

TRANSCRIPT OF PROCEEDINGS

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O/N 2874

**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, THURSDAY, 11 MAY 2006**

**Continued from 10.5.06**

**DAY TWENTY FIVE**

**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  
MR P. TURNER appears for the State of Tasmania,  
with MS K. GANLEY**

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HIS HONOUR: Yes, Mr Tree?

**<MICHAEL KENNETH MILLER, ON FORMER OATH [10.02am]**

5

**<CROSS-EXAMINATION BY MR TREE**

10 MR TREE: Thank you, your Honour.

Mr Miller, do you have Court book 4 in front of you?---Yes.

15 Can I get you please to turn to page 1393 and you might remember that just before we broke yesterday afternoon, I was directing your attention to paragraph 7 of your affidavit where you identified that you are responsible for co-ordinating strategic, tactical and operational timber production and land use planning for the district. Do I understand therefore that there are three  
20 different types of timber production planning: strategic planning, tactical planning and operational planning?---Yes, it could be described like that.

Can I do them in reverse order please. Is operational planning the planning of the actual harvest of individual coupes?---Yes, normally it refers to that. It's a forest operation which normally would require an FPP.

25

Yes?---So a discrete operation covered by an FPP.

30 So essentially when you say that you are responsible for co-ordinating operational timber production, that really means you are responsible for co-ordinating the forest practices plans in relation to lands under your supervision?---I'm more responsible for co-ordinating the efforts of other planners who draft forest practices plans.

35 Thank you. Can I then go to the next extraction which going in reverse order is tactical production planning; what is that?---I would categorise that as a good example of that as the putting together of our three year wood production plan at a district level.

40 And in what sense is that tactical?---Well, in terms of I suppose a military sense I see it in where, you know, you have these strategic broad operations coming into the more tactical tactics, what are we going to do here, and down to the individual operations.

45 So do I understand that strategic is broader than tactical?---Yes.

Right. And tactical is broader than operational?---Yes.

And you particularly identify tactical as encompassing the three year wood production plan?---I do.

5 Right. And it is tactical not in the sense that it is somehow requires a military design to achieve some goal in the face of opposition, it is not used in that sense is it?---Certainly not, no.

10 It is tactical in the sense that there are a number of considerations that need to be implemented in order to produce wood over three years?---Yes, that's right.

Now, do I understand the three year wood production plan is, or at least intended to be, published annually?---Correct.

15 So that would I understand that the first year of a three year wood production plan is probably pretty close to what will in fact occur?---I would like to think so, but that is not always the case. Various things can happen out there that cause you to change.

20 Sure, for instance, you might find a wedge-tailed eagle's nest and hence that coupe then goes away for a while at least?---Yes, or you may have a wildfire or some other catastrophe or a bridge collapse, or whatever it may be.

25 And do I understand that the three year wood production plan recognises that and has a series of contingency coupes which are identified, being coupes which can be brought on line at short notice if needs be?---That's the idea.

30 Right. So the first year, whilst it may not be gospel as to what will actually occur, is intended to be pretty close to what should occur?---Yes, I guess there is one level below that which is probably a degree of more certainty. If you would like me to talk about that?

35 Well, tell me what it is if it is not in the three year plan, what it is?---It's a harvesting schedule if you like that's put together by our sales people, based on coupes that are listed in the three year plan. That would normally cover a period of 12 months.

I see. But again it couldn't foresee each an every contingency that might arise in that 12 month period could it?---No.

40 The second year of a three year plan, I guess, is at a greater level of uncertainty; is that a fair comment?---Yes.

And the third year perhaps even more uncertain again?---Yes.

45 But nonetheless, it is intended to be the best prediction that is available for what will occur in that three year time frame?---Given the current knowledge of that time, yes.

Do I understand that there is an obligation on Forestry Tasmania to produce a certain volume of wood each year?---No, that is not entirely correct. I believe we are bound to produce the saw log and to my knowledge that is the only product that's - what's the word - I guess you know legislatively required.

5

Required of Forestry. Thank you. So a three-year wood production plan is prepared for the State, but I am assuming it is a conglomeration of district three-year plans?---That's correct.

10 How is it determined what volume will be produced from what district?---It's largely to do with customer demand and where the major mills are located.

Yes?---It's also, to some degree, determined by sustained yield calculations which are determined at the strategic level.

15

On a district basis or on a State-wide basis?---State wide.

Yes?---And so a combination of those things would in any one year determine production targets for that year.

20

So do you have given to you a production target for each year?---We do, for the first year, normally.

Sure. Who gives you that?---That's supplied by our planning branch in head office.

25

That is head-office planning rather than district planning?---Correct.

So you have been given, for instance, for this financial year - I guess it is financial year, is it?---It is.

30

You have been given a volume of wood that you must produce from your district?---Yes, an indicative volume for saw log mainly, from which all other products flow.

35

Right. And am I correct in saying that although the district has a sales component in its staff responsibilities, it isn't the case that individual districts are competing with each other for a market, are they?---No.

40

No?---No.

Sales is a State-wide activity?---Yes.

You don't have Derwent bidding against Murchison?---No.

45

No. So you are given annually a production that you must achieve for saw log?---Yes, that'd be true, normally.

And are you annually given production that you must achieve for pulpwood?---No.

5 So how then do you determine in planning what volume of pulpwood you should be harvesting?---Pulpwood - the way this works is that the number 1 target is saw log, to supply to our sawmills throughout the State. Now, depending on which areas are harvested the various ratios between saw log produced and pulpwood produced depends on the nature of the forest you're in.  
10 So largely pulpwood is arising from the saw log that is produced off a certain coupe.

So it is almost, if you like, a by-product?---Well, in that sense, yes.

15 I see?---But obviously there are certain market demands for pulpwood. So it's a matter of selecting a correct suite of coupes - an appropriate suite of coupes which tries to balance those products which is often very difficult.

20 It is no secret that by far the greatest volume of timber sold is pulpwood?---That's correct.

Something in the order, I think, of about 90 per cent, isn't it?---Well, I can't speak for the other districts but in our district I would say it would average about 10 to 1, 10 being pulpwood.

25 Yes. So 90 per cent would be about right?---I guess so, yes.

30 But you are not given a volume of pulpwood that you must produce?---At some stage during the process, during negotiations with industry, there is an indication that various companies wish to purchase various amounts of wood. So on that basis, as I said before, it's a matter of then balancing the required saw log, which is a given, and trying to select the suite of coupes which will closest meet market demand for pulpwood.

35 But how do you know how much pulpwood you should be producing. How do you get that other statistic?---Yes, there is, as I said, a document which we receive that indicates what the market demand is for pulpwood for the first year.

40 Yes?---So that is also used in trying to select the coupes which will supply closest to that amount.

So you are given a specific volume - I think you said it was an indicative volume - of saw log?---Yes.

45 Are you also given an indicative volume of pulpwood?---We're given a - it's more than indicative for saw log, I believe, because we need to meet a certain amount under legislation to supply the saw-log industry.

Sure?---But the pulpwood, I guess, is, yes, more indicative of what, at that very point in time, markets can absorb, which can change the next day.

Sure?---Yes.

5

Sure. But nevertheless you must have some idea of the volume of pulp wood that is expected to be produced in your district in a year, to achieve the planting of this harvest of suite of coupes, as you have just described them?---Yes, yes, that's correct.

10

I see. What would happen if you did not produce the volume of saw log or pulp wood that has been indicated that your district ought produce for a year?---It - to my knowledge it hasn't happened since I have been here.

15

Sure. What would happen though?---I imagine if we had difficulties during the year, for whatever reason, the reasons like I gave before, that that wood could be sourced from other districts.

20

But ultimately am I correct in saying that it is seen as your responsibility to ensure that production of that volume of wood?---Yes, within the circumstances that are under my control.

25

And if your district was not able to do so that would be a matter that would be, if you like, your fault, in a sense that it would be an issue that your line manager would take up with you?---I would certainly hear about it during the year if we were falling short for reasons which I could control.

Sure.

30

HIS HONOUR: It would be a problem, rather than a fault.

MR TREE: That is so, yes.

35

So would I be correct in saying that at least to that extent there is some pressure on you to ensure the harvest of the volume of timber that has been indicated you ought be producing?---I guess there is. I mean, there's pressure in any job, but the - it's the transition from coupes listed in the three year plan to the sales schedule - - -

40

Yes?--- - - - therefore from there to the planning process, which is most arduous, and that is where I think the most pressure comes on to - not me especially, but to my planners, in order to meet deadlines for planning, which these days can take a hell of a long time to produce an FPP.

45

Sure?---If that answers your question?

Sure. Does that then mean that there is, if you like, an incentive to maximise wood production per coupe?---We don't like to waste wood.

No. But there is an incentive therefore to maximise wood production per coupe?---Yes, within the constraints of the FPP.

5 Sure. Because the investment in time and cost perhaps in preparing a forest practices plan is the cost, from Forestry Tasmania's perspective, of producing the wood?---Yes. There are other costs as well.

Sure?---That is part of it.

10

But if for the cost of producing a forest practices plan you can get 10 ton of wood, or 100 ton of wood I assume it is better to get 100 ton of wood?---It could be. There may be other reasons why you are harvesting a coupe. It may have very low volumes that may be in a degraded state, but that you want to clean that up and get a good forest growing back.

15

Sure?---Now, there have been decisions made in the past where we have lost money over doing that.

20

Sure?---But the primary aim there was to rehabilitate that forest.

There is a further planning beyond the three years, isn't there, and that is the 10 year plan?---Some people refer to a 10 year plan. I don't often use that term, because it isn't really a plan.

25

Right. But there is something which looks forward for 10 years; is that correct?---There is a process by which coupes are identified. Some - yes, out to approximately 10 years or five years, or 10 years, whichever, and that's primarily for internal use within Forestry Tasmania, to help our planning section understand just what - you know, what we can - well, it helps to determine the sustained yield State-wide on the number of coupes that may be available out there. And it's just expressed by years in terms of just the way to do it. But other than that we don't use that at the district level. It's entirely for Forestry Tasmania to make decisions on, you know, the broad - the long term strategic future, to make decisions on, I guess, signing contracts for wood well into the future, and so on, and for, you know, our sustained yield calculations.

30

35

Is that 10 year planning that is - I know you have difficulty with it being a plan, but the process by which it is created must be some form of planning, mustn't it?---Oh, yes. Yes, you could call it that.

40

Sure. Is that planning undertaken at a district level, the 10 year planning?---Yes.

45

So that is again an area of your responsibility?---Yes.

And do I understand that the 10 year plan incorporates the three year plan, or is it a three to 10 year plan?---Yes. They are completely separate.

Are they? I see. But do I understand though that there are then two planning activities that you are responsible for, amongst others? Firstly, the three year plan, and secondly, a three to 10 year plan?---Yes. I don't call it a plan.

5

Sure?---Yes.

And whilst in the same way as the third year of a three year plan is most unlikely to actually transpire as planned, that would be a similar caveat in relation to the three to 10 year plan?---Certainly. Because it's not meant to be represented that way.

10

Sure. On the other hand it is useful on a strategic level, for instance, planning roading?---The - - -

15

The three to 10 year plan?---No. The three year plan would normally account for roading.

I see. You don't think knowing where it is possible in the next 10 years harvest may occur is a useful planning tool in relation to roading?---It can be on a very broad scale.

20

Sure. For instance the W road, which I think is a Forestry road, would have been intended to meet the needs of, for instance, probably 20 or 30 years of forest harvesting in Wielangta?---I think that's a Gunn's road actually.

25

Is it? I see?---But to answer your question, yes. A good example of a strategic or tactical approach to, you know, opening up a new area of forest.

30

On the other hand, the best indication we have of where forest harvesting might take place in 10 years is the 10-year planning, isn't it?---No.

I see. What is the better indicator of where forest harvesting might take place in the next 10 years?---There is none.

35

Well, I come back to my question. It is the best that we have, isn't it?---It's not intended for that purpose especially.

Sure, but there is nothing better which is a predictor?---It's not intended for that purpose so - I probably didn't explain it well enough, but it's really about the ability to look ahead, looking to the future, see what's out there, try and make some kind of an estimate as to what may be possible. And it happens to be expressed in years, because as a result of that there is some estimate of volume that may come from that suite of coupes. And so as I said before, it's primarily used at the higher level to determine what markets may be supplied in the future and the contracts and so on and sustained yield. It's not actually a - I mean, the planners that do it aren't thinking at the operational level when they are doing this.

40

45

On the hand, it is coupe specific, isn't it?---Provisional coupes, yes.

5 Yes. So that it isn't that there is simply a wish list as to a volume that will be produced, it is that there is planning for the stage where individual coupes, provisional coupes have been identified as being the source of that production?---Yes.

10 In the three to 10-year timeframe?---Yes.

At page 1394, paragraph 8(b) you say that one of your other duties is monitoring performance against planning targets for a range of wood and non-wood values?---Correct.

15 Do I understand that that is two things; are we achieving the amount of wood that we should be producing is the first?---Yes.

20 That is what monitoring performance against planning targets for wood values means?---Yes.

And the non-wood values would include for instance conservation of threatened species?---It could. I think I mean more there that, you know, we may for example be implementing the new community forest agreement reserves which were announced in May last year.

25 Yes?---And that they are now provisionally in place.

30 Yes?---I don't believe they have been gazetted yet, but we then - the planners then would need to make sense of those reserves, the boundaries of those, and to adjust if necessary where they should be in terms of other things going on in the forest. So that would be an example I would choose to say that I would monitor their actions in regard to that sort of thing.

35 In what sense is that a non-wood value?---Okay. Well, these are going to be either formal or informal reserves. So in that sense the wood that is encompassed in those reserves will not be harvested. So therefore that's what I mean by non-wood. Wood meaning wood production; non-wood meaning non-wood production if you like.

40 Is (b) your words? It sounds fairly high-faluting language?---You don't believe I'm capable of - - -

No, I just - do you normally talk in the terms of "non-wood values"?---Yes.

45 You do, I see. What is a non-wood value then?---Well, it's a value that is other than non-wood production.

Like what, conservation?---Yes.

Well, is that to say there are planning targets for conservation in Forestry?---That's the way I have expressed it there. As I just explained with the new reserves - all right, I can pick another one like for example our policy to install biodiversity spines which we have done over the last couple of years where we are given a set of guidelines on how to establish those things, you know, the size, the distribution, forest types and rules applying to them when they're in place. So the planners are then given the task to draft those and to have them approved. I would oversee that process, for example. That once again being a non-wood target.

Sure?---Target may not be the right word I guess, in that sense.

Is there a monitoring of the performance of Forestry in relation to conservation?---I'm talking about what I do here.

Sure?---And in terms of what my planners' work involves in relation to what I just mentioned. So I would be monitoring their efforts in terms of compliance with our policy.

I see. In paragraph 26 of your affidavit you talk about a broad-toothed stag beetle reserve that was established. I think if we look at virtually any of the Forest Practices Plans, for instance I am looking at page 1531 - - -?---Yes.

- - - we can see a circular reserve there marked?---Correct.

That is adjacent to, I think, three and perhaps four of the coupes that you have been considering in your affidavit?---It is within 150 or 200 metres.

Is it the only designated stag beetle reserve that you are aware of in Wielangta?---I can't recall if there are any others, but there may be one in 7A, but without the map I couldn't tell.

But do I understand from paragraph 26 that you have made inquiries as to how it is that this reserve came into existence, and you have not been able to find the answer?---Yes. That's correct.

Do we even know how long it has been there?---Well, I think I mentioned here that it was - that we first received notice of this locality on 27 July '95, so I'm assuming that it was probably that year, or the previous year.

Right?---But I don't know. I haven't been able to find any other records on that.

And is it a formal reserve, is it, rather than an informal reserve?---No, it's informal.

It is informal reserve?

HIS HONOUR: I think you said yesterday that the broad-toothed stag beetle was first discovered in '94; is that correct?---Yes.

5 Yes?---And I said in relation to Wielangta 7A.

Yes?---Yes.

10 MR TREE: Now, of the coupes that you have dealt with in your affidavit, am I correct in saying that at least one of those, coupe 13B, was subject to a high intensity burn?---No. Coupe 13B was never logged.

15 So although there is a forest practices plan it has not been implemented?---I don't believe there is a forest practices plan.

For 13B?---Yes.

20 Just have a look at page 1399. You will see that there is a heading Coupe WT013B?---Yes.

And you then talk about the identification of potential broad-toothed stag beetle habitat?---Yes.

25 And in paragraph 36 you say:

*The FPP did not include a prescription prohibiting firewood collection.*

30 Doesn't that not tend to suggest that there was a forest practices plan for that coupe?---Oh, okay. Yes, there was, but there is no longer. It's expired.

I beg your pardon?---It's expired.

Without being acted upon?---Yes.

35 I see. Am I correct in saying that there was planned for that a high intensity burn?---I would need to see the plan to understand the burning prescriptions.

40 Well, let us just see if your affidavit contains a copy of that plan. If you look at page 1530- - -?---Yes.

- - - we can see that this is a form which emanated in Forestry?---Yes. It's a notification form to the Forest Practices Board.

45 And if we look at about point 8 on that page, in the bold paragraph, third line, we see:

*13B will be cable clear felled and then burnt high intensity.*

?---Yes.

Does that make it fairly clear that there was a high intensity burn planned for 13B?---Not unless I saw the actual certificate FPP which states the same thing.

5

Well, high intensity burning is the usual method of burning used in relation to cable clear felling operations?---In wet forest, yes.

Right.

10

HIS HONOUR: What does the adjective "cable" signify there?---Oh, it's a harvesting method using a cable machine, a tower, standing on top of a hill. It has cable running down the hill, logs are attached, and it's winched back up above the ground.

15

MR TREE: Would you agree with me that in relation to a high intensity burn it is impossible to preserve, for instance, habitat reserves within the coupe?---Could you define habitat reserves?

20

Sure. For instance a wildlife habitat clump?---Not necessarily. In relation to clear fall of wetter forest, whether it be ground based or cable based, the code still provides for wildlife habitat clumps, albeit not inside the coupe, but on the edges of coupes.

25

Yes?---So that you could establish a wildlife habitat clump for instance at various points around the edge of the coupe. You could then track those areas to exclude them from the burn, and then carry out your burn with the aim to protect those areas.

30

Sure?---Following on from that, when the next coupe, if one occurs, adjacent to that one is also a wet forest coupe, the previous habitat clump that was retained on the edge of the first coupe would then be extended into the second coupe, therefore maintaining habitat clumps.

35

I think you may in fact be agreeing with the question, and perhaps I didn't make it clear enough. Reserves within the coupe. In other words, not at boundary, but inside the operational area, could not be reserved, or would be burnt by the high intensity burn, wouldn't it?---Yes. That's correct.

40

Hence the reason why you say the code suggests that the clumps should be put on the edge of the coupe?---Yes.

45

Now, you have annexed to your affidavit some documents which relate to the swift parrot, and am I correct in saying that the relevant genesis of those is the Brown Report from 2001?---I don't know of any Brown Report from 2001.

Well, just bear with me. Sorry, David James?---That would be correct, yes.

And that is at page 1510?---Yes, that's it, I think, yes.

And do I understand that what occurred was that, as is identified on page 1510, Mr James spent two weeks in five locations in the Wielangta area?---That  
5 would be true, yes.

And in consequence of that he prepared the map which I showed you yesterday with the green shading on it?---Correct.

10 That was the result, if you like, of - or the graphic result of his two weeks of activity?---That's correct.

You obtained - you personally obtained, ultimately obtained a copy of the report at page 1510 and the map, didn't you?---Yes. I received the map some  
15 time after, I think, but, yes, I did get both eventually.

And do I understand that in fact on 20 December you had a meeting with Dr Munks, Mr James and Ms Iliopoulos in relation to Mr James' report?---Correct.

20 HIS HONOUR: It is 2001?

MR TREE: 2001, yes.

And we can see that is clear from page 1507, the email that you sent on  
25 Christmas Eve of that year, that is right?---Yes.

Now, at that meeting, correct me if I am wrong, there was an agreement reached that the green shaded areas would be excluded from any future harvest operations?---I believe there might be an email in here somewhere which says  
30 something like that. Do you know where that is?

HIS HONOUR: Well, doesn't the witness himself say that specifically at paragraph 44, page 1402?

35 MR TREE: Yes. Your Honour is quite correct.

If you look at that paragraph you have said there in the second sentence:

40 *It was agreed that nominated areas of high swift parrot breeding activity marked as green would be excluded from future operations.*

?---Yes.

And that is the meeting on 20 December?---Yes. Oh, yes. It says, "It was  
45 agreed."

If I look though - sorry, I withdraw that. If we look at page 1504 we can see that Dr Munks sent to Ms Iliopoulos the reply form which specifically in the

first bullet point prescribed that?---The one starting, "In the areas of high swift parrot" - - -

Yes?--- - - - "breeding activities." Yes.

5

Mr Brown provides a report and a map?---Mr?

Sorry, Mr - - -?---James?

10 Yes. Mr James a report and a map. There is a meeting on 20 December in which it is agreed that the green-shaded areas will be excluded from future harvest?---Yes, that's what it says, yes.

Well, that is what you have said in your affidavit?---Yes.

15

Dr Munks sends Ms Illiopoulos, who is one of the people who works under you - she is one of the planners?---Yes.

20 Sends a prescription which explicitly says that that area is to be excluded?---Can I see that?

Yes. I have just taken you to it at page 1504, the first bullet point?---No, that is from the senior zoologist to Angela Illiopoulos.

25 Sorry, I may not have made my question clear. The sequence of events is, Mr James' report and map, meeting 20 December, Dr Munks' prescription, 23 December?---Yes.

30 But that agreement and that prescription have never been implemented by Forestry, have they?---If I can say, there was a period between November 2001 and about a similar month in 2002 where, although there are not records here to show, after that meeting I took this recommendation back to my office and discussed this with my district forest manager - - -

35 Who is who?---Steve Whiteley.

40 Yes?---We then - or he then suggested that even though this doesn't say that these areas should be put into reserves, it just says "excluded from harvest" there was some confusion over what was meant by that. Now, with my discussions with Mr Whiteley, he advised me that we would not - certainly would not be putting those areas into immediate informal protection, but that he felt there was more work required in that area seeing there was only one survey done, there was more work required to determine the best management outcomes for those areas, using those areas as a guide. So in other words - or  
45 or not in other words, actually what happened was the following the year there was another survey concentrating on those green areas which was directed by Dr Sara Munks from the Forest Practices Board and that was carried out to determine what the management options would best be for those areas.

Well, let us just take this step by step?---Right.

What is the ambiguity, please, tell me, about the prescription that says:

5

*The areas of high swift parrot breeding activity marked as green on the survey map in the adjacent coupes 13B, 12D are to be excluded from any future harvest operations and a similar prescription in relation to 12F and 13D.*

10

What is the ambiguity then?---Yes, I couldn't say. I mean, those areas were, sort of, being considered at the time, as I recall - I mean, yes.

15

Are you answering my question? I am asking you what is the ambiguity about that?---Sorry. Can you explain?

20

What is ambiguous about what appears in the three lines at the first bullet point on page 1504?---Oh, okay. I'm saying that the recommendation, which this is what it is, says that they are to be excluded from any future harvest operations.

25

Yes. And about three minutes ago you said that there was some ambiguity about that or it was unclear. I am asking you - some confusion in relation to that. What is ambiguous about that?---Because I think later people thought that to mean that they would be put into informal reserves. I mean, you can exclude an area from harvest without putting it into reserve.

Sure?---So that, in my mind, was some degree of ambiguity about that.

30

There is no ambiguity that the areas shaded green are not to be harvested, that is patent, isn't it?---Yes.

However, in fact, some of the green-shaded area has been harvested, hasn't it?---Correct.

35

The decision to reject this recommendation was made on or before 24 December 2001, wasn't it?---Yes.

The prescription was only communicated to you on 23 December?---Yes.

40

It was sent as an attachment to an email from Dr Munks?---I don't know if it was sent as an attachment or not.

45

Have a look at this document, please. What I have put before you is a copy of an email from Dr Munks to you attaching the prescription?---Yes. Okay. Yes.

We can see that in relation to coupes 12F, 13D, the prescription is dated 23 December. It follows that the email, which doesn't have a date on it, is 23 December?---Yes. It has a date down the bottom there, but - - -

What is the date down the bottom?---23 December.

23 December. I see. Thank you. And on 24 December you sent to  
5 Ms Illiopoulos the email that we see at page 1507?---Yes.

Why did you not adopt the agreement and recommendation or the prescription  
that we see at page 15041 to 505?---Because I refer to in this email her  
recommendation to add these areas to MDC protection.

10 Yes?---So I'm referring to that when I say I don't think we want to do this. As I  
mentioned before, after discussion with my manager, it was decided that we do  
not wish to do that at that stage until further studies were undertaken.

15 Why not? You had had two weeks of field studies by Mr James?---Yes.

Why didn't you want to accept what he had said?---He said - what did he say?  
Did he say that these areas should be protected?

20 Well, that was agreed in a meeting at which you were a party on 20  
December?---It was to exclude these operations - - -

Yes?--- - - - these areas.

25 Yes. Why didn't you want to do that?---For the reasons I just gave.

Which are what?---Which - it was one survey in one year, one breeding season.  
My manager considered that we did not wish to go to the level or putting these  
areas into protection until such time as we could undertake further surveys to  
30 determine: one, if there were more areas there that were missed and;  
secondly, if some areas were more important than others, therefore attracting a  
higher level of protection.

Wasn't the problem that the green shaded areas covered a large area of the  
35 Wielangta forest?---No.

Wasn't the problem that the nesting habitat for swift parrots required old trees  
which are valuable in terms of forest product?---No.

40 You would agree, wouldn't you, that in coupe 17E there was a dramatic  
reduction or a substantial reduction in the reserved area from that which was  
shaded in green by Mr James?---Following the survey in 2002, yes.

45 Right. So just let us understand this. Based on two weeks of field observations  
of Mr James in 2001, a map with green shading is prepared and in the  
following year there is a further survey undertaken, in consequence of which,  
less areas in coupe 17E at least were reserved?---That's correct. A subset of

the green James areas were actually made into informal reserves after that survey.

5 Were they - was the second survey in the form of a map?---I haven't got a copy of the map that came from that survey, all I have got is a report.

HIS HONOUR: So in net effect was a reduction in areas to be excluded from harvesting?---Yes, to the degree of them becoming informal reserves.

10 But smaller than the original green areas?---Yes, but also your Honour, as part of that work the remaining green areas were made special management zones.

MR TREE: The only document that was published as a result of the 2002 report is that which commences at page 1501; correct?---I believe so.

15 It says in relation to coupe 17E:

20 *The following decisions were made and the required changes made to MDC mapping: creation of WHS wildlife habitat strip, to protect high quality nesting habitat and to give - - -*

?---Sorry, sorry, I can't see where you are on the page.

25 HIS HONOUR: Under the heading Wielangta Hill.

MR TREE: See, 17E is the first - in the middle of the first group of three coupes?---Yes.

30 *...creation of wildlife habitat strip, to protect high quality nesting habitat and to give connectivity to the existing MDC protection informal reserves.*

?---Yes.

35 Well, you say that that is to be construed as the rejection of the green shaded area in the James map and the replacement of it with the wildlife habitat strip?---No.

40 Well, is there some other reference to coupe 17E?---No, just to be - sorry, I don't mean to be - I didn't say that the wildlife habitat strip put into protect high quality nesting habitat replaced the green area.

45 Right. It was to be in addition to the green area, was it?---It was to be - include part of the green area, as I recall.

Well, where is there any reference in this to a reduction on the James green shaded area in coupe 17E?---I don't follow the question, I am sorry.

Where is there - well, I will start it step by step. Where is there any mention of the James report in this document?---Can I just have a look?

5 Take your time?---I believe in the second paragraph at the top it quotes "On 14 November and the 20th, Ray Brereton, Tony O'Malley and myself assessed areas for potential management options where Dave Jones observed swift parrots the previous year".

10 Right. That doesn't refer to his report though?---No, it doesn't.

Nor to his map?---Well, by default I guess they would have needed the map to find out where he observed the parrots.

15 And am I correct in saying that it does not in this document in relation to coupe 17E say that the green shaded area should be made available for harvest?---Well, I can't see those words in here, no.

20 But that is how you have construed the sentence that says "creation of a wildlife habitat strip" etcetera?---No, I don't believe so. I thought I explained that the decision was made after the survey to - following observations and using James' report, especially in terms of where he actually found nest trees, that parts of those green areas would be put into informal protection. The remainder of the green areas would be put into special management zones.

25 So the green areas were to be either a special management zone or otherwise reserved; is that how I understand it?---Yes, or part thereof, yes.

30 But that hasn't occurred in relation to coupe 17E. Substantial areas of the green shaded area have been harvested?---Yes, okay. If you understand the way that special management zones are created and are treated, that can be possible.

35 You can have a special management zone for swift parrot and chop the trees down?---Provided you prescribe in relation to - sorry, in conjunction with specialists that there may be larger than normal for example wildlife habitat clumps retained. Special management zones does not preclude harvest, but it must take account of the value, the primary value for which it was created.

40 Mr Miller, you cannot point to any form like that at page 1504 that provides a different prescription for coupes 12F or 13D, can you?---No, only to say that time lapsed from that point, and I'm not sure if there are records. Time lapsed from that point to the stage when the planning was completed for 13D for example where there would have been contact with the specialists in regard to the James green areas, the SMZs which were created, and how we might best  
45 treat those. I mean, this was not done in isolation by ourselves. The final prescriptions for that coupe for example and indeed the authority to go ahead with that harvesting was made in conjunction with the FPA specialists on the proviso that certain management prescriptions be included in the plan.

Yes. Could the witness be shown exhibit AQ? We see that this is the reply form in relation to coupe 17E, also dated 23 December 2001?---That's correct.

5 We see that the first bullet point under the prescriptions there:

*The areas of high swift parrot activity marked as green on the survey map are to be excluded from the harvest area.*

10 ?---Correct.

You cannot point to any reply form which superseded that in relation to coupe 17E, can you?---I'm not all that familiar with 17E, I must tell you, in terms of the planning process. My affidavit does not cover that, but, no, sitting here I  
15 cannot point to any such document.

In terms of documentation, what you can point to is the two pages at page 1501 and 1502?---Yes.

20 Which is a document prepared it seems, if you look at the second page of it, by a Forestry Tasmania employee?---Karen Ziegler, correct.

Correct?---She was involved with the survey.

25 Now, let us understand this survey. It is patent from page 1501 that this additional survey took place over two days, the 14th and 20 November?---Correct.

30 It was a survey of, it would seem, all of the coupes that are identified, or referred to on the fact of the document?---Yes. That's what it says.

35 And do I understand your evidence to be that, based on that two day survey of all those coupes, effectively what Mr James had recommended in relation to the individual coupes was superseded?---I believe a review was carried out of the areas that Mr James visited in terms of their relative importance, for either becoming an SMZ or an informal reserve.

40 And of the course the beauty of them being SMZ, from Forestry Tasmania's perspective, is that they were then available for harvest?---Not necessarily. It would have to undergo the planning process through the specialists to determine to what degree, if any, they could be harvested, and that's what happened.

45 You do not know whether a single parrot was seen in this survey, or this review on the 14th and 20 November, do you?---I don't know if that's included in here anywhere.

Nor do you know exactly what it was that the persons on the ground on those two days undertook?---No. But I could establish a view on that.

5 HIS HONOUR: Mr Tree, I don't know whether your last question, but one, was fair. I think the document at 1501, although not specifically in relation - oh, no, not to 17E, but I think it does refer to 19D. It does refer to swift parrots being observed nesting.

10 MR TREE: Yes. I see that, your Honour. It is unclear though whether that is these persons, or whether it is a reference to Mr James' observations.

HIS HONOUR: Over areas that swift parrots were observed nesting.

15 MR TREE: Yes.

HIS HONOUR: Yes, I understand. And again the same sort of language is used at the bottom of 1501.

20 MR TREE: That is right. That is the only one that is unclear.

Anyway, based upon this review that we see at page 1501, a wildlife habitat strip was to be established on coupe 17E; that is right?---Yes.

25 So, just correct me if I am wrong, when I look at the forest practices plan for coupe 17E I should see a wildlife habitat strip, should I?---Yes, if the plan was done after this.

If you look at page 902.

30 HIS HONOUR: Book 1, is it?

MR TREE: Sorry. Book 3 in fact, your Honour.

35 HIS HONOUR: Sorry. Book 3, is it?

MR TREE: Sorry, your Honour?---Yes, I have got that.

40 Is that the wildlife habitat strip that we see marked on the eastern edge of the coupe; is that it?---I assume so.

It says "protection forest," doesn't it?---It does.

So that, your evidence would be, is a wildlife habitat strip?---Yes.

45 I see?---It - yes. I mean, there probably are other values there which aren't shown, but primarily I would consider that to be the wildlife habitat strip, yes.

Could you look please at page 1004 of that affidavit, of that book, rather?---Yes, I have that.

You will see that that is an email from Mr Palici to Mr Wapstra?---Yes.

5

You will see that it is in relation to coupe 17E?---Yes.

Point 7 reads this, does it not:

10           *The incorrect classification of the MDC protection on the eastern boundary of coupe 17E as a wildlife habitat strip, when it is protection forest for swift parrot.*

?---Yes.

15

So in fact it would appear that it is not a wildlife habitat strip?---When I looked at that map I think I did say that the shape of that wildlife habitat strip was not as I would normally expect to see it. There were other, you know, bits and pieces that emerged from that, which I assume then, and this is what point 7 refers to. So it would seem that it was made informal protection forest for the swift parrot. In any event, it has the same level of protection.

20

Well, correct me if I am wrong, what Dr Munks prescribed hasn't been implemented in relation to coupe 17E?---She made a recommendation - - -

25

In relation to the green shaded areas being excluded from harvest?---Correct.

You say that was superseded by the revision in 2002, which was to establish a wildlife habitat strip?---I did say that.

30

And now we can see that hasn't been done either?---Well, this says that it is not a wildlife habitat strip, but it is MDC protection for the swift parrot, so, yes, I guess so. But it's still an informal reserve in any event.

35

And being an informal reserve is not obliged to comply with the requirements for a wildlife habitat strip under the Forest Practices Code?---Is not or is it not?

Is not obliged to comply with the requirements for a wildlife habitat strip under the Forest Practices Code?---Those being?

40

Well, the code prescribes what a wildlife habitat strip is to be, does it not?---It does.

That is not a requirement which prevails in relation to a management classification zone for protection forest?---Sorry, you're getting me confused with the terms.

45

A wildlife habitat strip is a particular type of reserve identified and prescribed in the Forest Practices Code 2000?---Yes, for a particular reason, yes.

5 Yes. And its nature is described as well in the Forest Practices Code, isn't it?---Yes, it's primarily to protect fauna.

10 By having a management zone of protection forest, the requirements under the code for a wildlife habitat strip do not need to be complied with, do they?---The one that comes to mind that's mainly used in terms of a wildlife habitat strip is that you may road through such a wildlife habitat strip, but there are severe limitations on the width and formation of any such road that's constructed.

15 And we see that in this protection zone there is a road?---Sorry, what page was that map?

Just bear with me a moment?---917.

20 Well, 902 perhaps?---902, okay, so two of them. Yes.

Do you see there is a road through it?---In the south?

Yes?---Yes.

25 In fact am I correct in saying that at that point there is in fact a swift parrot nest where the road goes through the management zone?---There is a nest close by, I believe.

30 That is the nest we saw on the view, all those months ago?---Yes, yes.

That was something that could not have occurred had the zone been a wildlife habitat strip; correct?---No, it could have occurred.

35 Would you go back, please, to your affidavit, that is in Court book 4, and consider again Dr Munks' prescription at page 1504?---I must point out that that is a recommended prescription, there is a difference.

And we can see - the third bullet point:

40 *All these areas will be protected from burning, although a cool, patchy burn is acceptable.*

?---Yes.

45 If you look at the other prescription which I have put before you, exhibit AQ, I think it was, we see - second bullet point - in identical language:

*These areas will be protected from burning, although a cool, patchy burn is acceptable.*

?---Yes.

5

Look at the Forest Practices Plan for coupe 17, please, which is in Court book 3.

HIS HONOUR: 17E?

10

MR TREE: Yes, your Honour.

And it commences at page 890?---Yes, I've got that.

15

We see that there is burning prescriptions on page 898?---Yes.

There is no restriction on burning any area of the coupe, is there?---No.

20

That wasn't a matter that was even touched upon in the 2002 document, burning regime, was it?---Which document is that one?

The document of Ms Ziegler's annexed to your affidavit?---Okay.

25

HIS HONOUR: 1501.

MR TREE: Yes?---No, I don't believe it mentioned burning in there anywhere.

30

So how then is it that clear language about the exclusion of reserved areas from burning hasn't made its way into the Forest Practices Plan?---It doesn't say that they should be protected from burning.

35

No, and I am asking you how is it that the prescription which says that the area should not be burnt hasn't made its way into the Forest Practices Plan?---Sorry, could you show me where it says it should not be burnt?

Do you still have - - -

40

HIS HONOUR: 1504.

MR TREE: Thank you, your Honour.

- - - 1504 in front of you?---Which book is that in, please?

45

HIS HONOUR: Book number 4.

MR TREE: Do you see, the third bullet point:

*All these areas will be protected from burning, although a cool, patchy burn is acceptable.*

?---Yes.

5

Where do we see anything in the Forest Practices Plan which recommends the reserved areas be protected from burning?---It says a cool, patchy burn is acceptable.

10

Well, it also says all these areas will be protected from burning, doesn't it?---It does, but it qualifies that by saying although a cool, patchy burn is acceptable.

A few moments ago you made the point that what Dr Munks says here is only a recommended prescription?---It says that.

15

Does that mean you are free to ignore it?---I wouldn't put it that way, no.

How would you put it?---I would never ignore any advice. I could discuss that advice further and come to some other agreement that's sensible, it depends on the level of understanding of both parties as to what the issue is.

20

It then just becomes a suggestion which you can take on board and give such weight as you want?---No, no, in fact, this is how the system works, that's why they say it's a recommended prescription and then that would invite further comment. There may be operational reasons, for example, why some of these things can't work and that's what - then the process would be for the planner to discuss that with the specialist and see if there can be a more amenable outcome that would satisfy both parties. I mean, that's how the system works.

25

30

And your Honour could safely conclude that in respect of all of these coupes in Wielangta that is the way the system worked?---I can't speak for all the coupes in Wielangta. I only know as a general approach how the system works so I couldn't say for each coupe it worked in any certain way.

35

Do I understand the way in which the system works according to your evidence is this: the Forest Practices Authority gives recommended prescriptions which are then negotiated with Forestry Tasmania?---And also in cases of threatened species with the DPIWE and the Threatened Species Unit I imagine.

40

So that recommendation really is nothing more than an invitation to negotiate in the real world?---Not always.

So in other words if Forestry Tasmania isn't happy with the recommendation, the way the system works is it then goes and commences negotiations?---That would be fair.

45

And that is what happened in relation to coupe 17E; your evidence is isn't it?---Well, I really - once again I didn't - I wasn't really hands on with 17E, I was not involved with the plan to any great degree so I really couldn't say.

5 You were one of the people at the meeting on 20 December 2001 in relation to this very issue weren't you?---That's correct.

You were one of the people who agreed on 20 December what would occur, namely the green shaded areas would be excluded from harvest?---Yes, I mean  
10 I cannot recall actually agreeing to that, but - - -

That is what you say in your affidavit?---Yes, sorry I meant for reserves, I'm getting mixed up there. But yes that's right. Yes.

15 But the way the system works is having agreed it on 20 December 2001 doesn't mean that you can't later try and negotiate a better outcome?---Yes, and I would hope that that would be a normal course of practice in any situation in life.

20 And you say it is just coincidence do you that the outcome that was negotiated is one which saw a far greater volume of timber harvested from coupe 17E?---I see - my opinion on this is that that would be true, but it also would be true that after negotiation with the various specialists management prescriptions were put in place in that coupe which were seen to satisfy the requirements for the  
25 threatened fauna.

Might this be an illustration where the incentive to maximise the production of wood from the coupe was the inducement for Forestry to try and negotiate out of the Munks' prescription?---I have no idea.

30 HIS HONOUR: Mr Tree, are you moving to a new topic?

MR TREE: I am, your Honour, yes.

35 HIS HONOUR: How much longer do you think you will be?

MR TREE: Not that long, your Honour, probably another 10 or 15 minutes I would think.

40 HIS HONOUR: All right. Do you have some re-examination at this stage Mr Gunson?

MR D. GUNSON: I do.

45 HIS HONOUR: So it is probably better that we adjourn until a quarter to 12.

**ADJOURNED**

**[11.30am]**

**RESUMED**

**[11.47am]**

5

HIS HONOUR: Yes, Mr Tree.

MR TREE: Just excuse me a moment, your Honour?

10 You might remember that I was asking you some questions a little while ago about the status of the reserve area on coupe 17E?---Correct.

15 And we were debating whether it was a special management zone, or a wildlife habitat clump, or whatever. Presumably, to the extent that it is a wildlife habitat strip, that would count as an informal reserve, wouldn't it?---Yes.

Could the witness please be shown this document? We can see that that is a map which has been produced at Forestry Tasmania?---Yes.

20 The date of the map, please?---3 June 2004.

And we can see that it depicts, amongst other coupes, coupe 17E, or coupe 17E, does it not?---It does.

25 And we can see that the map has a legend which includes a yellow, or perhaps a buff colouring, for informal reserves?---Correct.

And we can see that there is no shading of an informal reserve on coupe 17E at all?---Yes.

30

That makes it clear that, as at that date, according to the MDC layer for coupe 17E that there was no informal reserve, does it not?---On this particular depiction of this map, which is a conversation inquiry map - - -

35 Yes?--- - - - it does, but I'm not sure why, because the area - if you look to the east of 17E you can see the shape of the coupe boundary I think would almost mirror what became the protection zone for the parrot, running north/south into the protection zone for the wedge-tailed eagle. So whether for some reason it hasn't appeared here, it is indicative that the shape of that reserve is in fact  
40 mapped.

Well, there is no shading?---I agree.

45 And it is indeed a conservation map. In other words, it is intended to give a print out of relevant conservation information?---That's correct.

I tender that, but I don't have copies of it.

HIS HONOUR: This is something that be easily photocopied, or does it require a colour photocopier?

5 MR TREE: It does require a colour photocopier, but I think we can, if your Honour is content for us to uplift it, we can procure multiple copies of it.

HIS HONOUR: Yes. Exhibit BO [sic]?---Might I just see the other map that we looked at earlier, which showed the - - -

10

**EXHIBIT #BN MAP PRODUCED AT FORESTRY TASMANIA DATED 03/06/2004**

15 MR TREE: I will just ask you some questions, if you don't mind. Now, you were in fact personally involved with the 2002 work of Ziegler and Brereton, were you not, involved in the negotiation that ensued from their work?---I would have been, I imagine, involved, yes, after that point, and prior to that.

20 Sure. And you spoke personally with Ms Ziegler, did you not, in relation to her work?---I would have.

And she told you that no parrots had been observed during the two days of visitation in November 2002, didn't she?---I don't recall that.

25

And the purpose of their visit wasn't just - sorry, their visit was not a parrot survey, was it?---It was - I believe it was to assess the management options - - -

30 Yes?--- - - - for the areas.

It wasn't a parrot survey?---Well, in effect it had to be some kind of parrot survey. It was undertaken during the breeding season, and they were looking at areas that had previously been identified as potential swift parrot habitat.

35

They were also looking at the positioning of roads, weren't they?---I don't know.

Now, your affidavit was prepared when?---I believe it was in November.

40

And how did you come to be asked to give evidence? Who asked you?---John McDonald asked me.

45 When?---I really can't remember that. I assume it would have been in early November, or late October, some time there.

And is the document we see as your affidavit the result of editing a draft of your affidavit?---No.

So there has only ever been one draft of your affidavit, that is, the document that is at page 1389?---Yes. Well, I have never saved individual drafts. It was

---

5

No. Please listen to my question. Has there only ever been one draft of the document we see at 1389, namely, that document?---Yes, developed to the point that we now see it.

10

Which is to say there were a number of preceding drafts?---Well, I'm not sure what you mean draft. I mean, this thing was done on the one machine over a period of, I don't know, two weeks, and just revised.

15

I see. Did you receive any assistance in drafting the affidavit?---I did.

From whom?---I received some assistance from Ms Vanessa Thompson.

Yes. I think she actually did the typing, didn't she?---Well, she did most of it, yes.

20

Sure?---And also from - some comments from Dr Maree Yee.

And how did you obtain comments from Dr Yee?---On a few occasions she had sat at the computer with the affidavit on the screen, and read various parts.

25

So that she physically sat at your desk and looked at the affidavit?---Yes.

And suggested changes, or made changes?---Suggested some changes to me.

30

What changes did she suggest?---Well, there were a number of - oh, mainly in relation to how the chronology had been put together, and the normal grammatical and spelling and so on, you know, for reasons of clarity.

35

So Dr Yee and Ms Thompson were the only person who assisted in drawing your affidavit?---I believe there may have been other office staff who helped to gather information from files and so on.

But not in the actual construction of the words in your affidavit?---No.

40

Did you email it to any person and obtain comment on it?---No.

Have you assisted others in the course of preparing their affidavits?---I've read some early affidavits.

45

Of whom?---Gee, I think it may have been Peter Brown and one of the first ladies to come on, I can't even recall her name now.

Witnesses of the applicant?---Yes.

Have you assisted witnesses of Forestry Tasmania by providing feedback on drafts?---I don't believe so, no.

5 Were you aware of any other Forestry Tasmania employees obtaining a copy of your affidavit in draft form?---No.

Were you aware of Mr Wapstra obtaining a copy of your affidavit in draft form?---No.

10

HIS HONOUR: Are you moving on to another topic, Mr Tree?

MR TREE: I am your Honour, yes.

15 HIS HONOUR: Mr Miller, you said before that Dr Yee gave you assistance I think with - I thought your words were - how the chronology was put together?---Yes.

20 What do you mean by chronology?---This involved, your Honour, going through a very large number of files and records in the district to try and piece together the chain of events in each of these coupes.

So it is the sequence of events?---Yes.

25 Thank you. Yes, Mr Tree.

MR TREE: Thank you, your Honour.

30 Would you have a look at this document, please. Have you seen that document before?---I have.

And what is it?---It is a summary of what I was asked to cover in my affidavit.

And was that communicated to you by Dr Yee?---It was.

35

In the form that it presently is, in a paper form or an electronic form, do you know?---I can't remember.

40 I tender that document, your Honour, and I have a copy for your Honour - we need that one do we - I don't have a copy, your Honour, it turns out.

HIS HONOUR: Can the parties assist us in telling us what exhibit BN was?

MR BROADFOOT: We didn't have a BN, your Honour.

45

MR TREE: Either do we, your Honour.

HIS HONOUR: It must have been in my imagination, either that or I was reluctant to come to BO. I think I must have been getting tired at the end of yesterday because I have got a note here something about question 7 not addressed in exhibit BN.

5

MR D. GUNSON: There is a BN I am told, your Honour.

MS MORTIMER: I think your Honour that is the statement. The list of questions given to Ms Thompson it sounds like.

10

HIS HONOUR: Yes, so question 7 was to question, so there should be a record of exhibit BN, a list of questions given to Ms Thompson. It may be my

- - -

15

MR BROADFOOT: Your Honour, we have that as BM, M for Mary.

HIS HONOUR: BM for Mary, okay. All right.

MR BROADFOOT: And we didn't have a BN.

20

HIS HONOUR: So we will make what was previously referred to BO/BN, that is the map of 3 June 2004, I should realise that Mr McKenna, my associate is always right and what is now being handed up will be exhibit BO, but I am sure it is clean, thank you.

25

**EXHIBIT #BO DOCUMENT WITH SUMMARY POINTS FOR MR MILLER TO COVER IN HIS AFFIDAVIT**

30

MR TREE: Now, I wonder if the witness might have exhibit 20 to his affidavit before him, please?

35

Can I direct your attention please to coupe 13D which is one of the coupes in the area of the second grouping of green shading?---Yes.

40

And am I correct in saying that that is one of the coupes which you were concerned with in preparing your affidavit?---Yes, well that particular coupe as shown there is from a map dated 15 January 2002 which the shape of Wielangta 13D which is the subject of the forest practices plan has now changed.

45

Right, just listen to my question. Coupe 13D is one of the coupes that your affidavit was concerned with?---Yes.

Your point is that the coupe boundary changed?---Yes.

And that what this map shows is the coupe boundary as at, I think, 2002.

HIS HONOUR: 15 January 2002.

MR TREE: Thank you, your Honour.

5

And that thereafter the coupe boundary altered to make the coupe smaller?---No, it altered to make the coupe larger.

Well, you can identify on that map a couple of things can't you, you can see a 350 metre contour?---Yes.

10

And we can see that there is a 400 metre contour which in fact goes through the W in the description WT013D?---Yes, I can't really see what that says.

Well, you see the 350?---I do.

15

And do you see that there are 10 metre contour intervals?---Yes.

If we go from 350 up the hill we see that we come to a bold contour which is the 400 metre contour?---Right on the road there, yes.

20

And that contour extends north in to the coupe so that the coupe as drawn there appears to almost wholly cover all of the land above 400 metres?---That appears to be true, yes.

25

There is a small area to the north of that coupe boundary which is above 400 metres that isn't within the coupe?---Yes.

Could the witness please be shown this document, I have a copy for your Honour.

30

What I have shown you is the forest practices plan for that coupe, coupe 13D?---Not as depicted on this map, no.

Well, I accept that you are being correct in identifying the changed boundaries, but this is the certified forest practices plan for coupe 13D?---Correct.

35

And we can see, it is not paginated, but about seven pages in the plan of the coupe which shows its boundaries?---Yes.

40

We can see, can we not, on that map contours?---Yes.

HIS HONOUR: Sorry, I am not with you.

MR TREE: Sorry, your Honour.

45

HIS HONOUR: Was this just after 9 of 13; is that correct? There is some pagination down the bottom?---Yes, that's right, your Honour.

And then there is 13D which is down the bottom, that is dated 6 September 2002.

5 MR TREE: Yes, that is so, your Honour, yes.

We can see, can we not, the 350-metre contour on that map?---I haven't found it yet. Yes.

10 And we can identify the 400-metre contour on that map?---We can, yes.

And we can see, if we compare that map with the green-shading map, that the coupe boundary has indeed changed between the two maps?---Yes.

15 We can see, however, that the left-hand end of the coupe boundary appears to have stayed relatively the same?---Yes.

Particularly we can see that the coupe boundary tapers as it goes west?---Yes.

20 And also we can see that the coupe boundary continues to cross the 400-metre contour line?---To the north?

Yes?---Yes.

25 We can therefore see - or make some comparison of the green-shaded area on the large map to see how, as certified, the Forest Practices Plan dealt with the habitat of the parrot?---Yes.

30 What we can see, correct me if I am wrong, is that a number of wildlife habitat clumps - there appears to be six - are all that has been retained of the green area?---I think at the green area immediately to the north-east of the letters Wielangta 13D has been excluded.

35 Well, you are talking about the roughly oval green-shading area?---Yes.

Well, it may be my interpretation of the map but it appears to be outside of the boundary of the coupe plan attached to the Forest Practices Plan for coupe 13D?---Yes, that's what I'm saying, it's been excluded, yes.

40 Yes. But I am talking about the areas within the boundary of the coupe plan that on the other map were shaded green?---Yes.

45 And I am suggesting to you that the only part of that green-shaded area that has been retained within the coupe boundaries are six wildlife habitat clumps?---Yes, that's correct.

And we are to understand that this occurred again, you say, as a consequence of the Ziegler work?---No, I say this occurred as a consequence of discussions with specialists in regard to prescriptions for this coupe.

5 And what work other than Ziegler's, to your knowledge, was undertaken to review the needs for swift parrot habitat in coupe 13D?---There were discussions and field meetings with specialists.

Who?---I believe Ray Brereton.

10

When?---In the process leading up to the production of this plan.

This is the negotiation phase?---No, I believe it was primarily concerned with correctly locating and marking the wildlife habitat clumps that were to be put in place for primarily the swift parrot.

15

Wildlife habitat clumps which may contain as few as two habitat trees?---No, these were prescribed to contain, I think, at least eight or nine.

20 I see. Would you agree with me that if the Munks' prescriptions had been implemented in relation to coupe 13D as we see it on the 2002 map about one half of the coupe would not have been available for harvest - perhaps a little over half?---If you take that literally as a rule and not a draft prescription, yes.

25 Interfering, I want to suggest, substantially with the economic viability of harvesting that coupe?---Well, obviously if the coupe was covered entirely by a reserve that precluded logging that would certainly be the case, yes.

HIS HONOUR: But the question wasn't covered entirely, it was covered slightly more than 50 per cent?---Yes.

30

The same answer?---Yes.

35 MR TREE: If we look at the coupe boundaries as drawn on the Forest Practices Plan would I be correct in saying that the green-shaded area would encompass probably about three quarters, perhaps even more, of the coupe?---Yes, it would be close to that.

40 Hence, the coupe would have been, would I be correct in thinking, financially non-viable from the perspective of Forestry Tasmania?---Without knowing the cost of roading and the volumes involved, I couldn't really answer that explicitly.

45 Well, there would almost be no area of it to be harvested, would there?---There would be possibly a third.

So it was very much in Forestry Tasmania's interests, wasn't it, to negotiate a reduction in the area that was not to be harvested?---I mean, that could be said  
- - -

5 Well, it is true?---Yes, I offer no comment, I don't know.

And the pressure is on you to produce a volume of wood from coupes in the Derwent district, isn't it?---I have a job to make sure that we do produce wood from coupes which are available.

10

And substantial effort had already by 2002 gone into the planning of the harvest of the Wielangta area, hadn't it?---Yes.

15 And you did not want to lose the benefit of that planning in 2002, did you?---We often have situations arise where planning is well, basically wasted in terms of what comes along during that process and afterwards. So I mean, it's standard fare for me.

20 You did not want to lose the benefit of that planning in 2002, did you?---I would normally not want to lose the benefit of any planning.

25 And so you realised that the only way in relation to coupe 13D that you could get some benefit from the planning that had already gone into it was to reduce the reserved area?---No, it was to follow a process, which I explained earlier, in as much as during the operational-planning process we would have discussions with relevant experts and we would arrive at an outcome that in both parties view went some way to satisfying their concerns.

30 Your concern being to reduce the area that was reserved?---Our concern being to not only retrieve the wood products that we wished to extract there but also to have the knowledge that any special values have been adequately managed.

35 So did you consult with Mr James, did you?---I don't believe I've ever met the man.

40 But he was the man who had undertaken two weeks of surveys in Wielangta in November 2001 and had prepared the plan. Why didn't you go back to him in 2002?---I think that was being dealt with at another level in terms of any negotiations or discussions and/or others, such as Ray Brereton. I can't be sure but I imagine that would have been through the Forest Practices Board.

45 Why did you not go to Mr James and say, "Did you really mean what you said last year when you said all of these areas should be reserved from harvesting?" Why didn't you do that?---Did he actually say that. I can't recall.

Well, you have seen his report, have not you, and you have seen the map?---Yes. Did the report actually say that these areas should be reserved?

HIS HONOUR: "Would be excluded from future operations" you say yourself in paragraph 44 at 1402?---Is that quoting James, your Honour?

Quoting you?---I am sorry.

5

MR TREE: Why didn't you go back to Mr James?---Sorry, I need to be clear on this, your Honour.

HIS HONOUR: 1402?---What Mr James actually said.

10

I am looking at what you actually say. Trying to shorten this but may have lengthened it inadvertently?---I mean Mr Tree, I think you are quoting that he said - that Mr James said that these areas should be excluded or reserved.

15

MR TREE: Paragraph 44 of your affidavit relevantly reads:

*It was agreed that nominated areas of high swift parrot breeding activity marked as green on the survey map would be excluded from future operations on 20 December 2001.*

20

?---Sorry, I thought you were referring to Mr James' report.

Well, focus on the current question?---Okay.

25

That's what you said in paragraph 44 of your affidavit?---I did.

But there was an agreement on 20 December that the green areas would be excluded?---Yes, okay. I am slightly confused. You were asking me about Mr James' report I believe. I don't know how we got here.

30

Why, in reversing that decision to exclude the green areas from harvest, didn't you go back to Mr James and seek his further involvement?---My understanding of Mr James' report was that he had spent some considerable time in this area, mapping areas that he considered to be good potential swift parrot nesting habitat.

35

HIS HONOUR: Nesting or breeding?---Yes, I mean the same thing. Yes, breeding.

40

MR TREE: Quite. Why didn't you go back to him then?---I never met the man.

No, but you had seen his map and you had seen his report?---Yes.

45

Why did you go back to the very man who had spent two weeks on the ground there in the previous year and ask for his advice?---I felt no need to do so, I believe, because I would have been in contact with the specialist from the Forest Practices Board, one of which at the time was considered to be the

authority on swift parrots and I wouldn't have seen any need to do so. I mean I was talking with those people I guess over that intervening period and not Mr James personally.

5 HIS HONOUR: Was that Sara Munks?---Yes.

MR TREE: The person who had, in December 2001, recommended a prescription to reserve the green shaded areas?---No, to exclude them from harvesting.

10

Sorry, to exclude them from harvesting, you are quite right. That person?---Yes.

15 Yes. Is one of the reasons why you didn't go back to Mr James because you thought that he would not change his views as to the reservation of the areas or the non-harvest of the green areas?---Once again may I ask, your Honour, is that if what Mr James actually said in his report?

20 Well, I will ask the question a different way. Is one of the reasons why you didn't go to Mr James was because you thought that he would agree with the prescription recommended by Dr Munks?---Sorry, could you ask that again?

25 Is one of the reasons you didn't go back to Mr James or go to Mr James was because you thought he might agree with the prescription recommended by Dr Munks?---No.

You say that on your oath do you, Mr Miller?---I had no involvement with Mr James. I told you that. I didn't consider even talking to him.

30 I tender the coupe plan - Forest Practices Plan for coupe 13D.

HIS HONOUR: Yes. That will be exhibit BP.

35 **EXHIBIT #BP FOREST PRACTICES PLAN FOR COUPE 13D**

MR TREE: Thank you, your Honour.

40 HIS HONOUR: Thank you, Mr Tree. Mr Gunson?

**<RE-EXAMINATION BY MR D. GUNSON**

**[12.22pm]**

45

MR D. GUNSON: Could the witness be shown Court book 4 at page 1510. Do you have that in front of you?

HIS HONOUR: I think it should be.

MR D. GUNSON: It should still be there I think. What you have got in front of you is a copy of the James' report; is that correct?---Yes, that's correct.

5

And you have obviously read that in the past. You have been asked some questions about it today. I wonder if you would just take your time please, look at those documents and tell me whether there appear to be any recommendations in that document as to the reservation of habitat. Take as much time as you need please?---I can see no such recommendation.

10

Thank you. You were asked a moment ago about swift parrot experts at the Forest Practices Authority and I think you said you regarded Sara Munks as an expert?---I think I said Ray Brereton.

15

I think you may have said Sara Munks. Did you intend Ray Brereton?---Well, I believe they were both working there at the time. Sara's specialty is fauna as well but Ray was the recognised - - -

20

Brereton was the recognised expert?---Yes.

You were asked a question this morning about cable logging equipment. I think that came from his Honour. Could the witness be shown the Forest Practices Code, which is an exhibit to Mr Wilkinson's affidavit, GRW3. It is not amongst the Court books, your Honour. It is a thick document. That will save some time. We have got a spare copy. Can you pass that to the witness. Would you turn to page 31, please?---Yes.

25

Do you see something there?---I do.

30

What is it?---It concerns cable logging.

Cable logging. And does it show some depictions of two types of cable logging systems, a high lead cable system, and a skyline cable system?---That's correct.

35

Right. Now, with cable systems, are the trees still felled by fellers on the ground?---They are felled by hand.

40

Felled by hand, and cable logging is what? Is that a method of removing the logs?---Extracting - extracting - - -

Extracting logs ?--- - - - the fallen logs, yes.

45

And is that the kind of machinery you were talking about earlier?---I was talking about the one under C5, called skyline cable systems. The difference being between C4 and C5, that under high lead - C4, high lead cable system, if you can see, the logs are actually dragged along the ground and up the slope.

But with the skyline cable system, C5, the configuration is such that the logs are actually lifted above the ground, so as to avoid any environmental harm to the surface of the ground.

5 Thank you. Does your Honour have a copy of that in front of you?

HIS HONOUR: Not at the moment, no.

MR D. GUNSON: Could that be - - -

10

HIS HONOUR: But I will follow it from the transcript.

MR D. GUNSON: Thank you, your Honour. Page 31. Yes, I have no further questions for Mr Miller, your Honour.

15

HIS HONOUR: Would you like Mr Miller excused?

MR D. GUNSON: Yes, your Honour.

20

HIS HONOUR: Yes. No reason why that shouldn't happen. Mr Miller, thank you for your evidence. You may be excused from further attendance, but if you wish you may remain in the Court room?---Thank you, your Honour.

25

<THE WITNESS WITHDREW

[12.27pm]

HIS HONOUR: What is the next step in the case?

30

MR D. GUNSON: I thought it was intended to deal with the issue of the undertakings. I thought that was the intention of my friend to deal with it now, but - - -

35

MS MORTIMER: Your Honour, we are just considering some issues about calls, if your Honour pleases.

HIS HONOUR: I see.

40

MR TREE: Yes. I note that there are two calls which do not appear to presently be answered which were made yesterday. The first was the email from Mr Wilkinson to Mr Wapstra, 3 May 2006, in relation to the public availability of management prescriptions data base. And the second was the map shown to Mr Mooney with indicative coupes on it, in relation to which Mr Gunson junior was to take some instructions.

45

MR D. GUNSON: I understand from Mr McDonald that he believes that Mr Roland Browne had in fact dealt with this direct with Mr Wilkinson and had

had a reply from Mr Wilkinson concerning it. Your Honour might recall that it was agreed that he would do that.

5 HIS HONOUR: Mr Wapstra was to deal directly with Mr Roland Browne on something. Was that something else?

MS MORTIMER: That is production of the CD or DVD for management prescriptions data base, and that has occurred, your Honour.

10 HIS HONOUR: That has occurred. Right.

MR TREE: No. There has been no direct communication, on my instructions, between Mr Wilkinson and Mr Browne on that.

15 MR D. GUNSON: We had anticipated that that was going to happen, and it is going to - perhaps I can ask, through your Honour, whether it is in fact going to happen. If not, we will follow it through.

20 HIS HONOUR: Mr Tree?

MR TREE: Well, I think that is the advisable course for my friend to follow through in answering the call.

25 HIS HONOUR: Yes, thank you. Is there - - -

MR D. GUNSON: As to the other issue about Mr Mooney's documentation, my junior hasn't attended to that, but he will.

30 HIS HONOUR: Yes. Thank you. Ms Mortimer?

MS MORTIMER: If your Honour pleases, now I have circulated to - - -

35 HIS HONOUR: I can let you know that, for reasons out of my control, I am going to have to cut you short at a quarter to 1.

MS MORTIMER: If your Honour pleases.

HIS HONOUR: Is it useful in commencing now?

40 MS MORTIMER: It may be useful in this sense, your Honour, that I haven't had a chance to discuss with my learned friend, Mr Gunson, what the respondent's attitude is to this application.

45 HIS HONOUR: I see. Could at least flesh that out.

MS MORTIMER: Well, I can certainly outline what the application is - - -

HIS HONOUR: Yes.

MS MORTIMER: - - - and the basis, and the evidence before your Honour. Your Honour, the application is under order 35, rule 11, in the sense, your Honour, not that we need of course rely on a rule to make an application for an  
5 injunction. And your Honour has jurisdiction to deal with that under section 23 of the Federal Court of Australia Act on the ordinary principles. But this particular rule deals with the circumstances in which there has been an undertaking give, and a failure to fulfil it. So, your Honour, in that sense the application is made, both under this rule, and under the Court's ordinary  
10 jurisdiction in section 23 of the Act, to make such orders as are necessary for the administration of justice, the proper conduct of the proceeding, and the preservation of whatever status quo needs to be preserved, pending the hearing and determination of proceedings.

15 HIS HONOUR: A la Patricks.

MS MORTIMER: A la Patrick, yes, your Honour, exactly. But this rule deals with a particular circumstance, and empowers the Court to, in effect, in my submission, substitute an injunction for an undertaking if it is satisfied that  
20 there has been a failure to fulfil it. Now, in our submission, your Honour, based on the evidence that is presented before the Court, about what has happened in relation to coupe 8E, WTO8E, and the uncontradicted evidence, tendered without objection, of the burn having occurred on 10 April 2006, put together with the terms of the undertaking given on behalf of the respondent by  
25 Mr Abbott, to which I took your Honour yesterday, together with the definition of the Regional Forest Agreement of forestry operations.

When one puts those three things together, in my submission your Honour can be satisfied that there has been a failure to fulfil the undertaking, and in the  
30 absence of any evidence to the contrary, your Honour ought to be satisfied, on the balance of probabilities, that that has occurred, and we submit that your Honour ought make an order in the form that we have handed up for that reason, because present circumstance, and the evidence before the Court, is that the respondent has not been capable, for whatever reason, unexplained at  
35 the moment, of fulfilling its promise to the Court. And that is the reason in particular, your Honour, that we submit there ought to be an injunction that is given in detailed and express terms that has an additional mandatory requirement of communication to all those people who might be responsible for conduct that could otherwise be in breach of paragraph 1, that there be  
40 liberty to apply reserved.

Because of course your Honour will remember from the transcript, and submissions made, in particular by my learned friend, Mr Abbott, that it was contemplated by the respondent that there might be circumstances where it  
45 would need to come back to the Court and ask for a dispensation. Nothing like that happened. There was certainly no opposition from the applicant to that liberty being available, and it was recognised it could be necessary. It didn't happen, but nevertheless we have contemplated in these orders that there be

express liberty to apply on notice given. And that the orders are appropriately endorsed. And that is the application that we make, your Honour.

5 HIS HONOUR: All right. Can you take me to the evidence in the transcript in respect of the burn of coupe 8E?

MS MORTIMER: Yes. It is in the evidence of Ms Thompson, combined with the exhibit, which I will just turn up for your Honour.

10 HIS HONOUR: Exhibit AM; is that correct?

MS MORTIMER: Your Honour, those are the photos, that is so.

15 HIS HONOUR: Yes.

MS MORTIMER: And then the evidence of the conduct of the burn itself is much further down the exhibit list than that. The forest practices plan for 8E is exhibit AY, and then the - your Honour, I am being told it is exhibit BJ and BK.

20 HIS HONOUR: BJ is the fire management evaluation plan according to the transcript.

MS MORTIMER: Yes. It is BK in particular, your Honour.

25 HIS HONOUR: BK.

MS MORTIMER: The forest operational plan, and your Honour will recall, and I will turn up the transcript reference that Ms Thompson's evidence was that the forest operational plan, which is exhibit BK, is the document, the more detailed document that is completed at the time that the burn is to be undertaken, because that is the, sort of a risk management document. And what your Honour sees in terms of the evidence about the date on which it was conducted is on page 8 of 11 of that. So transcript 1982, your Honour.

35 HIS HONOUR: Just a moment.

MS MORTIMER: Yes. I will do one thing at a time, your Honour.

40 HIS HONOUR: 8 of 11?

MS MORTIMER: 8 of 11, your Honour will see - - -

45 HIS HONOUR: Conveniently my exhibit skips from 7 of 11 to 9 of 11.

MS MORTIMER: That is helpful, your Honour. I will hand up my copy - our exhibit copy. And your Honour will see in the table there there is a little table that says "date started" and "date completed". And it has got time started and

time completed with the date the 10th of the fourth '06. Does your Honour see that?

5 HIS HONOUR: Yes, I remember looking at this. Maybe the copy that was handed to me wasn't - we had two copies and one became the exhibit and one became the spare.

MS MORTIMER: I see, your Honour.

10 HIS HONOUR: Yes, I remember looking at this in respect of questions being asked about - - -

MS MORTIMER: It is 1986, your Honour, is where I ask Ms Thompson about this.

15 HIS HONOUR: Yes.

MS MORTIMER: And it starts at about line 33. I am taking her through this document.

20 HIS HONOUR: Yes.

MS MORTIMER: But the point at which we reach this issue about what is on page 8 is at the bottom of 1986.

25 HIS HONOUR: Yes.

MS MORTIMER: And then I ask her some questions on 1987 about what "time completed" means. And your Honour will recall that that actually  
30 doesn't mean when the burn is stopped, it just means when the light admission process was completed.

HIS HONOUR: When the burning by people ceased.

35 MS MORTIMER: Yes, the ignition off, that is right, your Honour.

HIS HONOUR: Yes.

40 MS MORTIMER: That is right. And of course your Honour will recall that these are documents that have been produced from the custody of Forestry Tasmania to us.

HIS HONOUR: Where does it say that - where does she agree that the fire  
45 actually occurred?

MS MORTIMER: Where it says "on date commenced".

HIS HONOUR: Sorry, in the transcript?

MS MORTIMER: 1986, line 44 is the question and line 46 is the answer.

5 HIS HONOUR: "Is that the date on which the burnings commenced?---Yes, that's correct."

10 MS MORTIMER: And in any event, your Honour, in our submission in absence of any dispute as to the authenticity of the document, the document speaks for itself on that issue as well. So that is the evidence on which we rely to support the submission that there is evidence to satisfy your Honour on the balance of probabilities that the undertaking has not been fulfilled and that an injunction ought go.

15 HIS HONOUR: Yes, thank you.

MS MORTIMER: If your Honour pleases.

HIS HONOUR: Mr Gunson?

20 MR D. GUNSON: Yes, your Honour.

HIS HONOUR: Do you want to say anything now or - - -

25 MR D. GUNSON: I would prefer to start this afternoon I think, your Honour.

HIS HONOUR: Sorry, better to start this afternoon?

30 MR D. GUNSON: I would prefer to start this afternoon I think, given we only have a few moments.

HIS HONOUR: Yes.

35 MR D. GUNSON: But there is one thing I should say before your Honour retires, and that is that exhibit AM of the photographs - - -

HIS HONOUR: Yes.

40 MR D. GUNSON: - - - is not conceded to be a photograph or a series of photographs of that particular coupe. There was an attempt to have Mr Neyland agree initially that it was coupe 8A and then my learned friend, I think Mr Tree moved on to coupe 8E and Mr Neyland was simply unable to identify the coupe at all from the photographs. So to the extent that my friend was satisfied that the photographs depict burning at 8A - sorry, 8E - - -

45 HIS HONOUR: 8E.

MR D. GUNSON: - - - we would submit that there is no evidence as to that.

HIS HONOUR: Right.

MR D. GUNSON: Perhaps I can leave the balance until this afternoon.

5 HIS HONOUR: Right. But are you contesting the making of the injunction?

MR D. GUNSON: Yes, your Honour.

10 HIS HONOUR: Yes, all right. We will adjourn now until 2.15.

**ADJOURNED** [12.42pm]

15 **RESUMED** [2.15pm]

HIS HONOUR: Yes, Ms Mortimer?

20 MS MORTIMER: If your Honour pleases, I have mentioned to my learned  
friend that there is a case that I want to draw to your Honour's attention before  
I complete my submissions about order 35, rule 11, that we discovered over  
lunch, and if I can just hand up two copies to your Honour. We haven't had a  
chance perhaps to do all the derivative searching that one might, but as far as  
25 we can find so far, this is, if not the only, one of the few cases about order 35,  
rule 11, Lachlan Publishing Pty Limited v Central West Media Limited. It is  
an unreported decision of Nicholson J, 15 April 1996, and it is - the factual  
circumstance, your Honour, was a circumstance where there had been an  
undertaking, that there was then an allegation of a breach of that undertaking,  
30 and his Honour was asked to consider the application of order 35 rule 11.

And your Honour can see from paragraph 3 that prima facie there seemed to be  
a breach, but one of the things that becomes apparent when one reads this case,  
your Honour, is that the conduct that was said to be the breach occurred on 3  
35 April, and that was also the day on which the undertakings were given. And  
there was a bit of a factual controversy about which occurred first. The issue  
that his Honour makes some general observations in paragraph 4, which are, in  
our submission, relevant to the nature of the exercise required under order 35,  
rule 11, and then in paragraph 5 his Honour considers an argument that was put  
40 to him that order 35, rule 11, by its terms imposed an obligation on a Justice of  
this Court, once the pre-conditions were satisfied.

That is, if the Court was satisfied that there was a failure to fulfil the  
undertaking, the use of the word "shall" in the order made it mandatory. His  
45 Honour declined to reach a confirmed view about that issue on the basis that he  
didn't have to, and at paragraph 8 onwards his Honour looked at the question  
from the point of view of discretion, in any event. Because his Honour had  
found that he wasn't satisfied that there was a failure to fulfil the undertaking,

so he didn't get to the issue about whether he was obliged to issue an injunction.

5 But then went on to consider, as a matter of discretion, whether he ought to, and took into account a number of facts, an apology, a recognition that they shouldn't have done what they had done, and then his Honour decided even in exercise of his discretion not to order an injunction because he was satisfied because of the things that had been said by the respondent to him in the course of this application, that the respondent now understood exactly what it wasn't  
10 allowed to do. And had, in effect, proffered further undertakings, which his Honour in the circumstances was prepared to accept. Now, your Honour, that is the only case that we have been able to find that has dealt directly with this rule. If your Honour pleases.

15 HIS HONOUR: Yes. Thank you, Ms Mortimer. Mr Gunson?

MR D. GUNSON: Yes. Thank you, your Honour. Your Honour, there are two matters that are outstanding from calls, and I am in your Honour's hands as to whether you would like me to respond to those now, with respect to  
20 documents, or move on to address you in response to the application that is extant before you.

HIS HONOUR: I think it is probably better to leave the calls to one side for a moment.

25 MR D. GUNSON: I am happy to do that. I had indicated earlier that we would have the material I thought by lunch time.

HIS HONOUR: Yes. Thank you.

30 MR D. GUNSON: Your Honour, to understand the background of the giving of the undertaking in this case, it is necessary in the first instance to go back in time to the forms of the application that were made by the applicant to this Court as they evolved. And the first document that I need to take your Honour  
35 to is the original application by the applicant of 3 May 2005.

HIS HONOUR: I don't think that is in the Court book, is it?

40 MR D. GUNSON: I don't think it is, your Honour.

HIS HONOUR: No. Would it be in the Court file? Thank you. Document 30 May?

45 MR D. GUNSON: 30 May 2005, your Honour.

HIS HONOUR: Sorry. I thought you said the 3rd.

MR D. GUNSON: No. That is the application that was made originally.

HIS HONOUR: Yes.

5 MR D. GUNSON: And if I take your Honour to page 6 of that application you will see there the heading Interlocutory Relief.

HIS HONOUR: Yes.

10 MR D. GUNSON: If I could draw your Honour's attention to sub-paragraph (c) and you will note that the application that was made was that:

*Pending the hearing and determination of these proceedings, an injunction pursuant to section 475 subsection(2) of the EPBC Act restraining the respondent -*

15 and I don't pause to read the rest of it -

*in respect of activities in the two coupes in the Wielangta Forest identified as 17E and 19D.*

20 Now, in the first instance all that was ever sought by way of injunctive relief pending the hearing was relief with respect to those two named coupes. There was then an amended application filed in the Court on 22 June, following an order that had been made by your Honour on that day.

25 HIS HONOUR: There is something on the file which is document 21, Court Proposed Amended Application.

30 MR D. GUNSON: That would be the - - -

HIS HONOUR: 20 June.

35 MR D. GUNSON: Yes. The heading is Amended Application, Amended 22 June 2005, pursuant to an order made by Marshall J on 22 June 2005.

HIS HONOUR: I don't have that document in that form. I will show you what I have.

40 MR D. GUNSON: That would be the document that preceded the next document, I suspect, your Honour, because it would seem that that then was what was before you when you made your orders on 22 June.

HIS HONOUR: So that would be in the same form?

45 MR D. GUNSON: Well, yes, your Honour, I suspect.

HIS HONOUR: Well, we can check as you take me to the relevant passages.

MR D. GUNSON: I will take you to it, your Honour. At page 6 there is a prayer for interlocutory relief, which is in broadly the same terms as the - - -

HIS HONOUR: Yes, I see that.

5

MR D. GUNSON: - - - earlier one, again referring to 17E and 19D. And finally there was a further amended application in September 2005, when your Honour granted leave again to amend the application, and again at paragraph 7 the interlocutory relief sought was in similar terms relating - - -

10

HIS HONOUR: Just a moment. I will need my associate's assistance. Sorry, Mr Gunson. That was September?

MR D. GUNSON: 15 September, your Honour.

15

HIS HONOUR: Further amended application. Document 57 in the Court file. Yes?

MR D. GUNSON: And if you go to page 7, your Honour, you will see that broadly speaking there is a repetition of the earlier application - - -

20

HIS HONOUR: Yes.

MR D. GUNSON: - - - relating solely to coupes 17E and 19D, and that remains basically the state of affairs in this Court. Now, the - - -

25

HIS HONOUR: So that no interlocutory relief was, or is being pressed?

MR D. GUNSON: Is now? I am sorry, your Honour?

30

HIS HONOUR: No interlocutory relief was being pressed until today.

MR D. GUNSON: No, not at the end of the day.

35

HIS HONOUR: Until today?

MR D. GUNSON: That is right, because of the form of the undertakings. The point I am really making, your Honour, is that at all stages in the early days of these proceedings, the only coupes involved in any application for interlocutory relief was 17E and 19D.

40

HIS HONOUR: Yes.

MR D. GUNSON: Now, this matter came before Heerey J on 3 June 2005, and I will hand a copy of the transcript to your Honour. I am not sure whether my friends have a copy, but I will pass it to them in any event. And if I could take your Honour to page 4 of the transcript? This was when the matter was before Heerey J, and Mr Ellis, who then appeared for the respondent, at page 4

45

dealt with the undertaking. As I understand the position - and I stand to be corrected - Heerey J had indicated that he was not going to grant an injunction in respect to 17E and at this stage - - -

5 HIS HONOUR: Where does he say that?

MR D. GUNSON: I understand that was from - it doesn't appear in that transcript but I understood that, from my instructions, was how it got to the point where all that was sought and given at the end of the day was an  
10 undertaking in respect of 19D. Perhaps it is really irrelevant to go there, but the point is there was an undertaking given on that day. If your Honour goes to line 31, you will see that Mr Ellis says:

15 *A second is that it -*  
meaning Forestry Tasmania -

20 *undertakes from today that it will not permit further roadworks into coupe WT019D or forestry operations in that coupe until the end of the year.*

It is very specific. It doesn't refer to Wielangta as a whole, it doesn't refer to 19E and is confined to certain aspects of conduct relating to 19D:

25 *Further roadworks into coupe 19D or forestry operations in that coupe until the end of this year.*

Now, the matter then came back before the - - -

30 HIS HONOUR: Before you leave that, I can't resist referring to what appears at page 5, line 16. I will never take Mr Ellis to the races with me.

MR D. GUNSON: No, no, for many reasons, your Honour, wouldn't.

35 HIS HONOUR: Mr Ellis doubted - for those not with the transcript in front of them - whether this matter would last a week. Yes. Sorry. Where are you going to take me, Mr Gunson?

40 MR D. GUNSON: Your Honour, we then move to the proceedings that took place in this Court on 5 September 2005.

HIS HONOUR: Yes, I have the transcript in that.

45 MR D. GUNSON: And if I could take your Honour then to page 43? And you will see there that Mr Abbott in referring to the undertaking refers to the one given by Mr Ellis, but the issue actually precedes that, and if you go to page 42 you will see that my learned friend, Ms Mortimer, says this:

5                    *Your Honour, in relation to a postponement of the trial until  
5 December, my instructions are that the applicant will reluctantly  
agree to that in the sense that it is obvious that preparations are taking  
longer than might otherwise have been anticipated. I understand that  
my learned friend, Mr Abbott, has instructions to give an extended  
undertaking and on the basis of that undertaking being given then we  
accept that a more appropriate trial date is the 5th.*

10                    No need to read the balance of that. At the bottom of the page, Mr Abbott  
says:

15                    *Well, I should have said, your Honour, and determined as soon as  
possible thereafter, perhaps, I think, would be a better way of putting it.  
To facilitate all of that, your Honour, I propose to read an undertaking  
in the same form as the one given by Mr Ellis to the Court on 3 June  
extending the undertaking to 1 April 2005 and also extending its scope.*

                         And the undertaking, he says - and I will read what he said:

20                    *The undertaking is that from today Forestry Tasmania will not permit  
further roadworks -*

                         and I stress the use of that -

25                    *into any Wielangta coupe or forestry operations in such coupe - - -*

                         MS MORTIMER: Any such coupe.

30                    MR D. GUNSON: Yes -

*in any such coupe until 1 April 2006.*

35                    Now, it is my submission that the clear intention of Forestry Tasmania in  
giving an undertaking in that form was to, first, continue the spirit of the earlier  
undertaking which, as I have said, specifically referred only to coupe 19D and  
not to 17E and to, secondly, allay any concerns that Forestry Tasmania would  
allow the extension of roadworks beyond coupe 19D as had been planned by  
Forestry Tasmania as part of its onward planning and would not permit any  
forestry operations in those coupes that would be the subject of any further  
40                    roadworks. It had never been the subject of any requests from the applicant or  
his solicitors or counsel that Forestry Tasmania would not conduct forest  
operations in any other coupe in Wielangta that had already been harvested,  
and there are some 93 coupes in Wielangta, 30 of them are regeneration  
coupes, that have already been harvested and are regrowing and - - -

45                    MS MORTIMER: Your Honour, I object to my learned friend giving  
evidence from the bar table under the guise of a submission.

MR D. GUNSON: I think the evidence is before the - it doesn't matter. Wielangta contains many coupes and the matters before the Court clearly show that. There were also, as is clear from the evidence before the Court in various forms, no other extant plans for harvesting of any other coupes in Wielangta  
5 and there were no Forest Practice Plans for harvesting in existence at that time for the current financial year. So the Forest Practice Authority - I withdraw that. So, in our submission, it is clear what was intended by the undertaking, that Forestry Tasmania would not extend its roadworks into the coupes beyond 19D, as had been planned, and would not harvest there and that is what was  
10 contemplated by the undertaking.

Now, what my friend says is because of the form of that undertaking and because a fire was lit in April in coupe 8E that that has breached the undertaking. In my submission, it does not. Coupe 8E on any reading of the  
15 maps that are before the Court is some 10 kilometres by direct line from 19D and some 20 kilometres by road. If the undertaking is to be construed as meaning there is to be absolutely no works whatsoever done in Wielangta what it means is that Forestry Tasmania can do nothing whatsoever in the entirety of the Wielangta coupe. That was not what was asked for and that was not the  
20 subject of the undertaking. The FPA provides - - -

HIS HONOUR: Just before you go on any further. The undertakings refer to - in the order of Heerey J made on 3 June 2005, they are the undertakings that - the current undertaking varies only in respect to the date; is that correct?  
25

MR D. GUNSON: Essentially, your Honour. The current undertaking will not permit further roadworks into any Wielangta coupes so it is - - -

HIS HONOUR: Where do I find the text of the current undertaking?  
30

MR D. GUNSON: Page 43 of the transcript, your Honour. I am sorry I thought I had taken your Honour to that.

HIS HONOUR: Yes.  
35

MR D. GUNSON: It is probably my error, your Honour.

HIS HONOUR: No, no, I am trying to marry together that with what appears in Heerey Js order.  
40

MR D. GUNSON: Yes.

HIS HONOUR: Can I just bring you back to the top of 43?

MR D. GUNSON: Yes, your Honour.  
45

HIS HONOUR: I will do a Mr Tree and take you to the bottom of 42. Mr Abbott says I propose to read an undertaking in the same form as the one given

by Mr Ellis extending the undertakings to the new date and also extending its scope. What do those words mean?

5 MR D. GUNSON: Well, we say that you find the answer to that in the next sentence:

*The undertaking is that from today, Forestry Tasmania will not permit further roadworks into any Wielangta coupe.*

10 Because not all the coupes have been roaded yet.

HIS HONOUR: And what does, "All forestry operations in any such coupe" mean?

15 MR D. GUNSON: In any such coupe. It means such coupes into which roadworks are created. One, in our submission, follows the other. What Mr Abbott was saying, "Look, Forestry Tasmania is not going to put any more roads into the coupes," and if your Honour recalls for instance when you went to 19D the road ceased in 19D and the map showed there are coupes beyond  
20 that and in addition he said that, "There will be no forestry operations in such coupe."

HIS HONOUR: So no roadworks in any Wielangta coupe?

25 MR D. GUNSON: That is right. No further roadworks, we are not going to put any more roads in and not going to do any work in those coupes that don't have roads and of course there are works that are performed before roads are created such as surveying, pre-harvest surveys, road surveys and so forth. That is what the undertaking is about.

30 HIS HONOUR: Well, forestry operations in coupes where there are roads?

MR D. GUNSON: That is right. Now, that is, in our submission, what the  
35 undertaking is about. Nothing to do with the lighting of a fire many, many kilometres away in another part of Wielangta and the Forest Practices - I withdraw that. It must be borne in mind that Forestry Tasmania has, under section 8(1)(c) of the Forestry Act 1920, the statutory obligation to manage State forest and if your Honour goes to section 8 of that Act - I am not sure your Honour has a copy of it - - -

40 HIS HONOUR: I do somewhere. Section 8(1)(c)?

MR D. GUNSON: Under the heading Functions of the Corporation.

45 HIS HONOUR: What I am looking at is valid as at 31 May 2005.

MR D. GUNSON: Now, your Honour will see from section 8 the functions of the corporation are set out - the statutory functions, the control and delivery of

land use policy for State forest etcetera, and in subparagraph (c), the exclusive management and control of all State forests etcetera, so there is the clear statutory obligation on Forestry Tasmania to deal with that and section 10 as well sets out the additional functions and powers and if you go down to subsection (1)(d), there is a statutory obligation for the management of forest reserves, the provision and maintenance of forest roads and other facilities etcetera.

10 HIS HONOUR: Yes.

MR D. GUNSON: The authority has very, very wide powers. Under the - - -

15 HIS HONOUR: But it could undertake not to exercise any of them. Just to point to those powers begs the question as to what the meaning of the undertaking is.

MR D. GUNSON: Well, I agree with that your Honour, but it is infelicitous to say the least.

20 HIS HONOUR: Yes.

MR D. GUNSON: I don't seek to quarrel with your Honour that it could have, and should have, perhaps been better framed. If you go then to the RFA which your Honour will find in book 1, page 145, there is a definition of forest operations.

HIS HONOUR: Page 145?

MR D. GUNSON: Page 145.

30 HIS HONOUR: Yes.

MR D. GUNSON: You will find forest operations means the planting of trees or the managing of trees before they are harvested and the harvesting of forest products but for commercial purposes includes any related land clearing, land preparation, burning off and transport operations so clearly under the RFA that definition encompasses the sort of work that person then carried out. Forest operations under the Tasmanian legislation, section 4, means work connected with planting trees, managing trees before they are harvested or harvesting of forest products and includes any related land clearing, land preparation, burning off, access construction or transport operations and broadly mirrors the RFA requirements.

45 Now, in my submission, the evidence before your Honour would clearly show that there is a requirement for burning off to occur within coupes after they have been harvested. In addition, if you go back to the very beginning of what is required for the operations in a coupe, the evidence discloses that there is

preliminary planning, surveys of flora, surveys of fauna, stock surveys and assessments are carried out - - -

5 HIS HONOUR: If Ms Mortimer's construction of the undertaking was correct there would be no need to refer to further roadworks would there?

10 MR D. GUNSON: That is right, your Honour. If Ms Mortimer's construction is correct what it would mean is that Forestry Tasmania would be precluded by the terms of this rather infelicitous undertaking in carrying out any activities of any form whatsoever in the forest block at Wielangta. If your Honour would just bear with me I carefully put away - - -

HIS HONOUR: Page 43.

15 MR D. GUNSON: No, I was looking for a document, your Honour. That is what I wanted, thank you. There is an obligation, of course having put through roads within this area, for those roads to be maintained. They have to be graded, re-sheeted, drained and all general maintenance carried out with respect to roads throughout the forest area. There are plantations there - - -

20 MS MORTIMER: Your Honour, again I object to my learned friend making, under the guise of a submission, giving evidence. He is doing it again.

25 MR D. GUNSON: If there are plantations there it is reasonable to assume that they have to be maintained. Native forests require monitoring and everything that goes with them along the lines of the evidence that your Honour has heard.

30 HIS HONOUR: We could still undertake not to do those sort of things. I think the critical issue for me to determine is a very simple one, the meaning of what appears at page 43 of the transcript, lines 5 to 8.

35 MR D. GUNSON: Yes, your Honour. I don't argue with that, your Honour. There has been, at this stage, no forestry operations, I submit, in any coupe that has had further roadworks put into it and that was the way that your Honour would determine this issue. Now, I have been instructed to make it quite clear to the Court that Forestry Tasmania has not intended to breach any undertaking and will make it clear to the court that it will abide by the form of the undertaking that it has given and the intention of that undertaking, that is, it will not proceed beyond where it is at the moment. That was all it was  
40 intended - - -

HIS HONOUR: Is it possible to identify, by number, the coupes where roadworks have occurred?

45 MR D. GUNSON: Yes, your Honour. We can identify the coupes beyond where roadworks are to make it clear that Forestry Tasmania will not enter into those areas, that is they will not put roads in and will not harvest those coupes.

HIS HONOUR: I thought you were saying that this undertaking should be construed as meaning that where roadworks have been put in, there be no more forestry operations?

5 MR D. GUNSON: That is correct, your Honour. We say that what it means is that Forestry will not put any more roadworks into any coupes and conduct any forestry operations in those coupes into which it puts roads.

HIS HONOUR: Into which it puts roads or has put roads?

10

MR D. GUNSON: No, into which it puts roads. In other words if it does any more roadworks - - -

HIS HONOUR: Can I just get this very clearly so I can write it down - - -

15

MR D. GUNSON: It was the intention of Forestry Tasmania not to put in any more roads in the Wielangta coupe or to commit - - -

HIS HONOUR: Sorry, intention of Forestry Tasmania not to put in - - -

20

MR D. GUNSON: Any further roadworks into any Wielangta coupe or to conduct any forestry - - -

HIS HONOUR: Just go slowly for me.

25

MR D. GUNSON: Or to conduct any forestry operations in any of those coupes into which roads would otherwise have been put or constructed is a better word.

30

HIS HONOUR: So "It was the intention of Forestry Tasmania not to put in any more" - - -

MR D. GUNSON: "Construct" I think is a better word, your Honour.

35

HIS HONOUR: - - - "not to construct any further roadworks in any Wielangta coupe or to conduct any forestry operations in any of those coupes into which roads would otherwise have been put." It is a little clumsy isn't it?

40

MR D. GUNSON: It is very clumsy but that is the intention. I think I added in the word rather than put "constructed" because see before you actually construct a road there are operations required, surveying, pegging out and all of those sorts of things and that was what the intention was behind the undertaking, basically that Forestry were not going to log any more coupes, that is beyond where they were at the time.

45

HIS HONOUR: So not log any more coupes in Wielangta, full stop.

MR D. GUNSON: No, into new areas. They were not going to push the road beyond 19D. That was what the concern was about.

5 HIS HONOUR: It is undertake - breach of undertakings, as everyone is aware, can be punished by contempt. In accepting this undertaking and the parties seem to be seemingly in agreement as to what it meant, on 5 September I didn't focus too heavily on its precise terms but perhaps I should have on 5 September and I might have avoided this debate.

10 MR D. GUNSON: I suppose to answer it this way: if somebody had raised the issue as to whether a top-burn fire was to be lit in 8E in April of this year, and 8E being so far away from 19D, I imagine that the answer would have been, well, that is not contemplated by the terms of the undertaking. What the applicant was seeking to do I think is clear. It didn't want to see harvesting of  
15 19D, 17E having already been harvested, and he was anxious to ensure that the roadways and work would not extend beyond 19D into the balance of the coupe.

20 And that was what the intention was in the form of that particular undertaking, not something 20 kilometres away by road would not occur, not that Forestry couldn't carry out any activity at all within Wielangta in the coupes that were already there. I took the opportunity this morning to prepare what in my submission would be a more appropriate form of undertaking that should have been given, and if your Honour is prepared to admit the respondent to do so, to  
25 withdraw the undertaking in the form it has been given and to substitute it with this undertaking. And I will read it:

30 *The respondent undertakes that until determination of these proceedings or further order of the Court, that it by its officers, servants or agents will not undertake or permit to be undertaking any new roadworks into any coupes unharvested since 1970 in the Wielangta State forest, nor will it undertake or permit to be undertaking any harvesting of trees for commercial purposes in coupes unharvested since 1970 in the Wielangta State forest.*

35 HIS HONOUR: What is the significance of 1970?

40 MR D. GUNSON: That is when they basically started the harvesting processes there, clearfall. That is when I say "they", Forestry, because your Honour is aware Wielangta has been felled for 120 plus years by selective logging processes. The clearfelling started in there in 1970 and hence the plantations that your Honour saw on the view.

45 HIS HONOUR: Yes.

MR D. GUNSON: And the recovered areas.

HIS HONOUR: Yes.

MR D. GUNSON: And an undertaking in the form that has been prepared there which I am instructed to give would achieve that which the applicant wants pro tem.

5

HIS HONOUR: Yes.

MR D. GUNSON: Now, my client accepts as indeed it should that any breach of an undertaking is a serious matter and there has been of course no intention by it for the reasons that I have explained in the terms of the undertaking that was given on 3 June - sorry, 5 September by Mr Abbott.

10

HIS HONOUR: Yes.

MR D. GUNSON: Which follows on from the former undertaking given by Mr Ellis which basically tries to accommodate at least the concerns of the applicant as expressed in his applications to the Court.

15

HIS HONOUR: Yes, thank you.

20

MR D. GUNSON: If it please, your Honour.

HIS HONOUR: Ms Mortimer?

MS MORTIMER: Your Honour ought not to accept the construction of the undertaking at page 43 of the transcript on 5 September 2005 that is proffered by my learned friend for these reasons. The most significant fact, your Honour, that my learned friend has omitted in his recitation of the chronology is the fact that the scope of the applicant's application to this Court and upon which he asked the Court to decide this proceeding changed significantly after the proceedings were issued and in fact was approved as an amended application on 15 September 2005. And it is that change that in our submission your Honour needs to understand to understand the undertaking. And the change, your Honour, is from the scope of this proceeding concerning only WTO17E and 19D to concerning the Wielangta forest.

25

30

35

HIS HONOUR: That occurred 10 days after the undertaking?

MS MORTIMER: No, your Honour. The undertaking with which your Honour is concerned is the one given on 15 September 2005.

40

HIS HONOUR: I am looking at something that says 5 September.

MS MORTIMER: Exactly, and that is because it was continued, it was given again and continued by my learned friend, Mr Abbott, on the 15th.

45

HIS HONOUR: Continued, that is on page 18?

MS MORTIMER: Yes, your Honour. That is right. That is the one that is in force. The one that is given on 5 September is not in force, because that only goes to 1 April 2006.

5 HIS HONOUR: Yes.

MS MORTIMER: The one that is in force is the one given on 15 September 2005 at page 18 of the transcript, line 45.

10 HIS HONOUR: The only change I understood that was occurring that day was that the Sword of Damocles was being removed from my head and I was being trusted in the context of a one-week case. I thought I might determine it within the three-month rule.

15 MS MORTIMER: Of course, your Honour. But the first thing that your Honour has to determine is what is the undertaking? Now, that has - and when was it given? Now, the undertaking that is in force is the undertaking given by Mr Abbott on 15 September 2005 and to understand the terms of the undertaking we accept that your Honour has to go to the text on 5 September.  
20 But it is not correct to say, if that is what my learned friend is trying to submit to your Honour, that what is in force is what was given on 5 September. That is not right. What is in force is what was given on the 15th. And what is the significance of that?

25 The significance of that is on 15 September, having been given notice - having given notice to the respondent of his intention to so, the applicant had amended his application and extended the scope of his application. And the scope of his application plainly was to the whole of Wielangta. And the undertaking that was continued, in my submission, has to be understood in that context. Now,  
30 the construction that my learned friend urges upon you, even if you take the face of those words at page 43, is a strained and unnatural construction, in my submission. Because if he is right you don't need the words, "all forestry operations in any such coupe," because you can't - - -

35 HIS HONOUR: But if you are right you don't need the words, "all further road works."

MS MORTIMER: No, your Honour, because they - the road that - the road works themselves are in a separate coupe. So your Honour will understand  
40 from the evidence, and there is evidence about the 19D road, that roads themselves are coupes, so that when you push a road through new forest you are actually pushing it through a coupe. But there is no way, in my submission, to understand those words, "all forestry operations in any such coupe." "Any such coupe," means any Wielangta coupe. That is the plain  
45 reading of them, and in our submission in the context of an application that was dealing with the whole of Wielangta, that ought to be how it was construed. That ought to be how it is construed.

Your Honour, the consequence of my learned friend's construction, being said for the first time towards the end of this trial, is that the respondent considered itself free, and still does consider itself free, to go into that forest and cut down every single tree that is in a coupe, into which there is a road. And that would  
5 include any coupe where there is prime swift parrot nesting habitat, any coupe where there is known locations of the broad-toothed stag beetle, any coupe where there is a wedge-tailed eagle's nest. And that is the construction that he is proffering to you, that the respondent considers itself still free to do that, notwithstanding that since 15 September 2005 this application has concerned  
10 the whole of Wielangta. Now, that last issue may go more to the need for your Honour to grant an injunction in wider terms than the undertaking is proffered. And I accept that. But it does also go to how your Honour ought to construe those words.

15 HIS HONOUR: Ms Mortimer, my current thinking on this is that the undertaking is ambiguous at the very least, and I would be very reluctant to find that the respondent was intentionally in breach of a very ambiguous undertaking.

20 MS MORTIMER: Your Honour does not have, in my submission, to find an intentional breach. Your Honour has to find, only for the purposes of order 35, a failure to carry out the undertaking.

25 HIS HONOUR: Well, I am not sure that the - I think there is a reasonable argument either way as to the meaning, and that is what troubles me. And perhaps it was my fault on 5 September in not saying, you know what you mean, but I don't follow.

30 MS MORTIMER: Well, your Honour, I can assure you, and perhaps it is just poetic justice that I get to give a bit of evidence from the bar table, that we - well, certainly, did not understand.

35 MR D. GUNSON: Well, I am going to object to my friend giving evidence from the bar table, your Honour.

MS MORTIMER: We certainly did not understand that that undertaking was restricted in the way that my learned friend now says, and if we had so understood, your Honour, we would not have accepted it.

40 HIS HONOUR: Well, he says that he doesn't understand it as being broad, as it is now said by you that it is, and if he had have so - or his client had have so understood then Mr Abbott wouldn't have given it in the terms that you construe it in.

45 MS MORTIMER: Well, your Honour, that again is evidence against evidence from the bar table.

HIS HONOUR: Yes.

MS MORTIMER: That is the problem.

5 HIS HONOUR: Well, I am in an invidious position where I am asked to find that someone has breached an undertaking but no one is sure what the undertaking meant.

MS MORTIMER: Well, your Honour, we had - - -

10 HIS HONOUR: Certainly I am not at the moment.

MS MORTIMER: Yes. Your Honour, we have made a submission to your Honour that those words, "all forestry operations in any such coupe," ought be given a plain meaning, not a meaning that is constrained by having to either - and it is no different, your Honour, to construing anything else. Not a meaning into which you have to read a whole series of words, or turn them around, and your Honour need only compare what my learned friend is now proffering with what is there, to see that the construction that he urges on you is not a plain one. What is now proffered to your Honour today is a reconstruction of a different undertaking to what appears in the transcript, and the plain undertaking, the plain meaning is as the words say, "all forestry operations in any such coupe," meaning in any Wielangta coupe.

25 HIS HONOUR: Well, why would there have been a need - - -

MS MORTIMER: And, your Honour, I am reminded - - -

30 HIS HONOUR: Why wouldn't you have just said, the undertaking is from today Forestry Tasmania will not permit forestry operations in any Wielangta coupe, if that had have been the intention? The way you put it that is all that would have needed to have been said.

MS MORTIMER: No, your Honour. And again I need to recall the circumstances by - there was at the time of course a particular issue about the road, because the road was under construction.

HIS HONOUR: Well, I wasn't enlightened with any of that - - -

40 MS MORTIMER: No, your Honour wasn't.

HIS HONOUR: - - - on 5 September.

45 MS MORTIMER: Your Honour wasn't, and that is again because the parties were proceeding on an understanding of the facts that we did not outline to your Honour. I accept that. I accept that. But again, your Honour, your Honour ought, in my submission, to gain assistance in deciding what those words mean, by contemplating the circumstance in relation to 17E on that day. If my learned friend's strained construction is right the respondent could have

gone in on 6 September 2005 and put a high intensity burn through 17E. And that, even on his argument, is one of the coupes that we started with.

5 Now, in my submission, nobody sitting in Court listening to Mr Abbott say those words would have understood, particularly Forestry Tasmania, that they were not promising, or that they were promising that they would only refrain from doing anything in coupes into which they needed to put new roads. No one would understand that they were omitting a promise not to put a high intensity burn through 17E. And, in my submission, it is a plain as it need be,  
10 and, your Honour, we are not dealing with a contempt proceeding here.

HIS HONOUR: I understand.

15 MS MORTIMER: So your Honour need be satisfied only of a plain reading, in my submission.

HIS HONOUR: Thank you. Well, after hearing counsel in respect of the application by the applicant for an injunction, pursuant to order 35, rule 11, the Court is of the view that such an injunction should not be made, because I am  
20 not satisfied that an undertaking having been given, that the person who gave it has failed to fulfil it, because I am not satisfied that the meaning of the undertaking attributed to Forestry Tasmania by the applicant is the correct one. Indeed, I am not satisfied that the undertaking given is in a state other than apt to be described as ambiguous, and it is unfortunate that that was the position on  
25 5 September, and that the background to the undertaking was not explained.

The undertaking therefore, as it currently sits, is meaningless. It is so vague and ambiguous as to be meaningless, and that might invite now, as a matter of urgency, an application for an interlocutory injunction. The respondent  
30 proffers an undertaking which, in lieu of the undertaking, if I could use that expression, given on 5 September, or given initially before Heerey J on 3 June, varied on 5 September, and varied as to the time of its operation until 15 September, but it seems that that at the moment is not acceptable to the applicant. What I think might be of some utility this afternoon would be for  
35 the parties to confer about the possibility of an appropriately worded undertaking to satisfy the applicant.

MS MORTIMER: Happy to do that, your Honour.

40 HIS HONOUR: And to report on the outcome of that conference to me at 10 am tomorrow morning.

MS MORTIMER: If your Honour pleases.

45 HIS HONOUR: And if there is - sorry, 9.15. Mr McKenna is right as usual. If there is going to be an application for an injunction it has to be dealt with urgently, so I would ask the parties to expedite their dealings. I wonder whether, from the point of view of some interim protection for the applicant, if

he feels he needs it, on a without prejudice basis, that he might accept the current undertaking given, subject to the discussions and an application for an injunction. Or is that something you want to consider, and I will - - -

5 MS MORTIMER: No, your Honour. I can probably submit to your Honour that that would be appropriate if my learned friend is prepared, and I think this is really a matter more of form than substance, to inform the Court that there is nothing proposed, whether by way of burning, roading, or harvesting in Wielangta between now and when we conclude our discussions.

10

HIS HONOUR: Rather than accepting the undertaking on an interim basis?

MS MORTIMER: Well, your Honour, it seems to me to be a concession that my learned friend is probably easily able to make.

15

MR D. GUNSON: Just bear with me, your Honour.

MS MORTIMER: It is only 24 hours or so.

20 MR D. GUNSON: I am instructed there is nothing planned, your Honour.

HIS HONOUR: All right. Now, if it turns out that you want more time to talk I will come on at 9.15 and get a progress report - - -

25 MS MORTIMER: If your Honour pleases.

HIS HONOUR: - - - because I think this is an important issue.

MS MORTIMER: It is, yes, your Honour.

30

HIS HONOUR: All right. Do you want to deal with the calls?

MR D. GUNSON: Yes, I do, your Honour. First thing to deal with, your Honour, is the map that my learned friend, Mr Tree, had requested be  
35 produced, and we produce that. Now, the second issue, your Honour, was the issue about Mr Wilkinson, and an email from - as I understood it from Mr Wilkinson to Mr Wapstra, when he sent his affidavit to him. Now, I understood my learned friend, Mr Tree, to say that Mr Browne had been informed - I can stand to correct that - that there had been no contact, I think,  
40 Mr Tree, it was said between Mr Wilkinson and Mr Browne on the subject? The reason I raise this is because I have an email from Mr Browne to Mr Wilkinson saying this:

45

*Could you respond by 9.45 am tomorrow either with the email from you to Mark Wapstra -*

so Mr Wapstra attaching a draft affidavit -

*or letting me know where things are so I can inform the judge?*

Mr Wilkinson emailed back:

5           *Dear Roland, I have checked my email system. I do not retain a copy of any email -*

sorry -

10           *I did not retain a copy of any email attaching my affidavit to Mark Wapstra on or about 25 September 2005.*

So it would seem that Mr Browne is well aware of the position, having had discussions with Mr Wapstra on the subject.

15

MR TREE: It is the wrong document that my friend is referring to, but that is - if my friend is not producing the document that is the subject of the call, he is not producing it, we will just simply seek an order in due course.

20   MR D. GUNSON: Well, I made the point before it was correspondence from I think Mr Wilkinson to Mr Wapstra that was being sought. Mr Wapstra didn't have it and the plan was to pursue Mr Wilkinson for it.

25   HIS HONOUR: Mr Wilkinson I think has indicated that he is happy to hand over anything to Mr Browne if I consider it appropriate, and I do consider it appropriate.

MR D. GUNSON: It is really nothing to do with - - -

30   HIS HONOUR: It should be requested and if he doesn't co-operate it can be subpoenaed.

35   MR TREE: Your Honour, it appears as though there is a substantial misunderstanding from the other side of the bar table as to what it is that is being sought. It is not going to be of great assistance to involve your Honour in explaining to my friend what it is, there is just clearly a misunderstanding of what it is that is the subject of the call.

40   HIS HONOUR: Can you discuss that?

MR TREE: Yes, I am happy to discuss that with my friend.

45   HIS HONOUR: All right. Now, a though has occurred to me while you are raising - issues of calls is arising, whether the parties might be assisted if the discussion either doesn't bear fruit today, about the - this afternoon about the injunction, or whether it continues in some form tomorrow, whether it be appropriate - I know Registrar Parrot is not available - would it be appropriate to get a registrar down from Melbourne to mediate tomorrow? Whether you

would be assisted by a mediator or whether you are confident you could work productively amongst yourselves tomorrow.

5 MR D. GUNSON: I think it is important we sort out the terms of the undertaking, your Honour. Would it be more convenient if we had perhaps 10 or 15 minutes now to discuss the matter? If what we have offered at least is somewhere towards what is required then fine tuning may resolve the issue.

10 HIS HONOUR: Ms Mortimer and Mr Tree?

MR D. GUNSON: We are more than happy to discuss it.

15 MS MORTIMER: Your Honour, I can see no reason why we shouldn't have a short discussion now, but I am concerned that we don't occupy the whole afternoon and we get on with the evidence while we can. So I am happy if it is convenient for my learned friend and your Honour perhaps to adjourn until 3.30 to see if there is any progress that can be made.

20 MR D. GUNSON: Yes, I agree with that, your Honour.

HIS HONOUR: All right. We will adjourn until 3.30.

25 **ADJOURNED** **[3.12pm]**

**RESUMED** **[3.44pm]**

30 MS MORTIMER: Now, your Honour, my learned friend and I have had some discussions which are proving helpful. We jointly advise your Honour to adjourn now until 9.15 tomorrow morning at which time we expect to have an agreed form of undertaking to be able to give your Honour.

35 HIS HONOUR: Thank you.

MS MORTIMER: And there is only one matter that we need to clear up now and that is the map that was just produced by my learned friend before the adjournment which we would like to tender.

40 HIS HONOUR: All right. That is BQ.

MS MORTIMER: And if I could just identify it. It is a map otherwise identical to VNT29, but showing the indicative coupes 2008 to 2013.

45 HIS HONOUR: Exhibit BQ.

MS MORTIMER: Yes. Could we just defer the tender of that, your Honour?  
I need to take some instructions about it.

5  
HIS HONOUR: All right, we will call it MFI G.

**MFI #G MAP SHOWING COUPES 2008 TO 2013**

10 HIS HONOUR: It may become BQ in the morning.

MR D. GUNSON: As to the adjournment, your Honour, I certainly endorse  
what my friend has said about that. We are reasonably close to resolution of  
the issue and we hope to be in a position tomorrow morning to give you a  
15 rather detailed undertaking.

HIS HONOUR: Unambiguous.

20 MR D. GUNSON: Unambiguous, your Honour.

HIS HONOUR: And I should examine it to see if I have got any queries.

MR D. GUNSON: Indeed, your Honour, and no doubt we will probably make  
some observations to your Honour about it tomorrow morning so it is quite  
25 clear on the record what is intended by it.

HIS HONOUR: Contextual comments.

30 MR D. GUNSON: Yes, indeed. There is one final matter. There was a map  
that my learned friend Mr Tree tendered this morning, and I think we were  
going to be provided with copies of that because the only copy went into  
evidence.

35 MR TREE: I am told that is in hand.

MR D. GUNSON: Thank you.

40 HIS HONOUR: Right, thank you. And all other issues about calls have been  
satisfied, or in train?

MR TREE: They are in train, your Honour.

45 HIS HONOUR: Yes, all right. Is it premature to ask, should I be asking this  
tomorrow morning, whether we are on target to complete the evidence in the  
four weeks?

MR D. GUNSON: Yes, your Honour, I think we will.

MS MORTIMER: Yes, your Honour, I would agree with that.

HIS HONOUR: Yes. What is the current thinking about when we are likely to conclude?

5

MS MORTIMER: Your Honour, there has been some rumours running around the bar table that we might finish by the end of next week. I wouldn't at the moment like to have it on the record as anything other than rumours.

10 HIS HONOUR: Right. So it would be safe to say that the fifth week wouldn't be required? I am not going to give it away yet.

MS MORTIMER: Your Honour, that is a bit of cross-examination happening there.

15

HIS HONOUR: It is more likely than not.

MS MORTIMER: It would appear safe to me as I stand here today, your Honour, yes.

20

HIS HONOUR: All right.

MS MORTIMER: Yes.

25 HIS HONOUR: I am not going to rush into listing anything more than I have already listed for that period anyway for obvious reasons. It will take about a month to get through the mail. So the matter would in all likelihood conclude some time in the fourth week?

30 MS MORTIMER: Yes, your Honour.

HIS HONOUR: Yes.

MS MORTIMER: That would be at the outside.

35

HIS HONOUR: Outside.

40 MS MORTIMER: And perhaps I ought also indicate, your Honour, the other scheduling issue that my learned friend and I have agreed, that I am not sure if we have informed your Honour's associate about and certainly not your Honour is that Mr Shields, who is the respondent - - -

HIS HONOUR: Dr Shields.

45 MS MORTIMER: Your Honour, can I just be given leave to call everybody Mr and Ms? We have agree because he is coming from New South Wales he will have a start at 10 am on 18 May which is next Thursday.

HIS HONOUR: Yes, thank you.

MS MORTIMER: If your Honour pleases.

5 HIS HONOUR: Thank you. When the matter is nearing the conclusion of the  
evidence, I would like the parties to give some consideration to - and the  
interveners - some consideration as to how long they think they will need for  
their submissions, their written submissions. I would have in mind that the  
respondent would go first in the ordinary way, then the interveners. I don't  
10 know whether that would occur shortly after the respondent, or how long after  
respondent, or whether it would be together or whether there would be a space  
between the interveners and then the applicant and then a reply for the  
respondent. It would be good to have some sort of picture in my mind when  
the last step of all of that would be likely to occur. The sooner I can know that,  
15 the better, and then that would assist me in programming a couple of days to  
come down for people to address the written submissions, or a single day?

MS MORTIMER: I would say two, your Honour.

20 HIS HONOUR: I see it as, yes.

MR D. GUNSON: I tend to that view as well, your Honour. That would also  
assist me in determining whether I have to cancel some long leave I had  
planned. I wasn't going anywhere anyway, but is just a question of using it or  
25 losing it. So if the parties could bear that in mind, what I am sort of angling at  
is trying to work out a likely scenario as to when those two days would be.  
And also there is the danger of other matters being listed which puts those two  
days out. So if the scenario could - realistic scenario could be put to me, at  
least I could reserve two days at some time down the track. So it would  
30 depend on how long you would need for your submissions then how long for  
yours and how long for yours.

MS MORTIMER: Well, we will give that some consideration too, your  
Honour, certainly if not tomorrow perhaps Monday.

35 HIS HONOUR: Don't let it cloud the undertaking discussions.

MS MORTIMER: If your Honour pleases.

40 HIS HONOUR: The Court will now adjourn until 9.15.

**MATTER ADJOURNED at 3.50 pm UNTIL FRIDAY, 12 MAY 2006**

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**NONE REQUESTED**