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2 UPON RESUMING AT 2.14 P.M.:

3 MR WALLER: Just before I move on to Mr Spencer's evidence,
4 could I ask Your Honour to look at the agreed book, Vol.1.
5 Page 1 in that book sets out the establishing order by
6 which VicForests was established and Your Honour was taken
7 to this but I wanted to emphasise to Your Honour in
8 particular Clause 3.7 t the bottom of the page which
9 provides that: "VicForests must operate in a framework
10 consistent with Victorian Government policy and
11 priorities" and to again emphasise the distinction between
12 the entity that makes policy and priorities which is the
13 Victorian Government, to be contrasted again, Your Honour,
14 with the legislature. We are talking here about policy
15 and priorities of executive, and VicForests has to operate
16 in a framework that is consistent with government policy.

17 Your Honour this will come to the fore as the
18 opening develops when Your Honour sees the particular
19 roles that were played by DSE on the one hand and
20 VicForests on the other with the Minister and DSE acting
21 to implement the Minister's decisions, developing policy
22 and VicForests acting in accordance with that policy as
23 developed.

24 Your Honour, I was before lunch discussing the TRP,
25 the Timber Release Plan process. Your Honour has seen the
26 statutory basis which provides for VicForests to prepare a
27 Timber Release Plan but what I wanted to do, Your Honour
28 was to explain in more detail the practical process by
29 which the TRP is prepared because it does make very clear
30 that this is a very detailed process that operates in a
31 multi-faceted and multi-layered fashion, so far from being

1 a mere administrative task conducted on someone's desk top
2 it does involve various stages and it is a detailed
3 process which provides an example of VicForests meeting
4 its obligations under the various legislative enactments
5 that Your Honour has been taken to.

6 Your Honour knows that s.38 of the Sustainable
7 Forests Act provides that a TRP must include a schedule of
8 the coupes selected for timber harvesting and associated
9 access road requirements and details of the location and
10 approximate timing of the harvesting in the proposed
11 coupes and details of the location of any associated
12 access roads as well as any other matters that are
13 considered necessary or convenient, and once it has been
14 prepared by VicForests it is submitted to the Secretary of
15 the DSE who may or may not approve it.

16 The planning and development of TRPs is done by
17 VicForests and within VicForests by a particular group
18 called the Tactical Planning Group and it involves a two-
19 stage process. The first stage involves identifying and
20 assessing coupes to be included in a TRP and that is
21 referred to as the coupe inventory, and the second stage
22 involves planning, preparing and submitting the TRP to the
23 Secretary for approval.

24 The coupe inventory process involves the use of a
25 particular software program or programs or suite of
26 programs known as the geographic information system and
27 Mr Spencer who was involved intimately in this process
28 will give evidence that the GIS or geographic information
29 system produces information and data which is kept in hard
30 copy coupe files maintained by VicForests for each coupe
31 as well as being entered into an online data base called

1 the Coupe Information System. Your Honour, there is a GIS
2 which is the Geographic Information System which are
3 spatial software programs and then there is the online
4 data base which is called the CIS used by the DSE and
5 VicForests for planning and recording specific information
6 in relation to each coupe.

7 The process of the coupe inventory preparation is
8 conducted by VicForests through its tactical planning
9 group and it has five stages. My learned friend suggested
10 it was a desktop exercise. In fact it has five distinct
11 phases.

12 The first phase is known as cooping up where
13 proposed coupe areas are defined using electronic desktop
14 data. The next phase is the desktop assessment which
15 involves a thorough analysis of a potential individual
16 coupe area using all available electronic desktop data and
17 other relevant information. The third phase or stage is
18 the field assessment where VicForests actually visits the
19 proposed coupe area and verifies the information and data
20 assessed during the desktop analysis to assess the area
21 for new information which may not have been identified
22 during the desktop assessment.

23 The fourth stage known as completion where the
24 information and data collected in the previous stages is
25 confirmed and entered into the coupe information system or
26 CIS, and the final stage is the quality assurance phase
27 where a peer review is conducted by someone else within
28 VicForests to ensure that all the information and data
29 collected is of the best quality prior to that information
30 and data being included in the Timber Release Plan.

31 At every stage, at each of the five stages

1 consideration is given to a number of matters, relevantly
2 the potential timber yield within a coupe, operational
3 limitations such as access routes, slope and the presence
4 of hydrological features. Of particular relevance to this
5 proceeding consideration is given to management issues
6 such as prescriptions, exclusions, requirements or actions
7 stipulated in the East Gippsland Forest Management Plan or
8 any amendment to that plan and equally important
9 consideration is given to management issues such as
10 prescriptions, exclusions, requirements or actions
11 stipulated in any action statement.

12 Prescriptions arising, or exclusions requirements or
13 actions arising out of any management procedures are also
14 considered at this stage and Your Honour should note that
15 the management procedures have been amended yet again so
16 that the current management procedures in respect of the
17 East Gippsland Forest Management Plan are actually the
18 management procedures of 2009.

19 Many of these documents that I have referred to,
20 Your Honour, although they are exhibited to Mr Spencer's
21 affidavit and indeed they occupy most of Vol. 1 they are
22 also reproduced in the agreed book so there is a great
23 overlap between the exhibits and the agreed book and
24 hopefully as the case progresses those ten critical
25 documents merge, if not 10 then certainly less than we are
26 starting with.

27 The management procedures of 2009, Your Honour,
28 I will identify here and now as a critical document. It is
29 critical. It is to be found in fact in Vol.2 of the agreed
30 book at p.842.

31 Although I am in a sense jumping ahead because these

1 management procedures were finalised in conjunction with
2 and shortly after the Minister's media release that freed
3 up for logging the coupes in question and certainly they
4 post-date the development of the TRP that I have been
5 talking about, it is important to note that in two
6 significant respects the management procedures for logging
7 in this area were changed by the establishment of a 100
8 metre stream site buffer in place of the 20 metre buffer
9 that had previously been applicable. Your Honour can find
10 that - I want to take Your Honour to the precise part of
11 the management procedures that detail this.

12 Your Honour can find on p.872 of the agreed book
13 Your Honour will see "exclusion areas and restrictions,"
14 and s.1.4.2 deals with streams and catchments and Your
15 Honour will see over the page at p.873 in grey shading
16 there is sub-paragraph (g) which says that in the East
17 Gippsland FMA a 100 metre buffer applies along Brown
18 Mountain Creek in the area there defined.

19 Previously, Your Honour, a 20 metre buffer had
20 applied, and tomorrow on the view one of the matters that
21 we would be seeking to draw to Your Honour's attention is
22 first the previous 20 metre buffer because we will be
23 walking through that area, and similarly the new 100 metre
24 buffer.

25 The second important respect in which the management
26 procedures were changed or revised is set out on p.875 in
27 s.1.4.5.3 on p.876 under the heading East Gippsland FMA
28 and Tambo FMA, the section highlighted in grey starting
29 with sub-paragraph (d) that: "In coupes adjacent to Brown
30 Mountain Creek five things will occur. DSE staff with
31 appropriate expertise in biodiversity management will

1 guide the identification of hollow-bearing habitat trees.
2 This will be done in consultation with VicForests and the
3 harvesting contractors."

4 Pausing there, my learned friend in opening had said
5 that previously the identification of trees to be retained
6 was left to contractors. Whatever might have been the
7 position previously it is clear that the management
8 procedures in force in respect of these four coupes
9 required that to be done by DSE staff with appropriate
10 expertise even though they may consult with VicForests or
11 contractors.

12 Secondly that all trees with a diameter at breast
13 height over bark, the BHOB greater than 250 centimetres
14 will be retained where it is safe to do so. Thirdly that
15 where present in sufficient numbers and if it is safe to
16 do so, at least five hollow-bearing habitat trees per
17 hectare will be retained and that trees greater than 250
18 centimetres may count towards this retention level.
19 Fourthly that where more than six retained hollow-bearing
20 habitat trees are present in a concentrated area less than
21 one quarter of a hectare then harvesting machinery should
22 minimise traffic in that area, and other trees may be
23 harvested, and fifthly, harvesting debris and other fuels
24 are to be removed from within 20 metres of the base of
25 retained hollow-bearing habitat trees or from around
26 groups of retained hollow-bearing habitat trees to reduce
27 the impact of regeneration burning where it is safe to do
28 so.

29 If Your Honour sees p.844 it sets out the
30 commencement date of the management procedures (2009) and
31 the Your Honour will see that the commencement date

1 is October 2009 and Your Honour will see and should note
2 that the harvesting of Coupe 20 to which reference has
3 been made was not subject to these management procedures,
4 so the modified habitat tree prescriptions that I have
5 taken Your Honour to were not in place in relation to the
6 harvesting of Coupe 20, and although for the purposes of
7 the view tomorrow, given that we are travelling such a
8 great distance in any event and given that Coupe 20 is
9 relatively close by we do not object to Coupe 20 being
10 included in the view. Ultimately we will be submitting to
11 Your Honour that Coupe 20 is of very limited relevance if
12 any in relation to the matters that are before Your
13 Honour, given the differences that apply to that coupe and
14 indeed to the prescriptions that were in place at the
15 relevant time of its harvesting.

16 I should digress simply to say that although under
17 the
18 Evidence Act that we now operate under, the view is to be
19 considered as evidence, we would reserve the right to
20 submit to Your Honour that things that are seen on the
21 view not be regarded as evidence, or if evidence be given,
22 little or no weight if they don't bear on the issues to be
23 decided by Your Honour.

24 For instance if we see something on the view in any
25 coupe that is clearly outside of the range of matters
26 which Your Honour is concerned with we have seen it, but
27 just because we have seen it or you have seen it, Your
28 Honour, it doesn't mean that it becomes evidence for all
29 purposes.

30 HIS HONOUR: I don't think we will box at shadows, Mr Waller.

31 We will see what we see.

1 MR WALLER: Yes. Your Honour, without taking Your Honour to
2 it, by way of comparison the relevant prescriptions that
3 applied in relation to the harvesting of Coupe 20 can be
4 found in the 2007 management procedures and in particular
5 at agreed book Vol.2 p.750. Your Honour, a comparison of
6 those with the provisions that I have just taken Your
7 Honour to will demonstrate the difference in the
8 prescriptions that applied.

9 HIS HONOUR: Mr Waller, I wonder if I could take you to Map 13.
10 That gives me an idea of what that 100 metre buffer along
11 streams will be like, but as I understand it, both 15 and
12 19 have streams along substantial portions of their
13 boundaries so there will be a further 100 metre strip
14 along those as well, is that right? This relates to, it
15 is said, the Long-footed Potoroo, 100 metre linear
16 protected area or has a decision been made that a stream
17 is - the stream at the bottom of the valley but not the
18 streams going down to it? How do I understand it? What
19 you took me to earlier, are there further buffer zones
20 required by 1.4.5.3?

21 MR WALLER: No there is an overlap between the buffer zone
22 required by that prescription - - -

23 HIS HONOUR: I see, it is along Brown Mountain Creek, not along
24 other creeks.

25 MR WALLER: No, only Brown Mountain Creek. And it is indicated
26 on that map.

27 HIS HONOUR: And Brown Mountain Creek means - the Yarra River
28 includes its tributaries for the purposes of description
29 in various legislative and other screens so if you have a
30 little stream running into the Yarra River that is deemed
31 to be part of the Yarra River for some purposes like the

1 diversion of water, for instance but you say - does this
2 map show what I see at 1.4.2?

3 MR WALLER: Yes it does.

4 HIS HONOUR: Thank you.

5 MR WALLER: And Your Honour will know - it has been adverted to
6 by my learned friend and it is apparent on the pleadings
7 as well, that the defendant says that that stream side
8 buffer which is prescribed in the 2009 management
9 procedures will serve to satisfy a number of concerns in
10 relation to a number of species.

11 HIS HONOUR: Yes.

12 MR WALLER: That diversion occurred because I said to Your
13 Honour earlier that in preparing the Timber Release Plan,
14 at every stage of the five stages of the process regard
15 had to be had among other things to prescriptions in the
16 management procedures and the relevant management
17 procedures now are the 2009 procedures.

18 Another matter that VicForests just have regard to
19 at every stage are any other directions given to it by the
20 DSE. Your Honour, the process by which the Timber Release
21 Plan is created, as I have said, utilises this GIS suite
22 of programs and what occurs is that particular datasets
23 can be displayed on a map of the area. Those datasets
24 will demonstrate or depict particular items of interest,
25 whether they be geographic, fauna or other matters such as
26 road locations within a particular area, stream locations
27 within a particular area, contour information relating to
28 a specific area and bringing all of this information
29 together, the GIS program can produce a contour map
30 showing the location of roads and streams in a selected
31 area. Your Honour has seen in the book of maps an example

1 of that at map 13 where Your Honour sees contours, roads,
2 hydrology and contours, all depicted on the one map
3 utilising this GIS system that is being described.

4 The spatial data sets are not limited to those
5 matters but also relate to the forest stand types, the
6 logging history in the forest areas, the fire history in
7 the areas, relevantly biodiversity which would include
8 endangered and threatened species' records and forest
9 management zoning, that is to say whether the area is
10 designated general management zone, special management
11 zone or special protection zone (GMZ, SMZ or SPZ).

12 When Mr Spencer gives evidence it is proposed that
13 he will give evidence by reference to a series of power
14 point slides that he's prepared to demonstrate in action
15 how this occurs showing how the map is gradually - well,
16 there are various different sets of information input and
17 displayed on the map to demonstrate how this process of
18 cooping up is undertaken.

19 In particular, Your Honour, the primary datasets
20 used by VicForests in East Gippsland in preparing this
21 Timber Release Plan that Your Honour is concerned with
22 showed the presence and type of management zones of the
23 kind I've just described, also the particular forest
24 stands, that's the type of tree species in the area,
25 likewise the age of those trees, the volume of the timber
26 in the area, also the history of the logging in the area.
27 A particular record also contained information collected
28 by the DSE relating to threatened fauna and this dataset
29 indicated the location where threatened fauna had been
30 identified and subsequently recorded in a threatened fauna
31 database maintained by the DSE.

1 Your Honour may see map 14 for instance in the book
2 of maps in respect of forest block 840 which includes the
3 four coupes in question. There is a map depicting
4 threatened fauna records by reference to the dataset which
5 is described as THFAU, standing for "threatened fauna 100"
6 and Your Honour will see that the triangle with the blue
7 circle around it indicates a location where threatened
8 fauna had been identified and recorded on the dataset.

9 For instance, Your Honour sees on this map various
10 sites outside the four coupes. For instance, Your Honour
11 sees a Long-footed Potoroo had been identified from hair
12 to the west of coupe 15 on 27 September 2001 and likewise
13 another Long-footed Potoroo had been identified from hair
14 on 12 October 2001 and all of that, Your Honour will see,
15 is within the dark pink area - those two sightings are
16 within the dark pink area representing the new parks and
17 reserves created in 2009.

18 The other information that is specifically located
19 on the maps produced as part of the Timber Release Plan
20 are the hydrological features: streams, water catchments,
21 rivers and dams, roads and contours and I've taken Your
22 Honour to that already. Then what is done is the cooping
23 up process continues whereby the forest blocks which are
24 the larger area in the State of Victoria in state forest
25 are further divided into compartments and finally into
26 coupes so that each coupe is given, as Your Honour has
27 heard, a unique identification number comprising of three
28 elements: the first three digits represent the forest
29 block, the next three digits the compartment and the final
30 four digits the coupe number. Your Honour has seen that
31 and that's illustrated in the various maps that take Your

1 Honour from the larger forest block analysis to the
2 smaller coupe analysis.

3 The evidence of Mr Spencer will be that the cooping
4 up process begins by analysing data at the high level, the
5 forest block level, by using the datasets of the kind
6 referred to earlier and that once an area of forest is
7 potentially available for harvesting, once that's
8 identified then that area is further reviewed to ensure
9 that other factors don't limit the ability to harvest and
10 that's where issues such as contours, roads and hydrology
11 come in and then after that the issues relating to
12 particular threatened fauna and logging history and
13 particular tree type of forest stands is considered.

14 When that is done, Your Honour, the coupes are
15 identified and they're given a name as well as a number
16 and the cooping up process that I've explained, having
17 identified the proposed coupe, then proceeds to the next
18 which is the desktop assessment and the desktop assessment
19 reviews various information relating to the proposed coupe
20 to determine the net harvestable area, the potential
21 volume, how the coupe will be accessed and various other
22 operational matters and, in particular, Your Honour,
23 prescriptions, exclusions, requirements or actions
24 stipulated in the forest management plan are considered
25 and likewise such matters stipulated in the action
26 statement or the management procedures are considered.
27 That occurs at the desktop stage.

28 Your Honour, the analysis in respect of coupe 15 and
29 coupe 19, they were subjected to the desktop analysis
30 prior to the coupes being submitted for approval in the
31 2007 amendment to the 2004 Timber Release Plan and all

1 four coupes, the subject of this case, underwent the same
2 process prior to being included in the 2009 TRP submission
3 to the DSE.

4 Your Honour, turning now to the field assessment,
5 having completed the desktop assessment, the field
6 assessment is used to confirm and assess in greater detail
7 all information identified in the desktop assessment and
8 to identify additional features that have not been
9 identified during that desktop assessment and field
10 assessments are conducted by members of the tactical
11 planning group within VicForests or by suitably qualified
12 assessment contractors.

13 Reports are then prepared by those conducting the
14 assessments and, for instance, in respect of coupes 26 and
15 27 the evidence will be that the inventory contractor who
16 was asked to go and conduct the field assessment recorded
17 certain information as present in the coupes concerning
18 potential net harvestable area, the potential volume, how
19 the proposed coupe would be accessed and also dealing with
20 management issues such as prescriptions, exclusions,
21 requirements or actions stipulated in the forest
22 management plan or the amended forest management plan.

23 When the desktop and field assessment stages have
24 been completed the next stage known as "completion"
25 involves collating and reviewing all of the information
26 collected or produced during those two stages and entering
27 all of that into the CIS, that is the database. At this
28 stage the tactical planning group will determine the net
29 harvest area of the coupe and that is determined by
30 excluding all areas within the proposed coupe that have
31 been assessed as not being harvestable due to either

1 operational factors such as slope or access or due to
2 management factors such as the presence of streams or
3 relevantly habitat prescriptions.

4 Information and data collected in the cooping up
5 process, the first stage, the desktop assessment, the
6 field assessment are then entered into the CIS and a map
7 of the proposed coupe is then entered also into the
8 database. Then if at that stage the coupe is deemed
9 viable then the tactical planning group will enter the
10 management issues. The CIS divides the information
11 collected through those three processes, that's the
12 cooping up, desktop assessment and field assessment
13 stages, into two categories: one category is
14 merchantability and viability information and data and the
15 other are management issues.

16 Again, that emphasises this dichotomy under which
17 VicForests operates merchantability and viability
18 information and data going to the commercial value of the
19 timber that might be harvested. Management issues go to
20 matters that may interfere with harvesting and which
21 require care to be taken in respect of which no harvesting
22 can be undertaken by reason of either prescriptions or
23 exclusions.

24 If the coupe is deemed viable at that stage then the
25 tactical planning group will enter the management issues
26 into the CIS. The management issues will include
27 relevantly forest management zones in the coupe and within
28 500 metres of the coupe. So, for instance, if there's an
29 SPZ (special protection zone) that needs to be marked
30 clearly on the database. Likewise, if there are
31 threatened flora and fauna sites then they need clearly to

1 be entered into the system as well and that occurs whether
2 it's within the coupe or within 500 metres of the coupe.

3 For instance, if an identified management issue is
4 that an SPZ (special protection zone) exists within 500
5 metres of the coupe then the tactical planning group will
6 make a note in the CIS that access to the coupe will not
7 be via the SPZ but otherwise no further action is required
8 by VicForests.

9 The final stage, Your Honour, in relation to the
10 cooping up - I should say in relation to the preparation
11 of the TRP is peer review and once all of the information
12 and data is entered into the CIS then another member of
13 the tactical planning group within VicForests reviews and
14 assesses the information to ensure that the information
15 and data entered into the CIS is complete, appropriate and
16 consistent with the forest management plan, management
17 procedures, action statements where relevant and an other
18 direction given by the DSE and only at that stage will
19 VicForests submit the proposed TRP to the Secretary of the
20 Department.

21 Your Honour, I've gone into that in some detail
22 because there is a great deal of care and attention paid
23 in preparing the TRP by reference to all of the factors
24 that I've spoken of and which Mr Spencer will explain and
25 to the extent that a precautionary approach is warranted
26 and Your Honour has seen in the pleading that exception is
27 taken as to whether or not the precautionary principle
28 applies an enforceable obligation or raises an enforceable
29 obligation. But in the event that it does then Your
30 Honour will see that the defence is that sufficient
31 precaution has been applied.

1 In addition to the specific precautions that are
2 referred to at a micro level within each coupe there is a
3 broader question of the precautionary approach undertaken
4 by VicForests in the preparation of the TRP. That is to
5 say, it is not a random exercise by which areas of forest
6 are designated as appropriate for harvesting and only once
7 those areas are designated is there any attempt to
8 determine whether there are difficulties. The entire
9 process from beginning to end is one of checks and
10 balances where precaution is observed in the
11 identification of the area to be harvested as well as,
12 Your Honour, the manner in which the harvesting will
13 occur.

14 Your Honour, I wanted to say something briefly about
15 the code of practice for timber production to which Your
16 Honour has been taken. The code is a code of practice
17 within the meaning of Part 5 of the Conservation Forest
18 and Lands Act 1987 and Your Honour can find the code of
19 practice in Vol.1 at p.106 and, in particular, I want to
20 draw Your Honour's attention to p.4 of that document at
21 p.113 of the agreed book where under the heading "Code of
22 practice for timber production" in the section headed
23 "explanatory notes" it is said "Maintaining the benefits
24 to society provided by ... (reads) ... on which commercial
25 plantation development is proposed". The purpose of the
26 code is set out on the next page and my learned friend
27 took Your Honour to this, I think. But, again, we would
28 emphasise that the purpose of a code is said to provide
29 direction and guidance to forest managers and operators to
30 deliver sound environmental performance when undertaking
31 commercial timber growing and harvesting operations in a

1 way that produces or respects four matters: first,
2 permits an economically viable internationally competitive
3 sustainable timber industry; second, is compatible with
4 the conservation of the wide range of environmental,
5 social and cultural values associated with timber
6 production forests; thirdly, provides for the ecologically
7 sustainable management of native forests proposed for
8 continuous timber production and, fourthly, enhances
9 public confidence in the management of Victoria's forests
10 and plantations for timber production. The code applies
11 to all land in the State of Victoria that is either being
12 used for or is intended to be used for timber production
13 and that's apparent at the top of p.115.

14 If Your Honour goes to Figure 1 on p.12 Your Honour
15 sees the forest management areas in Victoria there set out
16 with East Gippsland clearly marked and Your Honour has
17 heard about the management zones, those are described in
18 more detail on p.13 or 122 of the agreed book. The three
19 management zones within state forest are there identified:
20 the special protection zone, the special management zone
21 and the general management zone and Your Honour sees that
22 SPZs are managed for particular conservation values
23 forming a network designed to complement the former
24 conservation reserve system. Timber harvesting is
25 excluded from this zone. SMZ (special management zone)
26 are managed to conserve specific features while catering
27 for timber production under specific management conditions
28 and GMZ (general management zones) are managed for a range
29 of uses and values but timber production will have a high
30 priority.

31 Modification to management zone locations and

1 conditions may be undertaken from time to time to reflect
2 new knowledge such as the discovery of a threatened
3 species. And Your Honour will know from the action
4 statements that where a particular species is detected in
5 forest the action statement may require the creation of a
6 special protection zone in addition to or, alternatively,
7 a special management zone. In that way the forest
8 management zones may be altered.

9 Your Honour should note that the creation of these
10 particular zones, in particular special protection zones
11 or special management zones is within the province of the
12 DSE. VicForests does not have the power to create these
13 zones and, indeed, when we come to look at the action
14 statement for the potoroo and, in particular, Appendix 1
15 to that action statement, Your Honour will see that it is
16 the DSE in consultation with VicForests but it is the DSE
17 that has the power and, indeed, the obligation to create a
18 special protection zone in certain circumstances.

19 Your Honour, just in summary, the power to define
20 and amend those applicable zones reside through the DSE.
21 If we move from the code, Your Honour, to - I want to take
22 Your Honour to the management procedures but perhaps we
23 may need to return to the code. If Your Honour goes to
24 Vol.2 of the agreed book and starting with the management
25 procedures for 2007 at p.724 which applied up to the end
26 of September 2009, so the events in this particular case,
27 Your Honour, straddle two periods: up to and
28 including September 2009 it was the management procedures
29 of 2007 and from 1 October it's the management procedures
30 of 2009. But the management procedures for 2007 which sit
31 underneath, as it were, the code of practice in the

1 regulatory hierarchy - and Your Honour sees that on p.733
2 of the agreed book.

3 HIS HONOUR: When you talk about the "regulatory hierarchy" can
4 you, from your point of view, depict that
5 diagrammatically?

6 MR WALLER: That's what's attempted to be done at p.733. Has
7 Your Honour seen that?

8 HIS HONOUR: Yes, I've got it here. Is that what you say - - -

9 MR WALLER: We don't cavil or disagree with it as depicted
10 there. Your Honour will see when I say that the
11 management procedures sit below the code of practice in
12 the hierarchy, that is set out in that table and the
13 objectives set out on the next page at 1.1.3(b) the
14 objectives of these procedures are to standardise where
15 appropriate the management of timber harvesting operations
16 and associated activities in all Victorian state forests
17 and to provide instruction on operational and
18 administrative procedures. Other matters are there set
19 out as well in the objectives, Your Honour will see.

20 It is important, Your Honour, to note in the next
21 section, 1.1.4, application and procedures, that the
22 procedures are divided into three parts. Part 1 deals
23 with general procedures which apply to all timber
24 harvesting operations and associated activities undertaken
25 by either VicForests or DSE or both. Part 2 applies -
26 they are VicForests' procedures which apply to VicForests
27 only and Part 3 are DSE procedures which apply to DSE
28 only.

29 If Your Honour goes to Part 3 of the management
30 procedures 2007 at p.786, Part 3 begins on p.783 and it is
31 headed "DSE procedures" and at p.786 Item 3.2.3 under the

1 heading "amendment of forest management plan zoning
2 schemes and texts" (a) provides "Amendments to the forest
3 management zoning scheme must be ... (reads) ... any
4 relevant regional forest agreement".

5 At 815 of the agreed book Your Honour sees Schedule
6 11 and Table 1 there deals with the approval and timing of
7 changes to the forest management plan zoning schemes. By
8 way of example, in the third row under the heading "zone
9 type" underlying values, zones based on map values, flora
10 and fauna points, historic sites, recreation sites - and
11 relevantly I'm speaking of flora and fauna points - the
12 additions to a GMZ which is the general management zone
13 reflected in green on the maps and which Your Honour knows
14 all four coupes, the subject of this proceeding, are
15 designated GMZ. New areas of SPZ (special protection
16 zone) or SMZ (special management zone) must be established
17 if new records are discovered that require protection in
18 accordance with the strategies developed in the FMP.

19 Likewise, deletions, that is to say converting an
20 SMZ or SPZ back to GMZ will occur if the protected value
21 is shown to be no longer present. The next column deals
22 with the timing of the changes and the approval is to be
23 provided by the regional director, a person within DSE, to
24 approve all changes with advice to the director public
25 land police, another person within DSE, subject to
26 appropriate consultation.

27 The point of that, Your Honour, is that that
28 highlights and reinforces the fact that it is DSE that has
29 the responsibility and, indeed, only DSE that has the
30 power to amend by additional deletion the zoning within
31 the particular forest management area.

1 A similar framework is set out in the management
2 procedures of 2009, which I took Your Honour to earlier.
3 It begins at agreed book 842 in Vol.2, Part 3. Again, DSE
4 procedures which are relevant only to DSE and at p.919
5 Your Honour will see in s.3.2.4 under the heading
6 "amendments to the forest management zoning scheme" (b) an
7 amendment to the FMZ scheme must be approved by the
8 director of forests except as described in 3.2.3(f) of
9 these procedures. Section 3.2.4(f) we would say, Your
10 Honour, is not presently relevant. That's all I wanted to
11 take Your Honour to in the management procedures, so Vol.2
12 of the agreed book, Your Honour, can be put away.

13 Your Honour has been taken already in the code to
14 the definition of "a mandatory action" and Your Honour has
15 also been taken in the code to a definition of the
16 "precautionary principle". Your Honour has likewise been
17 taken already and I don't need to revisit - I'm sorry,
18 I do need to take Your Honour to the Flora and Fauna
19 Guarantee Act of 1988. Your Honour has been taken to it
20 by my learned friend but there are one or two provisions
21 that I wish to emphasise.

22 Your Honour sees in s.4(2) that VicForests must be
23 administered so as to have regard to the flora and fauna
24 conservation and management objectives set out in 4(1).
25 Your Honour, there will be an argument on behalf of the
26 defendant that the objectives, in particular the
27 objectives stated in 4(1)(a) to guarantee that all taxa of
28 Victoria's flora and fauna - that the objectives set out
29 in s.4 to the extent that it is said against the defendant
30 that those objectives raise enforceable obligations and,
31 in particular, the obligation in 4(1)(a) to guarantee -

1 I'm sorry - the objective in 4(1)(a) to guarantee that all
2 taxa of Victoria's flora and fauna other than the taxa
3 listed in the excluded list can survive, flourish and
4 retain their potential for evolutionary development in the
5 wild cannot create an enforceable obligation. It's a
6 matter for submission but I flag it, Your Honour, at the
7 outset.

8 Your Honour, the Secretary of the DSE, as Your
9 Honour has heard, has important and specific functions
10 under this Act set out in s.7. Section 7(2), a section
11 that I - s.7(1) to begin with, "a Secretary must
12 administer this Act in such a way as to promote the flora
13 and fauna conservation and management objectives" and in
14 relation to what I said earlier about those objectives it
15 may be observed that the language of "promote" may be a
16 more appropriate way of describing how objectives are to
17 be approached, the language of a guarantee has a certain
18 completeness or finality about it. In one sense, one
19 couldn't guarantee the survival, flourishing and retaining
20 without - let me put it another way. It may be said that
21 any harvesting of timber in some sense diminishes an
22 absolute guarantee and yet obviously the régime that's set
23 up by the legislation is to promote and to allow
24 harvesting to occur. If it were a complete and utter
25 guarantee that had to be enforced in all respects it may
26 be that harvesting operations would cease absolutely and
27 for that reason we say that it is an aspirational goal,
28 the language of the Secretary, "being required to promote
29 the objectives" is consistent with that.

30 Significantly in sub-s.(2) of s.7, "If the Secretary is
31 of the opinion that action taken ought to be taken by a

1 public authority such as VicForests, is likely to
2 threaten the survival of a listed taxon or community of
3 flora or fauna or critical habitat the Secretary may
4 require the public Authority to consult with the
5 Secretary either before the action starts, or if the
6 action has already started, within 15 days of the request
7 being made."

8 The evidence to be led by the defendant through
9 Mr Miezis of the DSE will be that the Secretary is not of
10 the opinion that the harvesting of the Brown Mountain
11 coupes by VicForests is likely to threaten the survival of
12 a listed taxon or community of flora or fauna or critical
13 habitat. The evidence will also be that the Secretary has
14 not required VicForests to consult with him within the
15 meaning of s.7(2) of the Act.

16 I don't want to take Your Honour to any greater
17 detail than that at the moment. I want to move to the
18 action statements. That Act that we just looked at, Your
19 Honour, by s.19 as Your Honour has heard, requires the
20 Secretary to prepare an action statement for any listed
21 taxon or community of flora or fauna or potentially
22 threatening process as soon as possible after the taxon
23 community or process is listed and the action statement
24 pursuant to s.19(2) of that Act must set out what has been
25 done to conserve and manage the taxon or community or
26 process, what is intended to be done, and may include
27 information on what needs to be done. Your Honour was
28 taken to that yesterday.

29 There are seven relevant action statements in this
30 proceeding relating to the Long-footed Potoroo, the Spot-
31 tailed Quoll, the Orbost Spiny Crayfish, the Sooty Owl,

1 the Powerful Owl, the Giant Burrowing Frog and the loss of
2 hollow-bearing trees. As Your Honour knows there have not
3 been action statements issued for the Square-tailed Kite
4 or for the Large Brown Tree Frog.

5 Your Honour has been taken to these action
6 statements but I wish to go back to the action statement
7 for the Long-footed Potoroo.

8 HIS HONOUR: We might just take a short break before you do
9 that.

10 (Short adjournment.)

11 MR WALLER: I am turning now Your Honour to the relevant action
12 statements. They are to be found in Vol.2 of the agreed
13 book beginning with the Long-footed Potoroo action
14 statement of 2009.

15 HIS HONOUR: Yes.

16 MR WALLER: At p.542. I don't want to repeat anything my
17 learned friend said but to emphasise, Your Honour, that on
18 p.543 at the bottom of the first column it is stated that
19 the preferred sites appear to be characterised by
20 sheltered aspects with moist soils supporting a mixed
21 species over-storey and a dense under-storey. Animals
22 shelter in dense vegetation during the day and forage in
23 adjacent areas at night," and the next sentence, "Long-
24 footed Potoroos have been detected in a range of forest
25 aged classes from eight year re-growth post timber
26 harvesting to old growth forests." Reference is made to a
27 study by Chick et al (2006).

28 The defendant has served a subpoena on Mr Chick to
29 enable that report to be tendered and agreement could not
30 be reached about it going in the agreed book. There is a
31 study that was done by Mr Chick and Mr Henry and others in

1 2009 that is in the agreed book but this earlier work is
2 of particular relevance because it is headed "The Effects
3 of Timber Harvesting on the Long-footed Potoroo." I don't
4 wish to go to it in detail now but it does suggest that
5 harvesting of timber within areas populated by the potoroo
6 may not cause the species to become less prevalent, indeed
7 the study reveals that in surveys conducted after timber
8 harvesting had been undertaken the species in a particular
9 area actually increased and in weighing up what action
10 ought be taken in relation to the presence if there be
11 presence of potoroo within any of the four coupes we
12 regard the work that was undertaken by Mr Chick and his
13 colleagues in 2006 in the area in question as being
14 particularly relevant.

15 That work is referred to several times in the action
16 statement. The action statement sets out the objectives on
17 p.548 and of relevance are Actions 1 which speak to
18 "implementing a Long-footed Potoroo core protected area
19 for East Gippsland." More relevant on p.549 is Action 4
20 which speaks to "protecting Long-footed Potoroo habitat at
21 detection sites on public land outside the core protected
22 area."

23 It is to be noted, Your Honour, that in this action
24 statement and indeed in all of the action statements
25 dealing with threatened species action is predicated on
26 detection, not on supposition but on factual detection.
27 That is clear from Action 4 that speaks to detection sites
28 and requires "the establishment of additional protected
29 areas where Long-footed Potoroos have been detected in
30 state forest or other public land outside the core
31 protected area. In State Forest apply the protection

1 measures specified in Appendix 1 and the protection
2 measures will be formally reviewed in 2014."

3 Responsibility is stated to be that of DSE and VicForests
4 but when one looks to Appendix 1 on page - - -

5 HIS HONOUR: As distinct from the other sections on that page.

6 MR WALLER: Yes. We understand, Your Honour, that Action 1 is
7 not directly relevant to the coupes. I will clarify this
8 but I think it is common ground that if there was a
9 potoroo sighting in one of the coupes the relevant action
10 would be Action 4, not Action 1 because the sighting in
11 one of those coupes would by definition be outside the
12 core protected area which may be the State forest for
13 instance to the west of Coupe 15.

14 In any event Appendix 1, I don't know that Your
15 Honour was taken to Appendix 1 but I wish to emphasise,
16 Your Honour, Appendix 1 which is referred to in Action 4
17 sets out prescriptions to be applied in State forest and
18 on p.554 it provides 10 actions or 10 matters as
19 prescriptions to be applied.

20 Item 1 provides that each Long-footed Potoroo
21 detection site outside the core protected area will
22 generate a special management zone of approximately 150
23 hectares so we are within the range. We are talking here
24 about an SMZ Your Honour, not an SPZ, and Your Honour
25 knows that an SMZ is a hybrid zone which allows some
26 harvesting but obviously affords great protection as well.
27 The SMZ, as far as possible, SMZ boundaries will follow
28 recognisable landscape features such as ridges, spurs and
29 water courses.

30 Item 3. Within each SMZ at least one-third or 50
31 hectares will be protected from timber harvesting and new

1 roadings. So one-third of the new SMZ is treated
2 effectively as an SPZ and this will be known as Long-
3 footed Potoroo retained habitat and that is the 50
4 hectares within the 150 hectare SMZ will be the potoroo
5 retained habitat.

6 It is provided that the retained habitat will
7 include the best Long-footed Potoroo habitat in the SMZ
8 which will generally be in gullies and on low sheltered
9 slopes so once the 150 hectare is isolated the 50 hectare
10 protected zone has to be from the best of the habitat for
11 the potoroo in that area.

12 Item 6 provides that the Long-footed Potoroo
13 retained habitat may include areas otherwise unavailable
14 for timber harvesting due to restrictions under the code
15 of practice for timber harvesting. Item 7, the SMZ will
16 also have a general restriction of one-third of the total
17 area that can be harvested in any three year period. If
18 more than one coupe is to be harvested in an SMZ in the
19 same year the coupes must be separated by at least the
20 equivalent of another coupe width.

21 Item 8 the SMZ with the Long-footed Potoroo retained
22 habitat clearly delineated will be shown as part of the
23 forest management area zoning scheme, and the next point
24 we emphasise as critically important, "The SMZ will be
25 designed by the DSE in consultation with VicForests and
26 approved by the DSE." That is consistent, Your Honour,
27 with the management procedures which clearly state that it
28 is the role and solely the role of the DSE to amend the
29 zoning within a forest management area.

30 Finally Item 10, "If the 150 hectare area includes
31 any part of an existing conservation reserve or SPZ these

1 areas will retain their existing reservation or zoning
2 status but will be considered for inclusion as part of the
3 area of retained habitat. In such cases the final area
4 designated as SMZ may be correspondingly smaller."

5 What that makes clear, Your Honour is that
6 protection zones may serve more than one purpose so that
7 if there is an existing SPZ that may be counted towards
8 the area designated as the SMZ rendering the SMZ
9 correspondingly smaller than 150 hectares and Your
10 Honour's question earlier about the stream side buffer is
11 a case in point on the defendant's case where a protected
12 area may be serving more than one purpose. It may be
13 beneficial to a particular species but also provide
14 protection for other species as well.

15 If I could move now to the Spot-tailed Quoll and
16 that is at p.555. I don't propose to traverse the matters
17 that my learned friend went over but simply to again note
18 on p.4 and 5 of the statement that it is provided, at the
19 bottom of p.4, "In considering any impact of logging on
20 the Spot-tailed Quolls the amount of protected and
21 retained habitat across the landscape is important.
22 Substantial areas of potentially suitable habitat
23 throughout its range in Victoria are already protected
24 both in the parks and reserve systems and in areas of
25 State forest unavailable to logging."

26 Your Honour will know from the maps that the coupes
27 in question are surrounded by areas of protected and
28 retained habitat in the nature of parks and reserves and
29 therefore we say there is particular relevance to that
30 statement in the action statement in considering what
31 needs to be done in relation to the quolls.

1 Later on on p.559 at line 7 the action statement
2 provides: "If quolls were threatened by timber harvesting
3 alone then the species should be secure and common in the
4 substantial area of protected habitat established
5 throughout its range, especially considering the broad
6 habitat range the species utilises."

7 I should read the next sentence as well. "That
8 quolls are apparently not secure even in the large areas
9 of protected habitat suggests that factors other than
10 timber harvesting are threatening quolls. This is also
11 supported by the status of quolls in Tasmania where they
12 are still considered relatively common despite a similar
13 level of long-term loss of habitat, about 50 per cent, and
14 timber harvesting occurring in part of their remaining
15 range."

16 Your Honour should note that this action statement
17 was published in 2003. That is apparent from p.565 where
18 the copyright notice states that "Copyright is with the
19 State of Victoria, DSE 2003" and that the figures Your
20 Honour, quoted in the paragraph that I have been dealing
21 with which speaks about - this is - Your Honour, between
22 the two areas I read statements are made about the quolls
23 current range in Victoria and the area of public land
24 totals about 4.9 million hectares. Of this area 2.1
25 million hectares is in parks and reserves.

26 Your Honour should know that the figures quoted
27 above do not include the new areas which have been added
28 to the reserve system in 2009 which obviously increased,
29 particularly in this area, the amount of protected
30 habitat, retained habitat by way of the reservation.

31 The section on p.8 and 9, 562 to 563 of the agreed

1 book dealing with habitat protection states that "The
2 action is to implement a standard habitat protection
3 prescription of a 500 hectare special protection zone and
4 a 1,000 hectare special management zone for all confirmed
5 quoll records in state forests throughout Victoria up to
6 target specified in the individual FMPs (forest management
7 plans), the location of the SPZ and the SMZ will be based
8 on protecting preferred habitat features for quolls, the
9 SPZ will include known den and latrine sites protected by
10 at least 200 metre radius and may include other detection
11 sites based on habitat, quality and proximity of existing
12 protected habitats. Detection sites not included in the
13 SPZ will generally be included within the SMZ unless there
14 are compelling reasons for excluding them".

15 And then moving down, Your Honour sees reference is
16 made specifically to East Gippsland, this is about ten
17 lines from the bottom, "In East Gippsland the area covered
18 by the FMP (forest management plan) there will be a target
19 of 75 quoll sites in protected habitat, i.e. parks,
20 reserves and state forest SPZ, SMZ. Currently, there are
21 71 sites of quoll records protected in East Gippsland
22 including 21 in state forest. Note that this prescription
23 exceeds the target of 50 protected records specified in
24 the East Gippsland FMP". The evidence from Mr Mieziš will
25 be that the target of 75 quoll sites has been met. Your
26 Honour will observe again that the protection and
27 protective measures stipulated by the action statement are
28 predicated upon detection.

29 If I could move, Your Honour, to the Orbost Spiny
30 Crayfish action statement which begins at p.566. Your
31 Honour will remember that the pleading in relation to the

1 presence of the Orbost Spiny Crayfish in the coupes has
2 been deleted from the statement of claim. My learned
3 friend spoke in her opening of "the crayfish" and we
4 understood her submissions to be applicable to both the
5 Orbost Spiny Crayfish and the unnamed or unclassified
6 crayfish. There is, of course, no action statement for
7 any crayfish that this proceeding is concerned with other
8 than the Orbost Spiny Crayfish.

9 We note that the action statement for this
10 particular species under the heading "habitat protection"
11 on p.569 under the heading "intended management action"
12 not the section dealing with habitat protection under the
13 heading "previous management action" and it provides that
14 linear reserves consisting of an undisturbed buffer of
15 approximately 100 metres on each bank of the stream for
16 one kilometre upstream and downstream of the protection
17 site will be established at all sites on public land where
18 the Orbost Spiny Crayfish are recorded".

19 Again, action triggered by detection and the
20 relevant protective measure is a buffer of approximately
21 100 metres on each side of the stream. Your Honour knows
22 from the management procedures of 2009 that that has
23 effectively been implemented as a management procedure and
24 the evidence will be that that arose in the context of
25 suggested identification or detection of a crayfish said
26 to be the Orbost Spiny Crayfish but which was subsequently
27 shown not to be such a crayfish.

28 Your Honour, the next action statement at 571
29 relates to the Sooty Owl. Again, Your Honour has been
30 taken through this in detail but I wish to emphasise that
31 in relation to the action to be taken, Item 5 in the first

1 column under the heading "protection in state forest" Your
2 Honour sees "All confirmed nesting and roosting sites
3 utilised recently and frequently based on reliable
4 observation or physical evidence such as pellets or wash
5 located outside Sooty Owl management areas (or SOMAs) will
6 be protected by a three hectare SPZ (special protection
7 zone) around the site and a 250 to 300 metre radius or
8 equivalent linear area SMZ (special management zone)
9 buffers around identified localities unless they are
10 already protected. In these cases habitat for foraging is
11 provided in areas excluded from timber harvesting by
12 general prescription including wildlife corridors, steep
13 areas and unmerchantable areas and areas protected for
14 other management purposes".

15 That action statement, Your Honour, was published in
16 2003 and that may explain why VicForests is not referred
17 to as an entity having any responsibility. VicForests of
18 course was not established until 2004. But again, Your
19 Honour, we emphasise that action is predicated on
20 confirmed nesting and roosting sites utilised recently and
21 frequently and based on reliable observation and physical
22 evidence.

23 The action statement that I next wish to come to is
24 that for the Powerful Owl at 589 of the book and, Your
25 Honour, that follows a similar pattern as the Sooty Owl at
26 p.7 where it says at the bottom of the first column,
27 "Unless otherwise protected, all confirmed nesting and
28 roosting sites will be protected by a three hectare SPZ
29 around the site 250 metre radius or equivalent linear area
30 SMZ buffers around identified localities". Reference is
31 made to POMAs, that's the Powerful Owl management area.

1 Again, similarly, we emphasise the reference to confirm
2 nesting and roosting sites.

3 The action statement for the Giant Burrowing Frog,
4 Your Honour, again has been taken to that. Under the
5 heading "intended management action" on p.3 Your Honour
6 will see there's a subheading "timber harvesting" and the
7 action statement provides "As intended management action
8 introduce the following management practices at all sites
9 where the Giant Burrowing Frog has been recorded since
10 1980 and at all sites discovered after the production of
11 this action statement". So, it's predicated upon
12 discovery of a site after the production of the action
13 statement for this particular species.

14 The final action statement relates to the hollow-
15 bearing trees and that's at 579 and I wish to go to p.6 or
16 584 where Your Honour sees the subheading "state forest",
17 all of this under the heading "intended management
18 actions", p.5 states "The intended management actions
19 listed below are further elaborated in DSE's actions for
20 biodiversity conservation database". But Item 7 in
21 relation to state forest - - -

22 HIS HONOUR: Which page is this, Mr Waller?

23 MR WALLER: 584 of the agreed book. It stats "A series of
24 actions including continuing to identify significant areas
25 or stands of hollow-bearing trees in state forest using
26 the state forest resource inventory and other relevant
27 information to inform management decisions". Item 8
28 "Continue to implement a range of measures to maintain or
29 enhance the extent and/or density of hollows in state
30 forest where this known to be limiting the distribution
31 and/or abundance of hollow-dependent species and these

1 measures include application of management guidelines
2 including forest management zones and prescriptions for
3 fauna species as provided in the FMP" and, secondly, "The
4 development and application of revised habitat retention
5 prescriptions for areas within the general management zone
6 in accordance with the principles and objectives
7 established by the state forest flora and fauna habitat
8 management working group".

9 The prescriptions that we went to earlier in 2009
10 are an example of satisfying the intended management
11 action referred to by revising the habitat retention
12 prescriptions for hollow-bearing trees within areas that
13 are otherwise general management zone.

14 Your Honour, that's all I wish to say about action
15 statements. I want now to turn to evidence that will be
16 led in relation to a particular matter said to trigger
17 action statements about which the defendant will be
18 leading evidence and this evidence will be led
19 predominantly through Mr Cameron MacDonald but also
20 through Mr Lee Miezis. Mr MacDonald, of course, until
21 recently the Director Corporate Affairs within VicForests
22 and Mr Miezis who holds the position within DSE. He's the
23 Director Forests and Parks Division within the DSE.

24 Mr MacDonald will give evidence in particular about
25 events arising in January 2009 concerning the detection or
26 suggested detection or relevance of arboreal mammals, the
27 Long-footed Potoroo and Orbost Spiny Crayfish in the Brown
28 Mountain area. He will state that he learned in January
29 2009 of an alleged detection of an Orbost Spiny Crayfish
30 in the Brown Mountain Creek by Environment East Gippsland
31 (the plaintiff) and he will give evidence about

1 discussions or communications between DSE and VicForests
2 about the establishment of an interim prescription in
3 relation to the creek pending confirmation that the
4 detection of a crayfish was legitimate.

5 The interim prescription discussed at the time was
6 the establishment of 100 metre buffer streamside to the
7 creek. He will give evidence that he was informed
8 subsequently that the DSE had concluded that the crayfish
9 in question had not been correctly identified as an Orbost
10 Spiny Crayfish but was in fact a biduala(?) spiny crayfish
11 which was a more common species and which attracted no
12 prescriptive amendments.

13 That evidence will establish, as will be the case
14 with other detections that were said to have occurred with
15 a process that is put in place when species are brought to
16 the attention of VicForests or to the DSE in relation to
17 the importance of verifying detections before any action
18 is taken. In this case an interim prescription was put in
19 place and later in January Mr MacDonald will give evidence
20 that he received information from Mr Miezis within DSE
21 concerning information about gliders that had been
22 detected in the Brown Mountain area.

23 Again, the information had been provided by the
24 plaintiff by EEG and that as a result of that Mr MacDonald
25 spoke to another member of VicForests, Mr Barry Vaughan
26 and told him that the plaintiff had provided the DSE with
27 a survey that indicated elevated levels of arboreal
28 mammals had been detected and that the DSE needed to
29 confirm the detection, that VicForests would not be
30 commencing harvesting in coupe 15 or coupe 19 until the
31 DSE had an opportunity to conduct its own surveys in the

1 Brown Mountain area.

2 On 28 January Mr MacDonald received a further
3 communication, an email from Mr Miezis forwarding on an
4 email from the plaintiff attaching a survey prepared by
5 Mr Bilney concerning the arboreal mammals and reference
6 was also made in the email from the plaintiff to the
7 detection of a definite Orbost Spiny Crayfish.

8 Mr MacDonald will give evidence that surveys were
9 then organised, that DSE would organise surveys to verify
10 the position in relation to the gliders and, indeed, the
11 evidence will be that that survey that was conducted
12 between January and March of 2009 dealt with a range of
13 threatened species that had been said to be detected
14 including the crayfish, the arboreal mammals and the long-
15 footed potoroo.

16 Although it was DSE that coordinated and conducted
17 the survey, a representative of VicForests did participate
18 in the surveys that took place between January and March
19 of 2009. The work of the survey team commenced in
20 early February 2009 but was interrupted by the Black
21 Saturday bushfire which occurred as we know on 7 February
22 2009. The work continued later in February and into March.
23 The results of the survey that were conducted by the DSE
24 were not published till August 2009 and in the agreed book
25 of documents Your Honour will see the DSE Brown Mountain
26 report which is in Vol.3 of the agreed book at p.1052.

27 Your Honour will see on p.1054 that the surveys were
28 for a number of species, arboreal mammals Long-footed
29 Potoroo and spiny crayfish in proposed logging coupes 15
30 and 19. The background to the survey is there set out
31 including at the bottom of p.1054 that conservation groups

1 conducted or sponsored surveys in other proposed coupes
2 targeting arboreal mammals, large forest owls, Long-footed
3 Potoroos and Orbost Spiny Crayfish. All these animals have
4 prescriptions for the protection of sites through action
5 statements of the East Gippsland Forests Area Management
6 Plan.

7 The surveys, that is from the conservation groups
8 and I think relevantly it is the plaintiff, indicated
9 sufficient Greater Gliders and Yellow-bellied Gliders may
10 be present to trigger the prescription for the protection
11 of surrounding forest. The surveys also claimed to have
12 found evidence of Long-footed Potoroos and the presence of
13 the Orbost Spiny Crayfish.

14 Then there is set out the status of the various
15 species and the relevant prescriptions under the action
16 statement or forest management plan and in particular in
17 relation to the gliders Your Honour will see at p.1055
18 matters that Your Honour saw earlier in the plan itself
19 concerning the prescription for arboreal mammals.

20 Over the page one sees, reference is made to the
21 Long-footed Potoroo. Reference is made to action
22 statements that were promulgated in respect to that
23 species and notes that the action statement on p.1057, it
24 is noted that the action statement is currently under
25 review.

26 Your Honour will know that that review resulted in
27 the publication in August 2009 of the 2009 action
28 statement shortly after this report was published and Your
29 Honour will note that towards the bottom of p.1057,
30 "Environment East Gippsland, the plaintiff reported to DSE
31 on 3 February 2009 that a Long-footed Potoroo had been

1 detected using hair tubing. The hair sample was identified
2 as Long-footed Potoroo by an expert in the field Barbara
3 Triggs. The sample was reported as collected within 100
4 metres of Brown Mountain Creek. This is on the western
5 side of Brown Mountain on the edge of proposed Coupe 19."

6 Your Honour, then reference is made to the Orbost
7 Spiny Crayfish and the history of the sightings or
8 suggested detections that I have taken Your Honour to.
9 Then the report sets out at p.1059 the program that was
10 undertaken, that is to say the methodology that was
11 implemented in order to survey for these particular
12 threatened species, and dealing first with the gliders at
13 p.1059 and at 1060, the summary of animals detected and
14 indicated in bold in the table, Your Honour sees that
15 those figures in bold exceed the prescription threshold so
16 for instance you will see in the far right column, on
17 12 March 2008, that should be 2009 I think, Your Honour,
18 at particular times in particular places 11 Greater
19 Gliders were detected and seven Yellow-bellied Gliders
20 were detected and those amounts do exceed or meet the
21 prescription amount and I will deal with what was done in
22 response to that shortly.

23 Your Honour, I note the time. Your Honour asked me
24 to deal with any particular matters that are relevant to
25 the view. I think in short those matters have been dealt
26 with. Essentially they are the 20 metre buffer, the 100
27 metre buffer, the particular trees that would be retained
28 under the new prescription.

29 HIS HONOUR: And the results of the survey to some extent.

30 MR WALLER: That is so, but I do probably have another hour or

31 so and it would probably be convenient if I pause here and

1 if I resume on Thursday morning. I would endeavour to do
2 it very quickly to enable the evidence to then begin
3 thereafter.

4 I don't think I need to take Your Honour to anything
5 else to render the view more informative. Hopefully given
6 what has been said already Your Honour will be able to
7 appreciate matters that will be pointed out to Your Honour
8 by the various parties tomorrow.

9 From the Bar table we jointly would suggest that
10 Your Honour take with you on the view, if it is
11 convenient, the book of maps and perhaps the map that was
12 handed up by my learned friend yesterday which is Exhibit
13 7A to Mr MacDonald's earlier affidavit so that we can use
14 that as a point of reference if necessary on the view.

15 MS MORTIMER: Your Honour, may I just say something. Would it
16 be convenient if we provided perhaps another clean copy of
17 that separate map that could be marked while we are on the
18 view?

19 HIS HONOUR: Yes.

20 MS MORTIMER: If Your Honour pleases.

21 HIS HONOUR: Mr Waller, if you still have an hour to go I would
22 prefer you to start at 10.00 on Thursday.

23 MR WALLER: Yes Your Honour. I understand that and I will.

24 HIS HONOUR: Because I haven't quite decided how long we will
25 sit on Friday but with the view we really face the
26 prospect of only sitting three days in full this week and
27 three days next week with the public holiday. I am not
28 unduly troubled by how long the case will take but on the
29 other hand we have got to try and press along or we may
30 all find ourselves boosting the local economy for longer
31 than we expected.

1 MR WALLER: We may be pleasantly surprised by how quickly we
2 move through the evidence.

3 HIS HONOUR: That could be so and I think I understand how you
4 put part of your case better and I also think that you are
5 probably in the best position to judge that. But having
6 said that what we will do is we will adjourn to Orbost at
7 10.15 tomorrow and reconvene here at 10.00 on Thursday.

8 ADJOURNED UNTIL THURSDAY 4 MARCH 2010