
TRANSCRIPT OF PROCEEDINGS

SUPREME COURT OF VICTORIA

CIVIL JURISDICTION

SALE

WEDNESDAY 3 MARCH 2010

(3rd day of hearing)

(COURT VIEW)

THURSDAY 4 MARCH 2010

(4th 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 HIS HONOUR: I am sorry we have had some transcript
2 difficulties in the last few moments but before we come
3 back to you Mr Waller there are two things I thought
4 I should say.

5 Firstly I should record that yesterday by the
6 consent of the parties at Orbost I made an order pursuant
7 to s.53 of the Evidence Act that an inspection be held
8 generally in accordance with the written schedule prepared
9 by the parties.

10 Secondly I would wish to thank the parties for their
11 cooperation and support yesterday, in particular the
12 transport and catering arrangements that were offered to
13 the court which were greatly appreciated.

14 MS MORTIMER: If Your Honour pleases, I might just, pursuant to
15 what Your Honour has just said about an order, hand up a
16 form of order that is agreed between the parties.

17 HIS HONOUR: Yes.

18 MS MORTIMER: There are two copies, Your Honour.

19 HIS HONOUR: I am happy to sign that. Yes, Mr Waller.

20 MR WALLER: Your Honour, when I concluded what I had to say on
21 Tuesday during the opening I had taken Your Honour to a
22 report prepared by the Department of Sustainability and
23 Environment in respect of surveys for arboreal mammals,
24 Long-footed Potoroo and spiny crayfish conducted
25 in January to March 2009 and I took Your Honour to that
26 report at agreed book Vol.3 p.1052.

27 HIS HONOUR: Yes.

28 MR WALLER: At p.1063 the conclusions are set out. I should say
29 that this report was not received until some time later
30 but by late March 2009 following the actual survey itself,
31 VicForests was aware that DSE survey results had indicated

1 that on one night of the survey nights the number of
2 Greater Gliders and Yellow-bellied Gliders exceeded the
3 conservation guidelines contained in Part 3.4 of the East
4 Gippsland Forest Management Plan. Lee Miezis of the DSE
5 received a final copy of the DSE report on 27 April 2009.

6 The conclusion set out at p.10 of the report, 1063
7 of the agreed book Vol.3 state that: "The survey program
8 produced the following key results ... (reads) ... thirdly
9 that no Orbost Spiny Crayfish were detected."

10 The conclusions go on to note: "Spotlight surveys
11 were conservative estimates of the number of animals
12 actually present." Pausing there, Your Honour, of course
13 in respect of the species the subject of this report,
14 spotlighting is relevant only to the arboreal mammals,
15 Greater Glider and Yellow-bellied Gliders.

16 The report continues, "The consistent detection of
17 high numbers of Greater Gliders and Yellow-bellied Gliders
18 ... (reads) ... that the site supports a high-density
19 population."

20 Over the page, "Given the relatively short amount of
21 time available for the survey of the Long-footed Potoroo
22 and the presence of nearby records and suitable habitat
23 ... (reads) ... however the habitat was considered to be
24 sub optimal for the species."

25 HIS HONOUR: How do you say I am going to treat this report.

26 Are you going to call the authors?

27 MR WALLER: That report is in the agreed book, agreed by the
28 parties as being admissible and in evidence for all
29 purposes.

30 HIS HONOUR: For all purposes.

31 MR WALLER: Yes. As a result of the DSE Brown Mountain report

1 VicForests knew that the DSE would need to make a decision
2 as to whether a special protection zone would be declared
3 and VicForests also knew that they would not be able to
4 harvest in the area until the DSE had made that
5 determination.

6 Between April 2009 and June 2009 the evidence will
7 be that the DSE gave consideration as to whether an SPZ
8 would be declared. Lee Miezis told Cameron McDonald of
9 VicForests that the DSE was yet to make a decision on
10 whether or not an SPZ would be created.

11 On 14 May 2009 Lee Miezis will give evidence that he
12 reviewed a memorandum to Dr Peter Appleford the Executive
13 Director of Forests and Parks within DSE and Mr Miezis'
14 superior, recommending that Dr Appleford sign a draft
15 reply that had been prepared to Ms Jill Redwood concerning
16 harvesting in the Brown Mountain forestry coupes, and in
17 the memorandum addressed to Dr Appleford it was noted that
18 Ms Redwood had raised three key issues, first that
19 VicForests was undertaking an unauthorised operation as a
20 consequence of it conducting timber harvesting operations
21 in areas alleged to contain rare or threatened species,
22 second that VicForests had breached the code by failing to
23 address conservation of biodiversity and third, that pre-
24 logging surveys should be undertaken.

25 These were the matters that Ms Redwood had raised.
26 The memorandum to Dr Appleford went on to say that there
27 was no evidence that VicForests has conducted an
28 unauthorised operation or has breached the code, that
29 VicForests' harvesting operations are in accordance with
30 the approved Timber Release Plan.

31 In early 2009 while the DSE was still deliberating

1 as to whether or not to create a special protection zone
2 in relation to the Gliders Lee Miezis asked Mr McDonald
3 whether VicForests would put forward any modifications to
4 the harvesting prescriptions for Coupes 15 and 19 in
5 recognition of the elevated levels of arboreal mammals
6 that had been detected.

7 Following that conversation Mr McDonald spoke to
8 Mr Barry Vaughan, VicForests Regional Director and relayed
9 to him the discussion that he had had with Mr Miezis and
10 asked Mr Vaughan to consider what modifications to the
11 harvesting prescriptions for those coupes might be
12 possible or necessary. There were then email exchanges
13 between VicForests and the DSE on 16 and 18 June 2009.

14 Could I ask Your Honour to go to the second volume
15 of exhibits to the affidavit of Mr McDonald sworn on
16 27 November 2009. Volume 2 of those exhibits, Cameron
17 McDonald.

18 HIS HONOUR: Yes.

19 MR WALLER: In particular if Your Honour goes to Exhibit CM35
20 Your Honour will see a chain of emails. Dealing with them
21 in chronological order from the bottom up, those emails
22 reveal that on 16 June 2009 at 1.52 p.m. there was an
23 email from Barry Vaughan the Regional Manager East
24 Gippsland of VicForests to Mr Miezis, Director of Forests
25 within the DSE where Mr Vaughan says, "Cameron McDonald
26 has asked me to consider what habitat retention strategies
27 ... (reads) ... the spiny crayfish even though no
28 confirmed records exist for this site."

29 The next email of relevance in that exhibit is on
30 18 June 2009 at 11.09 a.m. from Mr Miezis to Mr Vaughan.

31 "Thanks Barry, a couple of other issues I spoke to Cameron

1 about ... (reads) ... can you please consider these and
2 get back to me ASAP. Signed Lee."

3 Finally another response from Mr Vaughan on 18 June
4 2009 at 4.17 p.m. "Lee, I am happy with your second
5 suggestion ... (reads) ... rather than impose an
6 additional standard. Regards, Barry Vaughan."

7 Your Honour now can put that volume to one side.

8 HIS HONOUR: Yes.

9 MR WALLER: The reference in Mr Vaughan's initial email to Lee
10 Miezis where he speaks about extending the stream side
11 buffer from 20 metres to 100 metres is a reference, as
12 Your Honour knows, to the requirement in the code that a
13 minimum 20 metre buffer strip be applied to streams. That
14 prescription is found in the first volume of the agreed
15 book of documents at p.106. In particular there is a
16 table, Table 2 on p.19 that sets out that requirement.

17 The DSE determined not to create an SPZ or a special
18 protection zone and determined to allow timber harvesting
19 at Brown Mountain Creek under modified prescriptions. A
20 briefing note dealing with the matter was prepared by the
21 Department of Sustainability and Environment addressed to
22 the Minister. It was prepared by Lee Miezis, endorsed by
23 the secretary of the Department and I wish to take Your
24 Honour to this document which is a document to be tendered
25 through Mr Miezis. It was in a list of documents - the
26 document was produced by subpoena served on the DSE, which
27 documents were delivered to the Prothonotary on 1 December
28 or thereabouts last year, and it was listed as one of the
29 documents to be tendered through Mr Miezis, referred to in
30 his outline.

31 HIS HONOUR: You had better take me to his outline.

1 MR WALLER: I don't know whether my learned friend is taking
2 issue with this.

3 MS MORTIMER: Your Honour if my learned friend says it was in
4 the subpoenaed bundle then we accept it has been available
5 to us.

6 MR WALLER: That is the case, Your Honour.

7 HIS HONOUR: I will just have a quick look at what Mr Miezis
8 says.

9 MR WALLER: For convenience Your Honour, it is the fifth dot
10 point on the last page of the outline.

11 HIS HONOUR: I see. So this is 18 June.

12 MR WALLER: Yes it is. That outline was filed in accordance
13 with the orders Your Honour made in October. Could I hand
14 up to Your Honour a copy of the briefing note. As I say,
15 Your Honour, the briefing note will be tendered through
16 Mr Miezis who authored it but for the purpose of opening
17 I wish to take Your Honour just to certain parts of it.
18 First to note in the first section headed
19 "Recommendations. I should note that this is a briefing
20 note ... (reads) ... the attached media release regarding
21 this decision". The media release said to be Attachment 1
22 which is not here but I'll take Your Honour to the media
23 release separately that was issued. I'm instructed that
24 the attachment was not in the documents produced on
25 subpoena, so to the extent that there's any issue there,
26 we will pursue that with Mr Miezis. "Fourthly, that you
27 note that the Department ... (reads) ... that this
28 decision framework be made publicly available".

29 Then further background is set out. Item 5, "Timber
30 harvesting at Brown Mountain in East Gippsland ... (reads)
31 ... and on fauna values in the area". Item 6, "Fauna

1 surveys at Brown Mountain have now ... (reads) ... has not
2 recommenced in the area". Item 7, "The surveys found no
3 threatened species". Item 8, "The surveys did find
4 densities of ... (reads) ... which runs through current
5 timber harvesting coupes". Item 9, "The conservation
6 guideline for arboreal mammals ... (reads) ... where the
7 threshold is met". Item 10, "The purpose of the East
8 Gippsland ... (reads) ... saw log suppliers to meet
9 industry commitments". Item 11, "In the forest management
10 plan ... (reads) ... in specifying conservation
11 guidelines".

12 There are then subheadings that I won't go into in
13 detail, detailing Victoria's natural parks and
14 biodiversity policy, dealing in more detail with the
15 species - the Greater Glider and Yellow-bellied Glider,
16 dealing with community and media interest. Then on p.3
17 there's a heading "Issues and options". Item 24, "The
18 creation of a special protection zone ... (reads) ... is
19 provided at Attachment 3". Again, Your Honour, the
20 attachment is not in this document and was not produced.

21 Then it is said in paragraph 26, "There are four
22 options available ... (reads) ... continue under modified
23 harvesting prescriptions". In the interests of time, Your
24 Honour, I don't propose at this point to go into detail of
25 those options but to take Your Honour to the intended
26 course that is proposed in this briefing note at paragraph
27 49. "Intended course of action", Item 49 "The intention
28 of the conservation guideline ... (reads) ... timber
29 production in the area". Item 51, "A decision to not
30 create ... (reads) ... as both are common throughout East
31 Gippsland". Item 52, "Considering all relevant matters

1 ... (reads) ... but allow for a viable timber industry".
2 Item 53, "To better achieve this balance ... (reads) ...
3 where it is safe to do so". Item 54, "Subject to your
4 comment on this decision ... (reads) ... in timber
5 harvesting coupes". Item 55, "It is anticipated that this
6 decision ... (reads) ... and be made publicly available".
7 Finally of relevance, Item 59, "VicForests was consulted
8 ... (reads) ... prescriptions at Brown Mountain Creek".

9 Your Honour, some time in the first week of August
10 2009 VicForests was informed by the DSE that the Minister
11 for Environment and Climate Change would be making an
12 announcement that the moratorium on harvesting in Brown
13 Mountain would be lifted on the basis that VicForests
14 implemented the streamside buffer and put in place
15 modified habitat tree prescriptions.

16 On 21 August 2009 the Minister for Environment and
17 Climate Change issued a media release entitled "Permanent
18 protection for Brown Mountain area" to be found in the
19 third volume of the agreed book at p.1043.

20 HIS HONOUR: Just before you go to that, I wonder if I could
21 take you back to court book 1060, which was the survey
22 results that seemed to have informed all this and I just
23 thought in terms of the spotlighting that's described
24 there, transect 1 is Legge Road and then the informal
25 walking track through proposed coupe from Legge Road to
26 Brown Mountain Creek. That's where we walked, is that
27 right, transect 1?

28 MR WALLER: Yes, that's so.

29 HIS HONOUR: And transect 3 is the same route but then across
30 the creek and east to the dozer track along the western
31 edge of proposed coupe 19. So, of those surveys there are

1 three that relate - or effectively four relate to what we
2 walked and one of those four went a bit further, is that
3 right?

4 MR WALLER: I think that's right, Your Honour.

5 HIS HONOUR: And when it says down at the bottom of the page,
6 "Long-footed Potoroos were surveyed by placing remote
7 cameras at six sites spaced out across the survey area
8 (see map)" that map is not in the court book, is that
9 right?

10 MR WALLER: That's so, it's not in the agreed book.

11 HIS HONOUR: But if I look at p.1062 I can see that the cameras
12 were either in coupe 19 or 15.

13 MR WALLER: Yes.

14 HIS HONOUR: I think in terms of understanding what then
15 follows, the observation about the non-detection being
16 interpreted as caution, the map might be of assistance to
17 me. I don't know whether it is or it isn't or will or
18 won't be, but it's for one or other of the parties to
19 clarify if they wish to. But I'd have to say to you that
20 given that conclusion that follows the table at p.1062,
21 I'd be quite interested in seeing where the cameras were,
22 because it seems to me that what happens is that this
23 survey is conducted and it's subject to various provisos
24 about the results relating to potoroos and crayfish and
25 then given what appears under the conclusions 1, 2, 3,
26 what's done is to respond to the positive finding of a
27 high density glider population.

28 I wouldn't wish to be taken to be critical of that.
29 I'm simply trying to come to grips with the evidence. But
30 the evidence about what has and has not been detected has
31 been flagged by you as of significance given the terms of

1 action statements and it seems to me that there is
2 something - there's an area in the evidence which is
3 potentially significant in that regard and I'm not sure
4 where I'm going to get to with all that.

5 I'm just saying to you that as you go through these
6 documents, in terms of the survey that clearly informed
7 the DSE decision to which your client responded and,
8 indeed, in a sense participated in precipitating to some
9 degree by putting the buffer proposal and the other
10 conditions together in consultation, effectively, with
11 DSE. That may not be a precise way of putting it, but the
12 email process is what I'm referring to.

13 MR WALLER: Yes, Your Honour.

14 HIS HONOUR: I think that, without making too much of a meal of
15 it, or seeking to put too much potential importance on it,
16 I'd be assisted by that map.

17 MR WALLER: Could I say, Your Honour, in response, we will
18 endeavour to find the map. Alternatively, it may be
19 possible to recreate a map based on the information which
20 obviously is not as good but our first priority will be to
21 find the map that is referred to and attached.

22 HIS HONOUR: There clearly was an understanding gained from the
23 surveys not only of the relatively high density of gliders
24 but also you contend of the higher densities or highest
25 densities being in the streamside zone because that then
26 lends weight to the prescription of the zone and it seems
27 to me if the camera - that the transect walks have
28 informed that but I'd then like to know where the cameras
29 were, what happened in effect.

30 MR WALLER: Yes. Could I say also, Your Honour, that it is
31 true that of the three species that were surveyed positive

1 sightings were received in relation to just the gliders
2 and it is true that there is reference to those gliders
3 being prevalent streamside. It is also apparent from what
4 we have seen already and what we will see in the evidence
5 that the streamside buffer would be serving more than one
6 purpose and that given the preferred hunting ground, as it
7 were, or living area of potoroos being in moist areas next
8 to the creek and also given, of course, the preferred or,
9 indeed, necessary site of the crayfish being in the creek
10 it is - or that the 100 metre buffer would deal or,
11 indeed, address those matters, too, notwithstanding the
12 absence of a detection.

13 HIS HONOUR: I understand that and at 10.58 the reference to
14 the action statement for the Orbost Spiny Crayfish
15 contemplates the new reserves consisting of an under-
16 storey buffer of approximately 100 metres at each bank of
17 the stream. So, I think you're right, what you've just
18 put to me, in the face of it.

19 MR WALLER: Yes, it's prompted by arboreal mammals but it
20 serves all three purposes in that sense.

21 HIS HONOUR: Yes, it not only serves it as a matter of
22 commonsense, if you like, on the face of it, but it
23 happens to coincide with what's suggested in the action
24 statement.

25 MR WALLER: Indeed. And on 21 August the Minister for
26 Environment and Climate Change issued a media release
27 which is to be found in that vol.3 at p.1043.
28 Unfortunately, Your Honour, the type face of this copy is
29 very small but still readable one hopes. Your Honour, we
30 can provide a larger print if that would assist. If Your
31 Honour can make it out now that would be - - -

1 HIS HONOUR: I can make it out.

2 MR WALLER: On 21 August, as I say, 2009 this media release was
3 published, headed "Permanent protection for Brown Mountain
4 area". The Minister announced that the Brumby Labor
5 Government will protect a further 400 hectares of the
6 Brown Mountain area including the mountain summit as part
7 of the establishment of old growth and icon reserves in
8 East Gippsland in East Gippsland, Environment Minister
9 Gavin Jennings said today".

10 Just pausing there, that answers perhaps Your
11 Honour's question about where is the summit. It's in the
12 pink area, as it were, not in any of these coupes.
13 "Mr Jennings said that the inclusion of a large area
14 around Brown Mountain would form part of a significant
15 broken link between the Errinundra and Snowy River
16 national parks. This area of Brown Mountain contains
17 significant natural values including old growth forests
18 that will now be protected forever (Mr Jennings said).
19 Mr Jennings said the Brumby Labor Government would
20 finalise the establishment of more than 41,000 hectares of
21 new conservation reserves in East Gippsland providing an
22 unprecedented level of protection for old growth and icon
23 forests in Victoria. The 400 hectare of new protected
24 area of Brown Mountain would be in addition to the 100
25 hectares already protected as part of the Gap Scenic
26 Reserve incorporating the northern slopes of the mountain.
27 This will be a wonderful outcome for the protection of
28 these magnificent forests, however, the government also
29 recognises that with the new levels of protection comes
30 the responsibility to ensure the timber industry has
31 sustainable supply of timber into the future. Mr Jennings

1 said an area containing a number of contentious timber
2 harvesting coupes around Brown Mountain Creek to the east
3 of Brown Mountain would remain available to harvesting as
4 they did not meet the standard of old growth warranting
5 inclusion in the reserve. He said VicForests would be
6 allowed to recommence timber harvesting at Brown Mountain
7 under modified conditions designed to provide greater
8 protection to the area. Mr Jennings said the significant
9 additional habitat protection measures including extra
10 wide 100 metre streamside buffers and the protection of
11 hollow-bearing habitat trees identified by biodiversity
12 officers would be put in place at Brown Mountain Creek
13 area even though no threatened species were found during
14 fauna surveys of the area".

15 Pausing there, Your Honour, that of course is an
16 accurate statement because the gliders are not a
17 threatened species, they were detected and no threatened
18 species, namely, in particular the Long-footed Potoroo and
19 the Orbost Spiny Crayfish had been detected.

20 "Biodiversity experts conducted a series of surveys in the
21 area to determine if any threatened species were present.
22 He said of the surveys conducted by DSE staff includes
23 specific surveys for Long-footed Potoroo and Orbost Spiny
24 Crayfish they found no threatened species, despite claims
25 to the contrary. Mr Jennings said the biodiversity teams
26 did locate a high density population of Greater Gliders
27 and Yellow-bellied Gliders along Brown Mountain Creek.
28 These species are both common across Victoria and extend
29 throughout the eastern states up to Queensland and
30 suitable habitat is well represented in conservation
31 reserves in Victoria, he said. Mr Jennings said the

1 gliders' presence triggered a DSE review to determine the
2 need for the creation of a special protection zone to
3 protect the species habitat. This review was required
4 under the East Gippsland Forest Management Plan to
5 consider whether adequate protection is already provided
6 to the gliders' habitat with the existing reserve system.
7 In those case DSE found that suitable habitat for the
8 gliders was already adequately protected and that creating
9 a special protection zone was not required. Mr Jennings
10 said 'I am confident that the extra streamside buffers
11 which represent a fivefold increase in the usual buffer
12 will provide significant protection to the populations
13 identified by the surveys as the majority of animals were
14 found within 100 metres of the creek'. Mr Jennings
15 acknowledged that, more broadly, the system of conducting
16 prelogging surveys in proposed harvesting coupes in
17 Victoria needed to be improved and that DSE was working
18 with VicForests, the agency responsible for conducting the
19 surveys, to significantly improve its processes. 'Put
20 simply, there is not enough prelogging assessments being
21 done and I'm committed to doing what I can within my
22 responsibilities to see that situation improve', he said",
23 noting also that the Brown Mountain survey report could be
24 found on DSE's website.

25 Your Honour, the prescriptions referred to in the
26 media release and to be applied for harvesting in the
27 Brown Mountain coupes were in fact incorporated into the
28 management procedures for timber harvesting operations and
29 associated activities in Victoria's state forests 2009.
30 I took Your Honour to those on Tuesday and they are, for
31 convenience, to be found in agreed book vol.2 at p.842.

1 With the benefit of the view that we had yesterday, Your
2 Honour, it may be useful to review them again now briefly
3 because they raise matters that were of direct interest
4 and the subject of the view yesterday.

5 HIS HONOUR: Just before we leave 1043, you see the Minister's
6 statement that the gliders' presence triggered a DSE
7 review and there is then the statement, "The review was
8 required under the East Gippsland Forest Management Plan".
9 In essence, as I understand it, part of the case put
10 against you is that the detection of species may lead to a
11 requirement for a review. In other words, it's not just
12 optional if you are to comply with the plan that the
13 Minister refers to, reviews required.

14 Now, as I understand the way you put it, do you say
15 there's no legal requirement? In other words, it may have
16 been required as a matter of operational practice but do
17 you say that as a matter of law, if the potoroo were
18 detected the day after the Minister made his media release
19 that would not trigger a further requirement?

20 MR WALLER: Your Honour, the potoroos are the subject of action
21 statements. The arboreal mammals are not. The arboreal
22 mammals are dealt with in the guidelines. They're dealt
23 with in the FMP, the forest management plan which
24 expressly states at p.28 of that plan what the purpose of
25 the guidelines is and says that - it also should be noted,
26 Your Honour, that the guidelines in the forest management
27 plan have been superseded in some respects by action
28 statements in respect, for instance, of the potoroo. We
29 would say, Your Honour, that where an action statement has
30 been introduced it trumps, as it were, any of the
31 guidelines, in any event, and it has force of a different

1 kind and the forest management plan says at much or it
2 certainly alludes to this issue when it states on p.28 of
3 the document, "The guidelines are a step towards more
4 comprehensive ... (reads) ... for example, may supersede
5 some guidelines".

6 HIS HONOUR: Say there's an FFG action statement - - -

7 MR WALLER: Then it has to be - then subject to the detection
8 being verified, for instance, yes, that has to be, we
9 would agree, undertaken as a matter of law by the
10 Department of Sustainability and Environment, depending on
11 where the responsibility lies pursuant to the action
12 statement. Your Honour knows, for instance, in relation
13 to the Long-footed Potoroo, action 4 deals with Appendix 1
14 which makes it clear that any SMZ of 150 hectares
15 incorporated retained habitat of 50 hectares has to be
16 introduced by the DSE.

17 HIS HONOUR: Yes.

18 MR WALLER: Now true it is, consulting with VicForests but it
19 is the DSE that has that responsibility.

20 HIS HONOUR: There are risks in asking simple questions early
21 in a case but can I ask you this. Do you say that there
22 has been no material development in the understanding of
23 the presence of species within these coupes since DSE
24 formed its position and the minister made this media
25 release? In other words is your case on the facts
26 effectively that a proper understanding was reached of
27 what was in these coupes and then there was a proper
28 response to that. Do you understand what I am saying?

29 MR WALLER: I understand what Your Honour is saying and this
30 comes to the fore - - -

31 HIS HONOUR: Or should I ask that at the end of the evidence?

1 MR WALLER: The evidence will show and I intend to open so far
2 as it concerns VicForests' evidence but of course much of
3 this will be adduced from the plaintiff that there has
4 been, as it were, an ongoing series of alleged detections
5 or what they would say are relevant matters, and of course
6 VicForests has to respond to those.

7 HIS HONOUR: Yes.

8 MR WALLER: It is not something that is set in stone as at
9 21 August and thereafter - in the same way that if - - -

10 HIS HONOUR: Precisely, and the very process that you have just
11 taken me through, of review, and decision based on the
12 state of knowledge at the time carries with it the seed of
13 problems for you if the knowledge changes.

14 It may be that there are difficult legal questions,
15 if you like, as to precisely why that is, but what this
16 seems to show is that if the surveys which plainly
17 contemplated that they might be deficient in relation to
18 the potoroo, if they were then trumped by conclusive
19 evidence shortly thereafter or shortly after the
20 Minister's decision one would expect that there would be a
21 further review of what you did.

22 As I understand it, really you say that in relation
23 to the crayfish the 100 metre buffer is probably the
24 answer - - -

25 MR WALLER: In any event.

26 HIS HONOUR: In any event. Because that is what the action
27 statement appears to contemplate, and you would say that -
28 we will have to see what the evidence is but you would say
29 that on the face of it one would expect that to deal with
30 the questions of stream flow, turbidity and temperature
31 and things of that nature that Ms Mortimer referred to.

1 In relation to the quoll and the potoroo,
2 potentially it is a different picture is it not? There is
3 a real factual issue as to whether the evidence has
4 changed as to the detection of those species from the time
5 at which the current conditions were formulated. Is that
6 right?

7 MR WALLER: Yes.

8 HIS HONOUR: I am going to have to hear all this evidence.

9 MR WALLER: There is no doubt that as an objective fact the two
10 prescriptions that I have referred to and which were
11 referred to in a media release occurred before other
12 matters being brought to the attention of the DSE or to
13 VicForests by the plaintiff in respect of a number of
14 species up to and including as recently as a few weeks
15 ago, as Your Honour knows.

16 HIS HONOUR: Yes. I am going to have to decide what on the
17 balance of probabilities all that means, is that right?
18 And if the picture stays as it was when the DSE formulated
19 the current conditions and the Minister in effect signed
20 off on them your case is relatively simple, but if it
21 changes it raises questions of what that means in terms of
22 the framework of controls, and as you said to me, the
23 question of whether they are threatened species or not is
24 quite a material consideration.

25 Without wishing to labour the point, the
26 reasonableness if you like, of your client's response and
27 the DSE response to the evidence as it was as at 31 August
28 2009 may be double-sided if the evidence on which it was
29 based, and by reference to which it might be said to be
30 reasonable has materially changed. So if for instance the
31 species which were said in the survey to possibly be there

1 because of limitations on the capacity to detect them, if
2 you now say they have been detected, then, if you like,
3 the factual basis of the reasonableness of that response
4 kind of turns on itself.

5 I perhaps shouldn't interrupt you but I just wanted
6 to say to you that there seems to me to be that dual
7 quality in the material you have been taking me through
8 this morning, that there is potentially - if the case put
9 against you were a kind of (indistinct) unreasonableness
10 case this would be extremely powerful in your favour,
11 right. Can I just say it as a judge who does a lot of
12 judicial review cases, right. But in a sense it's not.
13 What is put against you isn't pleaded that way and the
14 process in a sense itself raises the question whether - if
15 the evidence is good enough of further species within the
16 coupes, what the consequences of that is, and I don't
17 think I should actually keep talking to you about it at
18 this preliminary stage but I just wanted to say that to
19 you because that is the way I read it.

20 MR WALLER: It is obviously of great assistance to know what is
21 in Your Honour's mind and we understand the matters that
22 Your Honour has raised. Your Honour has raised them at a
23 point in the factual chronology that I am going through
24 that is not yet complete, I should say, and it may be that
25 what I go on to say clarifies in some respects what Your
26 Honour has raised.

27 HIS HONOUR: Yes.

28 MR WALLER: I should say, Your Honour began this discussion by
29 speaking about events that might trigger a review of the
30 guidelines.

31 HIS HONOUR: Yes.

1 MR WALLER: And the Forests Management Plan at p.28 again of
2 that document which itself - this is the confusing
3 document that appears in triplicate but we have only been
4 going to one version - - -

5 HIS HONOUR: Yes.

6 MR WALLER: Vol.1 at p.369. At p.28 of that document which is
7 408 Your Honour will see the heading "Guidelines for
8 conservation of featured species." In the second
9 sentence, "These guidelines are intended as tools ...
10 (reads) ... obviously these are the East Gippsland Forest
11 Management Plan." Then it states what the purpose of the
12 guidelines are. "To first provide planning protection for
13 sensitive and threatened species ... (reads) ... and other
14 conservation reserves towards meeting these requirements."
15 We would emphasise that, "And thirdly to initiate an
16 orderly process for ongoing reconciliation of timber
17 production with conservation of threatened species" which
18 again raises that balance, that dichotomy which I spoke
19 about on Tuesday.

20 Relevantly then it says, "The guidelines for large
21 forest owls and Long-footed Potoroo ... (reads) ...
22 protection that once reached will trigger a review of the
23 guideline," and it is that I was referring to.

24 Yes there are guidelines for other species and one
25 of the species that are referred to in the guidelines at
26 p.410 of the agreed book deals with arboreal mammals and
27 it is that guideline that Your Honour was taken to by my
28 learned friend.

29 HIS HONOUR: Yes.

30 MR WALLER: And it is that guideline that is the subject of the
31 briefing note from the DSE to the Minister that I have

1 taken Your Honour to, and which ultimately results in the
2 media release that a special protection zone not be
3 implemented and that other prescriptions be applied.

4 HIS HONOUR: Yes.

5 MR WALLER: Your Honour if I could go to Vol.2 of the agreed
6 book to look again with the benefit of what was made
7 apparent and what we have seen on the view yesterday, at
8 p.724 of Vol.2 Your Honour sees - I am sorry, Your Honour
9 sees the 2007 management procedures.

10 HIS HONOUR: Yes.

11 MR WALLER: Of course Your Honour, the 100 metre buffer and the
12 retained habitat prescriptions were not in that document
13 but at p.842 Your Honour sees the 2009 management
14 procedures and in particular if I could take Your Honour
15 to s.1.4.2G in that document - - -

16 HIS HONOUR: Which court book page is that?

17 MR WALLER: That is p.873.

18 HIS HONOUR: Yes.

19 MR WALLER: This is s.1 which Your Honour will remember is the
20 responsibility of both VicForests and the DSE. Your
21 Honour sees there that Item G which is at the top of the
22 page says "In the East Gippsland FMA a 100 metre buffer
23 applies along Brown Mountain Creek in the area so
24 described." Reference is made to coordinate systems and
25 the Vic grid but Your Honour, that, the evidence will be,
26 is the creek that we saw yesterday that runs between
27 Coupes 15 and 19.

28 The next relevant section is s.1.4.5.3B on p.876. It
29 starts at the very bottom, highlighted in grey, that "In
30 coupes adjacent to Brown Mountain Creek again in an area
31 described DSE staff with appropriate expertise in

1 biodiversity management will guide the identification of
2 hollow-bearing habitat trees. This will be done in
3 consultation with VicForests and the harvesting
4 contractors. All trees with a diameter at breast height
5 over bark greater than 250 centimetres will be retained
6 where it safe to do so."

7 Your Honour knows that on the view particular trees
8 were identified as meeting that particular diameter.
9 Various trees were marked. Some fell above, some fell
10 below but photos have been taken and they will be
11 ultimately put in evidence.

12 Third, "Where present in sufficient numbers and it
13 is safe to do so at least five hollow-bearing trees per
14 hectare will be retained. Trees greater than 250
15 centimetres may count towards this retention level."

16 HIS HONOUR: Yes.

17 MR WALLER: And fourthly, "Where more than six retained hollow-
18 bearing habitat trees are present in a concentrated area
19 less than one quarter of a hectare then harvesting
20 machinery should minimise traffic in that area and other
21 trees may be harvested."

22 HIS HONOUR: Yes.

23 MR WALLER: "Fifthly, harvesting debris and other fuels are to
24 be removed from within 20 metres of the base of hollow-
25 bearing habitat trees or from around groups of retained
26 hollow-bearing habitat trees to reduce the impact of
27 regeneration burning where it is safe to do so."

28 Your Honour knows that the evidence will be that the
29 previous prescription required a three metre area, not a
30 20 metre area, and when we went to see Coupe 20 yesterday
31 that was of course harvested pursuant to the 2007

1 prescriptions, not the 2009 prescriptions, in every
2 respect so far as relevant to the matters I have just gone
3 to.

4 Could I deal now with a matter Your Honour has just
5 raised, namely an event that occurred after 21 August, and
6 in particular to the possible detection of a Long-footed
7 Potoroo in Coupe 15.

8 HIS HONOUR: Yes.

9 MR WALLER: On 24 August 2009 which was the day before the writ
10 was issued in this proceeding Mr Miezis will give evidence
11 that he received an email from Stephen Henry who is a
12 biodiversity officer within DSE forwarding an email that
13 Mr Henry had received from Mr Andrew Lincoln concerning an
14 alleged detection of a Long-footed Potoroo in Coupe 15.

15 Mr Miezis sent an email concerning this issue the
16 same day. The correspondence will be tendered through
17 Mr Miezis and again it is a document that was described in
18 his outline and which was obtained on subpoena.

19 At this stage I don't wish to show Your Honour
20 copies but to summarise the email. On 24 August 2009 at 7
21 a.m. Mr Henry to Mr Miezis and others within DSE said,
22 "Please note attached a report of a Long-footed Potoroo
23 photographed in one of the proposed logging coupes at
24 Brown Mountain. I was informed of this record by Jill
25 Redwood at about 3 p.m. yesterday. The photo was
26 apparently taken early Friday morning. We have not yet had
27 time to verify the location of the record as per past
28 process. I am in Melbourne for the next two days attending
29 a biodiversity forum but can be contacted on my mobile."

30 At 1.55 p.m. on 24 August Mr Miezis sent an email to
31 Dr Andrew Hayward who is the manager of Forest Monitoring

1 and Reporting at DSE saying, "Andy, need your guys to
2 verify this site where it is claimed can you have them
3 take a photo from the same perspective as this location
4 described in report."

5 Later that day, 24 August 2009 Mr Miezis sent an
6 email to Mr Lincoln and to Jill Redwood requesting all
7 footage including still images and video taken at the
8 camera location and other camera locations at Brown
9 Mountain Creek and offering to pay them for any costs
10 associated resulting from sending such footage to DSE.

11 Mr Miezis sent another email to Mr Lincoln and
12 Ms Redwood that day stating that the reason why he
13 requested the complete footage was in order to verify
14 their claims.

15 Mr Miezis will give evidence that later on 24 August
16 he had a telephone conversation with Ms Redwood in which
17 Ms Redwood said she would not release the complete footage
18 without clearance from her legal advisers.

19 On 25 August, the next day, Mr Miezis sent an email
20 to Ms Redwood regarding the issue in these terms. "Hi
21 Jill, further to our conversation yesterday ... (reads)
22 ... I trust that you understand the department cannot act
23 on the reporting until it is verified."

24 Mr Miezis will give evidence that despite this
25 request the DSE has at no time been provided with the
26 footage and stills requested concerning the alleged Long-
27 footed Potoroo detection at Brown Mountain Creek in Coupe
28 15. He will give evidence that in those circumstances the
29 DSE considers the detection in the Lincoln footage to be
30 unverified and that in those circumstances no detection
31 within the meaning of the applicable action statement has

1 occurred.

2 HIS HONOUR: Yes.

3 MR WALLER: On 25 August 2009 Mr Miezis received a report or an
4 email from Dr Andrew Hayward that had been sent to him
5 from Mr Gary Trotter, all employees of DSE. The email
6 stated that in Mr Trotter's opinion the sighting of the
7 reported Long-footed Potoroo was at Brown Mountain Creek,
8 that is to say he was able to verify it by reference to
9 the photo that had been provided by Mr Lincoln, the trees
10 and other background features indicating that that
11 location was in fact in Coupe 15 near Brown Mountain
12 Creek.

13 On 26 August 2009, that is the day after VicForests
14 was served with the writ in the proceeding Mr Miezis
15 forwarded to Mr Cameron McDonald of VicForests the email
16 from Mr Lincoln to Mr Henry. That was the original email
17 that had triggered this email chain and attached to the
18 email from Mr Miezis to Mr McDonald was a report titled
19 Report on Remote Camera Survey of Poterus Longipes Brown
20 Mountain and video footage of approximately five seconds.

21 Later that day on 26 August 2009 Mr McDonald rang
22 Larissa Murray who at that time was a forester for
23 VicForests working at Orbost and McDonald asked Ms Murray
24 to design a special management zone that would comply with
25 the Long-footed Potoroo action statement assuming
26 detection was legitimate.

27 Later that day Ms Murray emailed to Mr McDonald a
28 nominal Long-footed Potoroo SMZ mapped on Brown Mountain.
29 If Your Honour goes to Vol.2 of the exhibits to
30 Mr McDonald's affidavit Your Honour will see that at
31 Exhibit 39.

1 HIS HONOUR: Yes.

2 MR WALLER: Your Honour will see at CM39 an email attaching a
3 map and the map indicates an SMZ of 160 hectares. Your
4 Honour knows the prescription of the action statement is
5 150 hectares, 50 hectares of which has to be a retained
6 habitat zone. It indicates also - one moment, Your Honour.
7 Your Honour, it marks the alleged sighting point, that is
8 the LFP record with a star. That is in Coupe 15.
9 Unfortunately it is blocked by this 100 metre buffer zone
10 but the 100 metre buffer is included specifically as -
11 I don't wish to say any more about it because I don't want
12 to say something inaccurate but certainly it does
13 highlight on this map the 100 metre buffer which of course
14 falls within the SMZ.

15 The evidence will be that later on 26 August or
16 possibly on 27 August Mr McDonald spoke by telephone with
17 Mr Miezis.

18 HIS HONOUR: What do you take the box labelled "LFP SMZ 160
19 hectares" and the arrow coming out of it to be denoting?

20 MR WALLER: This is in response to Mr McDonald's request - - -

21 HIS HONOUR: No, no. What is - - -

22 MR WALLER: It is the yellow area, Your Honour.

23 HIS HONOUR: I see.

24 MR WALLER: I don't know whether Your Honour's copy is clear
25 but it is the yellow area that really straddles both Coupe
26 15 and the area below Coupe 15.

27 HIS HONOUR: Yes, that is what I was seeking to confirm.

28 MR WALLER: Yes. And it goes in fact into Coupe 26 slightly as
29 well.

30 HIS HONOUR: Yes, so it takes out the whole of 15.

31 MR WALLER: As an SMZ?

1 HIS HONOUR: Yes.

2 MR WALLER: That is so.

3 HIS HONOUR: I understand.

4 MR WALLER: Your Honour will recall harvesting is allowed
5 within an SMZ except for 50 hectares. No, sorry, 50
6 hectares of an SMZ has to be protected.

7 HIS HONOUR: But within that SMZ the bottom half, excluding 27
8 which is the small triangle to the south west, the bottom
9 half has already been logged hasn't it?

10 MR WALLER: Your Honour would have to look at the map. Map 11.

11 HIS HONOUR: Yes. What I am saying to you is that the yellow
12 area includes blue areas both to the north and south of
13 Coupe 15.

14 MR WALLER: Yes that is so.

15 HIS HONOUR: And indeed appears to extend into the blue areas
16 on the eastern side of the stream line so it affects four
17 coupes which exist and have been logged in that area and
18 that strongly suggests to me that if your 50 hectares are
19 to be areas which haven't been previously logged, that is
20 going to be Coupe 15. If they are not, there is a real
21 question, isn't there, about the design of this SMZ?

22 MR WALLER: Yes, and this is one of a number of designs and
23 I need to take Your Honour through the narrative.

24 HIS HONOUR: Yes.

25 MR WALLER: This was the first that was produced. But Your
26 Honour is right. Insofar as the prescription in Appendix
27 1, it states that "Each Long-footed Potoroo detection site
28 will generate a special management zone of approximately
29 150 hectares and within each SMZ at least one-third will
30 be protected from timber harvesting and new roading.

31 HIS HONOUR: It is a bit hard if it was logged in - between

1 1980 to 1989.

2 MR WALLER: We need to be clear on which colour represents
3 which year there.

4 HIS HONOUR: I think you can read them relatively easily, can't
5 you? You are correct. As I understand it that is the
6 era(sic) that embraces the cobalt with which we are
7 concerned.

8 MR WALLER: Yes, it is either 1980 to 1989 or 1990 to 1999.

9 HIS HONOUR: Yes.

10 MR WALLER: It may be that it is 1990 - - -

11 HIS HONOUR: I think you are right. 1990 to 1999. Perhaps you
12 should just go on. May I just say to you that it is quite
13 a complex issue, it seems to me.

14 MR WALLER: Yes, and Your Honour will see that a number of
15 these maps were produced. That was the first.

16 HIS HONOUR: What I am saying to you is that it seems to me it
17 would be very difficult for me, sitting as a judge of this
18 court, to form a view about what the protection zone
19 should be if there is to be one. But keep going. I might
20 be able to form a view that on the face of it one
21 suggestion is just plainly defective - - -

22 MR WALLER: Yes.

23 HIS HONOUR: But I would have a lot of difficulty going - it is
24 not the sort of discretionary exercise which this court
25 would ordinarily engage in.

26 MR WALLER: I understand, Your Honour. In the conversation
27 that occurred either on the 26th in the evening or on the
28 27 August between Mr McDonald and Mr Miezis Mr McDonald
29 told Mr Miezis that in his opinion the 100 metre
30 streamside buffer had already been agreed to for Coupe 15
31 and Coupe 19. It would also satisfy the 50 hectare Long-

1 footed Potoroo retained habitat requirement in the
2 appendix to the action statement.

3 Mr Miezis said, "I have been doing similar analysis
4 and that would appear to be appropriate. I would need to
5 circulate that proposal within DES, biodiversity and eco
6 system services to get a sign-off."

7 On 8 September 2009 Mr Miezis emailed Mr McDonald a
8 map being an alternative option for a Long-footed Potoroo
9 SMZ and core retaining habitat in the event that the DSE
10 determined that this was necessary and that is to be found
11 in that volume CM40, next exhibit.

12 HIS HONOUR: Yes.

13 MR WALLER: So Your Honour sees that this is a variation which
14 refers to the 100 metre buffer on the western side of the
15 creek into Coupe 15 but also creates 90 metre buffers on
16 both sides of streams flowing off the creek.

17 HIS HONOUR: I thought that in the planning of these coupes
18 they had not been regarded as streams because if they were
19 streams then there would already be a buffer of some
20 degree along them, wouldn't there. There would be a 20
21 metre buffer running up those streams into Coupe 15 and
22 there isn't, is that right? They haven't been treated
23 previously as streams for the purpose of the planning of
24 the coupe.

25 MR WALLER: I am not sure, Your Honour, that these streams are
26 the ones that Your Honour is referring to, the ones we
27 went to yesterday. This is in Coupe 15.

28 HIS HONOUR: Yes that's right, and what I am saying to you is
29 if you look for instance at Map 13, what we have got is a
30 100 metre linear reserve along the principal stream line,
31 if I can call it that.

1 MR WALLER: Excuse me Your Honour, I am looking for my map.

2 HIS HONOUR: Yes. If we instance the Coupe 20 situation the
3 stream line between 19 and 20 as shown on there was
4 described to me yesterday as, if you like, an intermittent
5 water course, not as a stream and I had thought that what
6 is shown as the stream lines on either side of 15 had not
7 been treated as streams for the purposes of planning the
8 coupe. In other words we don't have a stream setback in
9 terms of the management code from those water courses, and
10 what I am now being given is a table labelled "Brown
11 Mountain Stream Buffers" which says that there are two
12 streams, one along the southern boundary of 15 and the
13 other running partially along the boundary and then into
14 15. It may just be a matter of nomenclature but what I am
15 saying to you is, the planning of the coupe hasn't
16 previously sought to treat those as streams. Is that
17 right?

18 MR WALLER: I accept that that may be right, but Your Honour,
19 I am suggesting to Your Honour at this point this comes
20 from the DSE. It may only be done at a desktop level and
21 it would then have to be subject to a field assessment to
22 confirm that those streams in fact exist. Yes, it is a
23 desktop exercise in Melbourne and it would obviously need
24 to be field checked after there was an agreement on the
25 concept. But Your Honour's observations are absolutely
26 correct, that those streams hitherto had not been
27 considered as part of the coupe in the planning for the
28 harvesting of that coupe.

29 HIS HONOUR: I think I'm wrong about the northern one, I think
30 I misread the plan, but the southern one is definitely the
31 one that forks on the boundary of 15. I may not be wrong

1 about the northern one either. No, the two streams shown
2 here are respectively the streams which we see on map 13,
3 coincidental in part with the boundaries of coupe 15. So,
4 what would happen would be that coupe 15 would sit in that
5 area except that this map has got the stream - it doesn't
6 seem to have Legge Road in the right place.

7 HIS HONOUR: That's what's happened, that's where the mistake
8 is.

9 MR WALLER: Yes, that's so. To further confuse matters the
10 black line around this exhibit is not, of course, the
11 boundary of coupe 15 but - - -

12 HIS HONOUR: Yes, I understand that.

13 MR WALLER: Your Honour, no more than a desktop exercise with
14 all the foibles that Your Honour has identified and
15 probably others but that was what was sent by Mr Miezis to
16 Mr MacDonald as an alternative.

17 Can I continue the narrative?

18 HIS HONOUR: Yes.

19 MR WALLER: By this stage therefore there were two different
20 proposals that had been raised regarding the creation of
21 an SMZ and retained habitat within it. The first proposal
22 was this linear area covered by a 100 metre streamside
23 buffer and the second alternative, although generated at
24 desktop level, includes 90 metre streamside buffers for
25 streams said to be within or at the boundary of coupe 15.

26 Thereafter there was some correspondence between
27 VicForests and the DSE which is referred to in paragraphs
28 81-90 of Mr MacDonald's most recent affidavit concerning
29 proposals for the SMZ and retained habitat.

30 HIS HONOUR: I'll give you a five minute break, Mr Waller.

31 MR WALLER: I'm sorry, Your Honour, I should have noted the

1 time.

2 HIS HONOUR: When we go through documents like this it's quite
3 hard to keep concentrating, so it's sensible just to take
4 a short break.

5 MR WALLER: If Your Honour pleases.

6 (Short adjournment.)

7 HIS HONOUR: Yes, Mr Waller?

8 MR WALLER: Your Honour, some of what Your Honour raised was in
9 fact raised by people within VicForests at the time
10 concerning issues arising from the DSE proposal which is
11 Exhibit CM40. The evidence from Mr MacDonald will be that
12 after he received the alternative retained habitat
13 proposal at CM40 he telephoned Mr Miezis and asked the
14 email that he'd sent previously to Mr MacDonald also to
15 Mr Lachlan Spencer. Your Honour will know that
16 Mr Spencer, a witness to be called by the defendant, is
17 the tactical planning manager of VicForests and Mr Spencer
18 received that email and sent an email himself to Mr Miezis
19 which is Exhibit CM42 in the bundle of exhibits and what
20 Mr Spencer says is "I've had a look at the alternative
21 version. Two key points: first, not sure why it doesn't
22 utilise existing park to the north at all in the special
23 management zone yet includes extensive areas of mid to
24 late 90s regrowth to the south" - it picks up Your
25 Honour's point about harvested areas. "2. Proposed Long-
26 footed Potoroo retained habitat as mapped also includes
27 large amounts of 1990 harvesting which I'm sure would not
28 be viewed well. LFP retained habitat 90 metre streamside
29 buffers also extend well up the slopes beyond where the
30 permanent streams extend. This appears contrary to the
31 intent of the action statement prescriptions remaining on

1 the lower slopes. Speaking of Cameron, he suggested
2 I have a look at the first option that you had and provide
3 comment on that and any proposed additions VicForests may
4 have. It would appear to me that there is a capacity to
5 make an FMZ that is larger than 150 hectares by
6 incorporating existing park and then focusing the LFP
7 retained habitat in the gullies, 100 metre buffer and the
8 park areas".

9 On 9 September Mr MacDonald will say that he
10 received an email from Mr Spencer to Mr Miezis that
11 commented in part on a map that had been sent to
12 Mr Spencer by someone within the DSE. There is then a
13 series of back and forward discussion about the proposed
14 SMZ that is being discussed between DSE and VicForests.
15 The contents of Mr Spencer's email to Mr Miezis, that is
16 to be found at CM45 and in substance Mr Spencer said to
17 Miezis, "Thank you for the updated map. I think that the
18 general approach of where the SMZ" - yes, this is CM43.
19 "Thank you for the updated map ... (reads) ... Long-footed
20 Potoroo habitat is 51 hectares".

21 The map that is being commented on by Mr Spencer is
22 Exhibit 45. Your Honour sees it is a map prepared by the
23 DSE. The SMZ of 169 hectares is in the blue diagonal
24 hatching. It extends only to the creek buffer on the
25 western side of the creek into coupe 15 and the point
26 Mr Spencer is making is that the retained habitat, which
27 is indicated in yellow, the stream buffer and the LFP
28 retained habitat is not part of the SMZ but additional to
29 it and given the prescription that requires one third an
30 amount greater than 51 hectares, namely some 78 or 73
31 would need to be carved out for retained habitat.

1 The third point Mr Spencer raises is that "The
2 proposed long-footed retained habitat contains 1990s
3 regrowth. This is unlikely to be an issue for potoroos,
4 however, considering public perception and the abundant
5 area to the north inside the Gap Reserve, I would suggest
6 that recent harvesting not be included in the Long-footed
7 Potoroo retained habitat area. The attached map has been
8 prepared to highlight the above issues. It also provides
9 an alternative which removes logging history from the
10 Long-footed Potoroo retained habitat and an increase in
11 the size of the retained habitat".

12 Your Honour can find that map, which is attached to
13 CM46 - as often occurs these emails are repeated in
14 various emails depending on who the sender and recipient
15 is and it may be part of a later trail so the email I've
16 just to is actually conveniently located at CM46 with the
17 attached map and Your Honour will see that that map gives
18 effect to what Mr Spencer had set out in his email to
19 Mr Miezis where the long-footed protected area - I'm sorry
20 - where the protected area is 142 hectares, that the SMZ
21 is in fact 309 hectares of which the protected area
22 involves part of - there's the streamside buffer but then
23 it extends into the northern areas of the park reserve, as
24 Mr Spencer had said.

25 So, to be clear, the changes implemented on the map
26 attached to Mr Spencer's email were that the Long-footed
27 Potoroo SMZ western boundary had been moved to the
28 ridgeline and the retained habitat area had been extended
29 along the stream south of coupe 15's boundary.

30 Your Honour, on 16 September Mr Miezis sent an email
31 to Mr MacDonald and Mr Spencer concerning the draft Long-

1 footed Potoroo SMZ. That's CM4. What Mr Miezis says is
2 that BES, that's the biodiversity and ecosystem services
3 within DSE, has recommended another option for LFP
4 protection for consideration. It is denoted as option 1
5 on this map and the 150 hectare area remains as per the
6 previous version "I sent Lachie. I've played around with
7 150 metres and 100 metres off creek. I think option 2
8 works best - 48 hectares of retained habitat - but want to
9 hear your thoughts before I go back to BES and discuss".

10 The evidence from Mr Miezis will hopefully explain
11 the map that's attached to CM47 and I'm instructed that
12 the only one who can properly interpret this map is
13 Mr Miezis who apparently suffers from colour blindness.
14 So, for those that don't have that attribute it's
15 difficult to understand. But, Your Honour, Mr MacDonald
16 will give evidence that the map attached to Mr Miezis'
17 email was difficult for him to interpret and he had asked
18 Mr Miezis whether they might need to discuss it. On
19 21 September 2009 Mr MacDonald attended a meeting at the
20 DSE offices in Melbourne. Mr Spencer was there, as were
21 others, within the DSE and at the meeting Mr MacDonald
22 said that the action statement did not express any
23 preference for the shape for the shape of retained
24 habitat.

25 HIS HONOUR: I don't know about that. It says that it is to
26 respect natural - to ridgelines and the like, so you
27 wouldn't expect it to go over any ridgeline and it's to
28 include the best - the protected areas to be the best
29 potoroo habitat within the zone, isn't it?

30 MR WALLER: That's what the action statement says, yes.

31 HIS HONOUR: So you would expect that to be decided by someone

1 with appropriate zoological expertise rather than a land
2 use planner, would you not?

3 MR WALLER: Rather than?

4 MR WALLER: Rather than someone who is simply a land use
5 planner, if I can put it that way. It is all very well
6 for - - -

7 MR WALLER: That's right.

8 HIS HONOUR: They are the two constraints, it seems to me.

9 MR WALLER: The entity with the zoological expertise of course
10 is DSE and that is why DSE is charged in the action
11 statement with designing and indeed implementing the SMZ
12 but in consultation with VicForests that brings to that
13 process its expertise which is more of the land use and
14 matters to do with the way in which timber would be
15 harvested aspect, so that is why it is the DSE in a sense
16 that is involved intimately, one can see, in putting up
17 this proposal for an SMZ all predicated of course on what
18 at the time is an unverified detection but on the
19 assumption that if that detection is correct and verified
20 then the action statement requires an SMZ to be
21 implemented, and the shape of the SMZ and of course any
22 retained habitat within it will need to be implemented.

23 At the meeting though Mr McDonald will give evidence
24 that he said that the action statement does not express
25 any preference for the shape of the retained habitat and
26 he asked whether the retained habitat could be situated
27 along lower streamside gullies as opposed to continuing up
28 the ridge line to the western boundary of Coupe 15.

29 Mr Spencer at the meeting said, "As all mapping has
30 been done in Melbourne so far there is no evidence that
31 the mapped gullies continue to the west as suggested. To

1 the contrary the logging history suggests that they do not
2 extend even to the road. This needs to be confirmed in the
3 field."

4 HIS HONOUR: I understand what you say about this map at CM47
5 but I don't take it to show an approximately 150 hectare
6 SMZ.

7 MR WALLER: I can't assist Your Honour.

8 HIS HONOUR: It may be that it is mean to be - what I take it
9 incidentally to confirm is that if you have a 50 hectare
10 core area and you avoid previously logged areas you are in
11 fact going to take out 15 and part of 29.

12 MR WALLER: Yes, so it seems.

13 HIS HONOUR: And this seems to show a 200 metre buffer back
14 from the stream, extending up into 19 and I don't - so in
15 effect what you have got is a 200 metre buffer from the
16 stream in both 15 and 19 and then you have got buffers of
17 150 metres going up the water courses which as you say,
18 have been apprehended from a desktop survey as distinct
19 from what is on the ground, and if in fact what happens on
20 the ground is that the moister country simply starts as
21 you go down from the road to the creek then you will wind
22 up not with arms coming up to the road, but with more than
23 a 200 metre buffer coming back from the creek, but the
24 fundamental problem I have with this is if it is to be
25 approximately 150 hectares and it is to include the best
26 potoroo country within that 150 hectares of at least one-
27 third as retained habitat, well, it raises as many
28 questions as it answers.

29 MR WALLER: This document?

30 HIS HONOUR: Yes.

31 MR WALLER: This document I think purports to illustrate two

1 options on the one document, that is one difficulty, in
2 addition to the difficulties Your Honour has mentioned,
3 and also we would say that this is developed as a concept
4 map or drawing which obviously would need to be subjected
5 to a careful field assessment and analysis.

6 HIS HONOUR: I took the second option, the difference between a
7 150 metre buffer and a 200 metre buffer in Coupe 19. Is
8 that not right? That is where your five hectares are?

9 MR WALLER: Yes. That would be right.

10 HIS HONOUR: In any event perhaps you had better press on with
11 the story.

12 MR WALLER: Yes. So at the meeting that is what Mr Spencer
13 said. Problems with the desktop survey we need to confirm
14 in the field. Mr Miezis said it would be feasible to
15 include areas along the gullies - - -

16 HIS HONOUR: Yes.

17 MR WALLER: In the vicinity of Brown Mountain Creek rather than
18 have the retained habitat extend to the western boundary
19 of the coupe. The best way to facilitate this would be to
20 have a field visit with representatives of both the DSE
21 and VicForests.

22 HIS HONOUR: Yes.

23 MR WALLER: Mr McDonald said that he would contact Mr Vaughan,
24 the regional director of VicForests to brief him on this
25 discussion and to nominate a staff member for the visit
26 and that we would let the DSE know.

27 On 28 September 2009 Mr McDonald received an email,
28 a copy of an email that had been sent from Mr Spencer to
29 Mr Vaughan and others, forwarding correspondence from
30 VicForests and the DSE concerning a field visit to Brown
31 Mountain for the purposes of identifying a Long-footed

1 Potoroo SMZ.

2 As a result of that correspondence Mr McDonald
3 understood tat a field visit would not occur until at
4 least the first week of October 2009 and those emails are
5 CM48.

6 Mr McDonald swears this affidavit on 27 November
7 2009 and his evidence at that point is that as at the date
8 of swearing the affidavit the field visit to Brown
9 Mountain had not occurred.

10 The evidence will be that VicForests indeed was
11 waiting for the DSE to initiate that next step but it
12 never occurred.

13 HIS HONOUR: That might be right. All I can say to you is these
14 sorts of plans can be put to different witnesses and
15 I have got no doubt that on your side of the Bar table
16 there are those who know these potential coupes well on
17 the ground and they could make one sort of observation.

18 On the other side of the Bar table they are going to
19 call evidence from people who if they are told that the
20 special management zone is to be of approximately 150
21 hectares and that it will follow recognisable landscape
22 features such as ridges, spurs and water courses - it says
23 water courses, not streams - and that within each SMZ at
24 least one-third, about 50 hectares will be protected from
25 timber harvesting and that the retained habitat will
26 include the best LFP habitat I suspect there is going to
27 be some fairly trenchant criticism of some of the
28 proposals that have been discussed but at the end of the
29 day you are going to have to think about where that leaves
30 me, potentially. I am not sitting as some sort of
31 environmental specialist, even if I might like to. That is

1 the problem. I can express conclusions based on the
2 evidence but I would have to say to you that prima facie
3 if the potoroo is detected and if the proper way forward
4 is the proper delineation of an SMZ with a retained
5 habitat within it on the face of it, there are problems
6 with this coupe, I mean big problems, but that is just on
7 the face of it. There may be answers.

8 MR WALLER: Of course all of this, as Your Honour said, is
9 predicated on verified detection.

10 HIS HONOUR: I agree. That is what I raised this morning
11 because on one view that is a very significant issue in
12 this case because if the situation stays substantially as
13 it was apprehended at the time of the creation of the 100
14 metre buffer, save perhaps with respect to the crayfish,
15 your case is that really the current controls are entirely
16 appropriate. If the situation on the balance of
17 probabilities has materially changed say by the positive
18 detection of a threatened species then we are in the midst
19 of this process that you have just taken me through which
20 hasn't crystallised in the sort of decision that you had
21 in respect of the glider habitat. Do you follow what I am
22 saying?

23 MR WALLER: Yes I do.

24 HIS HONOUR: I don't want what I am saying at this stage to be
25 taken as more than me thinking aloud because there is a
26 lot of evidence to come and there may be other ways of
27 looking at all this that are substantially more insightful
28 than my initial impressions but I am just saying this to
29 you so that you understand that I think on the face of it
30 there is - that the detection evidence on the face of it
31 is potentially very significant in the case.

1 MR WALLER: Yes, we agree. Mr McDonald's evidence as
2 at November, but he will confirm in his evidence though of
3 course he is no longer with VicForests but others within
4 VicForests will confirm that in the event, that the
5 Department of Sustainability and Environment determines to
6 declare a Long-footed Potoroo SMZ including a retained
7 habitat where harvesting is not allowed, then VicForests
8 will modify the harvesting boundary in the coupe plans for
9 15 and 19 to accommodate the prescription - as it must.

10 HIS HONOUR: Yes.

11 MR WALLER: Your Honour, but similarly the evidence will
12 be - - -

13 HIS HONOUR: You don't propose to call anyone from DSE.

14 MR WALLER: Yes we do.

15 HIS HONOUR: You do?

16 MR WALLER: Mr Miezis.

17 HIS HONOUR: Sorry, yes.

18 MR WALLER: Under subpoena, but it is to be hoped that we are
19 able to prepare, in cooperation with him - to finalise
20 I should say, in cooperation with him, a statement to
21 assist in the way the evidence is given rather than him
22 giving evidence entirely viva voce. It is to be hoped that
23 we can do that.

24 HIS HONOUR: Whether or not he gives evidence viva voce, when
25 you cross-examine Dr Meredith you are going to have to be
26 pretty careful to put to him views about where the best
27 potoroo habitat is, and any proposition that the re-growth
28 is equivalent to the old growth forest if that is what
29 Mr Miezis - if Mr Miezis is going to say that sort of
30 thing you are going to have to put it squarely to him,
31 because I accept that your client's position is quite

1 properly what you have just put to me, that if DSE
2 determines a zone they will abide by it. But we then get
3 into these areas where there is room for judgment about
4 things like the delineation of these kinds of zones and if
5 there is to be evidence about that sort of judgment from
6 Mr Miezis I think he is going to have to confront what the
7 plaintiff's witnesses say and conversely they are going
8 have to be given the opportunity if he - depends how
9 narrow his evidence is - but if he goes to ultimate issues
10 about what the reasonable delineation of the zone would be
11 to protect the potoroo that is going to have to be put
12 squarely to the other side or I am going to be in a
13 difficult position and perhaps you are going to be in a
14 difficult position.

15 MR WALLER: Yes. We understand that obligation and if that is
16 the evidence of Mr Miezis - any evidence that Mr Miezis
17 will give will relevantly be put to the plaintiff's
18 witnesses.

19 HIS HONOUR: Yes. I am not in any way suggesting you wouldn't
20 do what you should do. What I am saying to you is that the
21 process that you are foreshadowing carries with it that
22 risk. If you subpoena him and he is just called cold there
23 are some potential problems.

24 MR WALLER: I understand, and we want to obviate that if
25 possible by a witness statement.

26 HIS HONOUR: Yes.

27 MR WALLER: Served obviously in good time.

28 HIS HONOUR: Yes.

29 MR WALLER: We are aiming for Tuesday, the beginning of next
30 week to prove that if possible.

31 HIS HONOUR: Yes. I think that had better be before we get to

1 Dr Meredith. I will leave it entirely to you, Mr Waller.

2 I don't have any doubt that you will do the right thing.

3 I am just pointing out the foreshadowed timetable.

4 MR WALLER: Yes.

5 HIS HONOUR: You can see what I am worried about.

6 MR WALLER: I understand.

7 MS MORTIMER: Your Honour, and any outline that is delivered
8 may affect what we might want to lead in-chief from
9 Dr Meredith, if we are to know precisely what Mr Miezis
10 has to say.

11 HIS HONOUR: I agree with that. Or you might have to re-call
12 Dr Meredith or he might be a bit longer than what we
13 otherwise expect. I understand all that. All I am saying
14 is there is a potential problem in completing evidence
15 from key witnesses on the plaintiff's side, and, in
16 particular, completing the whole of the plaintiff's case,
17 if then something emerges which on proper view is critical
18 to the judgment that you might make about the effects of
19 what is contested, that is the detection of the potoroo.

20 MR WALLER: Yes. Could I deal now, Your Honour, with the
21 position taken by the defendant in relation to each of the
22 threatened species and I can do this fairly briefly. At a
23 general level, VicForests relies on the very large amounts
24 of reserve in the immediate vicinity of the Brown Mountain
25 coupes as it were a prism through which each of the
26 breaches alleged against it need to be analysed. This
27 point is highlighted by Professor Ferguson who will give
28 evidence that, as he does in his statement, that publicly-
29 owned forest in East Gippsland covers about one million
30 hectares and over 400,000 hectares were in nature
31 conservation reserves prior to 2006.

1 In 2006 the Victorian Government added a further
2 45,000 hectares to the reserved system and much of that
3 was to the immediate vicinity or in the immediate vicinity
4 of the Brown Mountain forest recoops. That was done to
5 provide greater protection for endangered species and
6 ecosystems, more diversity of forests and habitat types
7 and to enhance connectivity between parks and reserves.

8 To that very large amount of reserves almost half of
9 publicly owned forest in East Gippsland, one needs to add
10 a further 400 hectares of the Brown Mountain area
11 immediately adjacent to the proposed coupes as part of the
12 establishment of old growth and icon reserves which were
13 the subject of the Minister's media release in August last
14 year.

15 HIS HONOUR: What was that area again?

16 MR WALLER: That is an area of 400 hectares . Your Honour can
17 see that most clearly in the maps, the contrast between
18 the pre and post-November 2009 maps. Does Your Honour
19 wish to look at those?

20 HIS HONOUR: No, I remember the dark pink.

21 MR WALLER: Yes. That analysis, we would say, Your Honour, is
22 consistent with the purpose of the guidelines in the
23 forest management plan that we went to earlier which, Your
24 Honour - and this is at p.408 of agreed book 1 - is to
25 provide plan protection for sensitive and threatened
26 species in state forests to meet requirements of the Flora
27 and Fauna Guarantee Act and the precautionary principle
28 outlined in the national forest policy statement and
29 relevantly to take account of the contribution of national
30 parks and other reserves towards meeting those
31 requirements.

1 Harvesting is obviously prohibited in the reserve
2 system, so the reserve system operates, as it were, as a
3 retained habitat for each of the species the subject of
4 this proceeding. That's a primary observation, Your
5 Honour, I wish to make at this point.

6 In addition to that primary observation there are
7 other matters of more general application that the
8 defendant raises. First, it raises - and this is clear in
9 the defence - that the guidelines in the forest management
10 plan do not create obligations actionable at law. That's
11 pleaded in paragraph 23A of the defence. And that where
12 relevant, guidelines have been superseded by applicable
13 action statements and that is referred to in paragraph 38
14 of the defence and we draw a clear distinction between the
15 force of an action statement and matters referred to in
16 the guidelines.

17 HIS HONOUR: Does that mean you draw a clear distinction.

18 MR WALLER: We say that the guidelines do not create
19 obligations actionable at law but the action statements
20 do.

21 We also say in relation to the precautionary
22 approach that that does not create obligations actionable
23 at law. That's our primary position reflected in
24 paragraph 74 of the defence. An alternative position is
25 that if it does then that precautionary approach has been
26 met or has been satisfied for reasons we deal with in
27 respect of each of the individual species.

28 The plaintiff in opening suggested - and I now turn
29 specifically to the Long-footed Potoroo. The plaintiff
30 suggested that the evidence it would lead concerning the
31 Long-footed Potoroo would establish that VicForests is in

1 breach of the action statement and the forest management
2 plan and the precautionary principle and, as I've just
3 said to Your Honour, VicForests accepts that in planning
4 and conducting its forestry operations it must comply with
5 measures specified in applicable action statements.

6 But, as I've said at several points in this opening,
7 it is the DSE that has the power and, indeed, the
8 responsibility to declare an SMZ and core retain habitat
9 once a Long-footed Potoroo has been detected and, as I've
10 said, the evidence of VicForests will be that if such an
11 SMZ was declared then VicForests, of course, would comply
12 with it. But the DSE to date has not declared an SMZ and
13 the evidence will be that that has not occurred because
14 there has not in the DSE's opinion been a verified
15 detection of a Long-footed Potoroo within the meaning of
16 the action statement. Therefore, the obligations cast
17 upon VicForests by the action statement that otherwise
18 would arise are not enlivened but, as Your Honour has
19 said, matters on the ground change and in the event that
20 things change and the DSE takes a different view then, of
21 course, VicForests will comply with whatever obligations
22 arise under the action statement.

23 But concerning the precautionary approach, if
24 contrary to VicForests' primary position that reference in
25 the code to the precautionary principle doesn't create
26 obligations actionable at law, VicForests' position is
27 that it has in its approach acted in a precautionary
28 manner having regard to the following matters: First,
29 that the cooping-up process - the cooping-up timber
30 release plan process which I outlined and which Mr Spencer
31 will speak to in greater detail when he gives evidence.

1 Secondly, the implementation of the streamside buffer
2 which, as I've said, serves to protect a number of
3 species.

4 Thirdly, the fact that it did not harvest and has
5 not harvested, pending survey results which included
6 surveys for the Long-footed Potoroo, that is the
7 moratorium that was referred to in the media release.

8 Fourthly, the fact that the survey results did not detect
9 the presence of the Long-footed Potoroo. Fifthly, the
10 fact that it consulted - and Your Honour has seen the
11 scope and some of the detail of that consultation with the
12 DSE concerning proposals for an SMZ and retained habitat
13 pending a decision by the DSE as to whether it would
14 declare an SMZ. And, sixthly, the fact the DSE has not
15 declared an SMZ and the Minister has announced that
16 VicForests can harvest on Brown Mountain in accordance
17 with agreed prescriptions.

18 In addition to that, the evidence - - -

19 HIS HONOUR: When does he do that?

20 MR WALLER: That is badly expressed because it reverses the
21 order chronologically. I don't mean in any way to say
22 that there's been any decision post the alleged detection
23 of the potoroo but the position is, Your Honour, that
24 absent - - -

25 HIS HONOUR: So that really comes between your fourth and fifth
26 points.

27 MR WALLER: Yes. It comes to this: that absent the
28 declaration of an SMZ the prevailing position is as
29 reflected in the Minister's statement and, in addition,
30 Professor Ferguson's opinion is that VicForests has taken
31 a precautionary approach in relation to its proposed

1 harvesting in regard to the concerns raised by or in
2 relation to the Long-footed Potoroo.

3 If I could deal next with the spot-tail quoll.

4 HIS HONOUR: Just keep going, Mr Waller.

5 MR WALLER: Yes. There is no evidence of any detections of
6 spot-tail quolls in the Brown Mountain coupes. Further,
7 insofar as protection of habitat is concerned, Professor
8 Ferguson's opinion will be that the surrounding reserve
9 immediately adjacent to the proposed coupes addresses the
10 concerns raised by Dr Belcher and that opinion is
11 consistent with the action statement for the quoll in
12 agreed book vol.2 p.558, which says "that in considering
13 any impact of logging ... (reads) ... state forests
14 unavailable to logging".

15 Your Honour, this is even more so, having regard to
16 new areas added to the reserve system on Brown Mountain
17 which postdate the action statement and more so the action
18 statement, Your Honour will recall, refers to certain
19 targets and a target of 75 quoll sites has to be met in
20 East Gippsland Forest. The evidence is that that target
21 of 75 quoll sites in East Gippsland Forest has been met.
22 So for all those reasons, to the extent that any or all of
23 the action statement, forest management plan or
24 precautionary principle impose obligations on VicForests
25 vis a vis the spot-tail quoll those obligations have been
26 met.

27 Next, if I can deal with the Orbost Spiny Crayfish
28 and the new taxon.

29 HIS HONOUR: When you say that the quoll hasn't been detected,
30 the habitat protection description speaks of known den and
31 latrine sites and other detection sites. So, it is really

1 both a lack of evidence of detection generally and, more
2 specifically, of a known den and latrine site about which
3 you might, in effect, create a particular area of
4 protection.

5 MR WALLER: Yes. But the word "detection", Your Honour, would
6 have to be applied to both those aspects but one refers to
7 detection of the actual creature and the other detection
8 of its place of residence, so to speak.

9 HIS HONOUR: That's right.

10 MR WALLER: Your Honour, dealing with the Orbost Spiny Crayfish
11 and new taxon, the pleading that Your Honour has from the
12 plaintiff following the amendment makes it clear that
13 there is no allegation that the Orbost Spiny Crayfish is
14 actually present. We say that's a significant amendment
15 and we say that the evidence - - -

16 HIS HONOUR: I'm expecting you to plead to the current pleading
17 at some stage.

18 MR WALLER: I'm going to surprise Your Honour by delivering
19 that pleading at the end of this opening.

20 HIS HONOUR: For instance, you could plead that it is the
21 Orbost Spiny Crayfish for all I know at this point.

22 MR WALLER: We could but we don't.

23 HIS HONOUR: I see.

24 MR WALLER: VicForests' position is that there hasn't been a
25 detection site within the meaning of the action statement
26 to trigger any obligation arising under that action
27 statement but, as Your Honour has observed earlier, that
28 if VicForests relies on the streamside buffer which
29 happens in any event to meet the habitat protection
30 required in the event of a confirmed detection site under
31 the statement and that is the position of VicForests in

1 answer to the claim against it concerning both the Orbost
2 Spiny Crayfish and the alleged new taxon.

3 Professor Ferguson in his report was able to deal
4 with the new taxon because it had been raised by
5 Mr McCormack in his report but it wasn't elevated into a
6 fully fledged claim in the pleading until recently and we
7 still haven't had the opportunity to speak to Professor
8 Ferguson in greater detail about it. So, it may be that
9 what Professor Ferguson has said about the new taxon may
10 be augmented by evidence that he gives. But, in any
11 event, Professor Ferguson's opinion then expressed was
12 that even if a new taxon had been identified it would be
13 well protected by the streamside buffer (paragraph 4.2 of
14 his report on p.20 of his report says that).

15 Dealing with the sooty and Powerful Owls and the
16 loss of hollow-bearing trees, the position, Your Honour,
17 there is that there has not been any confirmed nesting and
18 roosting sites utilised recently and frequently based on
19 reliable observation or physical evidence such as pellets
20 or wash located within the coupes. My learned friend I
21 think said that there had been but I may have
22 misunderstood the way it was put. But the evidence
23 certainly doesn't go that far.

24 There was a detection, I think, of a nesting or
25 roosting site 500 metres outside a coupe but nothing
26 within the coupes in question, therefore the precondition
27 for the establishment of the three hectare special
28 protection zone in the Sooty Owl action statement or in
29 the Powerful Owl action statement does not exist.

30 Separately to that, the modified habitat pre-
31 prescriptions are relied upon by VicForests in conjunction

1 with the broader landscape analysis in answer to all of
2 the breaches alleged against VicForests concerning both
3 the sooty and Powerful Owl and the loss of hollow-bearing
4 trees and Professor Ferguson's analysis supports that.

5 Your Honour, in relation to the Giant Burrowing Frog
6 and the Large Brown Tree Frog, there has not been a record
7 (to use the language of the action statement) of the Giant
8 Burrowing Frog within any of the four coupes within the
9 meaning of the action statement and therefore, again,
10 VicForests' position is that the preconditions to the
11 obligations set out in that action statement have not
12 arisen.

13 Again, the defendant relies on the streamside buffer
14 in answer to all of the breaches alleged against it
15 concerning the Giant Burrowing Frog and the Large Brown
16 Tree Frog but there may be further evidence that is called
17 by the defendant in relation to the Giant Burrowing Frog
18 as that comes to hand.

19 The Square-tailed Kite, again to pick up the
20 language, there is no action statement in relation to this
21 particular species but there is no evidence of known nest
22 sites or nest trees within the meaning of the East
23 Gippsland Forest Management Plan which would trigger any
24 guidelines relevant to the Square-tailed Kite and, again,
25 we expect Professor Ferguson to deal with this but we
26 would point to the surrounding reserve again as being
27 relevant so far as VicForests need to meet any obligations
28 under the FMP or the precautionary principle if those are
29 said to effectively give rise to such obligations.

30 Next, the gliders. We looked at the gliders in some
31 detail this morning. Your Honour, there is no factual

1 dispute between the parties concerning the elevated levels
2 of arboreal mammals detected in the DSE Brown Mountain
3 survey report but what VicForests' position is is that it
4 relies upon the streamside buffer which was initially
5 implemented in response to this protection because it was
6 on the lower gullies near Brown Mountain Creek where most
7 of the gliders were detected and VicForests also relies
8 upon DSE's decision not to declare an SPZ for the reasons
9 set out in the memorandum of 18 June from Mr Miezis to the
10 Minister and reflected in the media release. The briefing
11 note prepared by Mr Miezis but really sent by the
12 Secretary of the DSE to the Minister for Environment and
13 Climate Change which recommendations were generally
14 adopted and implemented and reflected in both the media
15 release and in the revised management procedures of 2009.

16 Professor Ferguson will give evidence that the
17 surrounding reserves and also the new habitat
18 prescriptions address the concerns that have been
19 identified by Dr Bilney in his report.

20 Your Honour, that's really all I wish to say by way
21 of opening but I wanted to provide to our learned friends
22 and this is the first time it has been provided to them
23 because it's only just been finalised and also to hand to
24 Your Honour the defendant's defence to the amended
25 statement of claim.

26 HIS HONOUR: Thank you, Mr Waller.

27 MR WALLER: If Your Honour pleases, that concludes the
28 defendant's opening statement.

29 HIS HONOUR: And as I quickly look at them, you foreshadowed
30 the substance of these pleadings in respect of particular
31 species in what you've just said to me.

1 MR WALLER: Yes. And Your Honour was quite right in observing
2 on Thursday that there's a certain symmetry or aspect of
3 parallel pleading that's been adopted because our position
4 in respect generally of matters is reflected in the
5 defence. So, unless Your Honour has any particular
6 questions or matters to raise, those are the opening
7 remarks of the defendant.

8 HIS HONOUR: Yes, thank you, Mr Waller, that has been very
9 helpful.

10 MS MORTIMER: Your Honour, is it convenient if we start the
11 evidence after lunch?

12 HIS HONOUR: I think it is.

13 MS MORTIMER: That will be with Ms Redwood and, Your Honour, I
14 understand some of the exhibits from the files in
15 Melbourne didn't make their way down here and so we've got
16 folders, if I might hand those up to Your Honour's
17 Associate.

18 HIS HONOUR: That would be very helpful.

19 MS MORTIMER: It will be Ms Redwood, Mr Lincoln and Ms McLaren
20 this afternoon. We think, between my learned friend and
21 I, that that's probably all we'll get through.

22 HIS HONOUR: Yes, it sounds a full enough afternoon.

23 MS MORTIMER: If Your Honour pleases.

24 LUNCHEON ADJOURNMENT

25