

1 HIS HONOUR: Yes, Mr Waller.

2 MR WALLER: Your Honour, the next witness to be called for
3 the defendant is Mr Jonathan Kramersh. I call
4 Mr Kramersh.

5 <JONATHAN ALAN KRAMERSH, sworn and examined:

6 MR WALLER: Mr Kramersh, could you please restate your full
7 name?---Jonathan Alan Kramersh.

8 And what is your address?---Level 21, 570 Bourke Street,
9 Melbourne.

10 And your current occupation?---I am a lawyer, partner of HWL
11 Ebsworth.

12 And that firm is acting as lawyers representing the defendant
13 in this proceeding?---That's correct.

14 Yes. Now, Mr Kramersh, have you sworn an affidavit in this
15 proceeding?---Yes, I have.

16 Dated 14 March 2010?---Yes.

17 Yes. Do you have a copy of that affidavit in front of
18 you?---No, I don't.

19 If I could hand to you a copy of that affidavit and the
20 exhibits to that affidavit?---Thank you.

21 Mr Kramersh, is that the affidavit that you have sworn in
22 this proceeding?---Yes.

23 Yes. And are the contents of that affidavit true and
24 correct?---Yes.

25 Your Honour, I tender that affidavit.

26 HIS HONOUR: Yes.

27

28 #EXHIBIT P - Affidavit of Mr Kramersh.

29

30 MR WALLER: Thank you, Your Honour, I have no questions.

31 HIS HONOUR: Yes, Ms Mortimer.

1 <CROSS-EXAMINED BY MS MORTIMER:

2 Mr Kramersh, are you right standing?---Yes, thank you.

3 Mr Kramersh, your dealings with DSE in relation to witnesses
4 basically went through Dr Peter Appleford, is that
5 right?---That's correct.

6 And in relation to any general assistance that VicForests
7 needed in this proceeding from DSE, did that also go
8 through Dr Appleford?---I think it originated through a
9 direct request by the client by letters that David
10 Pollard sent, and then we were directed to Dr Peter
11 Appleford.

12 Thank you. And the arrangements for Mr Miezis to give
13 evidence, the undertaking issue that you describe in
14 your affidavit, and as I understand it none of that
15 applied to Mr Miezis and the evidence that he was to
16 give, is that right?---That's correct.

17 And in preparing the case on behalf of VicForests and looking
18 for expert witnesses, as I understand your evidence you
19 went only to DSE and the Arthur Rylah Institute, is
20 that right?---That's correct.

21 And the reason you went there, I suggest, is because you and
22 VicForests considered that DSE was in your camp, so to
23 speak?---No, that's not correct. I mean, we made
24 enquiries with I think - I think 21 or 30 odd experts
25 as well, we made enquiries outside of the DSE.

26 Before you went to Arthur Rylah and DSE?---At the same time.

27 At the same time. And indeed you did retain I think, on
28 your evidence in your affidavit, an expert in relation
29 to the large brown tree frog, is that correct?---That's
30 correct.

31 I gather from the evidence that you have given in this

1 affidavit that you were particularly interested in
2 retaining Ms Natasha McLean as a general expert on
3 threatened species, correct?---That's not entirely
4 correct, but she was the person who was head of the
5 biodiversity group, and we were actually directed to
6 her, but we hadn't had an opportunity of meeting or
7 seeing her.

8 And you had a meeting, as I understand it from your
9 affidavit, paragraph 8, if you would just like to have
10 a look at that, Mr Kramersh. There was a meeting on
11 17 November 2009, and it was after that meeting that
12 the first letter was sent actually by Mr Pollard on
13 behalf of VicForests to DSE, and that became - that's
14 the letter at JAK 1, is that right?---That's correct.

15 So after that meeting what happened is that the requests for
16 assistance by way of witnesses from DSE was somewhat
17 more formalised, would that be a fair summary?---Sorry,
18 could you repeat the question?

19 That after that meeting on 17 November 2009, the request for
20 assistance by way of the provision of witnesses from
21 DSE was formalised?---I don't think it was formalised
22 as such. I mean this was a constant agenda item for
23 us to try and obtain access to the appropriate people
24 with the appropriate expertise so we could at least
25 talk to them and find out whether they could or could
26 not assist the defendant.

27 Yes. And I should apologise, Mr Kramersh, because that
28 letter JAK 1 actually refers already to an earlier
29 letter that had been sent, so there had been some
30 previous correspondence?---That's correct. David
31 Pollard had sent a letter which I'd settled.

1 And did you settle that letter, that's JAK 1?---Yes, I think
2 so. Just one moment, please. That's correct.
3 And can I just ask you to look at JAK 2, Mr Kramersh, so I
4 can clarify a couple of matters?---Yes, JAK 2, yes.
5 JAK 2 - - -?---Yes.
6 I had understood the evidence to be that was in response to
7 JAK 1, but it's actually addressed to Ebsworths?---Yes.
8 But your evidence is that that is in response to Mr Pollard's
9 letter, is that right?---This says "I refer to your
10 letter dated 19 November", and the letter of 19
11 November was the letter that was sent by David Pollard.
12 Okay. And Mr Pollard, as JAK 2 reveals, had sent an earlier
13 request on 11 November?---That's correct. There were
14 two requests by David Pollard; one, a request for
15 documents, and two, to request access to the witnesses.
16 All right. And it was in response to the request for
17 documents that Mr Miezis said "You are going to have to
18 give us a subpoena", correct?---That's correct.
19 Now, we then move, as I understand it from the chronology, to
20 what I will describe as a process of negotiation about
21 which experts are required and which are prepared to
22 meet and on what species, would that be a fair summary
23 of what then starts to happen?---It's not a
24 negotiation, it's I am endeavouring to obtain access, I
25 have got a short time-line that I have to comply with,
26 and I am not getting the cooperation that we need to
27 meet those time-lines. So it's not a negotiation.
28 Well, to do that you have to negotiate with DSE,
29 Mr Kramersh?---I had to apply some diplomacy because it
30 wasn't that easy.
31 And as I understand your evidence, you wanted to meet with

1 the witnesses before - the experts, before getting a
2 report from them, correct?---Yes, we wanted access to
3 them to see whether they could assist the defendant and
4 the court in the defence of this proceeding, but we
5 weren't given that opportunity.

6 So the process was not that you simply sent a request for a
7 report, but you wanted to meet with them first,
8 correct?---Absolutely.

9 And you met with Ms McLean in early December, that's the
10 evidence, isn't it?---That's correct.

11 And after that meeting, as I understand it, there were no
12 further steps taken to try and obtain any expert report
13 from her?---No, that's correct, we did not.

14 Thank you. But the discussions continued about other
15 experts after that date?---Yes. I mean, this was a
16 continual attempt by me to try and get access to the
17 appropriate people within the DSE and that expertise,
18 particularly in relation to these species.

19 And it was clear - it is clear, I suggest, on the evidence
20 that you have given, that DSE had no difficulties with
21 assisting VicForests in providing comments on the
22 plaintiff's expert witnesses, there was no difficulty
23 about that, was there, Mr Kramersh?---Well, it's not so
24 much there was no difficulty. I'd forwarded the
25 expert statements as they came with a request to
26 Dr Appleford whether he could procure some comment at
27 least to the expert statements that had been filed by
28 the plaintiff, as a fallback at the very least because
29 we didn't have access to the expert witnesses.

30 And DSE provided that assistance to VicForests and its
31 counsel, its lawyers and counsel, correct?---They did

1 provide some assistance, yes.

2 And they provided assistance in cross-examination

3 material?---No, they just provided some assistance.

4 And that continued right up and including the trial of this

5 matter?---It wasn't right up including the trial. I

6 think we got a response to the last expert statement

7 that the plaintiff filed, which I think was sort of

8 mid-February or - - -

9 Is it your evidence after mid-February that nobody at DSE, no

10 experts at DSE, or at the Arthur Rylah Institute,

11 provided the defendant or its counsel with any

12 assistance in relation to the cross-examination of the

13 plaintiff's witnesses?---That's correct.

14 Thank you. And - - -

15 HIS HONOUR: When you say they provided some assistance,

16 what did they do? Provide some written commentary, or

17 did they talk to you? What happened?---No, there was

18 just some written commentary, it was emailed back with

19 no explanations.

20 Yes.

21 MS MORTIMER: Now, in about mid-January, if I can ask you to

22 go to JAK 5, please, Mr Kramersh?---Sure.

23 And by this time the Victorian Government Solicitor had

24 become involved on behalf of DSE, correct?---That's

25 correct.

26 So there were both internal DSE lawyers involved and the

27 solicitors for the State of Victoria?---That's correct.

28 And by this letter the Victorian Government Solicitors Office

29 proffers to you and VicForests a form of undertaking

30 that it says is required before a subpoena is to be

31 issued to any DSE employee, that was the proposal from

1 the Victorian Government Solicitors Office, wasn't
2 it?---Well, they proposed that if we wanted access to
3 the witnesses, we could proffer the undertaking and we
4 could not subpoena their witnesses. But this letter
5 for the first time extended it not to just experts,
6 extended to lay witnesses.

7 Yes, I will come to that, Mr Kramersh?---Yes.

8 I just want to draw your attention to the second paragraph of
9 that letter from Stephen Lee?---Yes.

10 And ask you whether that is - you agree that that accurately
11 describes what the situation was?---Well, that's what
12 they wrote to me in my absence when I was on leave on
13 15 January, yes.

14 No, no, that you, Mr Kramersh, had - were involved in
15 discussions with Peter Appleford in December 2009 to
16 the effect that the conferences, that's the conferences
17 with witnesses, would proceed on the basis that
18 "VicForests would not subpoena or otherwise seek to
19 adduce evidence from any DSE employees without first
20 obtaining the consent of DSE." Is that an accurate
21 reflection of the discussions and the outcome that you
22 had had with Peter Appleford?---It was put a little bit
23 higher than "the discussions I had with Peter
24 Appleford", but I didn't quarrel with it because I did
25 say to Dr Appleford that I would speak to him and I
26 would consult with him before we issued any subpoena.

27 And the undertaking that the Victorian Government Solicitor
28 required, as you have pointed out, Mr Kramersh?---Yes.

29 Went to two kinds of evidence?---That's correct.

30 Both expert evidence and any evidence from any DSE
31 employee?---That's correct.

1 So fact and opinion?---Yes.

2 But nobody involved in this, including you, Mr Kramersh,
3 understood this to apply to Mr Miezis, is that
4 right?---Mr Miezis had already received a subpoena.
5 That's right. So nobody understood this proposed
6 arrangement to apply to Mr Miezis?---No, because he had
7 already been subpoenaed.

8 And it seems on the evidence, Mr Kramersh, that there are
9 four steps that are proposed to be involved at this
10 stage: there's to be some interviews or meetings
11 between possible witnesses in VicForests before
12 VicForests decides whether it wants to call them,
13 that's the first step. The second step is that the
14 witnesses have to consent. The third step is that
15 Mr Appleford has to consent. And then and only then a
16 subpoena would issue. Have I got that sequence
17 right?---That's the proposal, yes, for both expert and
18 lay witnesses.

19 And the only difficulty you had with that proposal was that
20 it extended to lay witnesses?---Well, at this stage we
21 had - we had not been given access to any of the expert
22 witnesses, and we were constrained from - - -

23 I understand that, Mr Kramersh, but I will just repeat that
24 question. As I understand your evidence the only
25 difficulty you had with that proposal was that it
26 should extend to lay witnesses; you didn't otherwise
27 express any difficulty with that proposal, those four
28 steps?---Well, I mean it was an inroad into the rights
29 that the defendant had to have access to a witness.
30 No one has ownership in the witnesses, but we were
31 being dictated to with certain terms about the terms

1 for access to witnesses. Now, either I accept it and
2 have access to the witnesses, or I don't accept it and
3 I don't speak to the witnesses at all. And there was
4 the choice, so it was sort of the lesser of two evils.
5 Neither were practical and neither were appropriate.
6 And as between two public authorities, VicForests and either
7 the Department of Sustainability and Environment or the
8 State of Victoria, however you want to characterise the
9 person on the other side?---Yes.
10 You were comfortable with the proposal that involved an
11 agreement between two public authorities about the
12 terms on which a person with relevant evidence of an
13 opinion nature would be subjected to a subpoena, and
14 you were comfortable with that, is that right?---Sorry,
15 could you repeat the question?
16 Yes, I will, it's complicated. The starting point is that
17 this is an agreement or an arrangement that has been
18 made between two public authorities. Possibly on the
19 one hand the State of Victoria, certainly the
20 Department of Sustainability and Environment, do you
21 agree with that?---Yes.
22 And VicForests - - - ?---Well, sorry, it's not an agreement,
23 it's a proposal. It's a letter that comes - this is
24 the arrangement they are proposing. I see this as
25 dictating to me the terms of the access to witnesses.
26 It wasn't an agreement, in my opinion.
27 Well, you were prepared to give an undertaking that involved
28 the same four steps so long as it did not apply to lay
29 witnesses, that's right, isn't it?---That's correct.
30 But that was at the end of January, we had not been
31 given access to any of the DSE's expert witnesses, and

1 it was clear that we weren't - - -
2 So - - - ?---Going to be given that access. Sorry.
3 All right. And so by the end of January there was an
4 arrangement in place of the kind I have described, that
5 is that you wanted to have access to the witnesses,
6 then make a decision about whether you wanted to call
7 them, then get their consent, then get Mr Appleford's
8 consent, and only then issue a subpoena. And in
9 relation to the experts, that was the arrangement to
10 which you were prepared to agree and you did
11 agree?---There was no agreement. I put forward a
12 counterproposal which varied the form of the
13 undertaking to limit it to, only to the expert, or what
14 they called in the form of the undertaking drafted by
15 the VGSO as Order 44 witnesses. But insofar as the
16 other witnesses, I proffered a different version, I
17 changed the format using as best as I could the format
18 that had been proffered in the 15 January letter in my
19 form of undertaking which I think was dated 28 January
20 2010. But that was never agreed to by the VGSO.
21 They never came back and said "We agree to the terms of
22 your undertaking." They maintained the position which
23 was dictating to me what the barest minimum was that I
24 could get to have access to their witnesses.
25 All right. So your evidence - - -?---There's no agreement.
26 All right. And that's because they wished to maintain the
27 position that the undertaking would apply to lay and
28 expert, and you wished to maintain the position that it
29 would only apply to experts; and you never reached a
30 resolution of that, is that what you are
31 saying?---That's correct. And what I intended to do

1 was at least get access of the barest minimum to their
2 lay witnesses.

3 Well, you already had access to Mr Miezis?---Yes, but
4 Mr Miezis, as I said, he had been subpoenaed well
5 prior, we'd closed that off, and we had that
6 confirmation from the general counsel of DSE.

7 And just so I understand the position, Mr Kramersh. So you
8 didn't have any professional difficulty with an
9 undertaking arrangement in the sense that you thought
10 this was in your client's interests and this was the
11 only way you were going to be able to get access to
12 people who could give relevant expert evidence on
13 behalf of your client?---I should first say that it's
14 not - it's not a professional difficulty, but rather
15 the undertaking is being given by the client, and I
16 would give it on behalf of the client. But it's - I
17 think if you see the wording - - -

18 Yes?---It's "the defendant undertakes", it's not me who is
19 undertaking.

20 Yes, yes, I accept that. All right. And so you didn't see
21 anything appropriate with your client as a public
22 authority giving an undertaking like that?---Well, it
23 was - - -

24 Inappropriate, you didn't see anything inappropriate with
25 your client as a public authority giving an undertaking
26 like that?---Not that it was inappropriate, it was -
27 it's not the most practical way to conduct the defence
28 of a very serious piece of litigation, to be
29 constrained in this way. But we really had no choice.

30 Can I ask you to consider two matters, Mr Kramersh?---Sure.

31 And I would like you to tell His Honour whether you

1 considered them and whether you think there is anything
2 inappropriate about either of the versions of
3 undertakings based on these two things. Firstly, that
4 an arrangement that involves consent and undertakings
5 before a subpoena is issued of this kind really gave
6 Dr Appleford a veto to prevent relevant evidence being
7 given, even if a witness was willing to give it, do you
8 agree with that?---Well, that's the difficulty I had
9 with the terms that were dictated to us.

10 I understand that. And the second aspect that is
11 inappropriate about this undertaking arrangement - I
12 just want you to consider whether you agree with
13 this?---Yes.

14 Is that it could put pressure on a witness who had agreed to
15 give evidence under this kind of arrangement, knowing
16 in a sense that his or her employer had a power of veto
17 and had permitted them to give evidence, and that's
18 also rather unsatisfactory, Mr Kramersh, isn't
19 it?---Well, I think as was articulated by Mr Stafford,
20 one of the DSE's concerns was that there was a code of
21 - I think it was a code of public policy - that
22 constrained employees of the government to cast or give
23 opinion evidence, and he referred to that I think in
24 one of the correspondence to me, the one that you
25 referred to earlier.

26 Yes, but you wouldn't accept for one moment, Mr Kramersh,
27 would you, that a code of conduct like that could
28 preclude a person with expertise answering a
29 subpoena?---Well, that's not a question I can answer.
30 I certainly believe witnesses are available, no one has
31 ownership to witnesses, and one should have access to

1 witnesses. But as you can see from the
2 correspondence, and I have been absolutely open, I have
3 bared my book open for you, I have provided you with
4 documents to show you exactly what were the constraints
5 that were placed on the defendant.

6 I understand that. But can I just ask you to consider that
7 question I asked again?---Yes, sure.

8 You wouldn't agree for one moment, would you, Mr Kramersh,
9 that a code of conduct, like the public service code of
10 conduct, could be used to preclude a person with
11 relevant expertise, who can give relevant opinion
12 evidence in a proceeding, from answering a
13 subpoena?---I am not familiar with that code of
14 conduct, but it does offend one's ability to bring
15 people before the court with appropriate knowledge, of
16 course. But that's a code of practice within the
17 government.

18 And just to return now to the chronology for a moment?---Yes,
19 sure.

20 So by about 23 February, as I understand your evidence. And
21 I am now on about JAK 10, so that's paragraph 33 of
22 your evidence and JAK 10?---Yes.

23 The position had been reached that on behalf of VicForests
24 there was essentially an abandonment of any further
25 attempts to retain DSE expert witnesses, except for
26 Mr Chick and except for what might be done with
27 Mr Henry, is that a fair summary?---No, it's not. I
28 don't think it was an abandonment.

29 Okay. What would you describe it as?---It was a
30 continuation of the inordinate difficulties that I was
31 having to get access to the DSE witnesses.

1 Well, can I just ask you to go to JAK 10, please,
2 Mr Kramersh?---Yes, of course.
3 And can we just work through that email at JAK 10?---Yes.
4 The subpoena had been served on Mr Chick, but with no
5 undertakings provided, is that the position?---That's
6 correct. So there's no undertakings have been given
7 by me. My version of the undertaking was not accepted
8 by DSE, so there was no, as you earlier referred to,
9 agreement, there was no such agreement. And the
10 subpoena was not served on Mr Chick, but it was served
11 on the VGSO, they had instructions to accept service,
12 that's correct.
13 So you took what could well be described as an orthodox
14 approach and just issued a subpoena to a witness you
15 wanted to adduce evidence from?---Well, I think as
16 paragraph 29 states, we wanted to get the 2006 potaroo
17 report, as I have colloquially referred to it, into the
18 agreed book of documents, and that was rejected. So
19 immediately the rejection came through and we
20 endeavoured through counsel to try and see if we could
21 reach some agreement. That was not - no agreement
22 could be reached, so I issued the subpoenas the same
23 day that the rejection of that document in the agreed
24 book was placed in.
25 And that's because, Mr Kramersh, as you well understood, I
26 would suggest, you wanted to prove the expert opinion
27 that was contained in that report by Mr Chick,
28 correct?---Well, partly the expert opinion, but partly
29 the facts and the surveys that had been conducted. I
30 think that was a very important bit of information,
31 yes.

1 Yes. And so you took an orthodox and regular approach to
2 subpoenaing Mr Chick?---That's correct.
3 And in this JAK 10 you inform Mr Stafford - - - ?---That's
4 correct.
5 That you still want to meet with Stephen Henry?---That's
6 correct.
7 But then you inform Mr Stafford in the third paragraph: "At
8 this stage we do not wish to secure the attendance of
9 other DSE witnesses and we are enquiring whether you
10 could approach Stephen Henry", and so forth. And it's
11 that, Mr Kramersh, that I have characterised as an
12 abandonment - - -?---No.
13 Of seeking any other witnesses, at this stage, and because
14 perhaps of the pressures of time and trial?---No, the
15 reference to "secure the attendance of other DSE
16 witnesses" by subpoena, that's what the securing the
17 attendance - - -
18 I see, I see?---To secure the attendance by compulsion of an
19 order.
20 I see, all right. So your evidence is that you were still
21 trying to pursue expert witnesses on 23 February
22 2010?---That's correct. All witnesses. Any.
23 And what then happens, as I understand it, is that the
24 subpoena to - I withdraw that. Start with the
25 subpoena to Mr Chick. The subpoena to Mr Chick is to
26 attend to give evidence and produce documents,
27 correct?---Yes, because he was the author of the
28 report.
29 Yes. If I take you now to paragraph 34 of your
30 affidavit?---Yes.
31 The next step in the chronology as you recount it is that you

1 decided to give on behalf of your client a full
2 undertaking, that is as to fact and opinion in relation
3 to Mr Henry, as you say, solely to secure a meeting
4 with him?---That's right.

5 And that undertaking was accepted at least to the extent that
6 you were able to meet with Mr Henry at the Quest
7 Apartments in Sale on 1 March, the first day of this
8 trial?---Yes. I mean, a very inconvenient time, and
9 at the eleventh hour to have a witness, a potential
10 witness meet you.

11 And you had a very detailed conference that morning with
12 Mr Henry, didn't you?---Yes, it was a - I think it ran
13 for an hour, or just over an hour.

14 And when Mr Henry - I withdraw that. And so far as your
15 evidence then recounts the events, nothing - there were
16 no communications between you and any of DSE's lawyers,
17 whether it's internal or VGSO, about Mr Henry giving
18 evidence between 1 March 2010 and 12 March 2010, is
19 that right?---After Mr Henry had given his evidence,
20 yes, that's right.

21 After you met with him there was no contact - - -?---There
22 was, because after the meeting with Mr Henry I received
23 a communication from the VGSO, from Jason Rosen, to
24 confirm that the undertaking that I had proffered was -
25 if I could confirm that formally - - -

26 And that - - - ?---Back to the VGSO.

27 I'm sorry, Mr Kramersh?---That's all right.

28 And that's what you recount in paragraph 37?---I think that's
29 correct. Yes.

30 Sorry, 36 and 37?---37, yes.

31 One email from Mr Rosen and then an email back?---Yes, that's

1 his request I think after the meeting, because it's at
2 2.11 pm.

3 Yes?---And then mine later that evening after court.

4 And after that communication from you to Mr Rosen on 1 March
5 2010, at approximately 6.36 pm, there were no
6 communications by you or anyone on behalf of VicForests
7 with Mr Henry from then until your telephone call that
8 you refer to in paragraph 38, is that right?---That's
9 correct.

10 And when Mr Henry told you on 12 March 2010 that he preferred
11 not to give evidence, you did not press a subpoena on
12 him, correct?---No.

13 And the reason you didn't press a subpoena on him was because
14 you had placed yourself in a position where you could
15 not do that consistently with the undertaking you had
16 given, correct?---That's correct. Either I see the
17 witness and hear what he says and give the undertaking,
18 or I don't see him at all and fly blind.

19 And that was an option, Mr Kramersh?---And those were the
20 choices.

21 It was an option for you, using your words, to "fly blind"
22 with Mr Henry, wasn't it?---Certainly an option, but
23 not an appropriate one, in my view.

24 And you had seen all the documents discovered on subpoena by
25 DSE containing a lot of material from Mr Henry,
26 correct? You'd seen those?---Yes, but I don't believe
27 in any way that's a complete understanding of
28 Mr Henry's contribution that he could make.

29 And you had seen all the documents that your own client had
30 which were communications to and from Mr Henry,
31 correct?---Yes, but also not complete.

1 But nevertheless - I withdraw that. Now, Mr Chick was and
2 remains under a subpoena, Mr Kramersh, is that
3 right?---That's correct.

4 But he is not being called, is that correct?---That's
5 correct. Because the report was admitted into
6 evidence completely.

7 It's not because Mr Chick, and I quote "Doesn't have the
8 detailed knowledge of the survey, history, species
9 distribution and location of suitable habitat for the
10 long footed potoroo in East Gippsland, particularly
11 Brown Mountain"; that is a quote from the evidence you
12 have given, and is that the reason he is not being
13 called?---There was a communication from doctor, I
14 think Dr Peter Appleford to me, but I don't accept
15 that.

16 Well, that was Dr Appleford's view?---He is telling me that.
17 Yes?---He has met the witness, he has spoken to him, I
18 assume, otherwise how could he have written that to me.
19 I haven't, so I don't know.

20 And is it your evidence you did not pay any attention or take
21 any account of what Dr Appleford told you about the
22 quite significant limits on Mr Chick's expertise and
23 knowledge?---Well, obviously he is the person who has
24 some dealings with Mr Chick. I don't know Mr Chick,
25 and I don't know his experience, other than he was the
26 author of the report and he had co-authored that report
27 with other experts in the field.

28 Did you accept what Dr Appleford said to you in that email
29 about the limits on Mr Chick's expertise?---Well, I
30 don't know whether I accepted it or not. I read his
31 email and that's what he said.

1 Did you factor that in to a decision about whether you should
2 call on the subpoena to Mr Chick?---No, not at all.
3 The subpoena to Mr Chick was directed to the admission
4 of the report, nothing else.
5 If Your Honour pleases, I have no further questions.
6 <RE-EXAMINED BY MR WALLER:
7 Mr Kramersh, at the beginning of your cross-examination you
8 were asked whether you'd made any enquiries outside of
9 the DSE to make contact with and possibly call expert
10 witnesses?---Yes.
11 And you mentioned that you had, I think you used the figure
12 of 20 or something?---Yes.
13 Of those experts outside of the DSE, putting aside Mr Garry
14 Daly, were any of those experts willing and able to
15 assist the defendant in this proceeding?---No.
16 No further questions, Your Honour. And Mr Daly, what was
17 his species expertise, if any?---Brown tree frog.
18 Your Honour, I have no further questions.
19 HIS HONOUR: Yes, thank you. Thank you, Mr Kramersh.
20 <(THE WITNESS WITHDREW)
21 (Witness excused.)
22 HIS HONOUR: Yes?
23 MR WALLER: Your Honour, the final witness for the defendant
24 is Professor Ferguson.
25 HIS HONOUR: Yes.
26 MR WALLER: I am not sure that he is outside court, but if he
27 is we will have him called. Would it appropriate to
28 stand the matter down for 5 minutes?
29 HIS HONOUR: Yes, you can set yourselves up and - - -
30 MR WALLER: If Your Honour pleases.
31 (Short adjournment).

1 HIS HONOUR: Yes, Mr Waller.

2 MR WALLER: Your Honour, we call Professor Ian Stewart
3 Ferguson.

4 HIS HONOUR: Yes.

5 <IAN STEWART FERGUSON, sworn and examined:

6 MR WALLER: Professor Ferguson, please be seated. Could you
7 restate your full name?---Ian Stewart Ferguson.
8 And your address?---79 Athelstan Road, Camberwell.
9 And are you a Professor Emeritus of Forest Science at the
10 Department of Forest and Ecosystem Science at the
11 Melbourne School of Land and Environment at the
12 University of Melbourne?---I am.
13 Yes. Is that your only occupation?---I am also a consultant
14 and a company director.
15 Yes. Professor Ferguson, have you sworn an affidavit in
16 this proceeding?---I have.
17 Could I have this document shown to you. Now, Professor
18 Ferguson, is that the affidavit you have sworn in this
19 proceeding?---It is.
20 And that was sworn by you on 29 January 2010?---It was.
21 And exhibited to that affidavit are two exhibits. First
22 your curriculum vitae?---Correct.
23 And secondly, a copy of your report to the court?---Correct.
24 And your curriculum vitae, which is Exhibit 1, that is a true
25 and accurate statement, is it?---It is.
26 Exhibited or appended to your report, which is Exhibit 2 of 3
27 appendices, are the first appendix; the first appendix
28 attaches letters of instruction from HWL Ebsworth
29 Lawyers to yourself. I would like to show you another
30 document, if I may - a copy to His Honour. Professor
31 Ferguson, is that a document dated 30 September 2009

1 from HWL Ebsworth Lawyers to you which was the first
2 official communication that you had received from those
3 lawyers?---It is.

4 Yes. And that preceded the formal letter of instruction of
5 30 October 2009 included in appendix 1?---That is
6 correct.

7 Your Honour, I tender that letter of 30 September.

8

9 #EXHIBIT Q - Letter of instructions of 30/09/2009 to
10 Professor Ferguson.

11 MR WALLER: Now, Professor Ferguson, in your report of 28
12 January 2010 you set out facts and you express
13 opinions, don't you?---Yes.

14 Are the facts that you have set out in your report true and
15 correct?---Yes.

16 And are the opinions that you set out in your report your own
17 opinions?---Yes. I should backtrack, if I may, on one
18 fact, a misstatement of a figure that relates to the
19 number of hollow bearing trees.

20 Yes?---Which is shown as 12 and should be 8.5.

21 Are you able to direct the court's attention to where that
22 appears?---It's under the section dealing with hollow
23 bearing trees.

24 Is that on page 12?---That's correct. The penultimate
25 paragraph of section 2.1.

26 Where it refers to "12 per hectare", that should be - - -
27 ?---8.5.

28 Yes. With that amendment, are the facts stated in the
29 report correct?---Yes, they are.

30 And the opinions stated in the report are your own
31 opinions?---They are.

1 And are they honestly based?---They are.

2 Honestly held?---They are.

3 Yes. Your Honour, I tender the affidavit of Professor
4 Ferguson and the exhibits.

5

6 #EXHIBIT R - Affidavit and exhibits of Professor Ferguson.

7

8 MR WALLER: Now, with Your Honour's leave and in accordance
9 with the order Your Honour made on 25 February, I would
10 like to ask Professor Ferguson some questions
11 specifically relating to the square tailed kite, the
12 new taxon, and the giant burrowing frog.

13 Now, Professor Ferguson, your report does not
14 deal with the square tailed kite, does it?---No, it
15 does not.

16 And your report doesn't deal with the giant burrowing frog
17 either?---No.

18 Your report does deal with the new taxon, does it not?---Yes.

19 Yes. You have been provided, have you not, since you
20 prepared this report, with material filed by the
21 plaintiff in relation to the square tailed kite?---I
22 have.

23 And also material filed by the plaintiff in relation to the
24 giant burrowing frog?---Yes.

25 And you'd already been provided with material in relation to
26 the new taxon?---Correct.

27 Yes. In relation to the square tailed kite, having regard
28 to the material that you have seen, and I refer to the
29 material of Mr Bilney and Dr Debus, and assuming some
30 other matters that I want to take you to, I want to
31 then ask you to express an opinion concerning the

1 application of the precautionary approach in relation
2 to the square tailed kite and any proposed harvesting
3 in the Brown Mountain forestry coupes. Now, if I
4 could now set out for you the matters that I want you
5 to take into consideration in expressing that opinion.
6 First, the matters that you have seen already generally
7 and which you have relied upon in providing your first
8 report, and any other matters, I should say, that you
9 consider relevant to answering the question. Second,
10 the evidence you have seen of the plaintiffs relating
11 to the square tailed kite. In addition I want you to
12 assume that the evidence from Dr Debus established that
13 the square tailed kite has a large home range of
14 between 5,000 and 10,000 hectares. Further, that the
15 four coupes in question comprise about 1 per cent of
16 that home range. Next, that a square tailed kite has
17 been seen flying - I should say perhaps two square
18 tailed kites have been seen flying over coupes 19 and
19 20. Next, that Dr Debus has given evidence that where
20 in his experience there's been alternate coupe logging
21 and habitat tree retention in New South Wales, kites
22 have persisted. And that evidence was given, for the
23 court's information, at transcript pages 658 and 659.
24 That the logging in New South Wales involving alternate
25 coupe logging involved logging coupes of about 20 to 30
26 hectares each which were dispersed in space and in
27 time, and that kites in those coupes were sighted every
28 year thereafter. Next, that Dr Debus gave evidence
29 within those pages of the transcript that there did not
30 appear to be any threat posed to the kite by that sort
31 of logging. And next, and finally, at page 669 of the

1 transcript, where Dr Debus said that "The situation
2 likely to occur in Brown Mountain would replicate or
3 closely replicate that which occurred in the study in
4 New South Wales that I have referred to earlier."

5 Now, bearing all of that in mind, could I ask you
6 to express an opinion about the application of the
7 precautionary principle vis-a-vis the kite in the same
8 way that you have done in respect of other
9 creatures?---Firstly, given the two sightings of the
10 kite that have taken place, that would provide me with
11 confidence that the kite is present in the area despite
12 the fact that there has been harvesting going on since
13 the 1950s and indeed harvesting in the immediate
14 proximity of some of the coupes under discussion. So
15 anecdotal evidence I think is in a sense encouraging as
16 to the fact that those kites exist and are there. Now,
17 the evidence that you have suggested in terms of the
18 arrangement of coupes is a condition that I would
19 expect to be managed under the forest management plan
20 to ensure that the coupes are relatively small, are not
21 adjacent year by year in area but rather dispersed
22 territorially. So all of that would add to supporting
23 the degree of comfort I would have in relation to the
24 precautionary approach for the kite. And that would
25 bring me to try and weigh the risk-weighted
26 consequences which seem in the case of the kite to be
27 small both in terms of risk and probability and damage,
28 against what I think are much more significant
29 risk-weighted consequences in relation to the jobs in
30 the industry that would be affected by a cessation of
31 harvesting over those particular coupes.

1 The concerns I have in relation to that change in
2 jobs that would be triggered is that these coupes
3 supply a species which are particularly critical in
4 terms of the volumes of spanning out the allocation
5 order program over the next 15 years or so, and beyond
6 indeed, until such time as the regrowth harvesting
7 comes into play, in the production, age of production
8 and utilisation. The species, the ash type species
9 are particularly critical in that. They are the ones
10 that are most scarce by a very long shot relative to
11 mixed species, and they have to be eked out over that
12 time-span to provide sustainability for the industry
13 over that period.

14 HIS HONOUR: Is the shining gum the principal ash type
15 species on these coupes, as I understand it?---One of
16 them, yes. Of course there's also cut-tail, which you
17 can say is an ash type species also, Your Honour.

18 Yes.

19 MR WALLER: Now, you mention - what particular product,
20 timber product is produced from that species?---Well,
21 from a shining gum and the ash type species generally,
22 go into higher valued joinery furniture, flooring type
23 manufacture. They have a higher price in terms of
24 stumpage, they have a much higher selling price in
25 terms of the final product in general than some of the
26 other species. One can find exceptions, obviously.
27 I am talking about in general relative to the mixed
28 species.

29 We have seen in the evidence reference to D plus sawlog.

30 Does that have anything to do with what you have just
31 said?---Indeed. It is the D plus sawlogs - - -

1 MS MORTIMER: Your Honour, I object to this evidence. I
2 object to this evidence because it goes way outside
3 anything to do with these species, and it is clearly
4 designed to try and fill gaps now appreciated by the
5 defendant in its case, perhaps as a consequence of Your
6 Honour's ruling. And we have been given no notice
7 whatsoever of any of this evidence. And it is not in
8 accordance with Your Honour's ruling which was limited
9 to consideration of the species. And Professor
10 Ferguson gives none of this detailed evidence in his
11 report.

12 HIS HONOUR: Well, Mr Waller, this factor is a factor
13 generally applicable to the assessment of risk-weighted
14 consequences, isn't it, in relation to each of the
15 species which Professor Ferguson has already addressed?

16 MR WALLER: That is so.

17 HIS HONOUR: And he has given some evidence about this
18 already. But if objection is taken to him elaborating
19 on it further - - -

20 MR WALLER: Could I say this, Your Honour: at page 19 of the
21 professor's report, in dealing with the risk-weighted
22 consequences, the professor says "The losses of area
23 and volume to the timber industry and dependent
24 communities are therefore immediate and irreversible
25 because of the species and log grades involved and the
26 nature of the allocation order."

27 HIS HONOUR: That's right, and it seems to me that what he
28 has been saying elaborates that, and I don't have any
29 difficulty with that elaboration provided it's not
30 objected to. But once it's said "Look, we are
31 descending into areas of detail of which no notice has

1 been given", then the problem is that it's really
2 evidence on the face of it, as Ms Mortimer says,
3 elaborating his prior opinion rather than specifically
4 addressing the situation in relation to the kite, which
5 he has already done and on the bases that you have put
6 might not be thought to be the most pressing part of
7 the plaintiff's case, without wishing to be taken to
8 have expressed a concluded view. But you understand
9 what I am saying.

10 MR WALLER: I do.

11 HIS HONOUR: Under cover of answering the evidence about
12 the kite, you are now really elaborating what he has
13 previously said. I agree that he has previously
14 covered this topic, and the question is to what extent
15 should he be allowed to further elaborate it in-chief.
16 If he is not cross-examined on it, in a sense he said
17 what he said.

18 MR WALLER: That's so. Could I say this, Your Honour, and I
19 - - -

20 HIS HONOUR: If he is cross-examined on it, then the area
21 is going to be opened up.

22 MR WALLER: Indeed. If he is not challenged in
23 cross-examination on what he said, Your Honour is quite
24 correct. I must say, Your Honour, it is true that
25 where an objection is taken that Your Honour has to
26 deal with it. But given the way the evidence of
27 experts proceeded hitherto, with an average of 10 to 12
28 pages of examination-in-chief of the plaintiff's
29 experts, elaborating what they'd said without objection
30 for the benefit of the court - - -

31 HIS HONOUR: I agree with all that, and I agree that it's

1 often useful to summarise, if you like, critical
2 aspects of the witness' opinion. But if the objection
3 is taken that it's really doing more than that, and
4 that it's fresh evidence, then given that we have gone
5 this far on the basis of a trial on affidavit, I think
6 there is a bit of a problem.

7 MR WALLER: Your Honour, I don't press it.

8 HIS HONOUR: Yes.

9 MR WALLER: Could I ask you, Professor Ferguson, to turn your
10 attention now to the giant burrowing frog, and I want
11 you to answer the same question that I'd asked in
12 relation to the kite and which you have addressed in
13 relation to the other specie, but this time by
14 reference to the giant burrowing frog. You have said
15 that you have already been provided with further
16 material, principally from Dr Gillespie, which goes to
17 the giant burrowing frog. I want you to assume in
18 answering the question these matters as well. First,
19 that Brown Mountain Creek is a second order stream
20 within the meaning of the relevant action statement.
21 Second, that the giant burrowing frog generally breeds
22 in streams. Third, that when not breeding the giant
23 burrowing frog occupies non riparian habitats up to 250
24 metres away from breeding sites. Next, that in
25 Dr Gillespie's opinion a 300 metre buffer away from the
26 stream is required for adequate protection. And
27 finally, that there are no known breeding sites for the
28 giant burrowing frog in the Brown Mountain Creek area.
29 Now, having made those assumptions and relying on
30 other matters you consider relevant, is the proposed
31 harvesting in these four coupes consistent with a

1 precautionary approach insofar as the giant burrowing
2 frog is concerned?---If I understand your question,
3 perhaps I could ask you to repeat the initial part of
4 it again in relation to the conditions that we are
5 considering.

6 Yes. Those are the assumptions: first, that Brown Mountain
7 Creek is a second order stream within the meaning of
8 the action statement. Next, that the giant burrowing
9 frog generally breeds in streams. Third, that when
10 not breeding the giant burrowing frog occupies non
11 riparian habitats up to 250 metres away from breeding
12 sites. Fourth, that in Dr Gillespie's opinion a 300
13 metre buffer away from the stream is required for
14 adequate protection. And finally that there are no
15 known breeding sites for the giant burrowing frog in
16 the Brown Mountain Creek?---Given that there are no
17 known breeding sites, then it seems to me that the
18 issue for this species is particularly one of its
19 occurrence, and I note that in the action statement and
20 references to that species, that it is very widely
21 spread but very scanty in occurrence. And I note that
22 Dr Gillespie in his evidence referred to a significant
23 probability of occurring on a site, even though it had
24 not been discovered. I have some problems with that
25 statement in the sense of significant probability. I
26 would agree that there's a non negligible probability,
27 but the evidence of occurrence suggests that the
28 probability is very low. So on that basis I would
29 argue that the precautionary approach would be best
30 served by ensuring that there is much more research
31 done on the identification of sites of the frog and its

1 dispersal patterns. I do not believe that there is -
2 the risk-weighted consequences would weigh towards
3 cessation of harvesting for that purpose.

4 Could Professor Ferguson be shown volume 2 of the agreed
5 book, please. Now, I would ask, Professor Ferguson,
6 that you turn, if you would, to page 600, and do you
7 recognise that document?---I do.

8 That's the action statement under the Flora and Fauna
9 Guarantee Act for the giant burrowing frog. I want to
10 draw your attention in particular to page 602 under the
11 heading "Intended management action", and in particular
12 the subheading "Timber harvesting", and ask you to
13 reacquaint yourself with those paragraphs?---I have.

14 Now, in particular you will see that it states as an intended
15 management action "Introduce the following management
16 practices at all sites where the giant burrowing frog
17 has been recorded since 1980, and at all sites
18 discovered after the production of this action
19 statement", second bullet point, "Stream records on
20 second or higher order stream: No harvesting or new
21 roading inside a 100 metre buffer each side of the
22 stream for 1 kilometre upstream and downstream of the
23 record." Now, do you consider, in light of the
24 matters that I have asked you to take into account, and
25 in light of that part of this action statement, that
26 harvesting of the coupes in Brown Mountain, observing a
27 100 metre buffer each side of Brown Mountain Creek, so
28 far as the creek runs through those coupes, would be an
29 adequate and proper application of the precautionary
30 principle?---I do.

31 Your Honour, I have no further questions.

1 HIS HONOUR: Mr Waller, does the court book contain the
2 definition of "second order stream" to which you have
3 referred, because it may do but I haven't picked it up.

4 MR WALLER: Your Honour, I believe it may be in the forest
5 management plan.

6 HIS HONOUR: Yes.

7 MR WALLER: But I will confirm that now.

8 HIS HONOUR: Well, that's - - -

9 MR WALLER: I am indebted to my learned friend. It's
10 actually in the action statement at page 603.

11 HIS HONOUR: I see.

12 MR WALLER: Which says "For the purposes of" and then it goes
13 on to I think define what they constitute.

14 HIS HONOUR: Yes, thank you.

15 MR WALLER: If Your Honour pleases.

16 HIS HONOUR: Yes.

17 <CROSS-EXAMINED BY MS MORTIMER:

18 Professor Ferguson, can I ask you first to go to Exhibit ISF
19 2, which is the cover page to your report, the one
20 that's headed "Expert witness report". Yes, I think
21 that can - perhaps Your Honour's associate could remove
22 that agreed book.

23 HIS HONOUR: Yes.

24 MS MORTIMER: Thank you. Got that page?---Which page?

25 The one that's headed "Expert witness report". So if you

26 look for Exhibit ISF 2, it's just after your curriculum
27 vitae?---Yes.

28 Do you have that page?---Yes, I do.

29 Good. Now, you describe your specialist field as "forest
30 management, economics and policy", and that's in your

31 view an accurate summary of your specialist field?---It

1 is.

2 And your specialist fields are not ecology?---No.

3 Zoology?---No.

4 Conservation biology?---No.

5 Botany?---To the degree that botany is involved in much of

6 forestry.

7 Yes?---I would claim some expertise in botany.

8 So botany in terms of the growing and caring for

9 trees?---Correct.

10 Correct?---The same comment I should make in relation to

11 ecology of course. There are elements of ecology, and

12 that includes some knowledge of wildlife management and

13 other matters at a professional level rather than a

14 scientific level.

15 I understand, thank you. And you haven't engaged in any

16 sustained research into the ecology or biology of any

17 of the species that you see there on the photo

18 board?---No, I haven't.

19 And you haven't published any papers, peer reviewed or

20 otherwise, on any of those species?---No.

21 And you haven't undertaken for the purposes of preparing your

22 report for this proceeding any detailed research about

23 the habitat requirements, breeding cycles, breeding

24 success, current population, distributions of any of

25 those species?---Other than reading other expert

26 witness statements and the action statements, and what

27 immediate relevant literature might be available, no.

28 I see. And would I be right, Professor Ferguson - well,

29 perhaps we will just go through the things that you

30 have had a look at. So you have had a look at the

31 plaintiff's expert witness statements,

1 correct?---Correct.

2 And can I just run you through each of those because they are
3 not referred to in appendix 1 of your report, and I
4 just want to be clear about the ones that you have
5 seen. You have seen Mr McCormack's report on the
6 crayfish?---Yes, I have.

7 And you have read that?---Yes.

8 And you have seen Dr Bilney's report on the powerful owl and
9 sooty owl?---Yes, I have.

10 And you have seen Dr Gillespie's report on both - two reports
11 on the large brown tree frog and the giant burrowing
12 frog?---I have certainly seen the burrowing frog, I am
13 just trying to think whether I have actually seen a
14 Gillespie report on the giant tree frog.

15 On the large brown tree frog?---The large brown tree frog.
16 I would have to consult my notes to be sure of that.

17 Yes. And at some convenient point, Professor Ferguson, I
18 might get you to do that, because as I say they are not
19 referred to - I couldn't find that one in your report,
20 so I will ask you to do that when it's convenient.

21 What about Dr Belcher's report on the spot tailed
22 quoll?---Yes.

23 You have read that? Have you read Dr Meredith's report on
24 hollow bearing trees?---Yes, I have.

25 Have you read Dr Meredith's report on the long footed
26 potoroo?---Yes, I have.

27 Have you read Dr Meredith's critical habitat report?---I
28 believe so, but I would need to check that also.

29 All right. And you have read Dr Debus' report on the square
30 tailed kite?---I have.

31 And you haven't visited the coupes?---No, I haven't.

1 And you haven't undertaken any surveys or research about the
2 habitat requirements of these species yourself?---No, I
3 haven't.

4 And Dr Smith's report on the gliders, have you seen that
5 one?---Yes, I have.

6 Thank you?---That in combination with a number of other
7 reports came after I'd written my statement.

8 And you don't, I take it, dispute the expertise of any of
9 those gentlemen about the species on which they provide
10 reports?---No, I don't.

11 Could you turn now, Professor Ferguson, to that first part of
12 your report that deals with the history and background
13 of the regulatory scheme about forestry management in
14 Australia, I just want to ask you a few questions about
15 that. Now, you begin by giving a history of the
16 regulatory system, and I just want to clarify a matter
17 that's in the first paragraph under the heading
18 "History of the regulatory system". The last sentence
19 of that paragraph says - the one that starts "While
20 some people believed", see that sentence?---I can, yes.

21 Is that a summary of how you understood community
22 perspectives in the early 20th century to be, is that
23 what you were describing there?---Yes, it is.

24 Thank you. Now, page 5, if you can go to page 5 of your
25 report that's where - right down the bottom in the
26 paragraph starting "In the period since the 1986 timber
27 industry strategy", what we then see from page 5
28 through to page 9 of your report is, as I understand
29 it, an extract from one of your own earlier
30 publications, is that correct?---That's correct.

31 And that is the publication that's referred to in footnote 6,

1 correct?---Yes.

2 And that was a publication that was going to, as I understand
3 that journal, an international audience, is that
4 right?---Yes, it was.

5 And so an audience that wasn't really very familiar with the
6 development of national forest policy in
7 Australia?---Correct.

8 And you were describing that, correct? And as I understand
9 it, your general summary of the development in
10 Australia, especially through the 1990s in that
11 extract, is a summary from your perspective of that
12 development, correct?---It is.

13 And I want to take you to some examples of where it appears
14 that there are comments from your particular
15 perspective and ask you about those. Can you go to
16 page 7, please. Is this the part where you are
17 describing the National Forest Policy Statement, that's
18 right, isn't it?---Correct.

19 And, Your Honour, that's Exhibit 50 in this proceeding. And
20 at the top of page 7 you make this statement, or you
21 made it in the journal article, this statement: "Two
22 provisions in the National Forest Policy Statement
23 deserve special mention because of the changes they
24 were to institute." And the two that you have
25 selected are binding codes of practice and the CAR
26 reserve system, the comprehensive and adequate reserve
27 system, those are the two that you selected,
28 correct?---Correct.

29 But for example, Professor Ferguson, another reader of the
30 National Forest Policy Statement might read at page 8
31 of the National Forest Policy Statement this sentence:

1 "Two of the principal objectives of this statement are
2 the maintenance of an extensive and permanent native
3 forest estate in Australia and the protection of nature
4 conservation values in forests." And you would agree
5 with me, wouldn't you, that a reader with a different
6 perspective of the National Forest Policy Statement
7 might have picked out other features of that statement
8 as the most significant?---That's true, but the
9 reference to "national reserve system", of course,
10 covers part of what you have referred to.

11 Yes, I understand that. But you don't really disagree with
12 that proposition, that readers from different
13 perspectives can draw different emphasis out of the
14 National Forest Policy Statement?---Of course. I
15 think these particular two were emphasised considerably
16 by government at the time, ministers at the time.

17 And the second statement that I am going to suggest to you
18 reveals a particular perspective is just under those
19 dot points, where you say that the dispute about the
20 wood chip export licences during the 1990s in
21 particular led to a chaotic national protest in 1994.
22 That involves, Professor Ferguson, a value judgment on
23 your part about that protest, doesn't it?---I wouldn't
24 have thought from the newspaper reports that one would
25 find chaotic an inaccurate description of it. I am
26 not making judgments about the protest.

27 Well, those who sincerely held the beliefs for which they
28 were protesting - - -?---Absolutely.

29 May well have not thought that what they were doing was
30 chaotic, Professor Ferguson, do you agree with
31 that?---That's true, they may not have.

1 And you don't mention in that part of your description of
2 what was happening during the 1990s, for example the
3 very significant and controversial cases in the High
4 Court of Australia about the Commonwealth attempts to
5 control logging in the states, do you? You don't
6 mention that there?---Not there.

7 And you are familiar with those cases?--- Yes, I am.

8 Richardson v. Forestry Commission, the Tasmanian dams
9 case?---Yes.

10 Are you familiar with those? And there's no doubt that that
11 tension between the Commonwealth and the states over
12 what should be done with Australia's native forests was
13 a significant contributor to the development of the
14 regional forest agreements, do you agree with
15 that?---Yes, it did. It ultimately led to the dispute
16 between ministers of the Commonwealth.

17 Now, the fourth matter on that page I want to just take you
18 to is what you say under the heading "Regional forest
19 agreements" about the regional forest agreements, and
20 you will see there that in the second full paragraph
21 you have extracted a part that says "The regional
22 forest agreement process commenced in 1997 and sought
23 to achieve two main objectives." And again, Professor
24 Ferguson, that's your description of what the regional
25 forest agreement process was setting out to do,
26 correct?---It is.

27 And somebody else, perhaps from a different perspective,
28 might well describe what the regional forest agreement
29 process was designed to achieve in a different way,
30 agree with that?---Somebody else might.

31 And when you talk about - I withdraw that. When the

1 regional forest, the East Gippsland regional forest
2 agreement talks about a "comprehensive, adequate and
3 representative national reserve system", that involves
4 three components, doesn't it, Professor Ferguson?---It
5 does.

6 What are they?---That the - we try to achieve 15 per cent of
7 the pre 1770 vegetation types within the reserve
8 system, and frankly I would need some prompting on the
9 other two.

10 Fair enough, Professor Ferguson. I will give you a copy of
11 the East Gippsland regional forest agreement. And a
12 copy for Your Honour. Can I ask you to go to - this
13 copy is not numbered, Professor Ferguson, so we are
14 going to have to take you through it. But towards the
15 back there are a number of attachments to the
16 agreement, and I want you to go to attachment 1, which
17 is the definition of the "comprehensive, adequate and
18 representative reserve system". Got that?---Yes.

19 And you will see that the second paragraph there says "The
20 CAR reserve system has the following three components
21 as described by the JANIS reserve criteria", and you
22 are familiar with the JANIS reserve criteria, aren't
23 you?---Yes, I had some involvement.

24 And the first is dedicated reserves, and that's really the
25 national parks system, correct?---And other
26 conservation reserves, not only national parks.

27 And the second component is informal reserves, and they are
28 also called special protection zones,
29 correct?---Correct.

30 And the third component is values protected by a
31 prescription, and as the definition says, "This

1 comprises those elements of the SPZ protected by
2 regional prescriptions including stream buffers and all
3 remaining rainforests and heathland vegetation together
4 with a surrounding buffer." And that is the standard
5 definition of the CAR reserve system which appears in
6 each regional forest agreement, isn't it, Professor
7 Ferguson?---Yes.

8 And what that recognises is that some parts of the CAR
9 reserve system are completely dedicated in a legally
10 binding sense to reserves, and the protection of
11 biodiversity and conservation through complete removal,
12 correct?---Correct.

13 And other parts of the CAR reserve system are to be managed
14 for conservation and biodiversity values while they are
15 being used for other purposes, correct?---Correct.

16 So it certainly wouldn't be correct to construe the regional
17 forest agreement as concerned only with the removal of
18 things in to national parks or permanent reserves,
19 would it?---Not at all.

20 Now, just continuing on, your commentary on the development
21 of the structural aspects of forest policy in
22 Australia. Would you go to page 9, and the last part
23 of this quotation from your extract there, up the top
24 of page 9. What you say there is "The creation of the
25 national conservation reserve system meant that some of
26 the timber resources and public ownership was withdrawn
27 from that use." And I just want to ask you about
28 that, Professor Ferguson. Do you accept that that
29 again is a statement really from your perspective as
30 someone very closely involved for a long time in the
31 forestry industry?---Certainly, but it also seems to me

1 to reflect the reality of the transfer.
2 Well, you see, Professor Ferguson, I suggest to you that
3 people from a different perspective might describe what
4 has happened with the creation of the national
5 conservation reserve system as in fact putting what you
6 call the timber resource to a different and just as
7 important use, namely, the conservation of
8 biodiversity. And people from a different perspective
9 might not see it as a withdrawing at all, do you agree
10 with that?---I can certainly appreciate that, and I can
11 equally appreciate that the national conservation
12 reserve system and the achievement of that was a major
13 advance.

14 Now, you then go on, having concluded with the extract from
15 your earlier paper, to describe the East Gippsland RFA,
16 and in the second sentence under that quotation you
17 make this statement, that "It", that is the East
18 Gippsland regional forest agreement, "introduced the
19 precautionary principle formally into the application
20 of Codes of Practice for Timber Production 1996."
21 Now, you are making in that sentence, Professor
22 Ferguson, a couple of connections. A connection
23 between the regional - East Gippsland regional forest
24 agreement and the precautionary principle, and then a
25 connection between the East Gippsland regional forest
26 agreement and the code of practice. That's how I
27 understand what you are saying?---Correct.

28 I can't find in the East Gippsland regional forest agreement
29 any reference to the precautionary principle. Do you
30 know of one?---I can't think of one, but there was
31 certainly discussion at the time. The precautionary

1 principle was only in its very early stages of
2 development at that point, and there was very little
3 available. But there was some discussion of it in
4 committees about it.

5 That may well be why in fact, Professor Ferguson, it never
6 found its way into the text of the regional forest
7 agreement, do you agree with that?---Yes.

8 And you then say - as I understand it you then make a link
9 between the regional forest agreement and the codes of
10 practice for timber production, but again I couldn't
11 see in the codes of practice for timber production any
12 reference to the regional forest agreement. Do you
13 say there is one?---I would not be able to answer that.
14 I am trying to cast my memory back to it. I suspect
15 not.

16 And the footnote you give, footnote 9, is simply a reference
17 to the definition of the precautionary principle and
18 the code of practice, isn't it?---Yes.

19 Now, I want to go now to the evidence that you give over the
20 page, Professor Ferguson, at page 10 of your report,
21 under the heading "Proposed harvesting in the Brown
22 Mountain forestry coupes", and you describe there what
23 might be called - I withdraw that. You describe what
24 I understand to be your perspective on a hierarchy of
25 regulatory principles for the proposed harvesting,
26 would that be right?---That's correct.

27 And you have left out the East Gippsland Forest Management
28 Plan. Was there a reason for that?---I was really
29 trying to deal with the more general setting of it than
30 the specifics of the Brown Mountain forestry coupes,
31 and I take your point that it might have been

1 appropriate to include it.

2 It is a pretty important regulatory instrument?---Yes.

3 In timber harvesting in East Gippsland, isn't it? And can I

4 ask you to look at the - I withdraw that. I want to

5 take you to what you say under number 5 in that

6 hierarchy about action statements. And I will show

7 you this document. This is an extract from the DSE

8 website where it describes action statements, and you

9 will see in the second paragraph of this extract the

10 DSE website says: "Action statements are like brief

11 management plans. They provide some background

12 information about the species", including its

13 description and so forth, "they also state what has

14 been done to conserve the species and what will be

15 done. Action statements are designed to apply", and

16 so forth. Would it be fair to say, Professor

17 Ferguson, that you have taken quite a bit of what you

18 say under number 5 from that definition on the DSE

19 website?---Correct.

20 And so you haven't yourself engaged in any independent

21 analysis of what the purpose of an action statement

22 is?---No, I have not.

23 And aside from reading the ones that are in issue in this

24 proceeding, you haven't really had any direct

25 experience about the drafting of action statements from

26 a research or scientific perspective?---Not the detail.

27 Some of the principles of recovery plans which also

28 relate in part to action statements of course came up

29 in discussion in committees, in the expert committees.

30 Of course, in the sense of where they impinged on timber

31 harvesting, there was clearly a relationship?---Not

1 only, not only.

2 And as I see what you have written under number 5 there, you
3 have added a little bit of your own words to say that
4 they are "brief management plans to supplement the
5 code". Are you aware, Dr Ferguson, that it's actually
6 the code of practice that makes the action statements
7 legally binding, are you aware of that?---Yes.

8 So they don't really supplement the code in that way, they
9 are made enforceable by the code, do you agree with
10 that?---Correct.

11 Now, you then move directly under those paragraphs to a
12 proposition about forest practices, and what forest
13 practices involve in terms of choices, do you see that
14 paragraph?---I do.

15 And I want to suggest to you, Professor Ferguson, that the
16 legal and regulatory framework which you have
17 described, when we also put the action statement in
18 there and the laws of Victoria and the Commonwealth,
19 that that legal and regulatory framework has already
20 made the kinds of choices that you are talking about in
21 that paragraph?---Could you repeat that question,
22 please?

23 Sure. The legal and regulatory framework, so that you are
24 looking at all the things you have discussed here in
25 your report, the management plan, the Flora and Fauna
26 Guarantee Act, the Sustainable Timber Harvesting Act,
27 when you look at all that framework, the choices, the
28 balance that you talk about in that paragraph has
29 already been struck through that legal and regulatory
30 framework?---Some of the balances have, but at a field
31 application there are still decisions to be made.

1 There are decisions to be made on boundaries of coupes,
2 on treatment of particular things like hollow bearing
3 trees and so on.

4 I accept that. But you would accept, Professor Ferguson,
5 that there's no choice about whether you follow the
6 legal or regulatory framework, is there?---No.

7 And the precautionary principle is one aspect of that
8 framework, isn't it?---It is.

9 And there is no choice in timber harvesting in the State of
10 Victoria about not applying the precautionary
11 principle?---No, there's no choice.

12 Now, you conclude this part of your report, down the bottom
13 of page 11, with a summary and you say this, "The
14 hierarchical process of planning" that you have
15 described "requiring recognition of the precautionary
16 principle does two things, it provides a frameworking
17 basis for harvesting and ensuring that biodiversity
18 conservation is appropriately considered." I want to
19 suggest to you that the legal and regulatory framework,
20 Professor Ferguson, does a bit more than that, and it
21 is intended to ensure that biodiversity conservation is
22 achieved, do you agree with that?---That may be the
23 intent, yes.

24 Now, can you go to page 12, which is where you begin your
25 discussion about the appropriate maintenance of hollow
26 bearing trees. Have you read the reply reports filed
27 in this proceeding by Dr Bilney and Dr Smith?---I have.

28 And so you have read what they had to say about your opinions
29 about habitat trees, preservation of glider habitat and
30 so forth, is that right?---I have.

31 And you are not suggesting, Professor Ferguson, are you, that

1 you have the requisite qualifications and experience in
2 relation to the species that they are dealing with to
3 really contradict what they say about the relationship
4 between hollow bearing trees and those species?---No, I
5 am not.

6 Now, can you go to page 13 of your report, this is where you
7 start your discussion of the precautionary principle.
8 I just want to take you through the way that the
9 plaintiff will say the precautionary principle comes
10 into the regulatory framework in this case, so that you
11 understand how the plaintiff says that and then I can
12 ask you some questions. Now, I will just summarise
13 it, Professor Ferguson, and then I will take you
14 through it.

15 The plaintiff's case is that the precautionary
16 principle is entrenched in four places in the legal and
17 regulatory scheme, and the first of those is in the
18 Sustainable Forest Timber Act, and I hand you a copy of
19 the relevant section of that piece of legislation.
20 You will see in section 5(4)(b), down the
21 bottom?---Yes.

22 You will see what I would suggest to you is a fairly familiar
23 explanation of the precautionary principle,
24 correct?---It's one part of it, yes.

25 Well, that's the part that this piece of legislation picks
26 up, I suggest to you, do you agree with that?---Yes.

27 And the second piece of legislation is the - pardon me. I
28 withdraw that and, Professor Ferguson, I apologise to
29 you and apologise to Your Honour. I was going to go
30 to the FFG Act, but I am not going to go to that
31 because that doesn't actually expressly contain the

1 precautionary principle, so we are actually on three
2 sources, Professor Ferguson, not four.

3 The second source, then, is the Code of Practice
4 for Timber Production, and that's the definition that
5 you refer to in your witness statement, isn't
6 it?---Yes.

7 You are familiar with that definition. And the third one is
8 found in the East Gippsland Forest Management Plan, and
9 I will just ask you to be shown a copy of that, which
10 is in the agreed book of documents volume 1. And the
11 page that you need to go to, Professor Ferguson, is
12 paged 387. No, I'm sorry, Professor Ferguson, page
13 408. Have you read this recently?---Not very
14 recently. It is 408 we are referring to?

15 Yes, so this is page 28 of the East Gippsland Forest
16 Management Plan, page 408?---Right.

17 But you haven't read this recently, is that right, Professor
18 Ferguson?---Not in the last week, no.

19 You will see this is a part that deals with guidelines for
20 the conservation of featured species, and you will see
21 it sets out three purposes. And if you read the
22 purpose under the first dot point, it says "Provide
23 planned protection for sensitive and threatened species
24 in state forests, to meet the requirements of the FFG
25 Act, and the precautionary principle outlined in the
26 National Forest Policy Statement." So what this
27 management plan picks up firstly is the precautionary
28 principle as outlined in the National Forest Policy
29 Statement, agreed?---Correct.

30 And I also draw your attention to what it says on the next
31 page, page 409, about the spot tailed quoll. About

1 halfway down that page it says "Until further work on
2 habitat requirements is completed, a precautionary
3 approach of protecting areas of undisturbed forest as
4 foraging habitat will be adopted." And your report
5 accepts, Professor Ferguson, that the term
6 "precautionary approach" is synonymous with
7 "precautionary principle"?---Yes.

8 Correct? So what I want to suggest to you is that in each of
9 those three parts of the regulatory scheme with which
10 this case is concerned, the scheme itself provides a
11 context for the understanding of the precautionary
12 principle, do you agree with that?---Yes.

13 And you would agree that any interpretation of what the
14 precautionary principle means fundamentally has to be
15 undertaken in the context of each of the instruments in
16 which it appears or is expressed, agree with
17 that?---Yes.

18 And do you accept that ultimately it's really a matter for
19 His Honour what the "precautionary principle" means,
20 isn't it, Professor Ferguson?---Yes.

21 And that's what Chief Justice Preston in the Telstra
22 Corporation case that you referred to did, His Honour
23 made up his own mind in that case about what he thought
24 "precautionary principle" meant in the context with
25 which His Honour was dealing in that case, do you agree
26 with that?---Yes.

27 I will just now go back to what you say at 3.2 in your
28 summary of the precautionary approach at page 14. You
29 factor in, as I understand it, from there on when you
30 go into the part that deals with application of the
31 precautionary approach, you factor in economic

1 consequences to the timber industry and to communities
2 dependent on them, that's a factor you put in,
3 correct?---The risk-weighted consequences, yes.

4 Well, we will come back to that, but you as a factor insert
5 into the analysis economic consequences to the timber
6 industry and the communities that depend on it,
7 correct?---Correct.

8 And you also factor in asserted losses to the timber industry
9 from not being able to extract harvestable timber from
10 these coupes, correct?---Correct.

11 And your analysis of asserted losses from these particular
12 four coupes is based on Mr MacDonald's evidence,
13 correct?---That's correct.

14 And other than that the way you factor it in, those two
15 matters in, is set out on page 19 of your report, is
16 that correct?---That's correct.

17 HIS HONOUR: Professor Ferguson, we normally go through
18 until about one, but we often take a mid-morning break.
19 If you wanted one for five minutes you could take one,
20 but otherwise we will just keep going?---No, that is
21 fine, sir.

22 Yes.

23 MS MORTIMER: If Your Honour pleases. And would you accept,
24 Professor Ferguson, in the context that I have
25 described to you, those three contexts that I have
26 taken you through, the Sustainable Forest Timber Act,
27 the management plan and the code of practice, that
28 whether the factors that you have referred to, economic
29 consequences and asserted losses, whether they are to
30 be considered or are not considered is really a matter
31 that will depend on the construction of those

1 instruments by His Honour, do you agree with
2 that?---Yes.

3 Now, I want to ask you some questions now about what you say
4 at pages 16 to 19 about the long footed potoroo, and
5 can I get you to go first to page 16, and under the
6 heading of "Delineation of boundaries", see
7 that?---Correct, yes.

8 You start there by saying "For coupes 15 and 19 the evidence
9 suggests that an area in coupe 15 may be habitat to a
10 long footed potoroo." Is your report based on the
11 assumption that there is a single individual long
12 footed potoroo in these coupes, Professor
13 Ferguson?---At least one.

14 Well, is your report based on the assumption that there's any
15 more than one?---It's an open question. We only have
16 - I think it's more accurately an allegation of one.
17 I am not sure that it's been confirmed by DSE.

18 Well, I want you to assume the evidence shows at least three
19 detections and therefore at least detections of three
20 individuals. And I want you to assume that the expert
21 witness of the long footed potoroo that has given
22 evidence in this proceeding has said that there may be
23 up to 60 potoroos in this area. Does that affect your
24 opinion or does it not matter how many there are?---I
25 don't think it's critical, the number.

26 100, does it matter?---I don't believe so.

27 You think they could all hop up and down that little buffer
28 strip, Professor Ferguson, do you?---I think there's a
29 degree of mobility. If they were able to exist in
30 that number, there's a degree of mobility which would
31 enable them to survive elsewhere as well as in that

1 area.

2 What do you know about their exposure to predation by
3 foxes?---I know that they are subject to predation by
4 foxes, but that would have started in very early days
5 when roads were first introduced.

6 And you know that timber harvesting and the clearing of land
7 through timber harvesting increases predation, and
8 that's a well established proposition, isn't it?---Yes,
9 but most of that roading is now in and has been in for
10 some time.

11 I am not just talking about roading, Professor Ferguson, I am
12 talking about the clearing of coupes, the engaging in
13 regeneration burns and the complete loss of understorey
14 that that produces. You agree that that all increases
15 fox predation, doesn't it?---It may.

16 Where on page 17 you start to talk about the 100 metre buffer
17 in the paragraph that says "The area of the LFP
18 retained habitat would logically be extended north and
19 south", by the use of the word "logically", you are not
20 intending to suggest that you are applying any
21 particular research or expertise in long footed potoroo
22 habitat in that statement, are you?---I am suggesting
23 that the boundaries would make sense from a management
24 viewpoint.

25 Yes, from a forestry management viewpoint that makes a lot of
26 sense to run the buffer up and down the creek, doesn't
27 it, is that right?---Correct.

28 As I understand your evidence you have read the paper by
29 Mr Chick and others about the effects of timber
30 harvesting?---Yes, I have.

31 And are you aware that the studies that they undertook, and

1 the graphs that are reproduced in that report, show use
2 of habitat that is broadly circular, not linear, are
3 you aware of that?---Yes, but not exclusively.

4 And just so I understand - no, I withdraw that. I want to
5 now try and understand, Professor Ferguson, a little
6 more about what you are saying on page 17 and 18 about
7 the options for drawing the boundary. As I understand
8 it, what you are saying is that you take the logical
9 forest management approach and the buffer runs in a
10 linear direction 100 metres on each side of the stream,
11 correct? Is that right?---That is the proposal.

12 And then what you deal with in option 1 and option 2, it's
13 not really about where you put the retained habitat,
14 it's about where you draw the boundaries of the special
15 management zone, the bit that can be harvested, is that
16 right?---Well, in my report I was suggesting that
17 rather than a linear 100 metre reserve either side of
18 the stream, that that boundary be adjusted with the
19 terrain to include the better parts, that's the lower
20 parts of the slopes, and exclude the spurs, which would
21 be lesser habitat.

22 Well, again Professor Ferguson, you don't profess to have any
23 expertise in what this species prefers by way of
24 habitat, you are going on what's in the action
25 statement?---Yes, I draw on what is in the action
26 statement, which does refer to a predilection for lower
27 slopes.

28 Yes. And that's all you are basing that part of your report
29 on?---Yes.

30 HIS HONOUR: Do you say that ultimately the definition of
31 any reserve would sensibly respond to conditions

1 surveyed on the ground, is that right?---Absolutely.

2 Yes.

3 MS MORTIMER: And as I understand it, one of the options that
4 you are suggesting is that you have the linear strip,
5 the linear buffer, and then the SMZ, the other 100
6 hectares goes in a lateral direction across coupes 15
7 and 19, is that right?---To some extent that would be a
8 reasonable description. It's a little hard to put it
9 in quite those terms because we are dealing with rather
10 non linear areas.

11 All right. Your options all proceed on the area that cannot
12 be logged being on each side of the stream, is that
13 right?---That's correct, and extending - obviously
14 coupe 19, you will recollect the observation about
15 coupe 19.

16 Yes. And so some of the modifications that you deal with
17 are really about where you should place the special
18 management zone, the bit that will be affected by some
19 other additional prescriptions about logging and how
20 you should draw those boundaries?---Well, I would
21 prefer to put it around the other way, that my
22 understanding is that DSE and VicForests staff would -
23 should in this case - evaluate where the appropriate
24 boundaries are in the best interests of the potoroo.

25 Thank you?---Not in the best interests of harvesting
26 necessarily.

27 Can I now take you to some of the other species and start
28 with the crayfish which you deal with on page 20 of
29 your report. Now, you know that Mr McCormack has
30 given evidence that he has found a new species, a new
31 taxon?---Correct.

1 And you don't know anything about the distribution of that
2 new taxon, do you?---No.

3 And you are certainly not seeking to contradict Mr McCormack
4 that it might be a new taxon?---No.

5 And do you know of any scientific basis for the proposition
6 that a 100 metre buffer on either side of the creek
7 protects hydrological integrity of the sub-catchment,
8 do you have any scientific basis for that?---There's
9 been some work done on buffer zones in catchments by
10 Dr Bren that suggests that the high level streams are
11 the most critical parts. It doesn't provide any
12 insights as to whether it should be 100 metres or
13 whatever.

14 Dr Gillespie in his evidence told His Honour that there was
15 no scientific basis for that, that's at transcript 305
16 to 306, Your Honour. And he based his opinion on an
17 Australian study by gentleman called Pat O'Shannesy.
18 Are you familiar with that?---Yes, I am.

19 With that study?---A long time ago.

20 And that study showed that a 300 metre buffer was required to
21 protect the hydrological integrity of the
22 sub-catchment, you agree that's what that study
23 shows?---It does.

24 So what's the basis for saying 100 metres is all right in a
25 scientific sense?---It was in the sense that it would
26 seem to me to cater for the unnamed taxon of crayfish.

27 Can I ask you now about what you say on page 20 about the
28 owls, page 20 of your report. You have got a heading
29 there, 4.3 "Sooty owl and powerful owl, spot tailed
30 quoll and large brown tree frog." And the evidence -
31 I want you to assume, Professor Ferguson, that the

1 evidence in this case is that the targets for sooty owl
2 management areas and powerful owl management areas
3 under the East Gippsland Forest Management Plan have
4 not in fact been reached, and actual detections should
5 continue to be substituted for modelled habitat, so
6 that an actual detection of a sooty owl or a powerful
7 owl should generate a management area. Taking that
8 assumption, and putting it with an assumption that
9 there are actual detections of sooty owls and powerful
10 owls in this area by both DSE and Dr Bilney, does it
11 change your opinion that it's an appropriate measure to
12 meet the requirements of the precautionary principle
13 not to do anything about those detections?---If you
14 take those assumptions, I would agree.

15 Something needs to be done, that's what you are saying, is
16 it?---Yes.

17 Now, I want to ask you now about the large brown tree frog
18 which you deal with in the next paragraph on that page.
19 You say no action statement is available, and that's
20 absolutely correct, Professor Ferguson. You then say
21 it's listed as vulnerable under the data deficient
22 category of the Flora and Fauna Guarantee Act.

23 Professor Ferguson, I want to suggest to you there is
24 no such category under the FFG Act, and what you
25 actually have in mind is the threatened fauna advisory
26 list that's published by the DSE?---That is correct,
27 yes.

28 Is that right?---That is correct.

29 Because the large brown tree frog is listed as threatened
30 under the FFG Act, isn't it?---Yes.

31 And that attracts the usual definition in the FFG Act about

1 its risk of extinction, doesn't it?---Yes.

2 And when you say in that paragraph that "Given its preferred
3 habitat is probably near water", where did you get that
4 statement from?---Most amphibians would be associated
5 with water.

6 Well, Dr Gillespie's evidence is that this species is not at
7 all dependent on streams to breed and is found
8 throughout the forest. So you would accept that
9 that's probably not a correct statement in relation to
10 this particular frog species?---Yes.

11 And Dr Gillespie's clear opinion is that the 100 metre buffer
12 is inadequate for both - I withdraw that - has no
13 relationship to the large brown tree frog because it's
14 not stream-dependent, and you are not in a position to
15 contradict that, are you?---No.

16 And his opinion about the giant burrowing frog is that the
17 100 metre buffer is inadequate based on the outcome of
18 the O'Shannesy report, and you are not suggesting you
19 are qualified to contradict that?---I am not.

20 Now, can I turn to what you say about gliders, and you say at
21 4.4 that "Neither species is on the endangered list."
22 You are referring there to the list under the Flora and
23 Fauna Guarantee Act, aren't you, Professor
24 Ferguson?---Yes.

25 Did you know that those gliders are listed in other states as
26 threatened species?---Yes, I have seen that.

27 And do you know what the evidence is in this case about the
28 densities of both greater gliders and yellow bellied
29 gliders in coupes 15 and 19?---I have become aware of
30 those since receiving the evidence that was submitted
31 in the expert statement by Dr Smith, but I think also

1 there was a passing reference in Cameron MacDonald's
2 evidence, if I remember rightly, that DSE staff had
3 noted high populations in that area.

4 And I want you to assume that the densities in which they
5 have been found in these two coupes are rare, they are
6 rare densities, possibly unique densities, and it's a
7 density that Dr Smith, who has been working in this
8 area for 30 years, has only seen once before. Now,
9 when you assume those facts, do you adhere to your
10 opinion that it's acceptable or a proper application of
11 the precautionary principle to log these coupes?---Yes,
12 I do, provided that, as was proposed, there was an
13 assessment, a field assessment by DSE and VicForests
14 staff to identify the hollow bearing trees. And given
15 that they had already noted high populations, I would
16 assume that they would take the appropriate precautions
17 in terms of the numbers retained and any other
18 provisions which are outlined in that proposal for the
19 way it's to be handled, which is set out I think in
20 Cameron MacDonald's evidence.

21 Have you seen the photographs of coupe 20 and the outcome of
22 the logging on that?---Yes, I have.

23 And are you suggesting that that represents adequate
24 protection for these hollow-dependent species after
25 logging?---I can't answer that question. I am aware
26 that there are a number of trees that appeared to have
27 been damaged by fire. How important that is to their
28 future as hollow bearing trees I think is a subject I
29 will leave to the experts.

30 Thank you. Now, the quoll, I want to ask you about some
31 questions about the quoll. Firstly you say - I will

1 just take you back to what you say at 4.3 about "There
2 is no evidence of owl nesting sites, nor the presence
3 of spot tailed quolls or large brown tree frogs."
4 What you mean by that, I suggest, Professor Ferguson,
5 is that you are not aware of any evidence of an actual
6 detection, correct?---Correct.
7 And are you aware of the evidence about how difficult it is
8 to find nesting sites for owls?---Yes.
9 And are you aware that there have been no surveys whatsoever
10 undertaken by either DSE or VicForests in these
11 coupes?---Yes.
12 And therefore it is entirely unsurprising, Professor
13 Ferguson, I suggest, that there have been no such
14 detections; that's right, isn't it?---That may be the
15 case.
16 If you don't look, you can't find; do you agree with
17 that?---Yes.
18 Now, you say about the quoll at the bottom of page 21, you
19 say that "The additions to the reserve system provide
20 protections" - I am just dealing with the quoll here -
21 "the additions to the reserve system provide
22 protections for the spot tailed quoll", and these are
23 your words "in a manner proportionate in my view to the
24 threats involved". What are the threats, Professor
25 Ferguson, to the spot tailed quoll in 2010?---Any
26 threats to spot tailed quolls that did exist might be
27 in relation to harvesting of timber in that area.
28 But you don't - - -?---But it would also relate to foxes and
29 other predation.
30 It would be a fair statement, wouldn't it, Professor
31 Ferguson, that you are not - you don't purport to be up

1 to date with the latest research about what are the
2 most pressing threats to the spot tailed quoll in the
3 State of Victoria?---I can only go on what I have read
4 in relation to the reports of the fox baiting programs
5 and their success.

6 The problem with fox baiting programs for the quoll,
7 Professor Ferguson, is that they are very successful in
8 killing quolls, did you know that?---That is one
9 belief, and I understand there is dispute between the
10 experts over that.

11 Well, there's no dispute from Dr Belcher, who is a witness in
12 this case and I want you to assume that his opinion is
13 that it's dangerous for quolls. And do you know where
14 the ecologically functional populations of quolls are
15 presently in the State of Victoria?---Not in precise
16 terms. I have seen the Atlas digital representations.
17 But I am talking about ecologically functional populations,
18 not just historical records, Professor Ferguson?---Yes,
19 I understand the distinction.

20 And you don't know where the present ecologically functional
21 populations are?---No.

22 And you haven't read, I take it, the new national recovery
23 plan for the spot tailed quoll that's been endorsed by
24 the State of Victoria?---I don't believe so.

25 So it would be fair to say, Professor Ferguson, wouldn't it,
26 that you are not really in a position to express an
27 opinion about whether what's proposed to happen in
28 these coupes is a proportionate response to the threats
29 to the spot tailed quoll in 2010?---I am expressing an
30 opinion.

31 I am suggesting you are not really in a position to do that,

1 do you disagree with that?---I can only express an
2 opinion on the basis of what information I have.

3 No further questions, if Your Honour pleases.

4 HIS HONOUR: Yes.

5 <RE-EXAMINED BY MR WALLER:

6 Professor Ferguson, you were asked some questions about the
7 precautionary principle. My learned friend suggested
8 that it was entrenched in the regulatory system in four
9 places, and that then became - sorry, three places, and
10 the first place it was said to be entrenched was the
11 Sustainable Forest Timber Act. And you were provided
12 with I think a one page extract?---Correct.

13 From section 5(4) of that Act. You said in your answer that
14 section 5(4)(b) reflected part of the precautionary
15 principle. I want you to be provided with the whole
16 of that subsection, if possible, so I am going to give
17 you another page which is the balance of that
18 subsection. Now, looking at all of the subparagraphs
19 as well as (b), are there any other parts of subsection
20 (4) of section 5 that in your view comprise or describe
21 elements of the precautionary principle?---I think
22 there are several there that relate to economic
23 considerations in terms of the risk-weighted
24 consequences, in reference to diversified economy,
25 maintaining and enhancing international
26 competitiveness.

27 Could I draw your attention to subparagraph (a). Is that in
28 your view an element which is comprised within the
29 precautionary principle or not?---It is. The
30 integration there is an important component across the
31 various tenures.

1 So are you able just by referring to their letters to tell
2 the court which of those subparagraphs in your view are
3 comprised or describe elements of the precautionary
4 principle?---Paragraph (a) clearly. Paragraph (b),
5 although the second clause relates to the capacity for
6 environment protection and a strong growing diversified
7 economy, is in part about what the concerns regarding
8 the timber industry are about. And (e), maintaining
9 international competitiveness is also important.

10 So you pick up (a), (b), (d) and (e)?---Yes.

11 Thank you. You were asked some questions about the East
12 Gippsland Regional Forest Agreement. Do you know when
13 that was enacted or brought into effect?---My memory is
14 1997.

15 Yes. Your Honour, I tender that document.

16 MS MORTIMER: Yes, Your Honour, I apologise, I should have
17 tendered it.

18 HIS HONOUR: Yes.

19

20 #EXHIBIT S - East Gippsland Regional Forest Agreement.

21

22 MR WALLER: Now, you were asked some questions about your
23 report, and I want to draw your attention specifically
24 to page 11, page 10 and then 11. And it was put to
25 you that your statement of the principles, criteria and
26 regulatory methods set out on page 10 makes no
27 reference to the forest management plan in East
28 Gippsland. Could I ask you to look at page 11 of your
29 report, the paragraph beginning "The hierarchy of
30 planning measures". And you have got a sentence, the
31 second sentence, which states: "To be consistent with

1 the precautionary principle this planning is
2 accomplished by using expert opinion and stakeholder
3 consultation in the preparation and revision of the
4 management plan, allocation order, timber release
5 plans, code of practice and action statements." What
6 are you referring to when you refer to "the management
7 plan"?---Well, forest management plan both for East
8 Gippsland and more generically for the other regions.

9 Yes. You were asked some questions about your opinion
10 regarding appropriate measures to be taken in respect
11 of the new taxon, a new crayfish taxon. In preparing
12 your report dealing with both the Orbost spiny crayfish
13 and the new taxon, did you have regard to the Orbost
14 spiny crayfish action statement?---Yes.

15 And are you aware that that action statement mandates as an
16 appropriate measure a 100 metre streamside
17 buffer?---Yes.

18 Did you have regard to that action statement in forming your
19 opinion in relation to appropriate measures that ought
20 to be applied to the new taxon?---Yes, I did. I could
21 only assume that it would be similar.

22 Your Honour, I have no further questions.

23 HIS HONOUR: Yes, thank you. Thank you, Professor
24 Ferguson, you are excused.

25 <(THE WITNESS WITHDREW)

26 (Witness excused.)

27 MR WALLER: Your Honour, that completes the evidence to be
28 called on behalf of the defendant. There's one matter
29 that's outstanding, I should say generally about
30 evidence, and out of an abundance of caution, perhaps,
31 the parties jointly would ask that the agreed book be

1 marked as an exhibit, so there would be no doubt going
2 forward that it's part of the evidence. It can be
3 marked as a neutral exhibit, perhaps, not one of either
4 party, but just - - -

5 HIS HONOUR: No, I think that is sensible. I would take
6 the view that any documents that have been referred to
7 are part of the evidence, but if you want the whole
8 back to go in we will give it an exhibit number. The
9 documents are agreed to be relevant, so we will say the
10 agreed book of documents will be Exhibit T.

11

12 #EXHIBIT T - Agreed book of documents.

13

14 MR WALLER: If Your Honour pleases.

15 HIS HONOUR: Can I just say, just for the benefit of both
16 counsel, although the Flora and Fauna Guarantee Act
17 does not refer to the precautionary principle, the
18 criteria for determining whether a potentially
19 threatening process is eligible to be listed in a sense
20 might be thought to reflect part of the same approach,
21 because they proceed on the basis that it may be
22 sufficient to establish that something has the
23 potential to pose a significant threat for the survival
24 of a range of flora or fauna. And it seems to me
25 conceptually that is a precautionary approach, in other
26 words, the Act doesn't just deal with identified
27 threatened species, it also looks at potentially
28 threatening processes. And when it talks about
29 potentially threatening processes, it does so in the
30 context that it may be in some circumstances
31 appropriate to list a process although the degree of

1 the threat may not be scientifically ascertainable.

2 Now, I am not suggesting that that bears on the
3 issues in this case, but I wouldn't want the discussion
4 this morning and the framework within which Professor
5 Ferguson has been both cross-examined and examined, to
6 be taken as, if you like, it totally excluding the
7 framework of the Flora and Fauna Guarantee Act from
8 this question of the way the legislation addresses the
9 concept of the precautionary principle. So I am only
10 mentioning it for the sake of completeness, if you
11 like, but it seems to me that if you look at it
12 academically, if you like, and you are trying to think
13 about the conceptual framework created by these
14 interlocking pieces of legislation and subordinate
15 instruments, then there's a sense in which it might be
16 said that principle resurfaces at that point under that
17 mechanism of the Act, which is in part one that has
18 been raised in this case. So that's why I am
19 mentioning it.

20 MR WALLER: Yes, Your Honour, we understand.

21 HIS HONOUR: Well, as I think I foreshadowed, I propose to
22 give you some time to prepare final addresses, as it
23 was agreed that would be of assistance, and it seems to
24 me that this case does raise issues, particularly of
25 law, that haven't been considered by this court or,
26 indeed, any court previously, and for that reason I
27 would wish to ensure that the submissions were as full
28 as they can sensibly be in terms of assistance to the
29 court, and I propose to put the matter over to Tuesday
30 next. And as the parties have agreed, we will adjourn
31 to Melbourne for the purpose of final addresses.

1 As I have previously indicated, I will seek to
2 put in place a video link to the Bairnsdale court. If
3 in fact that's not taken up by anyone, then it's
4 unlikely to be maintained by the court staff. But on
5 the other hand I will initially seek to make sure that
6 it is there, because it's apparent that there have been
7 a number of local people present throughout the whole
8 of the hearing, and it may be difficult for them to
9 come to Melbourne, whereas, as I would apprehend it,
10 Bairnsdale is closer in fact to the sites in issue than
11 Sale, and it seems to me that that's the sensible place
12 to stream to, and I will seek to make those
13 administrative arrangements.

14 Now, is there anything else you wanted to raise
15 with me before we adjourn, Mr Waller or Ms Mortimer?

16 MR WALLER: I don't need to raise anything. I think we are
17 agreed that we would start, if that's convenient to
18 Your Honour, at 10.30 on Tuesday.

19 HIS HONOUR: Yes.

20 MR WALLER: But, Your Honour, that's all that the defendant
21 wishes to raise.

22 HIS HONOUR: Yes.

23 MS MORTIMER: Your Honour, in terms of the provision of the
24 transcript corrections for yesterday and today, what we
25 would jointly propose, if it's convenient, Your Honour,
26 is that we do an agreed note and have that to Your
27 Honour tomorrow.

28 HIS HONOUR: Yes.

29 MS MORTIMER: Is that convenient?

30 HIS HONOUR: Yes.

31 MS MORTIMER: If Your Honour pleases.

1 HIS HONOUR: We will adjourn until Tuesday next sitting at
2 Melbourne.

3 ADJOURNED UNTIL 10.30 AM TUESDAY 23 MARCH 2010

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31