the surveys,
17 the entire surveys. There were three nights of survey.

18 He then says: "Seeing that many is notable as they are
19 generally quite hard to see." That's another
20 qualified and direct observation that doesn't make its
21 way into any of the official material later on, isn't
22 it, Mr Miezis?---I don't believe he repeated those
23 phrases in his report that he prepared.

24 And neither did anyone else when they were preparing
25 documents based on the survey, did they,
26 Mr Miezis?---No. Not to my knowledge, no.

27 He then says: "The pattern that's emerging is the high
28 densities are concentrated on the lower slopes", which
29 surprises him because he would have expected them to go
30 up the slopes a bit more. He then says this: "The
31 upshot of this is if we ran our transect down the

1 walking track across the creek and along the gully,
2 part of the new coupe boundary, we would exceed the
3 threshold numbers for both greater gliders and yellow
4 belly based on last night's work." And what Mr Henry
5 is saying there, is if they had kept going a bit more,
6 they would have exceeded the threshold based on last
7 night's work; that's right, isn't it?---That's correct.
8 And in fact on the final night's work they did exceed -
9 - -

10 But again the observation that he makes, that if they'd gone
11 a little further on the second survey night, they would
12 also have exceeded the threshold, does not make its way
13 into any of the official material thereafter when it
14 talks about these surveys, does it?---No, we reported
15 the survey findings, we didn't report that the first
16 and second nights had not found the high density, we
17 reported on a three night survey process that did
18 ultimately find that a high density population did
19 exist.

20 You didn't report any of the context or qualifications that
21 would have been required for a fair summary of what
22 Mr Henry found, did you?---We relied on the survey
23 report Mr Henry and Mr Mitchell prepared.

24 Mr Incoll then sends all this on to you by the top email on 6
25 February, and he says: "Our preliminary analysis is
26 that the threshold for glider prescription are met by
27 the survey results." He is saying that, I suggest to
28 you, Mr Miezis, because of the comments by Mr Henry,
29 irrespective of what was going to happen on the third
30 night. He is telling you the thresholds are met after
31 two nights, isn't he?---As my preliminary analysis,

1 yes.

2 I tender that, if Your Honour pleases.

3

4 #EXHIBIT 66 - Emails of 06/02/2009 relating to DSE surveys.

5

6 MS MORTIMER: Is there a reason why that one wasn't in your
7 affidavit, Mr Miezis?---I reported on the final survey
8 report within my affidavit.

9 It would not have been helpful to you to have that in your
10 affidavit, would it? It paints a very different
11 picture?---No, it paints the same picture, that the
12 high density population of arboreal mammals was found
13 in that area.

14 The next email in the chain is Exhibit LAM 20 to your
15 affidavit, and again, Mr Miezis, if you could just
16 start at the back to get the chain right. There's an
17 email to you from Mr Incoll saying Barry Vaughan had
18 been in contact and "informed us that Brown Mountain
19 coupes are a high priority for them, they are keen for
20 us to do the surveys ASAP." You will remember - you
21 may not, Mr Miezis, I accept, through this process, but
22 I just took you to an email that you'd sent saying -
23 where it was reported that you were going to speak to
24 someone in VicForests?---Yes.

25 Now, putting that together with this, was Barry Vaughan the
26 person you spoke to in VicForests?---It may have been,
27 or it may have been Cameron MacDonald. This was in
28 the middle of a - obviously at this time of year a
29 bushfire that I was fairly heavily involved in and I
30 would have been grabbing whoever I could have got at a
31 senior level in VicForests.

1 A very fraught time, Mr Miezis, I understand that. So it
2 could have been Cameron MacDonald or it could have been
3 Barry Vaughan, you don't really have a clear
4 recollection which?---No.
5 Likely to be one of those two though?---Likely, yes.
6 And what you say at the bottom of the first page is "I
7 discussed with VF", and that means either Mr MacDonald
8 or Mr Vaughan, you are not sure, "and they have asked
9 whether we can get somebody to help and whether we can
10 get externals to do the survey, they can pay." And
11 that's a reference to - "externals" is a reference to
12 external qualified biologists, zoologists to do the - -
13 -?---Yes, I believe - my recollection is Lindy
14 Lumsden's name was the one that we were talking about.
15 And that's exactly what the top email demonstrates, isn't it,
16 Mr Miezis, that Mr Henry's suggestion was that ARI
17 could do the work, including Lindy Lumsden or Ryan
18 Chick. In fact that didn't eventuate, did it,
19 Mr Miezis, because VicForests said no to that proposal,
20 do you recall that?---I don't recall whether they said
21 no or ultimately Stephen and - Mr Henry and Mr Mitchell
22 were able to complete the surveys.
23 Well, I suggest to you the evidence shows that VicForests
24 said no to that. Are you in a position to contradict
25 that?---My recollection and reading this email is that
26 they were the ones that asked if we could get externals
27 to do the surveys.
28 Yes, and I am suggesting to you that ultimately VicForests
29 said that they didn't want externals. Are you in a
30 position to contradict that?---I don't recall whether
31 they did that or not.

1 Thank you. But there's no doubt in your mind, Mr Miezis, is
2 there, that when you look at that exchange of emails
3 and you think back yourself to that time, that
4 VicForests knew about the hair tubing result and they
5 knew that was why the long footed potoroo was to be
6 incorporated into the survey work, correct?---That's
7 correct, yes.

8 What by this time, Mr Miezis, had happened to the proposal
9 for the interim SMA for this record?---Ultimately we'd
10 stopped - the harvesting was stopped altogether within
11 that area. An SMA, an interim SMA still enables
12 harvesting to occur, it just doesn't allow harvesting
13 to occur within that core habitat area. But
14 ultimately VicForests had agreed that they would not
15 harvest the area at all until we had been able to
16 verify the reports that were made to us.

17 So you came to a negotiated outcome with VicForests that
18 avoided the necessity, is that right, for anything else
19 to be done?---Yes.

20 Now, the second issue about the presence or non presence of
21 the potoroo is what can fairly be drawn from the DSE
22 survey results, and I want to take you to that issue.
23 Your Honour, I will be probably 10 to 15 minutes on
24 that issue, and then that might be a convenient time?

25 HIS HONOUR: Yes.

26 MS MORTIMER: Can you go, please, to Exhibit LAM 23. Sorry,
27 Mr Miezis, pardon me. This is an email that starts
28 with an email from Stephen Henry to Ryan Incoll and
29 Tony Mitchell about the results of the spotlighting
30 survey. Again makes the point, Mr Henry makes the
31 point that the weather was not ideal, and he says:

1 "Bright moonlight is generally not conducive to
2 successful spotlighting either because animals tend to
3 be less active or less readily visible." And I
4 suggest to you, Mr Miezis, that's why when we come to
5 read the DSE survey in its final form, we see remarks
6 such as "the estimates are conservative". Do you
7 agree that that's the kind of first-hand information
8 that's likely to lead to the conclusion that the
9 estimates are conservative?---The estimates of the
10 arboreal mammals sighted through the spotlighting were
11 conservative, yes.

12 And over the page, Mr Henry reports on what the results were,
13 including a powerful owl, and several thousand leeches,
14 a matter we perhaps can all sympathise with, Mr Miezis.
15 Mr Henry then says this: "The abundance and visibility
16 of yellow bellies was particularly notable." Can you
17 see that? "Both in terms of sheer numbers in a small
18 area and our ability to distinguish separate
19 individuals as they were either seen or heard at the
20 same time and thus we could be confident they are not
21 double counting." The point Mr Henry is trying to make
22 here, I suggest to you, Mr Miezis, is one that he
23 continued to try and make throughout every opportunity
24 he has to have input into this process, and that is
25 about how unique and how rare what he was seeing in
26 these coupes was, do you agree with that?---He was
27 saying that, yes, there are a high number of arboreal
28 mammals, yellow believed gliders and greater gliders at
29 the area, Brown Mountain Creek area.

30 You are down-playing it, Mr Miezis, I suggest. He is trying
31 in the best language he can to make it clear to whoever

1 reads this that he hasn't seen anything like it?---He
2 was saying it was particularly notable, yes.
3 And not only was he saying that, he then went on to say the
4 number of greater gliders and yellow bellies exceeds
5 the threshold, and he says the prescription requires
6 the creation of approximately 100 hectares of SPZ
7 around the site, do you see that?---Yes.

8 HIS HONOUR: And that's the prescription in the forest
9 management plan, as I understand it?---Yes, the
10 conservation guideline.
11 Yes.

12 MS MORTIMER: Mr Incoll then sends you this information from
13 Mr Henry, and this is what Mr Incoll says to you.
14 Firstly he describes the report as a thorough report,
15 and you would agree with that, wouldn't you, Mr Miezis;
16 Mr Henry's report was a thorough report?---Yes.

17 And Mr Incoll says that he, Mr Incoll, supports Mr Henry's
18 conclusion based on this preliminary report, that the
19 evidence gathered supports the application of the
20 prescription. So you had the person in DSE senior to
21 the person that had done the surveys supporting what
22 had been seen and observed and how it had been
23 reported, do you agree with that?---Yes.

24 And Mr Incoll tells you that Barry Vaughan from VicForests is
25 also aware of the survey results, do you see
26 that?---Yes.

27 And you don't doubt, do you, Mr Miezis, that Mr Vaughan was
28 keeping a pretty close eye on what was happening with
29 these survey results?---In fact he participated in one
30 of the survey nights.

31 And what Mr Incoll says in this email to you is that "The

1 plan is to prepare a final report by close of business
2 on 24 March." Now, as I understand it, the final
3 report on your evidence wasn't received until 24 April,
4 and what's the explanation for the difference in those
5 dates?---One was an expected delivery date and one was
6 an actual.

7 Yes. Do you know why?---I can only assume at that time most
8 staff in DSE were involved in fire suppression and post
9 fire.

10 Could well have had something to do with the fires, yes.

11 Now, can Mr Miezis be shown Exhibit 60, please. This
12 was the email that Mr Vaughan sent to you expressing
13 his considerable unhappiness about the surveys, their
14 motivations and the application of the prescription,
15 correct?---That's correct.

16 And this would not be the first time, Mr Miezis, that you
17 received from VicForests in relation to the application
18 of prescriptions, pretty strongly worded statements
19 pushing back against the application of things that
20 will interfere with timber harvesting, it wouldn't be
21 the first time, would it?---No, VicForests likes to
22 negotiate over prescriptions.

23 As I understand it, Mr Miezis, the next thing that appears in
24 the chain in relation to the surveys is the meeting on
25 7 April, the threatened fauna meeting. Your Honour,
26 that's Exhibit 52. May Mr Miezis be shown Exhibit 52.
27 And you will see there under the heading "Fauna
28 surveys", third dot point, "DSE Lee Miezis has
29 responded to these additional reports by stating
30 VicForests is the harvesting organisation therefore it
31 is their issue." That's what you said at this

1 meeting, isn't it, Mr Miezis?---That's what the
2 minister is saying so I have no reason to doubt that
3 that's what I said.

4 And the explanation that you gave to His Honour earlier in
5 your evidence for why you said that is the correct one,
6 isn't it?---That's correct.

7 Can you go to the third page of these minutes, please, where
8 there's a comment attributed to you: "Surveys are not
9 required by the FMP, however, if densities are
10 'discovered' SPZ must be created (Lee)." Do you
11 recall making that comment?---Not specifically.

12 Mr Spencer has given evidence by reference to both his
13 handwritten notes taken contemporaneously and then
14 these, that these are accurate, this is an accurate
15 record of what was said at the meeting. And
16 proceeding on that assumption, Mr Miezis, that you said
17 that, "however, if densities are 'discovered'", I
18 suggest to you what that is a reference to is if
19 accidentally or inadvertently something is detected,
20 then you will have to do something about it, but you
21 don't have to survey to detect anything. That's what
22 is meant, isn't it?---We have an adaptive approach, so
23 under action statements, under forest management plans,
24 if things are detected then action is taken.

25 HIS HONOUR: And if operationally they were detected, you
26 would have to respond to meet the conditions in the
27 approvals?---That's correct. So if for example
28 VicForests detected a long footed potoroo, they would
29 report that finding to us and we would create the
30 zoning.

31 Yes.

1 MS MORTIMER: And one of the problems, Mr Miezis, that was
2 being addressed at this meeting, and subsequent
3 meetings, was that the only people who were discovering
4 and detecting threatened species were members of
5 Environment East Gippsland or other individuals who
6 were actually out in the forest doing the surveys, and
7 nobody officially from VicForests or DSE was making any
8 detections, were they?---We'd certainly had a lot of
9 reports of a threatened species coming in through
10 environment groups. We had undertaken surveys, we
11 undertake surveys at a strategic level, if you like,
12 but not coupe-specific surveys, no. And these were
13 targeted coupe-specific surveys.

14 Not in Brown Mountain, DSE hadn't done any surveys in Brown
15 Mountain?---No.

16 And indeed Brown Mountain wasn't one of the areas that was
17 surveyed back in the 1980s and early 1990s, was
18 it?---That's my understanding, yes.

19 And in the third dot point under "Pre harvest surveys"
20 there's a remark "VicForests is unlikely to be credible
21 enough to undertake survey." Do you recall who said
22 that?---No.

23 Do you remember whether it was you?---No. I am sure there
24 would have been discussion around standards, what sort
25 of standards would the department require for accepting
26 reports through its verification process and whether or
27 not VicForests had internally the appropriate skills to
28 do that.

29 Another interpretation, Mr Miezis, is that "credible" means
30 "credible with any body, particularly in the
31 conservation movement, looking at what VicForests was

1 doing", that's another explanation, isn't it?---It's
2 another interpretation, yes.

3 And just after this meeting there was the exchange with
4 Ms Redwood that I took you to earlier in your evidence
5 where she was saying "What's happening with the
6 surveys?", and you told her "Yes, well, VicForests is
7 going to have to respond to them." And that
8 chronologically comes after this meeting,
9 correct?---Yes.

10 Now, Your Honour, I am not going to finish dealing with the
11 surveys before lunch, I am afraid.

12 HIS HONOUR: Yes.

13 MS MORTIMER: Is that a convenient time?

14 HIS HONOUR: Yes, we will adjourn until 2 o'clock.

15 MS MORTIMER: If Your Honour pleases.

16 <(THE WITNESS WITHDREW)

17 LUNCHEON ADJOURNMENT

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1 UPON RESUMING AT 2.00 PM:
2 HIS HONOUR: Yes, Mr Waller.
3 MR WALLER: If Your Honour doesn't mind, the parties by
4 agreement wish to interpose a witness, Mr Gary Squires.
5 HIS HONOUR: Yes.
6 MR WALLER: Whose evidence we don't expect to take very long.
7 HIS HONOUR: Yes, thank you.
8 MR WALLER: So we call Gary James Squires.
9 <GARY JAMES SQUIRES, sworn and examined:
10 MR WALLER: Mr Squires, could you restate your full
11 name?---Gary James Squires.
12 And your address?---17 Perry Street, Orbost.
13 And your current occupation?---Consultant.
14 Yes. Mr Squires, could I hand you a document entitled
15 "Curriculum vitae", with a copy to His Honour. Our
16 learned friends have seen this. Mr Squires, do you
17 recognise that document?---I do.
18 Did you prepare it?---I did.
19 When did you prepare it?---Yesterday I updated it.
20 Is it true and correct?---It is.
21 Your Honour, I tender that document.
22 HIS HONOUR: Yes.
23
24 #EXHIBIT O - CV of Gary Squires.
25
26 MR WALLER: Now, Mr Squires, I would like to show you another
27 document. This is a document entitled "Form 44A
28 Expert Witness Code of Conduct", being a form attached
29 to the Supreme Court of Victoria Rules of Procedure.
30 Is that a document you have seen before?---Yes, I have.
31 Yes. Have you read that document?---I have read it.

1 Yes. Do you agree to be bound by it?---I agree to be bound.
2 Yes. Mr Squires, did you attend the view conducted by the
3 court on Wednesday 3 March this year?---Yes, I did.
4 Yes. And have you been shown photographs taken at the
5 view?---Yes, I have.
6 Could I ask that the witness be shown Exhibit 7, please.
7 Now, Mr Squires, is that a document you have seen
8 before?---Yes, I have.
9 And do you recognise that document as containing photographs
10 taken on the view on 3 March?---Yes, I do.
11 Mr Squires, have you been provided with a document prepared
12 in the proceeding entitled "View" containing a
13 commentary by reference to the photographs in that
14 book?---Yes, I have.
15 Do you have that document with you?---I have.
16 And, Your Honour, I am referring now to Exhibit 10.
17 HIS HONOUR: Yes.
18 MR WALLER: I want to draw your attention, Mr Squires, to
19 certain paragraphs in that document and ask for your
20 comment. If I could draw your attention to paragraph
21 5, there's a reference there to "paragraphs(sic) 4 and
22 5 depicting both a glider feed tree and a surrounding
23 forest." The next sentence reads: "Paragraph(sic) 6
24 is a close-up view of the tree." Do you have a
25 comment to make in relation to that sentence?---You
26 mean photograph?
27 Yes, I'm sorry, yes?---It should read - I believe it should
28 read "photograph 5 is a close-up view of the tree".
29 Yes. And does that accord with your - Your Honour, there's
30 no dispute about that.
31 HIS HONOUR: Yes.

1 MR WALLER: Could I draw your attention to paragraph 7 of the
2 document in relation to photographs 8 and 9. There's
3 a reference to your noting in the second sentence, that
4 "DBHob is a measurement used to model timber yield
5 within an area at the diameter is measured at 1.3
6 metres from the ground." Do you wish to comment on that
7 sentence?---The only thing that's important to note
8 there, that the measurement of DBHob is in conjunction
9 with stand height to do the modelling work.

10 Yes. So the measurement is used in conjunction with the
11 height of the tree?---Correct.

12 Yes. Could I draw your attention to paragraph 11 in that
13 document. There's a reference there to photographs 15
14 and 17 depicting diggings. Do you wish to comment on
15 that?---Yes, I think - I believe it should say
16 "Photographs 15 to 17", there's three photos there.

17 So 15, 16 and 17?---Yes, correct.

18 Yes. And again, Your Honour, I don't believe there is any
19 dispute about that. Could I draw your attention to
20 paragraph 13 of the document, which attribute to you a
21 comment that that photograph depicts the minimum sawlog
22 size of a tree and that you noted that "logging occurs
23 down to 25 centimetres DBHob for pulpwood." Do you
24 wish to comment on that statement?---Yes, in fact that
25 should read "25 centimetres small end diameter for
26 sawlog and then pulpwood above that."

27 HIS HONOUR: Yes.

28 MR WALLER: Yes. And could I draw your attention next to
29 paragraph 19C on page 4 of the document, where you are
30 said to have commented that "the maps are out so you
31 measure from GPS". Do you wish to elaborate on that

1 comment?---Just to say that the maps may be out, and
2 where that appears to be the case the actual creek can
3 be measured with GPS as well to ensure that the buffer
4 strip is the correct width.

5 Yes. And could I draw your attention now to paragraph 20.
6 Attributed to you in the second sentence is a statement
7 that "the practice is that some trees won't be felled
8 because the harvester cannot fell a tree over the blue
9 line." Did you wish to amplify that statement?---Yes,
10 to clarify that, some trees above or outside the blue
11 line won't be felled.

12 Yes?---Nothing inside the blue line can be felled.

13 Yes. And at paragraph 31 on page 6, commenting in respect
14 of coupe 20, the last sentence of that paragraph
15 attributes to you a comment that "On the road you will
16 get vegetation but no eucalypts." Did you wish to
17 comment on that statement?---Yes. You often get other
18 vegetation before the eucalypts, but you certainly do
19 get eucalypts on roads.

20 And finally, paragraph 32D, in respect of coupe 7, which was
21 harvested in 1987, 1988, you are there said to have
22 commented in subparagraph D that "that coupe contained
23 shining gum and messmate and nothing else. Habitat
24 trees have been retained and where identified." Do
25 you wish to comment on that statement?---Yes. The
26 shining gum and messmate as the predominant species,
27 but the words "nothing else" shouldn't be there, I
28 don't believe.

29 Now, with those amplifications and other comments, are the
30 comments that are attributed to you in this document
31 true and correct?---Yes.

1 And the opinions that you have expressed and recorded in this
2 document, are those opinions honestly held by
3 you?---Yes.

4 Your Honour, I have no further questions.

5 HIS HONOUR: Yes.

6 <CROSS-EXAMINED BY MS MORTIMER:

7 Mr Squires, just hold on to those photographs for a moment,
8 if you would, please. Now, can you look at photograph
9 43, please, in this?---Yes, I have photo 43.

10 Now, you remember we saw that track. Is that what would
11 usually be described as a snig track?---As I said at
12 the field trip, I was not aware and do not know what
13 that track is.

14 Thank you. Well, could it be anything else but a snig
15 track?---I would only be guessing.

16 Well, you are a very experienced forester, Mr Squires, and I
17 am sure you have got a good idea of why a track like
18 that might be made, and I am asking you to tell His
19 Honour if you think it's a snig track or what else it
20 could be if you don't think it's a snig track?---Well,
21 that track went through a buffer, or a filter, I forget
22 now, one or the other, and it could be a number of
23 things. It could be a break-out track or a road that
24 was to be constructed. It could have been an access
25 track to another coupe. But I don't see any reason
26 why a snig track would be built through a buffer
27 outside the coupe. There would be no point in
28 building a snig track outside the coupe.

29 Unless it was a snig track for a coupe that was about to be
30 logged in the future?---If it was a snig track for
31 another coupe, they would go in a different direction.

1 So it could be - your opinion is it's more likely to be a
2 road into another coupe, that's one option?---In the
3 location that it was, it is unlikely it would be a road
4 into another coupe, but it may have been an access
5 track to get machinery from one coupe to another.

6 All right. And your evidence is that as far as you can tell
7 from what you saw it goes into a buffer area, is that
8 right?---Correct.

9 Now, can Mr Squires please be shown - just hold on to the
10 photographs for a moment, Mr Squires, and the agreed
11 maps, the bundle of agreed maps which is Exhibit 12.
12 Now, can you go please to page 11 of those maps. Now,
13 that shows the logging history of the coupes that we
14 are dealing with, Mr Squires, and as produced by
15 VicForests. So just have a look at that and have a
16 look at the map on page 13, please, which you will see
17 shows a proposed 100 metre linear buffer running down
18 on either side of Brown Mountain Creek, see
19 that?---Yes.

20 And if you go back to map 11, it's right, isn't it, that when
21 you look at that logging history, the areas that have
22 been logged which happened to coincide or go towards
23 Brown Mountain Creek will have been logged, on your
24 understanding, with a 20 metre buffer, is that right,
25 not a 100 metre buffer, the ones that have already been
26 logged?---I think that's likely, yes.

27 That's the normal prescription, isn't it?---It is a normal
28 prescription, and unless they were made wider for
29 operational reasons, but the requirement would have
30 been 20 metres each side.

31 And so that means that when you look at the pink bit on map

1 13, some of what's marked in pink north of coupe 15 and
2 17, and some of what's marked in pink south of coupe 15
3 and 19 - I beg your pardon - will be in areas that have
4 already been logged, that is likely to be about 80
5 metres that's already been logged, according to the
6 logging history?---You were talking about 19, not 17?
7 Yes, I'm sorry, Mr Squires, that was my fault?---Yes.
8 That would be right, wouldn't it?---I don't know how wide the
9 buffer actually was, but if it was strictly to
10 prescription at 20 metres each side, you would be
11 correct. But quite often buffers are made wider than
12 the basic prescription, so it may be more than 20
13 metres each side north and south as you have described.
14 But what you are saying is it's likely to be the case if the
15 prescriptions were followed in the usual
16 way?---Prescriptions are - the buffer is often wider
17 than the 20 metres.
18 Well - - -?---So I can't say that that is only 30 metres each
19 side, or 40 metres each side. It has to be 20, but I
20 can't say how wide it is without going and doing an
21 inspection.
22 And if you look at the logging history, if you look at the
23 shading of those and look at the legend, I think that
24 means that they were logged between 1980 and '89. So
25 about 20 years ago, correct?---It's very difficult to
26 tell with the colours, but it's one of those periods,
27 yes.
28 Yes, either that or the more recent period, '90 to '99; one
29 of those two, agree with that?---Yes.
30 And that means that the regrowth - this is where you need to
31 go back to the photographs, Mr Squires. If you look

1 at photograph 46, which was the photograph of the
2 regenerated coupe we saw 30 years regeneration,
3 remember seeing that?---Yes.

4 So the regeneration along those buffer zones is going to be
5 less than the regeneration we see in photograph 46,
6 isn't that right? Because it's younger
7 regrowth?---Sorry, could you repeat that question,
8 please?

9 Yes, sorry, Mr Squires. Photograph 46 is a photograph of a
10 regenerated coupe logged more than 30 years ago?---23
11 years ago, wasn't it?

12 Sorry, 23 years ago, '87, '88?---Yes.

13 And the regrowth that we see, that you would expect to see on
14 map 11 in those areas between 20 metres and 100 metres
15 along that buffer is not going to be any bigger than
16 that and might be a bit smaller in terms of regrowth,
17 do you agree with that?---In terms of the logging age,
18 yes. If it's been logged it's going to be less.

19 No further questions, if Your Honour pleases.

20 MR WALLER: Your Honour, no re-examination.

21 HIS HONOUR: Thank you, Mr Squires. You are excused.

22 <(THE WITNESS WITHDREW)

23 (Witness excused.)

24 MR WALLER: We are back to Mr Miezis.

25 HIS HONOUR: Yes, would you recall Mr Miezis, please. If
26 the changes to the notes to view are in effect agreed,
27 it would be sensible just to reengross that exhibit?

28 MS MORTIMER: Yes, Your Honour, we accept that.

29 HIS HONOUR: And it seemed that most of them - - -

30 MS MORTIMER: But they are all agreed, Your Honour, we have
31 got no difficulty with that.

1 HIS HONOUR: Yes. Because otherwise you have got to go to
2 two places to - - -

3 MS MORTIMER: We will perhaps reproduce the version with the
4 track changes on it, Your Honour?

5 HIS HONOUR: Yes, that would be simple. You don't have to
6 do that if you agree, I will just substitute it. But
7 you can add the track changes if you like.

8 MS MORTIMER: Yes, we will agree a substitution, Your Honour,
9 and provide it.

10 HIS HONOUR: Yes, thank you.

11 MS MORTIMER: If Your Honour pleases.

12 <LEE ALEXANDER MIEZIS, recalled:

13 MS MORTIMER: Mr Miezis, can you go to paragraph 73 of your
14 witness statement, please. That's where you give
15 evidence about receiving the final copy of the arboreal
16 survey, the arboreal mammal survey, and that's LAM 24.
17 Now, Mr Miezis, on my copy of your statement there
18 wasn't a full version of that survey, so perhaps I will
19 ask that you be shown the version that's in the agreed
20 book of documents, page 1052 in volume 3. Can I just
21 take you through to a couple of points on that. You
22 will see at page 1057 there's a - this is page 4 -
23 there's a report of the hair tube sample and Ms Triggs
24 is identified as an expert in the field, and there's no
25 suggestion in the survey that that sample was not
26 accepted, is there, Mr Miezis?---No - - -

27 As accurate?---It's a statement of Environment East Gippsland
28 reporting, and a long footed potoroo hair sample
29 identified by an expert in the field.

30 And a reference to where it was found?---Yes.

31 Correct?---Yes.

1 And then if you go to page 1059, you will see there the
2 remark that - at the bottom of that page, the
3 second-last sentence - that the counts of individuals
4 were conservative, and that reflects a lot of the
5 material from Mr Henry I took you to this morning,
6 doesn't it?---Yes.

7 Then over the page, 1060, Mr Miezis, it says there that
8 there's a summary of the animals detected, and the
9 kilometres is in table 1, and the attached maps
10 indicate the locations of detections. Now, there is
11 no map attached to this version in the agreed book,
12 Mr Miezis, and there's no map attached to your version.
13 Did you receive a map when you received this
14 survey?---No, there was no map accompanying the report.
15 Are you 100 per cent confident of that?---There was no map
16 accompanying the report, yes, I am.

17 Have you ever seen a map that depicts what happened on these
18 surveys?---I believe at one stage I was provided a map
19 after the fact, after the release of the minister's
20 media release.

21 So some time after August?---Yes.

22 Can Mr Miezis be shown Exhibit 62, please. That is the map
23 which Mr Henry produced to Mr Vaughan describing it as
24 a "map of the Brown Mountain coupe showing the
25 locations of greater gliders and yellow bellied gliders
26 detected during our spotlighting survey work." And if
27 you look at the legend down the bottom, you will see,
28 Mr Miezis, that it covers all the surveys, it's got all
29 the dates down the bottom?---Yes.

30 Now, you didn't ask to see this map when you got the survey,
31 is that right?---That's correct.

1 Any reason why you didn't ask?---The assumption made was that
2 when the report went from Mr Henry to Mr Incoll, the
3 decision was made at that level to not provide the
4 maps.

5 But you have got no reason to doubt that this is the map that
6 is being spoken about on page 1060, have you?---It says
7 Brown Mountain spotlight survey, so no.

8 And there's also a reference on the bottom of that page 1060
9 to a map about where the remote cameras were placed for
10 the long footed potoroos, but that doesn't appear to
11 have made its way into any version of the report
12 either, is that your understanding?---Yes.

13 You have never seen that map?---No.

14 HIS HONOUR: Do I take it from the legend that one would
15 expect this map to actually have different colours on
16 it?

17 MS MORTIMER: Your Honour, is that a question to me or - - -

18 HIS HONOUR: Perhaps I should ask the witness. If we look
19 down at the legend, we see that there's a triangle for
20 greater glider observed on 28/1/09, and then there's a
21 similar symbol for the greater glider observed on 5
22 February, and indeed firstly by one set of observers
23 and secondly by other observers. Have you seen a
24 coloured version of this?---I don't recall whether the
25 version I was provided was colour or black and white.

26 Yes?---Common convention though would be that a map such as
27 this, or any map that the department produces would
28 have various colours to denote various aspects of the
29 map.

30 Yes. Because otherwise you can't really apply the legend
31 satisfactorily, can you, looking at it?---I agree.

1 Yes. Yes, Ms Mortimer.

2 MS MORTIMER: But, Mr Miezis, if you look at the legend, it
3 appears to me at least, and you can tell me whether I
4 agree with this, that the first triangle is a solid
5 black triangle, and then you have got a solid dot, and
6 then you have got an outlined triangle, and perhaps an
7 outlined dot.

8 HIS HONOUR: Yes, and then?

9 MS MORTIMER: And then we descend into much less
10 particularity, Mr Miezis, don't we?---I agree. So you
11 can distinguish between the various species and some
12 dates but not all dates.

13 HIS HONOUR: Yes, that's right.

14 MS MORTIMER: Wasn't this a pretty important document for you
15 to examine and for anyone at DSE to examine in order to
16 assess the survey and what should be done about the
17 gliders?---The findings of the survey were well
18 established within the report. As I said earlier, the
19 assumption was made through the internal quality
20 assurance process within biodiversity services within
21 Gippsland, but the maps weren't provided to us. The
22 findings are there, they are clear.

23 Well, the findings may be clear, Mr Miezis, but the document
24 that you say - in which you say the findings are so
25 clear expected the reader to look at the map, didn't
26 it?---Yes, I can only assume it was - that reference
27 was not removed when the decision was made to remove
28 the map.

29 Well, you are not in a position to positively give evidence
30 to His Honour that there was a decision made to remove
31 the map. You can't give that evidence, Mr Miezis, can

1 you, you don't know?---I am only give evidence to what
2 I was provided, and that was an email from Ryan Incoll
3 that had the survey report and no map.
4 You haven't produced that email, Mr Miezis. Where is that
5 email?---The?
6 The email from Ryan Incoll providing the survey. Where is
7 that?---I believe it was certainly provided.
8 Where is it? Is it LAM 24? It's not on my LAM 24,
9 Mr Miezis?---No, sorry, all I have attached is a copy
10 of the survey report rather than - - -
11 Do you have that email?---Possibly in the system.
12 You have it electronically still?---Likely in archive, yes.
13 So it would be open to you to open it and see exactly what it
14 shows and whether it has in the version that you have
15 electronically a map attached to it?---Yes.
16 If you are not required to come back tomorrow, Mr Miezis, are
17 you able to do that and provide whatever is available
18 electronically to Ms Howe?---Yes.
19 So you received on 24 April an email from Ryan Incoll, and
20 that's how you got this survey, is that right?---27
21 April.
22 27 April. That's how you got this survey?---Yes.
23 Now, I think I was taking you - I'd got to page 7 in the
24 report, and then I wanted to direct your attention to
25 page 9, if I might, Mr Miezis. This is the bit about
26 the potoroos. The non detection finding you will see
27 up the top "No long footed potoroos were detected", and
28 Mr Miezis that's the bit in the report that then makes
29 its way into all the official documents, isn't
30 it?---Yes.
31 And all of the part underneath the table doesn't make its way

1 into any of the official reports about this survey,
2 including your own, does it?---It is in this report and
3 this report has been attached to various - - -

4 Let me ask that question again. In relation to the official
5 reports, summaries, provision of information about this
6 survey to other people, including your minister, those
7 qualifications are not referred to or highlighted in
8 any of the information provided, are they?---They are
9 not specifically drawn out, no. The reference is made
10 directly to the survey report.

11 Neither you nor anyone else drew anybody's attention to those
12 qualifications, correct?---That's correct.

13 And what those qualifications show, apart from anything else,
14 is that it is plausible that the species may be present
15 on the site, and where do we see that in any of the
16 information provided to decision-makers or to the
17 minister about this? Do we see that anywhere?---I
18 would have to remind myself of the content of the
19 briefing note to the minister.

20 Well, all right, we will go to that in a moment. That's the
21 only likely place, is it?---I believe so.

22 Didn't make its way in your media release that you authored
23 about this, did it?---No, the media release was about
24 the findings of the survey and the decision.

25 That is a finding of the survey, Mr Miezis?---The finding of
26 the survey that was reported there was no potoroos
27 detected.

28 Are you seriously suggesting that it's not a finding of this
29 survey that it is plausible that the species may be
30 present at the site, is that your evidence to His
31 Honour?---There is a statement here, a qualification on

1 those findings, I accept that, yes.

2 And what about the bit on page 10 where it says that

3 spotlight surveys were conservative estimates of the

4 numbers actually present. Where did that make its way

5 into your media release or your briefing note to the

6 minister?---The critical issue there was, was the

7 threshold met, not by how much the threshold was

8 exceeded. So we reported that the threshold was met.

9 What it's saying is that the threshold in the sense of the

10 presence of the animals - I withdraw that. What this

11 is saying is that there may well have been more animals

12 present than detected, that's what it's saying, isn't

13 it?---Yes.

14 Where do we find a statement to the effect that there may

15 well have been more yellow bellied or greater gliders

16 present than were detected in the information

17 provided?---Again, the critical issue was had the

18 threshold been achieved, and it was reported that it

19 had.

20 And what about the qualification on page 1064 that there was

21 a short time available for the long footed potoroo

22 surveys and the presence of nearby records and suitable

23 habitat, and that a more intensive survey and longer

24 survey might record the species at the site. That was

25 ignored too, Mr Miezis?---Again, the findings - the non

26 detection was reported.

27 So when we come to look - taking into account that survey

28 result, when we come to look at your paragraph 76, your

29 paragraph 76 that says "DSE ultimately determined not

30 to create a special protection zone", you had, I

31 suggest to you, Mr Henry's information, that is his

1 direct original information that I took you to this
2 morning, you had that? You had Mr Bilney's
3 information, didn't you, from the EEG survey?---The
4 original survey that we sought to verify, yes.

5 And you had these survey results, and those were the three
6 principal pieces of information that you had about the
7 gliders, correct?---That's correct.

8 But there was no other scientific information that came in
9 between you receiving this report on 27 April and the
10 decision that was made perhaps some time in mid-June
11 2009 about the gliders, correct?---That's correct.

12 Now, how was it, Mr Miezis, that the decision not to create
13 an SPZ was made? Did you make it?---I made the
14 recommendation, yes.

15 So you made - when you say "DSE ultimately determined" in
16 paragraph 76, that means you made a recommendation to
17 whom, Mr Appleford?---That's correct.

18 And does Mr Appleford hold a delegation from the secretary to
19 make those decisions, does he?---I don't believe there
20 is a delegation that exists around the implementation
21 of a forest management plan.

22 Anybody can make those decisions?---Provided it's within your
23 portfolio of responsibilities, and the accountabilities
24 for VicForests management rests with the Executive
25 Director of Forests and Parks.

26 So theoretically, as far as you know, you could have made the
27 decision?---I don't have that accountability. The
28 accountability rests with the Executive Director of
29 Forests and Parks.

30 And you made a recommendation which you haven't put in
31 evidence, is that right?---The briefing, no.

1 That's as I understand it to the minister?---It's approved by
2 the executive director.

3 This is the briefing note at LAM 30, Mr Miezis, is that
4 right?---Yes, that's correct.

5 Well that's a briefing note to the minister. I am asking
6 about your briefing note to Mr Appleford?---There was a
7 single briefing note, true.

8 There was a single briefing note. Well, this isn't signed
9 by Mr Appleford, LAM 30?---No, this is an unsigned
10 version of the briefing note. There is a signed
11 version that on page 2 is approved by the Executive
12 Director, Forests and Parks.

13 Is there any reason why you didn't put the signed version in,
14 Mr Miezis?---My understanding is it was provided to the
15 Prothonotary's Office late because it hadn't been
16 returned from the minister's office until, my
17 recollection, around March or February.

18 And nevertheless your evidence is that on page 2 of LAM 30,
19 there is a version of this document which bears
20 Mr Appleford's signature approving the recommendations,
21 is that right?---That's correct.

22 But this is a document that you prepared, is that
23 right?---Yes.

24 If you look at the second page, the one headed
25 "Recommendations and background", it says in paragraph
26 7 the surveys found no threatened species, two things,
27 Mr Miezis: that's not true so far as the powerful owl
28 is concerned, is it?---The surveys were conducted for
29 long footed potoroo, Orbost spiny crayfish.

30 The surveys found no threatened species. That's not true so
31 far as the powerful owl is concerned, is it,

1 Mr Miezis?---I would have to again remind myself of
2 what the findings of the survey were. Again it was a
3 targeted survey at two particular species.
4 Well, it records on page 7 "Powerful owl: 1 distant." And
5 did you know that the powerful owl's prey principally
6 are the yellow bellied and greater gliders?---My
7 understanding from the reading of the action statement,
8 yes.
9 And that's one of the reasons that glider densities are
10 important, isn't it, because they are very important
11 prey for forest owls, agree with that?---I don't
12 believe there's any reference in the conservation
13 guideline within the forest management plan to
14 protecting a high density population for the purposes
15 of providing prey for the powerful owl.
16 What's your understanding of the purpose then,
17 Mr Miezis?---It is for the conservation of a high
18 density of population of gliders.
19 In and of itself?---Yes.
20 And the expert evidence in this case is quite to the contrary
21 of that, and you are not in a position to contradict
22 that, are you?---All I can do is explain to you what's
23 in the forest management plan.
24 And so it just wasn't relevant to say that a powerful owl was
25 heard, that was your view, was it?---Yes.
26 All right. Although you underline the word "no"?---Yes.
27 And it's also not a fair representation of the survey report
28 about the long footed potoroo, I suggest to
29 you?---Again the survey report was attached to the
30 briefing note.
31 So if the acute reader didn't read it all and detect the

1 qualifications that were there, you weren't going to
2 put that prominently on the front page of your report,
3 were you?---Again, I would have to - no, I agree, there
4 is no particular reference to that within the briefing
5 note.

6 And if you look at paragraph 8 under the heading
7 "Background", I suggest to you that the factual issue
8 of where most of the gliders were located has gone
9 through a bit of a metamorphosis from Mr Henry's
10 original "a bit more concentrated in 200 metres" to
11 "more concentrated", and now by the time you write it
12 they are "mostly located"?---That was the advice we
13 got, that was on the lower slopes and gullies.

14 Well, you are, I suggest, exaggerating that to justify only
15 imposing a buffer?---No, it was a reflection that Brown
16 Mountain Creek is in the lower slope and gully.

17 And if you go to paragraph 15 on the next page, "the greater
18 glider and yellow bellied glider are common throughout
19 East Gippsland." Where did you get that from?---That
20 was the advice we were given.

21 That completely ignores all the evidence that you had about
22 the rarity and uniqueness of these densities, and it
23 seeks to portray the situation in quite a different
24 light, Mr Miezis, I suggest?---No, this is looking at
25 the species, not the density.

26 Paragraph 22 refers to an FOI request from Environment East
27 Gippsland, amongst others, because it was the case when
28 you prepared this, Mr Miezis, that the survey had not
29 been publicly released, correct?---That's correct.

30 And it wasn't publicly released until 21 August, the same day
31 the minister made his announcement, correct?---That's

1 correct.

2 Go to paragraph 29, if you will, please. Perhaps I will ask
3 you to go to paragraph 24 first, please. You say that
4 "the creation of an SPZ required consideration of a
5 number of matters; (b) the extent of suitable habitat
6 to support high densities of greater gliders and yellow
7 bellied gliders in national parks and conservation
8 reserves", and there was no evidence before you about
9 that issue when you prepared this briefing note, was
10 there?---Suitable habitat, there was. We had forest
11 type mapping of Brown Mountain versus forest type
12 mapping of surrounding forests. We have quite
13 detailed information on the types of forest through a
14 state-wide forest resource inventory process that was
15 conducted over about 10 years, which had intensive plot
16 locations and quite detailed information about the
17 types of forest in East Gippsland.

18 And your desktop modelling had not picked up the densities of
19 gliders in this area, had it?---Again it was about
20 forest type mapping.

21 Your desktop modelling had not picked up the densities of
22 gliders in this area?---It was about forest type
23 mapping.

24 And at paragraph 29, when you say that "the densities are
25 infrequent", that is a complete minimisation of the
26 evidence you had before you, and it was deliberate,
27 Mr Miezis, wasn't it?---No, it was a reflection that
28 they are not common, they are infrequent.

29 "Rare", "unique", that's the language of the material you had
30 before you, and you didn't use it, did you?---No, I
31 used common language that I use.

1 You used language to minimise the position that would favour
2 triggering the SPZ, I suggest. You don't agree with
3 that?---No, I don't agree with that.

4 And when you say in paragraph 31 "there are two unharvested
5 coupes", there are actually four?---There are four - -
6 -
7 26 and 27?---There are four - - -
8 From the timber release plan?---There are four coupes in the
9 area.

10 Yes?---One had been harvested, or - - -
11 No - - -?---Or partially harvested.

12 There are four coupes in issue in this proceeding, and there
13 are four coupes approved on the timber release plan
14 located at Brown Mountain. Did you not know that when
15 you prepared this?---Yes, I can't recall how this timed
16 with the sequence of events, but that was obviously the
17 understanding at the time.

18 And just going back to paragraph 28 and what you have said
19 about your lack of knowledge about the owls, Mr Miezis,
20 you say there, you put forward that "the creation of
21 SPZ will not affect the viability or conservation
22 status of either species both of which are common", but
23 you don't consider at all in this briefing note whether
24 the creation of an SPZ might affect or enhance the
25 viability and conservation of the owls which are
26 dependent on this prey, do you? That is not a matter
27 you consider?--- Again this was an explicit
28 consideration of matters within the forest management
29 plan.

30 Well, the very same page of the forest management plan that
31 deals - that imposes this conservation guideline, talks

1 about the habitat being "hollow trees that provide nest
2 sites and support substantial populations of prey,
3 especially possums and gliders as prey for birds."
4 The very same page, Mr Miezis. Did you not make that
5 connection?---Again, this was a consideration of the
6 arboreal mammal conservation guideline.

7 And the decision that the department had made, as I
8 understand it on your evidence, Mr Appleford had made,
9 is reflected in paragraph 52 of this briefing note, is
10 that right?---That's correct.

11 And somehow, Mr Miezis, you have gone from on 7 April 2009 at
12 a meeting with VicForests saying "If the densities are
13 triggered an SPZ must be created" to deciding not to
14 create one, that's where you have gone, isn't
15 it?---Following full and complete consideration of
16 matters within the forest management plan.

17 Well, I suggest following full and complete consideration of
18 VicForests' opposition to such an SPZ, and that was the
19 reason?---I don't accept your reasoning.

20 And when you made, or when you recommended this decision to
21 Mr Appleford, your understanding was that there was a
22 choice available about whether to impose an SPZ or not,
23 is that right?---I think there's choice in everything
24 that we do.

25 Well, that may or may not be right, Mr Miezis, as a matter of
26 law. All I am asking you is that when you made the
27 decision you thought there was a choice?---Yes, we put
28 two options.

29 You didn't seem to think there was a choice on 7 April when
30 you told VicForests that an SPZ must be
31 imposed?---Again this was given following full and

1 comprehensive analysis of the requirements of the
2 forest management plan as opposed to a comment in a
3 meeting on 7 April.

4 Let's go to the situation now in March 2010, Mr Miezis. You
5 have got all the information that I have already taken
6 you through in a lot of detail, and there is now
7 evidence in this proceeding from Dr Andrew Smith, who
8 is an expert on gliders, and this Your Honour is at
9 transcript 404, to the effect that he has only I think
10 once before in his 30 years encountered densities of
11 this kind. And you have that, and then you have
12 Dr Meredith's report in this proceeding on hollow
13 bearing trees and their importance, especially to
14 gliders and owls. But as you sit in the witness box
15 today, the position of DSE still is that there is to be
16 no SPZ on Brown Mountain for gliders, is that
17 right?---The position of DSE is that the habitat for a
18 high density population of arboreal mammals is well
19 represented within the existing conservation reserve
20 system in East Gippsland.

21 Notwithstanding that that guideline has never been triggered
22 and you, as you sit here today in the witness box,
23 can't tell His Honour of a specific place in East
24 Gippsland where those densities occur?---I believe
25 there's about - there's reference within the back of
26 the forest management plan to where the densities are.

27 Now, in 2010?---Not that I am aware of, I would have to
28 reference the forest management plan.

29 And it's right, though, Mr Miezis, that from your
30 perspective, from DSE's perspective, there's nothing to
31 stop VicForests recognising what it's heard in this

1 proceeding and what it's heard through all the
2 evidence, and agreeing not to log these coupes because
3 of these gliders densities, there's nothing to stop
4 VicForests doing that, is there?---Again, the decision
5 of whether or not to harvest the areas, in the absence
6 of a formal protection imposed by the department as
7 part of its regulatory framework, rests with
8 VicForests'.

9 And DSE would be pleased to see VicForests recognising high
10 conservation values in that way, wouldn't it?---DSE
11 would be pleased to see VicForests do what it's meant
12 to do in accordance with the regulatory framework which
13 the department sets for it.

14 Can I take you to some questions about the imposition of the
15 100 metre buffer in these coupes, and that starts, as
16 far as I can see the chronology, at about paragraph 77,
17 so just where we were in your witness statement. You
18 told Mr MacDonald on 16 June that DSE was intending to
19 allow timber harvesting. Now, that was before
20 Mr Appleford had made a decision and before the
21 briefing note had gone to the minister, is that
22 right?---There'd been discussions between Dr Appleford
23 and myself. We wanted to put precautionary
24 prescriptions in place such as the buffer and the
25 retention of additional habitat trees. To do that we
26 had to discuss with VicForests to see whether they
27 would agree with those precautionary measures being put
28 in place.

29 Well, when did Dr Appleford make this decision?---Formally
30 the decision was made in the signing of the - - -

31 Yes, and when was that? We have got an unsigned version,

1 Mr Miezis?---Yes, I would have to reference - sorry,
2 the date is in my statement. 14th May it was provided
3 to Dr Appleford, so I would assume close if not that
4 date.

5 Now, let me just get this right, that is Exhibit LAM 25. Is
6 that - do you say that's Mr Appleford's approval?---I
7 am sorry, I will just find - - -

8 It doesn't appear to be - I'm sorry, Mr Miezis. So LAM 25.
9 That's a different, related but different memo, isn't
10 it?---This is what we call a correspondence memo.

11 Yes. So that's not the memo you are talking about when you
12 say you did a memo to Mr Appleford about making this
13 decision?---No, the memo I am referring to is the one
14 to the minister.

15 HIS HONOUR: Just repeat that, I didn't quite catch
16 it?---The formal approval process, if you like, was
17 through the - the briefing to the minister. Mine says
18 LAM 2 but I believe it's LAM 30.

19 Yes.

20 MS MORTIMER: So you prepare one document, the first page
21 supposedly to be signed by the minister, the second
22 page to be signed by Mr Appleford, and at some kind of
23 one-stage process, Mr Miezis, is it, that Mr Appleford
24 signs it and it just keeps going to the minister?---In
25 a formal sense. Mr Appleford can not sign it and send
26 it back and say "I do not agree with the
27 recommendations".

28 I accept that, but he signs it and it just keeps going to the
29 minister, is that what happens?---It's required to go
30 through Dr Appleford for approval prior to it going to
31 a minister.

1 Do you know why the signed version wasn't produced under the
2 subpoena served on DSE? Were you involved in that
3 process at all?---The ultimate coordination of the
4 documentation was done by our legal branch, but as I
5 said before, the signed version we did not have in our
6 possession at the time that the subpoena was served.

7 I understand, thank you. So it's likely then, is it,
8 Mr Miezis, that Mr Appleford had made his decision
9 before 16 June before you spoke to Cameron MacDonald,
10 is that right?---No, Dr Appleford and I would have had
11 regular discussions about this amongst other issues, my
12 direct supervisor.

13 And the modified prescriptions, that's the reference in the
14 briefing note at LAM 30, is it, to - where do we find
15 the modified prescriptions in LAM 30? Paragraph 53,
16 would that be right?---That's correct.

17 Yes. So that those are the prescriptions you had in mind
18 when you were talking to Mr MacDonald on 16
19 June?---That's correct.

20 HIS HONOUR: Are they endorsed by the director of
21 biodiversity policy and programs?---There were
22 certainly discussions between Dr Smith and myself
23 around these, equally with Mr Henry and others around
24 the application of the prescriptions.

25 No, that's not what I asked you. We don't seem to have an
26 endorsement by the director, biodiversity policy and
27 programs?---No, there was no formal endorsement.

28 And wasn't that required by the procedures?---No, these were
29 again prescriptions that were determined to be applied
30 outside of the existing regulatory framework.

31 MS MORTIMER: Outside the existing regulatory framework?

1 What does that mean, Mr Miezis?---Well, there's no
2 formal requirement based on the findings of the surveys
3 to apply a 100 metre buffer and the protection of
4 hollow bearing habitat trees identified by biodiversity
5 officers. That doesn't exist.

6 What do you mean no formal requirement?---Well, the existing
7 forest management plan doesn't require that, the action
8 statement doesn't require that, the code of forest
9 practices doesn't require that.

10 This is going back to how you interpret what you are required
11 to do under the forest management plan, doesn't it,
12 Mr Miezis?---It goes back to, yes, the reading of the
13 forest management plan.

14 HIS HONOUR: Are you saying this isn't a situation where
15 the forest management plan required the creation of a
16 timber harvesting exclusion area?---Based on the
17 arboreal - the arboreal mammal considerations, no, the
18 decision was made that a special protection zone was
19 not required, and these were made as I guess if you
20 like a precautionary - a precautionary prescription
21 that was agreed with VicForests to apply in this area.

22 Yes. So you don't regard this as applying the management
23 plan, you say a decision was made that it just didn't
24 apply, is that what you are saying to me?---That a
25 special protection zone was not required to be created,
26 and that these prescriptions were put on instead.

27 I see, yes, all right.

28 MS MORTIMER: And the two prescriptions in paragraph 53 of
29 the briefing note, 100 metre buffer and protection of
30 hollow bearing habitat trees, at the time you prepared
31 that briefing note you had already discussed those two

1 matters with VicForests, is that right?---Yes.

2 So that was a proposal that you were confident was something
3 that VicForests was likely to agree to?---I had had
4 discussions with them, we'd actually exchanged emails
5 on it which I believe are tendered, and that was -
6 they accepted the additional prescriptions, if you
7 like, that we wanted to apply it in the area.

8 Yes. And if you have a look at LAM 26, Mr Miezis, and tell
9 me if that's one of the emails you are referring
10 to?---That's one of them, yes.

11 But it's your evidence, isn't it, that there were discussions
12 with VicForests before this email on 16 June at 1.52 pm
13 about 100 metre buffer zones and habitat protection
14 trees?---Discussions between Cameron MacDonald and
15 myself, and by my reading of this email, Cameron had
16 raised that with Barry who ultimately - with Mr Vaughan
17 who ultimately came back to me.

18 All right. So if we read your paragraph 77, we can't, as I
19 understand your evidence, we can't read that too
20 literally, on 16 June you advised Cameron MacDonald
21 about something in the sense that he wasn't hearing
22 about those modified prescriptions for the first time,
23 was he, you'd already been discussing them with
24 him?---Yes, we'd discussed the concept of modified
25 prescriptions in the area. We hadn't nailed them
26 down, in fact we hadn't nailed down what the exact
27 prescriptions would look like until I think September.
28 So conceptually these were the prescriptions, we had
29 had discussions, and ultimately the final prescriptions
30 were determined, my recollection is, following field
31 assessment of the site by Mr Henry.

1 We will come to all of that, Mr Miezis. But what happens at
2 LAM 26 is after you have had all these discussions over
3 some time with Mr MacDonald and then you told him on 16
4 June that they were going to get the go ahead for these
5 coupes with modified prescriptions, a little bit more
6 flesh starts to be put on that by Mr Vaughan sending
7 you an email saying, well, kind of formally agreeing to
8 the 100 metre buffer, is that how you understand that
9 email?---Yes.

10 And you write back, LAM 27, saying "Well, that wasn't all.
11 We are also interested in V-notched trees." And
12 V-notched trees, Mr Miezis, this is LAM 27, they are
13 the feed trees for the gliders, is that right?---Yes, a
14 V shape in the bark.

15 And you are interested in DSE working with VicForests. And
16 Mr Vaughan's response to that at LAM 28 appears to be
17 to ignore your suggestion about the V-notched trees and
18 saying "Well, I am happy with your second one, but we
19 don't actually want DSE out there." That was the
20 position that was pushed back to you by VicForests,
21 wasn't it?---That's correct.

22 And the V-notched trees never went any further, did it,
23 Mr Miezis?---No, I think - I believe ultimately it was
24 a diameter on trees that was determinative which would
25 be the additional habitat trees, so - - -

26 And that didn't happen until we are right down into September
27 after the injunction was granted, did it?---I mean, I
28 am trying to think the sequence here. I was actually
29 at Brown Mountain when Stephen Henry was out on site
30 doing it. It would have been just a matter of timing
31 in terms of getting Stephen out there to have a look

1 and ultimately craft the final version of the
2 prescriptions.

3 And as far as I can tell from the material, Mr Miezis, that's
4 the end of the discussion about habitat prescriptions
5 and the 100 metre buffer until 21 August. Your
6 evidence certainly discloses nothing else?---That's
7 correct, there was work going on to finalise what they
8 looked like.

9 Well, you don't say that in your evidence, and you have not
10 produced anything that suggests that was happening,
11 Mr Miezis?---I accept that, and I wasn't directly
12 involved in that work.

13 And as far as the evidence before His Honour discloses,
14 including your evidence, Mr Miezis, as of 21 August
15 there was no map available with the buffer on
16 it?---Sorry, with?

17 With the 100 metre buffer, as at 21 August on your evidence
18 and on the evidence of everyone else in this case,
19 there was no map with the 100 metre buffer on it?---No,
20 there was agreement that 100 metre buffer would be in
21 place, but no map, that's correct.

22 And without a map, and without tying down that buffer,
23 harvesting couldn't start, could it,
24 Mr Miezis?---Harvesting would have been required to
25 maintain the 100 metre buffer in the coupes.

26 Without a map such as that, harvesting could not start, could
27 it, Mr Miezis, because there was nothing to work
28 to?---There was a requirement that a 100 metre buffer
29 be maintained on the creek.

30 And you know that the usual practice is, including in these
31 coupes, that maps are produced with variations of what

1 buffers are going to look like and where they are going
2 to go, and that process has to be exhausted and reach a
3 finality before harvesting can start, do you agree with
4 that?---I think this was a fairly explicit
5 prescription, 100 metre buffer on the creek.

6 It doesn't look very explicit, Mr Miezis, if you look at what
7 happened between August and October 2009, we are up to
8 about a dozen versions of this map, what this buffer is
9 going to look like?---No, the map that you are
10 referring to relates to the retained habitat, or the
11 options for retained habitat should the long footed
12 potoroo - alleged long footed potoroo sighting be
13 verified at Brown Mountain. They are two separate
14 issues.

15 Well, what do you say, Mr Miezis, as at 21 August 2008, did
16 the 100 metre buffer look like? There is no map?---No,
17 the simple 100 metre buffer on Brown Mountain Creek.

18 From where to where, north to south?---Along the creek.

19 What's the northern point at which it starts and what's the
20 southern point at which it starts?---It was simply
21 defined as Brown Mountain Creek.

22 Why are you finding it so difficult to admit that there was
23 no certainty around the definition of this buffer on 21
24 August 2009?---I believe there was certainty. There
25 was a prescription that said 100 metre buffer along
26 Brown Mountain Creek.

27 And you have produced no map to demonstrate what that buffer
28 looked like, have you?---No, ultimately a map was
29 created in I believe September - - -

30 I am not talking about September, Mr Miezis, I am talking
31 about 21 August. You have produced no map that

1 existed on that day about where the buffer started and
2 where it finished and what contours it followed, have
3 you?---No, I haven't. It was a simple 100 buffer
4 along Brown Mountain Creek.

5 And that's because there was no map?---That's correct.

6 So if, as Mr MacDonald told the Supreme Court, Brown Mountain
7 - these two coupes were going to be logged in the week
8 following the 27 August, they were going to be logged
9 without any map existing and any direction from DSE
10 about where this buffer was going to go, that's the
11 position, isn't it?---There was a clear direction that
12 it was to go along Brown Mountain Creek.

13 But you'd provided nothing to VicForests, and VicForests have
14 provided nothing to you by way of a map indicating
15 where that buffer was going to go, that is correct,
16 isn't it?---There was a written - a written
17 prescription in the same way that the code of forest
18 practices, or the code of practice for timber
19 production requires a 20 metre buffer along those
20 various water bodies, this was - - -

21 There was no prescription, Mr Miezis, because the
22 prescription was not enacted until September 2009.

23 There was no prescription as at 21 August 2009?---The
24 prescription was 100 metre buffer along Brown Mountain
25 Creek.

26 Where do we find that?---It was stated earlier on.

27 Where do we find the prescription as issued to
28 VicForests?---There is a series of emails with
29 agreement with VicForests that this was what would
30 occur.

31 You show me the one that you say constitutes the

1 prescription, please?---At 16/6, "VicForests will in
2 response to this request extent the streamside buffer
3 from 20 metres to 100 metres." Sorry, LAM 26.
4 That's an email from Mr Vaughan to you. Where's the
5 prescription? That's it, is it? That's what you
6 identify as the prescription that existed on 21 August,
7 that's it, is it?---There was agreed communication that
8 we would - - -
9 LAM 26?---That's the response from Barry Vaughan to me
10 regarding that prescription, we will do it.
11 That's, on your evidence, that is the prescription?---That's
12 the agreement from VicForests to impose that
13 prescription.
14 There is no other document from DSE that you want to point
15 His Honour to to say that there's the
16 prescription?---Not that I am aware of, no.
17 Let's turn to the potoroo detection, Mr Miezis. That you
18 start to deal with at paragraph 88 and onwards. 85,
19 I'm sorry, Mr Miezis?---Sorry, 85?
20 Pardon me a moment, Mr Miezis. Now, you say in paragraph
21 85, on 24 August you received an email from Steve Henry
22 that forwarded an email from Andrew Lincoln. And what
23 you attach to your witness statement about that is LAM
24 31, correct?---That's correct.
25 I am going to show you another version of that same email to
26 you, Mr Miezis. Now, this may be a different form, in
27 fact this is a different notification to LAM 31, do you
28 agree with that?---Sorry, just - - -
29 If you look at it, it appears to start with an email from
30 Andrew Lincoln, but then the second one is a bit
31 different, and the third one on the 24th is a bit

1 different. So you agree that they look like slightly
2 different email chains?---I suggest what's occurred is
3 I have forwarded the Andrew Lincoln part of the email
4 only on to Mr MacDonald.

5 Well, I am coming to what - are you looking at the document I
6 handed you, Mr Miezis?---Yes.

7 All right, let's just work that one through for a moment,
8 please. The first entry is the email from Andrew
9 Lincoln to Stephen Henry and Tony Mitchell on 23 August
10 at 3.53 pm, "Subject: Brown Mountain." And that then,
11 in an unexplained chain, had reached you and you
12 forwarded it to Cameron MacDonald - I withdraw that.

13 No, it went to Cameron MacDonald and then it went to
14 you. I withdraw that too, Mr Miezis, and I apologise.
15 There seems to be a chain missing in this, but
16 certainly your name is on it as forwarding Mr Lincoln's
17 email to Mr MacDonald, and Mr MacDonald forwarding it
18 to Mr Vaughan, do you agree that's what it
19 shows?---That's correct.

20 And it's quite conceivable, isn't it, Mr Miezis, that you
21 might have got the Andrew Lincoln email more than once
22 in more than one form on that day?---No, I believe what
23 I would have done here is forwarded on the Andrew
24 Lincoln part of the email - forwarded on the Andrew
25 Lincoln part of the email, the original alleged
26 detection by Mr Lincoln on to Mr MacDonald without the
27 intervening section, if you like, from Mr Henry.

28 And what was certainly attached to the email from Mr Lincoln,
29 if you turn over the page to the second page of this
30 document, is two things: something called PDF of
31 Brown Mountain long footed potoroo, and then an AVI

1 file. What's an AVI file, Mr Miezis, do you know what
2 that is?---I believe a movie.
3 Movie. And take it from me for a moment that the AVI
4 acronym that's shown there is the same number as the
5 AVI acronym attached to Mr Lincoln's affidavit in this
6 proceeding. And it's fair to say then, isn't it,
7 Mr Miezis, that what was sent to Mr Henry included the
8 movie, agree with that?---Yes.
9 And do you know whether you got the movie?---I would have,
10 looking at the email that's been tendered, my EA has
11 detached the attachments, probably because they were
12 too big and were clogging up my email, and saved them
13 to a shared drive.
14 So as far as you are concerned what happened is you got them,
15 you got the still and the movie, and then you saved
16 them and you may not have forwarded that on to
17 Mr MacDonald or you may have, you are not
18 sure?---Judging by, if this is a complete record, it
19 was forwarded on to Mr MacDonald with the attachments.
20 I tender that, if Your Honour pleases.
21 HIS HONOUR: Yes.
22
23 #EXHIBIT 67 - Email relating to Mr Lincoln's observations of
24 potoroo.
25 MS MORTIMER: Now, can you go please, Mr Miezis, to LAM 34.
26 And that appears to have - if you go to the third page
27 at the start of the chain, again the Andrew Lincoln
28 email. And you send an email to Andrew Lincoln and
29 Jill Redwood asking for all the footage, still images
30 and video, accepting that you had the still image of
31 this potoroo and a movie for this potoroo?---We have I

1 think approximately 5 seconds of footage.

2 Yes, I understand that. But you had that?---We had 5

3 seconds of footage, that's correct.

4 HIS HONOUR: Did you have any understanding of the way the

5 camera worked?---Yes.

6 That was the way it was set up to take short bites whenever

7 it was triggered by a motion?---I do understand that.

8 What we were looking - - -

9 Did you understand that at the time, is what I was

10 asking?---Yes.

11 Yes. So there was nothing inherently suspicious in the fact

12 that it was a 5 second bite, was there?---No, what we

13 were interested in, I guess there's three prongs that

14 we look at in terms of verifying these.

15 Yes?---Is it the animal?

16 Yes?---Is it the site?

17 Yes?---And was the footage legitimately taken? So we would

18 have looked at things like had we got, or if we are

19 provided with the full extended image has it captured

20 other animals, for example. I would have expected

21 there to be much more common species, wombats, et

22 cetera, coming on. So if that's it, if that's the

23 entire extent of the footage that the camera has taken

24 for the period of time it was out there, then we would

25 start - I guess that would make it very difficult for

26 us to be able to say "Well, this is a legitimately

27 sighted finding." My recollection of the footage is

28 that there was no - I would have expected - we would

29 have expected to see the animal enter the frame, even

30 partially. My recollection of the footage is that the

31 animal was front and centre in the frame of the 5

1 seconds. So the motion detection should have been
2 detected once the animal started entering the extent of
3 the camera rather than when it was directly in the
4 middle of the frame.

5 MS MORTIMER: Are you an expert about how these cameras work,
6 Mr Miezis?---No, as I said, this was my expectation.
7 We wanted the footage to be able to provide it to the
8 experts and able to verify it.

9 Well it sounds like you were, I suggest to you, unreasonably
10 suspicious about this from the start?---No, I think
11 it's what we do. We need to verify the three prongs.
12 There were questions about - as you would admit, or as
13 I would admit, there were questions about the timing of
14 this finding versus the announcement by the minister
15 that harvesting would commence, and we wanted to be
16 sure. In the same way that we wanted to be sure that
17 VicForests' estimates of its sawlog harvesting, for
18 example, where - or sawlog yields in Brown Mountain
19 were accurate. We wanted to make sure that this was
20 right too. We have a verification process that has -
21 - -

22 So of course then, the first thing you did was take it to be
23 a yes, and ask one of the experts if it was a long
24 footed potoroo. That was of course, the first thing
25 you did, wasn't it, Mr Miezis?---I got the advice from
26 Mr Henry, yes.

27 When did you do that?---Stephen forwarded the email.

28 No, when did you take it to be a yes within DSE and ask them
29 to identify it? Because that would have been the very
30 first thing you would have done, wouldn't it?---It came
31 from BES, it came from Stephen Henry.

1 No, but you said you needed to verify that it was the animal,
2 so when did you do that?---As I said, it had come from
3 Mr Henry, and it was described as a potoroo.
4 So on this you are taking Mr Henry at his word, are you?---He
5 is an expert, he has got knowledge and experience in
6 what a potoroo is.
7 You didn't take him as an expert on the gliders,
8 Mr Miezis?---No, we took his advice on the gliders.
9 We considered his advice in the light of the framework
10 for sustainable forest management in Victoria.
11 So you instantly accepted on this email from Stephen Henry,
12 that what you were seeing in this footage was a long
13 footed potoroo, instantly, is that right?---Yes.
14 No need to question that?---No.
15 Did you tell Mr MacDonald that?---No, I forwarded him on the
16 footage.
17 Did you tell him "Got no doubt, Cameron, that this is a long
18 footed potoroo"?---Look, we may have had discussions
19 that I can't recall, but it's clearly in the email that
20 I forwarded him. I did not explicitly say "This is a
21 long footed potoroo". We were treating it as a long
22 footed potoroo.
23 HIS HONOUR: Well, the three issues you mentioned to me is
24 that the animal was at the site, and the other one was
25 in effect what context was it photographed in. In
26 relation to the second issue is it the site, what
27 happened?---I instructed two of my staff to go out.
28 The fortunate thing with the footage is there was a
29 distinguishing tree in the background. We had and we
30 were able to go out and relocate that tree, so two of
31 my staff went out there, took photos, sent the photos

1 back. We compared the photos that they took and my
2 recollection is actually Mr Lincoln accompanied them
3 out there.

4 Yes?---So we knew that the site was where it was - well, it
5 was actually within 6 metres of, I think, where the GPS
6 coordinates were reported. But that's sort of - 6
7 metres is what you would expect from that type of GPS.

8 MS MORTIMER: And that was all happening on 25 August, wasn't
9 it, Mr Miezis?---It was around that time. There was a
10 - the report came in, I'd forwarded it on, I'd spoken
11 to Jill. We had arranged for her or someone to meet
12 on site, I'd sent two of my guys out, they photographed
13 the site and reported back.

14 That's right. And on 25 August, now that's the same day
15 that Ms Redwood told you that on legal advice she was
16 not willing to release any more footage, on the same
17 day as that you had people out in the forest with
18 Mr Lincoln checking the location, and you got a report
19 from Mr Potter, all on the same day, and that is LAM
20 35, correct? I'm sorry, Trotter I meant,
21 Mr Miezis?---25/8 Mr Trotter had reported back to
22 Mr Heywood and provided him with the documents.

23 So DSE knew as of 25 August that this was a potoroo and it
24 was where Mr Lincoln was saying it was?---That's
25 correct.

26 And what steps did you or anyone else in DSE take on 25
27 August to create an interim protection zone for the
28 potoroo?---None, we hadn't verified the sighting. We
29 still had a third prong to go.

30 Which was what?---Was the image legitimately captured at that
31 time.

1 And what - - - ?---How did the animal enter the frame?
2 Possibly it hopped, Mr Miezis?---Possibly, then I would have
3 expected to see it hop into the frame rather than be in
4 the centre of the frame.
5 Your suspicion was completely irrational, I suggest to
6 you?---No, I don't accept that.
7 And where do you express your suspicion to anyone, including
8 Ms Redwood? Do you express it anywhere?---It was
9 clearly communicated to Ms Redwood that we needed that
10 footage to verify.
11 You didn't say "Because I don't believe it", did you,
12 Mr Miezis?---No.
13 You didn't say "Because I think" - what exactly did you think
14 that Mr Lincoln had done?---Well, we weren't sure, we
15 wanted to verify. All we had was 5 seconds of footage
16 of an animal in the middle of a frame.
17 Yes. And how often before had you had that for a long
18 footed potoroo?---Had?
19 How often have you had camera surveys like that as a
20 detection form and accepted them?---Well, if - this was
21 the first one we'd had physically reported to me by an
22 external party.
23 But this is the same camera methodology that DSE uses, isn't
24 it?---Accept that, yes.
25 Exactly the same?---Yes.
26 Same cameras, Moultrie cameras?---I am not sure of the brands
27 of our cameras.
28 So what, Mr Miezis, did you possibly think that Mr Lincoln
29 had done with this potoroo to get it hopping across the
30 frame?---Well, we didn't know. All we had to base any
31 assessment of the validity of the sighting of that

1 animal was on 5 seconds of footage.

2 Why didn't you believe what you saw?---We wanted to verify
3 what we saw.

4 Why didn't you believe Mr Henry?---Sorry?

5 Well, he told you that this was a footage of a potoroo?---It
6 was a potoroo.

7 And then Mr Trotter told you where it was?---At Brown
8 Mountain, correct.

9 So why didn't you just accept that?---Because again we were
10 looking at how was the image captured.

11 Well, I am suggesting to you you had no basis for that
12 suspicion other than an irrational desire to ensure
13 that VicForests was able to keep logging these
14 coupes?---I don't accept that. If the sighting is
15 able to be verified then the requirements of the action
16 statement will be implemented.

17 And this was more than enough to impose interim protection,
18 you were talking about imposing interim protection,
19 Mr Henry was, for a hair tube, but you didn't impose
20 interim protection for this, did you?---No, I think
21 ultimately events overtook those steps.

22 Well, VicForests was planning to log within a week, don't you
23 think that might have been a really important time to
24 impose an interim protection?---Yes.

25 And you didn't?---I believe again that steps overtook it.

26 And you would have allowed VicForests to log those coupes
27 ignoring what you had seen from Mr Lincoln,
28 correct?---We would have required VicForests to comply
29 with the requirements of the action statement.

30 You would have allowed VicForests to log those coupes
31 ignoring what Mr Lincoln had supplied?---If we were

1 unable to verify the site, there would be no reason for
2 us to create a - take action under the action
3 statement.

4 HIS HONOUR: When you say "we", do you say this was
5 referred to a DSE staff member with appropriate
6 expertise in biodiversity management?---The department
7 - under our requirements it's done between consultation
8 with myself as in forest management responsibilities
9 and the biodiversity.

10 Yes, that's why I am asking about the "we"?---Yes.

11 What you have been saying hitherto is that you decided this,
12 as I understand it. Do you say that it was you or was
13 it someone with expertise in potoroos and photographing
14 potoroos that didn't accept this?---We set the
15 standards for verification. If it is provided as we
16 do and more recently in other events we pass that on to
17 the relevant expertise within the department for their
18 advice back.

19 Well, that's the same confusion about "we". Was it your
20 determination that you weren't satisfied by this, or
21 was it the determination of someone who was expert in
22 relation to evidence relating to biodiversity?---It was
23 the decision of my division, so yes, mine.

24 All right. And it didn't go to the people who had expertise
25 in biodiversity, is that right?---What we had had been
26 provided, and had we been provided the full footage it
27 would have been provided.

28 Yes, Ms Mortimer.

29 MS MORTIMER: If Your Honour pleases.

30 Mr Scotts has given evidence to His Honour that
31 he had no difficulty, was 100 per cent confident about

1 this footage and about it being a potoroo, and he
2 didn't express - do you know who Mr Scotts is?---No, I
3 don't.
4 Never heard of him? Read any published material about the
5 potoroo, Mr Miezis?---No, I am not a - - -
6 You don't know that he is one of the recognised experts in
7 Australia on potoroos?---Mr?
8 Scotts?---The Christian name?
9 Dave?---No, I do not know Dave Scotts, no.
10 Nevertheless without asking anyone, you assumed to yourself
11 the responsibility deciding what this was and how it
12 should be treated, you as a forester, Mr Miezis, is
13 that right?---No, we applied a standard to verify the
14 site. Had we been provided the information we would
15 have then sought the expertise of the relevant people
16 within the department to assist to make that
17 determination.
18 Where do we find that standard written down,
19 Mr Miezis?---It's not written down.
20 It's just a standard you made up for this sighting, isn't
21 it?---No, we have been working through a standard
22 internally.
23 It is a standard you made up for this sighting?---No.
24 Tell me another sighting that you have applied it to?---I can
25 tell you a more recent sighting.
26 No, at that time?---I believe this is the first time we'd had
27 a sighting of this type reported to us.
28 One that was very inconvenient for the timber harvesting that
29 was about to commence, is that right?---Our role in
30 this is to implement as VicForests used to implement
31 the action statement provided on the - based on

1 evidence that we are provided.

2 Let's move to what happened after Justice Forrest granted the
3 injunction. So now you have a Justice of the Supreme
4 Court of Victoria saying that there's a serious
5 question to be tried about the lawfulness of
6 VicForests' actions and based, I ask you to assume,
7 significantly on the potoroo footage. Taking that
8 opinion of a Justice of the Supreme Court of Victoria
9 into account, what did you do on or after 2 September -
10 I withdraw that. What did you do after you heard
11 about Justice - the granting of the injunction? Did
12 you impose an interim LFP retained habitat then and
13 there?---No.

14 And was that because you didn't need to because VicForests
15 was now restrained from harvesting and you could take
16 things at a more leisurely pace?---There was an
17 injunction and we still had not been provided the
18 footage to verify the sighting.

19 And you knew that VicForests had actively resisted the
20 injunction, didn't you?---I wasn't party to the
21 injunction.

22 You knew that they had actively resisted it?---They had, yes.

23 And you knew that they had told the court that they intended
24 to harvest next week unless they were stopped, you knew
25 that?---I did know that, yes.

26 And why in those circumstances did you start negotiating with
27 VicForests about what this habitat might look like
28 instead of just imposing on VicForests something that
29 would give interim protection?---Because the action
30 statement requires that to occur.

31 Requires negotiation?---Requires discussion with VicForests

1 about the application.

2 So you say that you are not able as a matter of power to
3 impose something on VicForests, do you?---Our role is
4 to implement the action statement. The action
5 statement has a number of steps prescribed, one of
6 which is doing so in consultation with VicForests.

7 And what you started doing then from about 8 September
8 onwards was negotiating with Mr MacDonald about what
9 this habitat might look like, is that right?---What the
10 implementation of prescriptions, so the retained
11 habitat area and the special management area might look
12 like.

13 Your email on 8 September to Mr MacDonald, which is CM 40, I
14 won't take you to it but I will ask you to assume this
15 is the case, you put forward to Mr MacDonald things you
16 called options. So you were just proffering options
17 to the entity that had refused to stop logging on the
18 basis of this potoroo sighting?---I was putting options
19 up for the basis of the discussion that we were
20 required to have.

21 Why didn't you just do what DSE thought was in the best
22 interests of the species, Mr Miezis, rather than
23 negotiating with the people that were trying to chop
24 down its habitat?---The department is required to act
25 in compliance with the action statements.

26 And what we then get, Mr Miezis, after the 8th September is
27 this exchange that Mr MacDonald gives evidence about in
28 his affidavit between paragraphs 80 and 94, there's
29 emails and maps going backwards and forwards between
30 you and VicForests and other people in DSE and
31 VicForests about what this habitat might look like,

1 correct?---Yes.

2 There was that process done?---There was various options.

3 None of which would have happened but for the injunction,

4 correct?---No, we were still hopeful that if the

5 sighting was valid the footage would have been provided

6 to enable us to verify it. So we were doing the work.

7 But it might have been logged before, Mr Miezis. Your

8 evidence was the 100 metre buffer had no map and

9 VicForests was able after 21 August to just go in and

10 log?---And had agreed to put in place a 100 metre

11 buffer along the Brown Mountain Creek.

12 But none of this negotiation about habitat, despite the hedge

13 hooving, despite the DSE surveys, none of this would

14 have happened but for that sighting and the injunction,

15 isn't that right?---The injunction certainly overtook

16 activities, yes.

17 Now, in the exchange of suggestions back and forwards between

18 you and other people in DSE and VicForests, there was a

19 suggestion that came from Natasha McLean, wasn't there,

20 do you remember that one?---I believe Natasha was

21 engaged in those discussions.

22 Can you find that one in your affidavits, Mr Miezis?---I

23 don't believe it's - - -

24 Pardon?---I don't believe it's been referenced.

25 It's not there, is it?---No.

26 What's the explanation for that?---I don't believe I

27 referenced any of the options.

28 Now, your evidence stops, doesn't it?---That's correct.

29 Why did it stop there?---Because that's - we got up - I gave

30 evidence up to the point that the injunction was

31 granted, if you like, for the actions that were

1 undertaken.

2 You didn't think it important to give any evidence on behalf
3 of DSE about what happened after that?---No.

4 I show you this document. Now, you will see that this is in
5 a chain, and we are going to come to the last part of
6 this chain which you have attached in a different form
7 to your email about the four questions, so you don't
8 need to look at that at the moment. But the part to
9 Natasha McLean that I want you to look at starts on the
10 second page. Some correspondence goes to Ms McLean,
11 and then she sends you an email, Mr Miezis, on the 14th
12 of September 2009 at 3.31 pm, see that?---Yes.

13 And she says three important things: the intent of the SMZ
14 and especially the retained habitat is to provide
15 protection for the habitat of the long footed potoroos
16 around the detection site, partly so we can demonstrate
17 we are not knowingly logging forest, which seems like a
18 bit of a concern about how DSE looks, correct,
19 Mr Miezis?---I can't speak to what Natasha had intended
20 by that.

21 What do you understand that to mean?---So - - -
22 She's writing to you, remember?---Partly so we can
23 demonstrate that we are not knowingly logging forest,
24 that is the home range of the individual detected.
25 Demonstrates to whom?---More generally to the broader public.
26 She then says this "The home range appears to be in the order
27 of 10 to 20 hectares, some ranging over - animals
28 ranging up to 100 hectares. The retained habitat
29 should be designed to try to capture an area of this
30 order, low tens of hectares, around the detection site,
31 which is why the action statement states the retained

1 habitat is to be about 50 hectares. Designing the
2 retained habitat so that it is greater than a few
3 hundred metres from the detection site is not within
4 the purpose and spirit of the prescription. Lee's
5 recommended SMZ design places about half of the
6 retained habitat further than 500 metres from the
7 detection site and thus well outside the expected home
8 range of the detected individual." She's telling you,
9 Mr Miezis, that the designs are not the best habitat or
10 design for the long footed potoroo, isn't she?---Yes,
11 she is.

12 She also then makes the point in paragraph 3 that a lot of
13 the buffer area that's been identified has been
14 harvested, and that it's not the intent of the
15 prescription to capture regrowth in the retained
16 habitat. You would agree with that, wouldn't you,
17 Mr Miezis?---I would agree that that's what?

18 It's not the intent of the prescription to capture regrowth
19 in the retained habitat if there is an option of
20 including older forest, do you agree with that
21 statement?---I believe the action statement requires
22 the best available habitat to be - - -

23 I am asking you whether you would agree or disagree with that
24 sentence, Mr Miezis?---Look, I can't give evidence to
25 the intent of the prescription. I can read the
26 prescriptions explicitly. The action statement refers
27 to, this is again my recollection, to long footed
28 potoroos being found in a variety of forest types, and
29 the requirement is that the best habitat be retained,
30 which is why we go through a process of looking at the
31 options. There's various options. Natasha has put a

1 view forward here.

2 Well, Ms McLean is the one with the qualifications, and it's
3 her job within BES to look closely at these kinds of
4 things, isn't it, Mr Miezis?---She certainly has a -
5 her responsibilities relate, pertain directly to action
6 statements, yes.

7 And she is the qualified one in this area?---She has a - I
8 believe she is a zoologist or similar.

9 And you have got no basis, in scientific information or in
10 your own qualifications, to disagree with that
11 statement, have you?---No.

12 But you do try and disagree with it, and that's the purpose
13 of your email back to her, isn't it?---I have asked
14 some questions.

15 If she's the expert, Mr Miezis, why don't you just accept
16 what she says?---I ask questions.

17 You ask questions on behalf of VicForests, I suggest. You
18 are pushing back because what she is suggesting won't
19 allow possibly as much of coupe 15 to be harvested, and
20 you know Mr MacDonald won't like that?---No, I ask
21 questions to clarify what she was saying when she talks
22 about intent versus my reading of the action statement.
23 You will see clearly there that I have expressed some
24 concerns with this and advised Natasha that she will
25 need to talk to VicForests directly about this.

26 "I would have thought you'd say that an exclusion that
27 enhances landscape connectivity would be preferable
28 from an ecological perspective", what's the basis on
29 which you were able to say what's preferable from an
30 ecological perspective, Mr Miezis?---I have expressed
31 my belief. "I would have thought" - - -

1 As a forester?---As the manager of state forests, yes.
2 As a qualified forester?---As a qualified forester.
3 I tender that, if Your Honour pleases.
4
5 #EXHIBIT 68 - Email correspondence with Natasha McLean about
6 special management sites.
7 MS MORTIMER: Now, I should have also asked you, Mr Miezis,
8 Ms McLean - - -
9 HIS HONOUR: Ms Mortimer, I think we might take a break.
10 MS MORTIMER: As Your Honour pleases.
11 (Short adjournment)
12 HIS HONOUR: I think we have reached a stage in the
13 proceeding where although there is an order for
14 witnesses out of court it's a good idea to leave the
15 door open.
16 MS MORTIMER: No disagreement from us, Your Honour.
17 HIS HONOUR: I think you can leave it open.
18 MS MORTIMER: Now, Mr Miezis, can you go to paragraphs 90 and
19 91, which I have really been asking you a few questions
20 about already. And also just have to hand LAM 34,
21 which is your email exchange with Mr Redwood. Got
22 that?---I'm sorry, what was the - - -
23 LAM 34?---And the two paragraphs within the statement?
24 90 and 91. Got those?---I'm sorry.
25 And just to clarify. As I understand your evidence that you
26 gave before the break, Mr Miezis, when we read what you
27 say at paragraph 90, that's only a reference to your
28 request to see more than the still photograph and the 5
29 seconds, isn't it?---That's correct.
30 And what Ms Redwood told you - I withdraw that. What you
31 recorded at LAM 34 by email to Jill Redwood on 25

1 August 2009, at 12.46 pm, was that you understood that
2 she was not willing to release footage to the
3 department without clearance from her legal advisers,
4 and that is what she told you, isn't it?---That's
5 correct.

6 And indeed the department, DSE, adopted a similar legal
7 position in relation to Ms Redwood, didn't it?---I'm
8 sorry, I don't - - -

9 You don't know what I am talking about? I will show you this
10 document. The very same day, Mr Miezis, later in the
11 afternoon your executive director wrote to Ms Redwood
12 cancelling appointments that had been scheduled with
13 EEG due to proposed legal action, that's what happened,
14 isn't it?---Yes.

15 Probably fair to say, Mr Miezis, some lines were drawn
16 between DSE and EEG, fair comment?---I can only assume
17 that Dr Appleford got advice that we should not meet
18 with Ms Redwood.

19 And what she had been asking to meet with you about was what
20 was happening on Brown Mountain, correct?---No, we'd
21 actually requested - advised Ms Redwood in response to
22 a number of letters that she was writing that we would
23 like to meet with her. And she should contact our
24 office or Dr Appleford's office if she wanted to meet.

25 And she had?---About three months after the first invitation
26 to meet was written.

27 Well, Mr Miezis, she had?---She had, that's correct.

28 And meetings had been scheduled?---We had scheduled a
29 meeting.

30 And then it was cancelled by this email?---Yes.

31 I tender that, if Your Honour pleases.

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#EXHIBIT 69 - Email to Ms Redwood.

MS MORTIMER: Mr Miezis, from early September, all through September and all through October, as you have already I think acknowledged, there was this exchange between DSE and VicForests about LFP retained habitat and what should be happening backwards and forwards, correct?---There was the required discussion, yes.

VicForests ever send you any other footage of a long footed potoroo?---Not that I am aware of, no.

Any DVDs?---Not that I am aware of, no.

Do you know there was another set of footage?---I believe I'd been told that there has been more footage tendered to the court.

VicForests didn't tell you about it?---No.

All these exchanges you were having with them about long footed potoroo habitat and how it should be designed, Mr MacDonald didn't mention to you that there has been another set of footage with a still and a 5 second clip?---No.

Didn't he say anything to you about that?---Not that I recall, no.

Would you have expected him to?---I would have expected him to converse with us around it, given that ultimately it's - the department is responsible for ultimately finalising the creation of the - - -

Pretty important information when you are having these exchanges with Mr MacDonald and VicForests about designing habitat to know whether there's been another, to use your word, "alleged" detection, isn't it,

1 Mr Miezis?---Yes, we would have sought to verify it,
2 yes.

3 And you didn't have any conversations or emails with
4 Mr Vaughan about it either, did you?---Not that I
5 recall.

6 But what you did get, Mr Miezis, on about 3 February 2010,
7 this year, was Dr Meredith's report about the long
8 footed potoroo, didn't you?---I was provided a copy, I
9 don't recall the exact date. I know it was within
10 Biodiversity and Ecosystems Services for a period of
11 time before it was provided to me, but I don't know the
12 exact date.

13 I'm sorry, it was provided to BES for a period of time before
14 it was provided to you?---Yes, that's my understanding,
15 yes. I can't say exactly what that period of time was
16 or when the exact date it was I saw the report.

17 According to Mr Kramersh, who is the instructing solicitor
18 for VicForests, Dr Meredith's report was sent to Peter
19 Appleford on 3 February 2010, and also according to
20 exhibits to Mr Kramersh's affidavit, you received it on
21 26 February 2010, does that about accord with your
22 recollection?---It would be about that time.

23 And in that report Dr Meredith positively identified both
24 sets of potoroo, long footed potoroo footage, and
25 deposed to his expert opinion that that's what they
26 were, and that on the basis of his expert opinion these
27 areas ought to be protected under the action statement;
28 you read all that, didn't you?---I did read his report,
29 yes.

30 And has DSE done anything to act on that expert
31 opinion?---No.

1 Insofar as you are aware VicForests hasn't told you that they
2 were doing anything to act on that expert opinion,
3 correct?---That's correct.

4 Now, I want to go to owls now, Mr Miezis, and look at your
5 paragraph 92. Yes, I'm sorry, 92. Got that?---Yes.
6 And you depose there that on 6 October 2009 you received some
7 advice from Dr Smith, and who is Dr Smith?---At that
8 time he was the Director of Biodiversity Policy and
9 Programs.

10 HIS HONOUR: The question of verification of Mr Lincoln's
11 video and still photos were never referred to him, I
12 take it, from what you have told me, is that
13 right?---Not referred, we would have had discussions
14 about it.

15 Yes, but the question of whether the record could be
16 confirmed was not referred to people with the relevant
17 expertise in the department to resolve, is that
18 right?---That's correct.

19 Yes.

20 MS MORTIMER: Now, Mr Miezis, what we see at LAM 36 is an
21 email from Dr Smith responding to four questions you
22 had asked, is that right?---That's correct.

23 And if you look at the third page of LAM 36, in your request
24 to Dr Smith you say this: "I require" - it's actually
25 addressed to Dr Smith and Ms McLean, correct?---I'm
26 sorry?

27 Third page of LAM 36?---Yes.

28 So you asked Dr Smith and Ms McLean, you say: "I require an
29 urgent answer to these questions on threatened species
30 in East Gippsland." And you are saying that on 5
31 October 2009. What was it that was happening on 5

1 October 2009 that meant you required an urgent answer
2 from Dr Smith and Ms McLean?---My recollection is I was
3 asked the - a series of questions from VicForests'
4 lawyers regarding those matters, and I could not answer
5 them.

6 Right. So you required an urgent answer because these were
7 matters that VicForests' lawyers had asked you to find
8 out about, correct?---Yes, they'd posed a series of
9 questions to me that I was unable to answer.

10 So you sought information from those two people,
11 correct?---Correct.

12 And what you have got, Mr Miezis, I want to take you to what
13 you have got about the owls. You will see on the
14 first page - I'm sorry, this is the third question.
15 We have got two questions about the quoll?---Yes.

16 And then you have got a question about the owls. And the
17 answer starts this way: "According to ABCs", what's
18 that, ABCs?---It's a computer record of threatened
19 species records.

20 Is it a DSE record, is it?---Yes, it's where we create
21 various threatened species records through time.

22 All right, and that talks about a review of the SOMAs, the
23 sooty owl management areas, and then I want you to look
24 at the bit that starts "Steve Henry", LAM 36, Your
25 Honour.

26 HIS HONOUR: Yes.

27 MS MORTIMER: "Steve Henry advised that we have work to do to
28 revise the sooty owl protection system, especially to
29 account for the new records found by Rohan Bilney in
30 his PhD project, and to account for the new election
31 promised reserves. We will do this as part of the FMA

1 plan review process, however we have a couple of
2 hundred sites, again many of these are in clusters so
3 don't represent separate SOMAs, and it's hard to judge
4 sometimes which records represent separate SOMAs.
5 However, I estimate that we have about 100 separate
6 SOMAs which I think is fairly conservative. The rest
7 of the target 133 is made up of modelled sites." I
8 suggest to you, Mr Miezis, the significance of those
9 two sentences is that there are presently in East
10 Gippsland, according to this document, there are 33
11 sooty owl management areas short of the target?---There
12 are 33 management areas that are based on modelled
13 habitat.

14 Not actual sightings or detections?---Not actual sightings.

15 All right. "Thus some new sites that do not fit into an
16 existing SOMA should be substituted for modelled sites
17 until we get to the 133." And what that is saying,
18 Mr Miezis, is that when you find a new sooty owl, a
19 real live sooty owl, you should declare a SOMA and
20 substitute it for a modelled one. That's what it's
21 saying, isn't it?---That's my reading of it, yes.

22 Just look at what it says about the powerful owl. "Steve
23 Henry advised that the story for powerful owls is
24 broadly similar to that for sooties. We have about
25 180 records but many of them are clustered, some are in
26 sub optimal habitat, not all placed in POMAs. My
27 estimate is that the records in good habitat fall into
28 about 80 POMAs so we are 20 POMAs short of the target.
29 The balance is made up of modelled habitat." And the
30 same proposition runs, doesn't it, Mr Miezis, that
31 where you find a real live sooty owl it should be going

1 in to - powerful owl - it should be going into the
2 powerful owl management area system, correct?---I
3 believe that's the way it works, yes.

4 And those were the answers provided to VicForests, is that
5 right?---Yes.

6 Now, let's go back to what has been said in the past until
7 this information was sought, including in your evidence
8 about sooty owls and powerful owls. Can you go to LAM
9 14, please. Can you look at the page into the
10 attachment that's headed "Sooty owls and powerful
11 owls". Got that? A couple of papers into that tabled
12 document, Mr Miezis?---Yes.

13 The paragraph starting "Action statements. The requirement
14 for establishment of SOMAs and POMAs have been achieved
15 in East Gippsland but is under review." It doesn't
16 say anything about the targets not having been met,
17 doesn't say anything about the substitution of modelled
18 habitat for real live sightings, does it?---No, it
19 simply says that we have met the target for SOMAs and
20 POMAs.

21 That is a completely misleading characterisation of the true
22 situation, I suggest to you?---I think it's an explicit
23 statement of whether or not we have met the targets for
24 SOMAs and POMAs.

25 Do you adhere to that evidence taking into account the
26 statements that I have just taken you to in your own
27 exhibits?---I'm sorry, you have asked me what this was.
28 Yes, and I have suggested it's completely misleading based on
29 what's in LAM 36?---It's a reflection that some of the
30 - yes, some of the SOMAs and POMAs are made of
31 modelled habitat, except we have met the target for

1 SOMAs and POMAs.

2 Well, that's not what that document I just took you to says.

3 It says "short". LAM 36 said "we are 20 POMAs short

4 of the target". Do we see that statement in this

5 paragraph?---No, and it says the rest of that is made

6 up of modelled habitat.

7 So your paragraph 67, which extracts this, talks about sooty

8 owls and powerful owls, is completely wrong, I suggest

9 to you, Mr Miezis?---Sorry, which paragraph?

10 Paragraph 67. "No further action required" is just not

11 true, is it?---It's a reflection of what I was advised,

12 yes.

13 But it's not true, Mr Miezis. Your LAM 36 establishes

14 that?---Except that there is a process of substituting

15 SOMAs and POMAs, it's a part of an adaptive process.

16 And you now revise your evidence in paragraph 67 to accord

17 with what's in LAM 36, would you?---I would say that is

18 part of an adaptive management process, as I was

19 describing things change and we substitute records for

20 modelled habitat.

21 And what about LAM 21, have a look at that, please, at

22 paragraph 10. This is your briefing note to your

23 minister. Have a look at paragraph 10?---LAM 21?

24 Yes. LAM 21 paragraph 10. That's not true either,

25 Mr Miezis, is it?---No, it should say that - I agree.

26 What we have reflected there is have we achieved the

27 targets of SOMAs and POMAs. The fact that there is a

28 substitution process or a substitution process can

29 occur has not been reflected in that statement.

30 And neither has the fact that you are 20 POMAs short for the

31 powerful owl. Not substitution, 20 POMAs short?---20

1 POMAs that are short are made up of modelled habitat.
2 20 POMAs short?---That's right.
3 You don't see that in paragraph 10, do you?---It's a
4 reflection of the fact that the rest are made up of
5 modelled habitat.
6 And similarly LAM 30, your briefing note to, as I now
7 understand it, both Mr Appleford and then to the
8 minister about what should be done about arboreal
9 mammals, I suggest to you, Mr Miezis, might have been
10 quite differently worded and approached if you had
11 taken the time and care to find out that you were short
12 on powerful owl management sites, and had modelled
13 habitat for sooty owl management areas?---We have
14 modelled habitat for powerful owl too.
15 The lack of care demonstrated in finding out, you finding out
16 what the true situation was on Brown Mountain for
17 powerful owls and sooty owls, I suggest led you
18 materially to misrepresent the situation to
19 Mr Appleford and the minister in LAM 30?---No, I
20 dispute that.
21 Well at least since 6 October 2009 you have known what the
22 true situation is, and what have you or DSE done about
23 that in relation to what Dr Bilney has found on Brown
24 Mountain and what DSE has found on Brown
25 Mountain?---I'm sorry, in relation to more - - -
26 Powerful owls and sooty owls?---We are undertaking a review
27 of forest management zoning in East Gippsland as we
28 speak. We are looking at SOMAs and POMAs. That
29 process has been going on now for - since October 2008.
30 Well, that won't help the sooty owls and powerful owls in
31 Brown Mountain if the area is logged, Mr Miezis, will

1 it?---We have not located through surveys - we have
2 seen one to the west of Brown Mountain, or heard one, I
3 should say.

4 And you know that Dr Bilney's report in January 2009
5 demonstrated that he found both, you know that?---He
6 reported that he'd found both, yes.

7 And his evidence to this court is that he's found both, and
8 he thinks that there's a sooty owl roosting site in or
9 near these coupes; are you going to do anything now
10 about it?---It will be considered through the process
11 that we are currently undergoing.

12 And that may or may not happen before this area gets logged,
13 Mr Miezis, is that your evidence?---No, we hope to have
14 a proposed new zoning process out for public
15 consultation as we are required to, April.

16 HIS HONOUR: I'm sorry, I didn't quite catch that?---I said
17 we are targeting April, end of April.

18 MS MORTIMER: Public consultation process.

19 HIS HONOUR: End of April?---The hold-up has been we have
20 had to - we have been doing a significant remapping of
21 ecological vegetation classes across East Gippsland,
22 which is quite an intensive and long process.

23 MS MORTIMER: And VicForests, having been told by DSE on
24 about 6 October 2009 that there were 20 POMAs short,
25 and that sooty owl, actual detections should be
26 substituted for modelled detections, VicForests having
27 that information and having Dr Bilney's reports hasn't
28 approached you, has it, Mr Miezis, or anyone else in
29 DSE to suggest that a SOMA or a POMA might be created
30 in Brown Mountain?---Certainly have not approached me,
31 no.

1 Or anyone else in DSE that you know of?---Not that I know of.
2 Now, are you familiar with the evidence that's been given by
3 Dr Gillespie in this proceeding about frogs?---No.
4 Are you familiar with the evidence that's been given in this
5 proceeding by Dr Belcher about quolls?---No.
6 What about the evidence given by Dr Debus and Dr Bilney about
7 the kite, are you familiar with that?---No.
8 What about the evidence about the Orbost spiny crayfish and
9 the new species, are you familiar with that?---I have
10 been told that there was a new species, yes.
11 All right. And what action is DSE proposing to take about
12 that?---None at this stage.
13 All right. And you haven't had any suggestions from
14 VicForests that it's proposing to do anything else
15 other than look at the 100 metre buffer, is that
16 right?---Sorry, is VicForests going to take any action?
17 You haven't been told that VicForests - by VicForests that
18 it's proposing to do anything else but continue to look
19 at the 100 metre buffer for these coupes?---On the
20 basis of the reported - - -
21 Crayfish?---That's correct.
22 New species?---That's correct.
23 Did you know that Dr Gillespie has given some evidence in
24 this proceeding that at least a 300 metre buffer on
25 each side is needed to adequately protect stream
26 dwelling frogs, did you know about that?---No.
27 HIS HONOUR: Well, Ms Mortimer, given that the order that's
28 been made, I suppose he might have been advised of the
29 report prior to the hearing, but he won't have been
30 told of any of the evidence, will he?
31 MS MORTIMER: I understand that that's what should have

1 happened, Your Honour. I accept that.

2 HIS HONOUR: Yes.

3 MS MORTIMER: Now, I want to ask you some questions about

4 action statements, Mr Miezis. There is no action

5 statement for the square tailed kite, is that correct,

6 do you know about that?---Action statements are created

7 through a process that sits within Biodiversity and

8 Ecosystems Services, so it's outside of my - - -

9 So you don't know very much about action statements, is that

10 your evidence?---I know the action statements that are

11 in place and the requirements under them.

12 And do you accept that without an action statement for a

13 threatened species, it's especially important to apply

14 the precautionary principle in relation to conduct

15 which may pose a threat to that species, do you accept

16 that?---The precautionary - if there is a risk of

17 catastrophic or irreversible damage to it, yes.

18 Well, especially without an action statement, because then

19 you don't have an official plan to guide how this

20 species is supposed to be managed, do you?---There are

21 no existing laws, if you like, around, or prescriptions

22 around how it's supposed to be managed, that's correct.

23 But in terms of the purposes of action statements in detail,

24 and what they are designed to do or avoid, it's your

25 evidence that that's not really your area, is that

26 right?---The department - I am responsible - - -

27 Your area personally, I mean?---Personally, yes. No, I am

28 not responsible for creating action statements.

29 All right. And that would mean, therefore, that you don't

30 really know very much about the new national recovery

31 plan for the quoll either, is that right?---No.

1 Did you even know that there is one that Victoria has
2 endorsed?---No.
3 I have no further questions, if Your Honour pleases.
4 HIS HONOUR: Yes.
5 MR REDD: Your Honour, there's no re-examination of this
6 witness.
7 HIS HONOUR: Thank you, Mr Redd. Thank you, Mr Miezis,
8 you are excused.
9 <(THE WITNESS WITHDREW)
10 (Witness excused.)
11 HIS HONOUR: Now, what time should we go over till
12 tomorrow, Mr Waller?
13 MR WALLER: Your Honour, the remaining witnesses are
14 Mr Kramersh and Professor Ferguson. The suggestion is
15 we start at 10, and the hope and expectation is that we
16 will finish tomorrow.
17 MS MORTIMER: I would be very confident about that, Your
18 Honour, and in good time.
19 HIS HONOUR: Yes. I would anticipate we would, but I take
20 it that we may run well into the afternoon, is that so,
21 Ms Mortimer?
22 MS MORTIMER: Perhaps, Your Honour, not necessarily.
23 HIS HONOUR: I see.
24 MS MORTIMER: Your Honour, I wouldn't like to be held to
25 having to finish in the morning, but I don't anticipate
26 that we would run a full day. That's not my
27 anticipation.
28 HIS HONOUR: Yes, well, I am really just asking for a
29 general indication in terms of arrangements that I may
30 wish to make.
31 MS MORTIMER: If Your Honour pleases.

1 HIS HONOUR: In terms of moving out of the court and
2 getting back to Melbourne. I am intending that we
3 will go over to Melbourne for final addresses, and my
4 current intention would be that we would commence them
5 on Tuesday next, not on the Monday. I think I'd
6 spoken of not sitting on Friday, but at the moment I
7 would intend we go over to the Tuesday, and on the
8 basis of what you have previously told me we would
9 complete the addresses in two to three days relatively
10 comfortably, would that be your expectation?

11 MS MORTIMER: Yes, Your Honour, I would expect that we may
12 need three days, but no more.

13 HIS HONOUR: Yes.

14 MS MORTIMER: Your Honour, may I make an enquiry in terms of
15 the form of final addresses, just so that we prepare in
16 the way that will suit Your Honour best. We propose
17 to give Your Honour an outline of final submissions and
18 to provide Your Honour with authorities, probably only
19 the ones to which we will go in final submissions. Is
20 that a convenient way to proceed?

21 HIS HONOUR: Yes, it is.

22 MS MORTIMER: If Your Honour pleases.

23 HIS HONOUR: I think I had indicated to you that I would
24 appreciate a written outline relating to the legal
25 framework for the decision. If you want to go beyond
26 that in the written outline you are perfectly welcome
27 to do so, that may also be of assistance, but what I
28 wanted to flag earlier was that, particularly in
29 relation to the law, I would like some clear framework
30 within which to hear the addresses on each side, and
31 otherwise it's up to you as to how you proceed.

1 MS MORTIMER: If Your Honour please.

2 HIS HONOUR: Provided it takes a logical sequence. And I
3 won't hold you strictly to the 10 document rule, but as
4 a matter of forensic persuasiveness, I would
5 encouraging you to pick from what is now something of a
6 morass of documents those upon which each of you
7 ultimately particularly rely. And I don't expect any
8 real surprises in that regard, but I think that it is a
9 case of sufficient complexity to mean that you have got
10 to be very careful to make your best points clear. I
11 won't say "Or they will be lost in the forest".

12 We will adjourn until 10 o'clock tomorrow
13 morning.

14 ADJOURNED UNTIL 10.00 AM THURSDAY 18 MARCH 2010

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