

1 HIS HONOUR: Call the matter for hearing.

2 MR HOWELLS: May it please the court, I appear with Mr Irving
3 and Mr Ross for the plaintiffs.

4 HIS HONOUR: Yes.

5 MR BORNSTEIN: If Your Honour pleases. I appear for the 1st,
6 3rd, 4th and 5th defendants.

7 HIS HONOUR: Mr Bornstein. I presume it's the same defendants
8 that you acted for last time.

9 MR BORNSTEIN: Yes, Your Honour.

10 HIS HONOUR: 1, 3, 4 and 5, yes.

11 MR BEACH: If the court pleases. I appear with my learned
12 friend Mr O'Meara for the 2nd and 6th defendants.

13 HIS HONOUR: Two and 6, Mr Beach, yes.

14 MR GRONOW: If the court pleases, I appear with Mr Dreyfus and
15 Mr Thomson for the 7th, 8th and 9th defendants and the
16 14th, 15th, 16th and 17th defendants.

17 HIS HONOUR: 14, 15 and 17?

18 MR GRONOW: 14, 15, 16 and 17, Your Honour.

19 HIS HONOUR: Yes, thank you.

20 MR MAHER: If Your Honour please, I appear for the 10th and the
21 11th defendants.

22 HIS HONOUR: Thank you, Mr Maher.

23 MR MITCHELL: If the court please, I appear on behalf of the
24 12th defendant.

25 HIS HONOUR: Yes. The 12th, now that's Mr Mitchell, is it?

26 MR MITCHELL: That's correct.

27 HIS HONOUR: Yes.

28 MR MURDOCH: If the court pleases, I appear for the 13th and
29 18th defendants.

30 HIS HONOUR: Yes.

31 MR BURNSIDE: If Your Honour please, I appear with Ms Benson

1 for the 19th defendant.

2 MR WALTERS: If the court please, I appear with my learned
3 friend Mr Russell for the 20th defendant.

4 HIS HONOUR: 20. That's everyone, I think, yes. Mr Howells, I
5 think it might be convenient if you were to commence this
6 matter. I've read the statement of claim. I won't say
7 that I fully understand it, but I see in general terms
8 how it's set out but perhaps it might be helpful if you
9 were to as shortly as convenient, set out what you say -
10 how you say the case is now being put, just before I call
11 on the others.

12 MR BURNSIDE: Just before my learned friend begins, can I
13 mention one thing?

14 HIS HONOUR: Yes.

15 MR BURNSIDE: I am for the 19th defendant and we were asked to
16 take a role in Your Honour's orders. Your Honour, I'm
17 part heard in a case in Adelaide so I am only in
18 Melbourne for today. I don't know how long my friend
19 will take.

20 HIS HONOUR: Yes, I will bear that in mind, Mr Burnside. Yes,
21 Mr Howells, can you just tell us what - if you want to
22 say anything, I mean you can leave it to the others if
23 you want to, but I give you the opportunity initially of
24 telling me - telling the court how you say the case is
25 now put and why it is more comprehensible than it was
26 before.

27 MR HOWELLS: Your Honour, we've filed an outline. Does Your
28 Honour have that outline?

29 HIS HONOUR: Yes.

30 MR HOWELLS: Your Honour will see in that outline in the first
31 few paragraphs we've attempted to address the question of

1 compliance with the decision and the directions and
2 orders that Your Honour made about Version 2. You will
3 see what we've done is set out in Paragraph 3 in a
4 summary way the sorts of things that have been addressed
5 and we note in Paragraph 3 of the outline and the
6 observation that Your Honour made at Paragraph 56 that
7 some parts of it may not be able to be corrected. Other
8 parts may be able to be repeated in the new pleading with
9 little modification. We then listed in A through to M
10 the way in which we've directed ourselves to specific
11 matters that Your Honour raised in Your Honour's reasons
12 for decision last year. For example, in A and if I could
13 take Your Honour to the pleading, instead of having a
14 deal of material about the individual defendants and the
15 defendant organisations cast through the pleading and in
16 particulars, we've recited it in the first dozen or so
17 paragraphs. You will see that from Paragraph 4 onwards.

18 HIS HONOUR: Yes.

19 MR HOWELLS: And right through to the 19th defendant in
20 Paragraph 20. Then we've dealt with the three
21 organisations in some subsequent paragraphs starting at
22 21 but these are much shorter, Your Honour, this time and
23 there is not the detailed - the extensive particulars
24 seeking to list all of the organisations and people
25 through whom these organisations are said to act. What
26 we've included in Paragraph 22 is the 6th defendant's
27 reference to its fund, its purposes under 23. In a short
28 form in Paragraph 24, its operation as part of a group,
29 the Wilderness Society group and then in 25, the manner
30 in which it goes about undertaking its work but in
31 particular making reference to the role of volunteers.

1 So in Paragraph 25, if Your Honour has 25 on p.7 at
2 the foot of the page there, there is an extract from one
3 of its documents and towards the foot of that italicised
4 quote on p.7, it references - it makes reference to
5 volunteers, over onto p.8, "National organisation operate
6 largely through the efforts of volunteers". Then in 26,
7 we've dealt with membership, 27 and 28 assertions about
8 the role of volunteers which is particularised in
9 Sub-paragraph 28(c). In 29 we've referred to the
10 policies which are reflected in the way in which the 6th
11 defendant carries out its operations and the fact in
12 Paragraph 30 that it has established a number of groups
13 or other organisations to conduct its campaigns and
14 they're listed there in Sub-paragraph 30(a) through to
15 (f). Then for the 17th defendant, we've done the same
16 exercise although it's somewhat shorter than for the
17 sixth. That's from Paragraph 31 and 32 and then for the
18 20th defendant at 33 and 34 through to 36.

19 HIS HONOUR: That describes the defendants and then you go on
20 to - I don't want you to go through it paragraph by
21 paragraph but you've then pleaded each of these actions.

22 MR HOWELLS: The actions, I suppose, if Your Honour please,
23 they're not actions in the curial sense, actions in terms
24 of direct action and Your Honour will be familiar from
25 the last - from the earlier version that it includes
26 direct action taken at Triabunna, Lucaston, Styx,
27 Hampshire, the Burnie Woodchip Pile, Banksia Awards then
28 the Japanese Customers Action, the Banks Action and then
29 Campaign against Gunns. The formula, if Your Honour
30 please, in that sense in the broad is as it was before
31 but we've taken a number of steps to reduce and simplify

1 aims to meet Your Honour's expressed concerns.

2 In particular, just going back to our outline
3 Your Honour. In the outline at p.2 in subparagraph 3(c),
4 Your Honour will recall that there were, in the earlier
5 version, there were many many pages devoted to Paragraphs
6 50A to R and 99A to S I think it was, Your Honour, that
7 recited a series of meetings that were said to have
8 occurred and the trouble with that was that Your Honour
9 pointed out that those meetings all having been reposed
10 in a collection of paragraphs, they were then the subject
11 of numerical cross-referencing everywhere else.

12 We believe that we've eliminated that Your Honour by
13 taking those specific meetings and referring to them in
14 the overt acts where they appear in respect of each of
15 these actions and in chronological order and I think
16 Your Honour referred - my recollection is that last July
17 Your Honour referred me to the formula that's used in
18 Bullen & Leake in relation to the pleading of
19 conspiracies where the assertion of conspiracy is made
20 and an assertion about an agreement is made but then in
21 addition in the appropriate case, overt acts are then
22 listed chronologically and in a, effectively a narrative
23 form. We've adopted that formula.

24 It has meant that it has reduced the amount of
25 material significantly and it has certainly removed the
26 overwhelming majority of numerical cross-references.
27 Going on the outline we have, in subparagraph E,
28 Your Honour may recall that we had quite extensive
29 particulars appended to the pleadings as to agency. The
30 way that's been dealt with now is that we have a
31 simplified form of a pleading of agency and the

1 particulars.

2 For example, if Your Honour would go to Paragraph 99
3 of the pleading.

4 HIS HONOUR: Ninety-nine?

5 MR HOWELLS: Ninety-nine, on p.35 Your Honour. This is in a
6 sense the second of the expressed pleadings as to agency
7 because for each of these actions Your Honour we've,
8 again by reference to the formula in Bullen & Leake,
9 there is a pleading that by virtue of being
10 co-conspirators, assuming a conspiracy is proved, it may
11 be said that the co-conspirators acted on behalf of
12 themselves and their co-conspirators. That's in 95,
13 Paragraph 95 at the foot of the page. That's not
14 intended as a basis for proving the conspiracy, it's
15 simply - the formula is extracted from Bullen & Leake,
16 it's simply an assertion that where there is a conspiracy
17 a legal conclusion is that co-conspirators will be said
18 to have acted on, behalf of each other.

19 Then turning over to 99, at the foot of the page.
20 We've said that each of the overt acts alleged to have
21 been done by the named defendants were done by those
22 persons as agents for 6th defendant. In each case
23 Your Honour, we have defined precisely which defendants
24 and only which defendants are said to be defendants for
25 the purposes of that part of the proceeding. That is, in
26 respect of whom relief is sought in relation to that
27 action.

28 An example of that is at Paragraph 42 on p.12.
29 You'll see in 42 Your Honour between certain dates the
30 6th, 8th, 9th, 12th, 15th and 17th defendants, and
31 they're described as the Triabunna 2003 defendants. What

1 we've aimed to do Your Honour is that in relation to each
2 and every campaign about which causes of action are
3 raised, that we've defined those defendants and the
4 relief claimed is expressed to be confined to those named
5 defendants. So any one of the defendants can go through
6 the pleading, identifying each of these protest actions
7 at which the parties are well familiar, and identify
8 which defendant is a party against whom relief is sought
9 in relation to those matters. We've then, in relation to
10 the Campaign against Gunns, Your Honour.

11 HIS HONOUR: Yes.

12 MR HOWELLS: Your Honour will recall that that was the subject
13 of observations by Your Honour. Going to Paragraph 695
14 on p.210. So that's after the pleading deals with each
15 of those individual protests and direct actions. In the
16 Campaign against Gunns it's first of all - it's now
17 expressed to be further and in the alternative to all of
18 the foregoing. We then refer to and repeat those
19 paragraphs that deal with the individual defendants and
20 the organisations and then named defendants, in this case
21 in Paragraph 697 the 1st, 2nd, 3rd, 4th, 6th, 10th and
22 11th defendants.

23 HIS HONOUR: The number of defendants involved in the Campaign
24 against Gunns is now limited?

25 MR HOWELLS: That's right, Your Honour. Yes, it's limited and
26 there are a number of other respects in which it's
27 different from the way it was pleaded before and in the
28 way in which - or that it differs from the totality of
29 the collection of individual protest based causes of
30 action. For example, not all of the defendants in the
31 other causes of action are implicated in the Campaign

1 against Gunns.

2 Secondly, the 18th, 19th and 20th defendants are
3 said to have joined this conspiracy at a date later than
4 the time when it was promulgated. Thirdly - - -

5 HIS HONOUR: So the 18th, 19th - - -

6 MR HOWELLS: And 20th.

7 HIS HONOUR: Initially it starts off against one, two, four,
8 five, six - - -

9 MR HOWELLS: Ten and 11.

10 HIS HONOUR: Seven, 12 - sorry, no. I'm looking at paragraph
11 numbers. First, 2nd, 3rd, 4th, 10th and 11th. Yes.
12 Subsequently - - -

13 MR HOWELLS: If you go to Paragraph 705, Your Honour.

14 HIS HONOUR: Yes.

15 MR HOWELLS: In 705 you'll see during 2002 the 18th to 20th
16 defendants decided to join the campaign and to do certain
17 acts.

18 HIS HONOUR: Yes.

19 MR HOWELLS: But, Your Honour, unlike the earlier pleading the
20 Campaign against Gunns as it's pleaded now as both an
21 interference and as a conspiracy doesn't include
22 reference to the Burnie Woodchip Pile protest nor the
23 Banksia Awards protest.

24 HIS HONOUR: So they're not - they're no longer part of the
25 Campaign against Gunns.

26 MR HOWELLS: Not referred to specifically as overt acts, no,
27 Your Honour, and nor are all of the logging operations
28 disruption campaigns. The ones that have been excluded
29 are - Lucaston and Hampshire are excluded. Then there is
30 also reliance upon what's said to be the wrongful use of
31 moneys from the 78AB fund specifically in connection with

1 the Campaign against Gunns not just as an incident
2 of - - -

3 HIS HONOUR: Say that again. The wrongful use of - - -

4 MR HOWELLS: The Wilderness Fund, Your Honour.

5 HIS HONOUR: Yes.

6 MR HOWELLS: Your Honour might recall we may reference to that.

7 HIS HONOUR: Yes.

8 MR HOWELLS: In the earlier pleading it wasn't specifically
9 attributed to the Campaign against Gunns. It's now
10 specifically referred to. That is allocation of money
11 and - from the fund as part of the wrongfulness involved.

12 HIS HONOUR: Yes.

13 MR HOWELLS: Then Your Honour there's a series of overt acts
14 said to be part of the giving effect or carrying into
15 effect of the conspiracy a number of which don't appear
16 in relation to any of the earlier mentioned specific
17 protest actions giving rise to those specific causes of
18 action. So in the Campaign against Gunns the overt acts
19 are commenced or they're set out in Paragraph 706. Does
20 Your Honour have Paragraph 706?

21 HIS HONOUR: They run - - -

22 MR HOWELLS: Page 212.

23 HIS HONOUR: Yes.

24 MR HOWELLS: 706, we say in furtherance of the Campaign against
25 Gunns and the Campaign against Gunns conspiracy, the
26 Campaign against Gunns defendants and the 18th, 19th and
27 20th did the following overt acts. Now, the first one,
28 Your Honour, in A the conduct of certain national
29 meetings in 2000 is not referred to in any of the earlier
30 causes of action. Your Honour will recall on the last
31 occasion it was - in the last pleading it was said well

1 look, all you've done is listed a series of causes of
2 action about these events and then in the Campaign
3 against Gunns it just simply wraps the whole lot up in an
4 overarching conspiracy.

5 HIS HONOUR: Yes.

6 MR HOWELLS: What we say the pleading now identifies is that
7 that original conspiracy as pleaded reflected a plan to
8 conduct a campaign of attrition against my clients was
9 one which had a number of component parts but certainly
10 didn't encapsulate or include each and every later
11 activity. It had a different outworking to those
12 individual causes of action arising from individual
13 protests.

14 The overt act pleaded in A, in 706A, is not referred
15 to elsewhere nor is B. It's the appointment of a
16 corporate campaigner whose job it was to carry out the
17 Campaign against Gunns. Sub-paragraph G, the allocation
18 of funds to the Campaign against Gunns not referred to
19 elsewhere and then over to X and Y. There are two
20 training sessions. One in south - X and Y are on p.217.
21 Does Your Honour have X and Y?

22 HIS HONOUR: Yes.

23 MR HOWELLS: One in South Australia and one in the Treasury
24 Gardens in Melbourne. Not referred to elsewhere and then
25 Z, Your Honour. In Z you'll see there that we have -
26 that on or about 2 February 2004, which is towards the
27 end of the dates of these various protests, the 6th and
28 the 17th is the Wilderness Society and the Huon Valley
29 Environment Centre, sought funds from environmental
30 groups and supporters for the conduct of the direct
31 protest actions in Tasmania. The particulars are that

1 that request was in writing. It was dated 2 February
2 2004. The substance of the request was as follows. The
3 request referred to protest action in Sydney conducted
4 against wood chipping in Tasmania by the 6th defendant
5 and the 15th defendant and protest action in the Styx.

6 The request stated and it's actually a quote, Your
7 Honour, here because the request actually says, "2004
8 will see many more and independent collaborative unlawful
9 actions as described above are hindered only by their
10 modern day expense. For this reason the Forest Defenders
11 Fund has been established by the HVEC. A hundred per
12 cent of the funds are directly used to cover legal fees,
13 court costs and fines incurred by independent protestors"
14 and it says how you can donate to the fund. It says,
15 "Fine donations are not tax deductible. If you'd like to
16 make a tax deductible donation, donations to the
17 Wilderness Society will specifically support independent
18 collaborative Tasmanian forest non violent direct
19 actions" and then the Wilderness Society's details are
20 set out.

21 Now, that's not referred to elsewhere, Your Honour,
22 in the other protest actions as an overt act. It's
23 particularly relevant to the Campaign against Gunns.
24 Then in AA on p.218 of the pleading there's a reference
25 to activities at the Triabunna Mill and Styx and the
26 Japanese customers and banks. We've now provided - two
27 days ago provided some further amendments to the further
28 and better particulars which list - - -

29 HIS HONOUR: I have that.

30 MR HOWELLS: They list specifically the - starting at

31 Paragraph 2 the specific acts they relied upon. Your

1 Honour, we've also, I think, and I hope that Your
2 Honour's associate received it yesterday sent a
3 letter - - -

4 HIS HONOUR: We got a - - -

5 MR HOWELLS: They were proof reading errors.

6 HIS HONOUR: Yes, I've got those.

7 MR HOWELLS: There's a list of those.

8 HIS HONOUR: Have you corrected the electronic version of the
9 statement of claim?

10 MR HOWELLS: We haven't done it as yet. We were waiting Your
11 Honour's direction about that simply because the rules,
12 of course, provide that where there are matters that
13 might be said to be in the nature of proof reading errors
14 a direction can be given that doesn't require the
15 recasting of the whole of the document.

16 HIS HONOUR: Yes.

17 MR HOWELLS: We'll do as Your Honour directs obviously
18 about - - -

19 HIS HONOUR: I think we'll deal with that now. Unless anyone
20 else has any objection I'll direct that the plaintiff
21 revise the electronic version of the statement of claim
22 to incorporate the proof reading errors set out in a
23 letter to all parties dated - - -

24 MR HOWELLS: 8 March, Your Honour.

25 HIS HONOUR: 8 March. Does anyone want to say anything about
26 that? Yes, very well. I'll give that direction that the
27 electronic version of the statement of claim be corrected
28 in those 15 enumerated ways. And it can be taken that
29 from now on, the statement of claim Version 3 will be
30 that corrected electronic version. Go on, Mr Howells?

31 MR HOWELLS: There's also been - there are differences, Your

1 Honour, as to what's pleaded by way of damage and that's
2 in relation to the Campaign against Gunns, that's pleaded
3 in Paragraphs 708 and 709. There are alternatives
4 pleaded and it's specified against whom the damages are
5 sought and that's again different from the pleading
6 earlier. The prayer for relief at the very end of the
7 document, Your Honour, no longer specifies identified
8 amounts of damage and claimed against by presumption
9 against every defendant. It's said what's claimed
10 against the defendants and each of them is damages
11 subject to be assessed, Your Honour.

12 HIS HONOUR: That means in effect that some defendants are not
13 in all cases so it's really a series of actions which
14 result in varying, you would say if you were successful,
15 varying amounts of damages in respect of varying actions
16 against varying defendants. Some defendants would be
17 liable for much more than others and some wouldn't. Some
18 would be liable for less.

19 MR HOWELLS: When we say they're individual actions, they're
20 not in the curial sense, we would refer to them as direct
21 actions that have been taken. That's the term that's
22 used in the media material about them.

23 HIS HONOUR: Ultimately, at some stage if not before, at least
24 at the trial and probably before, you're going to have to
25 designate what damages are claimed against each defendant
26 so the defendants know what their - what you say their
27 potential liability.

28 MR HOWELLS: Yes, Your Honour.

29 HIS HONOUR: When was that proposed to be done?

30 MR HOWELLS: Well, Your Honour, we're dealing at the moment
31 with strike out. In the case of aggravated and exemplary

1 damages and in respect of some of the protests about
2 which causes of actions are raised, we've specified
3 what's claimed against the individuals. We've also
4 identified that where costs are claimed, that is, the
5 costs of certain of these protest actions, we've
6 identified what the cost is and we have also in that - in
7 the recent further - amendments to the further and better
8 particulars, we've set out what those costs were and we
9 can but subject obviously to gathering the material, we
10 can seek to attribute. But that might, Your Honour, be
11 impacted upon by what's learned from discovery and
12 interrogation because the precise role in each respect,
13 that is who took the actuating role and who carried out
14 particular acts, will necessarily be impacted upon by
15 what will be revealed in discovery and interrogation and
16 we will be in a position to more fully particularise what
17 is claimed against each defendant after that process has
18 been undertaken. We can predict what the claim will be
19 in relation particularly to claims for aggravated and
20 exemplary damages and the precise costs, the overall
21 costs and we've done that in the pleading. But
22 attributing it as between individual defendants, even if
23 all of them are known to be involved, depending on the
24 way the evidence falls, there might be an argument for
25 saying, well, that particular cost ought to be sheeted
26 home to that particular defendant and not otherwise.

27 HIS HONOUR: Have you given any thought at all - on the
28 assumption that almost every fact in this statement of
29 claim will be put in issue, certainly everything other
30 than formal assertions I expect to be put in issue, have
31 you given any thought to how long a trial of this action

1 will take?

2 MR HOWELLS: Your Honour, that's going to depend on a number of
3 things. For example, if one were to assume that all of
4 this were not going to be the subject of for example
5 applications for injunctions, whether interlocutory or
6 otherwise, and were not going to be the subject of any
7 negotiation or discussion between the parties and were
8 not going to be the subject of management as to the scope
9 of evidence, then it would be a large exercise. We don't
10 anticipate that that will be the case, Your Honour.

11 HIS HONOUR: Assuming that it can be managed, assuming that
12 every possible modern judicial intervention step is
13 taken, what sort of order of a trial are we talking
14 about? A year? 18 months?

15 MR HOWELLS: No, nothing like it, with respect, Your Honour.
16 Nothing like it. Nothing like it. With respect, Your
17 Honour, this is a situation like many other cases where
18 there is controversy about the activity and where it's in
19 some cases ongoing, that - - -

20 HIS HONOUR: There's controversy about activities which by
21 their nature resemble the sort of disputes which occur in
22 the criminal courts frequently. That is, disputes about
23 factual minutiae, the question of who punched who, who
24 ran into the door of the hotel first, who came out first,
25 who saw what and we know that when we try one of those
26 cases in say a murder or a melee or an affray or one of
27 these other forms, they take for a single incident, a
28 fight in a pub can take three or four weeks to try.
29 We're talking here about you allege incident after
30 incident after incident after incident, each one of which
31 could have the same sort of factual disputes as say an

1 affray in a hotel or a murder in the course of a fight
2 where there are 15 eye witnesses. We know that that
3 takes three, four, five weeks minimum to try. Are you
4 not being unrealistic about the length of time in this
5 case?

6 MR HOWELLS: NO, Your Honour, because first of all, it's a
7 civil proceeding and that impacts upon the way in which
8 these matters are approached and if there is judicial
9 intervention, Your Honour, there are a number of ways in
10 which that will impact upon the scope of these
11 proceedings and, Your Honour, these events are put
12 forward on the basis that this campaign has been being
13 conducted for a long period of time and it has had
14 certain effects and it's been a - it's not as if my
15 client simply rushed off to the court at the first
16 opportunity and said, "Well, we will have a stoush about
17 this". Various efforts were made to - - -

18 HIS HONOUR: You can take all of those things as given, but
19 that doesn't - the last three or four things you've said
20 seem to me to simply lengthen the trial time that this is
21 ultimately going to take. I mean, one of the factors
22 that has to be taken into account when you're looking at
23 a case like this is that certainly in my experience, I've
24 never seen a statement of claim that's got 720
25 paragraphs. I've never seen one, I've never heard of
26 one. Perhaps there are - - -

27 MR HOWELLS: There are, Your Honour, and with respect, Your
28 Honour, there are frequently and in proceedings that
29 involve commercial transactions of one sort or another,
30 pleadings that have this sort of extensive - that run to
31 this extent are not uncommon, Your Honour, and it - what

1 has to be dealt with of course, Your Honour, in such
2 cases, is identifying what of that material - what of
3 those claims and grounds might ultimately be resolved in
4 a number of ways during the course of the proceeding. It
5 shouldn't be assumed, Your Honour, that each and every
6 issue here is going to end up being the subject of the
7 kind of extensive analysis that Your Honour identifies in
8 the criminal context where there are charges relating to,
9 for example, an affray.

10 That's not the way it's going to proceed Your Honour
11 and we have good reason for supposing that but it's
12 difficult, Your Honour, for me to indicate specifically
13 the way in which say that might turn out because as with
14 industrial cases Your Honour the feel alters and courts
15 are - sometimes the jurisdiction of the court is invoked
16 to deal with specific matters but the feel and the
17 players and the action alters oftentimes during the
18 course of those matters and it's no accident that of
19 course the kind of actions that are involved in this
20 proceeding are actions which have some similarities with
21 action taken in cases where what's referred to as the
22 causes of action are the industrial torts or the economic
23 torts.

24 We do say seriously to Your Honour, no assumption
25 should be made that the estimates that are given of a
26 year or more are the way that this will proceed
27 Your Honour. We have a number of reasons for being clear
28 about that.

29 HIS HONOUR: Yes well I won't press you any further on that
30 Mr Howells but I hear what you say and I will hear what
31 the others say. I think - - -

1 MR HOWELLS: That's the way we've cast it. Your Honour we do
2 desire to go in a little more detail to what we've said
3 in the outline - - -

4 HIS HONOUR: Yes well I'll deal with that when I've heard the
5 arguments of the defendants.

6 MR HOWELLS: As Your Honour pleases.

7 HIS HONOUR: Yes, now Mr Burnside, you've got the common
8 argument and so I'll call on you first.

9 MR BURNSIDE: Thank you, Your Honour.

10 HIS HONOUR: Your outline is a document dated 31 January, is
11 that correct?

12 MR BURNSIDE: Thirty-first of January, that's correct.

13 HIS HONOUR: Yes I have that.

14 MR BURNSIDE: I don't propose to read through it for obvious
15 reasons Your Honour.

16 HIS HONOUR: No I've read it.

17 MR BURNSIDE: What I want to do is make a couple of points
18 arising from it and then concentrate my submissions,
19 subject to your views - I want to concentrate my
20 submissions on the deep structural problems in this
21 statement of claim. It's true that some of the
22 superficial pleading deficiencies of the earlier versions
23 have been smoothed out but there remains a deep
24 structural problem. Before I go to that can I mention a
25 couple of points briefly.

26 First of all, in our submission, Version 3 does not
27 conform to the orders you made on the last occasion. To
28 suggest that all you were directing was that there need
29 not be underlying and sidelining to indicate changes,
30 textual changes, is simply to misunderstand the point of
31 your ruling, in our submission. Your Honour made it

1 quite clear that Version 3 was not to bear any relation
2 to the preceding versions but as you'll see from the
3 annexure to our outline, it in fact is substantially the
4 same. It has been tidied up. It has been shuffled
5 around but about 90 per cent of it reflects the content
6 of earlier versions.

7 HIS HONOUR: I don't propose to discuss the ruling that I gave,
8 it's there in writing and it needs to be interpreted by
9 persons reading it, but at this point the issue before
10 this court is whether this statement of claim is a good
11 statement of claim or not. I noted with some dismay that
12 a number of the submissions have gone back to look at the
13 early one. What I said in the judgment was a guide to
14 whatever it was I said but at this point what I've got to
15 do is look at the current pleading and it either succeeds
16 or it doesn't. Whether it can be argued that it's got
17 some of the defects of the earlier pleading or not is a
18 fruitless and barren exercise at this stage, but I
19 understand what you're say.

20 MR BURNSIDE: I accept that Your Honour, but of course the
21 reason for mentioning it is that what you are concerned
22 about last time included, fundamentally, the underlying
23 structural difficulty, and that remains and will always
24 remain as long as so much of the earlier versions is
25 being lifted into the new version, no matter how much the
26 language has been tidied up.

27 The second thing to mention is our complaint about
28 the formulaic pleading of agency. I think other
29 individual defendants might be better able to deal with
30 this because it concerns them principally but the fact is
31 that a formulaic set of particulars have been used to

1 justify assertions of agency. Typically the assertion is
2 that they are agents because they were volunteers and
3 volunteers are people who agree to engage in protest
4 activities, which either takes you nowhere or takes you
5 around in a circle depending on how you understand it.
6 It is not informative on the question of what gives rise
7 to agency.

8 HIS HONOUR: Yes.

9 MR BURNSIDE: We've listed in our outline the paragraphs where
10 the formula can be found. There's is a variant on the
11 formula in some cases where particular defendants are
12 said to be agents by virtue of being employees, but
13 of course that begs the question, whether they're agents
14 of their employer for the particular purposes of the
15 particular actions they're alleged to have done. So to
16 say a person is an employee of another and are therefore
17 an agent of the other simply misses the question whether
18 they're an agent for the particular facts alleged.

19 HIS HONOUR: The allegation of agency might be sufficient to
20 get the case moving, mightn't it? I mean in an ordinary
21 case, if you go away from this case for a moment, an
22 allegation that someone did something as the agent of
23 another may be sufficient if pleaded simply in that form.
24 The question then is a question of the particularisation
25 of the agency.

26 MR BURNSIDE: Exactly so and that's the complaint of course.

27 The fact of agency is a relevant fact to be.

28 HIS HONOUR: It's a fact.

29 MR BURNSIDE: When you offer particulars or are asked for them,
30 then you have to give something that meets the
31 circumstances of the case. The formula which is used in

1 the particulars is, they were employees or they're
2 volunteers. Where particulars have been asked for they
3 really add nothing to that. Particulars have been
4 provided pursuant to the request but they don't tell you
5 anything. Simply to say that a person is an employee
6 does not tell you why it is that they were an agent when
7 they conduct a particular act which is said to be part of
8 a tort or a conspiracy or whatever the case may be.

9 In our submission the defendants are clearly
10 entitled to know why it is said that they are agents for
11 another and those whose agents are said to be are clearly
12 entitled to know why it is that they are said to be
13 agents. In the written submissions of the plaintiffs at
14 Paragraph 18, they ad that by virtue of the conspiracy,
15 each conspiracy was agent for the 6th defendant and they
16 refer to - - -

17 HIS HONOUR: I saw that. That would seem to be not what the
18 High Court said in O'Hearn but I - - -

19 MR BURNSIDE: That's true.

20 HIS HONOUR: I don't want to get into arguments of the law of
21 conspiracy more than we have to for this purpose, I mean
22 otherwise we'll prolong this exercise which is already
23 obviously going to be wrong.

24 MR BURNSIDE: I agree with that. Can I hand up some documents
25 Your Honour? It includes a short two page discussion of
26 the O'Hearn principle.

27 HIS HONOUR: Yes. I'll add these to your submissions.

28 MR BURNSIDE: Yes thank you. I might explain to you how those
29 documents were - because they go to the structural
30 matters that I want to discuss. I won't say anything
31 more about the O'Hearn principle but, in our submission,

1 to suggest that the O'Hearn principle gets the plaintiffs
2 over the hurdle of proving agency is simply to
3 misunderstand that case. The other documents I handed
4 up, one of them is a sort of a table which I hope will
5 help guide you through the structural matters.

6 HIS HONOUR: Is this the one printed sideways?

7 MR BURNSIDE: There's one printed sideways and then there's a
8 two page document headed "Gunns Statement of Claim
9 Version 3". Gunns Statement of Claim Version 3 gives you
10 by reference to each of the actions referred to the
11 paragraph where particular elements of the action are
12 identified in the statement of claim and the defendants
13 who are brought in in those actions and it provides a
14 useful ready reckoner to see who is drawn into particular
15 parts of the claim.

16 HIS HONOUR: I've got that here.

17 MR BURNSIDE: Yes. If I can take you to the one that's printed
18 horizontally, it does something similar but in a more
19 condensed form. You will see along the top, there's the
20 relevant action, the paragraphs in which that action is
21 dealt with and then the reference to each of the
22 defendants in turn. In the first line in the - - -

23 HIS HONOUR: Heading of action, member of Wilderness Society
24 Huon Valley EC - what's EC?

25 MR BURNSIDE: Environment Centre.

26 HIS HONOUR: Yes.

27 MR BURNSIDE: That's not an action but it's something which
28 invokes the agency question repeatedly and you will see
29 that there's a reference in that line as to whether it is
30 said that the particular defendant was a member of the
31 6th or the 17th defendant respectively. Then below that,

1 you get to the actions themselves and the one in a cell
2 indicates that the relevant defendant is said to be
3 involved in the particular action. So taking Triabunna
4 2003, the 6th defendant is said to have been involved in
5 that action. Then if you take the 6th defendant column,
6 you can see going down the column the various other
7 actions in which that defendant is said to have been
8 involved. That was of course the Wilderness Society. If
9 you go to outline of the 19th defendant, you can see that
10 he's said to be involved in the - - -

11 HIS HONOUR: What's CA - I see, Campaign against Gunns, yes.

12 MR BURNSIDE: Go to the 19th defendant, you see he's said to be
13 involved in the Burnie Woodchip Pile Action and the
14 Campaign against Gunns. The Campaign against Gunns,
15 we've marked with grey in order to enable you to see the
16 way different allegations of involvement in other actions
17 corresponds with alleged allegation of involvement in the
18 campaign.

19 HIS HONOUR: I don't quite follow. Allegations with CAG, what
20 does - you've got - - -

21 MR BURNSIDE: You will see above that, four the actions the
22 Styx, Triabunna 04, Japanese Customs and Banks Overt Acts
23 are also marked in pale grey. Those actions are drawn in
24 as part of the alleged Conspiracy Against Gunns and so
25 you will see that although this is not uniformly true,
26 generally speaking if a person is said to be part of one
27 or other of those actions, they're drawn into the
28 Conspiracy Against Gunns.

29 HIS HONOUR: As Mr Howells said, the Campaign against Gunns is
30 no longer - it not longer relates to everything, I
31 gather. That seems to be what's happened. It's now a

1 conspiracy of conspiracies but only in relation to what
2 Styx, Triabunna, Japanese Customers and Banks.

3 MR BURNSIDE: That's the way it's said but you will see when we
4 get closer to it that it doesn't quite work out that way.
5 In any event, down below, you will see two lines, one
6 noting the number of allegations made against the
7 particular defendant counting the Campaign against Gunns
8 and below that the number of allegations against that
9 person not counting the Campaign against Gunns.

10 HIS HONOUR: So those numbers against are a number of
11 allegations.

12 MR BURNSIDE: Take the 1st defendant for example, if you start
13 with the Styx Action, the 1st defendant is said to be
14 involved, likewise Triabunna 04, Banksia, Japanese
15 Customers, Banks Overt Acts and Campaign against Gunns.
16 That means six big matters they're said to be involved in
17 including the campaign or five not including the
18 campaign. That's how those last two lines work. Our
19 major complaint about the structure of the statement of
20 claim, Your Honour, has two elements. The first is that
21 so many different allegations of different activities at
22 different times by different people have been brought
23 together in a single piece of litigation as to produce
24 the inevitable consequence of an exponential slowing down
25 of everything for everyone. It's probably idle to point
26 out that a year ago, I think Mr Irving said to you that
27 this case would be ready for trial in a year and would
28 take, I think he said, six weeks or 12 weeks or
29 something.

30 A year later, we haven't progressed at all and it's
31 not surprising when you consider that if there are 20

1 defendants with a vast spray of allegations against
2 various of them, the litigation will proceed at the rate
3 dictated by the slowest. It will be slowed down by the
4 legitimate concerns of each defendant legitimately
5 protecting their own position. It becomes exponentially
6 more difficult for anyone including you to keep a real
7 handle on where the whole action is at, what it's all
8 about, because to be candid, every time you read the
9 statement of claim, it's easy to forget what you read at
10 the beginning by the time you get through to the end.
11 That in itself should never be allowed.

12 This statement of claim is the size of a novel
13 although it doesn't read so well. It is, I think,
14 something like 66,000 words. There's a typographical
15 mistake in our submission. We've said that although it's
16 714 paragraphs or whatever it may be, once you count the
17 sub-paragraphs and the paragraphs within particulars, I
18 think we've said it's 840. In fact it's 1,840, it's
19 about 1,840 paragraphs of substantive assertion. The
20 sheer size of it is going to create formidable problems.

21 That's inevitable and the question is whether the
22 side of it is inherent in the nature of the action in
23 which case we can hardly complain, or is it an artefact
24 of the way so many different claims have been cobbled
25 together into one single action. In our submission,
26 that's the position. The second broad complaint and I
27 will deal with each of these in turn, the second broad
28 complaint is that by bringing in the Campaign against
29 Guns, we say absolutely nothing is added to the
30 complaints which are made but the complexity of the
31 matter is increased greatly.

1 HIS HONOUR: You say that the - so far as you understand it -
2 the plaintiffs could achieve the same remedies to the
3 same degree by litigating each of these actions, as they
4 describe them, separately as equally efficaciously as
5 they could by combining some of them into this Campaign
6 against Gunns?

7 MR BURNSIDE: Well, they - the allegations which do not form
8 any part of the Campaign against Gunns in our submission
9 ought to be run as separate actions and that raises this
10 interesting question. Whether they would even bother,
11 whether it would be even worth anyone's while if they
12 were acting purely for the purpose of vindicating their
13 rights, whether they would ever bother bringing an action
14 against some of these defendants for some of these
15 alleged acts. Can I give an example? If you look at
16 Paragraph 88 of the statement of claim. I pick this
17 simply because it was the first allegation of special
18 damage and it relates to the Triabunna 2003 action. In
19 the Triabunna 2003 action you will see that allegations
20 are made against - the defendants involved are the 6th,
21 8th, 9th, 12th, 15th and 17th. The allegation is that as
22 a result of the various things alleged in relation to
23 that action, various expense was incurred, \$1,550 in
24 relation to a delay for a ship loading crew, \$148 for an
25 electrician, \$171 for labour, cable work worth \$4,500 and
26 so on, a couple of non trivial amounts but for the most
27 part miscellaneous amounts of expenditure less than
28 \$1,000. Added up together I haven't added them up, but
29 not a lot of money. The defendants who have been brought
30 into that action include the 12th - - -

31 HIS HONOUR: Looks like 40472.78, I think, including 25,000 for

1 trouble and inconvenience.

2 MR BURNSIDE: So it's \$15,000 in actual loss. I don't know how
3 much has been spent by the plaintiff in drafting this
4 statement of claim but it must be a formidable amount. I
5 don't know what portion of that formidable amount relates
6 to Triabunna 2003 but pleading occupies 70 paragraphs, no
7 detail has been spared. One of the defendants whose
8 brought in on Triabunna 2003 is the 12th defendant. It's
9 the only allegation made against the 12th defendant, if
10 you look at the sheet I handed up.

11 HIS HONOUR: So that defendant is involved only in - - -

12 MR BURNSIDE: Triabunna 2003, that's it.

13 HIS HONOUR: Who's the 12th. Is the 12th defendant - - -

14 MR BURNSIDE: The 12th defendant is Ms Helen Gee. So over an
15 allegation that somehow the activities in which she was
16 said to be engaged caused the loss of \$15,000 or some
17 such to the plaintiff. She is liable to be exposed to
18 litigation which, on a conservative estimate, will
19 probably take years to get to trial and we should have
20 thought a year or so at trial. That with respect is
21 insane. It's just not capable of rational justification.
22 The other defendants who are brought in on Triabunna 2003
23 is the 16th defendant, again that's the only allegation
24 made against the 16th defendant. I am so sorry, I am
25 wrong about that. The 15th defendant. The 16th isn't in
26 that one. The 15th defendant is the subject of that one
27 and is also subject to allegations in the Styx Action but
28 that's the extent of the 16th defendant's alleged
29 involvement. Your Honour, one has to stop and ask, can
30 it really be suggested that Gunns is interested in
31 vindicating a claim for \$15,000 in loss in respect of

1 Triabunna 2003? Is that why those various defendants
2 have been named? Is that why they're enmeshed in
3 litigation which is enormously complex and will go for
4 ages? It's tempting to think that in relation to that
5 action, it's either there because why not throw it in or
6 it's there because this might have a chilling effect on
7 people's inclination to protest about the activities of
8 the logging company. When you look at the relatively
9 trivial amounts of special damage pleaded in various of
10 the actions and when you compare the amounts at stake in
11 those individual actions against the demonstrable
12 complexity and obvious cost of running this case, the
13 inference is almost irresistible that at least a
14 significant number of the components of this litigation
15 are not really directed to vindicating rights but to
16 warning off individuals who might be inclined to protest
17 against the activities of Gunns.

18 HIS HONOUR: If that was right, if that inference could
19 legitimately be drawn and I certainly don't suggest it
20 can on what I hear what you say, if that was right, this
21 whole action would be an abuse of process.

22 MR BURNSIDE: In its current form, we submit it is an abuse of
23 process. I would - if it were broken up, let's suppose
24 it were broken up or rather no leave was given to replead
25 except in individual actions and individual actions could
26 obviously be formulated that deal with each of the
27 protest actions that are named, that would be a much more
28 rational way of doing it, much less burdensome on
29 everyone involved and if in particular actions, for
30 example, Triabunna 2003, if that action were mounted and
31 looked like costing everyone a lot of money when at the

1 most, either \$15,000 or \$40,000 was at stake, then an
2 inference might be drawn that that specific action was an
3 abuse of process and was directed to ulterior purposes.
4 That's not a question you have to decide but it's
5 interesting to look at it that way because if you assume
6 in favour of Gunns that they're not simply trying to
7 intimidate people, then it might be that by breaking the
8 action up, significant components of it simply go away
9 and that's likely to be of benefit to everyone involved.
10 Can I take you to another example of the way in which the
11 structure of this action is oppressive to particular
12 defendants. Can I take the 13th defendant as an example,
13 with all due respect to whoever is acting for the 13th
14 defendant. Is that OK, good, thank you. The 13th
15 defendant, you will see from the sheet, is alleged to be
16 involved in two actions only, Styx and Triabunna 04 and
17 is not said to be part of the Campaign against Gunns. If
18 you go to the allegations - - -

19 HIS HONOUR: What defendant - 13th. I see, yes, so it's only
20 got two allegations - he or she has only got two
21 allegations and so that means - - -

22 MR BURNSIDE: Involvement in Styx, involvement in Triabunna 04.

23 HIS HONOUR: Doesn't that put them into the Campaign against
24 Gunns?

25 MR BURNSIDE: You might think so because that's the way the
26 Campaign against Gunns has been particularised but as a
27 matter of fact, and here you notice the greying out of
28 those two alleged involvements but no corresponding
29 greying out in the allegations of Campaign against Gunns.
30 That means that he has not been brought into that
31 campaign. I'm sure he's not complaining about that and I

1 don't complain about it on his part.

2 HIS HONOUR: Yes.

3 MR BURNSIDE: It's a curiosity. So there are just two
4 allegations against him.

5 HIS HONOUR: Yes.

6 MR BURNSIDE: When you go to the content of it what you find is
7 that so far as the Styx allegations against him are
8 concerned when you find out what's actually alleged, what
9 facts are put against the 13th defendant, you find that
10 at Paragraph 283 it is said that he stayed in a camp at
11 the relevant logging area on occasions.

12 HIS HONOUR: That's the only allegation against - - -

13 MR BURNSIDE: The only other reference to him in relation to
14 Styx - I say all this (indistinct) because it's easy to
15 overlook references but I believe this is accurate, is
16 288 where it's said that he was involved in some
17 discussions. That's it. That's the allegations against
18 him in relation to the Styx action.

19 Then if you go to the Triabunna 04 allegations
20 against him. The first relevant reference is at
21 Paragraph 334.

22 HIS HONOUR: Sorry, 334?

23 MR BURNSIDE: 334. There it's said that he was part of a
24 conspiracy so that's more or less (indistinct). You then
25 have to go over to 347 to find him doing anything.
26 What's said there is that he, among various other
27 defendants, either provided or organised for others to
28 provide various bits of equipment and you next find him
29 at Paragraph 353 where it's said that early in the
30 morning on 15 February 2004 he, with other people, were
31 conveyed across Spring Bay in a rubber ducky 200 metres

1 from the Triabunna wharf. At Paragraph 360 it's
2 said - - -

3 HIS HONOUR: 354 is relevant too, isn't it?

4 MR BURNSIDE: Yes. Entered the wharf. At 360 it is said that
5 he, with some other people, attached themselves to the
6 ship loading tower at the Triabunna mill site. At 374 it
7 is said that he, with other people, hindered some
8 employees between 4.45 a.m. and ten past midday.

9 HIS HONOUR: 374, the 13th defendant, yes.

10 MR BURNSIDE: What's alleged against him took place - occupied
11 less than eight hours and is said to have slowed people
12 down in their work. So the sum total of the allegations
13 against him are that he stayed in a camp on occasions and
14 had some discussions in relation to Styx and he spent
15 something less than seven hours at the Triabunna wharf.
16 It seems, with respect, utterly disproportionate that he
17 will find himself locked into litigation which is
18 destined to run for years.

19 The observations can be made with more or less force
20 in relation to many, if not all, of the defendants.
21 Obviously, in relation to some of them, there are very
22 numerous allegations. The most numerous are against the
23 6th defendant. They all depend on allegations of agency
24 but it's interesting when you go to the detail of some of
25 these allegations despite the pages and pages of material
26 pleaded against various people when you isolate the
27 allegations of things actually done by individuals they
28 resolve to really almost nothing. Fragments of
29 behaviour. The briefest events.

30 Now, that being the case it's easy to think that if
31 a person really wanted to vindicate their rights in

1 relation to, say, the 13th defendant a very simple action
2 could be confined to the particular allegations against
3 him. Would probably occupy less than day in the court
4 and - if it was thought worth running at all but it would
5 not be enmeshed in the complexity which inevitably grows
6 up when you have so many different people with so many
7 different allegations and so many sets of protest actions
8 involved. That's why I describe the increase in the
9 complexity as exponential. The more parties you add it
10 becomes disproportionately more complex.

11 Now Your Honour, I've said several times that this
12 action will take a long time. My learned friend does not
13 seem to share that view. There are a couple of things
14 about this that are work acknowledging.

15 HIS HONOUR: Are you talking about the interlocutory stages or
16 the trial?

17 MR BURNSIDE: I'm thinking of the trial but the interlocutory
18 stages will clearly occupy a lot of time but the trial is
19 perhaps the thing that is the greatest source of concern
20 because ultimately the question is whether the matter can
21 be tried fairly in its current form or anything like its
22 current form. A couple of things are clear. As you
23 point out a great deal of the contest will be about
24 particular actions or particular people at a time which,
25 when it comes round to it, will be some years past.

26 We have identified, I think, a total of 193 people
27 referred to in the pleading who presumably would be
28 relevant to give evidence and so you can expect - - -

29 HIS HONOUR: How many people?

30 MR BURNSIDE: 193, I think, plus the defendants. You will see
31 that there are many people named who haven't been joined

1 as parties.

2 HIS HONOUR: Yes.

3 MR BURNSIDE: All of those people will be relevant either for
4 the plaintiff or for the defendants and action which has
5 a couple of hundred witnesses is not going to be
6 compressed into six weeks of hearing. That would be a
7 world record.

8 Another thing to bear in mind is that not so long
9 ago in this court an action was run by some protestors in
10 the Otways brought against some members of the CFMEU.
11 The broad allegation was that they had been falsely
12 imprisoned when CFMEU, in effect, blockaded them inside a
13 logging coop where they had been planning a protest.

14 The CFMEU cross claimed and made various allegations
15 about wrongful conduct of the general sort you find in
16 this statement of claim. Perhaps that's because,
17 my learned friends Mr Howell and Mr Irving were counsel
18 for the CFMEU in that case. The activities with which
19 the litigation was concerned took place over the course
20 of five days. It was in substance a single blockade that
21 took five days although the counterclaim referred to
22 various other protest actions that had been done by some
23 of the plaintiffs.

24 The action took 60 days to try. This statement of
25 claim is vastly more complex and covers a vastly greater
26 range of activities than the Otways litigation. In our
27 submission it's simply fanciful to suggest that the trial
28 would take less than a year. In addition, in this case
29 allegations of criminal conduct are made against many of
30 the defendants, presumably as part of the construction of
31 the case of unlawful means of conspiracy.

1 Those allegations of criminal conduct mean that the
2 relevant defendants cannot be required to give discovery
3 or to file witness statements for the obvious reasons
4 that they're protected by the privilege against
5 self-incrimination.

6 HIS HONOUR: Unless the Evidence Act comes in before the trial
7 which it might.

8 MR BURNSIDE: Perhaps.

9 HIS HONOUR: Some of it might.

10 MR BURNSIDE: Perhaps. In any event the prospect is that the
11 trial will not run with all of the benefits and
12 efficiencies of modern case management technique, as you
13 also find in trade practices contravention allegations
14 where people simply come along and give their evidence.
15 It makes things slower, of course it makes things slower
16 because you don't simply hand up a statement and start
17 cross-examining. This trial will take at least a year
18 Your Honour.

19 The fact that it would take a year, we would have
20 thought, is self-evidence once you look into the detail a
21 bit. I mean it might be wrong, maybe a year and half but
22 it's a big trial.

23 HIS HONOUR: I know this is probably terribly unscientific but
24 if you said that the CFMEU case was sort of equivalent to
25 each one of the individual actions in this case, you've
26 got one, two, three, four, five, six, seven, eight - - -

27 MR BURNSIDE: Six hundred days.

28 HIS HONOUR: - - - eight odd, you'd - I mean you are looking at
29 horrendous - - -

30 MR BURNSIDE: Yes.

31 HIS HONOUR: Six hundred court days is about three years.

1 MR BURNSIDE: Three years. That's right. Can I say, I would
2 have thought two years perhaps, not three, but reading
3 the statement of claim and seeing the difficulty of
4 getting on top of the complexities of it and how
5 different elements of it relate to each other, it's
6 really not very surprising that it would take that long.
7 It's going to be a burden on everyone, especially you.

8 Whereas if you take each individual identified
9 action and contemplate the prospect of that action being
10 run as a single action in the Magistrates' Court or the
11 County Court or whatever may be appropriate to the damage
12 alleged, they would be, relatively speaking, much more
13 straight forward.

14 Our learned friends suggest, well that would
15 involved some duplicating of evidence. Well perhaps that
16 is so but the duplication of evidence in a couple of
17 actions, if they're actually run, is probably much less
18 burdensome than trying manage the whole gigantic package
19 as a single entity. In our submission even if you
20 thought that every paragraph was properly pleaded, you
21 should nevertheless order that it be struck out and that
22 each of the individual actions be brought as separate
23 proceedings in whatever is the appropriate jurisdiction.

24 That's our submission on the structural problems of
25 the case as a whole without even considering the campaign
26 against Gunns. When you get to the campaign against
27 Gunns you see another problem of similar form and it's
28 formidable. Can I take you to Paragraph 706. I should
29 actually start at 705 because although the campaign
30 against Gunns is pleaded out as running from the year
31 2000 through to 2004, you'll see in 705 it said that in

1 2002 the 18th, the 20th defendant had decided to join it.

2 From the middle of the allegations of the campaign
3 against Gunns you have the campaign against Gunns'
4 defendants plus the 18th, 19th and 20th. What follows in
5 706 is a narrative account of all sorts of things that
6 have taken place. Mostly pretty anonymes, meetings here
7 and there and so on and so forth but then the sting comes
8 in 706AA and BB. In 706AA it's said that between 2002
9 and 2004 the campaign against Gunn's defendants involved
10 themselves in various protest activities at the Triabunna
11 mill site and the Sticks and campaigns director for
12 Japanese customers and banks.

13 They then refer to and repeat the Japan overt acts
14 and the bank overt acts. What they have done by that
15 simple piece of drafting is to draw in another 200
16 paragraphs of allegations against the campaign against
17 the campaign against Gunn's defendant's but not, I point
18 out, the 18th, 19th and 20th. All of a sudden the
19 campaign against Gunns becomes in substance a repeat of
20 the trial about a mill site actions, arguably 2003 and
21 2004 but it's not articulated, and the Sticks campaign.

22 Then BB the Japan overt acts is at Paragraphs 548 to
23 632 and the bank's overt acts, 646 to 683. So four or
24 arguably five of the campaigns already dealt with are
25 suddenly brought in to this alleged conspiracy and each
26 of them in turn has been pleaded as a conspiracy. Then
27 the problem gets deeper because in 707 they say that the
28 guns overt acts caused injury to the plaintiff and in
29 Paragraph A of the particulars, they say that the damage
30 is alleged to have resulted from the Japan customs
31 action, the Japan conspiracy, the bank's action, the

1 bank's conspiracy, the Triabunna 2004 overt acts and the
2 Sticks overt acts. That sentence brings in 213
3 paragraphs of allegations.

4 And what's curious about it is that no reference -
5 nothing in those particulars alleges any damage caused by
6 the Burnie Woodchip Pile which is the only action in
7 which the 19th defendant, our client, is alleged to have
8 been engaged.

9 HIS HONOUR: That's Doctor Nicholson.

10 MR BURNSIDE: Yes. So he is somehow asked to pay damages in
11 respect of actions in which he is not said to have been
12 involved. So then the question is, how does he get drawn
13 in and for that you need to look at Paragraph 706(p). I
14 am sorry, the start of 706(m). On p.215 you will see
15 the entirety of the 19th defendant's alleged involvement
16 in the so called Campaign against Gunns.

17 HIS HONOUR: (m) says "The series of meetings at the home of
18 18th defendant at Somerset, near Burnie,", that should be
19 comma, shouldn't it?

20 MR BURNSIDE: Yes.

21 HIS HONOUR: "... at the green room in", "and" or "and at the
22 green room", they're two different places.

23 MR BURNSIDE: Two different places.

24 HIS HONOUR: That might be corrected in the new version. There
25 seems to be a typo there. "And at the green room in
26 Charles Street, Launceston".

27 MR BURNSIDE: So in August 2003, it's said that the 18th
28 defendant had these meetings. In (n), it is said that
29 the 19th defendant, among others, attended those
30 meetings. In (o) it is said that at the meetings,
31 various people including the 19th defendant endorsed,

1 refined and adapted the strategy referred to in Sub-
2 paragraph K and agreed on certain actions to be taken.
3 In (p) it is said that the acts referred to in (n) and
4 (o) were done by the 18th and 19th defendants on behalf
5 of the 20th defendant. That sentence is the way in which
6 the 20th defendant is drawn into the Campaign against
7 Gunns allegations.

8 HIS HONOUR: What's the 20th defendant?

9 MR BURNSIDE: It's the Doctors for Native Forests Incorporated.

10 The suggestion that Dr Nicholson was at a meeting where
11 the meeting, it is said, decided that various protest
12 actions would be held, there's no suggestion of anything
13 he said, he might have been out getting a cup of tea for
14 all we know, not a single fact is alleged against him,
15 not a single word is attributed to him, it's simply said
16 that he was at a meeting where certain things were
17 decided and because of that, he is drawn into alleged
18 involvement in a campaign which involves the Styx Action,
19 the Triabunna 2004 Action, the Japanese Customs Action
20 and the Banks Overt Acts and in our submission it is
21 extraordinary to think that by a single paragraph like
22 that, he can be drawn into a gigantic alleged conspiracy
23 in which he's not alleged to have done anything. The
24 overt acts of his involvement in that, if particularised
25 properly, would be he attended a meeting.

26 HIS HONOUR: That's 706, is it?

27 MR BURNSIDE: 706(m). We thought there might be a little bit
28 more to it because of the content of 706(o)(iii) where
29 it's said that the strategy was adapted the 6th defendant
30 would recruit, train and encourage protestors to
31 participate in protest action and the various named

1 defendants including the 19th would assist them in
2 performing these tasks. We asked for particulars of the
3 assistance given in performing those tasks and we were
4 told the request for particulars was based on a false
5 premise and that it wasn't alleged that they actually
6 assisted in performing those tasks. Merely that he was
7 at a meeting which endorsed a policy that they would
8 assist in those tasks. So it's not even suggested that
9 he did anything in implementation of the strategy which
10 is said to have been adopted at the meeting that he
11 attended. Your Honour, in our submission it is utterly
12 unreasonable to suggest that a person could be drawn into
13 a vast wide ranging alleged conspiracy merely by
14 attending a meeting and with nothing more alleged against
15 him. The 20th defendant is in the same position except
16 arguably one step worse because it only gets involved if
17 it can be suggested that by attending the meeting and
18 falling asleep or having a cup of tea or whatever else he
19 did, Dr Nicholson was acting in some way as agent for the
20 20th defendant.

21 HIS HONOUR: Is he the only member of the Doctors For Native
22 Forests that's a defendant?

23 MR BURNSIDE: No, the 18th is also a defendant and said to be a
24 member of Doctors for Forests and you will see in 706(p)
25 it says the acts referred to in Paragraphs (n) and (o)
26 were done by the 18th and 19th on behalf of the 20th.

27 HIS HONOUR: Is the 18th a doctor as well?

28 MR BURNSIDE: He's Dr Pullinger. There's virtually nothing
29 alleged him except what you see on p.215 except that Dr
30 Pullinger and this is leaving aside the Burnie Woodchip
31 which I will come to in a minute, except Dr Pullinger is

1 also mentioned in passing in relation to the Hampshire
2 Action, the Hampshire Action of course is not part of the
3 allegations relating to the Campaign against Gunns and
4 what's said against him in the Hampshire Action is that -
5 this is Paragraph 435 - that he provided accommodation to
6 someone who later went on to a protest and thereby
7 encouraged and procured that person to trespass. That's
8 the allegation against him in the Hampshire Action.

9 HIS HONOUR: Which action was this, the Hampshire?

10 MR BURNSIDE: The Hampshire Action, Paragraph 435 and the
11 consequences of providing a bed for the night to someone
12 is played out in Paragraph 451 where it is said that he
13 encouraged and procured a trespass by someone else. It's
14 only with some reluctance that I take you to this sort of
15 fine detail in order to make a point about structure.
16 But what you begin to see when you look at some of the
17 detail is how utterly flimsy some of these allegations
18 really are and how disproportionate are the facts alleged
19 on the one hand when compared against the vast bulk of
20 the litigation in which those acts are complained of.
21 Can I then simply take you to the - briefly to the
22 substantive allegation made against Dr Nicholson, Dr
23 Pullinger and the 20th defendant and that's to do with
24 the Burnie Woodchip Pile. This has changed very little
25 from its previous form. It begins at Paragraph 487.

26 HIS HONOUR: 487.

27 MR BURNSIDE: 487. The Burnie Woodchip Pile actually is
28 spelled out between Paragraphs 487 and 502. What it
29 amounts to is an allegation that on two occasions, the
30 18th, 19th and 20th defendants made publications or
31 published facts about Gunns. The first publication said

1 to be defamatory is in Paragraph 490. Paragraph (a) he
2 is said to have said on the television news that "The
3 bottom of the woodchip piles, I'd been told, or at least
4 one of them, hasn't moved here in seven years so it would
5 be compost and would almost certainly have Legionella and
6 fungal organisms which can be blown across the town.
7 That's the first statement.

8 The second statement is set out at Paragraph 490(b)
9 "Doctors for Forests are calling for an immediate and
10 independent assessment of potential health risks from the
11 large woodchip stockpiles et cetera" and it then goes on
12 to discuss possible existence of potentially dangerous
13 Legionella bacteria and so on. It says, "I've been told
14 by sources from sources from the wharf that for at least
15 one of the stockpiles that basically remain undisturbed,
16 if this advice is correct, then the material at the base
17 could be similar to compost or potting mix" and so on and
18 then it talks about the risks to the elderly, those with
19 chronic lung conditions and he urges a fully independent
20 risk assessment. The sort of moderate careful statement
21 you might expect from a doctor concerned about issues of
22 public health.

23 It is alleged against these defendants that the
24 statements were false and when we asked for particulars
25 or falsity, they simply said "they're not true".

26 HIS HONOUR: They're defamations, aren't they?

27 MR BURNSIDE: Yes, they're pleaded as defamations.

28 HIS HONOUR: You wouldn't be entitled to particulars of
29 falsity, would you?

30 MR BURNSIDE: Well, they haven't said that.

31 HIS HONOUR: They're presumed to be false. Presumptions.

1 MR BURNSIDE: That's not the response we've had. When
2 particulars of falsity were sought, they simply said,
3 "they're not true". And so, it's suggested that it isn't
4 true that Dr Nicholson has been told that at least one of
5 the piles hasn't been moved in seven years and that
6 therefore it would be compost and so on and it must be
7 suggested that it isn't true that if the stockpile hasn't
8 been moved, then the base could be similar to compost, et
9 cetera. The point is they're statements which are
10 sufficiently cautious and restrained. The proven falsity
11 is highly unlikely that they will be demonstrated as
12 being false and interestingly, the damage - - -

13 HIS HONOUR: The onus would be on Dr Nicholson to prove their
14 truth if he took justification.

15 MR BURNSIDE: So be it, but pretty straight forward and
16 justification would be pretty straight forward since he's
17 a doctor with a concern about matters of public health.
18 Furthermore, it's alleged against these defendants that
19 this caused them to have to get the piles investigated or
20 examined by a specialist consultant and the cost of the
21 consultant's report is part of the damage but they refuse
22 to show us the consultant's report.

23 HIS HONOUR: Is it referred to in the statement of claim?

24 MR BURNSIDE: I thought it was. It was certainly pleaded last
25 time. Yes, 495..

26 HIS HONOUR: Yes, it doesn't refer to the report. It simply
27 says there were professional consultant's fees.

28 MR BURNSIDE: Yes.

29 HIS HONOUR: One would've thought that that document would be
30 discoverable in due course, if there is one.

31 MR BURNSIDE: Yes, but having sought the particulars of it in

1 order to see how the facts stand, we've been turned
2 aside.

3 HIS HONOUR: This is a defamation case. I think you or another
4 defendant probably you, because it's Dr Nicholson, in
5 respect - I recall the argument last time was effectively
6 that this is a defamation case which could be run in the
7 appropriate court over here or in Tasmania.

8 MR BURNSIDE: Hobart Magistrates' Court or the Burnie
9 Magistrates' Court, whatever the case may be. With
10 respect, we would've thought that was fairly plain
11 because the allegation is so limited, so narrow in
12 compass that it is - there can be no justification for
13 dragging it into litigation which will last at trial for
14 a couple of years and that then exposes the vice of the
15 pleading of the Campaign against Gunns which is a
16 conspiracy, it is suggested, to commit other conspiracies
17 and the only involvement Dr Nicholson had is that he went
18 to a meeting. It's not suggested he was involved in the
19 actions that were part of that - - -

20 HIS HONOUR: The Burnie Woodchip - - -

21 MR BURNSIDE: Is not part of the Campaign against Gunns.

22 HIS HONOUR: Not part of the Campaign against Gunns, so it's
23 not suggested that by making the statement on the radio
24 or on the television, that he thereby engaged in the
25 Campaign against Gunns.

26 MR BURNSIDE: No. Nor is it suggested that the news
27 broadcasting agency, whichever television station it was,
28 is to be brought in as a defendant. On the contrary.
29 People have been brought in as defendants are generally
30 speaking people of limited resources which is another
31 reason why the court should be concerned to ensure that

1 the litigation is recast in a form that is manageable
2 because otherwise whoever hears the action will have a
3 lot of unrepresented defendants and that will double the
4 length of it. Your Honour, ultimately the question is
5 how can a just trial be held arising out of the facts of
6 which Gunns complain?

7 The answer to that is, by forcing the plaintiff to
8 disaggregate all of the various actions which they plead
9 so that any which they wish to pursue must be pursued
10 separately.

11 HIS HONOUR: If the plaintiff ran a number of separate actions
12 and obtained findings against various defendants, if
13 there was a legally viable course of action in the
14 Campaign against Gunns, it could run that then using such
15 - it would gain a number of issue estoppels or
16 issues - - -

17 MR BURNSIDE: It might be able to but it's very difficult to
18 see even at a conceptual level how they would be able to
19 prove any additional damage. If they're saying there are
20 all these conspiracies and they caused us damage so thank
21 you very much, we want all those actions, we've got all
22 the damages, now we want to say this is all part of a
23 larger campaign, well, where's the extra damage? I mean,
24 it's really difficult to understand. I know that the
25 plaintiffs say well, we've asked for extra but asking for
26 it is not quite the same as demonstrating additional loss
27 and conceptually in our submission, the Campaign against
28 Gunns cannot even if proved, cannot add anything to the
29 damage which they complain of in the underlying elements
30 of the campaign.

31 HIS HONOUR: It might - might it not justify an award of

1 punitive damages, if you engaged in a number of different
2 torts which individually attracted damages, there might
3 be theoretically at least a case for saying that because
4 of the number of torts, that itself gave rise to the
5 conditions which would justify an award of exemplary
6 damages. If you take a different and absurd example, if
7 you had a series of assaults that were separate and you
8 were sued or the defendant was sued in respect of five of
9 them and after each one, it stopped and then started
10 again, you could say that the aggregation of them
11 provided the factor equivalent to malice or whatever it
12 is that you have to show in an exemplary damages case.

13 MR BURNSIDE: Look, I understand the conceptual possibility.
14 The difficulty probably is this. First of all, that the
15 acts alleged to constitute the Campaign against Gunns is
16 spread over four years and appear to be relatively
17 isolated episodic things so that the analogy doesn't hold
18 together quite so well.

19 HIS HONOUR: Yes.

20 MR BURNSIDE: Secondly, it seems clear from the nature of the
21 allegations that there is ultimately a contest between
22 Gunns seeking to protect its commercial interests on the
23 one hand and a number of individuals expressing their
24 views, legitimately expressing their views albeit it's
25 alleged they've crossed the line here and there.

26 HIS HONOUR: Yes.

27 MR BURNSIDE: It's difficult to imagine that unless it was
28 suggested that the defendants were cynical and didn't
29 actually hold views about logging in Tasmanian forests.

30 HIS HONOUR: Yes.

31 MR BURNSIDE: They were doing it for some other reason. If it

1 were the fact that they were genuinely concerned about
2 protecting the environment then even if they did so
3 wrongly it is highly unlikely that they would be punished
4 with additional damages. You know free speech must get a
5 look in somewhere.

6 HIS HONOUR: Yes.

7 MR BURNSIDE: That's probably where it would be most visible.

8 So in our submission in the practical circumstances of
9 this case the Campaign against Gunns has no legitimate
10 forensic purpose on any structure of this litigation and
11 there is no reason not to desegregate all of the
12 complaints made so that the resulting litigation can be
13 manageable. If Your Honour pleases.

14 HIS HONOUR: Yes, thank you, Mr Burnside. Now you've addressed
15 essentially the joint issues and you've dealt with
16 Dr Nicholson who's your client.

17 MR BURNSIDE: That's right and obviously we rely on our written
18 outline - - -

19 HIS HONOUR: Can you just tell me what - just run me through
20 this document - the document at p.10 of your submissions
21 which is an analysis. These are - - -

22 MR BURNSIDE: Yes.

23 HIS HONOUR: This is the matters which are unchanged.

24 MR BURNSIDE: Yes.

25 HIS HONOUR: What do you say I should draw from this? It's
26 just a - - -

27 MR BURNSIDE: A lot of it is unchanged. That's what you draw
28 from it.

29 HIS HONOUR: Yes.

30 MR BURNSIDE: And B is paragraphs which are superficially
31 changed and C is a global comparison of the various

1 versions. Now, I didn't take you to that because of your
2 observations right at the beginning that you have to look
3 at this statement of claim and - - -

4 HIS HONOUR: Really as it presently is.

5 MR BURNSIDE: Yes.

6 HIS HONOUR: I mean that was the point I thought I was making
7 in the ruling but anyway.

8 MR BURNSIDE: Those annexures, A, B and C at least are - - -

9 HIS HONOUR: Are helpful to show what's happened to it and the
10 way it's gone. Somebody's put in an awful lot of work in
11 this.

12 MR BURNSIDE: Yes.

13 HIS HONOUR: Particularly B which seems to analyse it all.

14 MR BURNSIDE: I should explain with B there's a slight
15 difficulty with the formatting. To take an example
16 you'll see that say the line where Version 1 has
17 Paragraph 243. It's the fifth entry.

18 HIS HONOUR: Yes.

19 MR BURNSIDE: Annexure B. The paragraph numbers are aligned at
20 the bottom but the comment box is - - -

21 HIS HONOUR: Is started at the top, yes.

22 MR BURNSIDE: So in some paragraphs you need to look at that
23 with a little care to make sure you read the right bit
24 but I suspect you won't need to go to the detail. It
25 supports the proposition that in underlying structural
26 terms this statement of claim is no different from what
27 went before.

28 HIS HONOUR: Yes, thank you, Mr Burnside.

29 MR BURNSIDE: If Your Honour pleases.

30 HIS HONOUR: Now I think we'll probably go - do you want to say
31 something, Mr Beach?

1 MR BEACH: We have something to Your Honour's convenience.
2 HIS HONOUR: You've got an agreement, have you?
3 MR BEACH: Yes, that I would go next.
4 HIS HONOUR: Well, in that case we'll stick to that. You go
5 next. Now you're - - -
6 MR BEACH: The 2nd and the 6th defendants, Your Honour.
7 HIS HONOUR: Yes.
8 MR BEACH: Your Honour, could I just start by - - -
9 HIS HONOUR: Just wait until I get your papers.
10 MR BEACH: Sorry, I'll identify them for Your Honour. They are
11 a very short document dated December 2005.
12 HIS HONOUR: Yes.
13 MR BEACH: Headed 2nd and 6th defendants notice of strike out
14 common grounds. Then a slightly longer document dated
15 1 March of this year headed outline of reply submissions
16 of the 2nd and 6th defendants.
17 HIS HONOUR: Yes. I've just got a lot of - you've put nothing
18 in-chief as it were. You're - - -
19 MR BEACH: No, in-chief we confined ourselves to a very small
20 two page - one and a half page document which elaborated
21 the common grounds document. So there was no
22 submissions.
23 HIS HONOUR: Let me get to that. It's headed?
24 MR BEACH: The 2nd and 6th defendants notice of strike out
25 common grounds December 2005. My copy doesn't have the
26 day in December, Your Honour. I can hand Your Honour a
27 copy if that - - -
28 HIS HONOUR: That might be easier. I've got it here and I
29 looked at it - I actually saw it last night but I've now,
30 despite my best intentions of classifying them and my
31 associate's, seemed to have missed that. Yes.

1 MR BEACH: There is a second document. Does Your Honour have
2 the outline of reply submissions of the 2nd and 6th
3 defendants? A nine page document dated 1 March this
4 year.

5 HIS HONOUR: Yes, I have that.

6 MR BEACH: While Your Honour has that could I correct two
7 typographical errors?

8 HIS HONOUR: Yes.

9 MR BEACH: On p.5 in Paragraph 11c in the third line of
10 Paragraph 11c on p.5 we say, "Taking Paragraph 163".
11 That should be - -

12 HIS HONOUR: Page 5?

13 MR BEACH: Yes.

14 HIS HONOUR: C?

15 MR BEACH: C, third line.

16 HIS HONOUR: Yes.

17 MR BEACH: Taking Paragraph 163?

18 HIS HONOUR: Yes.

19 MR BEACH: Should be taking Paragraph 160.

20 HIS HONOUR: Yes.

21 MR BEACH: Then on p.7, Your Honour, in Paragraph 16 in the
22 sixth line Your Honour will see in parenthesis "For
23 example Paragraph 42 of the particulars".

24 HIS HONOUR: Yes.

25 MR BEACH: It should read, "For example the particulars of
26 Paragraph 42".

27 HIS HONOUR: I see, yes.

28 MR BEACH: If I hand to Your Honour a folder of authorities
29 which contain the authorities referred to in our outline.

30 HIS HONOUR: I think we've got - were these sent up yesterday?

31 MR BEACH: I don't believe so, Your Honour.

1 HIS HONOUR: No.

2 MR BEACH: No. If I hand them up. They contain the
3 authorities referred to in our outline plus an additional
4 case behind Tab 1 of John Holland Construction &
5 Engineering v. Cavrena which I hand to our learned
6 friends for the plaintiff. Your Honour, I barely need to
7 take Your Honour to any of those authorities. I will
8 probably take Your Honour to the first one a little bit
9 later but they're there for Your Honour's convenience.

10 HIS HONOUR: Yes.

11 MR BEACH: Having regard to the fact that we have cited those
12 authorities in our outline of argument.

13 HIS HONOUR: Yes, thank you.

14 MR BEACH: Could I now start, Your Honour, by saying whilst we
15 accept what Your Honour said to our learned friend,
16 Mr Burnside about the stability of going backwards and
17 looking at old versions of the statement of claim and, of
18 course, we wouldn't invite Your Honour to do that. There
19 is, we would say, at least as forming part of a
20 preliminary analysis to this pleading it is of assistance
21 to go back to Your Honour's judgment in relation to
22 Version 2.

23 Your Honour will recall and Your Honour doesn't need
24 to actually have the judgment in front of you.

25 HIS HONOUR: I've got it here somewhere.

26 MR BEACH: But Your Honour will recall that in Paragraph 16 of
27 that judgment Your Honour noted that a pleading must
28 contain all necessary particulars. Then in Paragraph 19
29 you noted that there were certain introductory paragraphs
30 making allegations against the 6th defendant and to quote
31 Your Honour, "to set up a form of fluid agency to enable

1 a case to be made against the Wilderness Society based
2 upon the acts of any personal body" - - -

3 HIS HONOUR: What paragraph is this?

4 MR BEACH: 19 of the judgment, Your Honour.

5 HIS HONOUR: Yes.

6 MR BEACH: "Set up a form fluid agency to enable a case to be
7 made against the Wilderness Society based upon the acts
8 of any personal body which could be brought within the
9 particulars given under Paragraph 9."

10 HIS HONOUR: Yes.

11 MR BEACH: Then in Paragraph 45 Your Honour, noted that many
12 paragraphs consisted of discursive narrative events
13 concerning aspects of the 1st plaintiff's business
14 dealings and included extensive quotations from letters
15 and newspapers and media releases.

16 HIS HONOUR: This is in - - -

17 MR BEACH: Paragraph 45 of Your Honour's judgment.

18 HIS HONOUR: Forty five, yes.

19 MR BEACH: Then in Paragraph 49 Your Honour stated that
20 particulars as to the allegation of agency were repeated
21 in various parts and not only suffered from extreme
22 prolixity but also did not adequately inform relevant
23 defendants of the case made against them on the issue of
24 agency. I'll come back to that in greater detail in a
25 moment.

26 Finally for this part, in Paragraph 59 of
27 Your Honour's judgment, Your Honour held that the
28 sweeping allegations of agency supported by formulaic
29 uninformative particulars can work injustice, and we note
30 the fair concession made by our learned friend this
31 morning that indeed insofar as Paragraph 95 and all it's

1 equivalence throughout the statement of claim, that's a
2 formula that has been pulled from Bullen & Leake.

3 Why I have taken Your Honour to these paragraphs in
4 Your Honour's judgment is of course because when one sits
5 down and attempts to read the statement of claim,
6 Your Honour will see that it suffers from all of these
7 vices again. It is really, whilst it's said that matters
8 have been shuffled around, it suffers for example
9 firstly, being a pleading that doesn't contain all the
10 necessary particulars we have requested particulars of
11 the statement of claim because the authors of it chose
12 not to heed Your Honour's suggestion that not only would
13 it be a good idea but that the rules actually required it
14 and in response we got back a 301 page document
15 containing a further and additional 1288 paragraphs of
16 particulars of this version. I'll come to the problem
17 that that has caused in a moment.

18 HIS HONOUR: That document has presumably been filed, I haven't
19 seen it.

20 MR BEACH: Yes it has Your Honour.

21 HIS HONOUR: What is it called?

22 MR BEACH: It's called the plaintiff's further and better
23 particulars in response to requests by the 2nd and 6th
24 defendants. It's dated 26 October 2005. Your Honour
25 would be in no danger of losing it because it's a book.
26 It's 301 pages of 1288 paragraphs.

27 HIS HONOUR: This is it apparently.

28 MR BEACH: Yes that looks to be it Your Honour. Your Honour,
29 to emphasis the defective nature of this pleading, and
30 my learned friend Mr Burnside did not concentrate on the
31 agency point, no doubt for the very good reason that it's

1 a point that is of far greater significance to the 6th
2 defendant than perhaps his client. I appreciate this is
3 a little tedious Your Honour but what I want to do is
4 demonstrate to Your Honour that the fluid agency
5 allegations that Your Honour was so critical of in the
6 last judgment, in fact all the same vices exist in
7 respect of this agency issue in the current document.

8 To do so Your Honour if I could start by taking
9 Your Honour to Paragraph 24 of the statement of claim.
10 Paragraph 24 is on p.6 Your Honour. "The 6th defendant
11 is and was at all relevant times part of a group that
12 consisted incorporated bodies and unincorporated
13 associations that have predominantly the same
14 purposes - - -

15 HIS HONOUR: Paragraph 20 - - -

16 MR BEACH: Twenty four Your Honour.

17 HIS HONOUR: Yes.

18 MR BEACH: "Predominantly the same purposes and predominantly
19 the same objectives and operate under a variety of
20 names", and they give some particulars. The members of
21 the Wilderness Society Group include, and they name some
22 bodies, but it's not exhaustive. So here you've got an
23 open ended plea that the 6th defendant is a part of a
24 group which is unspecified and undefined but includes the
25 various entities they name there. In the last sentence
26 of the those particulars, "From time to time one or more
27 of those bodies and associations have gone out of
28 existence."

29 So it's a member of a group. We're not going to
30 tell you the precise extent of the group but it contains
31 both unincorporated and incorporated associations, some

1 of which exist, some of which don't exist. Some of which
2 have gone out of business. Some of which may well still
3 be in business. That's the foundation from which we're
4 going to build our agency allegations.

5 We move to Paragraph 25 of the statement of claim
6 where it's said that the 6th defendant leads, co-
7 ordinates, directs and controls other members of the
8 Wilderness Society group, that's this undefined amorphous
9 group of bodies - - -

10 HIS HONOUR: Is it said that the Wilderness Society only - it's
11 only members are bodies that do not - it's got
12 individuals as well?

13 MR BEACH: Yes, because as Your Honour would've seen from the
14 note handed up by Mr Burnside this morning, that there
15 are a number of the individuals who are defendants in
16 this case who are members - - -

17 HIS HONOUR: Who are members, yes.

18 MR BEACH: So in Paragraph 25 we lead, co-ordinate, direct and
19 control other members who act as agents. So this
20 amorphous group of people, bodies corporate, bodies
21 unincorporated have gone out of existence, still in
22 existence, whatever, they all act as agents of the 6th
23 defendant. Then in Paragraph 26 of the statement of
24 claim, Your Honour will see membership of the Wilderness
25 Society is conducted informally. So that membership of
26 one body or association within the Wilderness group is
27 treated by other bodies or associations as - within the
28 Wilderness Group - as indistinguishable from membership
29 of each of the other bodies and associations. So as if
30 the - - -

31 HIS HONOUR: Where are you reading from there?

1 MR BEACH: Paragraph 26 of the statement of claim.

2 HIS HONOUR: Yes.

3 MR BEACH: So as if the allegations of belonging to a group and
4 - in other words, if one is trying to put a ring fence
5 around just who it is that the Wilderness Society might
6 be responsible for, it's impossible in these high level
7 fluid like allegations that are made before we get to the
8 substance of any of the so called actions further on into
9 the statement of claim. But there is, we divine, a
10 purpose for all of this and it is the foundation to set
11 up the formulae agency allegations that are made like a
12 chorus that occurs at the end of every claim that's
13 referred to in the document. I've taken Your Honour to
14 Paragraph 26 of the statement of claim. If I could then
15 take Your Honour to Paragraph 29 of the statement of
16 claim where the fluid is built on even further. "Since
17 at least the mid 1990s the 6th defendant (reads)
18 groups to plans", so we've got further groups
19 presumably, "To conduct campaigns (reads) and
20 resources".

21 So they're what we would say to Your Honour is a
22 high level hopelessly vague, hopelessly general and broad
23 foundation from which the rest of the pleadings springs
24 so far as attributing responsibility to the 6th defendant
25 for all of the other actions that are referred to in the
26 document. If I could come now to the specific claims and
27 we will start with the Triabunna 2003 claim. Your Honour
28 was taken this morning to Paragraph 42 of the statement
29 of claim and if I could take Your Honour there again just
30 quickly to Paragraph 42. You will see that's the high
31 level general allegation that "Between November 2002,

1 January 2003, (reads) the Triabunna 2003
2 conspiracy".

3 Then Your Honour, if we to go Paragraph 99 which
4 again you wee taken to this morning, this is the agency
5 allegation and it is part of a plea that starts in fact
6 in Paragraph 95 and goes to Paragraph 100 but it's all in
7 the same form in respect of each action, if I could call
8 it that and Your Honour will see in Paragraph 99 that
9 "The 6th defendant, the Wilderness Society is
10 (reads) - - -

11 HIS HONOUR: You're reading from 98?

12 MR BEACH: 99, Your Honour.

13 HIS HONOUR: Alleged to be done by the 8th and the other
14 conspirators were done as agents for the 6th defendant.

15 MR BEACH: Yes. So this is - Paragraphs 42 and 99 are central
16 paragraphs Your Honour because they are repeated in the
17 same form for each of the so called actions. In
18 Paragraph 99 having set up the conspiracy in Paragraph
19 42, in Paragraph 99 the 6th defendant is alleged to be
20 responsible for the 8th defendant as an employee and
21 everybody else, the 9th, 12th, 15th and those dozen or
22 more other people, as volunteers.

23 Your Honour will recall that this all comes off the
24 foundation of just about everybody in the world can be a
25 volunteer and here we are making an allegation of agency
26 against this large number of people. Your Honour it's at
27 this point that the whole thing goes off the rails once
28 you start to try and work out well what is in fact being
29 said against us. I apologise for this Your Honour but
30 Your Honour will need for the purposes of this argument
31 to have not only that book of particulars that

1 Your Honour had a quick look at a moment ago, but the
2 request which comes with it.

3 HIS HONOUR: It frightened me so I handed it back.

4 MR BEACH: Could I ask Your Honour also to be handed the
5 request for particulars.

6 HIS HONOUR: Have you got the request? It would also be filed
7 probably. Do you know the date Mr Beach?

8 MR BEACH: It's dated 14 September 2005, Your Honour.

9 HIS HONOUR: Fourteenth September.

10 MR BEACH: It's a big document too. No that doesn't look fat
11 enough.

12 HIS HONOUR: It would be Maurice Blackburn.

13 MR BEACH: Yes. Your Honour, one needs to have open a number
14 of - could I ask Your Honour first to turn up
15 Paragraph 42 of the statement of claim. Just go back for
16 a moment to Paragraph 42 of the statement of claim. This
17 is the paragraph that pleads for the Triabunna 2003
18 conspiracy. Does Your Honour see in the particulars
19 given under Paragraph 42 of the statement of claim, "In
20 or about November 2002 to January 2003 the Triabunna 2003
21 defendants and each of them became involved in
22 discussions with one another and other Triabunna 2003
23 conspirators."

24 If Your Honour then goes to the request for
25 particulars at Paragraph 22(d).

26 HIS HONOUR: Sorry, 22?

27 MR BEACH: Twenty two, little D. From p.10 of the request
28 Your Honour.

29 HIS HONOUR: Yes I have that.

30 MR BEACH: We asked, "Give the usual particulars and state the
31 substance of the discussions referred to in Particular

1 A." Your Honour will recall this morning, and indeed in
2 our learned friends' submissions it's said that all of
3 the cross-referencing and - this new document is
4 whiz-bang because we got rid of the cross-referencing.
5 You can see things all in the one place.

6 The response to Paragraph 22 can be found
7 Your Honour in Paragraph 59 on p.13 of the further
8 particulars.

9 HIS HONOUR: Yes.

10 MR BEACH: You'll recall Your Honour, we're asking them for
11 particulars of the discussions referred to in
12 Paragraph 42 of the statement of claim and the response
13 we get is, some of the discussions, not all of them by
14 any means, but some of them and their substance are
15 pleaded in Paragraphs 43, 49, 50 and 51. "The pleadings
16 and those particulars provide the best particulars the
17 plaintiff can currently provide. Further particulars of
18 the discussions will be provided after discovery and
19 interrogation. Further, the discussions are also to be
20 inferred from the nature, timing and results of the
21 Triabunna 2003 overt acts and the following statements."

22 Then what are set out, Your Honour, are in A to D
23 various media statements. The first one is a statement
24 made by the 8th defendant. The second one is one made by
25 the 8th defendant again. The third one is one made by
26 the 9th defendant and the fourth one is - - -

27 HIS HONOUR: Why don't you - looking at A, B, C and D, yes.

28 The 8th defendant, yes. Your Honour will see from the -
29 we ask - "Tell us about these discussions that you plead
30 in Paragraph 42?". The response we get back is, some of
31 these discussions, not all of them, and their substance

1 are pleaded in Paragraphs 43, 49, 50 and 51 and secondly,
2 you can infer that these discussions occurred because of
3 these four statements made by the 8th and 9th defendants
4 and whilst it's asserted in the particulars that they're
5 made on behalf of the 6th defendant, there's just nothing
6 to suggest they're actually made by the 6th defendant.

7 You just keep going around in a circle. "You were a
8 party to a conversation because someone else said
9 something and we assert that that person was speaking on
10 behalf of you". "Yes, but how do you know that person
11 was speaking on behalf of you?" "Because you were a
12 party to a conversation". It just goes round and around
13 and around. It doesn't go anywhere. This is the best
14 they can do and it - Your Honour, it then gets worse when
15 one goes back to Paragraph 99 of the statement of claim
16 which Your Honour will recall is the agency allegation.
17 What happens in Paragraph 99 is we also request
18 particulars in relation to the agency allegation. I
19 don't need to take Your Honour to the request but whilst
20 Your Honour has the further particulars in front of Your
21 Honour, if Your Honour would go to Paragraph 160, these
22 are the additional particulars.

23 HIS HONOUR: 160 of the?

24 MR BEACH: Of the particulars. These are the particulars of
25 Paragraph 99 which is the agency allegation. Starts on
26 p.40 of the particulars, Your Honour. I don't need to
27 take Your Honour to the detail of this but Your Honour
28 will see in the body of Paragraph 160, for example, that
29 particulars and further particulars have been provided,
30 it's asserted, in response to requests 6, 7, 10 and 12
31 above. So one is directed from these particulars to

1 additional particulars and then one is directed, Your
2 Honour a little further down, the plaintiff also refers
3 to and repeats the particulars and details set out in
4 Paragraph 42. We assume that our learned friends are
5 directing us to Paragraph 42 of the statement of claim
6 and not Paragraph 42 of the particulars because Paragraph
7 42 of the particulars is a mere objection. So here one
8 comes back to Paragraph 42, the plea of the conspiracy,
9 and of course we are also directed, if you look further
10 into these particulars at Paragraph 99, we're directed
11 not only to Paragraph 42 of the statement of claim - I am
12 sorry, I've got ahead of myself. We're directed to
13 Paragraph 42 of the statement of claim, Your Honour will
14 recall Paragraph 42, of course, contains reference to
15 discussions some of which are particularised or to be
16 found in Paragraphs 43, 49, 50 and 51 of the statement of
17 claim and if you look at Paragraph 43 of the statement of
18 claim and then look at the particulars of it which are
19 given in this document, you're directed back to Paragraph
20 99. It goes around and round in a circle.

21 Start at 99, request particulars of it, get some non
22 responsive particulars in Paragraph 160 which include
23 referring you back to other responses, to the requests
24 which include referring you back to other paragraphs of
25 the statement of claim including 42, 43, 49, 50 and 51,
26 look at those paragraphs, say "How do I understand
27 those?", look at the particulars of those paragraphs and
28 they take you straight back around to 99 again. You
29 never get off the merry-go-round. The notion first of
30 all that there's been an abolition of cross-referencing
31 is absurd.

1 The document is riddled with cross-referencing and
2 I've got an even more egregious example of it to give
3 Your Honour in a moment. But more importantly - - -

4 HIS HONOUR: I wasn't complaining about cross-referencing per
5 se which I think I said in the judgment was a useful - on
6 occasions, a useful tool for expression but when it gets
7 to a ridiculous extent, it then becomes a hindrance.

8 MR BEACH: Indeed. Your Honour, I've put the next one on paper
9 because I couldn't do it just talking to it. Could I
10 hand Your Honour a one page summary of the next point.

11 HIS HONOUR: Yes.

12 MR BEACH: Go to Paragraph 217 of Version 3 of the statement of
13 claim. This is another pro forma - it's the equivalent,
14 in fact, of Paragraph 99 insofar as this particular
15 action is concerned. It's Lucaston or is it - - -

16 HIS HONOUR: Lucaston.

17 MR BEACH: Yes, it's Lucaston, Your Honour. Your Honour will
18 see first that Paragraph 217 is again - and the plea is
19 to we're responsible for. That is who the 6th defendant
20 is responsible for. In Paragraph 217 the allegation is
21 we're responsible for the 8th defendant as an employee.
22 The 7th, 9th, 14th and 16th defendants and a whole swag
23 of named others as volunteers. We're also responsible
24 for the 10th and the 11th as members and we're
25 responsible for the 17th as having planned and conducted
26 the Lucaston activity in accordance our directions.

27 Now, if one starts with that universal allegation of
28 agency in Paragraph 217 the particulars of that
29 allegation are requested in Paragraph 57 of the request.
30 The particulars are provided in Paragraphs 267 to 286 of
31 the particulars but if you go to them those particulars

1 themselves refer to the response to requests 6, 7, 8, 9,
2 13 and 20 which can be found in Paragraphs 19 to 25, 31,
3 49 to 52 of the particulars and back to Paragraph 138 of
4 the statement of claim.

5 If one then looks at Paragraph 138 of the statement
6 of claim in an attempt to understand it and looks at it's
7 particulars, those are requested in Paragraph 40 of the
8 request and are given in Paragraphs 169 to 181 of the
9 particulars. Paragraph 169 takes you straight back to
10 217. So you're right back to where you started again.

11 Additionally you're also referred to these other
12 paragraphs in the statement of claim and I've listed them
13 in Paragraph 7 of the short document that I've given Your
14 Honour.

15 HIS HONOUR: Yes.

16 MR BEACH: Picking the first of this morass of paragraphs being
17 139. Looking at it. Trying to understand it. Looking
18 at it's particulars which are requested in Paragraph 41
19 and are provided in Paragraphs 182 to 193 of the
20 particulars you're then on two further occasions taken
21 straight back to Paragraph 217. Back where you started.
22 So it's all roads lead to Rome. You can go round and
23 round in this document.

24 Take the second of that list of paragraphs in
25 Paragraph 7. It's particulars take you to Paragraphs 198
26 to 203 of the particulars and again take you back
27 immediately to Paragraph 217 of the statement of claim.
28 Now, I haven't done the exercise for Paragraphs 143, 144,
29 145 and all those other paragraphs that are listed in
30 Paragraph 7 but Your Honour think how long this trial
31 will take. Pose the simple question, Mr Beach, where are

1 the particulars - where do I find the particulars of
2 agency? All the particulars the plaintiff says about
3 agency? Your Honour, it takes half an hour to just state
4 where you might find some of them without doing an
5 exhaustive --contemplating the next question is even more
6 horrific. What is the case that is made against you in
7 these particulars? The only proper response to that,
8 Your Honour, is Lord only knows. It is impossible.

9 Your Honour, that analysis can be done in respect of
10 all of the other claims. The Styx claims, the Triabunna
11 2004 action, the Hampshire claim, the Burnie Woodchip
12 Pile action, the Banksia Award action, the Japanese
13 customers' action, the Banks action, the Campaign against
14 Gunns. In the equivalent paragraphs we are variously
15 said to be responsible for bunches of defendants as
16 employees. Bunches of defendants and other named people
17 as volunteers. Bunches of defendants as members. Some
18 on alternative bases. I could take Your Honour to the -
19 I've taken Your Honour to the Triabunna 2003 in respect
20 of the particulars and I've now taken Your Honour to the
21 Lucaston claim in respect of the particulars but
22 the - - -

23 HIS HONOUR: Do you get the same results in relation to the
24 others?

25 MR BEACH: It's the same for everything, Your Honour, and it
26 would take literally hours to try and put a fence around
27 what these allegations of agency are in the whole of this
28 statement of claim and its particulars.

29 So what ultimately we say about this, there's a
30 number of things, Your Honour. First of all, there does
31 not appear to be any legitimate purpose in the

1 introductory of high level paragraphs on which all of
2 this is based and one asks rhetorically what is the
3 purpose other than to embarrass the fair trial of this
4 proceeding for the introductory high level paragraphs
5 which use the words "includes" wherever the pleader
6 thinks it's a good idea not to be bound too close - - -

7 HIS HONOUR: What's the example of an introductory high level
8 paragraph that you refer to?

9 MR BEACH: There are four of them, Your Honour. 24, 25, 26 and
10 29.

11 HIS HONOUR: Just let me go back and see if I understand what
12 you're saying.

13 MR BEACH: 24, they're part of a group that consists of an
14 amorphous group that's not defined and includes bodies
15 that might've gone out of existence. It's the antithesis
16 of a pleading which narrows the issues. If this pleading
17 was allowed to go to trial, one would face daily one
18 suspects - no, this is caught up in - if you go back to
19 Paragraph 24, you will see, yes, you're part of this
20 group, you're responsible for them because part of that
21 group contained volunteers or members who were treated by
22 other members of the groups or other groups of the group
23 as being as member of one is a member of all and we're
24 all in it together. Instead of looking at this pleading
25 and saying "How are the issues in it being defined?",
26 they're not.

27 At every turn you look, you're either being sent to
28 other parts of the pleading or particulars or around in a
29 circle or into an area which is just undefined and may
30 include any number of entities that exist or don't exist,
31 whatever the case. We say the high level formulaic

1 pleading of agency in this pleading merely obfuscates
2 rather than defines the case which the plaintiff might
3 wish to put. Your Honour, I don't need to take Your
4 Honour in any greater detail to the particulars, but a
5 trawl through the particulars will also see, Your Honour
6 on many occasions it's said particulars will be provided
7 after discovery and interrogation and return of subpoenas
8 so they're not purporting to give us an exhaustive, this
9 is how we put the case.

10 There is some suggestion in some responses that
11 allegations are sufficiently particularised when patently
12 they're not. I don't need to take Your Honour to it, but
13 Paragraphs 1,185 and 1,204 of the particulars are
14 examples. I am happy to take Your Honour to them after.

15 HIS HONOUR: I will just have a look at one of them perhaps.

16 MR BEACH: 1185 is as good a - - -

17 HIS HONOUR: That's on p.282.

18 MR BEACH: Yes, Your Honour.

19 HIS HONOUR: This looks at Paragraph 706(d) of this statement
20 of claim.

21 MR BEACH: Yes, 706(d) of the statement of claim pleads in
22 early 2001, there were several meetings with the 6th
23 defendant to plan - and we've simply asked for the - Your
24 Honour can go back to the requests and have a look as to
25 dates and here again, buried in Paragraph 706(d) of the
26 statement of claim is an allegation which might support
27 untold number of meetings. We can go to trial, are there
28 two meetings, are there five, are there 25, are we going
29 to hear evidence about one, three, seven, nine, whatever,
30 but the response is, the meetings referred to in
31 Paragraph (d) particularly are sufficiently

1 particularised there and that's a flavour that runs
2 through the document.

3 HIS HONOUR: We will stop now and take it up again at 2.15.

4 MR HOWELLS: Your Honour, I wonder if I could before Your
5 Honour rises, I should've handed it up earlier but we do
6 join issue with Mr Burnside's chart or table. He says
7 that these paragraphs are the same. We've done a
8 tabulation which we say - - -

9 HIS HONOUR: Which table are you referring to?

10 MR HOWELLS: I think it's Annexure D, Your Honour, to - - -

11 HIS HONOUR: You've analysed Annexure D - Annexure A, I think
12 it is.

13 MR HOWELLS: Sorry, it's A, Your Honour, yes. We say that
14 really it is a fairly serious gloss on what the reality
15 is when one looks at things. We note that Your Honour
16 has said it's not a matter - - -

17 HIS HONOUR: I am less interested in trawling over what
18 happened before, but I - I will take this as an answer to
19 Mr Burnside's submissions. We will resume at 2.15.

20 LUNCHEON ADJOURNMENT

1 UPON RESUMING AT 2.16 P.M.:

2 HIS HONOUR: My apologies ladies and gentlemen. I was held up
3 on a court matter. Mr Beach.

4 MR BEACH: Your Honour before lunch I was making submissions
5 concerning the defective way in which this statement of
6 claim is pleaded and how far from defining issues, it
7 seeks to obfuscate them. Before continuing with that
8 submission could I distract myself for a moment and take
9 Your Honour to Paragraph 516 of the statement of claim.

10 Submissions that have been made to Your Honour so
11 far have been at a higher level as to why the document
12 does nothing to inform the reader as to the nature and
13 extent of the case and why it does not define issues but
14 if one looks at the document at a much deeper level,
15 which one would ordinarily do in a much shorter document,
16 one finds paragraphs for example like 516(c) and (d)
17 which are pleas, "In or about April and May 2004 the
18 6th defendant denigrated the first plaintiff in the media
19 for the purpose of injuring the business of the first
20 plaintiff and putting pressure on the - - -

21 HIS HONOUR: Five sixteen, this is - - -

22 MR BEACH: Little c.

23 HIS HONOUR: C, sorry, yes.

24 MR BEACH: There's a paragraph there where it's pleaded at a
25 high level that we denigrated the first plaintiff in the
26 media and the next paragraph that we contacted the media
27 and stated - the substance of what's said that we stated
28 is set out there. Your Honour will see this is part of
29 the paragraph relating to Banksia overt acts.

30 HIS HONOUR: This is alleged diversion, effectively, of the
31 Banksia foundation from conferring an award or something.

1 MR BEACH: Yes, so much may be accepted but if Your Honour goes
2 to the top of p.173 or perhaps at the foot of p.172
3 rather. Paragraph 523, "The Banksia overt acts", of
4 which these two paragraphs are subspecies, "was wrongful
5 and unlawful in that the constituted a defamation."
6 Your Honour would - I barely need to make the point
7 Your Honour. The words aren't set out. It's not
8 possible to deal with that cause of action in any
9 meaningful way. If authority was needed for it the 10th
10 Edition of Gatley at Paragraph 26.11. Your Honour is
11 more than familiar with that. I need go no further with
12 it.

13 Riddled in the document are those dilemmas, even if
14 Your Honour thought that the form and structure was
15 impeccable. In a two or three day fight about the
16 pleadings, one is never going to get to the bottom of
17 those myriad of problems. Can I come back then to the
18 submissions I was making before lunch in relation to the
19 particulars. I have shown Your Honour the particulars
20 that go in every increasing circles and take you back and
21 forwards amongst the paragraphs. I have shown you the
22 responses that particulars will be provided after
23 discovery, interrogation and subpoenas.

24 The responses that suggest that allegations that are
25 patently not particularised are adequately particularised
26 and the last species of particular that I wish to deal
27 with Your Honour are ones that are just either
28 meaningless or circular and there is an easy example. If
29 one goes to the very last page of the statement of claim.
30 The very last allegation in it is that the - on p.221,
31 the 1st to 5th, 10th, 11th, 18th and 19th defendants were

1 members of the 6th defendants and acted in accordance
2 with their authority as members. Unsurprisingly
3 Your Honour since the allegation aren't particularised
4 you would not be surprised to learn that the 6th
5 defendant sought particulars of the authority. I don't
6 need to take you to the request Your Honour but it's the
7 last two paragraphs of the request.

8 The particulars provided are in the last paragraph
9 of the particulars. Paragraph 1288 on p.301 of the
10 particulars. I don't need to read the first two
11 sentences. "The rules and practice adopted by the
12 6th defendant do not strictly distinguish between office
13 and other members in terms of their capacity to act and
14 speak on behalf of the 6th defendant. Members of the
15 6th defendant are engaged in developing, organising and
16 implementing campaigns as they do so with the authority
17 of the 6th defendant."

18 Far from giving particulars of authority, it's just
19 a repetition of the allegation of authority. We just go
20 backwards and forward. The whole problem, Your Honour,
21 with the agency claim is it appears to be asserted in our
22 learned friend's outline of submissions, Paragraph 18 and
23 I think Mr Burnside took you to Paragraph 18 of it this
24 morning. The position may seem - - -

25 HIS HONOUR: Paragraph 18 of?

26 MR BEACH: Of the plaintiff's outline of submissions.

27 HIS HONOUR: Have you finished with these particulars or are
28 you going to come back to them?

29 MR BEACH: Yes, I've finished with the particulars for the
30 moment, Your Honour.

31 HIS HONOUR: Yes, just let me clear the decks here. Yes,

1 that's on p.12.

2 MR BEACH: Page 12. The plaintiffs retreat to the position, it
3 follows that by virtue of the pleaded conspiracy each of
4 the co-conspirators were agents for the 6th defendant.
5 As if no more need be said but, of course, Your Honour,
6 it's to be remember for the reasons already submitted
7 that each conspiracy pleaded stems from an inadequately
8 particularised set of discussions and inadequately
9 particularised set of meetings and it can't be that
10 simply by asserting that D6 - the 6th defendant, my
11 client is not a natural person was a party to the
12 discussions and conspiracies that every other participant
13 is therefore an agent in respect of anything that is
14 alleged to have occurred in the statement of claim. That
15 simply cannot be - it only has to be stated to see that
16 that cannot be so.

17 Can I come then to another example. Your Honour,
18 this morning when Your Honour asked counsel for the
19 plaintiff to outline the document reference was made to
20 an allegation of the improper allocation and use of
21 funds. Your Honour, that, as we apprehend it and I don't
22 wish to labour the point but it's not an allegation that
23 we found in either of the first two versions of the
24 statement of claim, though, as Mr Burnside said, errors
25 and omissions excepted. But we found it in 697 of the
26 statement of claim but it's not in the statement of claim
27 itself. In fact, in the particulars to Paragraph 697 of
28 the statement claim - can I take Your Honour
29 Paragraph 697 of the statement claim.

30 HIS HONOUR: Yes.

31 MR BEACH: Here it's the Campaign against Gunns that's defined

1 and in the particulars - in Paragraph C of the
2 particulars the unlawful means was the interference with
3 contractual relationships et cetera, et cetera, et cetera
4 and the improper allocation and use of funds forming part
5 of the Wilderness Society. What we would say about that,
6 Your Honour, is - - -

7 HIS HONOUR: Interference - - -

8 MR BEACH: What I wish to concentrate on is the allegation of
9 an improper allocation and use of funds forming part of
10 the Wilderness Fund which is a fund that my client is
11 alleged to own, operate, run, whatever. On it's face it
12 seems like a very serious allegation. It seems like an
13 allegation akin to an allegation of fraud. Is it pleaded
14 as a material fact up front in the statement of claim?
15 No, it's buried in particulars to Paragraph 697. It
16 suffers from a number pleading defects. First of all the
17 use of the word "improper" and again I don't need to take
18 Your Honour to the authorities which say that improper is
19 a weasel word which is only likely to embarrass the
20 conduct of the trial. Whether it means appropriate.
21 Whether it means unwise. Whether it means unethical.
22 Whether it means without lawful excuse. Whether it means
23 actually illegally. Who knows? It's delightfully vague.

24 HIS HONOUR: It might be difficult to maintain - I mean this is
25 an allegation that they've used a fund to which
26 concessional taxation treatment is given.

27 MR BEACH: Presumably.

28 HIS HONOUR: Using it for this purpose was wrongful. Was other
29 than in accordance with the taxation law.

30 MR BEACH: Or it might mean that you're not entitled to some
31 other collateral benefit or some taxation benefit. It

1 might mean a myriad of things. Your Honour, we requested
2 particulars of it and the response we got, sorry to take
3 Your Honour back to the particulars but it's
4 Paragraph 1153 of the particulars.

5 On p.277 to 278 and the response is, "The improper
6 allocation (reads) and interrogation". We say
7 a number of things about these particulars. First of
8 all, they breach Rule 13.02B of the Rules in that there's
9 no attempt made to identify the specific provisions of
10 the Income Tax Act which are to be relied upon in support
11 of this, what on its face might be a serious allegation
12 or might be a less serious allegation. Secondly, there
13 is the persistent use of the weasel word "improper".

14 HIS HONOUR: It's either illegal or it's not.

15 MR BEACH: Exactly, Your Honour. Thirdly, it's said in these
16 particulars that the fact that the serious conclusion is
17 to be, and I quote, "Ascertained and inferred from
18 accounts submitted by the 6th defendant during the
19 relevant period", whatever that might mean, again it's
20 the antithesis of a proper pleading that one would expect
21 in pleading such a serious matter and indeed, finally,
22 the pleader recognises the inadequacy of the particulars
23 by finishing with the formula, "Further particulars will
24 be provided after discovery and interrogation". Your
25 Honour, it's allegations of this kind buried within the
26 pleading hat lead me to refer Your Honour to what was
27 said by Justice Byrne in the first of the authorities in
28 our folder of authorities, Your Honour. John Holland
29 Construction v Cavrena. The passage I want to take Your
30 Honour to is Paragraph 22 on p.693. I don't need to read
31 the first sentence but His Honour goes on, "The

1 fundamental concern of the court (reads) in
2 some way". Your Honour, the only inference we would say
3 Your Honour is well capable of drawing either of those
4 last two inferences that Justice Byrne talks of there.
5 That this has either been done with a desire to
6 disadvantage the defendants or it's been done to conceal
7 a bogus claim in a snowstorm of unrelated and
8 insufficiently or ridiculously particularised
9 allegations. Our learned friends appear to respond to
10 some of our submissions by saying in fact there's a line
11 of authority which suggests that you can give particulars
12 after discovery. You can get discovery and we will have
13 a look and in response to your requests, we will - and
14 they've identified three cases where that's happened in
15 individual circumstances. A number of things can be said
16 of those cases. First, they turn on their own facts and
17 if it's necessary, I will deal with them in greater
18 detail in reply - - -

19 HIS HONOUR: What is the limit of making a statement that
20 something will be further particularised after discovery?
21 How far can that go?

22 MR BEACH: It depends on each case. The circumstances of each
23 case. For example, the first case that our learned
24 friends might refer to is one where the executors of a
25 deceased wife sued the husband for return of the wife's
26 property and the husband said "Give me particulars", he
27 had collected it all for himself and had it in his house
28 and said "Give me particulars of what you say is the
29 wife's property" and the court naturally said "You tell
30 the executors what you say is the wife's - you give
31 particulars of what you say the wife's property is or

1 give discovery of that first because that solely within
2 your knowledge, they can't possibly know that. They've
3 got a duty to collect in the estate and deal with it".

4 HIS HONOUR: Wouldn't the plaintiffs here be able to say that
5 questions of what occurred at meetings is peculiarly
6 within the knowledge - - -

7 MR BEACH: These aren't secret, they've made allegations,
8 they're open to the public in - as we apprehend the way
9 the case is pleaded. Perhaps a better example, Your
10 Honour, is the case that dealt with - Justice Brennan
11 dealt with it, my learned junior reminds me of course in
12 respect of each of these meetings there are large numbers
13 of people who are identified as having attended and who
14 are not defendants in this case.

15 For example, Joseph Kelly, Ruth Jacobs - all of
16 people referred to. Your Honour what I really wanted to
17 say to Your Honour, yes there is a point at which that
18 might be a valid matter but here we're talking about a
19 huge case where our client, the 6th defendant, is alleged
20 to be globally responsible for everyone and everything.

21 If you're going to make such an allegation, you
22 really are duty bound, in our submission, to give proper
23 particulars rather than just say, I can't give any
24 particulars, and to use the words of Justice Brennan
25 endorsed by Justice Warren as she then was, then seek to
26 ransack the documents. The case I'm referring to
27 Your Honour is Computer Share v. Perpetual Registrars.

28 HIS HONOUR: Yes I thought - is that in here?

29 MR BEACH: It's behind Tab 11 of the folder Your Honour. The
30 relevant passage is, I won't read it, but it's on p.637
31 to 638. In essence what is said is, the approach that

1 Your Honour suggested to me a moment ago is one that
2 might be appropriate if there was an anterior
3 relationship between the parties which entitled one to
4 obtain information or there was sufficient shown to
5 properly ground the suspicion that the party apply for
6 discovery has a good case which would be aided by
7 discovery.

8 It's in the passage that's quoted from Justice
9 Brennan's judgment at the foot of p.637 Your Honour. He
10 says in the third last line of that passage on that page,
11 "This is not such a case", and we would say that same
12 about the present case, "This is a case where a bare
13 allegation is made by Paragraph 6 of the statement of
14 claim, and the paragraph being denied the applicant seeks
15 to interrogate the chairman and ransack his documents in
16 the hope of making a case. That is mere fishing."

17 Your Honour to an extent, all of this is a sideshow
18 because it doesn't matter, on one level, that in respect
19 of some requests for particulars we get the response,
20 further particulars will be provided following discovery.
21 The claim as currently particularised is exceptionally
22 confusing in the way that it sends you all around two
23 different documents to know the case that has got to be
24 met and in essence comes back to the very point
25 Your Honour made in the first judgment when Your Honour
26 struck out Version No.2, a pleading should contain all of
27 its relevant particulars within it.

28 Perhaps these matters could be dealt with. Perhaps
29 the more likely inference is the reason it is not done
30 that way is because it would show the true bogus nature
31 of the claim as Justice Byrne said or the fact that it is

1 done to disadvantage the defendants because you'll simply
2 never know where things are, we'll tell you from time to
3 time what we say the document means. Their outline of
4 argument is 50 plus pages saying, this is what the
5 statement of claim means.

6 It's entirely unhelpful we would say, in our
7 submission, because what's going to happen at trial?
8 We'll get up with the statement of claim and the
9 particulars and say no, this is the bounds of the dispute
10 and they'll say no you've got to look at the key to it
11 which is our outline of argument on the strikeout
12 application where we told you it meant something
13 different. Or here's a second key to it. What it really
14 means is you can't unlock it. You simply cannot unlock.
15 Those are the submissions for the 2nd, 6th.

16 HIS HONOUR: Thank you Mr Beach. Is there anyone agreed to go
17 next? Mr Bornstein.

18 MR BORNSTEIN: I think it's me but I don't know how much
19 agreement there is.

20 HIS HONOUR: You are for?

21 MR BORNSTEIN: One to three, four and five.

22 HIS HONOUR: Yes.

23 MR BORNSTEIN: Your Honour should have - - -

24 HIS HONOUR: Yes I've got your concise outlines.

25 MR BORNSTEIN: As they were concise, Your Honour may recall.

26 HIS HONOUR: I'll hand this back.

27 MR BORNSTEIN: Your Honour the three documents filed on behalf
28 of my clients are - - -

29 HIS HONOUR: Just a moment, I'm just trying to find - yes I've
30 got it.

31 MR BORNSTEIN: Your Honour should have matters and grounds,

1 which is a two page document dated 22 December, an
2 outline of argument which is a three page document dated
3 31 January.

4 HIS HONOUR: Yes.

5 MR BORNSTEIN: An outline of reply which is a five page
6 document dated 1 March.

7 HIS HONOUR: Yes.

8 MR BORNSTEIN: The submissions seem to get longer - get longer
9 as time - - -

10 HIS HONOUR: Yes I've got those.

11 MR BORNSTEIN: Your Honour my learned friend, Mr Beach, has
12 taken you to a number of matters which I would have taken
13 you to about circularity of the particulars.

14 HIS HONOUR: There's no need to - I take it that the arguments
15 are - no one is disowning anyone else's arguments.

16 MR BORNSTEIN: No certainly not, but I wasn't going to take you
17 through them all again. What I was going to indicate to
18 Your Honour is that the pleading of the conspiracy in
19 each case is for all practical purposes unparticularised.
20 Whichever the particular alleged conspiracy may be, no
21 proper particulars are given of the meetings which are
22 concerned. They say however you can infer it from the
23 overt acts. But in many cases the so called overt acts
24 pleaded are nothing more than the meetings at which the
25 conspiracy is supposed to have been formed. They are not
26 an overt act in furthering the conspiracy, they are the
27 unparticularised meeting which is supposed to have formed
28 the conspiracy itself.

29 In many cases there is nothing more than that
30 alleged or there is something of such a general nature
31 alleged that it's impossible for any specific defendant

1 to know what it is alleged against him or her. The
2 purpose for which my client requested particulars and, as
3 with everyone else, got unsatisfactory answers which were
4 circular, was to ascertain the case which each of my
5 specific clients had to meet. That's the purpose of
6 pleading particulars.

7 Unfortunately, what one gets in response is a sort
8 of a global rolled up response and as I've indicated in
9 my reply grounds, it's frequently referring to things
10 said and done by other defendants. For example, in
11 relation to the Banksia awards section of the claim, it's
12 said in the outline of submissions, not in particulars,
13 that the second defendant said various things.

14 Other than as a matter of academic interest, insofar
15 as my clients are concerned I am not interested in what
16 the 2nd defendant may have said in terms of my client's
17 alleged participation in conspiracy. I am for one,
18 three, four and five. I don't care to want that. My
19 instructing solicitors don't care. My clients may care
20 because of course he is a fellow officer of the
21 Wilderness Society, but they are entitled to know what
22 they are alleged to have said and done. Each of them is
23 entitled to know what case each of them has to answer.

24 That is what is not done by the pleading and it's
25 not cured by the particulars. The particulars in many
26 cases make it worse or they just run round and round and
27 round in a circle.

28 Now in my submission, what underlies the problems
29 with the pleading is a misunderstanding of what O'Hearn's
30 case is really all about. It appears in the submissions
31 that - my learned friend, Mr Beach, took you to the

1 paragraph and my learned friend, Mr Burnside, took you to
2 the paragraph. I think it was Paragraph 12 of the
3 plaintiff's outline. Eighteen, I'm sorry. It's on p.12.
4 They recite certain of the parts of it. It follows by
5 virtue of the pleaded conspiracy each of the
6 co-conspirators were agents for the 6th defendant. What
7 isn't stated there but which is also clearly relied on in
8 the pleading that it follows by virtue of the conspiracy
9 that each of the co-conspirators - alleged
10 co-conspirators is an agent for every one of the other
11 co-conspirators.

12 Now, if a conspiracy is established by some other
13 means that may well be the case. That is what O'Hearn's
14 case says but O'Hearn's case doesn't say that you can use
15 a statement by, for example, the second defendant if and
16 insofar as it might constitute an admission and I don't
17 say that the statement quoted does but even if it could.
18 So what? It's not a particular nor is it anything which
19 is evidence of participation in a conspiracy as against
20 my clients. Nor is it evidence of a conspiracy as
21 against anybody else that was alleged to be involved in
22 that particular conspiracy or alleged conspiracy.
23 Everything is circular. It follows right throughout.

24 The thinking of the plaintiffs appears to be that
25 you're all in it together and therefore if we establish
26 anything against any one of you you're all liable. Why
27 is that so? Well because you conspired. What was the
28 conspiracy? Well the conspiracy is what we said it was
29 at these meetings. We can't tell you what's happened at
30 those meetings. You'll have to infer it from the overt
31 acts. Well, what were the overt acts? Attendance at the

1 meetings. It goes round and round and round in a circle.

2 In some cases you have situations where a group of
3 the defendants are alleged to have collectively either
4 provided or organised for others to provide equipment.
5 Well, unless you had the, say, eight individuals
6 concerned or whoever it may be standing in a block and
7 say here's your rubber ducky it must be that one or other
8 of them did so. It may be, of course, collectively they
9 wrote a letter to somebody and said you provide them with
10 X. Of course nothing like that has been said in the
11 particulars.

12 What's mostly occurred, of course, is, as my learned
13 friends have taken you to, well we'll give you further
14 and better particulars - further particulars after
15 discovering interrogation. This occurs time and time and
16 time again. It occurs in relation - curiously enough in
17 relation to some matters which are peculiar within the
18 knowledge of the plaintiff rather than within the
19 defendant's knowledge. This is in relation to areas such
20 as alleged threats by the Japanese customers or the banks
21 to either cease purchasing, break existing contracts or
22 withdraw facilities. Are any particulars given of those
23 despite request? No, I will give you those after
24 discovery, interrogatories and in some cases return of
25 subpoenas.

26 One has to ask why is it necessary to have return of
27 the subpoena to find out what the ANZ Bank, for example,
28 said to them that caused them to make a response and cost
29 them money. There must have been something that ANZ said
30 to them or did. Either they sent them a letter and said
31 we're going to cut off your facilities unless you satisfy

1 us of this, that and the other or look, we've had these
2 complaints. We'd have to review our situation unless you
3 do something.

4 HIS HONOUR: I think I made the comment the last time we argued
5 it that the plaintiff ought to be putting forward the
6 documents from the bank. I think I did. It seems so
7 obvious that - - -

8 MR BORNSTEIN: We went through this before, Your Honour.

9 HIS HONOUR: I thought that's right.

10 MR BORNSTEIN: Nothing's changed. There's been a statement in
11 relation to the Japanese customers that various
12 paragraphs in the statement of claim constitute the
13 communication or they refer to certain paragraphs. What
14 they say is that there were communications as between
15 senior officers of the paper manufacturers and senior
16 officers of the 1st plaintiff. They don't give
17 particulars of what those communications were. They then
18 go on to refer to a series of various statements or
19 rather other paragraphs of the statement of claim. Now
20 those other paragraphs don't constitute - none of them
21 constitute any kind of threat to stop purchasing. In
22 some cases, you know, sort this out. Do this. I think
23 in one case it refers to a statement made by the Tasmania
24 Premier which, I might add, is included as an overt act.
25 How that could possibly be an overt act is utterly beyond
26 me.

27 HIS HONOUR: He's not suggested to be an unindicted
28 co-conspirator, is he?

29 MR BORNSTEIN: I don't think so, no. In fact he appeared to be
30 on side if anything and wanting to sort matters out so
31 far as the plaintiff is concerned. You have a situation

1 nothing more than perhaps the pleading of the Japanese
2 customers' action indicates that the problems caused by
3 narrative style pleading as opposed to the pleading this
4 indicates a conspiracy. You conspired on such and such a
5 date or between these dates and was constituted by these
6 meetings at which various people said that, that and
7 that. It may also be inferred by the following, you
8 know, overt acts committed by a thing. Defendant 1 did X
9 in further a conspiracy and Y. Defendant B did M and M
10 et cetera as you go along. In that case everybody knows
11 exactly what's being put and the case that they have to
12 make.

13 Instead we have this narrative style of all this
14 happened and then that happened and something else. As I
15 said strangely things like things said and done by the
16 Tasmanian Premier at the time form part of this
17 allegation that it's one of the overt acts referred to in
18 the paragraph.

19 Other pleadings in relation to matters, I think, in
20 relation to Triabunna 2004. There's something alleged as
21 to the - Greenpeace having done something at the instance
22 of the 6th defendant. For example, made some sort of
23 representation to somebody. Well, the Triabunna 2004
24 protest is alleged to be something involving actual
25 physical interference. Nothing - what's that got to do
26 with anything. Why is it there? These are just examples
27 of things which my learned friend, Mr Beach, indicated as
28 well. They're just littered through the pleading.

29 We don't have time to go through chapter and verse
30 look that's wrong with this thing. That's wrong with
31 that. That's wrong with that. Because we'd be here not

1 for three days but probably for something closer to, you
2 know, 15 or 20 if each of us went through all the
3 individual complaints we had about pleadings or
4 particulars or lack of it.

5 The problem here, as I said, is this, in my view,
6 what appears to underlie there's a misunderstanding of
7 the principles of O'Hearn's case. They must plead what
8 it is that constitutes the participation of conspiracy so
9 each defendant knows what case they have to meet. Their
10 whole pleading, their argument, their particulars are
11 infective with this belief that it's enough to allege it
12 against one and therefore all the others are liable
13 simply because we say they're co-conspirators without
14 every establishing the conspiracy which is alleged by
15 some other means nor providing any facts of it.

16 The other underlying problem seems to also infect
17 the pleading from beginning to end is that there's an
18 unstated assumption that any form of protest against the
19 activities of the 1st plaintiff is unlawful. That you're
20 not permitted to do it. That's just simply wrong. The
21 mere fact that the plaintiff conducts its business in
22 accordance with the regional forestry agreement and
23 presumably conducts its business lawfully does not make
24 it immune from any form of public or private criticism
25 subject, of course, to laws such as defamation and
26 overstepping the line into trespasses. Laws are not
27 fixed in stone in this country.

28 The Regional Forestry Agreement has been changed in
29 the past and no doubt will be changed again in the
30 future. The fact that the 1st plaintiff's business is
31 conducted lawfully doesn't mean that the defendants are

1 not entitled to seek a change in the law. If it were the
2 case that you couldn't publicly or privately criticise
3 the activities of a lawfully conducted business, then of
4 course the tobacco companies would have enormous claims
5 for damages against medical bodies, against the Anti
6 Cancer Council, against governments, against nicotine
7 patch manufacturers, going back for decades. Their
8 product is entirely lawful, they've been publicly and
9 privately criticised, denigrated, all the things the
10 plaintiff complains about and the laws in relation to
11 tobacco marketing and sales of course have changed
12 dramatically over those periods. It isn't so long ago
13 that tobacco advertising was legal. Those laws were
14 changed. Tobacco sponsorship of sporting events was
15 legal for many years after that. Those laws have been
16 changed.

17 Smoking is discouraged now in all sorts of ways.
18 We've just had a recent change to the laws so that you
19 can't smoke in a covered bus shelter or a train station
20 or a car park, even if it's otherwise open and has full
21 air circulation, no longer legal as of 1 March.

22 Laws change all the time. It's part and parcel of
23 the democratic society. Seeking the change the law is of
24 course entirely legal. In some cases, there may be
25 stepping over the line. That might involve some trivial
26 trespass. It might involve a form of defamation. If
27 that be the case, well so be it but it cannot be
28 actionable for example, for a massive number of people to
29 get together for example to place enormous pressure on
30 their local member of parliament down in Tasmania about
31 the activities of the plaintiff.

1 They could do that with a massive public campaign
2 about the activities of the - and indeed, work overtime
3 to remove that particular - collectively to remove that
4 particular member if he didn't adopt their views of
5 matters. Part of the Australian political process,
6 that's all. What the 1st plaintiff seeks to do in many
7 cases is simply to recover damages or prevent the
8 ordinary operation of our democratic process of
9 government and - - -

10 HIS HONOUR: Insofar as it seeks to do that it would fail but
11 it's allegations are much more significant than that. I
12 mean - - -

13 MR BORNSTEIN: Some are and some are not.

14 HIS HONOUR: That's the point. It seems clear, as I think I
15 pointed out in my first judgment, that there are elements
16 of this case which are clearly causes of action in tort.

17 MR BORNSTEIN: Indeed, I recognise that.

18 HIS HONOUR: They're there and if they weren't pleaded properly
19 the last time, the question is have they been pleaded
20 properly now?

21 MR BORNSTEIN: In my submission, the answer to that is clearly
22 "No". The very reason I stated, the inadequacy of
23 particularity - - -

24 HIS HONOUR: I don't think you need to point out that peaceful
25 political protestors are a feature of Australian
26 political life and one that democracy encourages. That's
27 a given. What the court is concerned about is the tort,
28 if there is one.

29 MR BORNSTEIN: But is there a tort? Is there even a tort in
30 relation to the Japanese Customers Action, is there a
31 tort in relation - - -

1 HIS HONOUR: That's an interesting question. I don't quite
2 understand how that's put but eventually, I suppose I
3 will find out.

4 MR BORNSTEIN: It's put presumably that - without any real -
5 there is a problem of course, as I've indicated, there is
6 no causal link between the damage alleged and the
7 activity conducted because they can't show any actual
8 threat to withdrawal. You come back to political process
9 which becomes part of it because the Japanese Customers
10 have in effect asked them and for that matter, the
11 Tasmanian Premier, according to their pleading, to
12 mediate, to intervene, to sort out the political problem.
13 This is why I've referred to it, because the very fact of
14 what's been complained about is actually a political
15 process and not an interference, an actionable
16 interference with some form of contractual relations. I
17 will refer again to the tobacco industry. All the
18 advertisements for example of the Anti Cancer Council
19 over the years saying "Don't take up smoking", well,
20 that's trying to prevent new contracts being entered into
21 between the tobacco companies and potential customers or
22 indeed with existing customers. "Don't buy another
23 packet of cigarettes", that's what they're telling you.

24 That's what the advertisements were for.
25 Interference with existing contractual relations would be
26 a different matter but certainly no one would suggest
27 that there was anything unlawful about the medical
28 fraternity, the Anti Cancer Council and everyone else
29 seeking to discourage people from entering into new
30 contracts with the tobacco industry. That's - if that's
31 all there is in the case of the Japanese Customers Action

1 to prevent new contracts, well then in my submission
2 there's no cause of action. There's nothing there. So
3 you have a situation where if there's an attempt to
4 prevent new contracts, you have a situation where nobody
5 is interested in terminating existing contracts, well you
6 just don't have a cause of action. It doesn't happen.

7 The allegation is made that they had to do it but
8 they can't particularise it so the action falls away.

9 Same thing with the Banks. The Banks you have a
10 situation insofar as we're dealing with shareholders
11 meetings and I addressed you upon this last time, this is
12 just the shareholders exercising their rights. They're
13 enshrined, they don't have very many rights, they're
14 entitled to exercise them. Did anything come of it?
15 Well, no or rather they say they did, but what they don't
16 do is actually provide any particulars of something which
17 is within their knowledge, which is to say any threat
18 made by either the Commonwealth Bank or the ANZ Bank to
19 withdraw existing facilities.

20 They don't do that and that must be something within
21 their knowledge given that they've had two gos at that
22 now and they haven't provided it, the court's entitled to
23 assume that they can't make the allegation out and
24 without that allegation, there's no cause of action.
25 There's nothing there because there's no damage, no
26 causal link. The complaint bearing in mind that there is
27 no causal link, well what is the complaint? The
28 complaint is that they've been forced to take part in a
29 political process. That's why I raise the question
30 because there's this, in my view, an unstated assumption
31 that runs right through the pleading that any form of

1 protest against the 1st plaintiff's activities is
2 unlawful and that's not so.

3 So far as particularity is concerned, it's also
4 pretty much fundamental - perhaps I will take you now to
5 a document which was provided just yesterday, I think it
6 was, the day before, where the plaintiffs provided a
7 document called Notice of Amendments of the Plaintiff's
8 Further and Better Particulars filed and served on 26
9 October 2005. It's a document dated 7 March 2005. This
10 is a document which appears to have been delivered by the
11 plaintiffs with a view to trying to cure the deficiencies
12 or partially overcome the deficiencies in the statement
13 of claim and the particular provided pursuant to it.

14 If one goes to the very first paragraph, you begin
15 to see what the problems are and the problems with their
16 thinking in terms of how the case is put, the very first
17 paragraph, "The plaintiffs seek leave if necessary to
18 amend the responses given to request for particulars".
19 It's not a question of being if necessary. Your case is
20 your case. You put those particulars forward as your
21 case or you don't. What case do the defendants have to
22 meet? The ones in the previous particulars, these
23 particulars, who knows?

24 HIS HONOUR: I suppose what they're saying is that they've
25 discovered some inadequacies which they propose to remedy
26 by proffering these amendments and seeking such leave
27 that is necessary to incorporate them into their
28 particulars. I think that's what that means.

29 MR BORNSTEIN: I thought it meant something else. What we'd
30 given was adequate but we're going to give you these as
31 well.

1 HIS HONOUR: They plan to seek leave as necessary to amend the
2 responses. I suppose they need leave. The responses
3 become their particulars in the action, amendment of
4 particulars normally requires leave and I think that's
5 what they're saying. I don't think it's any more than
6 that. That's how I read it anyway.

7 MR BORNSTEIN: We read it differently, Your Honour, but so be
8 it. They go on to look at the additional particulars
9 given. This is part and parcel of what is meant to have
10 been the actual statements made by the various defendants
11 if and insofar that they made any at all. It says in
12 Paragraph 1, "In or about late April 2004 (reads)
13 Environment Foundation" and then they include
14 various written material, transcripts of television,
15 particulars of other material be provided following the
16 return of the subpoenas. There are two things to say
17 about that. One, which of the Banksia defendants sent
18 what, is the first thing.

19 HIS HONOUR: The allegation is that all of them sent it
20 together.

21 MR BORNSTEIN: Jointly. If they jointly sent a letter
22 presumably - undercover of a letter signed by all of them
23 - presumably that could have been given in particulars
24 but it's not. There's a deficiency.

25 HIS HONOUR: But it might not be a deficiency though because to
26 say that all the barristers at the Bar table at the
27 moment handed my associate a document, if you handed her
28 a document with the consent of everyone else at the
29 table, it would be all of you handing her a document and
30 that might be all this is. There's nothing mysterious
31 about saying the Banksia defendants sent written material

1 to the Banksia Environment Foundation. At the moment, it
2 means all the Banksia defendants. That mightn't be what
3 the plaintiff means but at the moment it's what the
4 particular says.

5 MR BORNSTEIN: And the next problem that I have with it, it
6 doesn't say that there's anything wrong with the written
7 material.

8 HIS HONOUR: Sorry?

9 MR BORNSTEIN: Nothing is said about the written materials,
10 nothing at all, well so what is the response.

11 HIS HONOUR: It may be irrelevant but I don't think the sending
12 is a problem.

13 MR BORNSTEIN: We then go on, and this is poor as well, in fact
14 this is worse in Sub-paragraph 2, "In or about late April
15 (reads) of the following things", this is a
16 period of not in the one conversation but we're not told
17 what any particular one is meant to have said and that's
18 a problem with each - a serious problem with each of the
19 defendants having to know what case - - -

20 HIS HONOUR: It might or might not be. Again, you could have a
21 situation where - at the moment the allegation is that
22 all of the Banksia defendants spoke with officers of the
23 Banksia Environment Foundation and each of them said one
24 or more of the following things. That could be a
25 description of a meeting at which all of the Banksia
26 defendants were present, indeed it is a description of a
27 meeting at which all the Banksia defendants were present
28 and during the course of it, one or more of them said
29 these things. That's what it says. You may disagree
30 with it, but that's what it says.

31 MR BORNSTEIN: No, no, with respect, Your Honour, it doesn't

1 say that there was any meeting attended by everybody. It
2 just simply says that over a period of a couple of weeks,
3 there were discussions between them. They don't say that
4 there was any meeting attended by all of the parties.
5 Quite the contrary and I don't think that's what's
6 intended to be put. The problem here is once again this
7 situation of you're liable for everything that anybody
8 else may have said without establishing first that there
9 was a conspiracy at all. This is an example of it.
10 There's no allegation that there was a meeting attended
11 by all of them at which one or more of them said that
12 would be an acceptable situation since presumably in such
13 a case they'd gone as a block. One presumes bearing in
14 mind that there are no particulars of when - indeed in
15 Paragraph 3, it says "The statements referred to above
16 were made on various occasions", so clearly it's not
17 intended to mean at a single meeting under Paragraph 3.
18 It then says "Some of the statements were repeated
19 publicly by the 2nd and 10th". Again that issue of,
20 well, I'm not particularly interested in what the 2nd and
21 10th may have said, not so far as defence of my client
22 was concerned. As I said, it's a matter of academic
23 interest only to me and to my instructing solicitors.
24 Then we go - if we go to Para 5, this is - it says, "The
25 words referred to in Paragraph 1 above - - -

26 HIS HONOUR: Just a minute, Paragraph 5.

27 MR BORNSTEIN: Roman 5, where it says, "The words referred to
28 in Paragraph 1 above", which I can only presume to - I
29 don't know if that's a reference to 1.1 or 1.2 or what
30 exactly it's a reference to because Roman 5 includes of
31 course - is included within Paragraph 1. I presume it's

1 meant to be a reference to the written material referred
2 to in Sub-paragraph I on p. and says - - -

3 HIS HONOUR: It should be Roman one, you think?

4 MR BORNSTEIN: I presume so, "Are to be understood in the
5 ordinary and natural meaning" and we don't know what was
6 said or what was in the documents that was sent. What
7 was sent across were transcripts of television programs
8 or including transcripts of television programs and the
9 like - we don't know what has been complained of there
10 because we don't know what words were used in that
11 particular - we're not told. These are, as I said, just
12 examples of the lack of particularity in the matter
13 although it wasn't given in response to - not purporting
14 to amend a request given by my client. If one looks at
15 Paragraph 2 of the particulars, you will see the alleged
16 involvements of various defendants which include my
17 clients and all they do is refer back to the so called
18 overt acts, the unparticularised overt acts which they
19 were meant to have been alleged to have committed. Those
20 included participation of meetings, for example the 3rd
21 defendant, if you go p.5 of the document and the matters
22 involving the 3rd defendant start at Paragraph 9 and it
23 speaks of the Styx campaign in Paragraph 9, what is the
24 3rd defendant meant to have done? Well, Paragraphs 269
25 and 287, I think are simply a meeting unparticularised.
26 I think Paragraph 288 is a general statement or Paragraph
27 269 is a meeting and Paragraphs 287 and 288 I think are
28 the joint provision or organising other to provide
29 equipment for the protest. Paragraph 10, the Japan
30 Customers Action, consists of nothing more than
31 attendance at unparticularised meetings and

1 unparticularised allegations that he permitted funds from
2 the Wilderness Society to be improperly used,
3 unparticularised as to what funds and indeed my learned
4 friend Mr Beach has already taken you to the vices in
5 that sort of pleading. That's all it is. There's
6 nothing there.

7 Again, the 3rd defendant in relation to the Banks,
8 it boils down to pretty much the same thing, attended at
9 some meetings, alleged improper use of funds from the
10 Wilderness Fund. The pleading as I said, is littered
11 with those sort of problems. I've dealt with in my
12 outline in reply just specific issues that apply to each
13 of my clients and problems and I don't think I need to
14 take you through those, Your Honour, you've undoubtedly
15 read them.

16 HIS HONOUR: I have read them and I will read them again, Mr
17 Bornstein.

18 MR BORNSTEIN: It's fairly short but what it keeps coming back
19 to and what it comes back to is that my clients like
20 every other individual defendant, are entitled to know
21 the specific case made against them. The statement of
22 claim Version 3 does not do so. It's no improvement on
23 the previous versions at all in substance. The only real
24 change between Versions 1 and 2 and Version 3 is that
25 it's a little more readable but in substance, nothing has
26 changed and it suffers from many, if not most of the same
27 deficiencies of substance as opposed to form that the
28 first and second versions of the statement of claim
29 suffered.

30 HIS HONOUR: You say it's better in form but not in substance?

31 MR BORNSTEIN: It's better, I didn't say it was perfect in

1 form, but it is better in form in the sense that it's
2 easier to read. There is still massive amount of
3 cross-referencing but it's been significantly reduced.
4 It's easier to read the statement of claim. It doesn't
5 inform you a great deal more if at all as to what case
6 your individual clients have to meet.

7 HIS HONOUR: Thank you, Mr Bornstein. Mr Gronow?

8 MR GRONOW: Yes, thank you, Your Honour.

9 HIS HONOUR: You're 7, 8, 9, 14, 15, 16 and 17.

10 MR GRONOW: Indeed, Your Honour. My leader, Mr Dreyfuss,
11 regrets his absence, Your Honour.

12 HIS HONOUR: He's doubtless busy.

13 MR GRONOW: He is, Your Honour.

14 HIS HONOUR: What's your first client's number?

15 MR GRONOW: Seven, Your Honour. I act for defendants 7, 8 and
16 9 and 14, 15, 16 and 17.

17 HIS HONOUR: Yes. I have your outline.

18 MR GRONOW: Thank you, Your Honour and we put in a brief reply
19 as well.

20 HIS HONOUR: Yes.

21 MR GRONOW: I shan't repeat what's set out in those though they
22 are our submissions. I also respectfully adopt what has
23 been said by Messrs Burnside, Beach and Bornstein and I
24 won't repeat that. Your Honour will excuse me if I
25 appear to jump about. That's because much of the
26 substance of what I say has already been said.

27 HIS HONOUR: Yes, that's all right. That's fine, Mr Gronow.

28 MR GRONOW: As some people do I'm going straight to the hear of
29 the periphery and just dealing with what is left unsaid.
30 First Your Honour, I'd like just to take you my way of
31 example to some of the paragraphs against our clients and

1 the particulars. I'll try and just pick out two sections
2 by example and use the particulars. The first bit is the
3 allegations at Paragraphs 42 through to 45. That relates
4 to the Triabunna 2003 claims. I say that the
5 corresponding allegations in each other claim were
6 infected by the same problems. I've set out all the
7 paragraph numbers in my outline. I'm not going to go
8 through it. If I went through them all we'd still be
9 here four days later which we don't want.

10 HIS HONOUR: Yes.

11 MR GRONOW: You'll see there at Paragraph 42 there's an
12 allegation that various people, including some of my
13 clients, wrongfully and maliciously conspired and
14 combined among themselves and with other people who are
15 named to injure the first plaintiff by unlawful means.
16 In my submission, apart from the problems you've already
17 been taken to that's suffers from the fundamental defect
18 that it doesn't tell you precisely what they conspired to
19 do. In my submission that is crucial to any conspiracy
20 or combination allegation because you can't determine
21 whether a particular overt act is done within the scope
22 of the conspiracy unless you have a clear allegation
23 about what the conspirators have agreed to do.

24 HIS HONOUR: Well, I suppose the plaintiffs would say that
25 they've said that the conspiracy was to injure the first
26 plaintiff by unlawful means.

27 MR GRONOW: With respect Your Honour, as an allegation to
28 determine the scope of a conspiracy that is hopeless. It
29 is worse than useless. To use Your Honour's example of
30 the conspiracy to knife the victim outside the pub, it's
31 one thing to say the defendants conspired to knife the

1 victim outside such and such hotel in such and such a
2 place. Now, you can then say well, if one defendant then
3 shoves the knife in the victim with the other defendant
4 there but not doing anything else that might be said to
5 be in pursuance of the conspiracy. If, on the other
6 hand, he pulls out a gun and shoots him I'd say that
7 wasn't in the conspiracy. So you can say, you know, the
8 evidence about the knife is relevant. The evidence about
9 the gun isn't.

10 Here you can't say it. If somebody where said to
11 have conspired to, you know, injure someone by unlawful
12 means and you couldn't say whether use of the gun was
13 inside or outside that.

14 HIS HONOUR: Yes.

15 MR GRONOW: That's the problem we've got here. We are entitled
16 to have a clear allegation about what we agreed to do and
17 that's one of the reasons why what Mr Beach says has so
18 much force about the never ending cross referencing.
19 It's circular. It says go and look somewhere else. You
20 go and look somewhere else and then it refers you back
21 somewhere else and then it refers you back and you never
22 actually find the answer to the question. You're
23 constantly - your sort of like Alice in Wonderland.
24 You're constantly being referred onwards to a new source
25 but it never tells you what you want to know which is
26 what did we - what did they say we agreed to do that's
27 wrong here.

28 If you look at then the particulars that are
29 provided they say the Triabunna 2003 defendants and each
30 of them became involved in discussions with one another
31 and the other conspirators in which they agreed that

1 they'd engage in activities at the Triabunna Mill site
2 and in order to injure the first plaintiff. Now, we're
3 not told who said what. I assume that it is implicit in
4 that that my clients were present at these meetings but
5 that's not said. Mr Burnside this morning complained
6 that it was alleged against his client only that he was
7 present at a meeting not that he said anything as Mr
8 Burnside rhetorically. His client might have been off
9 getting a cup of coffee or something.

10 In my client's case we've not even said whether
11 we're there although one assumes that if they're saying
12 we agreed to do something at a meeting they say we were
13 there but they should say. They should also say what the
14 people said. If they are going to be able to prove at
15 trial that something was agreed at a meeting they must be
16 able to produce evidence and have details about who said
17 what. Who was there? Who said what? We are entitled
18 now to particulars of what we agreed and what we are
19 supposed to have said and done to show that we agreed to
20 it otherwise - - -

21 HIS HONOUR: Will that be necessary? Colvin made it clear that
22 you can have a pleading of a conspiracy which pleads the
23 overt acts from which the conspiracy is inferred?

24 MR GRONOW: Yes Your Honour and this one does too and so let's
25 go to the overt acts. Because, with great respect, the
26 overt acts do not have an efficient coincidence of their
27 time and character and all the other things
28 Sir Isaac Isaacs said in order to show that these people
29 must have been part of the conspiracy in a case like
30 Colvin you might say you've got all these Collieries that
31 just happen to adjust their price and sell their coal in

1 exactly the same way and they did it all at about the
2 same time and between them they control most or all of
3 the coal market in Australia, therefore you can infer
4 from that they were doing it pursuant to a conspiracy.

5 With respect, if you go - just to pick one example,
6 if you go to Paragraph 53, now the 12th defendant, for
7 whom I don't act, is said to be in a conspiracy with the
8 8th and 9th defendants. What's said there is that the
9 12th defendant allowed my clients to stay at her house.
10 With respect Your Honour, it can't seriously be suggested
11 that you can infer from that a conspiracy to do anything
12 else that might be done.

13 HIS HONOUR: It might be. I mean depending on the
14 circumstances. If you were going to do something in a
15 remote location and you owned a house in that remote
16 location and a number of people stayed at the house the
17 night before they burnt the factory down, it might be
18 able to be said that you, if there was other evidence,
19 that would be relevant evidence at least - - -

20 MR GRONOW: Yes, Your Honour.

21 HIS HONOUR: if there was other evidence.

22 MR GRONOW: But with respect the crucial phrase is if there was
23 other evidence. You need more.

24 HIS HONOUR: Yes you'd need more - - -

25 MR GRONOW: You certainly couldn't say that if you could prove
26 that a number of people burnt a factory down that a
27 person at whose house they'd stayed at the night before
28 was therefore liable without more.

29 HIS HONOUR: That wouldn't - - -

30 MR GRONOW: Well that, with respect, is what is put here. In
31 my submission that is not good enough. You have also

1 this circularity problems. When we say what was the
2 scope of the conspiracy, they say go and look at the
3 overt acts. When we say what are the overt acts, they
4 say look you know it's all part of the conspiracy. Now
5 we're entitled to have set out clearly what we agreed to
6 do in the Colvin case that is exactly what could be done.
7 They'd agreed to fix prices for coal or whatever - I'm
8 deliberately paraphrasing and distorting the detail but
9 if that's alleged to the conspiracy, you can say what
10 that is.

11 In my submission that's what is needed. We
12 naturally asked for particulars of this and we get back
13 the sorts of self referential - in our request 9.1,
14 particulars to Paragraph 42, Paragraph 18 provided by the
15 plaintiffs as to the conspiracy in combination. The
16 pleading sufficiently pleads and particularises the
17 matters.

18 Well as they Quebec "Au contrait". In my submission
19 it doesn't and simply asserting it in the particulars is
20 not sufficient to give us what we want and you know, as
21 to the intentions the plaintiffs refer to and repeat
22 Particular C and then the intention to be inferred from
23 the nature of the results and then they pleaded some
24 other statements. I accept you can do that but you need
25 more than that and we're entitled to have it set out in
26 order. You agreed to do this, this was the scope of your
27 conspiracy, then there were these overt acts that were
28 done pursuant to it, so you can say whether a particular
29 overt act was or wasn't done pursuant to the conspiracy
30 alleged and the plaintiffs are not entitled to the
31 advantage they get of pleading a combinational conspiracy

1 which include evidentiary advantages unless they can say
2 with precision what it is. In my submission that is
3 crucial to the point made in O'Hearn's case by the High
4 Court.

5 You've got to be able to say what they conspired to
6 do before you can then use the rules about conspiracy
7 which it gives you. I don't think I need to go through
8 them but in many of those cases, the particulars simply
9 repeat what they said in the main allegation. One
10 example is with the contracts. They say, you know, you
11 well knew of the contract. We say, how did we know of
12 the contract and they say you well knew of it. That is
13 unhelpful. I accept that as a matter of law a plaintiff
14 pleading tort of breach - inducing breach of contract or
15 interference of performance with a contract doesn't have
16 to prove that the defendant knew every last term.

17 They don't have to say we served a copy of it and
18 they had a chance to read it, of course not, wouldn't be
19 very realistic. But you've got to say how they knew of
20 at least its terms in general sense and we've asked for
21 that information, we have not received it.

22 HIS HONOUR: The rules require a pleading of facts which go to
23 knowledge, anyway.

24 MR GRONOW: Yes, exactly, Your Honour, and we haven't got them
25 except the outline but that - and even if you put the
26 level of knowledge they have to prove as low as they do,
27 they haven't given us particulars to back that up. one
28 can see that in Paragraph 45 and the particulars provided
29 to it. That's the one about the contracts. Similarly
30 with the agency plea, and I just use Paragraph 99 as an
31 example and then also Paragraph 100, again, we are

1 entitled - if people have done things as an agent, we are
2 entitled to know what the nature of the agency was and
3 what the scope of it was. There are some cases where the
4 relationship alleged is the kind of relationship where
5 the law will always presume agency. An obvious example
6 is a solicitor acting for a client. If you plead X was
7 the defendant's solicitor, X agreed to terms of
8 settlement on behalf of X, that's all you need to say.
9 As the law says, a solicitor acts as agent for his
10 client, he's got ostensible authority and the other side
11 is entitled to presume that the solicitor when he or she
12 signs terms of settlement does so with authority. When
13 someone is an employee or a volunteer, that is not the
14 case. Neither relationship is one where the law would
15 presume from the nature of the relationship that there
16 was an agency, that there was authority to do things.

17 HIS HONOUR: It might depend, mightn't it, if you - it might
18 depend on the transaction. If you were standing behind
19 the counter at Myers wearing a Myers ID badge and you
20 sold a shirt, the law would - your employment with Myers
21 in that circumstance would give rise to an agency,
22 wouldn't it?

23 MR GRONOW: Precisely, Your Honour, authority to sell a shirt.
24 You wouldn't be presumed to have authority to commit
25 Myers to take over a rival store, say to buy out David
26 Jones. The Board of David Jones or David Jones couldn't
27 say, you know, you agreed to buy our business for a
28 thousand million dollars because the young lady at the
29 shirt counter said you were going to. That's why in that
30 case, let's say you've got to plead what the person's
31 employment was, what they were employed to do and if

1 you're going to say that as something as an agent, it's
2 got to be within the scope of their authority.

3 Now I accept if you've pleaded facts that show the
4 person was standing beside the shirt counter, the Myers
5 bag, John handing out shirts in return for money. The
6 person has authority to sell shirts, but they don't have
7 authority to do all sorts of other things. As the
8 authorities show, and I'll take you to them Your Honour,
9 even in the case of a director of a company, you need to
10 prove or you need to allege and prove what the director
11 did was in the scope of the director's authority and it
12 will vary in each case.

13 In some cases a director might have been given
14 carte blanche, like it might be a managing director in a
15 proprietary company, it might even be the sole director
16 of the company who is also the shareholder. In that case
17 you'd say well who else has got authority to do anything,
18 the person can do what he or she pleases and bind the
19 company. On the other hand a director of another company
20 in a different situation might have very limited
21 authority and you might not be able to say anything that
22 director agreed to do therefore bound the whole company.

23 Authority for that Your Honour is a in a case relied
24 on by the plaintiffs, it's in their folders. It's Beach
25 Petroleum v. Johnson (1993) 43 FCR 1. The relevant
26 passages are at pp.31 to 32.

27 HIS HONOUR: What was the page reference?

28 MR GRONOW: Thirty one to 32. Volume 43, Federal Court Reports
29 and the passage I rely on is at pp.31 to 32. That is the
30 case where the person is a director, so you could assume
31 the person has a level of authority but in every case

1 it's got to be said what the scope of that authority is
2 and it's not enough merely to allege X was a director and
3 therefore the defendant was the defendant's agent.

4 In the present case we simply don't have those kinds
5 of particulars given. We've got it said that some people
6 are volunteers and some people are employees of either
7 the 6th defendant or the 17th defendant or both and then
8 we ask a particularisation and we're told, and I'm now
9 referring to particulars to Paragraph 99 and Paragraph 81
10 of the plaintiff's response to our request. "The
11 plaintiffs rely upon the employment of the 8th defendant
12 and the engagement as volunteers of the 9th, 12th and
13 15th defendants and other Triabunna 2003 conspirators."

14 With respect, that is not enough. All sorts of
15 people volunteer for organisations. They don't
16 necessarily have authority to act as its agent. Either
17 ostensible authority or actual authority, ditto
18 employees. The person behind the shirt counter at Myers,
19 to use Your Honour's example, might, say if they sold a
20 defective shirt and refused to accept a refund of it that
21 might be something that bound Myers. On the other hand
22 if they were said to have engaged in a cartel with
23 David Jones and several other department stores to fix
24 prices in Australia then you might say well this person
25 does not have that level of authority.

26 We need more. We're entitled to be told what the
27 person was employed to do. What is it about the
28 employment that gives rise to the agency alleged and what
29 was the scope of the agency, and we need that so we can
30 test whether particular acts are inside or outside the
31 scope of the agency.

1 The same is true of Paragraph 100, where allegations
2 are made about the people being agents of the 17th
3 defendant. It's a similar point. And again in
4 Paragraph 84 of the response we've got, "The plaintiffs
5 rely upon the engagement of the 8th and 9th defendants as
6 volunteers." We've also got, back at Paragraph 82 of the
7 response - - -

8 HIS HONOUR: Is there any pleading as to what volunteers can
9 do?

10 MR GRONOW: Not in the sense I'm talking about Your Honour.

11 HIS HONOUR: No.

12 MR GRONOW: I accept they said people are volunteers but in my
13 submission they've got to say more than just you were a
14 volunteer. They've got to say that the guiding mind of
15 the relevant defendant, which would be presumably it's
16 board of management, had agreed that such and such a
17 person was authorised to do this.

18 HIS HONOUR: Do this, yes.

19 MR GRONOW: I mean I for years volunteered at North Melbourne
20 and Fitzroy Legal Services, though I have authority to
21 advise clients I don't expect I would have authority to
22 do anything else. If someone were alleging that I'd
23 committed the Legal Service to a contract they'd have to
24 plea that the board of management had authorised me to do
25 so.

26 Now that hasn't been done. Just because you accept
27 the services of a volunteer doesn't mean that you are
28 therefore bound by anything the volunteer does.

29 HIS HONOUR: At this level, you say that the facts which give
30 rise to the inference of agency must be pleaded?

31 MR GRONOW: Yes. Not just that, we're certainly entitled to

1 that, but we're also entitled to know what the scope of
2 the agency was as the Beach Patrolling case makes it
3 clear, even if it's a director which in a company is the
4 highest you can get, it's still got to be pleaded what
5 the director's authority was, because it will vary from
6 case to case. Some directors will have a wide authority,
7 some directors will have a very narrow authority, a non
8 executive director might have no authority at all to do
9 anything except turn up to board meetings and vote. You
10 might say, "Well you had discussions with such and such a
11 person but he's a non executive director, the rest of the
12 board didn't know about this and didn't agree so it
13 doesn't blame the company". In Paragraph 82 of the
14 response particulars to Paragraph 99 and it's Paragraph
15 82 of the plaintiff's response to our request, it says
16 "In doing the acts the (reads) of the
17 plaintiffs". With respect, that's just making the same
18 assertion in different words and to say her employment
19 envisaged is hopelessly vague. It doesn't tell us
20 anything. Is it said that there was a term of her
21 contract that she would do particular things? Is it said
22 to be written or oral? Is it said that she was directed
23 to do such things by a resolution of the board of the
24 relevant organisation? We don't know. In my submission,
25 those are basic requirements of the rules before any
26 agency can be pleaded.

27 The same thing is true for Paragraph 100 and for
28 each of the other paragraphs where agency is alleged and
29 I've given the numbers in my outline. I don't think I
30 need to go through them now. Your Honour, I'd also
31 respectfully direct you to McKellar v. Container Terminal

1 Management which is again in the plaintiff's book of
2 authorities and the citation for that is 1999 165 A.L.R.
3 at p.409 and I would in particular direct Your Honour's
4 attention to Paragraphs 165 to 169, 177 to 179 and 185 to
5 193.

6 That's a conspiracy statement of claim strike out
7 case. In my submission, those passages stand for the
8 proposition that the scope of the agreement or
9 combination alleged is crucial and without it you can't
10 have a proper conspiracy allegation because you can't
11 then determine whether a particular overt act was inside
12 or outside the scope of what was agreed. I just have
13 four miscellaneous points to make. Firstly, we continue
14 to be of the position that my clients are entitled to
15 know what damage is alleged them. It is in my respectful
16 submission, not satisfactory for the plaintiffs merely to
17 claim against all defendants, damages. That may have
18 been appropriate in the previous versions of the claim
19 where everybody was said to be on the Campaign against
20 Gunns and liable as a result - for everything else as a
21 result.

22 That is no longer the case. It's now said that my
23 clients are only involved in four of the ten - or they're
24 only alleged to be liable in respect of four of the ten
25 claims made and in my submission they're entitled to say
26 to be told exactly what is sought against them and it
27 isn't adequate for the plaintiffs to say well, you know,
28 "We'll just plead damages generally and we will tell you
29 later which particular bits we claim against you and we
30 reserve the right to change our mind".

31 They've got to tell us now what we're up for and in

1 my submission, it is oppressive to allow them to maintain
2 a claim for the whole \$6.36M or whatever the present
3 total is against my clients when they're only alleged to
4 have been involved in four of out ten of the alleged
5 actions. It emphasises what Mr Burnside and others have
6 said to you earlier about the injustice of allowing all
7 ten claims to go in the same proceeding. Secondly, Your
8 Honour, the plaintiffs as I understand it say that they
9 shouldn't have to provide more particulars until they've
10 had discovery.

11 In my submission the cases they rely on each
12 demonstrate that that rule only applies when the
13 plaintiff shows that discovery will yield information
14 that will enable it to particularise its case better and
15 in the case of Lyons v. Kern Konstructions, 1983 70
16 F.L.R. 135 and the passages I rely on are at pp.145-146
17 and at 148 and 152, it also there says that the
18 allegations are impermissibly vague and they've got to be
19 more precise.

20 I would respectfully submit that those observations
21 apply equally to this case. Secondly, there is the well
22 known case of Egg & Egg Pulp Marketing Board v. Korp
23 which is a decision of this court and it's reported at
24 1963 V.R. 378 and the passage I rely on is at pp.381-382.

25 HIS HONOUR: Is that a decision of Mr Justice Gowans?

26 MR GRONOW: No, that's Justice Adams, there are actually two.

27 There were other matters that went on appeal the
28 following year. This was an appeal from a Master and it
29 was a fight about discovery and particulars and as the
30 plaintiffs have said, it stands to the proposition that
31 there are cases where the court will say to a plaintiff

1 "You're entitled to wait until you get discovery before
2 you provide particulars" but in my submission, on that
3 authority and the other one, those cases are limited to a
4 situation where not only the matters are wholly in the
5 knowledge of the defendants but also where the plaintiff
6 has shown that discovery is going to give rise to useful
7 particulars. For example, there will be a correspondence
8 file or some documents or something like that. In this
9 case, this is not the sort of case where discovery is
10 likely to yield any further information that will assist
11 the plaintiff in particularising its case. It's the
12 plaintiff to show that it will.

13 The third case is called Grollo v. Newstart and
14 that's 1976 34 F.L.R. 81 and the passage I rely on is at
15 p.91. Last point, Your Honour, in my submission it is
16 demonstrated by the authorities cited by the plaintiffs
17 that in a conspiracy by unlawful means, it is mere
18 surplusage and that, I think, originated in the House of
19 Lords in Sorrell v. Smith, to allege unlawful acts which
20 are either unlawful by statute when they weren't unlawful
21 at common law where the statute creates a remedy because
22 that covers the field.

23 It is also mere surplusage to allege what is already
24 a tort at common law. So if you allege a conspiracy to
25 commit a tort, you can just allege the tort.

26 HIS HONOUR: Yes, you can't do any better than the tort.

27 MR GRONOW: That's my submission, Your Honour. Where it's a
28 statute that makes unlawful something that would
29 otherwise be lawful, then the statute provides the
30 remedy, whatever that is. Say if it's the Trade
31 Practices Act, then the Trade Practices Act has got lots

1 of remedies and that's the end of the matter. It's not
2 for the court to say "You've also conspired to breach
3 s.52 of the Trade Practices Act". They've got remedies
4 in the Act and if they're not good enough, then tough,
5 you don't have anything else.

6 The authorities that stand for that are - is a case
7 called Pancontinental Mining, these are all again in the
8 plaintiff's bundle. Pancontinental Mining v. Pozgold
9 Investments [1994] 121 A.L.R. 405. The passage I rely on
10 is at p.416. There is secondly the McKellar & Container
11 Terminal Case that I've already referred to 165 A.L.R and
12 the relevant passages are at Paragraphs 195, 196 and 300.
13 There is also Galland & Mineral Underwriters Limited
14 [1977] Western Australian Reports 116 and the passage is
15 at p.119 to 120. There is Sorrell v. Smith in the House
16 of Lords, that's 1925 Appeal Cases 700, and I rely on the
17 passage at p.716.

18 Lastly there is O'Brien v. Dawson which is 1942, 66
19 C.L.R. 18 and I rely on a passage in the judgement of Mr
20 Justice Starke at pp. 27 to 28, and a passage to similar
21 effect at pp.41 to 42 in the judgment of Mr Justice
22 Williams with whom Mr Justice Rich agreed. Now unless
23 there's something I can assist Your Honour with that
24 concludes the submissions for my clients.

25 HIS HONOUR: Thank you Mr Gronow.

26 MR GRONOW: Thank you Your Honour.

27 HIS HONOUR: Who's next, Mr Maher?

28 MR MAHER: I think I am Your Honour.

29 HIS HONOUR: Ten and eleven?

30 MR MAHER: Ten and eleven, Senator Brown and Mrs Putt.

31 Your Honour can I say that at the outset as much as he

1 was looking forward to being here, the only reason
2 Mr Estcourt isn't here standing where I am is that he had
3 a very bad fall when he was scaling Mt Wellington earlier
4 this year. He's an outdoorsman, but he fractured his
5 ankle very badly. I'm happy to report he's ambulatory
6 but in a very limited way.

7 HIS HONOUR: We will see him doubtless in some other later
8 phase of this.

9 MR MAHER: I will resist the temptation of responding to that.

10 HIS HONOUR: Ten and eleven. Yes I've got your outline.

11 MR MAHER: Your Honour I want to take you to the tables, but
12 before I do that can I like Mr Gronow before me,
13 respectfully and with gratitude adopt the submissions
14 which Mr Burnside, Mr Beach, Mr Bornstein and Mr Gronow
15 respectively made. I don't intend to repeat any of them
16 but I do at several places want to illustrate by
17 reference to the tables and some other material how it is
18 we submit that the contentions that have been urged on
19 Your Honour apply with equal force to the tenth and the
20 eleventh defendants. Your Honour could I just - perhaps
21 a couple of rather obvious things, but in my respectful
22 submission they require enforcing. In Table 1 to our
23 outline we've sought to make it plain the extent to which
24 the plaintiff's seek to make both the tenth and eleventh
25 defendants liable and we've done that in two ways. We've
26 adopted the classification that all the protest
27 activities, the on ground activities are site specific
28 and date specific. If Your Honour looks at that you will
29 see that - - -

30 HIS HONOUR: So they put you in to Lucaston, Styx, Triabunna
31 2004 but none of the others.

1 MR MAHER: Well that's Senator Brown. Ms Putts Lucaston only.
2 HIS HONOUR: Yes.
3 MR MAHER: Well they seek to put us into that, but in any event
4 we're the subject of allegations to that limited extent.
5 HIS HONOUR: And then you are both in the Banksia Awards.
6 MR MAHER: We're in all the what we've called the campaign
7 specific ones but not the Burnie Woodchip pile category.
8 HIS HONOUR: I see yes, that's right yes.
9 MR MAHER: Now what will emerge that is significant, and this
10 is an example of what follows from what my learned
11 friends before me - - -
12 HIS HONOUR: And you are both in the campaign against Gunns?
13 MR MAHER: Yes. And given that aspect and also the allegation
14 that we were both, now this appears at Paragraphs 12 and
15 13 respectively of Version 3, there's an allegation of
16 our membership in the Wilderness Society, we're roped in
17 again as it were via the agency with global claim of
18 agency, that's been the subject of submission in - - -
19 HIS HONOUR: Paragraph 12?
20 MR MAHER: And 13, if I can finish I think with - well just
21 more thing about Table 1 Your Honour, what our clients
22 submit is that when one looks at what we have for the
23 sake short haying description called the Campaign
24 Specific Claims, and allowing for the fact that we are
25 not in the wood earning claim they're all what in our
26 outline we've described as communicative activity. This
27 becomes important if at all for these two defendants
28 because I think with one other defendant we were the only
29 defendants that plead Version 1 of the statement of
30 claim.
31 HIS HONOUR: That's right, you did.

1 MR MAHER: One of the defences we plead and I will come to this
2 later, as soon as I can is (indistinct) and in our
3 outline one of our submissions is that as matters stand,
4 just looking at Version 3 as presently particularised, at
5 its highest No. 1 all the specific communicative using
6 our shorthand term, conduct, is clearly communicative,
7 communications of the kind to which Lange appears and if
8 we have to, get that far, we'll get over that threshold
9 and then I'll need to come back to that because my
10 learned friend - - -

11 HIS HONOUR: But if the communications re legal Lange doesn't
12 matter and if they're illegal - - -

13 MR MAHER: Exactly, I'll be urging that on Your Honour before I
14 get to Lange and in order to do that I will need to take
15 Your Honour then to Table 2, just by way of - - -

16 HIS HONOUR: Yes.

17 MR MAHER: again Your Honour, if you look at the columns in the
18 right which say, "10th and 11th defendants" although I
19 suppose in a nightmare one could imagine that there could
20 be a Paragraph 12,696, fortunately there isn't but the
21 numbers in those two columns are references to the
22 paragraph numbers in the statement of claim but the - - -

23 HIS HONOUR: What does 696 do?

24 MR MAHER: 696 picks up the allegations about our involvement
25 via our membership of the Wilderness Society, that's the
26 global allegation of a repetition of 12 and 13 and the 12
27 and 13 are the ones to which I've just referred and what
28 this table purports to do is summarise in shorthand
29 fashion the types of conduct or activity which it's
30 alleged against the 10th and 11th defendants respectively
31 they engaged in and in relation to both what we've called

1 the Sights Pacific Protest Claims to the extent that
2 we're respectively said to be involved in them, in the
3 campaign specific ones, they are all we would submit
4 manifestly communicative conduct even certainly beginning
5 with the membership but classically there were
6 allegations made that have been made against other
7 defendants and referred to already by my learned friends
8 about attending meetings, discussing things, making
9 decisions, encouraging protestors to go to Tasmania,
10 supporting and encouraging protestors, issuing media
11 statements.

12 Most of these activities, Your Honour, significantly
13 even on the plaintiff's allegations are public activities
14 including the ones that have us at a meeting which is
15 said to be the meeting at which both the tenth and the
16 twelfth conspired, but beyond that the accusation of
17 conspiracy doesn't proceed and it doesn't proceed in any
18 of the ways in which Mr Gronow most recently was urging
19 on Your Honour.

20 The point of Table 2 is that when one looks at
21 Version 3 in its now further particularised form - and
22 this is the full extent of what's levelled against both
23 the tenth and the eleventh defendants. In my respectful
24 submission the allegations if one looks at them on the
25 face - and perhaps the best starting point by way of
26 illustration is the Japanese defendants. It really is
27 with all due respect to the authors of the pleading
28 productive of nothing by way of - anything could be
29 critical - found of criticism of Senator Brown or
30 Mrs Putt.

31 It may be unpalatable to my learned friend's

1 clients, particularly the first one, but for the most
2 part on its face it just describes the sorts of things
3 which politicians notably do. Perhaps the most graphic
4 example of this is in Paragraph 577 though it's not
5 referred to in the table. This is in the context of the
6 Japanese defendants' action or that particular part of it
7 and this is Paragraph 548, the overt acts that were
8 pleaded, starting on p.180.

9 It's said against us, and we're one of the -
10 collectively the group described as the Japanese
11 defendants, that, "The action referred to in Paragraphs
12 573 to 576 was also intended by those defendants to
13 persuade the Japanese customers". Well, certainly it's
14 alluding to the communicative endeavour that, "The first
15 plaintiff will not be able to remain a reliable source of
16 wood chips and guarantee supply because by means of
17 adverse publicity, consumer boycotts and direct action" -
18 whatever that might mean - "and by means of political
19 action and influence all of which would be organised by
20 the Japan defendants".

21 Two of whom our clients, Your Honour, are
22 politicians, one in the Federal Parliament and one in the
23 Tasmanian Parliament, "All of which would be organised by
24 those defendants. The first plaintiff would eventually
25 be prevented from sourcing wood chips from forests which
26 have been allocated under the Regional forest agreement
27 process for harvesting by the first plaintiff".

28 HIS HONOUR: By the look of it, it seems to be an allegation of
29 tort arising out of being a politician. That might be a
30 good idea. But apart from the direct action, whatever
31 that means, the rest of it - I mean organising a consumer

1 boycott is not - - -

2 MR MAHER: Again I choose my words carefully to my learned
3 friends but it's risible to suggest that an allegation in
4 that form - I'm speaking for two of the Japan defendants
5 - could possibly have found any liability, any legal
6 liability.

7 HIS HONOUR: The direct action, whatever that - I mean - - -

8 MR MAHER: It's rhetorical, Your Honour. In any event, unless
9 there's some presumption that direct action is unlawful
10 it gets the plaintiffs nowhere. And the tenth and 11th
11 defendants ought not to be expected to plead to it. So I
12 just, Your Honour, use that as an illustration of the
13 extent to which these plaintiffs are prepared to make
14 allegations that on their face cannot survive in the
15 pleading. Now, that was certainly the case with the
16 first version and the second version, and if one goes to
17 Table 3, which is out attempt to summarise how matters
18 had advanced from Version 3. It seems to me, with
19 respect to what's happened, we're actually at the stage
20 of Version 4, because although in substance the claim
21 isn't advanced in the sense of being - it's (indistinct)
22 are not exposed anymore.

23 Perhaps the best illustration is Mr Beach's claim.
24 He's got hundreds of pages or paragraphs of additional
25 material so that in the formal sense, this is the fourth
26 go they've had. Less so in our case, but Table 3 is the
27 full extent and we were quite selective in the
28 particulars we sought, Your Honour. We tried to select -
29 given the rather repetitious and formulaic nature of the
30 allegations that were made against both Senator Brown and
31 Ms Putt, we endeavoured to couch the request in terms

1 that would pick up the formulaic repetition across each
2 of the categories on Brown protest activity and then the
3 campaign's specific communications. Really the most that
4 we got out of it, especially since they'd originally
5 alleged that we'd met on particular dates or between
6 certain dates and conspired with certain people.

7 We asked them in respect of Paragraph 176 to provide
8 further particulars and it turned out that we'd attended
9 a meeting. If one goes to the particulars that were
10 supplied, we're none the wiser, apart from the fact that
11 it gives us a date and a place and it says that - it's
12 only in respect of Senator Brown. It says he was there
13 as a special guest.

14 One would've thought that - and in response to
15 what's been urged on Your Honour on the previous occasion
16 and what we anticipate will be urged on Your Honour on
17 this occasion in relation to, for example, any one of the
18 conspiracy allegations, that by its nature a conspiracy
19 is a clandestine thing and therefore the victim can't be
20 expected or may not - depending on the case, be required
21 to particularise a case for that very reason. One
22 would've thought that in respect of this meeting that it
23 would've been a mistake of claim that was first
24 formulated, but apart from that there'd be some minimal
25 attempt to attribute to Senator Brown words, even a
26 single sentence, but as I think - at least Mr Gronow and
27 perhaps Mr Bornstein have already alluded to, and my
28 learned friends before them as well - I apologise for not
29 including them - one doesn't get to that stage. There is
30 nothing so far as Senator Brown is concerned, having
31 regard to that meeting that occurred at Cygnet on 24 May

1 2004, that attributes a single word to him; not a word.
2 And it's just no good for the plaintiffs in a case like
3 this. The allegation is against a member of the
4 Commonwealth Parliament, to some extent if one grapples
5 with the statement of claim it seems at the end of the
6 day there are some allegations of criminality within some
7 of overt acts.

8 The plaintiff cannot, despite all the colossal
9 effort that has gone into this, put a single sentence
10 into Senator Brown's mouth. What they can do, and this
11 is really the only other tremendous revelation that comes
12 out of the particulars, is refer to some - in the case of
13 Senator Brown, when we press them under Paragraph 304,
14 we're told he issued a media release. Well so what?

15 In respect of Paragraph 371 we're told that he made
16 a statement on ABC Radio. One has to, with respect
17 Your Honour, look at the situation as it advances for
18 these two defendants from Version 3 to Version 3 as
19 particularised, having regard to what again has been
20 alluded to by all my predecessors on the defendant's end
21 of the bar table, that you get - and this is dealt with
22 in the outline, you get this formulaic repetition. We'll
23 give you more particulars after discovery, after
24 interrogatories, after the return of subpoenas and as I
25 think Mr Burnside certainly urged on Your Honour, given
26 the stage at which the litigation has progressed,
27 Your Honour would be justified in concluding that, and
28 I'm confining my submission to my two clients, that this
29 is a deliberate attempt to manufacture a case or
30 fabricate a case as it goes along. Fabricate in the
31 sense of fish for information to enable something to be

1 erected on this very shaky foundation or in the hope that
2 something at the discovery stage - - -

3 HIS HONOUR: Will turn up. In the hope that something will
4 turn up.

5 MR MAHER: In the hope that something will (indistinct) turn
6 up. We only find out - Your Honour I'll finish on this
7 note. Even when we press them and say well what media
8 releases that we issued we have to bring them to this
9 stage, almost, well more than a year down the track to
10 get that bit of information and it amounts to absolutely
11 nothing.

12 HIS HONOUR: I'll stop you there and I want to deal with
13 Mr Howells for a moment before we adjourn for the day and
14 we'll continue in the morning with you, but I'll deal
15 with - - -

16 MR MAHER: I might be ten minutes, 15 minutes at the most in
17 the morning.

18 HIS HONOUR: Very well. Mr Howells, you've got a notice on to
19 amend some particulars.

20 MR HOWELLS: Yes Your Honour.

21 HIS HONOUR: I think we should deal with that and - where have
22 I put it? It's a document dated 7 March.

23 MR HOWELLS: Yes Your Honour.

24 HIS HONOUR: It seeks leave to amend particulars supplied to
25 Phillips Fox, Fitzgerald Brown and Maurice Blackburn
26 Cashman and I think someone else, or is just those three.

27 MR HOWELLS: That's in relation to Paragraph 1, Your Honour,
28 but Paragraph 2 on p.4 and Paragraphs 3, 4 and 5 on p.8
29 are directed to those and other requests that were made.

30 HIS HONOUR: Yes.

31 MR HOWELLS: There's one correction Your Honour that I should

1 seek to make to it in - on p.3, Roman 5 at the foot of
2 the page.

3 HIS HONOUR: It should be Paragraph Roman 1.

4 MR HOWELLS: Roman 2.

5 MR BEACH: We may have a different document Your Honour. We've
6 got a document which sounds like what Your Honour's
7 describing. It's dated 7 March 2006 but every page from
8 p.2 onwards is numbered nine and there doesn't seem to be
9 - it finishes at Subparagraph 24 of Paragraph 2.

10 HIS HONOUR: No I think that's a different document.

11 MR HOWELLS: Well Your Honour I might have to ask those
12 instructing me to look into what's been sent and who has
13 got what - - -

14 HIS HONOUR: What I was going to say is that if this is the
15 document that I've been looking at, and the document that
16 Mr - that Mr Gronow had, yes I think it was, it was
17 Mr Gronow, had that that document and notice of
18 amendments of the plaintiff's further and better
19 particulars.

20 MR HOWELLS: Yes Your Honour.

21 HIS HONOUR: What I was going to say is that, so that the
22 record is kept relatively neat and so I know what I'm
23 doing. It's easy to get out of control in a case like
24 this if you're not too careful. I was going to say that
25 ought to be incorporated into the further and better
26 particulars, unless there's some objection to that and I
27 can't imagine what there would be. I mean it either
28 sinks or swims on its own merits ultimately but if
29 everyone hasn't got it we'd better wait until tomorrow.

30 MR HOWELLS: I'll have to Your Honour because I'll have to ask
31 my instructor given that there a number of parties to

1 check carefully to make sure that everybody has been
2 provided with a proper document.
3 HIS HONOUR: I don't know what document Mr Beach has got but
4 it's clearly something that is - - -
5 MR HOWELLS: It would appear to be - some error has arisen
6 Your Honour. We'll need to look into that.
7 HIS HONOUR: Well I won't take that any further and we'll
8 adjourn now until 10.30 tomorrow.
9 ADJOURNED UNTIL FRIDAY 10 MARCH 2006