

**TRANSCRIPT OF PROCEEDINGS**

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O/N 3250

**FEDERAL COURT OF AUSTRALIA**

**TASMANIA DISTRICT REGISTRY**

**MARSHALL J**

**No TAD 17 of 2005**

**ROBERT BROWN**

**and**

**FORESTRY TASMANIA and OTHERS**

**HOBART**

**10.02 AM, WEDNESDAY, 30 AUGUST 2006**

**Continued from 29.8.06**

**DAY THIRTY THREE**

**MS D. MORTIMER SC appears for the applicant,  
with MR P. TREE SC and MR T. MITCHELL  
MR D. GUNSON SC appears for first respondent, Forestry Tasmania,  
with MR A. ABBOTT and MR C. GUNSON  
MR N. O'BRYAN SC appears for the Commonwealth,  
with MR A. BROADFOOT and MR I. TEMBY**

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HIS HONOUR: Mr Tree?

MR TREE: Thank you, your Honour. Your Honour might remember that when we broke yesterday I was making some submissions to your Honour in relation to the issue 8 which is whether the Tasmanian RFA is indeed an RFA and I had commenced to make some submissions in relation to the reasons why the applicant says it is not an RFA and that is because it does not meet the criteria of the RFA Act itself. Namely, that it does not provide for certain things. Now, I was moving then to a point where I was going to take your Honour to the RFA itself to demonstrate why it is that the clauses there do not satisfy the requirements of the definition in the sense they do not provide for the relevant material.

If your Honour has the affidavit of the applicant which is in Court book 1 at page 162 your Honour will see the three clauses which deal with ecologically sustainable forest management. Can I remind your Honour that clause 64 refers to attachment 10 which your Honour will find at page 240 and 241, so that there are if you like two aspects of this document which are relevant to this submission. These three clauses are the clauses which, depending upon the construction which your Honour prefers in relation to the words "provide for" must either require or establish on the applicant's case, or alternatively must plan for on the respondent's and the Commonwealth's case, ecologically sustainable forest management. Now, ecologically sustainable forest management is defined in the RFA. It is at page, or that definition is at page 145 and your Honour will see that the definition there is:

*ESFM means forest management and use in accordance with the specific objectives and policies for ecologically sustainable development as detailed in the NFPS.*

Now, I am sorry to embark upon a bit of a paper chase, but your Honour will find the NFPS in the materials in the Court books. It in fact is in Court book volume 5 and commences at page 2548. I am told it has another location in the Court books, but it is convenient to take your Honour to this passage. Now, if your Honour turns to page 2557 your Honour will see that chapter or part 4 is headed Specific Objectives and Policies and it would appear to be that section which was intended to be picked up by the definition on page 145 of Court book 1 because your Honour will remember it refers to:

*Specific objectives and policies.*

So it appears as though this is what was intended to be referred to. Your Honour will see that that extends for numerous pages. That particular chapter runs until page 2586 of the Court book and contains a number of specific obligations, not only upon the State Government but also upon the Commonwealth. It is not appropriate to go through this with a fine tooth comb and delineate each and every obligation, but can I simply point out a couple which demonstrate the breadth of the obligations comprised in these objectives



*commitment and that key elements are: CAR reserve; internationally competitive forest products industry and the establishment of fully integrated and strategic forest management systems.*

5 So that is not moving along the path at all, it is simply an acknowledge that it is going to take some time. Clause 63 says:

*The State confirms its commitment to the ongoing development, implementation and achievement of ESFM.*

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So clause 62 says it is going to take a long time and clause 63 says Tasmanian is nonetheless committed to it and clause 64 is the only clause which then descends to some specificity. It doesn't say this is how we are going to retain or attain ESFM, what it simply says is - we will do that which we have said in attachment 10 we intend to do. Although the language "undertakings" is used in section - clause 64, your Honour won't see that that level of language is actually in attachment 10 itself and so it is with great expectations we turn to attachment 10 and find that it is, whilst a little more specific, devoid of any real content. It is useful to spend a few moments going through what it contains:

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*The State intends to further improve its forest management systems by (1) implementing the State policy that pertains to water quality.*

I am at page 240, your Honour:

25

*Developing a -*

unspecified as to content -

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*State policy on integrated catchment management. Developing and implementing a threatened species protection strategy.*

Again devoid as to content:

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*Implementing a piece of Commonwealth legislation. Developing new legislation -*

again unspecified as to content -

40

*in relation to Aboriginal cultural heritage. Further developing and applying flexible silvicultural systems.*

Again, bureaucratic speak which is devoid of any real content:

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*Developing and implementing Statewide policies across all tenures on fire management -*

and some other things. Again, the content of the policies is left unspecified.

Clause 8:

*Ensuring that management plans are implemented for all State forests and national parks by the year 2000.*

5

Again, the content of the management plans are not specified, they just need to exist. And although a timeframe is descended to there is a let out, "or as soon as practicable thereafter". True it is, it says:

10

*the management plans will include objectives -*

which is, no doubt, a great leap forward -

*and will be periodically reviewed.*

15

But again devoid of real content. Clause 9 again is bureaucratic speak:

*Implementing as a high priority the mechanisms from proving the transparency and independence of the Forest Practices Board.*

20

One might think that clause 9 still needs some work. Clause 10:

*Continuing to adequately resource the system surrounding the Forest Practices Code.*

25

No specificity as to what adequately comprise. Clause 11:

*Developing and implementing by 2000 a Code of Practice for reserve management.*

30

Its content again unspecified. Clause 12: In relation to the forest practices system including the code ensuring two bullet points. Firstly:

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*Where the management intention of the forest or private land is to regenerate forest, timber harvesting plans will specify best practice reforestation standards.*

And secondly:

40

*Where an endangered species has been identified in an area for which harvest approval has been sought by private landholders the plan will include conditions which ensure the application of appropriate management prescriptions to those species.*

45

And clause 13:

*Ensuring the management plans for formal reserve and informal reserve elements of the CAR Reserve system clearly identify the CAR*

*values identified in the CRA.*

Now, even though there is in attachment 10 descent into some level of specificity it remains, upon analysis, wholly devoid of any meaningful assessable content. So long as there is some form of policy, so long as there is something done irrespective of what it contains, so long as it comprises, for instance, a State policy on integrated catchment management - - -

HIS HONOUR: Could you remind me what the CRA is again?

MR TREE: The Comprehensive Regional Assessment which your Honour might remember underpinned JANIS and indeed was referred to in the RFA itself. Now, the point which we make in relation to ecologically sustainable forest management therefore is a very simple one. At best - at best, it is aspired to in clauses 62 to 64. It is not required, it is not established, it is referred to, it is expressed as being something which is desirable, there are some hints as to how it is that it might be achieved, but beyond that one cannot look at attachment 10 or any of the three clauses and say that by virtue of those ecologically sustainable forest management is any closer to being created or required than it was prior to the signing of the RFA. It is useful to compare clauses 62 to 64 with the clauses which pertain to the CAR Reserve system. Your Honour will see that quite more emphatic language is used in relation to those provisions, clause 48, for instance:

*The parties agree that the CAR Reserve system is to be established.*

Clause 49:

*The parties agree that the CAR Reserve system established will comprise -*

Clause 50:

*The parties agree that the CAR Reserve system meets JANIS criteria, sufficiently protects CAR values -*

Etcetera. There is no such language deployed in the clauses which deal with ecologically sustainable forest management and yet your Honour knows that the definition of Regional Forest Agreement requires each of the CAR Reserve system and ecologically sustainable forest management to be provided for. So that one would expect there to be a similar dealing with both concepts in the RFA if both were being treated identically in the document.

Now, further we say that there is another reason why both in respect of CAR reserves and ecologically sustainable forest management they are not provided for by the RFA and that is because both of them fall within that part of the RFA which is expressly said to not be intended to create legally binding relations. Now, we say simply this, that if something is required or if

something is established doing so by aspirational language and more by doing -  
or by having that aspirational language in a part of an agreement which is  
expressly said to be unenforceable and hence contains no guarantee and no  
prospect of a guarantee that the terms of the agreement will be adhered to  
5 cannot be said to require or establish.

It leaves it as a matter of discretion, firstly, for the State of Tasmania as to  
whether or not it does that which it says it will do in relation to the several  
clauses and, secondly, it leaves it then as a matter of discretion for the  
10 Commonwealth as to whether it will use any of the dispute resolution matters  
referred to in the RFA in order to try and coax the State of Tasmania to do that  
which it has said it will do albeit expressly having said that it will not be  
legally bound to do. We say that quite simply to express the mandatory  
requirements of what is necessary to establish an RFA as non-legally binding  
15 obligations flies in the face of what the intention of the legislature was in  
prescribing what an RFA ought be under the RFA Act.

If your Honour is against us as to the submissions we make in relation to this  
and accept the construction which is contended for by the State and the  
20 Commonwealth we still do not concede that in relation to ecologically  
sustainable forest management that what is comprised in clause 62 to 64 even  
still meets the definition of "provides for". We say that because clauses 62 and  
63 clearly do not even comprise planning towards, they are at best woolly  
statements of intention and clause 64 by picking up attachment 10 which is  
25 devoid of any content again does not plan towards ecologically sustainable  
forest management.

It simply aspires towards it without any meaningful content to any plan. Now,  
although this aspect of our submissions appears, if I may be so bold as to say,  
30 almost as the last gasp of our written submissions, your Honour will appreciate  
it appears at page 137 and following, if your Honour looks at the table of  
contents of the applicant's submissions your Honour will appreciate exactly  
where it fits into the argument. It is a potentially highly significant point.

35 Although the other parties, perhaps not each to the same degree, have chosen to  
structure their submission substantially around the question of whether or not  
there is an RFA, or perhaps more precisely whether section 38 applies as the  
initial argument, we say that the appropriate way to embark upon an analysis of  
the issues thrown up by this case is to firstly consider whether there is an  
40 action which creates significant impact. So your Honour will be see on the  
front page of the table of contents, under the bold heading Contravention of  
Section 18 of the Act, the two components of that. Because of course if your  
Honour were not to be satisfied that there was a contravention of section 18 of  
the Act, in the sense that there was either not an action, or that if there were an  
45 action it did not have significant impact, then your Honour may not then  
proceed to consider the RFA question.

However, your Honour will remember that if there is an action which has

significant impact, then, if you like, the defence which is relied upon by Forestry Tasmania of section 38 comes into play, and although our submissions deal initially with the "in accordance with" argument, if your Honour were to be satisfied that the Tasmanian RFA is not an RFA, then that, on one view at least, would be the end of the matter, in terms of considering the section 38 argument. So that if your Honour were to be satisfied that the RFA does not meet the statutory criteria then that puts an end to the section 38 argument, which is raised by the - by Forestry Tasmania. That is what we wanted to say by oral submission in relation to the issue 8.

10

I should, perhaps by way of foot note, refute some of the submissions that were put forward by the Commonwealth. Both in its written submissions and its oral submissions the Commonwealth has invited your Honour to look at what, subsequent to the RFA, has transpired seemingly, although perhaps the argument wasn't firmly embraced by the Commonwealth, as an aid to construction of what the RFA meant. Clearly that would be an impermissible exercise, to look at what in fact has occurred as an aid to construction. And perhaps it was offered as some form of comfort to your Honour that, even if the RFA didn't achieve a definition - or didn't achieve what the definition of RFA required, then it had in fact delivered it, but of course.

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HIS HONOUR: There is certainly some jurisprudence in the industrial relations area that one can't interpret an industrial instrument by reference to the conduct of the parties subsequent to its making.

25

MR TREE: Quite so. And - - -

HIS HONOUR: I think there is a Full Court authority in the Fire Fighters Union case.

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MR TREE: Yes. It is an uncontroversial principle. I am only raising this because the Commonwealth seems to have been inviting your Honour, perhaps by way of comfort, perhaps by way of construction, to at least look at subsequent conduct, including reports for instance as to the compliance with the RFA. Those sorts of matters can't assist your Honour. Can I then move your Honour on to the second aspect of the oral submissions which I wish to advance, and that is to deal with the issues of science, or some issues of science, which this litigation has given rise to. One will appreciate that Forestry Tasmania has, if not expressly then tacitly, sought to defend its operations by saying that there is, if you like, a seamless process which underpins forestry activities in this State.

40

Firstly they say that the prescriptions which are applied in relation to all coupes are scientifically based. So that is the first recourse to science which they have in this seamless process. Next they say that those prescriptions are applied, in the sense of selected and imposed, scientifically. Next they say that the efficacy of those prescriptions are monitored, and that compliance with prescriptions is monitored and audited, and then they seek to reassure your

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Honour by saying, well, any deficiencies in terms of either efficacy or in terms of actual application of the prescriptions, is then picked up by adaptive management, and fed back into this seamless circle, so that we have this perpetuation of perfection or perhaps increasing perfection.

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Now, your Honour will appreciate that all of that has a highly scientific basis to it, and what I wanted to do, although not exhaustively, is to demonstrate some of the substantial flaws which attend each and every aspect of this allegedly seamless process. Firstly, your Honour, I wanted to deal with the question of whether in fact prescriptions have an adequate scientific basis. Now, I accept that to a certain measure this is not an obligation of the respondent. The adequacy of prescriptions falls within the administrative arrangement that I will take your Honour to in a moment. It seems to primarily be a responsibility of either the Threatened Species Unit or the Forest Practices Authority, or perhaps if neither of those wish to assume responsibility, some other entity that no one was able to identify.

Perhaps it is fair to say that in relation to the eagle the prescriptions are most - or are best developed. And that in relation to the beetle the prescriptions are worst developed, although that wouldn't be entirely correct, because some of the prescriptions in relation to the parrot are so deficient that they beggar belief. Although we accept that the eagle prescriptions are, if you like, better developed than those of the other species, can I remind your Honour of what Mr Mooney said at page 772 of the transcript at about line 14. And if your Honour will just bear with me for a moment I will attempt to bring it up on my screen.

HIS HONOUR: Mr Tree, the parrots would be coming back to Tasmania would they not?

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MR TREE: Yes, your Honour.

HIS HONOUR: At the moment it might be prudent for people, as they come, to stand by with orange spray paint.

35

MR TREE: Yes, your Honour, yes.

HIS HONOUR: Thank you. Sorry, 772?

MR TREE: Yes, your Honour, and although your Honour may care to review the question which is at the bottom of the previous page, it is the answer which contains the relevant passages that I want to deal with. Top of the page:

45

*It can differ. It can be either greater or smaller -*  
this is the 10 hectare requirement -

*One is literally a theoretical exercise and one is a practical exercise.*

5 *Fire can affect a regeneration burn. There have been several cases of regeneration burns intruding, even destroying nest reserves. so that effect has been improving, but, well, I will have to be frank and say far slower than I would have hoped. How I come up with the 10 hectares was, if you look at, if you imagine a graph of the size of forest versus eagle nest success at 10 hectares the success drops right off. Above 100 hectares it may as well be infinite size. It doesn't make much difference. So between 10 -*

10 and I am not sure what is missing there. There should be I think 20 or perhaps 100 -

15 *hectares was quite critical. So that is why the original recommendations back in the very 90s or the late 80s actually were 10 hectares core, plus 10, to give the 20 hectares, the 10 being a bit of a buffer. That was rarely implemented, and in fact it was an original instruction that was rescinded because the industry wouldn't tolerate it, and it just wasn't working. So we worked out an experimentation system where we tried to encourage, wherever possible, to have more than 10 hectares, and it was that, based on what happens if you move the eagles, you will just as likely encounter them again and have another set of problems, and that can be a disruption to the logging operation, a problem for the eagles.*

25 He then descends into general policy in relation to that but it is clear that although there is a scientific basis to the 10 hectare figure, in fact Mr Mooney would be far more comfortable advocating 20 hectares but that that wasn't abandoned for scientific reason but rather, in his language, "Because the industry wouldn't tolerate it." Can I then move on to the parrot and ask your  
30 Honour to look at the relevant Court book which contains the prescriptions? If your Honour will just bear with me a moment. Contained in Court book volume 5, in the affidavit of Mr Wapstra.

35 And your Honour will remember that the process of obtaining a prescription related to or arose from an interrogation of a database, and your Honour might remember Mr Wapstra demonstrated that by a projection on the screen. The swift parrot prescriptions are very brief. There are, I think, a total of nine recommendations - well, there are said to be nine recommendations in the sense that one can go to recommendation 9 but in fact, for reasons explained by  
40 Mr Wapstra, because of the format of the threatened fauna adviser, there aren't, in fact, a total of nine recommendations.

There are, I think, only five. Those recommendations form two groups. Recommendations 1 and 2 deal with foraging habitat. Your Honour will see  
45 the scenario for recommendation 1 is globulus and shrubby ovata viminalis  
- - -

HIS HONOUR: What page is that?

MR TREE: I do apologise your Honour, 2073. So the scenario, ahead of recommendation 1 is grassy globulus forest and shrubby ovata viminalis, which, your Honour will be aware from the various witnesses evidence, 5 comprises foraging habitat. And similarly when one looks at recommendation 2, one sees that it is generated in relation to a scenario of grassy globulus forest between five and 10 kilometres of the coast. And your Honour will see that the prescriptions which are then imposed deal with the potential preservation of that forest, ie the globulus ovata viminalis rather than being directed towards 10 the preservation of any nesting habitat.

Nesting habitat is dealt with by recommendations 5, 8 and 9. Recommendation 8 and 9 may be dealt with swiftly because they pertain to two specific locations, the Gog Range and Badger Range. However, in relation to nesting 15 habitat on the east coast of Tasmania - and neither of those two specific locations are there - it is only the scenario when generates recommendation 5 which has any potential application. And your Honour will see that the scenario generated there is in relation to known nest sites within 500 metres of an operation.

20 Now, it will be immediately apparent that there is the most glaring deficiency in these prescriptions, in that, unless and until there is a known nest site there will be no generation of a prescription which will even require, even require there to be any form of survey or searching for nests. So that potential habitat, 25 where known nest sites have not yet been identified, will not even fall for consideration by way of generation of a recommendation. That is a scientific flaw in the prescriptions which is vast.

Now, I am reminded that if your Honour were to - I won't take your Honour to 30 it - but if your Honour were to contrast that with the New South Wales position, which is contained in exhibit CN, albeit in relation to a different species of parrot, your Honour will see that there are extensive prescriptions which are designed to, firstly ensure that potential habitat is identified.

35 And, secondly to then preserve the potential nesting habitat. Now I accept that when one gets a little further into recommendation 5 one sees the use of the word suspected nest site - that is in the second paragraph after the italics - but with respect, that is not the scenario which will generate this recommendation. And in any event, there isn't there reference to potential habitat, one needs to 40 suspect an actual nest site. Now, we simply say that to suggest that there is an adequate scientific basis underpinning the prescriptions in relation to the parrot is patently incorrect.

45 We then go to the beetle and your Honour will find the prescriptions in relation to the beetle at page 2066. Your Honour will remember that I cross-examined Mr Wapstra in relation to the inadequacies of these prescriptions. One needs to only consider them internally again to realise that they are wholly deficient. For instance, one looks at recommendation 6, which is generated by a fuel-

reduction burning scenario and we see that burns are said to avoid or should avoid drainage lines and gullies. And particularly importantly, burning should occur outside of the active period of this species, ie November to February.

5 However one searches in vain for restrictions of that kind in relation to burning in any of the other scenarios which generate recommendations. Indeed, if one looks at those one can see that it is perfectly permissible under recommendation 2, which pertains to dry forest with damp or wet forest and drainage lines - bottom of the page - low intensity burning is acceptable, but  
10 should avoid retained areas wherever possible. No restriction on the burning to any particular months. No advertence to the movement of the beetle at all and indeed there is no restriction or no absolute prohibition at all.

15 Ironically, when one looks at the recommendation 3, which is generated for wet or damp forest, one sees that there is no restriction on burning at all. So that low intensity burning would be perfectly permissible at any time of the year, it seems, and indeed - although it may be unlikely in a selective logging operation - we see that there is no absolute restriction on there being a high intensity burn. So that there are grave deficiencies simply by reference only to  
20 an analysis of the prescriptions themselves, grave deficiencies in the science which underpins.

Now, that is the first matter that I wanted to deal with, the inadequacies in relation to the prescriptions. Now, there are of course other illustrations which  
25 I could take your Honour to, for instance the inadequacy of stream-side reserves, they are only 20 metres wide and hence the drying effect extends 10 metres in from the edge so therefore they are useless. And there are other prescriptions which are similarly useless in those linear reserves. The densities of beetles make them most unlikely that there is going to be a real possibility of  
30 there being breeding populations or if there, that they will be able to meet each other. There are all sorts of difficulties with the prescriptions, but I don't wish to deal with them exhaustively.

What I then wanted to do, your Honour, was to remind your Honour of the  
35 protocol which had been evolved in order to accommodate the concerns of the several agencies which deal threatened species particularly the managements systems. That protocol or agreed procedures is in the affidavit of Dr Whittington, and at page 2426 of Court book 5. Can I just give your Honour a few moments to familiarise yourself again with this document? You Honour  
40 will remember that it dealt if you like with a co-operative strategy between various agencies and specifically dealt with how management prescriptions in relation to fauna, clause 3.1, and flora, clause 3.2, would be implemented.

And importantly clause 7 dealt with the monitoring efficacy of prescriptions,  
45 although I will return to that in a moment. What I wanted to specifically focus on is the deficiency which I was I think acknowledged fairly by both Dr Whittington and Mr Wilkinson in relation to this protocol, is that in clause 3.1.4, 3.1.5 and 3.1.6 it provides a mechanism by which the whole process of

management prescriptions as contained and prescribed in the threatened fauna adviser can be subverted:

5                    *A forest practices officer will consult in the threatened fauna adviser to determine the appropriate endorsed management prescription and will seek further specialist advice from the senior zoologists of the Forest Practices Board where required by the provisions of the adviser.*

10                  3.1.5, or perhaps I should say this in relation to point 4: that seems fairly sensible. When we go to clause 3.1.5 however, we see that there is again a requirement to notify. And then we come to clause 3.1.6:

15                    *Where a forest practices officer seeks further advice for a specific operational area in accordance with the threatened fauna adviser -*

so that is the first limb of clause 3.1.6, where the officer seeks further advice in accordance with the adviser. And your Honour will remember that there are numerous occasions in the adviser where that is required:

20                    *... or where endorsed prescriptions are not appropriate for an operation it is left unspecified as to whose opinion that is and against what criteria the inappropriateness is to be generated. Then in either of those two circumstances, the senior zoologist will consult with DPIWE to determine an appropriate management prescription.*

25                  Now, if that were all it said then perhaps it would be unusual but not particularly exceptional. We then see where the potential for subversion arises:

30                    *This should involve consultation and negotiation amongst the specialists, the forest practices officer and the land owner and may involve field inspections or surveys. Advice will be provided within six weeks, otherwise the officer may proceed on the basis of best available information.*

35                  So that it then positively encourages negotiation between, amongst others, the forest practices officer and the land owner, accepting of course that the forest practices owner - sorry, forest practices officer in many occasions is likely to be an employee of the land owner. Now, your Honour will no doubt remember that in relation to coupe 17E and 19D, that negotiation ensued with what can only be described as shameful results, and I will take your Honour to that in a little moment. What I wanted to do though was to stay with this document to identify some further issues which concern, or ought concern your Honour in relation to this litigation, and particularly clause 7 which provides for monitoring of efficacy:

45                    *The board in association with DPIWE will monitor the efficacy of management prescriptions through a co-ordinated approach to research.*

Now, your Honour might remember that there was a concession by every witness to whom this was put that there was no published research in relation to the efficacy of management prescriptions, and although it was hinted at by Dr Whittington that he thought there was some research being undertaken in the threatened species unit in relation to the parrot and the eagle. There was no suggestion at all that there was any even plan to monitor the efficacy of management prescriptions in relation to the beetle. So not only do we say that the prescriptions themselves aren't scientifically based, we see that the procedures by which they stand to be applied or alternatively not applied contain real flaws within them.

I should give your Honour the transcript reference to Dr Whittington's evidence in relation to his absence of knowledge in relation to efficacy of prescriptions. That is at page 1594 and following for about two pages. However, it is not merely the flaws in the prescriptions themselves or in the administrative arrangements which see them applied which are of grave concern, but it is the application of those prescriptions themselves which is in this litigation patently flawed. And is the parrot which in this case assumes great significance. Your Honour might remember that in November 2001 Mr James undertook a survey of the Wielangta forest generally.

Your Honour will find his report and map in the affidavit of Mr Miller. That is at Court book volume 4. Your Honour might remember that Mr Miller's affidavit is the one which has the annexures around the wrong way so that annexure 1 is at the back and annexure 44 is at the front. And I want to direct your Honour initially to annexure 19 which commences at page 1510. Your Honour can see from page 1510 that this survey was conducted in November 2001 and importantly it was conducted over a period of two weeks in five locations. The surveys aims are said:

*To provide information so conservation values may be retained where appropriate.*

Your Honour can see that the coupes that were the subject of the survey are clearly identified, relevantly in relation to this litigation it is at the top of page 1511, Wielangta Hill, and I don't stay to read all of that paragraph but I do direct your Honour's attention specifically to about the middle of it where it says:

*This area was contiguous with areas of frequent activity adjacent coupe 17E and 19D where juvenile birds were located. Juveniles were also recorded just outside the eastern end of 17E.*

And the summary is critical:

*Surveys have revealed the Wielangta forests are extensively used by swift parrots. These forests are perhaps the breeding stronghold for*

*the species, a suggestion supported by Brown and Brereton. To some extent it appeared swift parrots were to be found to be using any area if a long enough period of time was spent in waiting. Parrots are quiet around nest sites so any number of nests may have been walked past.*

5

And Mr James gives an illustration of that. Mr James prepared a map which was in evidence, which is in evidence before your Honour. It is exhibit MKM20 and your Honour will see that there the green shading has been applied to extensive areas of coupe 17E and some areas of coupe 19D, the two very coupes that apply in this litigation. Mr Miller conceded that there was nothing ambiguous in this report, nor was there anything ambiguous in the recommendation which ensued from Dr Munks. That was of course the official reply form which under the threatened fauna adviser and as contemplated by the protocol I took your Honour to a few moments ago, specifically contemplated would be generated. It is at page 1504 and your Honour will see that again this is an unambiguous document.

*A meeting was held on 20 December 2001 between Mick Miller, Angela Illiopoulos from Forestry Tasmania, Derwent District, Peter Brown from the Threatened Species, DPIWE and myself to discuss the outcomes of a survey completed by TSU consultant zoologist Dave James.*

Next paragraph:

25

*Frequent swift parrot activity was recorded in parts of this coupe, see green areas marked on survey map.*

Now, I pause to note that this is in relation to coupes 12F and 13D. Your Honour will find a very similar document in relation to coupe 17E at exhibit AQ. In material terms it is identical. Bullet point, sorry the paragraph before the bullet point:

*The following recommendations to protect this nesting habitat in accordance with the recovery plan for the species which was discussed and agreed in the meeting.*

The first bullet point:

*The areas of high swift parrot breeding activity marked as green on the survey map in the adjacent coupes 13B and 12D -*

And again your Honour can transpose into that the two coupes the subject of this litigation -

45

*are to be excluded from any future harvest operations.*

Now, can I just take your Honour back for a moment to the prescriptions which

prevail in relation to the swift parrot. They are in the same Court book that your Honour is presently in - no, I tell your Honour a lie - they are in Court book volume 5 and at page 2074. Your Honour will see that recommendation 5 which dealt with known nest sites delivered a level of comfort in relation to a person who was looking at a site in these terms:

*Known nest sites -*

This is the third paragraph underneath the italics:

10

*Known nest sites on State forests have been protected under the Forestry Tasmania Management Decision Classification System. If new sites are found they will be added to this system.*

15 Now, your Honour might think there is nothing ambiguous about Mr James' report, nor about recommendation 5 which mandates that new sites will be added to the Management Decision Classification System. Of course that is not what occurred. One sees the extraordinary arrogance demonstrated in response to this report on natural cultural values and page 1507. Now, even  
20 accepting that this is an email generated late on Christmas Eve one simply cannot find any logical scientific reason for the view which is articulated there:

*Please find email from Sarah re a meeting on 20.12.'01. As at close of business today the map had not arrived. In relation to her recommendation to add these areas to MDC protection -*

25

Which is of course what recommendation 5 under the threatened fauna adviser mandated -

*I don't think we want to do this. Reasons being that if further studies are undertaken and other habitat is discovered then it may emerge that some of these may be more important for reservation.*

30

One doesn't see that permitted under recommendation 5. He continues:

35

*Besides I don't think we would want to reserve areas prior to any management agreement process coming into being. However, we will in the interim stay out of these areas as per our discussion on the 20th.*

40 Well, of course that is a transmogrification as to what occurred on the 20th. It was an agreement and indeed this witness said as much, in those exact terms, in the body of his affidavit:

*However, I suggest at this stage to show them within MDC as conditional instead with special management zone for research. I've discussed the above with Steve -*

45

That was his line manager -

*and he endorses this approach.*

5 Your Honour will notice that that was carbon copied to Mr Haywood. He of  
course was the person who certified plan 17E and 19D. And your Honour will  
no doubt remember what occurs thereafter. A second report if one can accept  
that term as comfortably applying to it, is generated. That is at page 1502 -  
sorry, 1501 in fact. This is the Ziegler report. It arises out of two days of  
assessment of various areas on 14 and 20 November 2002, and it then makes  
10 certain recommendations in relation to the two coupes which at least  
immediately concern your Honour in this litigation. Coupe 17E:

15 *Creation of a wildlife habitat strip to protect high quality nesting  
habitat and to give connectivity to the existing MDC protection and  
former services.*

And coupe 19D:

20 *Place a special management zone for the swift parrot over the areas  
that swift parrots were observed nesting.*

Now, it is coupe 17E that represents the greatest disgrace in this litigation,  
because all your Honour needs to do is to make even the most cursory  
comparison between the David James map which is exhibit MKM20 and the  
25 map identifying the wildlife habitat strip which is appended to the Forest  
Practices Plan to realise the grave deficiencies, the grave deficiencies in that  
Forest Practices Plan. The relevant plan appears at page 902 in volume 3, and  
your Honour will see that what started in Mr James' map as a large area of  
restraint has been contracted dramatically into a skyline constraint and five  
30 wildlife habitat clumps.

Now, your Honour will be aware that there has been an extensive process of  
discovery which has underpinned the applicant's preparation for this trial and  
that, on occasions, that generated considerable contention between the parties,  
35 and it would be we submit inconceivable that the applicant could have known  
prior to the discovery process or indeed prior to the receipt of these several  
affidavits of the process by which the selection of skyline constraints and  
wildlife habitat clumps for coupe 17E had been arrived at. So that it is  
coincidence that the two coupes which this litigation primarily focuses  
40 attention upon have upon scrutiny of the process which caused the reservation,  
or informal reservation of areas in them, scrutiny of that process has disclosed  
such vast flaws in the allegedly scientific approach of the respondent in the  
adoption rather than the implementation, the adoption of appropriate  
prescriptions.

45 It is breathtaking to think that for whatever reason the respondent simply chose  
to ignore a recommendation from the senior zoologist, a recommendation  
which by terms of the adviser itself required the nests to be placed upon special

management zones, simply declined to do so because they "didn't want to". Even more extraordinary, your Honour, is that coupe 17E was logged after this litigation had been filed. That then begs to question what would happen if there had been no scrutiny at all in relation to coupe 17E, if that is what the respondent is prepared to do knowing that scrutiny will be directed towards it in relation to this particular coupe. Can I remind your Honour, please, of the lame - I use a kind word - the lame explanation of Dr Whittington as to why it is that this shameful consequence may have ensued. At page 1602 of the transcript your Honour will see this at line 4:

5  
10  
*And in formulating the plan, the speechless management prescription arrived at by consultation under the protocol is intended to form part of the prescriptions, and so that is what the agreed procedures indicate?---Yes.*

15  
He continues:

20  
*The agreed procedures don't direct the Forest Practices Authority or any other people to adopt specifically what we say?---They're arrived at through negotiation.*

He then repeats:

25  
*They don't direct that the plan has to follow our advice. It's arrived at through negotiation. So we could start with the position through negotiation. I can be refined as more knowledge comes to the table.*

30  
*So does that mean in substance the advice can just be ignored?---No, I didn't say that.*

35  
*It just doesn't need to be followed?---I said that as information and advice comes to the table, the advice can better reflect better information, and it's a negotiated process. The agreed procedures are quite clear on that.*

40  
*Do I understand that Forestry Tasmania is on your understanding not obliged to adopt a prescription which has been arrived at in consultation under clause 3.6.1 of the protocol?*

He answers:

45  
*Saying that the plan that is implemented is what needs to be followed. The processes of developing a plan, as our agreed procedures say, there is a negotiation. There is a discussion amongst specialists on the advice.*

*Is Forestry Tasmania free to ignore the specialist management prescription provided under the protocol, Dr Whittington?---I don't*

*think I said.*

*Well, I am asking you the question, is it free to?---The plan has to be complied with.*

5

The answer to the question seems to be so long as there is negotiation, Forestry Tasmania can thereafter do whatever it feels like, which is exactly what it did in relation to coupe 17E. Similarly, your Honour, in relation to the beetle I don't stay to take your Honour to chapter and verse through the prescription in relation to it, but your Honour will remember that Mr Wapstra had to concede at page 1895 of the transcript and following, that in coupe 17E the prescriptions as in fact apply or as in fact are selected, permitted the burning of wildlife habitat clumps and streamside reserves. So there is no restriction on the burning of them. And this is all part of Forestry Tasmania's seamless scientific process which underpins the protection of threatened species in this State.

20 Could I then move, your Honour, quickly to the efficacy of the prescriptions and remind your Honour that the evidence of Dr Whittington was that there was no real research into the efficacy of prescriptions. Of course that was one of the things which the protocol by clause 7 specifically required to occur, but needless to say it hasn't. There is then the issue of compliance with the prescriptions themselves, so that it isn't just a process of imposing the prescription, but rather there needs to be compliance with the prescription itself. Strictly speaking, this is not a scientific matter in that it is a matter of how that scientifically generated prescription is imposed on the ground by foresters.

30 But can I simply remind your Honour again that in relation to the coupe 17E, the number of non compliance issues in relation to the parrot alone is breathtaking. Your Honour might remember that the road to the coupe passed within but a few metres of a known nest site. And your Honour might remember that on the day of the view, we actually walked from the road to that nest site. So that is clearly a road that is placed far too close to the nest, and it is a known nest.

40 Secondly, there is the incursion into the reserve, so even though there was a reservation area in coupe 17E designed to protect the swift parrot, or at least habitat for it, even that was the subject of an incursion and your Honour might remember there was an investigation and a fine imposed on Forestry Tasmania by the Forest Practices Authority. And as if that is not enough your Honour might remember the road out of coupe 17E was constructed so that it actually left at an area, or at a point which was not on the approved forest practices plan, it went straight through another area of swift parrot reserve area into another coupe.

45 So that although it is not strictly speaking a scientific issue, the reality is that in the coupe that was particularly the subject of these proceedings in relation to

the parrot, there have been at least three major deficiencies in terms of implementation of the prescriptions. Forestry Tasmania seeks to reassure your Honour by saying, "Well, that's all right we'll pick that up in the audit." And although I don't intend to take your Honour through the cross-examination of Mr Wilkinson in relation to audit, your Honour will remember there were two grave deficiencies with the audit process.

The first is, breathtakingly, that although the audit is of a system of which Forest Practices Authority is at least the titular regulator. The audit of that system is conducted by auditors, one of which is an employee of the authority and in the past the employee auditor, for whatever reasons, had been sacked by the authority. Or if that is too strong a term had had his employment terminated. Not only that but there are other deficiencies within the audit, your Honour might remember that the overall audit score is arrived at by treating issue, the subject of an inquiry on the audit, equally. So that a ditch dug in the wrong spot is treated as identical weight as having chopped down a wedge-tailed eagle's nest. So your Honour simply can't be assured that the audit process that underpins all of this has any real satisfactory basis.

Your Honour, there is one final issue upon which to put it bluntly I wish to take a swipe at the science which underpins Forestry Tasmania's case and that isn't so much the science which underpins their prescriptions or the selection of them, or adaptive management which they say arises out of the deficiencies identified. But that is the science they have used in this very case. We submit that the science which their alleged independent expert employees - accepting that that term is a conflict within itself - have brought to bear in preparation for this case, has been embarrassing. It has been embarrassing. The most extraordinary illustration of this is the model which was formulated by Dr Grove in relation to course woody debris.

HIS HONOUR: Mr Tree, is this an issue, being your final issue on science that is going to take some time?

MR TREE: It won't take a long time, your Honour, but it will take a few minutes, your Honour, yes.

HIS HONOUR: I might adjourn now until 11.30.

**ADJOURNED** [11.15am]

**RESUMED** [11.32am]

HIS HONOUR: Mr Tree, you were taking me to Dr Grove?

MR TREE: Yes, your Honour.

HIS HONOUR: Yes?

5 MR TREE: I was going to remind your Honour that to save your Honour's  
pen in fact the passages which demonstrate the embarrassing science which  
underpinned his model are all referred to in the footnote, footnote 169 at page  
72 of the applicant's final submissions. I simply stay to remind your Honour  
that Dr Grove was proffered by the respondent as an expert in relation to  
10 coarse woody debris. And the purpose of his evidence was ostensibly to  
demonstrate to your Honour, in order to persuade your Honour to make a  
finding of fact, that although it might fly in the face of commonsense, logging  
was good for the beetle because there would be further resources of coarse  
woody debris into the future and that those could be continued on a sustainable  
basis into a time frame of 220 years.

15 However, your Honour might remember that the model was demonstrated to be  
farcical. It assumed that there would be no further harvest within the 220  
years; that there would not be any further fire event in that time; didn't factor  
in any heavy machinery; didn't factor in a reduction of debris by post harvest  
20 burning; and although it was conceded by Dr Grove that the decay class of  
logs and the diameter of logs were important in terms of the habitat of the  
beetle, didn't attempt to demarcate between those resources. So here was a  
very senior scientist within the respondent's ranks produced as an expert,  
produced as an independent expert, produced so as to persuade your Honour to  
25 make findings of fact based upon his evidence which would support the  
respondent's case.

It is complimentary to that model to describe it as useless. It was worse than  
that, it was a deliberate attempt to mislead your Honour, we submit. Now, true  
30 it is that it may have only been within Dr Grove's knowledge that the  
assumptions of the model were hopeless and true it is that those to whom he  
proffered the model, whether by way of peer review or in anticipation that it  
might find its way to this Court, may have been to use your Honour's language  
indeed at the time, blinded by science. But the reality is that the concessions in  
35 relation to the utility of that model were not volunteered by Dr Grove, they had  
to be extracted.

Similarly, your Honour, although I don't wish to ignore all of those whose  
science could be the subject of legitimate criticism, do wish to dwell upon a  
40 second alleged independent expert employee of the respondent and that is Dr  
Roberts. Your Honour might remember that Dr Roberts and to a large measure  
Dr Laffan and Dr Grove were all trotted out by the respondent in what we say  
was nothing more than a blatant effort to discredit Dr McQuillan. As we say in  
our written submissions, ultimately not much of what Dr Laffan or Dr Roberts  
45 had to say is going to trouble your Honour because it was just an attempt to  
destroy the credibility of Dr McQuillan by attacking some of the aspects of the  
science which he relied upon.

Nonetheless it is illustrative to look at the approach, allegedly scientific approach, that Dr Roberts brought to bear in that task. Your Honour might remember that she used not actual data for rainfall, but SILO data, some computer-generated data. And your Honour might remember that at page  
5 2231, I don't ask your Honour to turn to it, but at page 2231 to page 2234 she was cross-examined about the difference between that data and trends shown within it and data which was actual data derived from both Sorell and Orford, adjacent population centres.

10 And, firstly, she had to concede that she hadn't used the SILO data or hadn't generated SILO data in relation to either of those two known locations in order to check whether the SILO figures were accurate for South East Tasmania. That is the first deficiency. She just assumed the data was correct but  
15 undertook not even the most cursory efforts at establishing whether or not in relation to known data the projected data was correct or even within acceptable parameters, but more the trends demonstrated with those actual figures in relation to Sorell and Orford showed consistent seasonal variations over time which were not demonstrated by the notional projection in relation to  
20 Wielangta only some 26 kilometres distant.

And we respectfully submit that the absence of even the most cursory attempt to check trends - because of course that is what her evidence was all about, her evidence was all about a refutation of Dr McQuillan's suggestion that there was reduced rainfall - or was the reducing rainfall on the area. The absence of any  
25 cursory attempt to even check that trend - or the trend shown in the SILO data against actual data demonstrated a wholesale failure of even the most basic scientific approach.

As if that wasn't enough, your Honour might remember that Dr Roberts was  
30 forced into what must be an exceptionally embarrassing position for an alleged scientist and that is that she had sought to refute a statement by Dr McQuillan by reference to a report of a Mr Nunez - N-u-n-e-z. However, she had only had regard to an extract of that report and when shown that which is now exhibit BW - when shown that and shown the full text of what Mr Nunez had,  
35 in fact, written had to concede that the passage that she had put into her report was not an accurate reflection of that which was in the whole Nunez report. Your Honour will find this passage of the evidence at page 2038 to page 2039.

She had to concede that it was embarrassing for her not to have gone to the  
40 principal report. As if that it not enough we then look at her science in relation to her assertions that moisture levels in relation to reserved areas - the edge of reserved areas are not markedly different from moisture levels within the reserves. Your Honour might remember that at page 2245 of the transcript she had to concede that it would be very simple to actually undertake an  
45 experiment using a penetrometer or some other similar device to actually record in a scientific manner what the actual moisture levels were. She conceded that it was no great effort to do so.

But your Honour might remember that the method that she preferred was some anecdotal evidence that had been given to her by another Forestry Tasmania employee about sticks - dehydrated sticks that were used to gauge whether or not a particular site was ready for burning or not. Not research she had  
5 undertaken herself, not using a scientific method that was designed to measure actual soil moisture, but rather anecdotal evidence derived from the use of a particularly primitive scientific mechanism intended to achieve results for a different purpose. Your Honour, this is the quality of the science that the respondent has paraded not only for your Honour's edification but for the  
10 world's edification in support of the respondent's case or in opposition of the respondent's case.

It is glaringly deficient, it is embarrassing, and it can give your Honour no confidence at all that the science which underpins any of the process - alleged  
15 process for protecting threatened species in this State is ever any better than that. It is interesting, your Honour, to look at what Dr Grove had written in relation to saproxylic insects at a time when he was an independent academic, not in the employ of Forestry Tasmania, and with no financial association with the forest industry. Your Honour will find this at exhibit CG, which is no  
20 doubt a peer reviewed, in a proper scientific sense, academic article written by Dr Grove.

And I want to take your Honour to page 13 of that document to remind your Honour what Dr Grove said then prior to his involvement with Forestry  
25 Tasmania and the forest industry. Your Honour might remember that he was at that stage based in North Queensland and was considering forestry impacts upon rainforests there and the article looked at the likely impact of those by reference to temperate experiences in European forests. And your Honour might remember he concluded that article in the relevant body of the text with  
30 these words, the second column on page 13:

*But unless models of forestry are adopted that cater for the maintenance of sufficient mature timber habitat then the chances are that more and more species will ultimately face extinction.*

35

And this is the rub:

*However, even the most conservative silvicultural system and even the most innovative management technique aimed at recreating old-growth structural conditions in managed forest would still be highly unlikely to cater for all saproxylic species.*

40

As Hunter in 1990 concluded:

*The best way to manage for old growth is to conserve an adequate supply of present stands and leave them alone.*

45

Although that is the article that is specific to species dependent upon coarse

woody debris we respectfully submit that there is little that would impede the extrapolation of that statement of general principle to the other species in this case. Try as much as you like in your silvicultural regime to ameliorate the effects of logging but at the end of the day if you want to preserve threatened species don't log. I think Ms Mortimer has got some further submissions for your Honour.

HIS HONOUR: Thank you, Mr Tree.

MS MORTIMER: Your Honour, can I, before I begin my submissions, hand up to your Honour, and pass to our learned friends, a document for which I am very grateful to my learned junior, Ms Simons, for working very hard last night to prepare. We have prepared a corrected version of our submissions.

HIS HONOUR: Yes, thank you.

MS MORTIMER: I will hand that up and explain to your Honour what is in it. What we have incorporated into that document, your Honour, these things, corrections that we found ourselves, which are - or made ourselves, which are reflected in the table that I gave your Honour yesterday. So all those have gone into this document. It is a marked up version, so everyone can see what we have done. That is the first thing that has gone in. The second thing that has gone in are the entries from table 2 in the Commonwealth's document, all the transposed transcript references. They have gone in.

And then in relation to table 1 of the Commonwealth, adopted by Forestry, those criticisms with which we agree we have incorporated as well. Now, I can inform your Honour that we are not quite finished with that task of responding to each and every entry in that table 2. I had hoped we would be done with that this morning, but correcting this document has occupied our time to some extent. So we are not quite finished with that, but we anticipate we will be finished with that by probably the close of today. But we will have that document to hand up to everyone else. So those are - - -

HIS HONOUR: Do you expect to finish your submissions by the close of today?

MS MORTIMER: Oh, yes, your Honour.

HIS HONOUR: Yes.

MS MORTIMER: And if it is of assistance to either our learned friends or your Honour we can send around an electronic version of this document. Now, your Honour - - -

HIS HONOUR: I just mentioned the question of finishing by the close of today, because normally on the day that I would be returning to Melbourne I would start at 9.15, but I inadvertently scheduled a mention of an industrial

matter for 9.30 tomorrow. So if the case did go on it wouldn't be a problem if it resumed at 10 if it needed to. It would still finish well before 3? Would that be - - -

5 MS MORTIMER: Well, I would certainly be hoping to finish well inside today, your Honour.

HIS HONOUR: Thank you.

10 MS MORTIMER: Your Honour, where I left off in our oral submissions yesterday was having taken your Honour through about three construction questions, and addressed some issues in response to submissions made on behalf of the Commonwealth. And one of those issues, your Honour will recall I hope, is the question of how far in the construction exercises your Honour  
15 ought go in looking at the biodiversity convention. And I just want to return to that specifically, because I have made some submissions about what we say the correct approach is, in terms of legal principle, and now I want to make a specific submission about how in this case we submit your Honour can use the biodiversity convention.

20 Your Honour will find that convention in our folder of authorities behind tab 24. What we have annexed, your Honour, are the front pages, the print out from the DFAT treaty data base, which recites all the relevant details about where the treaty was done, when it was acceded to, ratified, all those things,  
25 and then it reproduces the treaty. Your Honour, our submission is that Australia's international obligations under this convention can be used to confirm the applicant's construction of two things. Firstly, the construction of significant impact in section 18, as including cumulative effects.

30 And secondly, in confirming the construction of "in accordance with" in section 38, as meaning in compliance with, rather than just that something exists. Now, the specific international obligations which Australia has agreed to in this treaty on which we rely are mostly contained in article 8. There are some relevant parts, your Honour, in the preamble, if I just direct your  
35 Honour's attention to that. On the second page of the print out the three entries at the top of page 2 of 23, noting that it is vital to three things:

*Anticipate, prevent and attack the causes of significant reduction or loss of biological diversity.*

40 Noting also that there is a threat of significant reduction or loss of biological diversity where there is lack of full scientific certainty, and the rest, the precautionary principle, your Honour. Noting further that the fundamental requirement for the conservation of biological diversity is the in situ  
45 conservation of eco-systems, echoing, your Honour, what Mr Grove was saying in the article that my learned friend, Mr Tree, took you to. But the specific obligations on which we rely your Honour will find in article 8, which is all about in situ conservation. Article 8, paragraph C, imposes an obligation

on states parties to regulate - that is on page 5 of 23, your Honour, 8C:

*An obligation to regulate or manage biological resources.*

5 Now, that phase is defined in the treaty to include populations important for the conservation of biological diversity. That is not an aspirational obligation, your Honour, those verbs, regulate or manage, they are practical and real obligations, and they support our construction of section 38. And D, 8D:

10 *Promote the protection of eco-systems, natural habitats and the maintenance of viable populations of species in natural surroundings.*

Again, in our submission, that is an obligation assumed by Australia to maintain in fact viable populations, not to plan it, or think about it. Article 8L:

15 *Where a significant adverse affect on biological diversity has been determined -*

no, I withdraw that, your Honour. 8K I should have gone to first:

20 *That the concept of protection, this is an obligation to develop or maintain necessary legislation.*

25 Now, this of course is the obligation, we would submit, on which the Commonwealth founds the exercise of its external affairs - in promulgating the EPBC Act, and what is the concept it talks about there? Protection of threatened species and a population. And, in our submission again, that is when it is looking to the development and maintenance of legislative and regulatory provisions it is looking at regulating what people are doing, not plans. 8L, this is again an obligation about doing things that have a real effect. 30 It is an obligation to regulate or manage relevant processes or activities that have already been identified as having a significant adverse effect.

35 Now, that needs to be read, your Honour, with article 7, because article 7 is the obligation imposed on states parties to do that very thing, to identify components of biological diversity that are important, monitor what is happening to them, identify processes that might have adverse effects, and do something about it. And that is exactly what the listing of threatened species is designed to achieve, because it is by that very listing, in our submission, that 40 the Commonwealth performs this obligation of identifying components, populations in Australia's ecosystem which are at risk, and identifying what has to be done to protect them. So all those articles, in our submission, support the construction that we put forward of section 38. Article 14(1)(a) is the other one on which we specifically rely, and this is an article that:

45 *Imposes an obligation on states parties -*

I am just reading from (a) -

*to introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects -*

5

this is on page 8 of 23, your Honour -

*significant adverse effects on biological diversity, with a view to avoiding or minimising such effects.*

10

15 So again this is one of the obligations to implement a system such as the EPBC Act. But what, in our submission, this obligation requires is that the system is introduced, and we emphasise these words, with a view to avoiding or minimising such adverse effects. And that again is speaking to a real and practical outcome of actually achieving either the avoidance of adverse effects or the minimisation of them. So again that supports our construction of section 38.

20 The other thing in our submission that this particular article supports, and your Honour will notice that the convention uses this phrase "significant adverse effects" and the phrase that has been picked up and imported into the domestic legislation is "significant impact". But when in our submission those two phrases are compared, what the phrase "significant adverse effects" confirms is that no narrow meaning should be given to "significant impact".

25

30 And it can include cumulative impacts. Because those kinds of impacts are quite capable of being a significant adverse effect. And so the language in the convention pursuant to which Australia has assumed the obligations that it implements talks of "adverse effects" and the choice of the language by Parliament in Australia of "significant impact", in our submission, ought to be construed consistently with it, and not narrowed down to something that excludes cumulative impacts. So that is the way that we submit the biodiversity convention can inform and assist your Honour's construction of those two aspects of the EPBC Act.

35

40 I want to move now to some other submissions. I have a couple of short submissions to answer things that are in, principally, the respondents reply submissions and then I have got two major topics to deal with, your Honour, and then I will be finished. There is a submission, your Honour, made both by Forestry Tasmania and by the Commonwealth at various points that there has been a failure to particularise things by the applicant. Or that the applicant hasn't pleaded something and it is a particular complaint that is made the respondent in its reply submissions at paragraph 167 about our arguments about clauses 70 and 96 of the RFA.

45

Just perhaps if your Honour refreshes your memory and looks at paragraph 167 of the respondents reply, particularly the last sentence at the top of page 80 where the respondent submits:

*This argument is not part of the pleadings and should not be entertained by the Court on that ground that even if it is justiciable.*

5 Your Honour, there are no pleadings in this case. This is a case that was commenced by application and affidavit and in our submission each and every of the arguments that we have made in our written submissions are comprehended within the application, and the argument that we make about clauses 70 and 96 fits squarely within the ground of the application that says:

10

*That the forestry operations are not in accordance with the RFA.*

And that is the short answer to this point.

15 HIS HONOUR: More importantly for present purposes within the amended agreed list of issues.

MS MORTIMER: And it is in the amended agreed list of issues, your Honour, and the questions of recovery plans and the questions of the adequacy of the prescriptions have both been explored exhaustively in the evidence. The next point I want to deal with, your Honour, is something by way of oral submissions about witnesses and divide into two parts. I want to make some submissions about the species experts, so to speak. And I want to make a submission in response to what seems to have occupied vast amounts of time in written submissions, Jones v Dunkel.

25

HIS HONOUR: Yesterday you referred to something about a reference to the attorneys. Where was that in the respondent's submissions? Can you remind me where that was?

30

MS MORTIMER: A reference to?

HIS HONOUR: The attorneys. Notice to the attorneys on a constitutional point.

35

MS MORTIMER: Yes. 78B. Well, it says 73B and I took that to be a typographical error and that there was an assertion - and I am very happy to stand corrected if I have misunderstood the respondent's submissions - there is an assertion that we are somehow raising a constitutional issue. Now, I will just find that, your Honour. Paragraph 56 is the conclusion of it. I assume it should be 78B.

40

HIS HONOUR: Sorry, these are the submissions in reply is it?

45 MS MORTIMER: Yes, your Honour. Paragraph 56, page 25.

HIS HONOUR: So this is in response to what argument?

MS MORTIMER: Your Honour, I am not sure. I think it has got something to do with international conventions and the way that we submit that the Court can have regard to the biodiversity convention. But it is - if it is pressed your Honour, it is actually a very serious matter because as your Honour will be  
5 well aware, section 78B of the Judiciary Act is expressed in mandatory terms and prohibits a Court from proceeding if a constitutional matter is raised, until notices are given. Now, it is just wrong, with great respect to our learned friends, there is no constitutional issue raised. I have explained to your Honour the way that we say the biodiversity convention on orthodox statutory  
10 construction principles is applicable and we don't seek to go beyond that.

HIS HONOUR: Simply because someone raises section 78B doesn't mean the Court is obliged to stop and have the attorneys notified because the Court might form the view - - -  
15

MS MORTIMER: No, your Honour must be satisfied that it is truly raised on the material and our submission is it is truly not.

HIS HONOUR: And you rely on the reference to the international  
20 conventions for the purposes just demonstrated and referred to in your submissions.

MS MORTIMER: Yes, your Honour, that is all. That is all.

25 HIS HONOUR: Aiding in the construction of the legislation.

MS MORTIMER: That is so, your Honour. Now, if I can return to the short submissions about the species experts, your Honour. And this submission in relation to the applicant's witnesses is directed at the following people: Mr  
30 Peter Brown, Mr Simon Kennedy, Dr Peter McQuillan, Dr Michaels, Dr Bekessey, Dr Wintle and Dr Dickman - although we accept that he is not a species expert but I have put him in this category in terms of people that were dealing with the three species.

35 Now, in terms of their evidence and opinions, your Honour, about the likelihood of adverse impacts or significant impacts, the level of the impact, the inadequacy of the CAR Reserve System and the inadequacy of management prescriptions, in our submission the question for your Honour to consider is twofold: was their evidence reliable, and was it persuasive?  
40

In contrast to the respondent's witnesses - and in our submission it doesn't help simply in written submissions to drop in the adjective authoritative or independent as many times as you possibly can - the contrast with the respondent's witnesses is telling in almost each and every case in terms of  
45 reliability and persuasiveness. In reliability, of course your Honour, this comprised in our submission a number of things: independence, experience and expertise, willingness to make concessions, all those kinds of things are built into that concept of reliability.

Your Honour saw their demeanour. Your Honour saw which witnesses would make reasonable concessions and which would not; which witnesses actually had some tangible experience with the species to draw on - that is particularly a submission directed at the contrast between Dr Shields and Mr Kennedy and Mr Brown - and which witnesses gave their evidence in our submission, your Honour, totally honestly reflecting their experience and expertise in a measured way, not seeking to exaggerate it.

Your Honour had the opportunity to see the demeanour of these witnesses over extensive cross-examination over many days. We submit that overwhelmingly there was a high degree of reliability in the applicant's witnesses and a low level of reliability in the respondents. When you actually strip back the respondent's witnesses in terms of who they had for species, in our submission, the respondent was really very weak on the species evidence. It had Mr Meggs and Dr Grove for the beetle and I suppose Dr Roberts, but not really on species and they were entirely discredited. Had Dr Shields for the parrot and his evidence as we have said in our written submissions was frequently inconsistent, frequently baseless and generally devoid of any particular experience in relation to the swift parrot and the respondent ended up calling nobody about the eagle because it elected not to call Dr Reed.

Now, your Honour, it is right to say as both the respondent and the Commonwealth do in their submissions, that some of our experts expressed very broad opinions. And it is right that some of them gave opinion evidence to the effect that the management prescriptions for the parrot or whatever were not capable of protecting. Now, they were exposed to cross-examination, as I have submitted, over many days and they were never shaken. What happened in cross-examination more often was that more favourable evidence to the applicant's case was elicited. So in our submission it doesn't matter how broad their opinions are, if your Honour is satisfied that they are qualified, that they are experienced, that they are honest and they are reliable.

If your Honour is satisfied of those things then the breadth of the opinion doesn't matter. We say that your Honour is able to be satisfied of those things in relation to all our species experts. Now, there has been in the written submissions something of a focus on Jones v Dunkel and what that - how that principle ought to be applied by your Honour in this case. I want to take your Honour to what is said about that principle by Branson J in Booth v Bosworth, that is on I think our learned friend's for Forestry's list of authorities. Number 14 in their first list. Pardon me, your Honour.

This was, your Honour, aside from all the other helpful reasons that Booth v Bosworth continues to be cited to your Honour in this case, this was also a case where the proponent, or the person who was undertaking the action didn't go into evidence and so her Honour had to deal with Jones v Dunkel. Her Honour sets out at paragraph 42, so we accept your Honour a slightly different situation not going into evidence at all, but the principles that her Honour sets out a

paragraph 42 in our submission are appropriate, that:

5           *The burden is on the applicant, the applicant must establish evidence of each of the facts in issue notwithstanding that some relevant or important evidence is peculiar within the knowledge of the respondents. The failure of the respondents to give evidence doesn't of itself amount to any proof of any fact in issue, however if there is before the Court evidence tending to establish each of the facts in issue, albeit that it be meagre -*

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That is not this case, your Honour -

15           *in assessing the probability of the existence of the fact in issue, weighing the evidence, use may be made of the failure of the respondents to give evidence apparently in their possession relevant to that fact in issue. That is it is open to the Court to draw the inference that the evidence which the respondents could have given to the Court would not have been favourable to the case and thus more confidently to draw the inferences available to be drawn from the evidence that is before the Court.*

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That is precisely the way that we ask your Honour to use to features of the applicant's witnesses - the respondent's witnesses. Firstly, the failure to call anybody from DPIWE, particularly the Threatened Species Unit or from the Forest Practices Board those people that we identify in our written submissions, who were the people on the ground involved, particularly in relation to the swift parrot. They would have been the obvious people to call, particularly in relation to the swift parrot. Instead, what does the respondent do, it goes about as far away from Tasmania as it can to Dr Shields who doesn't really know very much at all about the swift parrot, although he knows lots about forest management and they call Dr Shields.

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What do we find out from exhibits CP and CQ right at the end of the case during Dr Shields' cross-examination we find out in black and white that DPIWE thinks exactly what the applicant's witnesses think about the swift parrot. So the Jones v Dunkel inferences are overwhelming in our submission in relation to that category. Now, in relation to Dr Reed the Jones v Dunkel inferences are also available and they are available to be used in this way: Dr Reed was to the chief - is the chief scientific officer for Forestry Tasmania and having witnessed a demolition of the respondent's scientific witnesses he then wasn't called. Particularly, your Honour, noting in our submission that it was Dr Reed who was often at the other end of emails from Mr Meggs.

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So once there was an exposure through Mr Meggs' cross-examination of the interference with the formation of Mr Meggs' opinion, how Mr Meggs had had his hands all over all sorts of aspects of Forestry Tasmania's preparation in this case that he hadn't disclosed, including the PVA evidence, once all that was exposed and once, in our submission, the prospect that there were going to be

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more emails found and called for during Dr Reed's cross-examination, it was decided not to read his affidavit. So that if your Honour is in any doubt - - -

5 HIS HONOUR: But aspects of it were put to Dr Bekessey and I think Dr Wintle - - -

MS MORTIMER: That is right.

10 HIS HONOUR: - - - and in many respects those witnesses took issue, so the Court subject to hearing anything in response from Mr Gunson which might persuade me to the contrary, would approach that matter by preferring the view expressed by - by considering as more probative the point of disagreement.

15 MS MORTIMER: And that is the substantive way, your Honour, aside from any issues to do with credit or credibility, that is the substantive inference that your Honour can draw. Your Honour can be more comfortable in accepting the evidence of Dr Bekessey and Dr Wintle about the PVA which essentially remains unchallenged. The key part of that evidence that remains  
20 unchallenged is Dr Bekessey's extrapolation of the work that she had done in Bass in 2002 and revised in 2005 to Derwent. Now, that is not in her publications, that is in her report that is annexed to her affidavit and she expresses the opinion very firmly with one qualification about the extent of plantations being a little less in Derwent, but she expresses the opinion very strongly that the results of her PVA can be extracted and extrapolated to  
25 Derwent.

And the cross-examination of her about that, your Honour will find at transcript 1093 and there is very little on it and she maintains, in our submission, very convincingly that her model is robust and her opinion about it  
30 being capable of applying to Derwent is maintained. And I am reminded, your Honour, that Mr Mooney - of course who is also an author of that PBA - agreed with the robustness of the model, and the transcript reference is 782.

35 So that is the principal use in a Jones v Dunkel sense that the failure to call Dr Reed having put him up as the witness who was going to contest the PBA, that withdrawal should make your Honour wholly comfortable in accepting the evidence of Drs Bekessey and Wintle. Contrast, your Honour, those two submissions that we make about Jones v Dunkel with the way the respondent wants to use it in its submissions and reply only. Now, that is important, your  
40 Honour.

45 In its principal submissions the respondent made no mention - or no submission to your Honour that your Honour should use Jones v Dunkel in relation to any of the witnesses that the applicant had foreshadowed calling and did not. Didn't say a thing about it. But in reply the applicant now submits that your Honour should draw similar inferences in relation to Dr Houghton, Mr James, and Mr Wakefield. The contrast in the circumstances is immediate, in our submission, because the main difference is that your Honour had the

written evidence from each of those witnesses.

And the written evidence from each of those witnesses wholly supported the applicant's case. So how, we ask, can it possibly be said that there is any  
5 adverse inference to be drawn by the fact that we didn't call them. Now, we explained at the end of the May hearing, your Honour - I explained to your Honour in this Court on instructions why we weren't calling them. Now, my instructions have not been questioned. Nobody asked that they be given by way of evidence and unless the respondent seeks to do that and question my  
10 instructions your Honour ought to accept the explanation that I put on the transcript and that was cost.

And it should have been obvious, in my submission, to everybody in this Courtroom that had to sit through what, in our submission, was a prolix cross-examination of the applicant's witnesses to date - to that point to see that it was  
15 an unbearable burden for that to continue for possibly another week or two. Now, your Honour, I want to turn to two principal submissions that I want to make on two other topics raised in this litigation. The first is the concept of cumulative impact and the second is the use of the proportionary principle.

And I can start with cumulative impact. That, as I have already submitted to your Honour, we say, is comprehended by the concept of significant impact and we deal with it in our written submissions at paragraphs 271 to 278. The respondent submits that section 18 does not extend to cumulative impact. It  
20 says that the section would have been drafted differently had that been intended and it relies, your Honour, on clause 51 of the explanatory memorandum. Now, your Honour might remember that what that means is that there is competing reliances by each of us on the explanatory memorandum to the EPBC Act because in paragraph 264 of our submissions  
25 we rely on one passage from the explanatory memorandum and then what Forestry Tasmania does in its reply submissions at paragraph 159 and 60 - 160, is rely on a different part.

If I can ask your Honour to go to paragraph 160 of the reply submissions? The  
35 short point I want to make orally, your Honour, about competing reliances on the explanatory memorandum unsurprisingly, your Honour, is the submission that we are right and Forestry is wrong and that clause 51 that Forestry Tasmania seeks to rely on is really looking at a very different issue. If your Honour just reads it through and turns over the page to the part that is  
40 reproduced on page 78, what this clause is getting at, in our submission, is that there may be, as it says in really the second half of that paragraph:

*The cumulative impact of independent actions by different persons all of which are below the significant impact threshold are primarily to be  
45 addressed through State planning and land management legislation and recovery plans.*

Now, that is not the kind of action with which we are concerned here and with

which your Honour has to decide whether there is a significant impact. We are not concerned with independent actions by different persons and on the evidence in this case, in our submission, we are not even concerned with on the narrow definition actions that are below the significant impact threshold, but it is just directed to a very different kind of activity.

And while it is true that it says that the cumulative impact of that kind of activity is to be addressed in another way, in our submission, it doesn't preclude the concept of cumulative impact being within significant impact altogether. If it did then some of the comments that we have relied on in our written submissions by members of this Court about the construction of significant impact would be wrong because, in our submission, members of this Court have clearly contemplated impacts that are indirect and consequential and it is those kinds of impacts that fit very well with the notion of cumulative impact.

Now, the key paragraph, your Honour, in our submissions about cumulative impact - in our written submissions is paragraph 274 and we accept, your Honour, that the evidence about the eagle in this case raises this construction issue acutely. Just to remind your Honour where we deal with the evidence that we say supports a finding of cumulative impact, we do that at paragraphs 439 to 449. I won't take your Honour to that, but those are the paragraphs where we say the evidence discloses that there are plain cumulative adverse effects at a notable level of forestry operations on the eagle. The way that this should be approached, in our submission - because it is a question of construction, and we emphasise that, your Honour, because if the respondent is right and cumulative impact is outside the concept in section 18, subsection 3, if they are right then it is always outside the concept of significant impact.

Forget this case, they must contend for an absolute proposition, they must say in relation to no threatened species, in relation to action that could possibly occur can you ever have a significant impact that arises because the effects are cumulative. That is the threshold that they have to cross, in our submission, to persuade your Honour as a matter of construction that cumulative impacts are not included.

HIS HONOUR: So coupe-by-coupe activity could never amount to significant impact?

MS MORTIMER: That is right, your Honour, and that is a practical illustration, in our submission, of why that construction must be wrong. In an Act whose provisions - the ones that we are dealing with - are there to protect threatened species, the respondent submits to your Honour that that statutory object, that purpose can be entirely frustrated if you break your action up into a series of actions none of which on an individual basis will have significant impact. All because of a happenstance and the happenstance is that you are dealing with a species whose ecology and biology means that it is spread across a wide range.

And that is the real fallacy in our submission in the rejection of the cumulative impact arguments. Very well illustrated in this case by looking at the difference in ecology and biology of the eagle and comparing it with the beetle and the parrot, because it is a species that has a wide range. Now, Mr Mooney gave much evidence to your Honour about why that is so - what its role in the ecosystem is, what its nesting habits are, how far away each pair nests from the other - all those sorts of things.

It is, in its natural occurrences, wide ranging. And what the respondent seeks to do by this construction is to say, "Well, you can incrementally destroy this species and there is nothing that the EPBC Act can do about it." Now that is an argument that flies, your Honour, in the face of the biodiversity convention, and it flies in the face of what this Act is about. And the only point on that argument, that construction argument where significant impact will be reached for a species like the eagle is when you demolish the last nest.

And if that is what this Act means then it is a farce, your Honour. It can't be the proper construction. Now what we say in addition to that is that when one is looking - one gets past the initial hurdle of accepting that cumulative impacts are comprehended by the concept "significant impact" then what does significant mean is the next question. How do you decide whether an effect that is cumulative can be, to adopt the definitions that have been used in the cases and which everybody at the bar table agrees about - how do you decide whether the effect is notable or of consequence. Those are the kinds of definitions found in the authorities of this Court.

In our submission, when one is dealing with a threatened species, your Honour - and I am going to come back to this with a precautionary principle - but remember we submit, your Honour, in section 379. No, I'm sorry your Honour, I think I have got that wrong. Pardon me - 179. I knew it was something 79. 179(4) - the definition of a native species in the endangered category facing a very high risk of extinction in the wild in the near future. The respondents and the Commonwealth are fixed with that being the description of the threat facing each of these three species.

They are fixed with that in this proceeding, your Honour, despite many attempts they make to walk away from it. That is the listing category into which each of them fall. Now, taking that into account, accepting that a cumulative impact is within the concept of significant impact then the question for your Honour is in relation to a species facing a very high risk of extinction in the wild in the near future, what kinds of effects are notable or of consequence. And the answer to that in our submission are effects which exacerbate an existing adverse situation.

Your Honour, you don't need to go past the generic description for the eagle, the parrot and the beetle. They are threatened so there is your existing adverse situation and if the action exacerbate that then, in our submission, plainly and

simply you have an effect on these species that is notable or of consequence. It defies belief that anything else could be considered. And that is what the evidence establishes in our submission for forestry operations in relation to the eagle. In relation to the Wielangta State Forest the respondent's existing and proposed forestry operations exacerbate the existing adverse situation for the eagle.

That is Mr Mooney's clear evidence. Every coupe that is logged in actual or potential eagle nesting habitat increases disturbance. That is his evidence. His evidence is that disturbance is the key factor effecting breeding success. You can't maintain a population if your breeding success is effected and you certainly can't recover it, and he gave a lot of persuasive evidence about this concept of disturbance creep. That what is happening, because of forestry operations, not solely but significantly because of forestry operations and in the context of the evidence he gave to this Court particularly, is that every time an area is logged or areas near a nest is logged, the nest moves from the less disturbed category to the more disturbed.

Your Honour will recall Mr Mooney adopted as part of his evidence, a table that we had prepared about that movement. That was gathered from his report. I will just get your Honour the exhibit number for that. So in our submission, Mr Mooney's evidence is all one way, that nest disturbance results in poorer breeding outcomes. He was clear that management prescriptions do nothing more than mitigate the damage and might mitigate the disturbance. They don't prevent it, they don't arrest it and they certainly don't reverse it. So his evidence in relation to the prescriptions also supports the proposition that even if they are applied to the letter, with the best of intentions, they don't stop the disturbance creep and the resulting poorer breeding outcomes.

Exhibit T, your Honour, was that table. Now, that is on a coupe-by-coupe basis, your Honour, but more obviously we submit in the action in the broader, as we have identified it, that is the proposed forestry operations in Wielangta to 2013. If you look at the action in that way, in our submission, it plainly exacerbates the eagle's perilous situation, because the disturbance creep will be on a larger scale, and you are talking about an effect on six territories across the Wielangta State Forest, and poorer breeding outcomes in six territories.

Now, for a species that is facing a very high risk of extinction in the wild, that is an impact of consequence. That is an impact that is notable, in our submission. And your Honour, just to give a cross-reference, the way that Mr Mooney in his evidence identified that that exacerbation might be avoided we reproduce at paragraph 447, that logging and prime or secondary breeding habitat, good hunting habitat and habitat with sufficient replacement trees needs to be maintained and not logged. That is Wielangta State forest, your Honour.

Now, in relation to cumulative impact and the PBA analysis, the way that we submit your Honour can use that, Dr Bekessey's analysis and her opinions in

her report confirm the probability of further damage to eagle population numbers. And we have set that out at paragraph 448 of our written submissions, particularly 448(b), your Honour, where in our submission what her research and her opinion demonstrates is that the impact of timber  
5 harvesting in the absence of the other threats, meant the eagle population would halve expected minimum population size.

Now, that is an opinion because it is in both the - that is an opinion in our submission with which Mr Mooney agreed. He has no problems with that  
10 PVA analysis and he was not cross-examined to suggest that he differed from it in way. So what you have in relation to Dr Bekessey is an expert opinion agreeing that there is - confirming that by her modelling there is a cumulative impact that leads to an extremely high risk of extinction. Your Honour will recall that in her report she said she had never done a PVA analysis that had  
15 predicted this kind of risk of extinction. Now, if that is the kind of prediction, even if you don't - even if one doesn't accept it at its highest in the way that Dr Bekessey put it, it certainly confirms what Mr Mooney was saying and that is that there is an inevitable population decline because of poor breeding outcomes, just about all of which is traceable back to disturbance.

20 Now, your Honour, I am about to move to the final matter that I want to address by way of oral submissions, and that is the proportionate principle. We deal with that in our submissions at paragraphs 89 to 97 and I just remind your Honour briefly what the submissions by our learned friends are. The  
25 respondent submits that the precautionary principle has no role to play in this litigation. It says so at paragraph 86 of its reply. And it justifies that claim, if I can ask your Honour to turn to paragraph 102 of the reply, it justifies that claim in the first sentence by saying that there is no claim of serious or irreversible environmental damage that is adequately sustained by the scientific evidence.

30 The problem, your Honour, with that submission is that it omits the key word in the first part of the precautionary principle which is threat. And even Hornsby, the case that our learned friends quote for many pages in their reply submission, make it clear that the precautionary principle is not invoked once  
35 you prove serious or irreversible environmental damage, it is the threat of it that matters. And as we understand the respondent's submissions they stop really at that threshold point. So if they are wrong about that threshold point, we can't otherwise find anything in their submissions about how your Honour should adopt the precautionary principles save for that very large quote from  
40 Hornsby, which we agree it is very helpful, and I will take your Honour to that in a moment.

The Commonwealth also contends that the precautionary principle has no role to play in this litigation. That is in its submissions at paragraph 126. It says  
45 that the precautionary principle has no role to play in Part III, Part III of the EPBC Act, so that is section 18, no role to play in section 18, no role to play in section 38, no role in the RFA, no role in the RFA Act. But in the second half of paragraph 126 of its submissions, the Commonwealth makes a concession

which is very significant in our submission, and I am going to come back to it. It concedes that the precautionary principle is relevant to decisions about the CAR reserve system and management prescriptions.

5 And it concedes that it is relevant to implementing ecologically sustainable forest management. At paragraph 138, however, we submit the Commonwealth makes the same mistake as the respondent has by suggesting that the precautionary principle is concerned with actual damage and ignores the key word in it, which is threat. So that is how the parties stand somewhat  
10 differently from each other on how your Honour should use it. What there doesn't appear to be any disagreement about, your Honour, and nor could there be, is what the precautionary principle is. That is, how it is to be defined.

15 HIS HONOUR: Well, it is in the Act.

MS MORTIMER: It is in the Act.

HIS HONOUR: Yes.

20 MS MORTIMER: So that solves that dispute. And it is in the Act in two places, your Honour. It is in the Act by definition in section 391(2) and that is the part that we submit makes it a mandatory consideration for some decisions under the Act. Now, as I read the Commonwealth's submissions, I understood they might take issue with our characterisation of it like that. We maintain it,  
25 maintain it in the sense that the term "relevant consideration" is understood in administrative law, that is exactly what section 391 does.

HIS HONOUR: That relates to the Minister.

30 MS MORTIMER: Yes, your Honour, and it relates principally to decisions about whether something is a controlled action or whether permission ought to be given. So very much the same kind of decision making that the Land and Environment Court is talking about in Hornsby. The actual granting of permission for a particular project, and it is mandatory in that, and in a  
35 different sense that is exactly what is recognised in the New South Wales legislation that the Court was dealing with in Hornsby. Just because it is mandatory in one part of the Act, the EPBC Act, in relation to some decisions, of course your Honour on first principles doesn't mean that it is legally irrelevant in other parts. And that again, that is the threshold of persuasion that  
40 Forestry and the Commonwealth have to get your Honour to, in our submission.

HIS HONOUR: What was the second reference you were going to take me to in the Act?

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MS MORTIMER: The second one is in section 3A, where in setting out the principles of ecologically sustainable development in our submission, those being the principles that underpin the entire structure of this legislation, the

second principle, with some of the words moved around - - -

HIS HONOUR: Yes,

5 MS MORTIMER: - - - but nevertheless identical words, is the precautionary principle.

HIS HONOUR: 3A(b), paragraph (b).

10 MS MORTIMER: (b), yes, your Honour.

HIS HONOUR: Did you have much longer to go on this topic?

15 MS MORTIMER: I do, your Honour, and it would be a convenient time if that is - - -

HIS HONOUR: All right, we will adjourn until 2.15.

20 **ADJOURNED** **[12.45pm]**

**RESUMED** **[2.15pm]**

25 HIS HONOUR: Yes, Ms Mortimer?

30 MS MORTIMER: Your Honour, on that question that I addressed before lunch on cumulative impact there is just one passage of Mr Mooney's evidence that I want to draw your Honour's particular attention to. It is at transcript page 757, line 14 onwards. That is the part where I asked Mr Mooney some questions about the eagle and the difference between immediate and significant impact from logging one coupe and cumulative impact. So that is the part where he gives, in our submission, very clear evidence about that issue.

35 Now, your Honour, going back to the precautionary principle. Where I had got to before lunch, I think, was to submit to your Honour that we, in agreement with our learned friends for Forestry - that the case that they extract in their reply submissions of Hornsby is of considerable assistance and I want to just highlight some passages from that that we ask your Honour to rely on. That appears at paragraph 103 of the respondent's reply submissions.

45 Your Honour will see that in paragraph 126 of the decision there is a reference to a number of previous decisions in the Land and Environment Court in New South Wales. One is Providence Projects and that is a case that we rely on and that I will take your Honour to briefly in a moment. If your Honour turns the page to paragraph 128 there is a statement about two conditions, precedent or thresholds, that need to be met.

We accept that that is correct in principle, but the following discussion, in our submission - the bulk of the discussion in this case, really addresses the use of the precautionary principle in an approvals or planning process and so what  
5 your Honour reads particularly from paragraph 129 onwards has to be seen in that context. Not all of that and not that kind of application of the precautionary principle is going to be relevant to the matters your Honour has to consider.

10 Nevertheless, if your Honour turns to paragraph 143 that is a relevant statement which we submit is correct, that one is never going to be able to find complete or full scientific certainty about the damage that a threat might - or the environmental damage that might be caused. Paragraph 146, your Honour, we say - we submit is very important in this case. What the judge is noting  
15 there about the commentators on this principle is that there is - the way that this principle works is that the magnitude of environmental damage is usually inversely proportionate to the likelihood of risk in order for precaution to be triggered.

20 So, in our submission, where the risk is high then you need a comparatively high level of certainty to be able to proceed to do something which might cause that risk to eventuate. That is this case, in our submission, your Honour, because we are dealing with threatened species. We are dealing with damage recognised by section 179 of the EPBC Act in the description of threatened  
25 species that means that the risk is very high. That is the starting point.

So the taking of actions that might cause that risk to grow or eventuate means that you have to have a very high level of certainty that there is going to be no damage. Your Honour, the comments at paragraph 150 onwards about the  
30 burden of proof, we don't submit are relevant to the way that your Honour has to look at this, the issues in this case. We do submit that the principle at paragraph 156 is relevant:

35 *The precautionary principle permits the taking of preventative measures without having to wait until the reality and seriousness of the threats become fully known.*

That is why, in our submission, it is the wrong approach - although it is, in our submission, on the evidence, the respondent's approach - to say well, we will  
40 just log and then we will see what happens and that is the inverse of this aspect of the precautionary principle that is described at paragraph 156. From about 163 onwards, your Honour, there is a discussion under the heading Degree of Precaution Required about adaptive management.

45 But, in our submission, the description of adaptive management that is given there in the context of that being part of the precautionary principle might, we accept, be fine in theory and be capable, that is, adaptive management may be capable of being consistent with the precautionary principle and part of it but,

firstly, the evidence in this case shows that adaptive management is nothing more than an experiment in the way that the respondent implements it in Wielangta.

5 But more importantly, your Honour, whether adaptive management sufficiently addresses the question of precautionary principle depends on what you are talking about and this discussion in this case is in the context of an approvals process. Your Honour can see the example that is given in paragraph 165 which is about a fisheries case with a development where there was a  
10 monitoring regime put on as a condition of approval.

That is a very different context in which to invoke the notion of adaptive management from the context with which your Honour is concerned, which is where you are dealing with threatened species and what underlies a lot of our  
15 submissions about the respondent's reliance on adaptive management is it is simply not precautionary enough when you are dealing with threatened species.

For the very reason that the evidence has revealed in this case, that it is nothing more, as we have said in our written submissions, than reactive. It is not  
20 proactive. You cut the trees down and then you see what happens to threatened species, and then you might fiddle with some of the prescriptions and that is just not precautionary in the context of threatened species. That is all I want to say about Hornsby, your Honour. The only passage out of the Providence Projects case that I want to direct your Honour's attention to - it is in our  
25 bundle of authorities, and the only passage that I will specifically direct your Honour's attention to is at paragraph 80 of that decision where Bignold J - tab 23, your Honour.

HIS HONOUR: Thank you.

30 MS MORTIMER: At paragraph 80, where in considering a statutory formula very similar to part of section 18(3) that your Honour has to consider, this formula of "likely to significantly affect" his Honour recognises that that is an appropriate context for the ready application of the precautionary principle.  
35 Now, your Honour, turning now to in substance how do we submit that your Honour ought take account of the precautionary principle in this case and in our written submissions we deal with that at paragraph 97.

40 What we say at paragraph 97 is that your Honour should take account of the precautionary principle in two matters that the Court is asked to decide. The first is whether the actions of Forestry Tasmania will have or are likely to have a significant impact on the three species - so the section 18 issue. And, secondly, what clause 68 of the RFA requires. Now, in relation to that first issue, section 18, we say that there are two propositions involved. There is  
45 unarguably a threat, a threat of serious or irreversible environmental damage. That is the threat of extinction to these three species. That is recognised by their listing in accordance with the criteria in section 179(4). 179(4) uses the language of threat by the use of the word risk.

That is what it is all about. So we are in the territory of the precautionary principle with these species immediately. Given that threat in our submission, lack of full scientific certainty should not be used as a reason to refuse to find or for your Honour to refuse to find that forestry operations are likely to have a significant impact. This is the point that is made in the Providence Projects case. That the word likely itself incorporates a level of uncertainty into it. It assumes that there is a lack of scientific certainty and that is where the precautionary principle cuts in very well, in the exercise in section 18(3).

Now, where, for example, in cross-examination in this case, in the face of the opinions expressed by the applicant's witnesses about what they believed would be the impact of forestry operations on each of the species with which they were concerned, it was suggested to them at various stages that there were no studies backing up their opinion, that there was no monitoring proving what they say, that there were no surveys - "you don't know whether the swift parrots are going to just go elsewhere, Mr Kennedy?" - a line like that. No research proving why you find beetles in dry forest - are they only vagrants?

All those kinds of attack, your Honour, simply identify in our submission the lack of full scientific certainty. And therefore, in your Honour's assessment of whether the actions are likely to have a significant impact, the precautionary principle in our submission allows your Honour, if you are other wise persuaded by those opinions, to recognise that the lack of full scientific certainty doesn't preclude you finding that there is a likely significant impact. And that is particularly so, your Honour, it is particularly ironic that we have to make that submission, because who is responsible for the lack of that scientific certainty?

It is the State of Tasmania, the Commonwealth and Forestry Tasmania, because they are the bodies who are responsible for funding and carrying out this kind of research that would provide that scientific certainty. And so the gap is their responsibility and now they seek to use it in this case to say that your Honour can't have confidence in the opinions that the applicant's witnesses have expressed. That is how we say your Honour can use it in relation to section 18. Now, how can the precautionary principle be used in relation to clause 68?

Again, we say it is a two-stage process. Is there a threat of serious or irreversible environmental damage? The same point, your Honour, the listing gives that threat. Given that threat, lack of full scientific certainty should not be used as a reason to say that the non-fulfilment of the requirements in clause 68 to protect the species is not made out. In other words, because of the threats of extinction faced by these species, lack of scientific certainty about the effectiveness of the CAR Reserve System, lack of scientific certainty about the effectiveness of management prescriptions is not a reason to refuse to find that these three species are not protected.

5 So what both the uses of the precautionary principle in section 18 and clause 68 have in common is that they don't allow a person in the position of the respondent, the State of Tasmania or the Commonwealth to argue that its own failures in not conducting effectiveness monitoring or implementing actions and recovery plans, that its own failures which caused the lack of full scientific certainty preclude or stand in the way of findings about significant impact or failure to protect.

10 Now, your Honour, there is a second way in which the precautionary principle enters into the Court's fact finding in this case, about clause 68. And it is this: that it is in relation to the implementation of the CAR Reserve System in Tasmania and the application of management prescriptions in the Tasmanian forestry practices system. Now, those two things, your Honour, the CAR Reserve System and the prescriptions, need to be the subject of fact finding in  
15 our submission by your Honour both in relation to significant impact and in relation to whether the requirements of clause 68 have been met.

20 The Commonwealth - and this is where I come back to the concession about the precautionary principle that the Commonwealth has made, your Honour - the Commonwealth concedes in its submissions reflecting in our submission the concession made by Dr Dickson in her evidence, that the precautionary principle is relevant to implementing ecologically sustainable forest management. Dr Dickson, in her evidence, we quote that at paragraph 91 of our submissions, your Honour, agreed that the precautionary principle is  
25 applicable to forest management. Now, Forestry Tasmania make no such concession, your Honour.

30 That is to be expected in one sense because it is to their clear disadvantage in this litigation to make that concession. But for a statutory authority cast with the responsibilities that it has, it is a remarkable position in our submission. Your Honour doesn't have the benefit of knowing precisely where the State of Tasmania sits on the application of the precautionary principle, whether it sits with the Commonwealth or Forestry Tasmania. But we submit that  
35 overwhelmingly, your Honour, the evidence in this case demonstrates that no matter what is down on pieces of paper about protection of threatened species like the State's threatened species protection strategy that we learnt in cross-examination hadn't really been implemented very much.

40 No regard in our submission on the evidence, is paid to the application of the precautionary principle in this State in the implementation of the CAR Reserve System and particularly in the application of management prescriptions. No regard is paid to that principle in relation to these three species. Their risk of extinction is recognised by not only the Commonwealth legislation but this State recognises it because they are all listed under the State threatened species  
45 legislation as well. And there is a lot of scientific uncertainty in our submission, about the biology and ecology of each of the species and about the impacts of forestry operations on them, and that is putting it kindly.

Now, from my learned friend Mr Tree, your Honour heard this morning that sometimes there is no science at all backing up what the state of knowledge is about these species. So whether the CAR Reserve System in this State and the management prescriptions are doing anything to maintain the existing  
5 populations of these three species or recover is relatively unknown.

Now, what does the respondent do in the fact of that kind of scientific uncertainty, in the fact of no effectiveness monitoring about its prescriptions? It charges full-steam ahead logging old-growth forest in Wielangta, destroying  
10 beetle habitat, destroying swift parrot habitat, destroying potential eagle nesting habitat, increasing disturbance in eagle nesting. That is what the evidence in this case shows. It just keeps going. Nobody, in our submission, looking at that evidence could find that there is anything precautionary about the approach of Forestry Tasmania, and that is the exact opposite of what the  
15 precautionary principle requires.

So we submit that your Honour should find consistently with our submissions and consistently with the submissions of the Commonwealth that the precautionary principle applies to forest management in this State. That it  
20 should be applied for these three species in the implementation of the CAR Reserve System and the application of management prescriptions but that instead of applying it, Forestry Tasmania is wholly disregarding it.

Now, where that by itself, in our submission, leads in relation to the parties competing constructions about clause 68 - does it mean deliver protection or does it mean plan to protection - where that evidence about disregard of the precautionary principle leads is that even if the respondents are right and all  
25 clause 68 means is that you have to plan to protect these species, they are not even doing that. They couldn't possibly, in our submission, be found to be  
30 planning to protect threatened species if they - by their actions - are disregarding a precautionary approach.

So on any view, in those three ways - two ways about clause 68 and one way about section 18(3) - in our submission the precautionary principle ought to  
35 enter into your Honour's consideration of the issues in this case. Your Honour, those are the submissions on behalf of the applicant. Yes, and we have that table - our response to the Commonwealth's document adopted by Forestry.

MR D. GUNSON: I think there is one other matter Ms Mortimer wants to deal with, your Honour, that she may have neglected, which is the applicant's response to the respondent's further observations. I think she was going to delete a passage from it, I understand.  
40

MS MORTIMER: Yes, I was. Yes, I am grateful to my learned friend. This is the document that I handed up yesterday, your Honour, which is our response to appendix 2 of the respondent's reply. Now, yes, in what we say about paragraph - that is very unhelpful this document doesn't have the entry - but I will do my best. What the respondent says about 509 - - -  
45

HIS HONOUR: Is this something that has three columns? Is that the document?

5 MS MORTIMER: That is the document, your Honour, yes. And if your Honour turns to - it is in sequential paragraph order, so if your Honour looks for, in the first column paragraph 509, right towards the end.

HIS HONOUR: Yes.

10

MS MORTIMER: And in the third column, the first sentence should be deleted.

HIS HONOUR: So it starts with "if A to B are true".

15

MS MORTIMER: Yes, your Honour.

HIS HONOUR: Thanks, Ms Mortimer.

20

MS MORTIMER: If your Honour pleases.

MR D. GUNSON: Your Honour, before commencing my response, could we have a few moments to look at the applicant's response which is that document just handed to us? Just to - we probably would need about 15 minutes. We will comfortably finish this afternoon, your Honour.

25

HIS HONOUR: All right.

MR D. GUNSON: We would like to have a look at it to just check it.

30

HIS HONOUR: I just have a difficulty sitting beyond 4.30.

MR D. GUNSON: We will finish before then, your Honour.

35

HIS HONOUR: Before then.

MR D. GUNSON: Before then, your Honour.

HIS HONOUR: Right. So how long will you need? 15 minutes?

40

MR D. GUNSON: 15 minutes.

HIS HONOUR: We will come back at 5 to 3.

45

MR D. GUNSON: Yes. Thank you, your Honour.

HIS HONOUR: Thank you.

**ADJOURNED**

**[2.40pm]**

5 **RESUMED**

**[3.05pm]**

HIS HONOUR: Yes, Mr Gunson.

10 MR D. GUNSON: Yes, thank you, your Honour. Your Honour, could I deal  
first with the document that my learned friend, Ms Mortimer, handed up to  
your Honour shortly before the adjournment, which is entitled Applicant's  
Response to Observation on Applicant's Attribution of Evidence to Factual  
15 Submissions, and take your Honour to page 9. And at the top of page 9 you  
will see - and there is reference to Mr Meggs, first of all the substance of the  
submission and then the observation, then the applicant's response.

If I could ask your Honour to note the page reference 413. I don't - I am not  
20 going ask your Honour to actually look at it now, but at the end of that page  
when Mr Meggs does agree eventually to some discussion with counsel, he  
says - the question is put to him:

*Well, do you agree or disagree with what I am putting to you?---I will  
agree with you for the sake of semantics.*

25  
is the answer he gave at that point. I invite your Honour in due course to read  
the whole of the sequence of questions that leads to that ultimate answer being  
given by Mr Meggs because several times he refers to the semantics of the  
question being put to him and the issues involved. So it is not a black and  
30 white answer as it would be contended for by my friends.

Your Honour, yesterday there was some issues raised, I think by my learned  
friend Ms Mortimer, if not her, then by my friend Mr Tree, about the way in  
35 which the process of obtaining the relevant forest practices plan arises and it is  
probably useful if I take your Honour back to that particular sequence of events  
and your Honour will need the authorities referred to and the respondent's  
written submissions in reply, filed 21 August. It should have blue tags on it. It  
might have - I am sorry - I am told it could also have yellow tags - it is the -  
40 there are two volumes and the one your Honour is looking for is the one that  
relates to the submissions in reply, and if your Honour goes to tag 5.

HIS HONOUR: Forest Practices Act.

45 MR D. GUNSON: Forest Practices Act and if I could take you first of all to  
section 3 of that Act and the owner of land is defined there in subsection A(a).  
And you will see that in the case of Crown land, that a State forest within the  
meaning of the Forestry Act 19 - - -

HIS HONOUR: Sorry, subsection A(a).

MR D. GUNSON: 3A(a).

5 HIS HONOUR: Yes.

MR D. GUNSON: Top of the right hand page. And then if you go to section 17 of that Act, which is page 26 of 69, under the heading Restriction on Harvesting Timber, you will see, for the purposes of this section, a person is  
10 taken to be "a responsible person in relation to any land of that person is the owner of land", and, of course, by virtue of the deeming provision that I have just referred your Honour to, Forestry Tasmania is deemed to be the owner of State forest when it is to be harvested.

15 And of course, it is our submission and remains our submission that Forestry Tasmania allows forestry operations in its role as a governmental authority under section 8(1)(c) of the Forestry Act and, of course, as I said a moment ago, as a deemed land owner pursuant to section 3 of the Forestry Practices Act. Now, Forestry Tasmania is one of two Governmental authorities, the  
20 other being the Forest Practices Authority, that actually grants permission at the end of the day for forestry operations to occur in State forests before they become lawful. Because any other harvesting methods are unlawful. Now,  
- - -

25 HIS HONOUR: The Authority does that as well as Forestry Tasmania?

MR D. GUNSON: Well, Forestry Tasmania, under the way in which it - as a land owner, perhaps I can take your Honour to the documentation in support. Just bear with me, your Honour. If your Honour goes to a forest practices plan,  
30 I had it carefully marked but it has disappeared - I apologise for this, your Honour. And if your Honour goes to book 1 - I am sorry, your Honour, I have given you the wrong reference because I need the one that has the reference to Gunns in it. I do apologise for this.

35 I had it earlier, marked. In any event, I can continue on, your Honour, because the situation is that Forestry Tasmania is a land owner and it is the land owner who submits a forest practices plan to the Forest Practices Authority, which then goes through the processes of giving the requisite permissions to harvest. And in that forest practices plan there is of course reference to the harvester,  
40 which will be either in this case it was Gunns or A and B Contractors to which you were referred yesterday. So the role of Forestry Tasmania is very limited. As the landowner it simply prepares the plan, gives it to the Forest Practices Authority and it then goes through the necessary approvals process and also  
- - -

45

HIS HONOUR: Would it be safe to assume that I could assume that the Forest Practices Authority is aware of this proceeding?

MR D. GUNSON: Of this proceeding?

HIS HONOUR: Yes.

5 MR D. GUNSON: I imagine so.

HIS HONOUR: Yes.

10 MR D. GUNSON: Mr Wilkinson gave evidence, your Honour.

HIS HONOUR: Yes.

15 MR D. GUNSON: He was from the authority, but your Honour is correct they are aware of it.

HIS HONOUR: Yes.

20 MR D. GUNSON: But of course to the point that my friends make of course is that in some way we are responsible - when I say we, Forestry Tasmania, are in some way responsible for the operations of the Forest Practices Authority and the Act makes it quite clear it is not. If you go back to the Forest Act - Forestry Act of about six or seven years ago then the Forest Practices Board was a division of Forestry Tasmania. It worked under the auspices of Forestry Tasmania, but the Act was amended to make it quite that it was a separate, independent, statutory body, and that remains the case.

25 Now, Save the Ridge, a case to which we have already referred of course is all about planning authorisation not being an action. It is our submission that effectively all Forestry Tasmania does is take part in a planning process for the reasons we have outlined in our written submissions to you. If your Honour  
30 was to take the applicant's submissions to their logical conclusion, as articulated yesterday, then any decision by a planner at Forestry Tasmania's head office, for instance, to draw a line on a map or to allocate a number to a coupe alone would, without more, constitute an action. If you took that  
35 submission to its logical conclusion.

40 And I simply refer your Honour again to paragraph 17 of the majority judgment in Save the Ridge on this issue. Your Honour, the Forest Practices Plan that your Honour will need to refer to will be found in Court book 3, page 890. I don't need to take your Honour to it at this stage. And if you go through that Forest Practices Plan you will see that throughout the party who is actually charged with doing things on the ground throughout is, in fact, Gunns. And you will find repeated references in there to Gunns.

45 HIS HONOUR: It is referred to as the principal processor and A and B Nominees Pty Limited as the contractor.

MR D. GUNSON: That is right.

HIS HONOUR: Forestry Tasmania as the applicant and the landowner.

5 MR D. GUNSON: That is right, your Honour. So the actual work on the  
ground - and the evidence supports this and I will refer you to it in a moment -  
is performed by Gunns or the contractor whose task it is to fall the trees and to  
remove them. Your Honour will also find evidence relating to this in Court  
book volume 9, the affidavit of Jonathan Rudd, where he sets out who actually  
did the work and who would be doing the work at paragraphs 6, 7, and 12. At  
10 paragraph 6, Mr Rudd said:

15 *That he noted that the roading was constructed in the manner described  
and the roading was conducted by Gunns Forest Products Pty Limited  
and the road into 19D had been partially built by Gunns which will  
carry out further roading into the coupe in the same manner as 17E.*

And he said at 12:

20 *At 17E, the start-up briefing was conducted by Gunns, 17E was  
harvested by A and B Nominees contracted to Gunns.*

HIS HONOUR: That is at 2868?

25 MR D. GUNSON: That is right, your Honour. That is the actual physical  
sequence of what is carried out. With respect to the submission that was made  
about Mr Mooney and provisional coupling can I simply refer your Honour to  
transcript page 755 where Mr Mooney was asked, "What do you understand  
the difference to be?" He said:

30 *I understand that it is very tentative forward planning. Now what I  
don't know is how many of these indicative coupes are, in fact, logged.  
Historically, I don't know. So it may be an accurate example of what is  
likely to be logged or it may not be, I don't know.*

35 So his response about that was not as positive as asserted by my learned  
friends, merely he said, "I just don't know what the situation is." Could I then  
take your Honour to the decision of Greentree v the Minister which was  
referred to by my learned friends and also to the Minister v the Queensland  
Conservation Council. With Greentree could I take your Honour, please, to - I  
40 think it may have been handed up to you, a copy of that, your Honour. It is a  
decision of Kiefel, Weinberg and Edmonds JJ. I think a copy was actually  
handed to you.

45 HIS HONOUR: Of the Full Court?

MR D. GUNSON: The Full Court decision (2005) FCAFC 128. Look, I don't  
pause to let your Honour find it, if that is appropriate, I would simply ask your  
Honour, though, if you would note these following paragraphs?

HIS HONOUR: Is that the one that is at 144 FCR?

MR D. GUNSON: Yes, your Honour.

5

HIS HONOUR: Yes. Thank you.

MR D. GUNSON: Could I ask your Honour to note paragraphs 26, 29, 35,  
10 through to 39 and similarly with the Minister for Environment and Heritage v  
Queensland Conservation Council could I ask your Honour to simply note  
paragraphs 2, 52, and 53, with respect to the use of conventions?

HIS HONOUR: 2, 52 and 53?

15 MR D. GUNSON: 2 - - -

HIS HONOUR: Yes.

MR D. GUNSON: - - - 52 and 53.

20

HIS HONOUR: Yes, thank you.

MR D. GUNSON: Now, there was some criticism yesterday by my learned  
25 friend Mr Tree, of Dr Grove, and it was submitted that he had attempted to  
deliberately mislead the court. And my friend articulated the reasons why. I  
simply invite your Honour to note that that proposition was never put to Dr  
Grove. It was never suggested to Dr Grove, in the course of cross-  
examination, that that is what he had done, and I submit that before your  
Honour could make such a finding it would be appropriate of course that the  
30 proposition be fairly and properly put to Dr Grove, and he be allowed to  
comment upon it. It is a submission that was really not based on anything  
other than a brief outline, and your Honour would need far more than that to  
make any finding adverse to Dr Grove.

35 It is submitted that all that Mr Tree submitted this morning merely reinforces  
that the respondents - that is, reinforces the respondent's submissions, that the  
issue is not a justiciable one, and it never intended to be. The criticism of Dr  
Roberts for using SILO data, I submit, is ill founded, particularly when you  
bear in mind that Dr McQuillan, on his evidence, based his evidence of rainfall  
40 at Weilangta on what he described as a power point demonstration he had been  
to given by Mr Barnes Keegan from the Weather Bureau. So I suppose in one  
way what is sauce for the goose may well be sauce for the gander, in terms of  
that sort of submission.

45 But I would submit at the end of the day the evidence by Dr Roberts would be  
more persuasive, given her reliance on the SILO data. She gave extensive  
evidence as to the basis for that data, the reliability of it, and its extensive use  
within the farming community, the scientific community, and so forth. I am

conscious that Dr McQuillan was critical of the SILO data, but I don't believe, and I stand to be corrected as to this, but his criticisms were actually put to Dr Roberts for the purpose of comment.

5 HIS HONOUR: I recall one aspect where Dr Roberts conceded that something was incorrect. I think it related to the amount of rainfall.

MR D. GUNSON: Yes. But at the end of the day she gave, I submit to your Honour, evidence about the use of SILO data which your Honour can and  
10 should accept. And I would submit to you that you would be very wary of relying upon the evidence of Dr McQuillan as to this issue, given the source of it. It was unsourced, apart from, as he said, a power point presentation he had been to by Mr Barnes Keegan. I take you then, your Honour, of the criticism of the respondent made this morning by my learned friend, Ms Mortimer, and  
15 her reliance on the decision by Branson J in Booth v Bosworth, and I will just quote the passage:

*To give evidence apparently in their possession relevant to the fact in issue.*

20 And stress, as we have in our written submissions, that DPIWE and FPA are independent bodies. They are independent of Forestry Tasmania. There is no suggestion that in any way at all Forestry Tasmania has in its possess information that is in the possession of DPIWE, or the FPA.

25 HIS HONOUR: DPIWE is a - or whatever it is now.

MR D. GUNSON: I think it is D-P-I-W this week, I think.

30 HIS HONOUR: Yes. It is an arm of the State, isn't it?

MR D. GUNSON: It is arm of the State, your Honour, yes. It is one of the State Government instrumentalities, or ministries, more correctly. A department, yes. And any information held by DPIWE and FPA obviously it  
35 cannot be and is not in the possession of Forestry Tasmania. And finally if I could take your Honour to court book, please, number 5, and I invite your Honour to turn to page 2041. A submission was made by my learned friend, Ms Mortimer, to you late this afternoon that there was no effective monitoring, there was no effective continuing research.

40 But if your Honour looks at MW9, which is the Forest Practices Board research and monitoring program for fauna 2004 to 2009, Goals and Priority Projects, which is a report to the Forest Practices Board, and the Forest Practices Advisory Council, you will see attached to that report table 1 through  
45 to table 7, what exactly is in fact being done by way of monitoring and ongoing research. So to submit that there is no evidence of any ongoing research is incorrect. Unless I can assist your Honour further, they are our submissions in reply.

HIS HONOUR: Thank you, Mr Gunson. I would like to thank the counsel that are appearing in the case for their assistance to the Court in what has been a long running matter, which has necessarily taken a lot of time, because the parties have needed the time to prepare written submissions. And then sufficient time was then required to enable the Court to set these dates, to allow the parties to address them. The task ahead of me is unprecedented in my 11 years on the Court, but I can't make any promises about timing of judgment, only to say that if I can keep enough other work away I will do it sooner than later.

MS MORTIMER: Your Honour, might I say on behalf of everyone at the bar table that we appreciate your Honour's patience and good humour throughout this trial.

HIS HONOUR: I am not sure that I did when I read some of the transcript. I will just change feet occasionally. All that remains to be said is that I reserve my judgment and I may be a while in having the position - where I can get back to the position where I was before a second ago when I didn't have any reserve judgment. The Court will now adjourn, thank you.

**MATTER ADJOURNED at 3.28 pm INDEFINITELY**