
TRANSCRIPT OF PROCEEDINGS

SUPREME COURT OF VICTORIA

CIVIL JURISDICTION

SALE

TUESDAY 2 MARCH 2010

(2nd day of hearing)

BEFORE THE HONOURABLE JUSTICE OSBORN

B E T W E E N

ENVIRONMENT EAST GIPPSLAND

Plaintiff

- and -

VICFORESTS

Defendant

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

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

1 MS MORTIMER: Your Honour, I was, as part of the plaintiff's
2 opening about to turn to the Sustainable Forests Timber
3 Act (2004) and take Your Honour through that.

4 Before I do that, Your Honour, may I come back to
5 something that I said I would provide to Your Honour
6 yesterday which are the regulations made under the Flora
7 and Fauna Guarantee Act which expand a little on the
8 listing criteria for species. I hand a copy of that up.
9 I just draw Your Honour's attention to the relevant part.

10 Your Honour will see that under Regulation 5,
11 Regulation 5 picks up s.11 of the Act and states that:
12 "The set of criteria by which eligibility is to be
13 determined is set out in Schedule 1" so you go from
14 Regulation 5 to Schedule 1 and then when you look in
15 Schedule 1 on p.5 of the reprint one sees two primary
16 criteria and they are the criteria that appear in the Act,
17 and a provision for sub-criteria, not exhaustive, and Your
18 Honour will see from the evidence that the ones that are
19 used in relation to the species that we are dealing with
20 is primary criterion 1.1, that is the one that gets used
21 quite a lot, and then primary criterion 1.2, together with
22 sub-criterion 1.2.1 and 1.2.2.

23 Your Honour will also see from the evidence that
24 sometimes it appears that there is another classification
25 added which is whether something is threatened or
26 endangered or vulnerable. Now as far as we can ascertain,
27 Your Honour, there is no statutory basis for that and that
28 appears to be something that the Scientific Advisory
29 Committee engages in its classification process. It is
30 certainly there under the Commonwealth legislation and it
31 may just be something that is extraneous to the statute

1 that the advisory committee engages in and that is how we
2 understand that additional kind of classification that
3 Your Honour might see in some of the evidence.

4 HIS HONOUR: I see that Group 5 relates to potentially
5 threatening processes.

6 MS MORTIMER: Yes Your Honour, I should have drawn Your
7 Honour's attention to that. If Your Honour pleases.

8 Now Your Honour if I might turn to the Sustainable
9 Forests Timber Act (2004). Your Honour will see if one
10 goes to the purposes of this Act in s.1, and Your Honour
11 if one takes note of the date - see this is a legislative
12 regime that broadly coincided with the creation of
13 VicForests and the allocation of responsibilities to
14 VicForests in the way that I took Your Honour through
15 yesterday.

16 This is the Act as the purpose sets out, that
17 provides the framework for sustainable forest management
18 and sustainable timber harvesting so together with the FFG
19 Act this is the principal piece in the legislative scheme
20 with which we are concerned.

21 Your Honour there are three actors under this
22 legislative scheme. The first is the minister. The second
23 is the Secretary to the Department of Sustainability and
24 Environment and the third is VicForests.

25 HIS HONOUR: Yes.

26 MS MORTIMER: In our submission, Your Honour, all three of them
27 are bound by the principles set out in s.5 of the Act and
28 the application of those principles to what they do and
29 I ask Your Honour to look at s.5 of the Act. Section 5(1)
30 provides: "In undertaking sustainable forest management in
31 accordance with this Act" and it is that language, Your

1 Honour, that grounds the submission that all of the actors
2 under this act are bound by these principles. Regard is to
3 be had to the principles of ecologically sustainable
4 development set out in the section. That, Your Honour, is
5 becoming a familiar form in Victorian legislation. I am
6 sure Your Honour has seen provisions like this before. In
7 sub-s.(2) there is then a general definition of what
8 ecologically sustainable development is, and then in sub-
9 s.(3) there is a list of three objectives and we of course
10 will be submitting that it is the third of those three
11 that is particularly relevant to this proceeding. Guiding
12 principles are then set out in sub-s.(4) and Your Honour
13 will see 4B, the precautionary principle in 4B. This is
14 the first place - - -

15 HIS HONOUR: There are inter-governmental agreements about that
16 principle as well, are there not?

17 MS MORTIMER: There are, and it is also the national forests
18 policy statement which is what one might call an important
19 originating document on which a lot of these subsequent
20 documents are based, both legislative and management, like
21 the management plan, that for example the East Gippsland
22 Management Plan picks up the National Forest Policy
23 Statement, so yes Your Honour, there are inter-
24 governmental agreements like the Regional Forest
25 agreements.

26 HIS HONOUR: I thought there were Commonwealth State agreements
27 as well that applied.

28 MS MORTIMER: The Regional Forest Agreements are Commonwealth
29 State agreements.

30 HIS HONOUR: Yes.

31 MS MORTIMER: Your Honour is correct. There are other inter-

1 governmental agreements about the environment. Your Honour
2 is quite right about that. Yes, so there is a framework at
3 international level then at federal level, then at federal
4 State level and then at State level.

5 HIS HONOUR: Yes. I have thought of it before in terms of the
6 law of Victoria is as couched within that underlying
7 federal framework, as it were, so that there is a sense in
8 which the State of Victoria has agreed to apply that
9 principle in relation to environmental decision-making, as
10 I understand it, but that may be too loose a way of
11 looking at it.

12 I had a case involving a residential development in
13 an open water catchment, Rosen v. the West - I can't
14 remember the name of the catchment now - but in any event
15 I think it is the only time that the Supreme Court has
16 looked at that.

17 MS MORTIMER: We agree with that, Your Honour.

18 HIS HONOUR: There is no great body of case law relating to it.

19 MS MORTIMER: No, there is a bit out of New South Wales in the
20 Land and Environment Court, Your Honour, and - - -

21 HIS HONOUR: There are Queensland decisions and other decisions
22 but it seemed to me that there is a sense in which it is
23 understood in general terms but it has become, well as
24 this section shows, it has become a specific consideration
25 in relation to various schemes of land use management.

26 MS MORTIMER: Precisely Your Honour, and that development will
27 in our submission assume some considerable importance in
28 Your Honour's determination of the different approaches
29 the parties will take in this case to the nature and
30 enforceability of the precautional principle because it
31 will be our submission that while the approach the

1 defendants we apprehend will urge on Your Honour might
2 have been one that was appropriate when the precautionary
3 principle was no more than part of either international
4 agreements or national policy statements the world has
5 moved from there and Victoria in our submission has moved
6 considerably into the recognition of that principle in
7 State legislation.

8 HIS HONOUR: Yes.

9 MS MORTIMER: And the incorporation of it into the context that
10 is intended to produce a binding obligation.

11 If I can turn to the first of the actors under the
12 scheme and that is the Minister. I take Your Honour
13 through the Minister's role. The first important function
14 the Minister has is to set the sustainability criteria and
15 indicators for sustainable forest management. That is
16 under s.6(1).

17 The Minister is also responsible under s.11 for
18 developing a sustainability charter. Now that is a
19 document which Your Honour - I won't take Your Honour to
20 it. It is in evidence at the agreed documents p.712,
21 generally a collection of what we would describe, Your
22 Honour, as high-level statements.

23 The third and more critically important
24 responsibility of the Minister is under s.13 and that is
25 to make an Allocation Order. So there is the Minister who
26 makes the order to allocate timber in State forests to
27 VicForests for the purposes of harvesting and selling or
28 harvesting or selling timber resources.

29 Now the Allocation Order, Your Honour, is by species
30 of tree and general location. Before I take Your Honour to
31 that document I will just work Your Honour through a

1 couple of these other provisions. Your Honour will see by
2 s.14 it is for a fixed period initially of 15 years that
3 may be extended, so the Allocation Order is a document
4 that spans quite a long period and when we come to the
5 Timber Release Plans Your Honour will see they are the
6 next step down in the hierarchy and they go for a shorter
7 period of time.

8 Section 15 then prescribes what an Allocation Order
9 must include, "A description of the forest stands, their
10 location, a table, a list of any activities VicForests is
11 permitted to undertake" and paragraph C is most important.
12 "The Allocation Order must contain the conditions to which
13 VicForests is subject in carrying out its functions under
14 the Allocation Order including any applicable performance
15 measures and standards," and then there is a discretion in
16 sub-s.(2) to include other matters that the Minister
17 thinks fit.

18 Your Honour the Allocation Order is in Vol.1 of the
19 agreed documents at p.9. I ask Your Honour to turn to
20 that. It is p.9, Your Honour.

21 HIS HONOUR: Yes.

22 MS MORTIMER: It is the order made by the then Minister for the
23 environment on 29 July 2004 to VicForests. The objectives
24 are set out in Clause 2 of the Order and essentially
25 follow the form of s.15.

26 Your Honour will see that the period in which it is
27 in force is from 1 August 2004 till 31 July 2019 so the 15
28 year period contemplated under the Act, then in Clause 4
29 there are two kinds of allocations. The first allocation,
30 if you read the first paragraph in Tables 1 to 3 is an
31 allocation for timber resources for new harvesting, and

1 that is contained in Tables 1 to 3.

2 HIS HONOUR: Yes.

3 MS MORTIMER: Then further down about halfway through that
4 paragraph Your Honour will see a separate allocation in
5 Tables 4 to 6 for thinning and selling.

6 HIS HONOUR: Yes.

7 MS MORTIMER: Over the page, Clause 5 then sets what the
8 authorised activities are for VicForests and they are:
9 "The harvesting and sale or the harvesting or the sale in
10 accordance with this order," and in our submission not
11 otherwise. "VicForests is permitted to undertake
12 associated activities" which are then specified, Your
13 Honour, as in our submission the Act requires them to be,
14 and Your Honour will see they include activities that are
15 preparatory to harvesting. They then include site
16 rehabilitation and they include forest regeneration, Your
17 Honour.

18 That specification we pause to note, Your Honour,
19 does not say "forest regeneration solely for the purpose
20 of commercial harvesting in the future." It does not say
21 that. It says, "Forest regeneration" and that is an
22 important issue for our case.

23 VicForests is then authorised to rehabilitate and
24 regenerate in accordance with the conditions and standards
25 specified in s.6 so that reinforces, in our submission,
26 the broader nature of that obligation about forest
27 regeneration.

28 Specified conditions are then set out as s.15(1c)
29 requires them to be and Your Honour will see the mandatory
30 language that is used. "VicForests is required to comply
31 with conditions and standards in the following documents

1 as amended from time to time." So there are two things,
2 there are conditions in the documents and there are
3 standards so this is not such a specific obligation as an
4 our submission the defendants will have Your Honour read
5 this, as to say if it doesn't say you must do X then there
6 is no obligation, because there is an obligation to comply
7 with standards and that is, in our submission, very
8 outcome-oriented.

9 There are then a number of documents which contain
10 the more specific obligations. The two which are
11 particularly important, Your Honour, are the first one,
12 the Code of Forest Practices.

13 HIS HONOUR: Yes.

14 MS MORTIMER: The third one, the Management Guidelines and the
15 Forest Management Plans and the fourth one, the Management
16 Procedures for Timber Harvesting.

17 The Allocation Order was amended in 2007.

18 HIS HONOUR: What am I concerned with here, Mountain Ash or
19 Alpine Ash?

20 MS MORTIMER: I was going to come to that. I was just going to
21 take Your Honour to the amendment and then I was going to
22 take Your Honour to the species.

23 HIS HONOUR: Yes.

24 MS MORTIMER: The amendment Your Honour will find on p.24, but
25 really starting on p.23, but it was an amendment that as
26 it reads was principally prompted by the occurrence of
27 fires in Victoria in 2003 and then again in 2006 and 2007
28 but there were some consequential amendments made, Your
29 Honour, to add a further document that VicForests was
30 required to comply with which was the Sustainability
31 Charter. Your Honour can see all this on p.24 of the

1 Appeal Book. About a third of the way down p.24 Your
2 Honour will see the words in paragraph 6 of the 2004
3 Order.

4 HIS HONOUR: Yes.

5 MS MORTIMER: So in goes another document. There is then some
6 updating of some of the other documents because they then
7 become available in amended form. There is a Code of
8 Practice, a new Code of Practice and that is revised and
9 then there are also new management procedures and new
10 harvesting procedures, so the amendment brings up to date
11 the actual content of the documents with which VicForests
12 is required to comply.

13 HIS HONOUR: If I go back to - - -

14 MS MORTIMER: Go back to the species. As I understand it, Your
15 Honour - - -

16 HIS HONOUR: No, go back to where we were. Of the four that you
17 picked out for me, the 1996 Code - - -

18 MS MORTIMER: Is now at 2007.

19 HIS HONOUR: Yes.

20 MS MORTIMER: Yes.

21 HIS HONOUR: And the Management Guidelines?

22 MS MORTIMER: The Management Guidelines are the same, Your
23 Honour, because they are in the Management Plan and the
24 Management Procedures are 2005 and the Harvesting
25 Procedures are 2007.

26 HIS HONOUR: Yes.

27 MS MORTIMER: Your Honour was asking me the classifications,
28 and Your Honour I do completely stand to be corrected
29 about this by my learned friend.

30 HIS HONOUR: Yes.

31 MS MORTIMER: Because he may know this part of the case,

1 I readily confess, a lot better than me. But as
2 I understand it one of the key species or classifications
3 of species we are dealing with is the one that appears on
4 p.12.

5 HIS HONOUR: I wonder if I might ask you to reproduce
6 conditions - or Clause 6 of the Allocation Order as
7 amended subsequently so that there is a consolidated
8 version, if you like.

9 MS MORTIMER: Yes Your Honour, of course.

10 HIS HONOUR: Just type it up in bold or however you like,
11 whatever is convenient electronically so that both sides
12 agree that this is what applies.

13 MS MORTIMER: Of course, Your Honour, we will.

14 HIS HONOUR: Where were you going to go now?

15 MS MORTIMER: I was going to go to p.12. Your Honour asked
16 about the species. As we understand it, one of the
17 principle species is - p.12 at the third last entry,
18 Mountain Mixed Species, mature.

19 HIS HONOUR: Yes.

20 MS MORTIMER: But Your Honour, I stand to be corrected about
21 those issues completely. There will be no doubt other
22 species present in the coupes, because this is a document,
23 Your Honour, that if Your Honour looks across the top of
24 the column Your Honour will see the forest management
25 areas across Victoria and the last one is East Gippsland
26 and then it is an allocation by species, so that
27 VicForests is permitted to harvest, and this is an
28 allocation that goes from period to period but VicForests
29 is permitted to harvest not only particular species but
30 then there is an allocation as between those species
31 between different areas.

1 HIS HONOUR: All right.

2 MS MORTIMER: And I am just having that little explanation
3 updated that it also - as we understand it the other
4 allocation that is relevant is about four entries above
5 that. "Alpine Mixed Species, mature."

6 HIS HONOUR: Yes.

7 MS MORTIMER: And possibly for each of them also, Your Honour,
8 "Alpine Mixed Species, uneven aged" and "Mountain Mixed
9 Species, uneven aged." The way that is picked up will
10 become a little bit clearer when I take Your Honour to the
11 Timber Release Plan which also specifies the species.

12 HIS HONOUR: Yes. So is the allocation made with respect to the
13 whole of the East Gippsland Region.

14 MS MORTIMER: The allocation is made with respect to the whole
15 of the State of Victoria, then divided into two things,
16 species.

17 HIS HONOUR: Yes.

18 MS MORTIMER: And regions. So within a species and within a
19 region.

20 HIS HONOUR: I understand, yes.

21 MS MORTIMER: Your Honour, that completes my description of the
22 principal responsibilities of the Minister as they are
23 relevant to this proceeding under the Act. I want to now
24 turn, and I am going to come back to the Timber Release
25 Plan in a moment, Your Honour, which is the next important
26 document.

27 I want to turn now to the responsibilities of the
28 Secretary to the Department of Sustainability and
29 Environment under this Act. The first responsibility not
30 particularly relevant but I will just draw it to Your
31 Honour's attention is under s.8. "The Minister having set

1 criteria and indicators for sustainable forest management,
2 the Secretary is to report on those indicators."

3 HIS HONOUR: Yes.

4 MS MORTIMER: That is s.8 of the Act. Then Your Honour, the
5 very important sections which fall under the
6 responsibility of the Secretary are those in Part 5 of the
7 Act starting with s.36.

8 HIS HONOUR: Yes.

9 MS MORTIMER: And some of these are VicForests responsibilities
10 which I will come back to in a moment but essentially the
11 process is, Your Honour, that the Act makes it clear that
12 the resources in State forests are the property of the
13 Crown and that the property in them only passes from the
14 Crown to VicForests in accordance with s.42 or otherwise
15 under this Act. And that process is started by a
16 preparation by VicForests under s.37 of the Timber Release
17 Plan with respect to an area. So, it's a proposal, if you
18 like, Your Honour, based on the allocation order. The
19 plan then must include the things that are set out in s.38
20 which are essentially harvesting details. It has to be
21 submitted to the Secretary under s.39 and then it is the
22 Secretary's function to approve the Timber Release Plan if
23 the Secretary is satisfied that the plan is not
24 inconsistent with the Allocation Order and any code of
25 practice relating to timber harvesting.

26 Your Honour, as we understand it, our learned
27 friends might place some considerable reliance on the
28 approval given by the Secretary to this particular Timber
29 Release Plan and say to Your Honour that on the basis that
30 s.40 requires the Secretary to be satisfied that the plan
31 is not inconsistent with the allocation order and any code

1 of practice and we accept the Secretary must be satisfied
2 about that but our answer is, Your Honour, that's a fairly
3 high level and mechanical exercise, i.e. it's a matter of
4 cross-checking what's in the proposal with what's in the
5 Allocation Order and it's a matter of cross-checking
6 what's in the code of practice. It is not an absolution
7 to VicForests of its responsibilities under this
8 legislative scheme.

9 Your Honour, may I take you to the Timber Release
10 Plan which is in the agreed documents just a little
11 further on from where we were at p.36. Your Honour,
12 I must start at p.33, I'm sorry. Your Honour, this
13 appears and it's a little unclear from the evidence but it
14 appears that the process that is adopted is to provide -
15 to gazette two documents in performance of this
16 satisfaction of this part of the Act and the first
17 document that goes from p.33 to 35, it is the document
18 which purports to describe the timber which is to be
19 released to VicForests presumably consequent upon its
20 proposal and to specify the conditions and that power,
21 Your Honour, comes from s.40(2) of the Act. So, in
22 approving a Timber Release Plan the Secretary may approve
23 the plan wholly or in part subject to any conditions which
24 the Secretary considers appropriate. Your Honour, will
25 see sub-s.(3) as well, so there's a constraint on the
26 Secretary in terms of not holding things up unreasonably.

27 Your Honour, the document that's at 33-35 is the
28 plan together with the conditions and then a second
29 document is issued at p.36 which is the actual approval.
30 So, the document that's at AD36 appears to be the notice
31 of the approval and the Secretary is required to publish

1 that under s.41 but it's the documents at 33-35 that are
2 the operating documents, so to speak.

3 Your Honour will see from the objectives in the
4 Timber Release Plan that - and from the plan itself that
5 it operates from 2009 to 2014 and that it provides a
6 schedule of coupes selected for three things: clear fell
7 harvesting, sea tree harvesting and thinning.

8 Over the page, Your Honour, Your Honour will see
9 under the heading "authorised activities" a repetition of
10 the language that one finds in the Allocation Order and a
11 repetition of that general obligation about forest
12 regeneration and we make the same arguments. The
13 paragraph underneath that reinforces the fact that the
14 coupes that are specified in this plan remain the
15 responsibility of VicForests until rehabilitation and
16 regeneration has been completed in accordance with the
17 condition and standards.

18 Then over the page again, Your Honour, one gets at G
19 a repetition of the specified conditions that were also
20 present in the Allocation Order and because this is a more
21 recent document, Your Honour, it may actually be the case
22 that we can lift the document Your Honour wants straight
23 from that but I'll check that with my learned friend
24 because Your Honour will see these are updated versions.

25 There is one aspect of flexibility, Your Honour,
26 which is in this document that is not in the Allocation
27 Order and that is the last sentence in that first
28 paragraph under "specified conditions": "VicForests
29 requests that any such amendments be made in consultation
30 with VicForests". It is not completely clear to us, Your
31 Honour, how that appears in a statutory instrument but

1 it's there.

2 Your Honour, to take you to the contents of that
3 Timber Release Plan and how they relate to the coupes that
4 we're dealing with, the first one - there are four coupes,
5 Your Honour, and they fall into two categories under this
6 plan. The first ones appear at p.45 of the agreed
7 documents, items 3 and 4. So these, Your Honour, are -
8 and that's where you see the identification: the address
9 in the forest (to use the forestry language); new coupes
10 East Gippsland forest management area Bendoc district. So
11 that means, Your Honour, these are coupes included for the
12 first time in the harvesting schedule. Your Honour will
13 see there the silver culture system is specified and the
14 species are specified.

15 HIS HONOUR: I see it's described as "alpine/mountain mixed
16 species 3 1950s uneven aged".

17 MS MORTIMER: Yes, Your Honour, and so that's really an amalgam
18 of several of the categories and the Allocation Order that
19 I took Your Honour to. That simply reflects the fact of
20 the presence of many different species in those coupes.

21 Your Honour, the second set of coupes - if I can
22 take Your Honour first to p.70 and Your Honour will see
23 down the bottom is the heading, right down the bottom is
24 the heading on p. 70 "carryover coupes", so that means
25 that these are coupes which were in the last Timber
26 Release Plan not harvested and carried over.

27 Over the page, Your Honour, p.71 items 7 and 8, Your
28 Honour will see "coupes 15 and 19". The other thing that
29 these documents tell us is the gross and net area for
30 harvesting. I should have pointed that out on the other
31 coupes, Your Honour. So, this is a good source of at

1 least raw figures about estimated area gross and net.

2 HIS HONOUR: What is netted out? What comes out of the gross?

3 MS MORTIMER: As I understand it, Your Honour, that would be in
4 terms of once the prescriptions are applied, so that if
5 you have to leave a buffer zone or once you survey you see
6 the areas that you can't log and that's how I understand
7 it.

8 HIS HONOUR: I see.

9 MS MORTIMER: Just to point out, Your Honour, because one of
10 the things that we are talking about is we're also talking
11 about what happens after logging. If Your Honour turns to
12 p.86 and just to point out, Your Honour, because one of
13 the things that we are talking about is we're also talking
14 about what happens after logging. If Your Honour turns to
15 p.86 you will see a heading "regenerating coupes, East
16 Gippsland forest management area" and when Your Honour
17 looks down at the silver culture Your Honour will see
18 essentially the activities and Your Honour will see that
19 some of them appear to be released for the purposes of
20 thinning and some appear to be released for the purposes
21 of harvesting.

22 HIS HONOUR: Yes, I see.

23 MS MORTIMER: So these are presumably, Your Honour, coupes
24 which are old enough to be being logged again or, as the
25 table suggests, thinned.

26 Your Honour, I'm reminded I should have also pointed
27 out to Your Honour on p.71 one other entry. On p.71, Your
28 Honour, item 9 is coupe 20. For the purposes - and this
29 might be important to understand for the purposes of the
30 view tomorrow - coupe 20, although it's been harvested,
31 according to this table contains - firstly was harvested

1 by the same method and, secondly, contains the same kind
2 of species.

3 Your Honour, there are a variety of other functions
4 and powers that the Secretary has under this Act but
5 I won't bother going through those.

6 The obligations of VicForests under this piece of
7 legislation are as follows: it must under s.9(1) provide
8 certain information to the Secretary about performance of
9 its functions, so it's got kind of a reporting function
10 under s.9. It has got to respond to the Sustainability
11 Charter under s.12. Then we come to some more relevant
12 obligations: the first of them is s.16. Section 16
13 imposes an obligation on VicForests on the making of an
14 Allocation Order to carry out its functions in accordance
15 with that order insofar as those functions relate to
16 timber resources or the area to which the order applies.
17 So that's how the conditions that are specified and the
18 activities that are specified in the order are picked up
19 in the Act. This is the first stage, so to speak, Your
20 Honour, through s.16 and s.15 and the Allocation Order
21 that concrete obligations on our case are imposed on
22 VicForests. That's the first category.

23 It is required to prepare the Timber Release Plan
24 and submit it to the Secretary in the way that I have
25 already described to Your Honour and then as a consequence
26 of that process a second category of obligation arises
27 under s.44. I ask Your Honour to look at s.44 - "...in
28 carrying out its functions and powers under this Act in
29 relation to vested timber resources", so that means in
30 relation to the ones that have come through into the
31 Timber Release Plan or in the area. VicForests must do so

1 in accordance with any approved Timber Release Plan. Your
2 Honour, that's the second stage, so the Timber Release
3 Plan again through s.44 entrenches those conservation
4 obligations on VicForests.

5 Then the third important source of obligation in
6 this Act upon which we rely, Your Honour, is s.46 which
7 imposes an independent - so this is the section Your
8 Honour may remember that picks up s.39 of the Conservation
9 Forests and Land Act. Remember, Your Honour, that there
10 was - unless you put it into a relevant law it doesn't
11 crystallise as an obligation.

12 HIS HONOUR: Yes.

13 MS MORTIMER: So that's this section that crystallises that
14 obligation to abide a code of practice.

15 What we have, Your Honour, in summary in terms of
16 the legislative scheme is the Allocation Order read with
17 s.16 of this Act that imposes obligations through a series
18 of documents. We have the Timber Release Plan through
19 s.44 which picks up and imposes the same kind of
20 obligation, so they're entrenched twice. And then we have
21 s.46 which becomes an independent statutory obligation
22 about compliance with the code of practice.

23 So if you work through that, Your Honour, some
24 obligations are entrenched twice at least; the code of
25 practice is entrenched three times, it's entrenched
26 through the Allocation Order, through the Timber Release
27 Plan and through s.46 and the precautionary principle is
28 entrenched through s.5 of this Act (the Sustainable Forest
29 Timber Act); it's entrenched through the code of practice
30 and it's entrenched through the forest management plan.
31 So, it is also entrenched three times.

1 I want to take Your Honour briefly in terms of the
2 documents that then set out some of the more detail of the
3 obligations to the code of practice and to the forest
4 management plan. Your Honour, I will aim to finish by
5 lunchtime so my learned friend has the afternoon. Your
6 Honour, the code of practice is at agreed documents 106.

7 So what's in here, Your Honour, is the 2007 version
8 and that's as we understand it the appropriate version and
9 if Your Honour turns to the contents page that provides a
10 good indication of what the code covers. Your Honour,
11 obviously in the interests of time, I'm not going to take
12 Your Honour through it in too much detail, I'm going to
13 turn only to the most critical parts of it.

14 There are some parts - perhaps if I just run Your
15 Honour through some of the pages and then I'll just pause
16 on the most critical ones. On p.127 there are some
17 obligations about water quality and buffers and the way
18 that water quality is to be protected by buffers. On
19 p.131 there are some statements about habitat retention
20 measures. On p.132 and onwards there are some provisions
21 about forest regeneration and management.

22 Then on p.130 is the key one: 2.2.2 conservation of
23 biodiversity. Your Honour will see that the way the code
24 operates - and this is apparent throughout the code - is
25 that it's divided into two categories. You get an
26 operational goal and then you get something that is called
27 a mandatory action and that is defined on p.116 of the
28 agreed documents. A mandatory action are actions to be
29 conducted in order to achieve each operational goal.
30 Forest managers and operators must undertake all relevant
31 mandatory actions to meet the objectors of the code.

1 Mandatory actions are focused on practices or activities.
2 Failure to undertake a relevant mandatory action would
3 result in noncompliance with this code.

4 So, they are very important Your Honour and Your
5 Honour will see under those mandatory actions we would
6 emphasise the second paragraph: forest management
7 planning and all forestry operations must comply with
8 measures specified in the relevant flora and fauna
9 guarantee action statement. So that's how the action
10 statements are picked up.

11 There's provision about rain forest communities.
12 There's then an important provision about facilitating the
13 protection of biodiversity values. The code says the
14 following matters must be addressed when doing two things,
15 Your Honour, and this is again important - they must be
16 addressed when developing and reviewing plans (that's the
17 first thing); they must be addressed, adhered to during
18 operations. So you don't comply with the code of practice
19 on our case, Your Honour, by planning. You comply with it
20 by what you do on the ground and the effects of what you
21 do on the ground.

22 Your Honour will see the precautionary principle in
23 the first dot point and Your Honour will find a definition
24 of that in this code. At the back there's a glossary,
25 Your Honour, and on p.185 Your Honour will find the
26 definition of the precautionary principle. There's then
27 the second obligation in the dot point - consideration of
28 the advice of relevant experts and relevant research; the
29 use of wildlife corridors, appropriate undisturbed
30 buffers, maintaining forest health and ecosystem
31 resilience by managing - - -

1 HIS HONOUR: What page was the definition?

2 MS MORTIMER: It's on p.185. And then under the dot points
3 there's a specific obligation at both the planning stage
4 and the harvesting stage to retain habitat trees or
5 patches and long-lived under-storey elements in
6 appropriate numbers and configurations and provision for
7 the continuity and replacement of old hollow-bearing trees
8 within the harvestable area. So that's an important
9 obligation for the purposes of this case as well.

10 Those obligations, Your Honour, draw on the
11 principles on which the code is based and they are set out
12 at p.117, just going backwards a little bit, Your Honour.
13 So that's at p.117 you see a general statement of the
14 principles on which the code was based and it's the first
15 one that we rely on, Your Honour, the first principle is
16 that biological diversity and the ecological
17 characteristics of native flora and fauna within forests
18 are maintained. Again, Your Honour, outcome driven, in
19 our submission, that is the kind of language that is used.

20 Just again on that outcome oriented point, can
21 I draw Your Honour's attention to the last sentence on the
22 page of 117.

23 HIS HONOUR: Yes, I have just read that.

24 MS MORTIMER: The East Gippsland Forest Management Plan, if
25 I can now take Your Honour to that, and start with an
26 apology and confession about it because it's somehow made
27 its way into the agreed book three times and that's
28 unhelpful and it doesn't need to be in there three times,
29 Your Honour. Can I ask Your Honour to look at the index
30 to the agreed book just to explain that and then we'll go
31 to the plan.

1 Entry 9, Your Honour, is the first entry and that's
2 one - it starts at p.195 and that's the original one, it's
3 photocopied in a way that makes the print very small so
4 I'm not going to suggest that Your Honour looks at that
5 one. The second one is - as amended it's an online
6 version, that's a version that we used at the injunction
7 application because that's all that was available to us at
8 that time and that's not a complete version, so I'm not
9 suggesting Your Honour should look at that one.

10 So, the right version, Your Honour, is the one that
11 actually starts - it doesn't somehow appear to be in the
12 index - at 369. So that is the version that, in our
13 submission, is the one that Your Honour can use. I'm sure
14 if my learned friend disagrees with that he'll let Your
15 Honour know. This is a document, Your Honour, that was
16 prepared during the 1990s which were a time of great
17 change for the management of forests throughout Australia
18 with the proposed introduction of the regional forest
19 agreement process and Your Honour will see from the
20 introduction by the then Secretary to the then Department
21 of Conservation and Natural Resources who was at this
22 stage the entity who was logging in forests, that
23 essentially Victoria decided it wasn't going to wait
24 around for the negotiations for the Regional Forests
25 Agreement and it would implement this Forest Management
26 Plan.

27 Again Your Honour, in the interests of time I am not
28 going to take Your Honour through it although it is an
29 important document with a lot of things in it that we are
30 going to come back to. One of the things it does in the
31 summary, Your Honour, is to set out the initiatives and to

1 refer to particular species that are important and Your
2 Honour will see at p.376 in the middle of the page there
3 is a dot point that starts, "Conservation Guidelines" so
4 that the species that get a mention in this particular
5 area are many of the species that we are dealing with,
6 Your Honour, Long-footed Potoroos, Powerful Owls, Sooty
7 Owls, Spot-tailed Quoll, arboreal mammals, threatened frog
8 species, and crayfish. So right from the start, what this
9 management plan recognises is the species - that is from
10 1995, Your Honour - it was recognised that many of the
11 species that we are dealing with in this case were
12 featured important species for East Gippsland.

13 HIS HONOUR: Is Concerned Residents of East Gippsland the
14 unincorporated predecessor to your client?

15 MS MORTIMER: Yes it is, Your Honour.

16 HIS HONOUR: So your client is part of the advisory committee
17 that guided the team that produced this?

18 MS MORTIMER: Yes Your Honour. Well, an individual from that.
19 Certainly an individual from that unincorporated
20 association was part of the team. That is so, Your Honour.

21 HIS HONOUR: Yes, but she was part of the team as representing
22 Concerned Residents of East Gippsland.

23 MS MORTIMER: Yes Your Honour. That's right. The plan is
24 then, if Your Honour looks at the table of contents,
25 divided into a number of parts and I will just take Your
26 Honour to Chapter 3, Biodiversity Conservation, which is
27 on p.12 of the plan on p.392 of the agreed book. To keep
28 it in chronological order may I just firstly take Your
29 Honour to p.387 because this where we get another
30 reference to the precautionary principle, p.387.

31 HIS HONOUR: Yes.

1 MS MORTIMER: The strategy adopted by the Forest Management
2 Plan has as this page sets out, under the heading "Forest
3 Management Strategy" it has got three parts. You get
4 "Guidelines for the Protection of Conservation Values,"
5 and Your Honour will see in the second sentence a summary
6 of essentially the precautionary principle. "Where
7 insufficient is known about a particular area a
8 precautionary approach has been adopted." You then get
9 the reference to forest management zones which are one of
10 the particular management tools contemplated by this plan
11 and then you get a reference to a review process to
12 evaluate and adjust the guidelines to ensure that they
13 stay meaningful and relevant throughout the life of this
14 plan.

15 Then Your Honour, still going backwards rather than
16 forwards, just to pick up the way this plan fits into the
17 legislative scheme at p.381. Page 381 the legislative and
18 policy framework. There Your Honour will see that it
19 identifies this plan as a working plan under that s.22 of
20 the Forests Act and it then picks up a number of the other
21 aspects of the legislative scheme including the then
22 Commonwealth Endangered Species Protection Act which was
23 later brought into the EPBC Act and Your Honour will see
24 also there down the bottom references to the National
25 Forests Policy Statement, the old growth study and the
26 National State Values Assessments.

27 Your Honour, then the plan deals from p.392 onwards
28 with biodiversity conservation and I won't take Your
29 Honour through it in too much detail but it does seek to
30 implement management really through those three things in
31 the strategy that I just took Your Honour to, so you have

1 got conservation guidelines, you have got reservation
2 areas and you have got review. This part then goes on to
3 deal with flora. It has a particular section on old growth
4 forest at p.403 and it then turns to deal with fauna at
5 p.407.

6 HIS HONOUR: Yes.

7 MS MORTIMER: At p.407 one of the things that that plan
8 recognises in that third paragraph is that, "Over the next
9 30 years" - so that is 30 years from 1995 - "the timber
10 industry will be in a state of transition," it was
11 apprehended in 1995 at least, Your Honour - "from being
12 based on older forests to one based on re-growth, and the
13 main thrust of the strategy," the plan says, "is to ensure
14 that a suitable habitat network is retained as the ratio
15 of older forest to re-growth decreases." That strategy is
16 said to have three elements, the guidelines, a network of
17 - that is species-specific guidelines, a network of - that
18 is species-specific guidelines, a network of linear
19 reserves and modified timber harvesting arrangements to
20 retain high fauna values.

21 We then have, Your Honour, the specification of two
22 aims which are in our submission outcome-driven. To ensure
23 that all indigenous fauna species survive and flourish.

24 Your Honour will have seen now that word "flourish"
25 in several different places, both statutory and non-
26 statutory throughout the FMA and "provide special
27 protection for threatened and sensitive fauna species."

28 Over the page, Your Honour, then the first of the
29 management mechanisms is described and that is guidelines
30 for the conservation of featured species. That is really a
31 reference back to that entry right at the start of the

1 management plan which picked up a lot of the species that
2 we are dealing with so this is a plan that treats those
3 species as featured species. That is particularly
4 important to East Gippsland.

5 There is quite a detailed description of what the
6 purpose of the guidelines is in this and what they are
7 intended to achieve. When we come, Your Honour, at the end
8 of this case to addressing Your Honour on what the
9 evidence has showed and what the evidence has showed about
10 compliance with these guidelines, what is on this page is
11 going to be very important but I won't spend too long on
12 it now. Essentially that is where a lot of the compliance
13 obligations arise, Your Honour.

14 Over the page, 409 the guidelines then start to deal
15 with each of the species and I am going to come back to
16 this in a minute because I am going to open what we say
17 are the obligations and the breach for each species, so
18 I will come back to this in a little bit of detail.

19 We then follow for several pages conservation
20 guidelines and then on p.413 we move to linear reserves
21 and on p.414 we move to some harvesting issues but not
22 ones that are particularly relevant because there is no
23 special management zone in the areas that we are dealing
24 with.

25 HIS HONOUR: Yes.

26 MS MORTIMER: Your Honour, I am going to come, as I said, back
27 to that document. I now move to deal with obligations and
28 open how we say they have been breached and I am going to
29 do that species by species. Would this be a convenient
30 time for a very short break?

31 HIS HONOUR: Yes.

1 (Short adjournment.)

2 MS MORTIMER: If Your Honour pleases. Your Honour was correct
3 about the inter-governmental agreement on the environment,
4 (1992) whereby the States and the Commonwealth agreed to
5 apply the precautionary principle and it is paragraph
6 3.5.1 of that agreement.

7 HIS HONOUR: Yes.

8 MS MORTIMER: And it is picked up in the National Forest Policy
9 statement which is one of the documents that the
10 management plan refers to. The National Forests Policy
11 Statement is a 1992 document.

12 I am going to turn now to open the plaintiff's case
13 about each of the species in terms of what we say is
14 required and what has not been done and can I just first
15 indicate what the submission is in relation to the
16 obligations under s.4(2) of the FFG Act, so that is the
17 public authority - VicForests is a public authority and it
18 has to be administered taking into account those
19 objectives in the FFG Act because that is really a case
20 the plaintiff makes in two ways and I won't do it species
21 by species, I will just outline it now.

22 We say that that obligation has been breached if you
23 look at what VicForests has done species by species
24 because it is not acting in a way to guarantee that each
25 of the species will survive and flourish. It is not
26 conserving them across their ranges. That is a very
27 important issue. It is rushing to harvest where there are no
28 surveys, no current surveys but likely presence of the
29 species and good quality habitat, and now there is expert
30 opinion about that, Your Honour.

31 It is not managing potentially threatening processes

1 in the way it should, particularly the loss of hollow-
2 bearing trees and it is not ensuring genetic diversity of
3 the species concerned. So whether you look at VicForests's
4 planning and conduct species by species or whether you
5 look at it across its planning and conduct for Brown
6 Mountain we would submit that it is in breach of s.4(2)
7 and indeed Your Honour, it will be the plaintiff's case
8 that there is an aspect of wilful blindness in the way
9 VicForests carries out its job and that is fundamentally a
10 submission that will be based on it not doing pre-logging
11 surveys. If you don't look you don't find.

12 HIS HONOUR: In a sense though that is not necessary to your
13 case, is that right? It is not a question of tortious
14 liability dependent upon recklessness or negligence.

15 MS MORTIMER: No Your Honour.

16 HIS HONOUR: Or some other want of care?

17 MS MORTIMER: That's right.

18 HIS HONOUR: It is, you say, a question of obligations created
19 by this basket of obligations under the relevant
20 legislation.

21 MS MORTIMER: That is so, Your Honour, and it is essentially a
22 factual evaluation. Either those things have been done and
23 there is an environment in which logging is lawful or they
24 have not been done and there is an environment in which
25 logging is unlawful. It depends on circumstances having
26 been reached where these obligations are fulfilled and if
27 those circumstances have not been reached then the logging
28 will not be lawful. The reason I point to that - - -

29 HIS HONOUR: Theoretically though, you might commence logging
30 and discover something on the first day, you would say,
31 which meant that you couldn't properly go on (indistinct)

1 extraordinary (indistinct).

2 MS MORTIMER: In our submission it is not extraordinary at all
3 and in part what these codes contemplate so that you
4 reduce - - -

5 HIS HONOUR: That is what I am putting to you. you say it is
6 not just a matter of planning, it is a matter of
7 operation, so you might plan in good faith, you say, but
8 if when you go down on the ground you find that in fact
9 something that is thought to be extinct is actually there
10 you can't go on, you would say.

11 MS MORTIMER: That is so, that is absolutely right, we would
12 say. It will be dependent, Your Honour, naturally, on a
13 number of circumstances but in that kind of extreme
14 example when the finding of individuals of a species which
15 is at a very low level of abundance or particularly - that
16 kind of thing. I mean Your Honour if a single Yellow-
17 bellied Glider was observed during logging leaping out of
18 a hollow that is probably not under this legislative
19 scheme the kind of thing that would require harvesting to
20 be stopped. If you saw a family of potoroos hopping along
21 the ground it might. So we would offer those two examples
22 but we certainly contend that the obligations continue
23 through the on the ground harvesting into the regeneration
24 so that if you are not rehabilitating and regenerating in
25 a way that brings the species back you are also not
26 complying with what the suite of regulations and
27 legislation envisage. It is a process where the
28 obligations crystallise really at three stages, in the
29 planning stage, in the harvesting stage and afterwards.
30 That is how we would put it.

31 To turn to each of the species, and to outline how we

1 put the case in relation to each of the species I start
2 with the potoroo. Your Honour, in the interests of time
3 I probably won't go back, though I said I would, to the
4 management plans and things because that is just really
5 going to detain us for a very long time if I go through
6 eight of nine species so I will just give Your Honour the
7 summary of it.

8 In relation to the Long-footed Potoroo Your Honour,
9 the plaintiff's case is that there have been records
10 produced in this proceeding that establish sightings in
11 coupes 15 and 26, that the survey carried out by DSE in
12 the first half of 200 all but concluded that potoroos were
13 present and it found diggings and even in the somewhat
14 highly charged context in which those surveys were
15 produced the DSE people were prepared to say that those
16 diggings were strongly suggestive of the species presence.
17 It will be our case that the potoroo were present in the
18 coupes and that harvesting them would be in breach firstly
19 of the action statement, secondly of the standards in the
20 management plan, thirdly of the precautionary principle,
21 and Your Honour I have already made a general submission
22 about the FFG Act and I won't continue to repeat that
23 through this part of my opening.

24 In relation to the action statement Your Honour, the
25 breaches we say are constituted by the managing of logging
26 operations without undertaking any investigations as to
27 whether the potoroo was present or likely to be present so
28 in our submission VicForests puts itself in the position
29 where it will not detect sites because it doesn't survey
30 and so in that sense it acts in a manner that is
31 completely inconsistent with the objectives and actions in

1 the action statement. It is compounded in relation to the
2 potoroo because before and after these proceedings there
3 were detection sites recorded and those sites and the
4 prescriptions in the action statement have not been
5 applied to those records.

6 We would submit that there has been no process to
7 determine where a special management zone should be sited
8 that fits the potoroo's requirements and instead what has
9 been done is that a buffer has been imposed that is
10 convenient for logging practices alongside the stream and
11 it happens to be a buffer that VicForests says that they
12 can provide as an answer to many of the species
13 requirements so it is not something that reflects the way
14 a potoroo moves in the landscape, it is something that
15 reflects the logging convenience of VicForests.
16 In any event, Your Honour, there is around what is now
17 called a core protected zone, no special management zone
18 as the action statement requires.

19 In relation to the precautionary principle Your
20 Honour, our case in relation to the potoroo is that
21 VicForests awaits confirmed sightings but does not itself
22 look so it is a reactive process it takes and it takes
23 that process on the basis, in our submission, of desktop
24 survey results that are obviously outdated and obviously
25 incomplete.

26 So here we have a species whose likely to be present
27 with, on the evidence before Your Honour, habitat that is
28 critical to its survival. We have reports of diggings by
29 DSE itself. We have sightings by persons acting on behalf
30 of the plaintiff and we have Dr Meredith saying there is a
31 strong case for it, for the area to be declared critical

1 habitat under the FFG, and notwithstanding all of that
2 VicForests proposes to log the area and we say that in no
3 way shape or form for a species in the state that the
4 Long-footed Potoroo is in could that be considered
5 precautionary.

6 The evidence will show that the effects of logging on
7 this species, particularly in terms of what it will do to
8 populations in this area immediately are potentially
9 serious or irreversible. There are localised impacts that
10 come from habitat fragmentation and those sorts of things,
11 when one looks at the way the logging will be carried out
12 and what will happen to those areas afterwards, are not
13 reversible either.

14 There is in our submission in summary Your Honour, no
15 positive for the Long-footed Potoroo. In taking the action
16 the environmental consequences are only negative.

17 Your Honour if I can move now to the Spot-tailed Quoll
18 and Your Honour again, in relation to that we submit that
19 logging will be in breach of the management plan because
20 it will be in breach of the standard so that is really an
21 argument that flows through each of the species. The quoll
22 is one of the species where the management plan
23 specifically requires a precautionary approach to be taken
24 to protecting areas of undisturbed forest as foraging
25 habitat, and given the very low numbers of the quoll
26 Dr Belcher's opinion that East Gippsland is now the
27 stronghold for this species and it is functionally extinct
28 elsewhere, that precautionary approach is particularly
29 important.

30 This is a species, the evidence will show, Your
31 Honour, that is particularly susceptible to habitat

1 fragmentation and this logging of this high quality old
2 growth substantially contributes to that habitat
3 fragmentation. This is also a species which is highly
4 dependent on the presence of hollow-bearing prey and
5 hollow-bearing trees and there will be a significant
6 reduction in the availability of prey, that is the
7 evidence for the plaintiff from both Dr Smith and
8 Dr Belcher in relation to the quoll.

9 The logging, in our submission, will be completely
10 contrary to the precautionary principle in relation to the
11 quoll. The existing protection for the species is a
12 particular issue. It's not such an issue for some species
13 but this is an area where the reservations - the
14 effectiveness of them are unknown and whether the quolls
15 are present in some of the areas that are supposed to be
16 reserved for them is a matter on which Dr Belcher will
17 give evidence to say that their functionally extinct in
18 some of those areas where there are reservations for them.
19 So, again, Your Honour, this is about protecting species
20 where they are likely to be now in 2010.

21 In relation to the Sooty Owls and Powerful Owls,
22 Your Honour, the evidence will show that there were
23 records of the Powerful Owl in these areas in 1979 and
24 again in 2009 from DSE or its predecessor. There are
25 surveys on behalf of the plaintiff that found the Powerful
26 Owl in January 2009 and the Sooty Owl in January
27 and November 2009 and we have Dr Bilney's evidence that
28 both the Sooty Owl and the Powerful Owl are present in
29 these coupes and that the Sooty Owl is likely to be
30 roosting there.

31 Whether either or both of these species are nesting

1 there, Dr Bilney will say it's unknown but the habitat is
2 of extremely high quality for nesting. So, Your Honour
3 will hear evidence from Dr Bilney about how difficult it
4 is to find these nests without very intensive surveys but
5 his evidence will be that this is the kind of habitat in
6 which one would expect to find them.

7 As far as the forest management plan is concerned,
8 firstly we have again the failure to adhere to those
9 standards that are on p.407 but we also have, in our
10 submission, reliable sightings which ought to trigger the
11 special protection zones under the forest management plans
12 and we have a detection of a roosting or a likely roosting
13 site and the roosting site is something that triggers
14 obligations under the action statement, Your Honour, for
15 the Sooty Owls.

16 It should, in our submission, trigger a three
17 hectare special protection zone around the site and a 250-
18 300 metre radius buffer around the locality of where it's
19 believed to be roosting. But, despite that, there are no
20 plans on behalf of VicForests, as the evidence shows, to
21 implement any special zones for either the Sooty Owl or
22 the Powerful Owl.

23 There has been in relation to these species, Your
24 Honour, no attempt to locate or protect the Sooty Owls in
25 parks nearby which is something that the action statement
26 talks about and there are no studies or any research on
27 which VicForests is basing its decisionmaking about this.
28 The decisionmaking about the owls is based on the
29 identification, in our submission, of old records without
30 any investigation of whether those records reflect where
31 owls currently are and the habitat that they are currently

1 using and in contrast what we have here is cogent evidence
2 that they are in these areas, that one of them is at least
3 roosting in these areas, they both might be nesting in
4 these areas and so it is not precautionary, in our
5 submission, to prefer to rely on an outdated record, a dot
6 on a map as discharge of your obligations in preference to
7 real information about real presence at the time you
8 propose to engage in the logging.

9 One of the things that is important in relation to
10 the performance of the obligations for the owls, Your
11 Honour, is that Dr Bilney's evidence will be that the
12 impact of logging of these four coupes can't be considered
13 in isolation but it has to be considered as part of a
14 process of habitat loss and that, we would submit, is
15 particularly important in relation to the application of
16 the precautionary principle because this is one of the
17 problems, in our submission, with examining logging on a
18 coupe by coupe basis that, as Dr Bilney says in his
19 report, you might see a pair of owls, the owls that are
20 presently in this area will be affected and they'll move
21 on and they might not breed as successfully, they might
22 not forage as successfully. There's a whole lot of
23 immediate impacts on them.

24 It is easy to say they might be somewhere else but
25 what you are doing is creating an incremental effect on a
26 species only in one direction which is downwards instead
27 of upwards when the whole thrust of the action statements
28 and the management plans and this is to recover the
29 species not go the other way.

30 Your Honour, the Giant Burrowing Frog, if I can turn
31 to that, the plaintiff's evidence will show that that is

1 present in the coupe on Dr Gillespie's opinion not on a
2 finding, that the habitat, Dr Gillespie will say, is
3 highly suitable and there are historical records of the
4 species nearby and in broadly similar habitat. But there
5 have been no surveys by VicForests at all about the
6 species so there is, in that sense, nothing to diminish
7 the likelihood that Dr Gillespie is right in his opinion.

8 One of the important things about the species is
9 that they disperse through the forest, they spend (on
10 Dr Gillespie's opinion) 95 per cent of their time more
11 than 250 metres away from a stream environment. So that
12 if you look at the 100 metre buffer zone, which is
13 proposed, for a species that spends 95 per cent of its
14 time away from that stream, up to 250 metres away, the
15 buffer zone is not going to do enough.

16 Your Honour, the action statement for this species
17 requires prescriptions based on historical records since
18 1980 and all sites discovered after the action statement,
19 so that this is one of the action statements which is
20 built around the discovery of science. It is highly
21 likely to be said against us, Your Honour, there's no
22 sites discovered but our submission is you deprive that
23 obligation of all content if you don't take the steps
24 necessary to discover them.

25 So that if, for example, you're not supposed to
26 undertake a particular kind of activity on a piece of land
27 if there are hydrology problems with that land it's no
28 answer to say "I won't investigate whether there are any
29 hydrology problems and therefore I won't be in breach of
30 that obligation" and that, in our submission, is the kind
31 of circumstance that we're in here.

1 The way that VicForests approaches its obligations,
2 Your Honour, makes the discovery of the Giant Burrowing
3 Frog, which is anyway a cryptic and rare species,
4 impossible if there's no work done to see if it's there.
5 This issue of pre-logging surveys, Your Honour, is going
6 to be a critical one because it is standard practice in
7 other states and it's not standard practice in the State
8 of Victoria.

9 Your Honour, we will also say that because of the
10 following kinds of matters: there's been a breach of the
11 precautionary principle about the great burrowing frog
12 because there have been no steps taken to assess the
13 adequacy of the reserve system; there's no checking done
14 on whether the records that are there are accurate or not;
15 there's nothing much known about the population status of
16 the species throughout Victoria and there's the
17 prescriptions that are proposed to apply, the 100 metre
18 buffer prescriptions are, in our submission, generic
19 prescriptions and they are not designed to fit the
20 requirements of the species.

21 Can I turn now to the Large Brown Tree Frog, Your
22 Honour. Again, Dr Gillespie's opinion is that the habitat
23 is highly suitable for the species and there are
24 historical records of the species nearby and there are no
25 surveys or other assessments that have been undertaken
26 which diminished the likelihood that the species is
27 present. Again, Your Honour, the broad standards and the
28 management plan at p.407 we submit are not being observed
29 in relation to the species. There is no action statement
30 for the species. It was listed in 2003.

31 So the plaintiff's case about this species, Your

1 Honour, depends really on the s.4 FFG Act, the management
2 plan standards and the precautionary principle and, in our
3 submission, again you have a complete absence of surveys,
4 of steps to undertake whether the current reserve system
5 meets the requirements of these species. What we do know
6 about the species is that it requires high quality patches
7 of wet forest and that it does particularly well in old
8 growth forest and so in that sense you are looking - if
9 it's present in these coupes, it's not a species that can
10 move very far, Your Honour, it's not like the quoll. It
11 doesn't range over 2,000 hectares, it can't go anywhere.
12 It's going to get burned in the burn. It's going to get
13 preyed on when it's exposed. The ground is going to dry
14 up. This is a species that is not going to persist in the
15 area if it is there and so logging - and there's no other
16 old growth nearby so logging in that sense, in our
17 submission, is not precautionary. As I have already
18 emphasised, this is a species whose breeding sites are
19 scattered throughout the forest so, again, the 100 metre
20 buffer does nothing for the species.

21 Your Honour, I turn now to the crayfish and I'm
22 going to deal with this as "the crayfish" and Your Honour
23 will see why in a moment. Our submission will be that
24 there's no doubt that there are crayfish in that
25 watercourse in Brown Mountain Creek between coupes 15 and
26 19. The real question is what species are they and the
27 real question, in our submission, is whether they are the
28 Orbost Spiny Crayfish or a new species.

29 What the evidence will show is that whatever species
30 they are they have the same vulnerability to localised
31 disturbance. So they have the same vulnerability to

1 incremental decline and habitat quality. They have the
2 same narrow range in terms of where they occur and their
3 exposure from timber harvesting is the same: the
4 alterations to run-off and flow characteristics, the
5 amounts of debris in the stream, temperature régimes, the
6 rate and amount of sediment in the stream and the increase
7 in flow of a stream even, because Dr McCormack talks about
8 these species being ones that are dependent on a certain
9 kind of flow in the stream. All those things - it doesn't
10 matter what you call the species - it's equally vulnerable
11 to all those and it will be the plaintiff's case that
12 those are all consequences likely to occur,
13 notwithstanding the 100 metre buffer.

14 There will be a burn that is undertaken so that the
15 edges of that buffer will be burned right up to and will
16 be dried out. There will be a loss of vegetation, so
17 you're going to have an increase in light intensity and
18 temperature and the changes in the catchment hydrology are
19 simply unknown, Your Honour. There's been no
20 investigations about that whatsoever.

21 There's obviously, Your Honour, a significant lack
22 of knowledge if this is a new species because it's just
23 been discovered. If it's the Orbost Spiny Crayfish
24 there's still not a lot known about that species and in
25 that sense, in our submission, it's completely
26 incompatible with the precautionary principle to log
27 whatever the species is. It is also incompatible with the
28 action statement to create a buffer if the buffer is for
29 other reasons, such as the logging and burning off of the
30 catchments and the alteration to the stream quality, it's
31 not going to be protective even if the buffer is

1 maintained.

2 Your Honour, if this is a new species, an entirely
3 new species and, on Dr McCormack's evidence, completely
4 restricted to this area, it is the opposite of
5 precautionary for VicForests to say "We'll stick in 100
6 metre buffer and see how it goes" with a completely new
7 species. If nothing else, Your Honour, that is the
8 starkest example of the disregard of the precautionary
9 principle.

10 Your Honour, if I can turn now to the Yellow-bellied
11 Glider and the Greater Glider and I'm going to deal with
12 those because of their importance to a number of species.
13 The forest management plan sets particular guidelines or
14 triggers of densities of gliders which ought to trigger
15 particular management options and Your Honour will find
16 that at agreed documents p.410 and up the top,
17 "conservation guidelines arboreal mammals", Your Honour
18 will see for the Greater Glider there's supposed to be a
19 special protection zone of approximately 100 hectares
20 where you find the Greater Glider more than two
21 individuals per hectare, ten per kilometre, 15 per hour of
22 spotlighting.

23 Just pausing there, the DSE evidence in this case,
24 Your Honour, is for that species up to 11 per kilometre,
25 Dr Smith up to 12.5 per kilometre. So, over those
26 prescriptions whether you're looking at DSE or you're
27 looking at Dr Smith. The Yellow-bellied Glider more than
28 .2 per hectare, five per kilometre or seven per hour. The
29 DSE survey showed up to seven per kilometre and Dr Smith's
30 survey up to 12 per kilometre, so prescriptions, in our
31 submission, on the ground triggered in relation to both

1 species but not proposed to be applied notwithstanding
2 that three feature species of the East Gippsland
3 Management Plan, the Powerful Owl, the Sooty Owl and the
4 quoll all depend on this prey. In our submission, the
5 action statement in relation to hollow-bearing trees -
6 well, firstly, the management plan guidelines will be
7 breached; the action statement in relation to hollow-
8 bearing trees will be breached because VicForests is not
9 going to maintain the presence of hollow-bearing trees in
10 these coupes and therefore gliders in these coupes in high
11 densities and it is going to reduce - the logging is going
12 to reduce the distribution and abundance of gliders as
13 prey for both the owls.

14 It is likely to be said, Your Honour, against us
15 "We've got some modified prescriptions about how many
16 trees we're going to keep in these coupes and we've done
17 that expressly" and this is where, Your Honour, and the
18 evidence about what's happened in coupe 20 will be
19 particularly relevant. Dr Smith's evidence before Your
20 Honour is that only 85 of the 225 trees retained in coupe
21 20 are alive - 85 of 225. That's not even starting to
22 look at the issues about the way those trees are now
23 isolated and the likelihood that any gliders are going to
24 find them attractive for denning.

25 Your Honour, again, when one looks at the context of
26 the forest and Brown Mountain, the fact that these coupes
27 contain old growth, high densities of hollow-bearing
28 trees, high densities of gliders with lots of species that
29 need to prey on them and are likely to be in the area, it
30 is not precautionary in any way shape or form on the
31 plaintiff's case to be logging that area.

1 Your Honour, the last species that I need to deal
2 with is the Square-tailed Kite and this is currently a
3 species that's listed as endangered and our submission is
4 that again the logging of this area will be in breach of
5 the management plan both as to standards and as to the
6 particular conservation guidelines for the kite; it will
7 be in breach of the precautionary principle as well.

8 The evidence from Dr Deavis and Dr Bilney is that
9 the kite is present in these coupes and using these coupes
10 for foraging at least and that because of the absence of
11 any surveys or any more detailed assessments. It's not
12 possible to identify a nesting site but Dr Deavis' opinion
13 is that there's plenty of suitable habitat for such a
14 nesting site and he is 90 per cent confident that the kite
15 is using these areas for foraging, that is for prey.

16 It really goes back to the point I made earlier
17 about if you don't look for a nest you're not going to
18 find one and therefore you can't trigger your obligations
19 to protect a nest. That's exactly the position that we're
20 in in relation to the kite. There's an additional
21 prescription in the forest management plan, Your Honour,
22 that is important in relation to the kite because the
23 forest management plan requires, as Dr Deavis points out,
24 the protection of areas where there are high bird
25 densities - generally high bird densities and that's
26 important for the kite because the kite feeds on those
27 birds. So there's a particular conservation guideline to
28 which apparently no consideration has been given in
29 relation to the kite.

30 Again, Your Honour, when one is dealing with a
31 threatened species clearly present in the area there is

1 nothing precautionary about saying "We'll knock down its
2 foraging habitat, we'll remove its prey and for all we
3 know we might be destroying one of the live trees",
4 because this species needs live trees to nest in, "We
5 might be destroying one of the live trees where it's
6 nesting".

7 Your Honour, that's how the plaintiff's case will be
8 put in relation to each of the species and that really
9 just leaves me now to deal with a couple more housekeeping
10 matters.

11 Firstly, the order of our witnesses and if I can
12 hand up a document that sets out the order of our
13 witnesses. I just draw your attention, Your Honour, to a
14 couple of matters on this list. Your Honour will see that
15 we've scheduled Dr Gillespie for this week and that's been
16 done with the consent of my learned friend on the basis -
17 Your Honour, there are some footnotes to this document
18 that really shouldn't be on there for Your Honour's
19 benefit and I'd ask Your Honour to ignore them - all of
20 them, Your Honour.

21 The arrangement my learned friend and I have come
22 to, Your Honour, is that my learned friend will tell me
23 whether he's ready to do the Giant Burrowing Frog or not
24 and if he's not we'll have Dr Gillespie back at the end of
25 the trial in accordance with Your Honour's directions, but
26 he will be giving evidence about the Large Brown Tree Frog
27 this week at least, Your Honour. The rest of the table -
28 and Your Honour also the position of Dr McCormack is a
29 position that's one that's been agreed between the parties
30 although he's not technically - technically he should be
31 after Dr Belcher in accordance with your direction but my

1 learned friend has no objections to him being there.

2 That's the order of witnesses.

3 I just might describe to Your Honour to refresh Your
4 Honour's memory what Mr Lincoln and Ms McLaren, they're
5 two of the individuals that were out in the forest laying
6 the cameras who took the footage of the potoroo and
7 Ms Paul is one of the people who identifies the potoroo
8 from that footage so those are just a brief description of
9 who those people are.

10 Your Honour, arrangements for the view, I hand up a
11 copy of that. If I can just run through that. We might
12 meet at Wally's Bakery rather than "Wally's Bake-it" but
13 that's pretty easily identified, Your Honour, on the main
14 street in Orbost. So this, Your Honour, sets out so far
15 what is an agreed course for the view. Does Your Honour
16 want a minute to read that and perhaps then I'll try and
17 answer any questions Your Honour has.

18 HIS HONOUR: If we want to have a brief break for lunch that
19 would be between - - -

20 MS MORTIMER: Between 15 and 20, Your Honour. The hard work
21 will have been done once we get out of 15, so that might
22 be an appropriate spot. There's sort of an area there
23 where there's a turnaround and certainly sufficient space
24 and we'll provide food, Your Honour, and drinks.

25 HIS HONOUR: Yes.

26 MS MORTIMER: Are there any matters Your Honour wishes to raise
27 with me about that?

28 HIS HONOUR: No.

29 MS MORTIMER: If Your Honour pleases, that is the opening on
30 behalf of the plaintiff.

31 HIS HONOUR: Thank you. Yes, Mr Waller?

1 MR WALLER: If Your Honour will just give me a moment to get
2 organised.

3 HIS HONOUR: Yes, certainly.

4 MR WALLER: If Your Honour pleases. I wanted to begin, Your
5 Honour, by taking Your Honour back to the maps.

6 HIS HONOUR: Yes.

7 MR WALLER: My learned friend did take Your Honour to the maps
8 but I wanted to return to them and perhaps to go to some
9 that Your Honour wasn't taken to in great detail.

10 Your Honour sees Map 1 of course sets out the East
11 Gippsland Forest Management Area, indicating the forested
12 area and locating Brown Mountain in the north. Then
13 significantly, Your Honour, the next map, Map 2 sets out
14 the forest management zones that existed before November
15 2009. Your Honour sees in particular the pink areas are
16 the conservation parks and reserves where of course no
17 timber harvesting can occur. Your Honour sees then the
18 three particular management zones that reference has been
19 made to, namely the general management zone, that's the
20 area in green where harvesting can take place generally
21 without restriction. Then there is the special management
22 zone where a certain degree of protection has to be
23 observed and the special protection zone where a much
24 higher degree of protection has to be observed and there
25 can be no harvesting.

26 It is significant, if Your Honour turns the page to
27 Map 3, to see how the landscape has changed after November
28 2009 when the implementation of the Minister's
29 announcement is set out and a great deal more parks and
30 reserves have been included. This of course becomes
31 especially relevant in relation to the Brown Mountain

1 area. Your Honour can see even by looking at the
2 difference between Map 2 and 3 that significant new parks
3 and reserves have been included, that is the pink area
4 surrounded by the black outline in the immediate vicinity
5 of Brown Mountain.

6 I would ask Your Honour now to go to Map 7 where
7 Your Honour sees a much closer view of Brown Mountain and
8 indeed the four coupes in question are indicated. Pre-
9 November 2009 the area of reserve was really limited to
10 the area to the immediate north of Coupe 26 and the area
11 to the immediate south of Coupe 27, whereas post-2009 one
12 sees in Map 8 that really large tracts of land have now
13 been included in the new parks and reserves, including to
14 the immediate west of Coupe 15 but extending through most
15 of the area marked 502.

16 My learned friend in opening commented that one
17 ought not be under the impression that this has included
18 as reserve pristine forest because much of it had already
19 been logged. If Your Honour goes to Map 11 Your Honour
20 sees a closer view of the four coupes, and in particular
21 indicated in blue the logging history of the area, with
22 the paler blue indicating logging as far back as 1960 when
23 the records began, and the successively darker blue
24 indicating more recent logging up to and including the
25 2000 to 2009 year period.

26 Significantly Your Honour will see that much of the
27 new park and reserve area included in 2009 has no logging
28 history indicated. So for instance the area to the
29 immediate west of Coupe 15 has no logging history
30 indicated, and likewise Your Honour can see on the map
31 there are significant other areas which appear not to have

1 been logged either.

2 So far as the areas that are indicated in very dark
3 blue, Your Honour will see moving back to Map 8 that those
4 heavily logged areas, indeed most of the logged areas
5 indicated in blue, appear in the area denoted as general
6 management zone in the coupes surrounding the four coupes
7 in question.

8 Your Honour asked a question about the particular
9 species of trees located in the coupes and my learned
10 friend helpfully took Your Honour to the allocation order
11 in the timber release plan, but Your Honour can also gain
12 some information from Map 9 which indicates the particular
13 species that are present in each of the four coupes. As
14 my learned friend indicated, predominantly it is alpine
15 mountain mixed species pre-1950s uneven age. There are
16 some areas indicated in red as unallocated and also within
17 Coupe 15 there is an area that is indicated in brown as
18 ash pre-1950s uneven age.

19 Your Honour, last Thursday when Your Honour dealt
20 with the application to amend the statement of claim,
21 I briefly mentioned to Your Honour the way in which the
22 claim has developed in this matter, beginning when the
23 proceeding was commenced on 25 August 2009 with an
24 allegation by the plaintiff that the proposed harvesting
25 would be unlawful having regard to the actual or likely
26 presence of four species in the coupes, principally the
27 Long-footed Potoroo, the Large Brown Tree Frog, the Orbost
28 Spiny Crayfish and the Sooty Owl.

29 The first statement of claim that was filed in the
30 proceeding on 28 September 2009 broadened the claim to
31 refer to the actual and likely presence of the four

1 species I have referred to, but also to the actual and
2 likely presence of two additional species, namely the
3 Spot-tailed Quoll and the Powerful Owl.

4 His Honour granted an interim injunction, indeed an
5 interlocutory injunction which prevented harvesting of
6 timber in Coupes 15 and 19, those being the coupes that
7 VicForests had indicated they intended to log immediately.
8 No order was made in relation to Coupes 26 and 27 on that
9 basis.

10 The claim was further expanded as Your Honour knows
11 last week, by allowing a deletion to a reference to the
12 actual presence of the Orbost Spiny Crayfish but the
13 addition of new claims in relation to a new yet unnamed
14 species of crayfish, perhaps not formally named, the
15 Square-tailed Kite and the Giant Burrowing Frog.

16 The claim that is made in the proceeding as it now
17 stands is for an injunction preventing the harvesting of
18 timber in all four coupes. One of the issues that Your
19 Honour has to determine in this proceeding is the issue of
20 whether the plaintiff has standing and don't propose to
21 make any submission obviously at this point about it but
22 to flag that, Your Honour, as an issue that Your Honour
23 will need to determine and while the defendant does not
24 intend to call any evidence directly there will be
25 obviously some challenge to the evidence or more
26 particularly an argument in relation to what that evidence
27 establishes and whether according to the proper tests that
28 apply to standing the plaintiff has the necessary
29 standing, or rather whether it only has the sort of
30 emotional or intellectual concern referred to in some of
31 the authorities.

1 Taking a step back again, Your Honour, and looking
2 at the historical context in which the legislative scheme
3 which Your Honour has been taken to arises, this is to a
4 great extent helpfully set out in the evidence that we
5 will be calling from Professor Ferguson but by way of
6 summary and in opening it should be noted that Professor
7 Ferguson sets out in his report the history and background
8 of the regulatory scheme that now operates, and what that
9 history reveals is a need to balance ecological processes
10 and biological diversity of public forests with a full
11 range of economic and social benefits.

12 Professor Ferguson will tell Your Honour that he was
13 appointed the Chairperson of the Victorian Government's
14 Board of Inquiry into the timber industry in Victoria in
15 1984 and the principal recommendation of relevance which
16 resulted from that inquiry was that the objective of
17 managing public forests should be to maximise the nett
18 social benefit to the community, an objective best
19 translated into four operational principles and they are
20 that the provision of wood and other market, that is
21 commercial goods should be first, economically viable,
22 second, environmentally sensitive with respect to the
23 provision of environmental services and non market goods,
24 thirdly sustainable with respect to the interests of
25 future generations, and fourth, assisted by public
26 participation in the planning process.

27 Professor Ferguson will tell Your Honour that in
28 accordance with those recommendations forest management
29 plans were developed as was a code of forest practices for
30 timber production in 1989 and also the enactment of the
31 Flora and Fauna Guarantee Act in Victoria in 1988.

1 Picking up what Your Honour said earlier about
2 Commonwealth arrangements and Commonwealth State
3 arrangements and relationships, although the Commonwealth
4 does not have constitutional control over State forests a
5 joint policy statement between the Commonwealth and the
6 States was finalised in 1995 and a National Forest Policy
7 Statement was released which rests on three main
8 principles as the basis for sustainable forest management.
9 First maintaining ecological processes, second maintaining
10 biological diversity, and third, managing for the full
11 range of environmental, economic and social benefits.

12 As Your Honour has been told, following the release
13 of the National Forest Policy Statement regional forest
14 agreements were entered into between the Commonwealth and
15 the States which sought to establish a comprehensive
16 adequate and representative national reserve system and
17 Your Honour may see in other documents the abbreviation
18 CAR which signifies "comprehensive adequate and
19 representative."

20 Secondly the RFAs the Regional Forest Agreements
21 sought to provide greater certainty regarding the native
22 forest resource available for wood production by
23 integrating industry and conservation policy and by
24 encouraging the downstream processing of the native forest
25 resource and the export of unique Australian wood
26 products.

27 In Victoria in 2002 the Victorian Government
28 announced a policy statement on forests that indicated a
29 very important development in this area. It was called Our
30 Forests Our Future. Mr Cameron MacDonald, one of the
31 witnesses to be called by the defendant has filed an

1 affidavit sworn on 27 November 20089 which will represent
2 his evidence in-chief and he has exhibited to that
3 affidavit a number of important documents including that
4 document.

5 It may be convenient for Your Honour to be given the
6 exhibits to that affidavit. Perhaps I can hand up to Your
7 Honour those that I need to, unless Your Honour has got a
8 working copy there already.

9 HIS HONOUR: I think I might have. I have got a working copy of
10 the affidavit but not of the exhibits.

11 MR WALLER: If I could hand up to Your Honour two folders which
12 contain the exhibits to the affidavit of Mr MacDonald,
13 they are tabbed so as to indicate the particular exhibit
14 number and if necessary the originals which are in court
15 can be tendered through Mr MacDonald at the appropriate
16 time.

17 Your Honour, I don't propose to tender anything
18 during the opening as my learned friend did or did not,
19 and we will work on the basis that any documents will be
20 tendered through the appropriate witness at the relevant
21 time.

22 HIS HONOUR: It is possible I met Mr MacDonald when I was at
23 the Bar but I didn't know him anything other than in a
24 professional capacity and that is true of Dr Meredith on
25 the other side. There are some of these witnesses I have
26 known either in Tasmania or Victoria in connection with
27 particular pieces of litigation which I was involved in
28 but none of them are such that I regard myself as somehow
29 compromised.

30 MR WALLER: Your Honour it certainly doesn't present any
31 difficulty for the defendant.

1 MS MORTIMER: Nor for us, Your Honour.

2 MR WALLER: Your Honour, I should note, the affidavit of
3 Mr MacDonald states that Mr MacDonald is employed by the
4 defendant, VicForests. That of course was an accurate
5 statement at the time that this statement was sworn.

6 Mr MacDonald in very recent times has left the
7 employment of VicForests. He is now the chief operating
8 officer of a company Hancock Limited but that should not
9 affect anything that he has said in his affidavit.

10 Your Honour, what Mr MacDonald does in Exhibit 20 to
11 that affidavit is to exhibit the Victorian Government
12 policy statement, Our Forests Our Future and Your Honour
13 will see relevantly the statement states that - and this
14 is on the first page which unfortunately is not numbered -
15 that the policy Our Forests Our Future presents a
16 significant opportunity for the Government in partnership
17 with the community to ensure the long-term future of our
18 forests and regional communities. It sets out the
19 background to the issue of the statement. It highlights in
20 the first column that the government recognises the many
21 roles forests play in protecting biodiversity as water
22 catchments are sources of timber and non-timber products
23 as the generator of employment in many small rural
24 communities, in nature conservation, in recreation and eco
25 tourism and as carbon sinks.

26 That paragraph of course captures the tension that
27 exists and perhaps is represented by this proceeding
28 where the one resource is obviously serving multiple
29 functions and there is a tension in the way in which the
30 resource is managed and of course the plaintiff falls
31 squarely on one side of that argument and we fall on the

1 other.

2 What this statement does is to highlight that
3 tension and to set out in general terms how it is to be
4 dealt with. Relevantly it introduced for the first time
5 the entity VicForests and this is on p.3 of the document,
6 describing it as a new commercial entity and it goes on to
7 state that one of the main inhibitors to the restructure
8 of the industry has been government itself. Government is
9 both the monopoly supplier of native forest timber and the
10 environmental regulator. As a result of the inevitable
11 conflicts of these dual roles the management and
12 protection of Victoria's forests have suffered. In
13 accordance with our commitment to national competition
14 policy principles we are required to take into account
15 ecological sustainable development, social welfare and
16 equity considerations, economic and regional development
17 and the efficient allocation of resources in forming
18 policy.

19 Then leaving the next two paragraphs and moving to
20 the paragraph which begins "The creation of a separate
21 commercial forest service entity, VicForests will
22 transparently disentangle the commercial objectives from
23 the regulatory functions of government."

24 That paragraph highlights, and I will come back to
25 this, the clear distinction in the role played by
26 VicForests and the role played by government. That is
27 reflected also in the establishing order which Your Honour
28 was taken to and which I will return to shortly which sets
29 out that dichotomy more clearly.

30 The next paragraph states that: "The establishment
31 of VicForests will also ensure that the government's

1 commercial forest operations are open and accountable and
2 that the logging industry is managed more efficiently and
3 competitively" and goes on to say that "The government
4 will establish VicForests as a separate fully commercial
5 entity to manage the commercial interface with industry,
6 reporting, reporting through an independent board. The
7 government will clearly separate forest policy, regulatory
8 and commercial functions," and that again highlights the
9 point that I made earlier. Forest policy would be the
10 province of government. The commercial function will be
11 the province of VicForests, indeed the regulatory function
12 will be within the executive and legislative control.

13 The third point. "The government will enhance
14 competition and efficiency in the utilisation of forest
15 produce and will identify and directly fund from
16 government budget, community service obligations, will
17 improve transparency in the allocation of rights and use
18 of forest produce and will also investigate the
19 feasibility of taking forest management out of Melbourne
20 into regional Victoria."

21 That policy statement explained also, by way of
22 background that "Saw log harvesting in State forests would
23 be cut by about a third to ensure that forests, the timber
24 industry and their communities were protected for the long
25 term and it noted that 900,000 hectares had been added to
26 the reserve system in Victoria as a result of the RFA
27 Regional Forest Agreement process. It noted, perhaps on
28 the other side of the ledger, that in 1999 the Victorian
29 timber industry contributed around \$1.8b to Victoria's
30 total gross State product of \$160.5b and that the
31 government was determined to ensure that small and medium

1 sized timber enterprises in regional and rural communities
2 are sustainable and make the most of the forest resource
3 available."

4 That announcement was made in 2002 and in 2004 the
5 Sustainable Forests Timber Act of 2004 came into operation
6 and Your Honour has been taken to that Act in some detail
7 by my learned friend.

8 I wish to highlight some matters but I don't
9 obviously want to rehearse matters that Your Honour has
10 already heard about.

11 We accept that the purpose of that Act was to
12 provide a framework for sustainable forest management and
13 sustainable timber harvesting in State forests as
14 reflected by s.1A and s.5(1) of the Act provides that: "In
15 undertaking sustainable forest management in accordance
16 with the Act regard is to be had to the principles of
17 ecologically sustainable development set out in s.5."

18 My learned friend took Your Honour to the objectives
19 of ecologically sustainable development identified or
20 defined in s.5(1)(iii) and, again, those objectives
21 highlight this balance or the factors that need to be
22 weighed in the balance in managing the resource. The
23 first is to enhance individual and community wellbeing and
24 welfare by following a path of economic development that
25 safeguards the welfare of future generations. The next is
26 to provide for equity within and between generations and
27 the third is to protect biological diversity and maintain
28 essential ecological processes and life support systems.

29 Of course VicForests as a commercial entity is
30 principally established as a vehicle to give effect to the
31 first but obviously having regard to all of them as well.

1 The Act does provide that the minister may develop a
2 sustainability charter (s.11) and in the event that the
3 minister does do that VicForests must develop initiatives
4 and targets for those initiatives which respond to and
5 support those objectives or the objectives that are set
6 out in the charter in its statement of corporate intent
7 (s.12 of the Act).

8 If Your Honour goes to Exhibit 22 of Mr MacDonald's
9 affidavit in the folder Your Honour will see that that
10 contains a VicForests statement of corporate intent
11 2009/10-2011/12 and on p.28 of that document VicForests
12 sets out its response to the sustainability charter for
13 Victoria state forests. Your Honour can see the
14 objectives stated in the left-hand column and the
15 initiatives and actions in the middle column with the
16 target date in the far right column. By way of example,
17 there is an objective in the charter to minimise the
18 impact of timber harvesting operations on route
19 regenerating under-storey species and VicForests'
20 initiative or action is to implement process and procedure
21 to monitor the survival and regeneration of regenerating
22 species. Target date for that is 1 October 2009.

23 HIS HONOUR: Which page is this?

24 MR WALLER: This is p.28 of that exhibit. It's set out in
25 Appendix 1 and it meets VicForests statutory obligation in
26 s.12 of the Sustainable Forest Timber Act to develop
27 initiatives and targets in response to the charter.

28 My learned friend has taken Your Honour to the
29 allocation order process but it pays I think to repeat
30 some aspects which the defendant relies upon. As Your
31 Honour has seen, the system of allocation of timber to

1 VicForests is set out in Part 3 of the Sustainable Forest
2 Timber Act and the power to make an allocation order rests
3 with the minister. That's s.13, where the minister is
4 empowered to make such an order to VicForests for the
5 purpose of harvesting and selling timber. Section 15
6 provides that among other things the allocation order to
7 VicForests must provide details of the allocated timber to
8 which VicForests has access but also must set out
9 conditions to which VicForests is subject in carrying out
10 its functions under the allocation order including any
11 applicable performance measures and standards.

12 Your Honour knows that relevantly two allocation
13 orders have been made. The first allocation order was
14 made on 29 July 2004 and that appears in agreed book one
15 p.9 and the second allocation order was made on 21 March
16 2007 and that appears in agreed book one p.23. Your
17 Honour has heard that the amended allocation order had the
18 principal objective of amending the first allocation order
19 as a result of fire that had occurred in 2003 and in 2006
20 and 2007.

21 The combined effect of these allocation orders is to
22 allocate to VicForests over a 15-year period in an area
23 that for our purposes relevantly includes East Gippsland
24 and the East Gippsland forest management area and if Your
25 Honour sees map one. I point to that simply to remind
26 Your Honour that that area indicated on the map is the
27 East Gippsland FMA. As Your Honour noted earlier, the
28 allocation order deals with the whole of the state but is
29 divided on an FMA basis and sets out in relation to the
30 East Gippsland FMA the timber that's been allocated. The
31 other FMAs Your Honour would have seen are set out in the

1 first allocation order at p.15 of agreed book one, not in
2 the map, Your Honour, but Your Honour will see that the
3 other geographical areas within the State of Victoria, the
4 subject of the allocation order.

5 Your Honour, the amended allocation order described
6 in Tables 1 to 3 of the order for three five-year periods
7 the timber that was available to VicForests and map 9 in
8 the book of maps shows the forest stands within forest
9 block 840 which of course is the relevant forest block
10 within the East Gippsland FMA which contains the coupes,
11 the subject of the proceeding. But the coupes, the
12 subject of the proceeding, were obviously included within
13 the greater allocation order and there's no debate in the
14 case about that.

15 The expression "forest stand", evidence will be
16 given by another witness to be called by the defendant,
17 Mr Lachlan Spencer, that that term is used to refer to a
18 defined forest type that is relatively uniform in species,
19 age, structure, quality and composition. The Act, that is
20 the Sustainable Forest Timber Act of 2004 requires the
21 Minister for Environment and Climate Change to review the
22 allocation of timber resources every five years(s.18) and
23 in conducting the review the minister has to have regard
24 to the matters listed in s.19 of the Act which include
25 principles of ecologically sustainable development, the
26 structure and condition of the forest and its impact on
27 future timber resource, VicForests' compliance with the
28 allocation order including the condition specified in the
29 order during the previous five years and, among other
30 things, VicForests' compliance with any code of practice
31 during the previous five years. So there is an

1 opportunity for VicForests' compliance to be carefully
2 checked.

3 We propose to lead evidence through another witness,
4 Mr Lee Miezis who is an employee of the Department of
5 Sustainability and Environment and who has been subpoenaed
6 by VicForests to give evidence in the case. A particular
7 document which is the allocation to VicForests order 2009
8 review, that document recommended that the allocation
9 order be amended primarily based on the need to address
10 the impacts of two fires, very large fires in 2006 and
11 2007 and the fires of last year, 2009. The effect that
12 those fires had on the structure and condition of the
13 forest and therefore on the timber resources in state
14 forests available for harvesting. But the review is not
15 in the agreed book. It will be tendered through Mr Miezis
16 and it will state - it does state that the department's
17 audit showed that VicForests had complied with the code of
18 practice.

19 While I speak of Mr Miezis, I mentioned Your Honour
20 that he's a witness not employed by VicForests but
21 employed by the DSE. He has been subpoenaed to give
22 evidence and we have filed an outline of the evidence that
23 we expect and anticipate that he will give and, indeed, we
24 have also produced a list of the documents that we propose
25 to tender through Mr Miezis and we have provided our
26 learned friends with that.

27 It may be that we are in a position, Your Honour, to
28 finalise a witness statement or, indeed, even an affidavit
29 for Mr Miezis which will assist in a way that Mr Miezis
30 can give evidence. But, of course, if that is done it
31 will be done in sufficient time for our learned friends

1 obviously to familiarise themselves with it and it is
2 consistent with a fairly detailed outline of evidence that
3 we've already given them and which we filed in court.

4 Your Honour was taken also to the timber release
5 plan process. Your Honour knows from what Your Honour has
6 been told that s.37 of the Sustainable Forest Timber Act
7 2004 provides that VicForests must prepare a Timber
8 Release Plan in respect of an area to which an allocation
9 order applies for the purpose of harvesting and selling or
10 harvesting or selling timber resources and undertaking
11 associated management activities in relation to those
12 resources. But it is the Secretary pursuant to s.40 of the
13 Act who may approve a Timber Release Plan if the Secretary
14 is satisfied that the plan is not inconsistent with,
15 first, the allocation order to which it relates and,
16 second, any code of practice relating to timber
17 harvesting.

18 The Secretary did approve, as Your Honour has heard,
19 the East Gippsland FMA timber release plan on 30 July 2004
20 and by a letter dated 5 July 2007 the Secretary approved
21 amendments to that TRP, that Timber Release Plan that had
22 the effect of approving new coupes for harvesting by
23 VicForests within the East Gippsland forest management
24 area. Relevantly those new coupes included coupe 15 and
25 coupe 19.

26 The process by which the Timber Release Plan is
27 prepared by VicForests will be the subject of detailed
28 evidence from Mr Lachlan Spencer. Mr Spencer is the
29 tactical planning manager of VicForests and, Your Honour,
30 he has sworn two affidavits in this proceeding: the first
31 on 27 November 2009 and a second affidavit on 25 February

1 2010.

2 What Mr Spencer has done - and this will be a matter
3 that he explains in greater detail in evidence-in-chief by
4 reference to a power point presentation - is to describe
5 the process by which the Timber Release Plan is developed
6 prior to it being submitted to the Secretary for approval.
7 Your Honour, I'd ask at this point for Your Honour to be
8 handed two folders which comprise the exhibits to
9 Mr Spencer's affidavit of 27 November which are also
10 contained in two folders and, Your Honour, before I embark
11 upon what I want to say about Mr Spencer, I should - I
12 note the time and it may be more convenient to commence
13 this process after lunch. I just wanted to say that we're
14 grateful for the proposed running sheet that has already
15 been provided on a more informal basis between counsel, so
16 Your Honour shouldn't think that this is the first time
17 we've seen it. Also for the proposed view itinerary which
18 has also been the subject of discussion and this is the
19 product of useful negotiation between the parties and
20 we're content with it.

21 HIS HONOUR: Yes. Without wishing to complain in any way,
22 Keane CJ was pleased to observe that in his view there's a
23 lot to be said for limiting parties to their ten best
24 documents and when we come to the final address can I just
25 say that forensically from my point of view you've got to
26 understand that there's a real risk I'd be "snowed" (to
27 use a colloquial) unless you really do highlight the ones
28 that are critical to your case and so I say that on both
29 sides. I'm not saying that there's anything inappropriate
30 in what you have exhibited, Mr Waller, or anything of that
31 nature, I'm just saying that from my point of view it's

1 very important that you do ultimately at some point say
2 "this document is critical from our point of view" if it
3 is.

4 MR WALLER: Yes, Your Honour, we will.

5 HIS HONOUR: From your point of view, this is an appropriate
6 point at which to adjourn, is it?

7 MR WALLER: Yes, it is, Your Honour

8 LUNCHEON ADJOURNMENT

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