

1 MS MORTIMER: If Your Honour pleases, I appear with my
2 learned friend Mr Niall on behalf of the plaintiff.

3 HIS HONOUR: Yes, Ms Mortimer.

4 MR WALLER: If Your Honour pleases, I appear with my learned
5 friend Mr Redd for the defendant.

6 HIS HONOUR: Yes, Mr Waller. Ms Mortimer, I have read the
7 written submissions carefully and considered them, so
8 you can proceed on that basis.

9 MS MORTIMER: Yes, Your Honour. I propose only to make some
10 short supplementary submissions orally on both issues.

11 HIS HONOUR: Yes.

12 MS MORTIMER: Your Honour, in relation to costs, we submit
13 that it's important not to lose sight of the fact of
14 this being public interest litigation, and that EEG has
15 not brought this proceeding to vindicate its own rights
16 but to advance a claim about the Victorian statutory
17 authority not complying with the law in a way that
18 would cause significant harm to a number of listed
19 threatened species. In our submission, in relation to
20 the exercise of the costs discretion, Your Honour
21 should also not lose sight of the fact that these
22 coupes would by now have been decimated if it wasn't
23 for this proceeding, an outcome which the court's
24 judgment now shows would have been unlawful and likely
25 would have killed at least individual members of
26 threatened species that we now know to be there, and
27 affected one of the most significant concentrations of
28 gliders ever detected in Victoria.

29 So in that context, Your Honour, we submit, and
30 we ask rhetorically, where does the figure of 60 per
31 cent of the costs come from. A dissection of EEG's

1 claim in the way that VicForests has in our submission
2 is really just another attempt to discourage groups
3 such as EEG from bringing these kinds of proceedings,
4 and we have had that, Your Honour, from the start in
5 this proceeding. A prime example was after the
6 interlocutory injunction another whole day is spent on
7 the question of whether there should be security for
8 the undertaking of damages. At each step VicForests
9 has sought make it, in our submission, as hard as
10 possible for a group like EEG to bring a proceeding
11 like this, and now it seeks to make it as hard as
12 possible to secure an outcome that fully compensates it
13 for having brought this long and complicated piece of
14 litigation.

15 So, Your Honour, we submit that this is not the
16 occasion for hair splitting in the way that VicForests
17 seeks to do about what we were or were not successful
18 about, and we stand, Your Honour, by our written
19 submissions in paragraphs 14 and 15, and we say that an
20 analysis of what was at issue in a core sense in this
21 proceeding reveals that the plaintiff was entirely
22 successful. It is not to the point to go through the
23 pleadings and say "Well, we admitted things which were
24 obviously not contentious." That distracts attention
25 from the substance of our submission where we say that
26 VicForests put everything at issue, everything of
27 substance, Your Honour, which could conclusively or
28 conceivably result in EEG succeeding. That's what was
29 put in issue, everything of substance that could stop
30 this proceeding succeeding.

31 There might have been a concession that

1 VicForests was a statutory authority. Well, that
2 really was neither here nor there. But anything over
3 which there could be a fight that could impede success
4 in this proceeding there was a fight. And we have
5 addressed in our written submissions, Your Honour, by
6 way of example some instances of where there were
7 fights that the evidence subsequently revealed there
8 should not have been fights about, including the
9 presence of the potoroo.

10 Where, Your Honour, in VicForests's submissions
11 at paragraph 22 there's a submission about whether we
12 have or haven't obtained the kind of relief we sought,
13 we want to emphasise by way of oral submissions these
14 points, Your Honour. It ought not be a core aspect of
15 the exercise of the costs discretion to require a
16 successful party completely and precisely to anticipate
17 the relief that the court will ultimately grant. Not
18 in a case such as this, in our submission. We sought
19 injunctions, and Your Honour has found we were entitled
20 to injunctions.

21 Now, because of the course of the trial, and
22 because of the nature of the evidence that has emerged,
23 there will be some alteration to the content of those
24 injunctions. But the fundamental relief we sought we
25 have been granted, and the basis on which Your Honour
26 in our submission fundamentally found we were not
27 entitled to declarations was that we were in fact
28 entitled to higher relief than declarations. So
29 that's not a reason to deny the plaintiff part of its
30 costs.

31 The ultimate relief that is granted in this case

1 is closely informed, in our submission, by the course
2 of the evidence in the trial, and that course of
3 evidence included what steps hadn't been taken and
4 needed to be taken about each of the species, and it's
5 all that evidence which had to be extracted in an
6 adversarial context in a highly contested hearing that
7 has led the court in substance to tell VicForests and
8 DSE what has to be done, and that is in our submission
9 as much success as one could anticipate having in a
10 proceeding like this.

11 Now, it is true, Your Honour, that we didn't
12 succeed on every species, but the species were no more
13 than indicia, in our submission, of the circumstances
14 of unlawful logging, and it was the circumstances of
15 unlawful logging which was the centre piece in this
16 case, and on that the plaintiff has been wholly
17 successful.

18 Your Honour, that's all I want to say orally by
19 way of extra submissions about the costs.

20 HIS HONOUR: Yes.

21 MS MORTIMER: Now, in relation to the orders, I start, Your
22 Honour, by accepting that there should be an
23 undertaking in the form proposed by VicForests, and
24 confirming to Your Honour that I have instructions to
25 give that undertaking on behalf of Environment East
26 Gippsland.

27 HIS HONOUR: Yes, thank you.

28 MS MORTIMER: Recognising, naturally, of course, Your Honour,
29 that that doesn't extend to an undertaking on behalf of
30 individuals such as Ms McLaren.

31 HIS HONOUR: No.

1 MS MORTIMER: But I have those instructions on behalf of EEG.

2 HIS HONOUR: Yes.

3 MS MORTIMER: Your Honour, the difference between the parties
4 on the form of orders, in our submission, really boils
5 down to the degree of autonomy which ought be given to
6 a non-party to ultimately resolve the central issue in
7 this litigation: when will logging be lawful, if ever,
8 at Brown Mountain in these coupes? And the non-party
9 who has been identified in the judgment as the Director
10 of Biodiversity and Policy and Programs within DSE,
11 Your Honour, we don't quarrel with the identification
12 of that office holder as the appropriate repository of
13 the task of forming satisfaction about the matters Your
14 Honour has identified in the judgment. We accept that
15 that director is the appropriate repository.

16 HIS HONOUR: Well, Ms Mortimer, even if you did quarrel
17 with it, I think the time for quarrelling has passed.

18 MS MORTIMER: I understand that, Your Honour.

19 HIS HONOUR: And I have been confronted with a particular
20 statutory scheme, and what I have sought to do is to
21 provide for relief within the framework of that scheme,
22 and for better or worse I have formed a view as to what
23 is necessary to grant equitable relief. Now, I
24 understand that your clients might wish for more, but
25 it would be very problematic from the court's point of
26 view for the court, for instance, to have the on-going
27 role of supervision of these matters.

28 MS MORTIMER: I accept that, Your Honour.

29 HIS HONOUR: Yes.

30 MS MORTIMER: I accept that. But there are two matters I
31 want to put to Your Honour to try and persuade Your

1 Honour about why the form of orders that VicForests has
2 proposed should not be accepted. Those two matters,
3 Your Honour, are transparency and certainty.

4 HIS HONOUR: Yes.

5 MS MORTIMER: Now, Your Honour, this is a public interest
6 case about which there's been a great deal of
7 controversy and public interest. And Your Honour
8 knows from the evidence that the dialogue between DSE
9 and VicForests is not generally transparent. And it
10 is important in the final resolution of this case, in
11 our submission, Your Honour, that there be transparency
12 about the performance of what the court has said are
13 the necessary protective conservation measures for
14 these species.

15 HIS HONOUR: Yes.

16 MS MORTIMER: Not that there be a further evaluation of those
17 by the court, Your Honour, but that there be
18 transparency that what the court has said is necessary
19 for conservation - the protection of these species has
20 been done. And that is achieved, in our submission,
21 best achieved by an application on evidence to the
22 court that establishes that the director has undertaken
23 tasks that need to be undertaken, and has formed the
24 relevant satisfaction. That, Your Honour, does not
25 provide an occasion for Your Honour to review the
26 lawfulness of the formation of that satisfaction, but
27 it does provide complete transparency after a lengthy
28 trial and a lengthy judgment that what the court has
29 said needed to be done has been done.

30 So that's the first thing, Your Honour, that we
31 submit, that requiring VicForests to come back to court

1 on evidence to apply for a discharge of the injunction
2 significantly promotes the transparency of the issues,
3 the completion of these proceedings. And it's really,
4 Your Honour, the completion of them that matters.

5 The trial was interesting, the trial was
6 controversial, but what matters is the relief and the
7 working through of that relief.

8 HIS HONOUR: I accept that in principle, that that of
9 course is the fundamental issue. But that doesn't
10 strike the balance in itself, and that's what I have to
11 do.

12 MS MORTIMER: Your Honour, may I allude to the certainty,
13 because the proposition that the injunction can be
14 discharged in a self-executing way upon the formation
15 of certain satisfactions is, in our submission,
16 attended with sufficient uncertainty as not to be the
17 desirable approach; that is, that the director, that in
18 a sense VicForests is left to be informed in some kind
19 of administrative, some non transparent and
20 administrative way by DSE on behalf of the director as
21 to when these steps are completed and how they have
22 been completed and what the outcome is. And then
23 again, in some kind of administrative and non
24 transparent way VicForests can consider itself freed
25 from the injunction, and if it considers there's
26 something to log, send the truck in, start logging.

27 Now, Your Honour, in circumstances where the key
28 findings of the court are that logging is unlawful in
29 the circumstances in which the court has found, the
30 certainty that should be delivered by the performance
31 of the court's orders, or the respect for the court's

1 orders, is that the injunction be discharged by the
2 court on application and on evidence.

3 That again, Your Honour, does not involve any
4 supervision by the court, it simply involves in a sense
5 a reporting back on evidence that those steps have been
6 taken. And then there will be a pronouncement of an
7 order, and from that date each party has certainty, but
8 particularly VicForests has certainty about what it can
9 log, if there's anything left to log, and in what
10 circumstances. And that is likely to be conducive, in
11 our submission, Your Honour, to there being no further
12 spin-offs from this case in terms of other pieces of
13 litigation, if there is some quarrel about whether
14 steps have been taken or haven't been taken.

15 Again the discharge of the injunction by the
16 court will achieve a level of certainty, and a level of
17 binding the parties that won't be achieved through some
18 kind of administrative notification by DSE to
19 VicForests.

20 So, Your Honour, it's for those two reasons, and
21 it's important that I emphasise that we don't suggest
22 that that involves any review by the court of the
23 completeness or lawfulness of those steps, because
24 ultimately there has to be an opinion formed by the
25 director, and Your Honour's language is "satisfaction"
26 as to when steps have been completed, but in our
27 submission it's quite appropriate in this case that the
28 director formalise in the sense of actually expressing
29 that satisfaction in a way that enables, not only the
30 parties, but the public to compare what this court has
31 said needed to happen with what in fact has happened.

1 And that advances the administration of justice, in our
2 submission, in a case like this of significant public
3 interest, and that should be an important consideration
4 for Your Honour, in our respectful submission.

5 Now, Your Honour, to get down to brass tacks in
6 terms of what on the basis of our submissions the
7 orders could look like, may I take Your Honour to
8 VicForests' form of order and work off that, because
9 subject to a couple of changes we are happy with that.
10 Of course they are important changes, Your Honour, but
11 subject to that. Does Your Honour have a copy of that
12 draft?

13 HIS HONOUR: Yes.

14 MS MORTIMER: So we don't have any difficulty, Your Honour,
15 with the form of this and the definitions that are
16 contained in "Other matters". And as I have submitted
17 to Your Honour, we don't have any difficulty with
18 giving the undertaking, and that will be given. The
19 modification to paragraph 1 of the orders on our
20 submission would be that it begins with the words
21 "Until further order".

22 HIS HONOUR: Just wait a moment.

23 MS MORTIMER: So that paragraph 1, Your Honour, would be
24 begin with the words "Until further order", and at the
25 end of that paragraph the words "unless and" - pardon
26 me, Your Honour - would be deleted. So one would have
27 only the word "until". I'm sorry, Your Honour, those
28 words would be deleted completely, "unless and until"
29 would be deleted.

30 Then the parts that are presently paragraphs (a),
31 (b), (c), (d) and (e) would begin with the paragraph

1 that follows the form of our paragraph 2, Your Honour,
2 that says: "In the event that the following steps have
3 been completed the defendant be at liberty to apply to
4 the court for the discharge of the injunction", and
5 then the steps as described by VicForests we are
6 content with, Your Honour.

7 HIS HONOUR: Just wait a moment. So you start paragraph 1
8 by saying: "Until further order the defendant be
9 restrained".

10 MS MORTIMER: Yes, Your Honour, down to the word "coupes".

11 HIS HONOUR: Down to the word "coupes". Then you insert:
12 "In the event that the following steps have been
13 completed the defendant be at liberty to apply to the
14 court for the discharge of the injunction."

15 MS MORTIMER: Yes, Your Honour. And, Your Honour, we leave
16 on this hypothesis, we omit our paragraph (g), which
17 was about the exchange of some information with the
18 plaintiff. We do that, Your Honour, on the assumption
19 that if the defendant is to apply to the court, there
20 will be affidavit material that demonstrates
21 satisfaction of the matters identified in the judgment,
22 so that our paragraph (g) would not be required.

23 So we would then remain content with the
24 defendant's subparagraphs (a) to (e), and content with
25 what would then be paragraph 3 of the defendant's
26 proposed minute that the injunction granted by the
27 court on 29 September hereby is discharged, and what
28 would then be paragraph 4, Your Honour, in accordance
29 with our submissions the words "60 per cent of" would
30 be deleted.

31 HIS HONOUR: Yes.

1 MS MORTIMER: If Your Honour pleases, those are our
2 supplementary submissions.

3 HIS HONOUR: Yes, thank you. Yes, Mr Waller.

4 MR WALLER: If Your Honour pleases. I will also be brief.

5 Of course we rely upon our written submissions. Can I
6 deal first with the issue of costs. My learned friend
7 asks rhetorically where does the 60 per cent figure
8 come from. It's submitted that my learned friend's
9 submission involves a reductio ad absurdum because on
10 its logic EEG could have amended its claim to include
11 reference to another six, eight or ten species. And
12 even if it would have failed in respect of all of those
13 additional species and still achieved the result that
14 it has achieved, there ought be no alteration or
15 diminution in the costs that it ought be awarded.

16 HIS HONOUR: Yes.

17 MR WALLER: Now, we say, Your Honour, that clearly it has
18 decided, and it's made a deliberate and informed
19 decision, to raise for consideration a number of
20 species, we are criticised, and it's repeated today,
21 for putting everything in issue. That must imply that
22 we are criticised for putting in issue arguments in
23 respect of the square tailed kite and the two crayfish,
24 for instance, when it is submitted that VicForests was
25 entirely within its rights to put those matters in
26 issue, and the court has ultimately determined that
27 there was no basis for a finding that any harvesting
28 would be unlawful vis-a-vis those particular species.

29 Your Honour will know that at least in respect of
30 the square tailed kite and in respect of the crayfish,
31 there was an application made a week before the trial

1 seeking specifically to include some additional species
2 in the claim, and when Your Honour asked my learned
3 friend whether that effectively raised new and discrete
4 causes of action, there was an acceptance that that was
5 the case.

6 So while it may now be convenient to say, "Well,
7 that was just another example of unlawful conduct, and
8 in the scheme of things it can be ignored", certainly
9 when it comes to costs it can be ignored, VicForests'
10 position is that it had to meet the case that was
11 presented, and to the extent that it challenged and put
12 the plaintiff to proof in respect of that case, the
13 court should have regard to the ultimate outcome in
14 respect of those matters upon which EEG failed.

15 In terms of the submissions that are broadly put
16 about costs following the event, my learned friends
17 refer to some cases which go back certainly into the
18 1990s. There's a decision of Justice Eames in Pricon
19 which is referred to where His Honour states the
20 principle at page 8 of the Butterworths unreported
21 decision that: "As a general rule costs should follow
22 the event and a successful party should attain all the
23 costs of the action even although it failed to
24 establish some of the alternative heads of the claim."

25 HIS HONOUR: Well, that statement has been cited with
26 approval in the Court of Appeal in McFadzean and in the
27 Spotless case and on a series of occasions.

28 MR WALLER: That's so, but His Honour of course went on to
29 say in that very paragraph that: "However, in the
30 exercise of discretion the court may decline to order
31 costs in favour of the successful party or may order

1 the successful party to pay the costs of the
2 unsuccessful party where the plaintiff failed to
3 establish discrete heads of claim or failed to
4 establish issues which it pursued in its claim,
5 although ultimately succeeding on the basis of another
6 discrete head of claim. And in having regard to this
7 question, neither the fact that the plaintiff may be
8 thought to have nearly succeeded on some of its other
9 heads of claim, nor the fact that it may be thought to
10 have been reasonable for the plaintiff to have argued
11 its case on the alternative heads of claim which it
12 pursued, is of particular if any relevance."

13 It is true to that our Court of Appeal has cited
14 that decision, but it is also true that there has been
15 a general shift, perhaps greater emphasis is now placed
16 upon the appropriateness of apportioning costs where
17 there have been a number of issues raised and the
18 plaintiff has not been successful in respect of all of
19 them, that may be a feature of present day litigation
20 where there may be a tendency to raise a number of
21 issues, perhaps a greater number of issues than in the
22 past. Perhaps Justice Finkelstein in the Baulderstone
23 case that we refer to put it most succinctly when His
24 Honour said at paragraph 4 of that decision that: "The
25 days when a plaintiff could with impunity mount an
26 attack on several fronts, some with little prospect of
27 victory in the hope of a direct hit and recovery of all
28 costs, must be put behind us. Litigation is too
29 expensive for courts to sanction this approach.
30 Indeed, it should be discouraged."

31 My learned friend referred to the fact that this

1 was public interest litigation. It may well have been
2 the case that if the plaintiff had not succeeded there
3 would have been an argument based on Oshlack and other
4 decisions that there ought be no adverse order for
5 costs made against the plaintiff because of the public
6 interest nature of the litigation. But it is
7 submitted that it is quite different to utilise that
8 argument in - - -

9 HIS HONOUR: Those observations of Justice McHugh - - -

10 MR WALLER: Yes.

11 HIS HONOUR: Although they are often cited, were in fact
12 made in dissent, were they not?

13 MR WALLER: Yes, yes.

14 HIS HONOUR: And what was upheld was the decision of
15 Justice Steyn at first instance, which took a
16 particular view about public interest litigation. So
17 in a sense it's not so much the observations of Justice
18 McHugh that were helpful to the plaintiff, but the view
19 that was upheld by the majority that you could take
20 account of the public interest nature of litigation in
21 assessing the question of costs, that it was something
22 that could go into the discretion, if you like.

23 MR WALLER: It would go into the mix, perhaps.

24 HIS HONOUR: Yes.

25 MR WALLER: It's also worth noting that in the decision of
26 Ruddock, which is cited by our learned friend, where
27 Your Honour will know in the famous Tampa litigation
28 when the matter came back to the Full Court of the
29 Federal Court to determine the question of costs, the
30 Full Court held by majority, comprising the Chief
31 Justice Sir Justice Black and Justice French with

1 Justice Beaumont publishing a strident and, in my
2 submission, vigorously reasoned dissent, that public
3 interest litigation of the kind before the court in
4 Tampa was to be contrasted with predominantly
5 environmental litigation in which many of the previous
6 decisions concerning the impact of public interest
7 considerations on costs awards had been made.

8 HIS HONOUR: Yes.

9 MR WALLER: That's at paragraph 29 in the joint judgment of
10 Chief Justice Black and Justice French, where they said
11 that "this", that is the Tampa case, "was a most
12 unusual case." Justice Beaumont of course was of the
13 view that there was no basis upon which to make an
14 order for costs that would relieve the unsuccessful
15 plaintiffs of an obligation to pay costs.

16 So, Your Honour, it's far from clear, as Your
17 Honour has noted, what impact the public interest
18 nature of litigation can have. And while there might
19 have been vigorous argument in the event that the
20 plaintiff had been unsuccessful, the plaintiff is now
21 seeking to rely upon that aspect as a way of securing
22 100 per cent costs order we would say is to overstate
23 the position.

24 HIS HONOUR: Well, I think you can say this: that there
25 have been cases in which the public interest nature of
26 the litigation has been held to go to the question of
27 whether the successful defendant or contradicitor of the
28 public interest argument should get its costs, because
29 it may be that the issue raised is such that although
30 the plaintiff fails, there's still an argument the
31 plaintiff should not be penalised. But that's not

1 this case. In this case on any view the plaintiff has
2 been substantially successful. It seems to me that
3 the question of the public interest, if it bites at
4 all, simply adds to the argument that at base the
5 plaintiff has sought to restrain immediate logging, and
6 it has succeeded, and it sought to do so in the public
7 interest. It seems to me that does mean, on the face
8 of it, the plaintiff should substantially get its
9 costs. The question is - or as I see it - whether it
10 should not get its costs of discrete issues.

11 Now, you say well, it shouldn't, because as you
12 have said to me when the crayfish and the kite were
13 pleaded, it was accepted that they were discrete. You
14 would also say, well, if you look at the relief that I
15 have said I should grant, it's species specific and
16 it's not some global finding that logging is unlawful
17 absent an analysis of what bears on each species. So
18 it seems to me that there's something to be said for
19 that argument.

20 But can I put this to you, it seems to me that
21 although you say there are two species of crayfish, the
22 crayfish issue was really one issue in the case. You
23 can say there was an argument about two species, but as
24 it was run and as the evidence developed the question
25 really was what evidence is there of a species, a
26 crayfish species that should be protected, and what
27 measures, if any, should be adopted to protect it. So
28 it seems to me that that's really one inter-related
29 issue.

30 So if I say there's an issue relating to the
31 crayfish, and I agree with you there's an issue

1 relating to the kite, and you also raised the hollow
2 bearing trees, and in relation to that it seems to me
3 that the evidence in respect to them was very much
4 bound up with the evidence relating to the gliders, the
5 quoll and both the species of owl. In other words,
6 there's a sense in which the evidence about hollow
7 bearing trees was inextricably bound up with the
8 evidence about a number of issues on which the
9 plaintiff succeeded.

10 It may be that there should be some allowance,
11 you would say, because of my finding that the
12 requirements of the action statement would be met by
13 the prescription, but it's not quite like the kite
14 situation where the evidence about the trees was
15 discrete. It seems to me that both in opening and in
16 closing and in debate and in evidence there's an
17 overlap. So what I am really saying is that, all
18 right, at that point you get to two and a half or two
19 and a bit issues that I am prepared to say are
20 discrete. And it doesn't seem to me that even with
21 the set-off, which is it seems to me the sensible way
22 to go, because you don't want to be taxing two sets of
23 bills, and I am not very comfortable about specifying
24 particular witnesses or attempting to formulate precise
25 figures in relation to preparation and transcript times
26 and the like. It seems to me that's not something I
27 can satisfactorily do. I have to form a broad
28 judgment. It doesn't seem to me that you are going to
29 get a 40 per cent reduction in the plaintiff's costs,
30 Mr Waller.

31 So I am really saying to you that I am prepared

1 to accept in part what you are putting to me, but if
2 you look at the discrete issues in the way I have just
3 put to you, you don't really get that order of
4 reduction, in my view. So I have said what I have
5 said in fairness because this aspect of the issues
6 wasn't really argued by Ms Mortimer this morning at the
7 forefront of her position, but I am saying to you I am
8 inclined to go down your path, but I am troubled about
9 how far that takes me. And it may not be that it
10 takes me all that far.

11 MR WALLER: What Your Honour has said is - and concerning in
12 particular the difficulty of being precise about it -
13 is exactly of course what the cases have said where
14 they talk about matters of impression and not precise
15 arithmetic, and of course that's how the discretion has
16 to be exercised. But can I deal briefly with Your
17 Honour's points.

18 HIS HONOUR: I have got a judgment of 233 pages. I don't
19 simply pull out the 12 pages that relate to these
20 species is what I am saying to you.

21 MR WALLER: No.

22 HIS HONOUR: And I accept that, and it's not - you can't do
23 it like that.

24 MR WALLER: No.

25 HIS HONOUR: And you can't do it precisely by reference to
26 evidence time either, it's a little more subtle than
27 that.

28 MR WALLER: Yes. Could I deal directly, though, with some
29 of the matters Your Honour has raised and mention one
30 or two others as well.

31 HIS HONOUR: Yes.

1 MR WALLER: So far as the crayfish are concerned, ultimately
2 the real issue perhaps was the new crayfish. But for
3 reasons that are perhaps unclear, and still unclear,
4 the plaintiff saw fit to maintain its position in
5 relation to the Orbost spiny crayfish, and that was
6 despite the very, we would say, clear submissions that
7 we made on 25 February that now was the opportunity, or
8 then was the opportunity to dispense with the claim in
9 respect of that crayfish and focus only on the Bonang
10 crayfish. The point of that amendment, it was said,
11 was to bring the evidence or the pleading in conformity
12 with the evidence, and we demonstrated that the
13 evidence of Mr McCormack's report was that the Orbost
14 spiny crayfish was not there. And also that the
15 hundred metre buffer that was being proposed would in
16 any event be satisfactory.

17 Now, despite that, my learned friend on that day
18 refused to concede that the point was not relevant and
19 at the time Your Honour said "Well, we will have to see
20 how the evidence comes out." But we were, as it were,
21 still faced with two discrete claims, as it were, in
22 relation to two species of crayfish. Now, it's true
23 that they were dealt with together, and the evidence of
24 Mr McCormack clearly dealt with both species. But we
25 say that it would be a little artificial to simply roll
26 the two together and say "Well, you were only
27 effectively dealing at any one time with one crayfish
28 or one issue relating to crayfish." And for that
29 reason - and this goes as well, of course, to an
30 argument that so far as the crayfish is concerned our
31 costs really only fall to be considered from 25

1 February onwards. We were dealing with a crayfish
2 issue from the very first day, or shortly thereafter,
3 back in September '09, and that claim then morphed into
4 two claims in relation to two discrete crayfish, and to
5 the very end, certainly on the pleadings and I think
6 even in argument, there was a submission put that there
7 should be recognition or protection in respect of both
8 crayfish.

9 I don't know whether that in fact was reflected
10 in my learned friend's final submissions, but certainly
11 there was no attempt on the pleadings to omit that at
12 the end.

13 So far as the hollow bearing trees are concerned,
14 what Your Honour says about its inter-relationship with
15 those other species is quite correct, but that begs the
16 question why raise it at all? If there was to be
17 protection for those species, then there would be no
18 logging in a fashion that would harm those species, and
19 to the extent that that involved protecting the trees
20 in which they habitat, which they inhabit or upon which
21 they rely, they would be protected. But this was put
22 as a separate claim, and it had to be met as a separate
23 claim.

24 There's also to be considered, Your Honour, the
25 fact that the plaintiff sought, and indeed we would say
26 still seeks, effectively an unconditional injunction.
27 It sought to stop logging absolutely without condition
28 and in an absolute and permanent sense. And the way
29 Your Honour has fashioned the relief is to impose
30 effectively a conditional injunction, and logging may
31 resume subject to certain conditions being met.

1 Your Honour has in Your Honour's judgment cited
2 that well-known passage from the High Court in
3 Bridgewater v. Leahy where the court said often the
4 relief that's granted is not in a form that satisfies
5 either side. And we would say that it's clear that
6 the relief that Your Honour has in mind, and which Your
7 Honour indicates the court is minded to grant, is not
8 something that the plaintiff is completely satisfied
9 with. It maintains that it should have the absolute
10 injunction and then it seeks to impose upon VicForests
11 a requirement to come back to the court and to make
12 application to be permitted to continue to harvest
13 which application one might expect could be opposed.

14 That is not what Your Honour has found, it is
15 submitted, and in that sense in working out an
16 appropriate costs order we have asked Your Honour to
17 have regard not just to quantitative matters, but
18 qualitative matters, and we have explained that by
19 means of not just the time taken to deal with
20 particular species, length of transcript, evidence
21 called, hours spent, but recognising the qualitative
22 difference between the sort of relief that was sought
23 and the sort of relief that is ultimately granted,
24 because part of VicForests' position in opposing the
25 relief that was sought was to put a case that argued
26 against the grant of an unconditional, absolute,
27 permanent injunction.

28 Your Honour may recall that in final submissions
29 we advanced a form of such condition or relief.
30 Ultimately Your Honour didn't accept that it was
31 appropriate, but Your Honour did accept that the relief

1 needed to be fashioned having regard to the statutory
2 scheme that operated, and we would say that what is now
3 sought in the form of orders by EEG is to ignore both
4 that scheme, but also what Your Honour has determined
5 to be an appropriate result. So I am moving now into
6 the final orders aspect.

7 HIS HONOUR: Yes.

8 MR WALLER: But just before I do, I would say that of course
9 60 per cent was a figure that we thought recognised
10 both - and we would say the four aspects.

11 HIS HONOUR: Yes.

12 MR WALLER: Four of the 12 on one view, being a third, but
13 also recognising the qualitative differences between
14 the relief sought and the relief that we say it's
15 appropriate to grant. We would say that just as the
16 two frogs and the two owls and the two gliders are to
17 be given separate recognition, so too the two crayfish
18 ought to be given separate recognition. And if one
19 looks at the potoroo as one, the crayfish being two and
20 three, the two frogs four and five, the owls six and
21 seven, the quoll eight, the gliders nine and ten, the
22 square tailed kite 11 and the hollow bearing trees,
23 that's 12. So on a species basis we would say we
24 raise concerns about four of the 12, being 33 per cent.

25 But of course, Your Honour, it's no more precise
26 than that, and ultimately it's a matter for the court
27 to give appropriate weight to the matters that we
28 raised and to fix an apportionment that is appropriate
29 if Your Honour is minded to go down that track. But
30 we clearly agree that an apportionment order, or a
31 percentage order is the most appropriate way to

1 proceed, because it would provide the greatest degree
2 of certainty and the least difficulty for the Taxing
3 Master.

4 In terms of the final order, though, Your Honour,
5 we do take issue, because we say, as we have in
6 writing, that what is sought by EEG does not give due
7 recognition to Your Honour's reasons. It seeks to
8 maintain the form of injunction that the court has said
9 it is not prepared to grant. It requires VicForests
10 to effectively return to the court, and it does clearly
11 give an opportunity to EEG to yet further attempt to
12 argue that the injunction should be extended, and
13 possibly to query or question the determinations that
14 have been made by the director.

15 If EEG is minded to challenge the director's
16 decision, then it has separate avenues in which to do
17 that. We accept that transparency might require
18 VicForests to inform EEG or, indeed, to publish upon
19 its website, that the director has approved the various
20 matters the subject of the order prior to engaging in
21 any harvesting operations. And I am instructed that
22 in "Other matters" the defendant would be prepared to
23 undertake to do so. But to require it to effectively
24 make application upon material of the kind that had
25 been specified in subparagraph (g) of my learned
26 friend's order, we would say would be inappropriate and

27 - - -

28 HIS HONOUR: Wait a moment. If I go to subparagraph (g) -

29 - -

30 MR WALLER: Yes, of my learned friend's original draft.

31 HIS HONOUR: It says: "Copies of each of the surveys and

1 reviews and particulars including maps of any SPZ, SMZ
2 along the potoroo retained habitat area created as a
3 result of the terms of the injunctive relief be
4 provided to the plaintiff through its solicitors" -
5 then it says: "Within 14 days of the survey review and
6 creation of SPZ or SMZ or retained habitat area being
7 completed or created." What do you say you would
8 undertake to do?

9 MR WALLER: First, if I clarify. My learned friend today
10 said they do not press (g).

11 HIS HONOUR: No, they don't press (g) if - - -

12 MR WALLER: If we have to make application.

13 HIS HONOUR: If you have to make application. But you
14 have just said to me that that's inappropriate because
15 if there is to be further debate then that will involve
16 debate about what the director has or hasn't done, and
17 if that be an issue, then there are separate avenues
18 open to the plaintiff.

19 MR WALLER: Yes.

20 HIS HONOUR: And that echoes - - -

21 MR WALLER: Echoes what Your Honour has said.

22 HIS HONOUR: It also echoes what you said during the course
23 of the trial about the absence of the Secretary or the
24 Department before the court. But put that to one
25 side, you have just conceded that transparency might
26 require EEG to be informed of various matters the
27 subject of the order.

28 What I want to sort out is, well, that seems to
29 be what order (g), that is 2(g), had in mind in the
30 minutes put forward on behalf of the plaintiff.

31 What's wrong with 2(g), if anything?

1 MR WALLER: What we say, Your Honour, we understood - we can
2 understand that there may be some disquiet if the first
3 that EEG knows about the resumed logging is when a
4 logging truck emerges over the hill towards one of the
5 coupes. And for that reason we can see merit in a
6 requirement, and we are prepared to give an
7 undertaking, that prior to logging - and it might be at
8 least 14 days prior to the recommencement of harvesting
9 in the coupes - VicForests will inform or provide to,
10 or give notice to EEG, that the director is satisfied,
11 or has provided notice that it is satisfied, that each
12 of items (a) to (e) have been undertaken. That would
13 then give EEG the knowledge that the director has
14 completed its process, and it could seek from the
15 director further information, or it could make such
16 application as it may be advised if it wished to
17 challenge decisions that have been made by the
18 director.

19 But what we do not think is appropriate is
20 providing the sort of detail to EEG - surveys, reviews,
21 maps - all of that material as a prerequisite for the
22 recommencement of harvesting, because Your Honour those
23 things occur in the ordinary course under the statutory
24 scheme that this court has been concerned with. And
25 to require those sorts of matters to be brought to
26 EEG's specific attention we say is to go outside and
27 far beyond the scheme that Your Honour has been dealing
28 with, and it does not then allow the orders to be
29 fashioned having regard to the scheme.

30 We say that telling EEG and informing EEG in an
31 appropriate fashion that the director who the court has

1 acknowledged is the ultimate arbiter and proper entity
2 to determine these matters, that that has occurred, and
3 letting them know within reasonable time, 14 days, so
4 that they can if they want take some further action or
5 make further enquiries is appropriate; but any more is
6 inappropriate.

7 HIS HONOUR: Well, any change to the zoning or to the
8 location of management areas is subject to public
9 consultation anyway, isn't it?

10 MR WALLER: I believe that's right.

11 HIS HONOUR: So why do you say it goes outside the scheme
12 that the court's had to consider? It seems to me that
13 it's true the provision of the surveys is something
14 that perhaps doesn't fit neatly into that category, but
15 I am a bit troubled by this 14 days prior to logging
16 notion. It seems to me to be a recipe for dispute.

17 MR WALLER: Well - - -

18 HIS HONOUR: Because what will happen is they will say
19 "Well, give us the documents", and there will be this
20 great - if they haven't been made public, there won't
21 be any acceptance of what's in issue.

22 MR WALLER: The question, though, is what is in issue? And
23 Your Honour has said that there are certain matters
24 that have to be done, and they have got to be done to
25 the satisfaction of the director, and my learned friend
26 has said there is no basis at all to doubt that the
27 director will do, and properly do, that which it has to
28 do. The only aspect of transparency that we were
29 seeking to meet was that EEG be told at an appropriate
30 time that those conditions have been met, rather than
31 discovering it after the event, that is to say, after

1 the logging may recommence.

2 HIS HONOUR: Yes.

3 MR WALLER: In terms of (g), copies of each of the surveys,
4 reviews and particulars, one wonders, well, what are
5 particulars? On my quick reading I can't see the word
6 "particulars" referred to anywhere else. It seems
7 that an order like that would be a - that would be
8 inviting dispute about, have we been given everything,
9 every piece of paper, every piece of correspondence.

10 And one then asks "Well, why is EEG entitled to any of
11 that?" In the same way "Why is it entitled to any of
12 the material that might go between DSE and VicForests
13 in respect of harvesting any other coup in Victoria?"

14 In circumstances where Your Honour has left to the
15 director the decision about whether these particular
16 conditions have been satisfied, then we say all that
17 EEG should be required, or that VicForests should be
18 required to give EEG, is notice that the director is so
19 satisfied.

20 HIS HONOUR: Yes.

21 MR WALLER: And if EEG wants to test that satisfaction, and
22 that appears to be what it is seeking to do - because
23 if it does in fact accept that the director's decision
24 is proper, then one can't see any difficulty with
25 logging resuming. But if it wants to test the
26 decision, then it has other means to do it, and what we
27 have suggested gives it time in which to take whatever
28 steps that it may be advised. But those steps ought
29 not be taken as an incident of these proceedings and as
30 a way of seeking further to extend an injunction in
31 circumstances where Your Honour has identified the

1 conditions that have to be satisfied. They are
2 discrete, they are delineated, and they ought to be
3 certain.

4 My learned friend is talking about certainty.
5 We say that the order that we propose with the
6 undertaking that we are prepared to give provides
7 certainty and finality.

8 HIS HONOUR: Yes.

9 MR WALLER: Which is another important incident that we say
10 the orders ought to provide.

11 So, Your Honour, unless Your Honour has any
12 further questions, those are the only oral submissions
13 we wish to make in addition to the submissions we have
14 made in writing.

15 HIS HONOUR: Thank you. Yes, Ms Mortimer.

16 MS MORTIMER: Your Honour, I will start with the orders, if I
17 might.

18 HIS HONOUR: Yes.

19 MS MORTIMER: Your Honour, the matters - my learned friend
20 quibbles with the language in paragraph (g) of our
21 proposed orders, but it's nothing more, in my
22 submission, than a quibble with language. What we are
23 clearly after are the products of the steps that Your
24 Honour's judgment requires to be taken. Now, if the
25 product of the declaration of an SPZ is a map, and that
26 sufficiently delineates the SPZ, then that's all we
27 want. What we want is to see the product of the
28 things that Your Honour says have to be undertaken
29 before any logging is lawful. Now, that is not, in
30 our submission, an unreasonable request in the context
31 of these proceedings. In fact, in our submission it's

1 a necessary part of the resolution of them.

2 HIS HONOUR: Yes.

3 MS MORTIMER: My learned friend says, well, we might tell you
4 something, you, EEG, but as an aside, Your Honour.
5 Not that you are entitled to be told anything, which is
6 precisely our point about transparency, Your Honour.
7 My learned friend's submissions have revealed quite
8 obviously that there's no intention to be transparent
9 unless the court orders them to be, and that is
10 incredibly undesirable after a proceeding like this, in
11 our submission.

12 You can ask, my learned friend says, you can ask
13 DSE. Well, Your Honour, the evidence in this
14 proceeding demonstrates that it's very unlikely that
15 anything is going to be volunteered to EEG by either
16 VicForests or DSE. We couldn't during the trial get
17 much agreement about where there was an SPZ or where
18 there wasn't an SPZ, or where there was an SMZ. That
19 zoning information, Your Honour, is not publicly
20 available, and that is the core of the resolution of
21 these proceedings. That is how the public, not just
22 EEG, will ascertain where for the potoroo an SPZ has
23 been created, and where for the potoroo an SMZ has been
24 created. And that is the core of the resolution of
25 these proceedings, in our submission.

26 It is disturbing but revealing, Your Honour, that
27 VicForests' submissions to Your Honour are couched on
28 the assumption that they will be logging these coupes.

29 HIS HONOUR: Well, I don't - - -

30 MS MORTIMER: Your Honour, that's how it's been put.

31 HIS HONOUR: Yes. I think that that embraces with it the

1 possibility that they might be logging part of one
2 coupe, for instance. I don't take it quite as broadly
3 as you do, but I understand why you have the
4 apprehension that you do.

5 MS MORTIMER: Your Honour can understand, in my submission,
6 that that apprehension is a real one on behalf of my
7 client, and those within the general community who
8 support the position taken by my client.

9 HIS HONOUR: Yes.

10 MS MORTIMER: This sounds like all we have to do is tick the
11 boxes and then we can go out and cut down the trees.
12 Now, when one even just does the simple maths about the
13 SPZs and the SMZs, and the number of hectares involved
14 in these coupes, it is difficult to see mathematically,
15 Your Honour, in our submission, what is left to log.

16 HIS HONOUR: Well, I understand that. And if you put a
17 POMA or a SOMA there it's all over.

18 MS MORTIMER: That's right, Your Honour. That's right.

19 HIS HONOUR: But if they put a POMA or a SOMA there they
20 may get another area as an offset.

21 MS MORTIMER: Exactly, Your Honour.

22 HIS HONOUR: So there are cascading series of possibilities
23 as to how all this may work out.

24 MS MORTIMER: That's so, Your Honour. And that's why it's
25 not appropriate, in our submission, to engage in some
26 kind of definitive characterisation about the nature of
27 this injunction, as it's only conditional, that is, if
28 we do A and B then we can log. That's not an
29 appropriate characterisation of it at all, in our
30 submission, because it assumes an outcome that cannot
31 be assumed at the moment. And that is why, in our

1 submission, the better approach to what this relief
2 really is is that it is - it's a permanent injunction
3 that is capable of being discharged upon completion of
4 certain steps. And, Your Honour, we - I withdraw
5 that. There's nothing else I need to add in relation
6 to that in terms of certainty and transparency. I
7 have made those submissions, Your Honour.

8 Can I go back to the costs. Your Honour, the
9 submissions by my learned friend focused on, as I
10 understood it, the amendment to the claim that was
11 made. And may I say a couple of matters by way of
12 reply in relation to that. Firstly, VicForests
13 received compensation by way of a costs order in part
14 in relation to that, and somehow that's got to be
15 accounted for in the working out.

16 HIS HONOUR: Yes.

17 MS MORTIMER: Secondly, it can only operate from the date of
18 the amendment, in our submission, and I will come to
19 what I say about the crayfish. And if that's right,
20 Your Honour, then one can't apply a percentage across
21 the board to all aspects of the trial, and certainly it
22 would be highly inappropriate to apply a percentage in
23 relation to, for example, the injunction application.
24 None of that is affected by what my learned friend has
25 said. So one can't do, in our submission, some kind
26 of global apportionment unless it's done including
27 specific references to timing, and the point of time at
28 which any apportionment could operate in our submission
29 would be from the date of the amendment.

30 It's completely wrong, Your Honour, to say that
31 post that amendment anything like 40 per cent of the

1 proceedings, or 40 per cent of the trial was occupied
2 by those species.

3 We submit Your Honour should treat the crayfish
4 as one species essentially for this exercise, if Your
5 Honour is minded to do anything about the crayfish.

6 My learned friend put to Your Honour that it was
7 unclear why we maintained our position about the Orbost
8 spiny crayfish at the date of the amendment. Your
9 Honour, there is a simple explanation for that, and
10 it's the same theme that I emphasised to Your Honour
11 this morning: there were no admissions from the
12 defendants.

13 If it is so clear, if it's always been so clear,
14 Your Honour, that this was a new species, and it was so
15 obvious, then why didn't the defendants admit that?

16 They didn't. They put us to our proof, and at that
17 stage we didn't know what evidence they were going to
18 adduce, or how they were going to cross-examine about
19 which of the species might be there and why, and what
20 protections were necessary for one vis-a-vis the other.
21 All that had to be worked out during the trial.

22 So it's quite wrong to say that there was such a
23 clear position at the date of the amendment that we
24 should be deprived of our costs thereafter in relation
25 to the crayfish.

26 Now, Your Honour, in relation to the kite, that
27 is such an infinitesimal part of this proceeding that
28 it would be difficult to understand what percentage
29 should be allocated to it. I don't even recall, Your
30 Honour, whether Professor Ferguson said anything about
31 the kite when he was given the opportunity to write a

1 second report.

2 HIS HONOUR: No, well - - -

3 MS MORTIMER: And our expert didn't spend very long in the
4 box, and there was hardly any cross-examination. But,
5 Your Honour, I just don't know how one could identify
6 that with any level of discreteness so as to fix a
7 percentage on it in a trial of this nature.

8 HIS HONOUR: Well, I think that the kite got nine pages out
9 of 233 in the judgment. So it's not infinitesimal,
10 but it's not 40 per cent, you are right.

11 MS MORTIMER: Well, we each have our flourishes, Your Honour.
12 Your Honour, the hollow bearing trees - - -

13 HIS HONOUR: Well, you have heard what I said about them.

14 MS MORTIMER: I have, Your Honour. There's one other
15 submission I want to make about that.

16 HIS HONOUR: Yes.

17 MS MORTIMER: The core reason that Your Honour decided that
18 there was no additional protection needed for those was
19 those additional prescriptions. Now, when did they
20 come in? They came in after the injunction. They
21 came in because of this proceeding, Your Honour. And
22 that needs to be recognised, in our submission.

23 Now, Your Honour, we do put the public interest
24 nature of this litigation as a factor, and that is how
25 we put it. There is no difference with Tampa. Just
26 as the people on the Tampa couldn't speak for
27 themselves, Your Honour, neither can the potoroo.
28 Somebody has to bring a case for threatened species,
29 and there's no material difference between that
30 happening in an environmental piece of litigation and
31 it happening for a bunch of refugees who are stuck on a

1 boat something. One happens to be human beings, one
2 doesn't, but the advancement of the insistence that
3 government and arms of government act lawfully is
4 exactly the same.

5 If Your Honour pleases.

6 HIS HONOUR: Yes. Yes, I think I will stand this matter
7 down until 3.45 this afternoon.

8 MS MORTIMER: If Your Honour pleases.

9 LUNCHEON ADJOURNMENT

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