

TRANSCRIPT OF PROCEEDINGS

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O/N 2343

**FEDERAL COURT OF AUSTRALIA**

**TASMANIA DISTRICT REGISTRY**

**MARSHALL J**

**No TAD 17 of 2005**

**ROBERT BROWN**

**and**

**FORESTRY TASMANIA and OTHERS**

**HOBART**

**10.18 AM, MONDAY, 5 DECEMBER 2005**

**DAY ONE**

**MR D. MORTIMER SC appears for the applicant,  
with MR P. TREE SC**

**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 MR M. DIXON**

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MR D. MORTIMER SC: I appear with my learned friend, MR P. TREE SC,  
for the applicant.

5 MR D. GUNSON SC: I appear with my learned friends, MR A. ABBOTT and  
MR C. GUNSON for the respondent, Forestry Tasmania.

MR N. O'BRYAN SC: I appear with my learned friend,  
MR A. BROADFOOT for the Commonwealth.

10 MR P. TURNER: I appear with my learned friend, Mr M. DIXON, for the  
State.

HIS HONOUR: Thank you.

15 MS MORTIMER: If your Honour pleases. Can I just run through, your  
Honour, the proposed order of the proceeding as far as we have got so far. It is  
proposed that I open the applicant's case to your Honour this morning and I  
may go into this afternoon with that. There are likely to be a few preliminary  
20 issues to be dealt with, perhaps by way of documents. We will attempt to sort  
out whatever we can, but if we have some time left over this afternoon, your  
Honour, if we need to trouble your Honour about that we may. Then  
tomorrow is set aside for a view in Wielangta and both my instructor and my  
learned friend, Mr Gunson's instructor, have been working hard to organise  
that. That will take the whole day.

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Then we will start on Wednesday, your Honour, with the applicant's witnesses.  
We have a witness schedule which we distributed which is more in terms of an  
order of witnesses than a schedule because it is going to be a little difficult to  
predict how quickly we will move. We will have a copy of that given to your  
30 Honour as well. I don't know if we have a spare with us at the moment, but we  
will have a copy delivered to your Honour so that your Honour knows the order  
in which the applicant's witnesses will be called. I understand that we are going  
to get a similar document from my learned friend, Mr Gunson about the  
respondent's witnesses.

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HIS HONOUR: Thank you. The Registrar raised with me the issue as to  
whether the inspection could be completed in one day?

40 MS MORTIMER: We are confident it can, your Honour. It will be a full day,  
that is my understanding. We are going to start at about 9.30 I think and we  
anticipate that we will run through until about 5 o'clock.

HIS HONOUR: It might be best if your instructors liaise with my associate  
about logistical issues.

45 MS MORTIMER: We will do that, your Honour, and can I just mention that  
the applicant and respondent are agreed, your Honour, that if the weather is not

kind to us and it is raining that we will make other arrangements and the view won't take place if it is raining. Your Honour, might be pleased to hear that.

5 HIS HONOUR: I had my Collingwood Football Club waterproof jacket, I am not worried about rain.

MS MORTIMER: No magpies in the bush down here, your Honour, I don't think.

10 MR ABBOTT: Yes, there are.

MS MORTIMER: Well, there will be another one, your Honour, then. That is the proposed schedule of events, your Honour, as far as we can see.

15 HIS HONOUR: Just a moment. Sorry, Ms Mortimer.

MS MORTIMER: If your Honour pleases. In opening I am going to attempt to use some technology to show your Honour a diagram or two and some maps, and just ask your Honour and all my learned friends to bear with us if that doesn't quite go as smoothly as we might hope it does. Now, can I check, your Honour, in terms of the documents that your Honour should have: there are five volumes of Court book; there are then three volumes of documents filed on behalf of the respondent and on which the respondent proposes to rely, we understand it. Pardon me, your Honour.

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HIS HONOUR: Just a moment, Ms Mortimer.

MS MORTIMER: So there are eight volumes all up. There are volumes 1 to 5 which are all the evidence and a couple of agreed documents and some of our documents at the end of volume 5. Then there are three volumes of the Court book which comprise documents the respondent wishes to rely on. There is an affidavit that has been filed and served on behalf of the Commonwealth which has a lot of exhibits to it. I understand that my learned friend, Mr O'Bryan, is going to make an application at an appropriate time for leave to read that affidavit.

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HIS HONOUR: Will that be objected to?

MS MORTIMER: It will.

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HIS HONOUR: Leave to read it or the affidavit?

MS MORTIMER: It will be objected to in the sense, your Honour, that we say that the rules clearly proscribe that in relation to interveners. And we say it is not necessary, that it is all in the respondent's material, but we will get to that, your Honour. So that is the material before the Court. Now, if your Honour pleases.

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Your Honour, there is a forest about 50 kilometres from Hobart, it is called Wielangta. Wielangta means tall forest in Palawa, which is the generic name for the Aboriginal people in Tasmania. When people talk of Wielangta, your Honour, and when your Honour looks at the way that word is used in these proceedings, the area they speak of may differ. This case is about that area of the Tasmanian State Forest that is known as Wielangta. That State forest is comprised of eucalypt forest of two principal types: dry and wet sclerophyll.

These proceedings, your Honour, are about three endangered species which inhabit that forest and the effect or impact that cutting down that forest will have on those species. We don't understand, your Honour, that anybody in these proceedings denies that there is an effect or an impact from Forestry operations in Wielangta and what we differ about is the nature of that impact the extent or effect of it on those three species and what, if anything, should be done about it. Now, the three species in issue in these proceedings are: the broad-toothed stag beetle, which I will refer to as the beetle; the swift parrot and the Tasmanian wedge-tailed eagle which for shorthand purposes I will just call the eagle.

Your Honour, the matter for determination in these proceedings we characterise in the first paragraph of our outline of submissions as to whether the Commonwealth legislation, the Environmental Protection and Biodiversity Conservation Act is capable of delivering real, practical protection to threatened species or whether instead it is nothing but an aspirational instrument that requires lots of polices and procedures, but doesn't really enable anything to be done to stop conduct that has a significant impact on threatened species.

Now, that submission drew some criticism from our learned friends in their submissions but I repeat it here, your Honour, because, in my submission, that is what this case is about. It is about what can be done to protect threatened species and what the Commonwealth legislation says about that. The applicant says, your Honour, that the EPBC Act should be construed as delivering real protection to threatened species through its injunction provisions and as not exempting forestry operations from its reach unless those forestry operations deliver a high level and kind of protection and, indeed achieve protection of those species and we submit that that is what the EPBC Act contemplates.

There are major issues, your Honour, of construction of both the EPBC Act and the RFA that are live between the parties and the interveners and there is live issues about what the EPBC Act seem as a whole, is intended to deliver. There are, your Honour, some other important legal issues that have been raised, for example, your Honour will have seen in the Commonwealth submissions a claim that the question whether the respondent's forestry operations are in accordance with the Tasmanian RFA is not justiciable and the Court should decline to inquire into it, so there are a range of legal issues between the parties.

There are, your Honour, some important factual issues that arise for determination and they fall into two categories. Firstly, whether forestry

operations, as proposed, are likely to have a significant impact on each of the beetle, the parrot and the eagle. That is the language, your Honour, in Part III of the EPBC Act which I will take your Honour to in a moment. We don't, I understand, your Honour, differ as between the parties and the interveners about the construction of those words "significant impact" but we differ on the facts.

The second factual category that is raised in this proceeding is whether - what mechanisms are in place to avoid or minimise such impacts by way of reserves of land set aside and free from logging, management prescriptions imposed on forestry operations and compliance with those management prescriptions and there is also a factual issue about whether those mechanisms are effective or capable of being effective. But, your Honour, in my submission, the key differences and the key issues for determination in this matter boil down to three things.

Firstly, what is required as a matter of law to sustain the exemption for forestry operations from the EPBC Act. Secondly, what the true facts are about the level of threat that is posed to each of the beetle, the parrot and the eagle by logging in State forests in Wielangta. Thirdly, whatever the level of those threats are, what the true facts are about how effectively the respondent contains, addresses, or ameliorates those threats in conducting its forestry operations.

Now, your Honour has four sets of people represented at the bar table. The applicant, Senator Brown. Your Honour has his affidavit in the Court book at page 133. He is not required for cross-examination, your Honour, and his affidavit really goes only to the issue of standing to bring this proceeding which we don't understand to be challenged. The respondent, Forestry Tasmania, is a statutory authority established by the Forestry Act 1920. It is separate from the authorities that your Honour is going to hear many references to such as the Forest Practices Authority and the Threatened Species Unit and I have a diagram to show your Honour to help your Honour to try and understand where all those entities fit in.

Now, Forestry Tasmania, your Honour, is the respondent in this proceeding because it is the person who applies under the relevant regulatory scheme to conduct forest operations in Wielangta, that is, it is our case that it is the person who undertakes the action for the purposes of the EPBC Act. Although your Honour won't see any references to this in the respondent's material the fact is that the logging operations themselves are subcontractors out and then the tenders on-fold. So - but the person that carries out the operation, on our submission and on our case, is the respondent.

Your Honour, the Commonwealth is an intervener in this proceeding because, obviously, the proceeding concerned is legislation and it is one of the two parties to the RFA and we accept the Commonwealth has a legitimate role to play by way of legal submissions, but your Honour has already heard our position in relation to evidence and we oppose the adducing of evidence. The

State is also an intervener and your Honour made an earlier ruling about that and we don't understand that the State has sought to lead any evidence. Your Honour, we haven't seen any submissions from the State but I assume they are on their way at some stage.

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Now, if I can take your Honour to the legislation and start with the EPBC Act. Your Honour, I would just make this preliminary submission. This case is about the EPBC Act. It is not about logging per se and it is not about generally how environmentally friendly logging can or can't be, it is about three threatened species that are protected under this piece of Commonwealth legislation. It is not about the State threatened species legislation it is about what protection this Act gives. So it is the regime that is set up under this Commonwealth piece of legislation that we submit is the framework for this proceeding. And I ask your Honour to turn to section 3 of the Act which is where your Honour will find the objects. Section 3(1)(a) and (b) and (c) we place emphasis on in this proceeding. They are, in our submission, the relevant objects that inform some of the construction issues that your Honour is going to have to decide later on in this case.

20 HIS HONOUR: Did you say (a) and (c)?

MS MORTIMER: (a), (b), and (c)

HIS HONOUR: (a), (b), and (c).

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MS MORTIMER: So to provide for the protection of the environment, to promote ecologically sustainable development, and to promote the conservation of biodiversity. The way that the Act seeks to achieve those objects is set out in section 3(2) and the subparagraphs that we place emphasis on in that are paragraphs (b), (c), (d), and particularly (e).

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And it is (e) that I want to just draw your Honour's attention to in opening. What subsection 2 provides is that in order to achieve its objects the Act enhances Australia's capacity to ensure the conservation of its biodiversity by including provisions to (i) protect native species and then the words in brackets, your Honour, are very important in this case and in particular prevent the extinction and promote the recovery of threatened species and ensure the conservation of migratory species.

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So it is, in our submission, a specific function of this legislation to protect native species and that word "protect" does not mean just sustain population levels. The legislation is quite clear about that. It includes promoting the recovery of species. Your Honour is going to hear a lot of evidence about this issue but it will be part of our case that that is a very important aspect of the concept of protection. Protection is not just about maintaining a visible number of individuals of a species, it is about promoting a species back to sustainable levels.

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In terms of the other aspects of the definition part of this legislation, I draw your Honour's attention to 3A, the Principles of Ecologically Sustainable Development. Now, there is a particular definition given to ecologically sustainable development by this legislation. It is not directly relevant, your Honour, for this proceeding, it is a concept that your Honour will find in relation to this legislation in terms of being a condition on some of the powers that can be exercised but not some of the matters that your Honour needs to deal with. But as a concept, ecologically sustainable development is relevant because it informs another concept that your Honour will see in a lot of the other material which is ecologically sustainable forest management.

HIS HONOUR: Just while we are going through the legislation, it is important to make sure that one is looking at the same version as counsel.

MS MORTIMER: Absolutely, your Honour, it is a very good point.

HIS HONOUR: I am looking a reprint 2.

MS MORTIMER: So am I, and I can see a purple copy on the other side of the bar table. So I hope that we are all working off the same reprint. I am sure my learned friend, Mr O'Bryan, perhaps will tell us if he doesn't think that is appropriate.

HIS HONOUR: Yes, reprinted on 1 January 2004 taking into account amendments up to and including those made by Act 88 of 2003.

MS MORTIMER: We are not aware, your Honour, of any amendments since that date that have any significant impact, your Honour, on anything that is pertinent to this case but we will check that and perhaps consult with my learned friend, Mr O'Bryan, about that.

MR O'BRYAN: We are useful for some purposes, your Honour, but apparently not for others.

MS MORTIMER: Your Honour, so ESD if I can abbreviate it and start the list of acronyms that your Honour is going to have to come to grips with in this proceeding, ESD is a concept that is going to crop up from time to time but there are debates over what it means. This Act gives it a particular meaning and we don't anticipate that we are going to have to have a debate about its construction per se in this legislation. Your Honour, then there is another definition or concept that I want to draw your Honour's attention to that is used in this Act and it is the precautionary principle. And your Honour will find a reference to that in section 392 subsection - oh, that is not right. Sorry, your Honour, I have given a wrong reference there, 391(2).

HIS HONOUR: Will you be taking me to Ms Pell's book - Peel's book, I should say?

MS MORTIMER: To?

HIS HONOUR: Ms Peel's book.

5 MS MORTIMER: We might have enough books in this case, your Honour,  
but - - -

HIS HONOUR: I have discovered a book recently published this year in fact  
10 called the Precautionary Principle in Practice, Environmental Decision-Making  
and Scientific Uncertainty by Jacqueline Peel.

MS MORTIMER: Well, your Honour, will probably be having a look at that,  
yes. And again, your Honour, the - - -

15 HIS HONOUR: I coincidentally came across Precautionary Principle not long  
ago sitting as a judge of the ACT Court of Appeal in looking at a water use  
issue. So it is amazing how things happen for a reason.

MS MORTIMER: Yes, it is, your Honour.  
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HIS HONOUR: Until then I had never heard of it.

MS MORTIMER: Oh, your Honour, that is an admission and a half. Your  
Honour, it is a concept that is found throughout this legislation and is a key  
25 component of environmental decision making. Again, there are some powers  
and duties under this legislation that are conditioned by the taking into account  
of the precautionary principle and that is not the case with some of the - directly  
in terms of the expressed reference in the legislation with the ones that we will  
be dealing with but it is a concept again that your Honour is going to hear some  
30 evidence about and it is going to be I anticipate your Honour a matter of debate  
between some of the witnesses for the applicant and the respondent as to how  
that principle does or does not come into play in the protection of these three  
threatened species from forestry operations. The definition that is given in the  
EPBC Act your Honour will find at section 391(2). The precautionary principle  
35 is that:

*Lack of full scientific certainty should not be used as a reason for  
postponing a measure to prevent degradation of the environment,  
40 where there are threats of serious of irreversible scientific damage.*

So in a nutshell, your Honour, it works in a sense in a reverse way to say, just  
because you can't confidentially, with full scientific certainty, predict an adverse  
impact, ought not to stop you trying to do something to avoid it. Now, if I can  
take your Honour back to the front of the Act, and to Part II, which is on page  
45 8 of the reprint, and sets what is called a simplified outline of the chapter,  
chapter 2, and then Part III is the substantive provision.

So this is the part of the legislation that sets up prohibitions, and then exemptions from those prohibitions, which can be obtained in a number of ways.

And from Part III division 1 onwards your Honour will find a number of categories of activities that are prohibited, and then a series of exemptions provided for to cover conduct that is undertaken. And the relevant one for our purposes is section 18, which deals with - that is on page 26 of the reprint - and that deals with listed threatened species and communities. So there are a number of prohibitions set out there. The relevant one, your Honour, is section 18(3):

*A person must not take an action that has, or will have a significant impact on a listed threatened species included in the endangered category, or is likely to have a significant impact on a listed threatened species included in the endangered category.*

So that is the relevant prohibition for the purposes of this proceeding, and your Honour will see that it hinges on the taking of an action. And to understand what the legislation means by that your Honour has to go to section 523. And your Honour will find there a definition of the term "action," an inclusive definition, not an exhaustive one, enumerated in paragraphs (a) to (e). In our submission, very broad, but there will be an issue, I understand, in this proceeding, your Honour, about - certainly I think raised by the Commonwealth, about what of the matters that we have identified in our application, in terms of forestry operations, are capable of constituting actions.

I don't understand, your Honour, there to be a dispute between the parties, or between the applicant and the interveners, that forestry operations in the two named coupes in Wielangta constitute an action, for the purposes of section 18. I do understand there to be a dispute between us about whether forestry operations generally in Wielangta can constitute an action. Now, what follows after section 18, your Honour, we go back to - there is the creation of some offences in section 18A in relation to threatened species, and, your Honour, those are the kinds of provisions that we are going to be relying on at the end of this case to make some submissions to your Honour about why this Act is about protection in fact for threatened species, not planning to protect them. Now, if your Honour goes to section 19 your Honour will see one of the first, or the relevant exemption, and that is section 19(3)(a):

*A subsection of section 18 or section 18A does not apply to an action if Part IV lets the person take the action without an approval under Part IX for the purposes of the subsection.*

So that is the cross-referencing provision that takes one into Part IV of the Act, and operates as an exemption. So something that is otherwise prima facie not only unlawful, but an offence, is exempted through the operation of section 19(3)(a). Before, your Honour, I take you to Part IV and how that exemption operates I want to just run your Honour through the ordinary approvals process, because that, in our submission, also informs the construction of some

of the provisions that we are dealing with. So in this Part, Part III, you have all the prohibitions set up, and then if your Honour goes to Part VI, which starts on page 107 of the reprint, your Honour will see chapter 4, Part VI, which sets out the general approvals process.

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So if you can't bring yourself within a specified exemption then what has to happen is that you have to go through a complicated and detailed approvals process to get permission to undertake the action. And what chapter 4 sets out is how one does that. I won't take your Honour through that in too much detail, in terms of how you figure out whether something is a controlled action, but if I can ask your Honour to look at Part VIII, once you are in that context, once you are in the context of having to get an approval, then the minister has to make a decision about what kind of assessment approach is going to be undertaken. And essentially, your Honour, there is a graded choice.

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If your Honour looks at section 85 on page 128 there is a graded choice of investigations into assessing the impact of proposed actions, and they range from an accreditation process right through to a full-blown public inquiry. So that is all bypassed if you get an exemption, that whole process. Once you have gone through that process then approvals can be given under Part IX and Part IX starts on page 163. I don't need to take your Honour through that in too much detail. The grant of an approval is dealt with in section 133 and it can be, as your Honour would expect, subject to a whole range of conditions, for example, if your Honour looks at section 139 there are a series of conditions that can be imposed, pardon me, your Honour, in relation to threatened species.

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The protection of threatened species specifically by this legislation occurs in Part XIII of the legislation and it is through the decision-making process, that is on page 217 of the reprint, your Honour, and it is through the decision-making process in that Part that a species gets to a spot where it gets some kind of legislative recognition and protection. Your Honour will see that that chapter is headed Conservation of Biodiversity and Heritage which goes back to the object of the Act about Conservation of Biodiversity and to the function of protecting native species.

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The minister is required, your Honour, under section 178 to establish a list of threatened species, to divide that list into categories and those categories are designed to reflect in substance, a sliding scale in qualitative terms of how threatened each species is assessed to be. So the categories range from extinct - not a lot of hope for species in that category, through to conservation-dependent at the other. Section 179, your Honour, defines the broad criteria by which one determines eligibility for each of these categories and to qualify as an endangered species the criteria in section 179(4) have to be met.

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Firstly, that it is not critically endangered so it doesn't meet the threshold of having an extremely high risk of extinction in the wild in the immediate future. Your Honour would think that that - would understand my submission that that criterion is really referring to a species that is teetering on the brink of extinction

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in the wild and endangered is one step back from that. So that is the first criterion. And then the second is that it is facing a very high of extinction in the wild and so the language, in our submission, in that subsection is still quite extreme, very high risk of extinction in the near future.

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And then the legislation turns to some more specific criteria in the regulations and there are some criteria that are prescribed in the regulations. Now, I haven't asked your Honour to have a copy of the regulations to hand, but the relevant regulations are reproduced in our outline of submissions, your Honour, and that might be a convenient spot, your Honour, to turn to in paragraph 17.

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HIS HONOUR: What was the date of filing of the submissions?

MR MORTIMER: 23 November 2005, your Honour, paragraph 17. So there are relevantly five criteria that have to be met that the species has undergone, is suspected to have undergone, or is likely to undergo in the immediate future a severe reduction in numbers. So, again, quite extreme language, "severe reduction". The geographic distribution of the species is precarious for the survival of the species and is restricted. The estimated total number of mature individuals is low and evidence suggests the number will continue to decline at a high rate or the number is likely to continue to decline and its geographic distribution is precarious for its survival. Again, your Honour, extreme language. I ask your Honour just to focus on that criterion for a moment and it is opening words:

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*The estimated total number of mature individuals is low -*

and that is repeated, your Honour will see, in D, as a separate and independent criterion on its own. That is because, your Honour, and it is part of the evidence that your Honour will hear, mature individuals in any species are the important ones because they are the ones that are breeding and when you are talking about survival of the species and recovery of it, it is not the kids and the teenagers that you are looking at, it is the mature breeding adults and it is the success around breeding that is the key to the recovery in any species. So that is why these criteria focus on the estimated total number of mature individuals.

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And the final criterion, your Honour, is the probability of its extinction in the wild is at least 20 per cent in the near future, and your Honour is going to hear some specific evidence in this case about the eagles, and predictions that have been made by experts about the probability of its extinction in the near future. And the applicant's case is that that probability is up in the 90 per cent, so more than four times this criteria.

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Now, your Honour, the listing of a threatened species, as undertaken by the minister, having considered advice from a threatened species scientific committee, that committee is established under section 502 of the Act, which your Honour will find on page 644 of the reprint. I don't need to do any more than just direct your Honour's attention to that. Those are the sections that

establish the committee. Your Honour, the swift parrot, the beetle and the eagle are each listed, and that is not a fact that is in dispute.

5 They are each also listed under the relevant Tasmanian legislation, which is the Threatened Species Protection Act 1995. And each is also listed as what is called a priority species under the Tasmanian Regional Forests Agreement. And I will just give your Honour the reference to that. Your Honour need not go to it at the moment. It is in the court book at page 190. Your Honour will see the scientific names for each of the species there under that listing. Now, if I can  
10 take your Honour back to Part IV of the Act, which is the exemptions from the EPBC Act approvals process for forestry operations. Part VI, your Honour, sets up a number of different kinds of exemptions that are given, and your Honour will recall that cross-reference that I took you to in section 19(4), and the relevant one for our purposes is section 38, which appears at page 75 of the  
15 reprint:

*Section 38(1) Part III does not apply to an RFA forestry operation that is undertaken in accordance with an RFA.*

20 Key issues, your Honour, in our submission, from that are that there must be an RFA, as that word is defined, and the definition your Honour will see takes us to another piece of Commonwealth legislation, the Regional Forest Agreements Act 2002, and I will take your Honour to that in a moment. Secondly, there must be an RFA forestry operation, as that term is defined again in the Regional  
25 Forests Agreements Act 2002. And thirdly, the RFA forestry operation must be in accordance with an RFA. Now, your Honour, it is true that in our construction of this legislation we give those words a lot of work to do. In our submission, the respondent and the interveners do not.

30 So this is where we get to the question of whether what has been promised to be done under an RFA really matters, in order to give logging operations the privilege of not having to go through a complicated approvals process, and risk not getting it, and not having their operations coupe by coupe scrutinised under this legislation for how they protect threatened species, amongst other things,  
35 and not being exposed to the risk of not getting their approval. So that prospect, and we call it a privilege, your Honour, and we submit that that is an accurate characterisation, the question is how much work do those words, "In accordance with", have to do, and we say we give it a lot. The RFA requires, in our submission, the protection of threatened species. Forestry operations  
40 undertaken must therefore protect threatened species, or they will not be in accordance with an RFA.

Your Honour, we submit that Part IV contemplates that another mechanism of environmental assessment and regulation has assessed these actions that would  
45 otherwise go through the approvals process, and that that other method has ensured, that other method being the RFA has ensured that no significant impact will occur on those species which inhabit the area affected by the actions. So we say Part IV allows for parallel processes and protections, but not processes

and protections that are of a lesser quality. And, your Honour, I pause here to note one of the submissions that is made on behalf of the Commonwealth, and it is in paragraph 40 of the Commonwealth's submissions that:

5            *EPBC Act approval can be granted, even if there is significant impact.*

So what we understand the Commonwealth to be saying is that in practice the EPBC Act approvals process doesn't necessarily mean that just because you can establish significant impact you won't get a project approved. That submission, your Honour, might be unobjectionable in relation to some actions under this Act, but, in our submission, it can't be an argument and a construction that can run in so far as this Act operates to protect native species, and promote their recovery. That is, you couldn't possibly give an approval to an action that is going to have a significant impact on a threatened species, because you couldn't do that lawfully, because to do that would be in direct contradiction of the objects of this Act, which is to promote the recovery of a species.

So although we accept that the Commonwealth might be able to burrow away in this legislation and find some kinds of actions for which approval could be given, notwithstanding significant impact, it can't operate, in our submission, in relation to native species. You cannot read that kind of construction consistently with the objects of this legislation. Now, your Honour, how does this Act, and how does the protection that this Act give get in forced? Your Honour needs to go to the provisions at the end of the Act, section 475. Those are the injunction provisions, and taking the prohibition, with which we are concerned in this case, that is the prohibition in section 18, that prohibition can be enforced either by the minister, who has two options open:

30            *The minister may seek an injunction or a pecuniary penalty.*

But standing is given to another category of person, and it is in this category that the applicant falls:

35            *An interested person who may seek only injunctive relief under section 475.*

The meaning of interested person, your Honour, is dealt with in section 475(6) and (7). It is subsection (6) that is relevant for these proceedings, and it includes relevantly:

40            *An individual who has engaged in a series of activities for protection or conservation of the environment at any time in the two years immediately before the conduct, or the proposed conduct.*

45            And Senator Brown, your Honour, on the evidence obviously fits within that definition. So the mechanism by which protection is achieved relevantly for people other than the minister, and we say the Act contemplates that, the Act in this sense, your Honour, has a public interest function, plain and express on its

terms. It enables people who have a special interest, if you take some of the common law descriptions, to use this legislation to protect the environment. That is what it contemplates.

5 Now, those are the matters in this piece of legislation that I want to take your Honour to by way of opening, but your Honour will recall that in section 38 there are some definitions that undertake cross-referencing to the Regional Forest Agreement Act 2002, and if I can ask your Honour to turn to that. Your Honour, that - in section 3 sets out three main objects to give effect to certain obligations of the Commonwealth under Regional Forest Agreements, to give effect to certain aspects of Forest and Wood Production Products Action Agenda and the National Forest Policy Statement.

15 The National Forest Policy Statement, your Honour, is a document that some attention might have to be paid to in this case. And subsection (3) to provide for the creation, or the existence of a Forest and Wood Products Council. It is really the first object, your Honour, that is relevant in these proceedings. Section 6 - before I come to the definition, can I just draw your Honour's attention to section 6(4) which provides a mirror kind of protection to section 20 38 and your Honour will see the same language used.

Now, the definition that the EPBC Act picks up are, firstly, the definition of a Regional Forest Agreement. Your Honour will see that in section 4. RFA, or Regional Forest Agreement means, "an agreement" and then there are a number of criteria that have to be met:

*...have to be in force between the Commonwealth and the State, has to be in respect of a region.*

30 And then there are, in my submission, a number of matters that are conditions precedent to an agreement coming within this definition, that is, the agreement must satisfy all of these conditions. The relevant two that we have picked out for the purposes of this application as not being satisfied are little (b) and little (c). The agreement provides for a comprehensive, adequate and representative reserve system. The agreement provides for the ecologically sustainable management and use of forested areas in the region, or regions.

Now, your Honour, this is an argument that really doesn't concern any evidence whatsoever and it is an argument that we will deal with in submissions at the end of the case because it is a pure construction argument about whether those words "provides for" mean "planned for" or "achieves", actually implements.

HIS HONOUR: I might be taken to any explanatory material in relation to this legislation?

45 MS MORTIMER: There is some explanatory material, your Honour. I don't know that it - we always seem to say this about explanatory material, your Honour. I don't know that it descends to the detail, to any detail that would

assist the construction of those words but certainly we will be in final submissions, taking your Honour to explanatory material and I anticipate, particularly my learned friends for the Commonwealth, will be doing that too.

5 So I draw that to your Honour's attention, and the argument to your Honour's attention but it is not a matter of evidence at all. The other definition that is relevant, your Honour, is the definition of RFA Forestry Operations. And the relevant part of that, your Honour will see, it goes through all the different states. The relevant part is little (d), Forestry Operations as defined in the  
10 agreement between the Commonwealth and Tasmania that are conducted in relation to land in a region covered by the RFA.

We don't understand, your Honour, there to be any dispute between the parties or the interveners that that is the relevant part of the definition of RFA Forestry  
15 Operation. Now, what are Forestry Operations is a matter that is picked up in the Tasmanian RFA itself. I am going to take your Honour to that shortly but just while we are on these definitions can I ask your Honour to look at page 145 of the Court book. Down the bottom your Honour will see there is a definition of Forestry Operations and over the page the relevant bit:

20

*...the harvesting of forest products for commercial purposes, and includes any related land clearing, land preparation, burning-off and transport operations.*

25 Now, that is relevant in this sense, your Honour, that when one is looking at an action for the purposes of the EPBC Act, in our submission, one is not just looking at the cutting-down of trees, one is looking at the putting-in of roads, the cleaning-up, the land clearing, the associated land clearing that might happen, the burning-off that might happen afterwards, those are all  
30 encompassed in the definition of Forestry Operations.

Now, before we go back to the RFA, your Honour, just to complete the Cook's tour of legislation, may I ask your Honour to look very briefly at the Threatened  
35 Species Act 1995, Tasmania? The two short points in opening that I want to make about that, your Honour, just so your Honour can understand where that fits in to the context: section 51(3) of that Act gives a - that Act, as your Honour will understand, also sets up a whole lot of prohibitions and creates a census about the taking of threatened species, but it gives a very broad  
40 exemption to things that are done under the authority of a certified Forest Practices Plan, and I will take your Honour to what that is but, in essence, once you are in the realm of forestry operations and forestry operations are being conducted under a certificate Forest Practices Plan, threatened species can be killed as far as the Tasmanian legislation is concerned. And what that makes clear, your Honour, is that obviously what is contemplated is that it is in the  
45 Forest Practices Plan in the planning process that the protections will be picked up.

Now, the second relevance of that piece of legislation, your Honour, is that your Honour will hear some evidence from the respondent particularly, I think it is Mr Wapstra, who will tell your Honour about the interrelationship between the Tasmanian Threatened Species Unit which administers this legislation and the Forest Practices Authority and how they work in relation to forestry operations. Now, can I take your Honour to, before I get down to the way that forestry operations are conducted in Tasmania, and take your Honour back to the Tasmanian RFA, which starts at page 138 of the Court book and to the recital that start on page 142. So this is an agreement made in 1997 and the two first objectives of the agreement are, in my submission, relevant ones, namely, that:

*The framework for the management and use of Tasmanian forests will, in particular, provide for certainty for conservation of environment and heritage values through the establishment of the CAR Reserve System -*

we will come to what that means -

*and provides the ecologically sustainable management and use of forests in Tasmania.*

And there your Honour will see the entry of those concepts of ecologically sustainable management and what they mean and, no doubt, your Honour is going to hear lots of submissions at the end about what those words mean.

Your Honour will see in recital D a little description of the three parts that comprise this agreement. There is part 1, which is sort of the definitional part. Then the agreement is divided up into two parts. There is part 2, which is expressed by the parties not to be intended to create legally binding relations. And then there is part 3, which is intended to create legally binding relations. And the attachments are said to fall into the former category. Your Honour, there has been a range of definitions, many of which are going to crop up in this case, and I will just try and point out a few of the more relevant ones.

Biodiversity, and that is cross-referenced to another report that your Honour is going to have to become a little familiar with, the JANIS Report, which is a committee that reported on a whole range of issues to do with forestry and the environment, and the approach that that committee took to some of these concepts is picked up throughout the RFA, and indeed I think in parts of the EPBC Act as well. The CAR reserve system, is a system of, in a nutshell, your Honour, setting aside land for the purpose of protecting it. Now, that might not be for protecting threatened species. It might be because it has got world heritage values. It might be because it addresses a whole lot of - it might be cultural values.

There might be a whole lot of reasons, and they might inter-relate, and there is a sliding scale, as we understand it, your Honour, and there may be some differences, for example, impermanency between a formal reserve and an

informal reserve, those sorts of issues. But it is a system that is designed to set parts of land aside. Your Honour, there is a definition of ecologically sustainable forest management, and your Honour will see that that picks up ESD, and takes us back to the National Forest Policy Statement. So that there is a complicated picking up and cross-referencing throughout this document to a number of other documents. Your Honour, there is the definition of forest. That is fairly straight forward.

There is a definition of forest management systems, which essentially is intended to cover all activities of the State that relate to the management of forests. Forestry operations I have taken your Honour to. Over the page your Honour will see formal and informal reserves are given a specific definition. And your Honour will see that there is, in the definitions themselves, different levels of security attached to them. Your Honour will see in the definition of formal reserve on the third line:

*The status of formal reserves is secure, requiring action by Tasmanian Parliament for dedication or revocation. Not the case for informal reserves.*

So informal reserves much more susceptible to ordinary processes of decision making about whether they ought to stay or not stay. The JANIS Report is defined, your Honour, at the bottom of that page. Over the page, management decision classification system. That is another creature that your Honour is going to hear some evidence about in this proceeding, and it is, as it says there:

*A map based zoning system that is used by Forestry Tasmania for the classification of State forests.*

I am going to come back to some issues about that a little later in this opening. And the management prescriptions data base, your Honour, is another important concept, because a lot of the evidence in this case will revolve around the adequacy of management prescriptions for these three species, and compliance with them. National Forest Policy Statement on the next page, your Honour, is given a definition. And priority species is given a definition. That is a reasonably critical definition, your Honour, and that is where your Honour will find the cross-reference to attachment 2. And perhaps I ought to just take your Honour to that, to show you where the three species appear. Attachment 2 on page 190, with the heading Fauna Species, Lathamus Discolour - I am going to get into trouble with my Latin here - swift parrots, and then about half way down, and then that is under the heading Species with Recovery Action Committed or Under Way.

And your Honour will see later in the evidence that there is a swift parrot recovery scheme. Species requiring recovery action, about two thirds of the way down that, Lissotes latidens, broad-toothed stag beetle. And then under the third heading, Species with Recovery Plans needing revision, Aquila audax fleayi - probably half the room can pronounce that better than I can, your

Honour - wedge-tailed eagles. And there is a particular - if I can take your Honour back to the definition section, recovery plans have a particular definition, and they can either be State recovery plans, under the threatened species legislation, or Commonwealth recovery plans. And there may, your Honour, in fact be both.

Your Honour, State forest is given a particular definition, and then over the page there are three definitions of matters that - concepts that concern threatened species, a threat abatement plan, a threatened fauna manual, that is a manual that is referred to quite a lot in the respondent's evidence, and a threatened species data base, which I think your Honour will find also lots of references in the respondent's material about that. So that is the definition section. The next clauses talk about this document being a Regional Forest Agreement, clause 4, and the duration is set out in clause 7. It is an agreement that is to be in force for 20 years. Your Honour can then turn, if your Honour pleases, to Part II on page 153. That is where the start of the section not intended to create legally binding relations is.

The basis of the agreement goes back to the National Forest Policy Statement and a lot of this, your Honour, with respect, is fairly general high minded policy statement kind of material in this level, and when your Honour looks at the National Forest Policy Statement it is of the same nature, although obviously these commitments are taken seriously. But they are rather general commitments at that level in clause 19. The introduction of legislation, clause 22, and that is the clause, your Honour, that contemplates a process whereby, having entered into a Regional Forest Agreement, there will be exemptions given from other kinds of controls and approvals that would otherwise have to be met.

And at the stage that this agreement was made the relevant Commonwealth legislation, your Honour will see in clause 22B(ii), the Environment Protection Impacted Proposals Act 1974, which was one of the pieces of Commonwealth legislation that was repealed and replaced by the EPBC Act, the EPBC Act trying to replace a number of pieces of legislation, but that was one of them. Your Honour, clause 24, action to establish and manage reserves, and so there is an undertaking by the State, clause 24A, to manage areas in the CAR reserves system, which is defined, but I at the moment don't propose to take your Honour to that. There is then a series of confirmations in clause 30 onwards about threatened species, which are all, in our submission, looking in part backwards at what has been done in preparation for this RFA, and then looking forwards to what might be done in relation to threatened species.

And in clause 38, your Honour, there is a cross-reference again to attachment 2 and the status of recovery action. Important to emphasis, your Honour, in our submission, that all those clauses are not about keeping these threatened species at a survival level. They are about recovering these species to sustainable levels. It cannot be contended, in our submission, that it is not a prime focus of this agreement to achieve recovery of threatened species. The CAR reserves

system your Honour will find set out in more detail in clause 48 and onwards. I don't propose to take your Honour to that in any more detail. There is then the objective of ecologically sustainable forest management at clause 62.

5 And that is to be achieved by three identified key elements. The reserve system is one of them. The development of forest products industries that are economically sustainable and provide for socio and economic benefit is another, and the third is a fully integrated and strategic forest management system capable of responding to new information. And as we understand the  
10 respondent's material, there is some emphasis placed on that, and what they have called in their evidence the concept of adaptive management, learning through mistakes, in ordinary terms, we understand that to mean, your Honour. There is then a cross-reference to attachment 10, which are some specific matters about improvements in Tasmania's forest management system that the  
15 State has undertaken to achieve.

And I don't think there is anything in particular there that I want to draw your Honour's attention to. There is then an accreditation clause in clause 65, and I understand that there will be some reliance placed on that and argument by both  
20 the respondents and our learned friends for the interveners about what that means, in terms of construing the EPBC Act. There is then clause 68, which is a clause upon which we place some particular reliance, your Honour. The State agrees to protect the priority species listed in attachment 2, through two mechanisms, your Honour. The reserves system, and the application of relevant  
25 management prescriptions. Now, your Honour, we say, we submit that this clause should be construed as agree to protect in fact, deliver protection of, that is what it means.

It doesn't mean try, or think about, or consider. It means the State of Tasmania agrees to protect the priority species, and as we have already submitted to your Honour, that concept means not maintain individuals at a survival level or  
30 current level, it means recover the species. There is to be a five-yearly review by the State of how it is going in that protection by clause 69 and there is to be management prescriptions prepared, recovery plans prepared, and implemented,  
35 your Honour, as a matter of priority. That is 1997, your Honour. The evidence before your Honour will show that in 2005 of the three species with which we are concerned there is one that has a recurrent recovery plan.

There is then a particular procedure, your Honour, that has to be undertaken by  
40 clause 71 if there are to be alterations or new management prescriptions and we place some significance on that process and I ask your Honour to go to clause 96. This, your Honour, finds its way into the binding obligations part if that matter - we say it doesn't but I understand your Honour may hear some arguments that that distinction does matter. Clause 96 says:

45

*That the State agrees that any changes to the priority species in attachment 2 including new or altered management prescriptions will do four things. They will be adequate to maintain the species*

*identified; they will have a sound scientific basis; they will be endorsed by the Tasmanian Threatened Species Scientific Advisory Committee; and they will take note of public comment.*

5 Now, that is a rigorous mechanism, in my submission, your Honour, for any new or altered management prescriptions and in construing this document in our submission one would expect consistently that the original prescriptions must at least meet that standard. And we will be submitting to your Honour they don't.  
10 Now, Part III, your Honour, appears on page 166 and that is the Part that the parties agree is intended to create legally enforceable rights and obligations as between them.

HIS HONOUR: Ms Mortimer, maybe to protect your voice and our backs we might adjourn for 10 minutes, and I would indicate that because of that I will sit  
15 on until about five to 1 for lunch - before lunch I should say.

MS MORTIMER: If your Honour pleases.

20 **ADJOURNED** [11.35am]

**RESUMED** [11.45am]

25 HIS HONOUR: Ms Mortimer?

MS MORTIMER: If your Honour pleases I am about to move on to something that I need the electronic wizardry for and my instructor has just  
30 disappeared. So if your Honour can just bear with us for a moment?

HIS HONOUR: Certainly.

MS MORTIMER: I will put that down as the first glitch. Your Honour, I am  
35 just going to take a few moments to try and explain some of the entities that your Honour is going to be hearing about in evidence and I will distribute a hard copy of that. Firstly, I will hand one up to your Honour. Now, while we are doing this, your Honour is going to need a little bit of legislation as well. If I can just take your Honour through that chart. So in terms of the management  
40 there are three entities that have responsibilities and roles in relation to that.

Some more direct than others, Forestry Tasmania, the Forest Practices Authority which used to be the Forest Practices Board and the Threatened Species Unit. And then in terms of wood production, your Honour, there are  
45 three groups of entities that have a role in that. Now, the Forest Practices Authority if I can - well, I will start with the respondent and I don't propose to say anything more about that, it is established under that older piece of

legislation and I think that is all I want to say by way of opening about the respondent's statutory status.

5 But the Forestry Practices Authority I want to say a little bit about your Honour, and if I can ask your Honour to turn up the Forest Practices Act 1985? The authority is established under section 4AA of that legislation and its objectives are set out in section 4B. The authority is part of the State's forest practices system, the objective of which is set out in schedule 7. If I can just ask your Honour to turn briefly to schedule 7 which is the last schedule. And  
10 your Honour will see there again:

*The aim being to achieve sustainable management of Crown and private forests with due care for the environment while delivering in a way that is as far as possible self-funding.*

15 And then a number of outcomes that are supposed to be delivered. And your Honour will not see in that a particular environmental emphasis, in my submission. So that although this authority is required because of the inter-relationship of a lot of pieces of legislation to undertake some regulatory  
20 activities that involve environmental protection that doesn't form a large part of its expressed statutory objectives. Forest Practices plans though, your Honour, are one of the key management tools that are used in practice to regulate forest operations.

25 Your Honour, will find them dealt with in section 17 and following of the Forest Practices Act. And your Honour will see on the little chart that we have prepared that one of the roles the Forest Practices Authority has is to approve Forest Practices plans and section 17 sets out again who is a responsible person, and 17(1) really puts into that definition people who are the owner of particular  
30 pieces of land or carries out forest practices on those lands. Again, we don't understand there to be any dispute in this case that for the purpose of the forestry operations that occurring in Wielangta, Forestry Tasmania is the responsible person for the purposes of section 17. Section 18 deals with the - no, I withdraw that. Section 17(4), your Honour, is the prohibition coupled  
35 with an exemption if there is in existence a certified forest practices plan.

40 So if you are going to do any of the things listed in subsection 4 you have got to do it under the authority of a certified forest practices plan and the way that that process occurs is set out from section 18 onwards, the preparation of the plans and what needs to be set out in them. Then in section 20 lest it be not clear by the way that section 18 is structured, section 20 tells everybody what a certified forest practices plan authorises. So again it is not just forest practices it is operations associated with forest practices, so roading and all those sorts of  
45 things.

Contravention of forest practices plan is made an offence under section 21 and the other principal part of this Act that I just want to direct your Honour's attention to, which we have also noted on this chart, is the obligation of the

Forest Practices Authority to issue what is called a forest practices code, and your Honour will find that in section 30. And that again, if your Honour looks at section 31, it sets out what the forest practices code is to do:

5                   *Shall prescribe the manner in which forest practices shall be conducted so as to provide reasonable protection to the environment.*

So again, your Honour, a low threshold much lower than the EPBC Act and the obligations that that imposes, and that is why at the start of this opening I  
10 emphasised to your Honour that this is not about compliance with State legislation, this about compliance with the EPBC Act. Now, the forest practices code, your Honour, is in the evidence before your Honour and it does - although it doesn't descend to, as I understand it, your Honour, and I do stand to be corrected about some of these because I am still digesting a lot of the  
15 material filed on behalf of the respondent, but as I understand it the code does not descend to the level of individual prescriptions for threatened species.

But it does establish some concepts that are relevant to the protection of threatened species such as wildlife habitat strips and wildlife habitat clumps and  
20 your Honour is going to hear some evidence about that. So although it is a regulatory code it is one of a fairly general nature. Now, forest practices plans, as I have just explained to your Honour, are approved by the Forest Practices Authority but they are essentially prepared by those people who are going to be engaging in the operations.

25 So there is a three-stage process and it is one that is circular. So the person that wants to undertake the forestry operations, as your Honour can see, prepares the forest practices plans, they are approved by the Forest Practices Authority, but then the certification goes back to the person who is undertaking the  
30 operations. So it a self-regulatory system. The forest practices plans, your Honour, are prepared on a coupe-by-coupe basis and so what they say - what they authorise are forest operations in relation to a defined area and a defined purpose.

35 And your Honour is going to see in the evidence in this case in particular the forest practices plans for each of the two coupes in Wielangta and it is within those forest practices plans according to how we understand the evidence that the management prescriptions for threatened species are delivered. So that the control on the conduct of the people on the ground is through the prescriptions  
40 and the limits that are set out in those forest practices plans. And if your Honour turns to Court book, page 351, which is in volume - book 1, 350, sorry, your Honour.

45 Your Honour, can see the forest practices plans for coupe WT017E. And the prescriptions as such - your Honour will see if you turn over the pages a number of things that have to happen in relation to clearing, specifications about clearing, stream-side management, restoration, boundaries, snig tracks - it is where they pull the logs out, your Honour, snig tracks. I think I am going to

learn a lot in this case as well. Felling prescriptions. And then if your Honour turns to part D on page 356 there is a heading Conservation of Natural and Cultural Values.

5 And in this particular forest practices plan, over the page at page 357 your Honour will see some of the prescriptions that are inserted for two of the three species that we are dealing with. The eagle and the parrot. And then there is also some prescriptions about wildlife habitat clumps. Pardon me a minute,  
10 your Honour. All right. And if I can just go back and draw your Honour's attention because I was telling your Honour a little bit about how the process of planning and certification happens. If your Honour looks at the bottom of Court book 350, in the second last box, the one that says period which plan applies. Does your Honour see that box down the bottom?

15 HIS HONOUR: Yes.

MS MORTIMER: It says, "Plan prepared by," and there are a number of individuals named including Mr Haywood, who is one of the respondent's witnesses in this case. So he is amongst the people that prepares the plan, but  
20 you will see, your Honour, that he is also the person who certifies it. Then starting on page 363 of the Court book, your Honour, is the Forest Practices Plan for the other coupe, now that is the one that hasn't yet been logged. So WTO17E has been logged. WTO19D is the one that is subject to an undertaking by the respondent. Your Honour will see again that there is a part  
25 D with prescriptions and in this one we have got a prescription for the eagle - it is on page 369, your Honour - a prescription for the beetle and a prescription for the parrot, plus wildlife habitat strips and clumps.

Your Honour, there is going to be quite a bit of evidence in this case about the  
30 nature of those prescriptions whether they are adequate, whether they are complied with, whether they are even capable of being effective. All that sort of thing will be the subject of evidence. To turn now, your Honour, to the species that are under consideration in this case and the areas that we are talking about. The beetle, your Honour will find in volume 5 some photos, page 2597. Just in  
35 case tomorrow your Honour happens to be about to step on one, this is what it looks like.

HIS HONOUR: It might be grounds for disqualification.

40 MS MORTIMER: So 2597, that is a broad-toothed stag beetle. Then over the page, your Honour - just while we are on the photos and then I won't have to go back to them - is a photo of the eagle, page 2598 and a photo of the swift parrot at page 2599. Again, your Honour, in terms of the view tomorrow your Honour now knows what to look for. To open, your Honour, a little bit by way  
45 of what the evidence is about each of these species. The broad-toothed stag beetle, your Honour, and I am taking this from what is in Dr McQuillan's affidavit at Court book 111 - the broad-toothed stag beetle forms a group of beetles. There is a group called stag beetles, about 950 species of them.

Your Honour, they are very ancient. They are thought to have originated about 200 million years ago and were once much more widespread and diverse. Today, your Honour, on our evidence they are found mainly in old growth  
5 forests in the tropics and moister parts of the temperate zone. Many of the species within that group are rare, some are locally or globally extinct, especially in the northern hemisphere. So not only as a particular species is this beetle under threat, but it comprises a group of beetles that have had real survival difficulties.

10 Your Honour, they are particularly affected by habitat loss and that is because they breed in rotting wood on the forest floor, especially in or under large moist logs that have been partly degraded. Those kinds of conditions are generally associated with old growth forests or forests that are minimally disturbed. Dr  
15 McQuillan's evidence is that stag beetles can be one of the first groups of insects to abandon disturbed forests and they can therefore be an indicator of forest decline. Now, what is their importance in an ecological sense, apart from the ordinary principles of diversity?

20 They are important because they are the recyclers in the forest. They are the ones that chew up the dead wood and recycle it and their larvae hosts a whole lot of microbes that assist in digesting the woody cellulose priming old logs for a succession of other species which use them as food and living space. So they are the recyclers of the forest, your Honour. There is a bit more of a  
25 description, your Honour - pardon me a moment - just at the moment for your Honour's information in the material that accompanies Dr Meggs' affidavit, page 1259, there is another general description of the stag beetle with some diagrams. At the moment I will not take your Honour to that, I will just give your Honour that reference.

30 Now, the swift parrot, your Honour, is generally described by Mr Kennedy who is one of our witnesses and he picks up what the general description that is in the Recovery Plan that he was involved in drafting. Your Honour will find that at page 427 of the Court book. It, your Honour, is a fast, quite a small parrot,  
35 fast flying, feeds on nectar and occurs in the eucalypt forests of south-eastern Australia. Very bright in colour and makes a rather distinctive call while it is flying and your Honour will hear some evidence in this case that that is one of the principal ways which one can spot a swift parrot is by listening for its cry.

40 There is a general description set out there, your Honour, of the family that it comes from and although to those of us who aren't ornithological inclined it might look a bit like a lorikeet and sound a bit like a lorikeet, but it is not a lorikeet. The distribution, your Honour, is quite wide in terms of where it is found, but the significance for this case is that it breeds only in Tasmania. It  
45 may forage - it forages up into the flowering eucalypts in Victoria and New South Wales but it comes back to the East Coast of Tasmania principally to breed. Your Honour will see in the Recovery Plan there in the second paragraph under the heading Distribution the statement is:

*In Tasmania the breeding range of the swift parrot is largely restricted to the south-east coast within the range of blue gum where it occupies an area of less than 500 kilometres.*

5

So if your Honour thinks back to some of the criteria that I took your Honour to in the EPBC Act about listing, areas in which breeding range occurs is the kind of criteria that is looked at in listing. Here we are dealing with a species with a very small breeding range. The habitat, your Honour, that it needs is dealt with in the Recovery Plan, page 429.

10

HIS HONOUR: I take it that is square kilometres in footnote 2?

MS MORTIMER: Yes, square kilometres - yes, that is right, your Honour. Your Honour, habitat is dealt with at page 429 and there is a fairly comprehensive description there of the kinds of blue gums that these parrots like, that they feed on the nectar of the flowers that come off those eucalypts. What they are looking for is a food resource shrubby swamp gum forest and then they need to be able to find hollows because their nesting and breeding occurs in hollows in old growth trees. The Recovery Plan sets out what is known about their preferences, but it is going to be, your Honour, an important part of the evidence in this case about the nesting habits of these parrots, their requirements for hollows and where those hollows can be found.

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There is then some more descriptions, your Honour, that relate to their foraging habits which although important are not central features of this case because this case is about sustaining and recovering a population and that focuses on breeding. Now, the eagle, your Honour, if I can ask your Honour to turn to Mr Mooney's report and there is a description at page 35. There is a photo over the page of an eagle on a next at page 36, but there is a good description set out about the bird itself in paragraphs 5 to 9. It is Australia's largest bird of prey, your Honour, nearly one metre long and it builds very impressive and large nests.

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It has got a unique shape to its tail, hence the name wedge-tailed eagle which Mr Mooney points out appears to be a special adaptation for hunting and forests. It is known, your Honour, for its slow flight through the forests with unusually good braking and manoeuvrability. So when it is hunting in forests then a feature of its flight is that it is quite slow, so that it can obviously spot and pick-up the prey that it is looking for.

35

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Mr Mooney describes how although the birds are dimorphic in the sense that you can tell the males and females apart, it is the females that are the bigger and although he adverts to the fact that it can be difficult to tell them apart in the field if they are not seen in a pair. He gives some evidence about their colours and their maturity and your Honour will note that the level at which they reach maturity is five to seven years old. So this is a long-lived species, your Honour, that doesn't mature until reasonably late in its development.

45

Mr Mooney talks in paragraph 9, your Honour, about how isolated the species has been and about how it is really not able to pass over large bodies of water. So how well it has been contained to Tasmania. Your Honour will find over the  
5 page some descriptions by Mr Mooney about the role that the eagle plays as a top predator. The habits it has of scavenging and of therefore cleaning up and that is an important role that it has. That it is a biological indicator, one of the early warning system for problems in the environment and its special value to Tasmanian Aboriginals.

10 He then describes its food and hunting habits and goes on to consider its breeding, and that is the part that I want to direct your Honour's attention to a little bit. It talks about the kinds of trees that the eagle requires, sheltered areas of old growth eucalypts where disturbance is negligible and where the nest trees  
15 are usually the largest and most stable at a site with branches near the ground. So very particular kinds of requirements and he notes that breeding does not occur in isolated trees and rarely in forests less than 10 hectares.

Your Honour will see that it is that kind of information that to some extent has  
20 informed some of the prescriptions about the areas around that the - the distances around a nest that need to be protected from forestry operations. I am going to come back a little bit later, your Honour, in the opening to tell your Honour a little bit more about Mr Mooney's evidence and what we want to emphasise from it. That is just to give you a run-down about the bird itself.

25 I want to turn now to the areas that are under consideration and we will just look at some of the images that are up on the screen, if your Honour pleases. Just to put the small geography lesson I needed at least, your Honour, about where we are and if you go to the next slide your Honour will see a slide. Now,  
30 if I can just indicate to your Honour a couple of things. Firstly, as I indicated there is going to be a dispute in this case - well, not a dispute but a question in this case about what is the area we are talking about. And different documents and different pieces of evidence talk about Wielangta in different ways, but we are talking about and the case is about the State forest in Wielangta. That is  
35 what this case is about.

The second point I want to make before I go any further through this  
40 Powerpoint, your Honour, is that these are maps that have been constructed by one of our witnesses, based on information given to us from Forestry. As we understand the evidence at the moment there may be some issue taken about the accuracy of the maps and your Honour is going to see in the respondent's evidence a heap of mapping that has been produced that may have a different bases, that is databases, to this and therefore may map forests differently and forest types differently.

45 Now, it is unfortunate that that is the state of the evidence at the moment, your Honour, and no doubt it will have to be explored with the witnesses to some point, but in my submission, your Honour, it is going to be of assistance to your

Honour in this case if by the end of this case we can produce an agreed set of mapping for your Honour about where the State forest occurs, what kinds of forest occur in particular places, what kind of habitats occur. I point that out at the moment that there is a difference and it is said that some of our mapping is  
5 inaccurate and it is put that the respondent's mapping is more accurate, and that is not a matter in my submission that ought be left for your Honour to make findings of fact about. So certainly for our part we will seek to see at some stage before this case closes we can present your Honour with an agreed set of mapping.

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Now, before we go any further, your Honour, I want to say a little bit about forest types because it is an important issue in relation to each of these species in terms of understanding the habitat that each requires to live, feed and breed. Mapping becomes, your Honour, very important in this process because it is  
15 used in this area as a planning and predictive tool in relation to the protection of threatened species. The lack or the absence of research and study to a level that can find enough actual individuals, enough actual nests in high numbers and can reach conclusions about actual habitat, means that modelling and mapping has to be used to fill a gap by trying to predict by reference to forest type,  
20 vegetation type where you might find a species and where a species might breed.

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Some of the issues in this proceeding are going to revolve around the accuracy of that kind of modelling and mapping. And some of them are going to revolve around the utility of that as opposed to finding out where the actual individuals are and finding out where the actual individuals are nesting. The forests that you are going to be dealing with in this proceeding are eucalypt forests and as I said of two kinds: dry and wet. Dry forests really means forests in which it is a lower rainfall area, generally the trees don't reach the same height as in wet  
30 forests, the ground layer is more grassy and the forest has a more open understorey.

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These are very general divisions and part of the evidence that your Honour is going to hear is that they are not as easy to make in relation to particular coupes and areas as it might seem as I am uttering these words to your Honour. Wet forests, your Honour, can get very tall, trees up to more than 80 metres, you have a denser understorey and you have a ground layer with more broadleaf shrubs. The forests, your Honour, are classified for the purposes of  
40 management into different types and your Honour is going to see in the material a lot of references to old growth forest and your Honour has seen some in some of the public documents that I have taken your Honour to already.

45

The term "old growth forest", your Honour, is a relatively contentious term and in the materials before your Honour it is given a range of meanings. I will just give your Honour a list of some of the places that it can be found. It is in the National Forestry Policy Statement which is at Court book 2594. There is another definition in the RFA at page 148 which is really a cross-reference definition. But to boil it down, your Honour, one of the key issues that is used

in deciding what is and isn't old growth forest is the level of disturbance that has been experienced.

5 I do emphasise to your Honour it is a highly contentious characterisation. In this proceeding it does have some relevance because certainly for example in relation to the beetle, we say old growth forests are some of its most critical habitat and absence of disturbance is a very important issue for the beetle. But there is another concept that perhaps is going to feature more relevantly in this proceeding and that is the classification of mature eucalypt and a refinement of  
10 that of tall mature eucalypt and they are phrases derived from the respondent's classification system.

15 The evidence will show, your Honour, that trees that are very tall may not be the only ones that are very old so for a range of reasons, including things like the effect of wind, trees may lose their tops or their branches but it is their age in combination with the effects of the natural environment like wind and fire that, for example, determines whether hollows will form and whether those hollows will be suitable for nesting species such as the parrot.

20 Your Honour will hear in the evidence that it may be more difficult to predict breeding habitat for swift parrots than it may be for a species like the eagle where the evidence is fairly strong that it prefers trees of a certain height so that is considered a relatively easy kind of prediction of where you might find its nests. So, your Honour, what that map shows is the Wielangta State Forest so  
25 what you are seeing there in the little bit is where you will see Wielangta State Forest.

30 Next one. Tall mature forests - so that, your Honour, is a statewide map of where all the tall mature - so that is where you have a predominance of trees above about 27 metres I think all over the State. Next one. That is, your Honour, a map of the old growth forest statewide in Tasmania. A lot of that, your Honour, that you will see down on the west coast there is rainforest so this mapping makes no distinction between rainforest and eucalypt forest and so a lot of that old growth down there is not old growth that is particularly relevant  
35 to the issues in this proceeding.

40 Next one. That is an over-lay of old growth and mature forest within 10 kilometres of the coast. Now, why have we chosen within 10 kilometres? Because the evidence that your Honour is going to hear about the swift parrot is that that is about the extent of its breeding range from the coast so it doesn't go inland much further than that to breed. Next one. That, your Honour, is a map, on the information that we have, of the respondent's provisional coups.

45 Now, provisional coupling is another activity that is going to assume some importance in this proceeding in terms of it being part of the respondent's planning for its forestry operations and your Honour will see there is going to be a bit of a dispute in the evidence between us about how much reliance can be placed on planning and provisional coupling because a lot of the respondent's is

going to be saying, "Well, we can change our minds. We might not long those places that we provisionally couped," but that gives your Honour an indication, on the material supplied to us, what is presently intended to be logged in the State of Tasmania.

5

Next one. And that is the provisional coupling for the next 10 years and your Honour can see quite a bit of activity happening down in the Wielangta area. Next one. Now, this is tall mature forest so this again is habitat where we have got quite old tall trees all over the State. Next one. And then we put over that

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the provisional coupling. The idea of that, your Honour, is to demonstrate how much of that tall old forest is planned to be logged.

Next one. What that shows, your Honour, is the spread of eagle nests throughout the State and your Honour may have seen that there is a similar map in Mr Mooney's court report. Your Honour in that really an absence of the eagle in the rainforest area down the west coast of Tasmania but otherwise a fairly even spread of them and your Honour will see in the blue the provisional coupling that is proposed in relation to logging in those areas.

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Next one. Returning to the parrot for a moment so on that map your Honour will see three things: mature forest, old growth forest over-lapping, and the provisional coupling. Again some activity down in the Wielangta area and the parrot nests and it is a little hard to see but what your Honour can see in this map is the plain sticking of the parrot to the coastal areas. Next one. We move to some closer up maps of Wielangta so that is the State Forest area of Wielangta.

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Next one. And what this shows, your Honour, is that the land tender system as it exists in the area so the formal reserves are in green. Those are the ones, your Honour will recall from the definitions, that are secure and then the informal reserves. The proposed reserve is the one under the new Community Forest Agreement I think and for both formal and informal. That is the new agreement between the Commonwealth and the State and then the bits in grey are the State forest areas.

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That shows your Honour how much of the State forest area in Wielangta is mature forest so, in our submission, a lot of it capable of supporting the three species with which we are concerned. Next. And similarly old growth. So a lot of Wielangta covered by that kind of forest. Next one. That is an over-lay showing a little of both. Just again to indicate that there are differences in the classifications between mature and old growth. Next. And that shows you the planned coupes in Wielangta so a lot of logging planned in that area.

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Next one. Sorry, that was the provisional coupes and this is the 10 year so your Honour can see quite a difference between what the long term or longer term planning is and the shorter term planning. Next one. And what we have here, your Honour, is an attempt to sort of over-lay three things: those parts of the mature forest in the bluey colour that are not going to be affected by logging; in

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the pinky-grey, those parts of the mature forest that are going to be planned to be affected by logging and other kinds of forest that are going to be affected but for our purposes it is really the couped mature forest that is the important one in that.

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And this shows the same kind of picture but again trying to incorporate the old growth as well and again it is the couped old growth and mature that is the important areas for this proceeding. That shows your Honour where in and around Wielangta there have been located eagle nests and if I can just digress a little bit here, your Honour, there is fairly reliable indication in the evidence that the location of eagle nests, there has been a lot of effort put in to the location of eagle nests and that there have been a lot of successful locations of eagle nests and so the information that is presented both in evidence on our side and by Mr Mooney as the court expert in terms of the location of these nests is relatively comprehensive and, we would say, in stark contrast to the situation in relation to the parrot.

And this is a map that shows those nests that have been located in relation to the parrots and where they fall in terms of both forest type and planning for logging and again the important part is the couped mature and old growth forest but what I want to emphasise to your Honour about the difference between this map and the one that your Honour has just seen in relation to the eagle is that it will be our case that these nests that have been identified are just a drop in the ocean in terms of whether they are actually either active nests or, in reality, parrot nests and certainly they form a very small proportion of the hollows likely to be used by swift parrots.

Your Honour is going to hear a lot of evidence about how difficult it is to find swift parrot nests and to decide whether they are actively being used or not so that in contrast to the eagle where you have got a fairly comprehensive set of information we say that that is not the case for the parrot. Next one. This is the beetle and again, your Honour, in terms of locations we are looking at locations where they have been discovered and your Honour is going to hear, again some evidence about how tricky these little creatures are to find and therefore, again in contrast to the eagle, it is not, in our submission, going to be possible to say that these are the only locations or the majority of locations or anything like that but it gives your Honour an idea of the kinds of positions in which they occur and particularly the kind of habitat in which they occur.

And your Honour will see some found in forest types other than mature forest but the majority of them in mature forests. That, your Honour, is a map that just sets out again, in relation to Wielangta, the tenure and shows the large area of State forest. Is that it? Right. Vegetation communities. Now, that is an attempt again to explain how the - where some of the important habitat for these species are found. Where, for example, the eucalypt that the swift parrots rely on can be found, where the dry parts of the forest are and where the wetter parts of the forest are.

And that shows an over-lay, your Honour, of how much of that - those vegetation communities are going to be taken up by planned logging. That is it. That is the slide show, your Honour. I want to, before I move off those issues to do with forests, just direct your Honour's attention to some other

5 terminology that your Honour is likely to encounter in this case. Your Honour is going to hear some evidence about partial harvesting and clear felling and there is going to be a bit of a distinction in the evidence between the applicant and the respondent about what those terms mean.

10 Partial harvesting, your Honour, is sometimes also described as advanced growth retention or a similar technique is described as advanced growth retention where commercially valuable trees are removed but seedlings, up to a certain diameter trunk, are left and clear-felling, your Honour, is the technique

15 where just about everything that is commercially valuable and without distinction as to size is cut down and there is going to be some evidence in this case about what kinds of operations are being conducted in Wielangta and into which category they fall and how they ought properly be described.

Now, your Honour has heard I think me mention already in this case a couple of

20 other terms: wildlife habitat clumps and wildlife habitat strips and what those are, your Honour, the evidence will show is that they are part of the protection mechanisms that are employed for threatened species and they are areas of land within each coupe that are not supposed to be logged or interfered with but again your Honour is going to hear quite a bit of evidence about their efficacy

25 and their scientific bases.

Now, your Honour, I will turn to an outline of what our evidence will address. The applicant's evidence, your Honour, addresses the endangered species of each - the endangered status of each of the three species, is not in dispute; the

30 importance of Wielangta as a forest and its importance to these three species in particular; the wide-range in planning or harvesting of timber in Wielangta, and what we will be submitting to your Honour are the destructive effects of timber harvesting.

35 Now, the word "disturbance" is one your Honour is going to hear a lot about and the respondent is going to seek to persuade your Honour that the destruction that occurs is temporary and of little, or no significance to the threatened species and we are going to be saying just the opposite. We are going to be saying that the concept of disturbance when you are talking about

40 certain species, has a particular meaning and it is something that Mr Mooney in his Court report goes into in some detail.

And disturbance isn't just about whether you cut the trees down, it is about how the change in the environment and the operations undertaken to change that

45 environment disturb the otherwise settled breeding habits of these species. So it is a much more intangible concept than something that relates just to the cutting-down of trees. Your Honour is going to hear evidence from the applicant about Wielangta's role as both actual and potential habitat for the

three species and those two kinds of concepts need to be distinguished, for the reasons that I have already outlined to your Honour that such is the state of knowledge and research about each of these three species that there is more that we don't know than we do know, and in those circumstances, particularly when  
5 one is dealing with questions around breeding practices, there is a little bit of speculation that has to be required and the way that that is done is through modelling and mapping to engage in some kind of predictive exercise.

But it is into this kind of debate, your Honour, that the question about the precautionary principle is likely to enter and there is going to be, I would understand between us, a real difference about what the absence of research ought to mean for the protection of threatened species in an area like Wielangta.  
10 Your Honour is also going to hear a lot of evidence about the management prescriptions that are in place for each of these forestry operations, their adequacy and their capacity to protect these species and whether, in fact, the  
15 prescriptions are being complied with in logging operations.

Now, if I can turn to what each of our witnesses is going to deal with, Mr Dell, for the applicant, is the person who has constructed the mapping that your  
20 Honour has just seen, and the mapping which is - forms part of his affidavit and I think your Honour, we have applied all that in CD form. As I have said to your Honour, the source data which Mr Dell has relied on is that that has been supplied to us by the respondent, so if there is some criticism about whether it is up to date, or accurate, then we would expect that we ought to be able to  
25 resolve that with the respondent.

Your Honour will also see that there is mapping which has been undertaken by some of the experts in this proceeding in relation to the species with which they are going to deal. So that is Mr Dell. But we move to Dr Dickman. Now,  
30 your Honour, he will be our first witness on Wednesday. Dr Dickman, is a Professor of Ecology at Sydney University and he is a Director of the Wildlife Institute for the University of Sydney.

He has got particular expertise and interests in species' decline and extinction and he has also got particular experience and expertise in relation to attempts  
35 within Australia to protect and recover threatened species populations. So he has been involved in a lot of the public and Government efforts in relation to threatened species protection. His evidence to your Honour will be that habitat loss is a critical threat to species abundance, survival and recovery.  
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He will tell your Honour about the characteristics that make a species vulnerable to decline and extinction and his opinion, your Honour, is that further decline of a threatened species is inevitable if threatening activities don't cease. So his view about the critical nature of habitat loss when you are talking about a  
45 threatened species, is one that looks at hands-off approach to that critical habitat. He agrees with Dr McQuillan's opinion that logging in Wielangta which constitutes actual, or potential habitat for the beetle would stop, and his opinion in relation to the modelling, the predictive modelling that has been done by Dr

Bekessy, another witness for the applicant, in relation to extinction risks to the eagle, his opinion is that that modelling is sound and reasonable.

5 He will tell your Honour what his opinion is about the usefulness of wildlife habitat clumps and wildlife habitat strips as management prescription and his opinion, and that particularly in relation to the beetle and the parrot, and his opinion is, your Honour, that those prescriptions are not adequate and that wildlife habitat clumps and wildlife habitat strips are not management mechanisms that are capable of protecting those two species and assisting in recovery.  
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Forestry operations in Wielangta generally in terms of a bit of an overview of that area we have some evidence from Ms Underwood about that and she provided a history and overview of Wielangta. Again, your Honour, either based on supply of information from the respondent or that which is publicly available. So there is, your Honour, a disparity in this case in terms of access to sourced information and where it is, for example, a criticism, your Honour, of our witnesses that they used information that they oughtn't to have used we say it ill-behoves the respondent to attack witnesses in that way when it holds all the information, and if it doesn't give us the right information then it is a little difficult for us to do the right thing with it.  
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Now, an example, your Honour, of the after-effects of logging and what, in practice, on the ground wildlife habitat clumps mean, is given by Mr Dudley for the applicant. He provides mostly by way of photographic evidence, your Honour, what we will be submitting is some quite graphic evidence about the after-effects of logging and the obvious inadequacy of wildlife habitat clumps, or the retaining of a couple of trees in a coupe.  
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Now, your Honour, we have two witnesses who are giving evidence about the beetle, that is Dr McQuillan and Dr Michaels. Your Honour, there is a clear difference of expert opinion between the applicant and the respondent over threats to the beetle from logging. Doctors McQuillan and Michaels will describe to your Honour, based on their "in-the-field" experience with this species, why they believe logging in Wielangta will have a significant impact on the survival and recovery of the beetle and their opinion is based principally on habitat disturbance caused by logging and the short and long-term effects of this.  
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And if your Honour recalls the description I gave to your Honour about where this beetle lives and breathes, and then pauses even for a moment to think about what happens when you log a coupe and you have got lots of heavy machinery driving around it, cutting down very large trees, in our submission, it is pretty plain that if you are a beetle trying to live in that coupe you are going to have a pretty difficult time and at that very pragmatic level, your Honour, in our submission, the case about the impact of logging on the beetle is very clear.  
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This is not a mobile species. They can't fly. We are not dealing with something that is able to flee and find a habitat somewhere else. Now, this is a species, your Honour, on which there has been some research done but a great deal still remains unknown about it, including the areas in which it might be found, and that is a good example in relation to this proceeding because part of Dr  
5 McQuillan's evidence is that he found the specimen in an area that, on looking at the predictive modelling, or the speculation that one needs to engage in, you might not have expected to find the beetle.

10 Now, the respondent that characterised that individual is a vagrant but there is going to be a real dispute between us whether that is an accurate characterisation, or perhaps whether there is something wrong with the classifications of the forests themselves over wet and dry, and whether the distinction between those two forest types is really quite as clear as one might  
15 think. I note the time, your Honour, is that - - -

HIS HONOUR: We might go on another five minutes, if that is convenient?

MS MORTIMER: Your Honour pleases. Your Honour, we have three  
20 witnesses who will be dealing with the parrot. They are Dr Kennedy, Mr Brown and Mr James. Now, their evidence will tell your Honour, as I have already outlined a little, that these parrots breed only in Tasmania although their range for foraging at other times of the year is wider. For a bird their breeding numbers are quite low, about a thousand breeding pairs. Little research has  
25 been done about the species, your Honour, and what has been done is rather patchy.

There have been some surveys, on the ground surveys, and there has been attempts made to see where they might be nesting, or foraging but it is rather  
30 patchy. They are not an easy bird to study and much remains to be learned about their nesting and foraging habitats. But one thing that is plain, your Honour, on the evidence we will be submitting is that these birds need tree hollows of a certain size to breed in. Now, those hollows are only found in trees over about 120 years old. So, again, your Honour, reducing that back to  
35 fairly pragmatic levels it doesn't take much to figure out what happens if you cut down a lot of big old trees, you are cutting down a lot of trees with hollows in them.

And how long is it going to take before that area - if it is allowed to and it is not  
40 logged again - is capable of regenerating to support trees of the age necessary to create the hollows? You are looking at over 100 years. All three of our experts will give evidence to your Honour that maintenance and improvement of breeding habit is the key to the survival and recovery for this species. Now, one of the particular problems about maintaining the survival and assisting the  
45 recovery of this species is that their nesting and foraging habit - nesting and foraging practices are unpredictable.

They need to nest within certain distances from where the blue gums are flowering. And the blue gums are not going to be flowering in the same area all the time. And your Honour is going to hear some evidence from Dr Kennedy about that, about how blue gums don't flower regularly every year and therefore  
5 this is an opportunistic parrot. This is a parrot that needs to look for areas where there are lots of blue gums and they are flowering that year, and then it needs to find nests that are close enough for it to take advantage of the feeding that is there.

10 And therefore, your Honour, what is important is again that wherever that is occurring - and we are talking about a parrot that needs to range widely, to be able to feed on a lot of eucalypts to be able to sustain itself - are there going to be hollows close enough - wide-ranging hollows to support that group - that population group that is moving around feeding, are there going to be hollows  
15 close enough to its feeding grounds to be able to ensure successful breeding.

Without labouring the hollow issue too much, your Honour, but it is going to be very important for this species and as your Honour has seen with Mr Mooney's evidence the things that know best what they need to breed are the birds  
20 themselves. And the parrot, just like the eagle, will look for a hollow that is suitable, and it is not always the case - this will be the evidence, your Honour, that someone - a person standing on the ground, looking up, seeing a hollow in a tree, is able to say that that is going to be a hollow in which a swift parrot is going to choose to nest and successfully breed.

25 It is an entirely different exercise for a person to stand on the ground and do that than it is for a bird. So when you are dealing with a ranging, opportunistic bird then there has to be a range of nesting sites available for it. Your Honour, finally on the parrot, all three of our experts will give evidence about the likely  
30 ineffectiveness of wildlife habitat clumps or tree retention for swift parrot breeding. Now, it may be the case, your Honour, that if you retain a couple of big eucalypts, of the right species, eventually they are going to flower and they might produce some suitable food for a parrot. But that is not the key to survival and recovery of a species. Survival and recovery of the species is about  
35 breeding. It is about finding places to breed. I am about to move to the eagle, your Honour, would that be a convenient time?

HIS HONOUR: We will move to the eagle at 2.15.

40 MS MORTIMER: If your Honour pleases.

**ADJOURNED**

**[12.55pm]**

45

**RESUMED**

**[2.14pm]**

MS MORTIMER: If your Honour please. Now, before the luncheon adjournment, your Honour, I almost completed what I wanted to say about the parrot. There is just one more matter that I want to emphasise in opening which is merely a culmination of all the bits and pieces I opened about the parrot and it is this, that Wielangta, the evidence will show in our submission, that Wielangta is the largest, continuous range of undisturbed breeding habitat for this parrot in Australia, so we would submit on the evidence, of pre-eminent importance to the recovery of that species, for that reason.

Now, your Honour, the eagle. There are three witnesses, we have two witnesses for the applicant giving evidence about the eagle. That is Dr Bekessy and Dr Wintle and Mr Mooney, who is a Court-appointed expert. Now, your Honour, Mr Mooney, is perhaps the foremost expert about the eagles and that is apparent in his report. A theme that comes through strongly on it from his report is that - - -

HIS HONOUR: Just before we go to that, is there any arrangement with Mr Mooney to have him available at a particular time?

MS MORTIMER: Your Honour, there is, and at the moment in the schedule we have proposed that he be called towards the end of the applicant's case after Dr Bekessy - no, sorry, before Dr Bekessy and Dr Wintle.

HIS HONOUR: And is that a day on which he is available?

MS MORTIMER: I believe so, your Honour, but I know that - I think my instructor has been in contact with him about availability and I doubt that we would have put him in there if he wasn't available but, of course, we will be checking.

HIS HONOUR: Now, it appears that there are more witnesses for the respondent than there are for the applicant; is that the case?

MS MORTIMER: That is the case, your Honour.

HIS HONOUR: If the applicant's evidence is going to take, with the opening and the view combined and Mr Mooney's evidence, is going to take almost two sitting weeks out of the three weeks allocated is it safe to say the matter will conclude in the third week?

MS MORTIMER: No, your Honour, it is not so.

MR D. GUNSON: Could I assist your Honour, perhaps?

HIS HONOUR: Yes.

MR D. GUNSON: There is one witness who is listed in the witness schedule on the 13th, Mr Jeff Meggs and he is also listed for the morning of the 14th, he

is a witness for the respondent but because he lives in Canada it has been agreed that he will be interposed. Now, from a timing point of view it is essential that we have him on the 13th and the 14th because of his need to return to Canada on the 16th.

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HIS HONOUR: Yes, I understand. But still that lessens my point only slightly.

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MR D. GUNSON: Indeed, your Honour.

HIS HONOUR: Yes.

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MR D. GUNSON: I think the reality, your Honour, is that we are not going to finish in those three weeks and extra time is going to have to be allocated. There are 18 witnesses for the respondent - Jeff Meggs will be 17, and just being realistic about the length of time of cross-examination I think it is probably going to take the better part of two weeks.

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HIS HONOUR: An additional two weeks?

MR D. GUNSON: An additional two weeks.

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HIS HONOUR: Well, the sooner we allocate that time, the better, before everybody's calendar is filled up and on my part it might require some re-jigging of intended leave and other issues, but - - -

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MS MORTIMER: Your Honour, I have tentatively proposed with my learned friend that I would probably only be about half an hour and that we then have a short adjournment because there are a couple of matters, the view and a few other things that we need to discuss and raise with your Honour.

HIS HONOUR: Yes.

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MS MORTIMER: And perhaps we could then add to the list, proposed dates and try and deal with that this afternoon?

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HIS HONOUR: Well, if you go on for half an hour then I can have a look at my diary and see how I am placed and if counsel could do the same thing at that break that would assist?

MS MORTIMER: Of course, your Honour.

45

HIS HONOUR: I should say the longer it goes then the longer I need to write the judgment, which I stupidly promised I would do in three months.

MS MORTIMER: Well, your Honour, I am sure both sides and all parties will treat that as an incentive to keep it short.

HIS HONOUR: Yes, I think I made a comment when I was being subject to positions where the respondent would agree not to log by a certain date and then by a certain date felt it is only about pressure in a way about being subject to a timetable and made the comment that I had only exceeded the practice goal  
5 in the Federal Court, that is of a first instance matter of giving a judgment within three months on one occasion in my first very complex commercial trial, and the fourth month included January, so I think my comments were trusting that I - - -

10 MS MORTIMER: We still trust you, your Honour. We still trust you and your Honour will get plenty of assistance. If your Honour pleases. Your Honour, the eagle, and what Mr Mooney has to say about that. Your Honour, a theme that comes through very strongly in Mr Mooney's report is that this is a bird whose breeding success is highly affected by disturbance even indirectly.  
15 Indeed, in our submission, his evidence demonstrates that disturbance of any kind is detrimental to breeding success in this bird and, overwhelmingly, his report demonstrates that this bird breeds best in undisturbed areas and so when you examine the data that underlies this report what you see is that the best breeding success percentages, which are not that high and not that much above  
20 50 per cent in any event, but the best ones are achieved in areas that are wholly undisturbed.

The eagle has been well studied, and Mr Mooney is one of the principal people who is engaged in this and quite a lot of information is available, your Honour.  
25 In that sense the eagle is a little different from the other two species with which your Honour is concerned. Mr Mooney is pessimistic in his report about the capacity of management's perception to protect the species. Indeed, his evidence is that we are not capable of doing so.

30 Your Honour, the opinion he expresses in his report is that forestry operations in the two coupes will not have a significant impact on the survival and recovery of the eagle because there are only a couple of nest sites near the coupe, and he expresses a similar opinion about forestry operations in the whole of Wielangta.  
35 And your Honour will see from both the maps that we showed your Honour this morning, and the maps that are attached to Mr Mooney's report, that the eagle has a wide distribution throughout Tasmania apart from the rain forest area in terms of both its territories and its nests.

40 Although, when one looks at the numbers, the number of breeding pairs is small, your Honour, it is about 450, so we are talking, in terms of number of breeding pairs we are talking very small numbers. And the reasoning behind Mr Mooney's conclusions about impact will be some of the principal matters that we will be asking him some questions about and how he came to those conclusions. At the moment, your Honour, as we understand it, the position in  
45 relation to Mr Mooney and his report is that we, that is the applicant, wants to ask him some questions but we don't understand that the respondent does. That is the present position.

Your Honour, the second aspect of the applicant's evidence about the eagle is evidence resulting from what is known as Population Viability Analysis. That is research, your Honour, that involves computer modelling by putting in information about a species, its habitat, and then all the threats to the species  
5 itself and the threats to its habitat. And what can be produced, your Honour, is a comparison of effects on a species from a number of selected management regimes which are also fed into the model.

So it is one of those predictive tools that I talked to your Honour about before  
10 and, your Honour, it is one that Forestry Tasmania obviously thought was a useful tool because it was Forestry Tasmania who commissioned the University of Melbourne in 2002 to undertake such an analysis for 10 threatened species and flora in the Bass district in Tasmania. So what was commissioned in 2002 and what was the genesis for some of the evidence that Dr Bekessy is going to  
15 give, it does not relate directly to Wielangta, it has its origin in a different district in Tasmania. Dr Bekessy was the lead author on the chapter of that report that dealt with the eagle.

Now, in relation to the Bass district what that model showed, your Honour, was  
20 that the eagle had a high extinction risk. About 62 per cent when human-caused mortality is taken into account, road kills, electrocution, shooting, the kind of things Mr Mooney talks about in his report, but in the model, when one factored in the impact of forestry operations, the 2002 university studied showed that the risk was increased to between 91 and 97 per cent. 91 to 97 per  
25 cent extinction risk.

And advice was given to Forestry Tasmania in the 2002 report that the provisions of the Forest Practices Code supposed to protect the eagle should be  
30 reconsidered. Dr Bekessy has since that time, your Honour, revised and updated the population viability analysis as part of her own research, in preparation for submitting her work for publication, and in her evidence she describes some of the refinements she has made to the modelling, and the recalculation of the extinction risks that she has undertaken in relation to the eagle. Nevertheless, your Honour, her revised modelling, when timber  
35 harvesting is factored in, still comes back with a 98 to 100 per cent extinction risk for the eagle.

Dr Bekessy will also give evidence that she has considered whether there is any  
40 reason that her findings about Bass, and the modelling she has done about that could not be extrapolated across to the Derwent district, Derwent being the district in which Wielangta is found, and she concludes, your Honour, that though there may be some differences, including that a smaller proportion of Derwent is planned to be harvested, what she concludes, your Honour, is that the risk of extinction is likely to be of a similar magnitude in the Derwent  
45 district, as was predicted for the Bass district.

So in terms of the fundamentals that underlie her analysis, she sees some differences, and she recognises their material, but she still puts the risk of

extinction at a similar magnitude, in terms of modelling. Now, your Honour,  
the last of the applicant's witnesses is a reply witness, Dr Keith Houghton, and  
that is the affidavit that was filed and served this morning. One aspect, your  
Honour, of the respondent's evidence, upon which considerable reliance is  
5 placed - - -

HIS HONOUR: I don't know that that has reached the Court file as yet.

MS MORTIMER: Oh, hasn't it? I will apologise, your Honour. I think it was  
10 - it has been filed, but if your Honour has the file that is probably the  
explanation why it hasn't made its way up there. Your Honour, I am informed  
by my instructor that the affidavit is unsigned. Dr Houghton resides in the ACT  
in Canberra.

15 HIS HONOUR: It might be a good idea at some stage, if there are a range of  
matters that aren't in the Court book, for there to be a supplementary Court  
book, accommodating those matters, or including rather those matters that were  
filed subsequent to the preparation of the Court book.

20 MS MORTIMER: Of course, your Honour. If it is convenient I will just  
explain to you - - -

HIS HONOUR: Yes. Certainly.

25 MS MORTIMER: - - - what Dr Houghton's evidence is about. Your Honour,  
he is an audit specialist, and one aspect of the respondent's evidence, which  
occupies quite a bit of its evidence, is the argument that Forestry Tasmania have  
best practice systems in place for the - - -

30 HIS HONOUR: Apparently my associate had it, but it wasn't in the judges  
copy.

MS MORTIMER: Your Honour, as we understand it the evidence runs that  
Forestry Tasmania have best practice systems in place to identify actual and  
35 potential habitat for threatened species, and processes in place, auditing  
processes, to ensure that the prescriptions that are in place are complied with,  
and that they are effective at doing what they are supposed to do. And Dr  
Houghton's evidence goes to whether those auditing processes are as effective  
as the respondent's evidence suggests. And we accept, your Honour, that it is  
40 later serviced than desirable in that, and we will accommodate our learned  
friends in relation to the time they need to prepare for cross-examination.

Now, your Honour, just to conclude if I can go back to the three key issues, or  
differences that I outlined at the start of the opening. The first one was what is  
45 required as a matter of law to sustain the exemption for forestry operations  
under the EPBC Act, and our case about that, in a nutshell, is what is required  
is adherence to what we submit is the correct construction of clause 68 of the  
RFA, actual protection of threatened species, which includes protection that

enables populations to recover. That is what is required for these kinds of operations to be exempted under the EPBC Act.

5 The second key issue, what are the true facts about the level of threat posed to each of the beetle, the parrot and the eagle by logging in the State forests in Wielangta. The applicant's case will be that the level of threat is high, and that it reaches significant impact threshold in the EPBC Act. The third issue, whatever the level of threats, what are the true facts about how effectively the respondent contains, addresses or ameliorates those threats in conducting its forestry operations. Your Honour, we say in essence three things. The applicant's case is the respondent's management regime is not designed to ameliorate those threats to enable survival and recovery of those species.

15 Its management is not capable of doing so, and, finally, and perhaps most importantly there is absolutely no evidence that the respondent's management system in fact delivers protection by way of results to any of these species. Your Honour, that concludes the matters I want to raise by way of opening, and that only took me 15 minutes, and not half an hour. If it is convenient - oh, one more matter I ought to raise, your Honour, and that is the status of the evidence in terms of objections. As we understand it, there has been, in accordance with your Honour's directions, objections filed on behalf of the respondent to one affidavit sought to be read by the applicant, and that is the affidavit of Mr Dudley. I think that is all. And for our part we haven't lodged any objections, and I want to explain to your Honour why that is.

25 HIS HONOUR: Just before you do that, my associate had a look before. He wasn't confident that the objection, while it might have been served, had in fact reached the Court file, so you might inquire immediately at the break with whoever has made the objection to Mr Dudley's material. If there could be a copy of it, at least an extra copy given.

MS MORTIMER: Given to your Honour's associate.

35 HIS HONOUR: Did you respond?

MS MORTIMER: We received - it was served, your Honour.

40 HIS HONOUR: Did you respond to that within seven days of the hearing, because my standard order is objections within 14 days and a response within seven.

MS MORTIMER: I don't think so, your Honour, and I am not quite sure when it was served, whether it was served - - -

45 HIS HONOUR: Well, can you have a think about that - - -

MS MORTIMER: Yes, we will have a think about that.

HIS HONOUR: - - - after Court this afternoon, and - - -

MS MORTIMER: We will have a think about that.

5 HIS HONOUR: So that we know what the ambit of the dispute is, if any, and if it is possible to resolve the objection - - -

MS MORTIMER: I understand it is a dispute on relevance, your Honour.

10 HIS HONOUR: Oh, I see.

MS MORTIMER: I understand that is the objection, and we are prepared to meet that - - -

15 HIS HONOUR: As to all the - - -

MS MORTIMER: - - - if that is maintained.

20 HIS HONOUR: As to all of it, or parts?

MS MORTIMER: As to all of it, I understand it.

25 HIS HONOUR: I see. As the basis put forward in the notice, or is it a just bare notice of objection, because the - - -

MS MORTIMER: I think it says relevance, your Honour, but I don't know that it says much more.

30 HIS HONOUR: All right.

MS MORTIMER: But we will attend to that in the break.

35 HIS HONOUR: I don't generally find bare statements particularly useful. The import of a direction like that is that there be some identification of the issue.

40 MS MORTIMER: Your Honour, can I just before we break explain to your Honour the reason behind the way we have approached the evidence, and it is simply this, we are just being pragmatic about it, your Honour. We will have a lot to say at the end of this case about weight, and about relevance, but we will put that in our submissions in terms of the way your Honour ought deal with the evidence, rather than taking up time in what is already going to be a lengthy trial about admissibility.

45 HIS HONOUR: Yes.

MS MORTIMER: So that is the explanation, your Honour, and if this is a convenient time, perhaps we could break until quarter to, or 10 to 3, to try and sort out a few matters.

HIS HONOUR: If that is convenient. Is it likely that you will need longer, or is that - - -

5 MS MORTIMER: I don't think so, your Honour. There are only a few matters to - - -

HIS HONOUR: All right. We will adjourn until 10 to 3.

10

**ADJOURNED**

**[2.35pm]**

15

**RESUMED**

**[2.50pm]**

20 HIS HONOUR: I do not mean to be critical of the author of this document who is Mr McDonald but it is probably just a question of getting used to the judge's idiosyncratic demands of counsel. What I mean when I say that people should put objections to affidavit evidence is not just say "Affidavit, relevance" or even "Paragraph 1, hearsay", "Paragraph 2, opinion". The whole idea is to put out there in the open at least seven days before hearing the dispute.

25 The basis for the objection of the relevance should be stated rather than just a single word uttered and I do not mean to be critical because I think counsel have difficulty getting used to different idiosyncratic demands of different judges so I just put that on the record for the future and any one who is unfortunate enough to have further dealings with me.

30 MS MORTIMER: If your Honour pleases. Your Honour, my learned friend, Mr Gunson, and I have agreed, if it is convenient to your Honour, that that objection will be dealt with where Mr Dudley appears in the schedule of witnesses.

35 HIS HONOUR: Yes. What would happen and what I usually do again is to have - before the witness goes into the witness box to resolve any issue about relevance.

40 MS MORTIMER: And, your Honour, while we are on issues about objections, in the break I have just been informed by my learned friend, Mr Gunson, that the respondent now takes what I consider to be a further objection and I understand Mr Gunson has a different characterisation of it but I understand the respondent proposes to rely on the terms of order 34, rule 6, about the appointment of a court expert and the restrictions that the rule puts on  
45 the adducing of further evidence on the same question.

HIS HONOUR: Whose evidence would that effect?

MS MORTIMER: I have just been informed by the respondent that it considers that it affects the applicant's ability to adduce evidence from both Dr Bekessy and Dr Wintle.

5 HIS HONOUR: At all?

MS MORTIMER: At all and that is why, in my submission, it ought to have been - - -

10 MR GUNSON: One only.

MS MORTIMER: One of them. So the respondent's position is we can have one but we can't have both without your Honour's leave in any event. And apparently they say the same thing about Professor Dickman.

15

MR GUNSON: No, I need to clarify that. It is not Wintle. It is only Dickman and Bekessy because Wintle touches on evidence by Bekessy, your Honour.

20 MS MORTIMER: So it is an objection that relates then to Professor Dickman and Dr Bekessy and the respondent's position is that the way the rule operates is that we can have one as a right but two only by leave

25 HIS HONOUR: Notwithstanding that I made an order for the applicant's witnesses to be by affidavit long before I made an order for the court expert.

MS MORTIMER: Absolutely, your Honour, and we say that this point has no substance but I have agreed with my learned friend that if he wants to press it we will press it first thing Wednesday morning before we start with the witnesses.

30

HIS HONOUR: Well, in addition to what appears on the plain face of that rule, the parties should also bear in mind the provisions of order 1 - - -

35 MS MORTIMER: Now, your Honour, the next matter I can inform your Honour about in terms of developments is the status of the - or the affidavit sought to be read on behalf of the Commonwealth. I understand now that that particular problem will be addressed by my learned friend, Mr Gunson, on behalf of the respondent seeking to read the affidavit and subject to any timing concerns in terms of any responses we might want to make because that then  
40 may trigger a need for us to reply to anything but I doubt it given the substance of that affidavit but that is the way that that problem is now sought to be addressed.

45 And that brings me, your Honour, to the absence of any outline of submissions on behalf of the State of Tasmania not in accordance with your Honour's submissions and, in my submission, we are entitled to know when we might expect to be served with the State of Tasmania's submissions.

HIS HONOUR: Do you want to assist me on that, Mr Dixon?

MR DIXON: I can't give any specific time as to when they may be filed or served but I can - - -

5

HIS HONOUR: When was it ordered that it happen?

MR DIXON: I am not sure when it was ordered that it happen either. I have been instructed by Mr Turner today to appear. Without actually speaking to Mr Turner about that I cannot enlighten you any further on that other than to say that he has viewed the submissions of the other parties and was intending to not add to those in any - - -

10

HIS HONOUR: So you thought at the moment that you would just be adopting the submissions of Forestry Tasmania.

15

MR DIXON: And the Commonwealth.

HIS HONOUR: And also adopting the outline?

20

MR DIXON: I would imagine so but unfortunately without speaking - - -

HIS HONOUR: Could you confirm that in the morning?

MR DIXON: I can confirm that. And while I am on my feet I just wish to seek relief for the State of Tasmania in respect for tomorrow's viewing for myself and Mr Turner.

25

HIS HONOUR: I hope it wasn't the Collingwood jacket that put you off.

30

MR DIXON: No, not at all. I have been to the Wielangta Forest and it is quite nice but unfortunately I won't be able to make it tomorrow.

HIS HONOUR: I understand the Commonwealth is in an identical position?

35

MR O'BRYAN: I am sorry, your Honour.

HIS HONOUR: I understand the Commonwealth wants to be relieved as well from going.

40

MR O'BRYAN: No, we want to be there.

HIS HONOUR: Oh you want to be there?

MR O'BRYAN: Is that what your Honour means.

45

HIS HONOUR: I have been misinformed.

MR O'BRYAN: No, we intend to be there, your Honour.

HIS HONOUR: I probably misunderstood what I was told.

5 MR O'BRYAN: Your Honour, could I just raise a question about Ms Dixon's affidavit, the affidavit which was filed on behalf of the Commonwealth.

HIS HONOUR: Yes.

10 MR O'BRYAN: It would be our preference, your Honour, to ourselves tender that affidavit and to call Ms Dixon if she is to be the subject of cross-examination by any of the parties. It was really only to avoid what we felt would be a rather sterile debate about the application of sub rule 17 of order 6  
15 Dixon.

HIS HONOUR: Certainly.

20 MR O'BRYAN: Our preference would be in fact to call her as our witness. Out difficulty would be of course if we allowed Forestry Tasmania's evidence to close without having that position resolved, we might be left high and dry, as it were, in the wet or dry sclerophyll.

25 HIS HONOUR: Yes, I understand. I should have said also, Mr Dixon - sorry, have you completed what you wanted to say, Mr O'Bryan?

MR O'BRYAN: Yes, sir. We don't need to resolve that now, your Honour, but at some point.

30 HIS HONOUR: I had momentarily forgotten that everybody is going to be occupied and you will not be with us tomorrow but if you are able to confirm that after court with Mr Brown today, instructing Ms Mortimer and Mr Tree, that would be appropriate but certainly no later than Wednesday morning.

35 MR O'BRYAN: Certainly, your Honour.

HIS HONOUR: Does that satisfy your concerns, Ms Mortimer?

40 MS MORTIMER: It might be the best we are going to get, your Honour, so - - -

HIS HONOUR: Generally court orders should be complied with. Some of my colleagues would be a lot more upset right now than I am.

45 MR O'BRYAN: Yes, certainly.

MS MORTIMER: Your Honour, that leaves I think two matters which are the arrangements for the view tomorrow and dates for next year and if I could turn first to arrangements for the view - - -

5 HIS HONOUR: Yes.

MS MORTIMER: - - - we have had, I am pleased to say your Honour, in a very co-operative manner a proposed schedule of what is going to happen. If I can hand a copy up to your Honour and pass one around the bar table and that explains to your Honour where we are going and what we are going to be seeing.

HIS HONOUR: How long will it take to drive to Orford from here?

15 MS MORTIMER: About an hour I am told, your Honour.

HIS HONOUR: It is an hour and a half for me.

MS MORTIMER: I had hoped your Honour might have a local driver that would find his or her way a bit easier, and your Honour will see we are lunching up in the coupe and then proceeding onto see a whole lot of other things and concluding at about 5 o'clock and draw your Honour's attention to a number of safety issues that are set out at the back of this document. And we also have, as I understand it - just pardon me a moment, your Honour. We have also - and this bodes well - an agreed map. I will hand a copy up to your Honour - two copies and hopefully that will assist your Honour in following where we are and what we are looking at.

20 HIS HONOUR: Orford is well sign-posted isn't it? It is between here and Freycinet.

MS MORTIMER: Your Honour, I am going to sit down and someone else at the bar table can answer this.

35 HIS HONOUR: If I remember when you drive from certainly Coles Bay to Hobart you go through Orford. Is that correct?

MR TREE: That is so, your Honour.

40 HIS HONOUR: So the signs you follow out from Hobart would firstly be to Sorell then - - -

MR TREE: You go left and you head on the road towards Orford and your Honour will in due course arrive in Orford.

45 HIS HONOUR: Go left from where?

MR TREE: The sign where it says Orford, your Honour.

HIS HONOUR: If I go left when I drive out of the car park here I am going to head into one-way traffic going the other way but if you are heading out to the airport for example - - -

5

MR TREE: Keep going and you will cross two causeways at the end of which you will be in Sorell. You will then in Sorell come to what is effectively a T-junction but from the air would probably look like a bit of an odd intersection - you turn left there.

10

HIS HONOUR: Turn left?

MR TREE: Yes.

15 HIS HONOUR: Right would be to Port Arthur?

MR TREE: That is right.

HIS HONOUR: Thank you.

20

MS MORTIMER: Yes. I think that is all that we need to tell your Honour about the view but if your Honour has any - - -

HIS HONOUR: So I should take these with us tomorrow.

25

MS MORTIMER: Please, your Honour, yes. I don't think they will help you find your way to Orford but once you are there, your Honour, they will be of great assistance.

30 HIS HONOUR: I think I am already mentally in Orford.

MS MORTIMER: Your Honour, the last matter this afternoon is dates in relation to finding another week and I think it is fair to say, your Honour, it is a joint proposal from - - -

35

HIS HONOUR: Was it another week or two?

MS MORTIMER: Well, perhaps - yes, my learned friend Mr Tree says two and we can work backwards. Your Honour, in my submission it is going to have to - if your Honour wants oral submissions there is going to have to be a bit of a break between the close of the evidence and the preparation of submissions. And for our part we would want to prepare an outline of final submissions and then speak to it, that is the course we would like to take, but it would be erring on the side of caution and I accept that might be appropriate if we nominated two extra weeks, and the preference at the bar table, your Honour, is for them to run on so that we are not engaging in any more a disjointed proceeding than we need to.

45

HIS HONOUR: Yes, and has there been any discussion about dates that are inappropriate or otherwise not available?

5 MS MORTIMER: I think, your Honour, everyone here is going to - if it is fixed for the next two weeks starting after 6 February, that week and then two more weeks we will be arranging our commitments accordingly, your Honour.

HIS HONOUR: Oh, I can't do that.

10 MS MORTIMER: Oh, you can't do it then?

HIS HONOUR: No.

15 MS MORTIMER: Okay.

HIS HONOUR: I have got commitments in Perth the week of 20 February and then Full Court commitments in Melbourne. If I ran on - - -

20 MS MORTIMER: Can your Honour run on one week there?

HIS HONOUR: Well, if I ran on one week, I was going to say I would be in the ridiculous position that I am now where I was in Canberra and Sydney all last week and two weeks here. One possibility would be to - although if it has to be it has to be. The dates I would have free - and I appreciate only one of these is a whole week. I have free Wednesday, 29 March to Friday, the 31st.  
25 Then the following week of 3 April. Then the following week of the 10th, which is only a four-day week because Good Friday is the Friday. That is the earliest I could give consecutive weeks.

30 MS MORTIMER: I understand, your Honour, and so just to be clear, your Honour's proposal is that we still have that week of 6 February?

HIS HONOUR: Yes.

35 MS MORTIMER: And then we would resume either the week starting 29 March or the week starting 3 April?

HIS HONOUR: Or if you prefer that you didn't have that week and took that time, although that is - I suppose from my point of view it is not as bad as  
40 having three weeks on the trot including a Perth week, but one option would be to have continuously from Wednesday, 29 March right through to 13 April and abandon the February week, or alternatively keep the February week and - - -

45 MS MORTIMER: Your Honour, could we all give that matter some consideration and perhaps try and reach an agreed position about that and we could try for that now, your Honour, if it a matter that your Honour best pencil in now rather than wait till Wednesday? We could have another short adjournment and see if we could - - -

HIS HONOUR: Oh, certainly. I think what I will do is if I get any other pressure for other dates for hearing I won't allocate them until after this time. In other words, put these on freeze for only - for these parties and for no-one  
5 else and it gives you a little bit more time to think about it. So there is no huge rush, but if everyone could make sure that they don't have any other commitments in those periods or try not to, I will do the same.

MS MORTIMER: If your Honour pleases and then perhaps if we need to raise it again on Wednesday we can. Is that convenient, your Honour?  
10

HIS HONOUR: Yes. Does that suit everybody

MR D. GUNSON: Yes, your Honour.  
15

HIS HONOUR: Yes. Unless there are other developments. For example, if I find that Perth is settled or something like that. I joked to my personal assistant at the first break this morning that this matter had settled.

MS MORTIMER: Oh, well, never give up hope, your Honour.  
20

HIS HONOUR: It was very cruel.

MS MORTIMER: Never give up hope. Your Honour, for our part, those are  
25 the matters that we want to raise by way of administrative arrangements. If there is nothing further - there is nothing further on our part, your Honour.

HIS HONOUR: Yes. Does anyone else have anything to say? Is there any issue about the dates that anyone wants to raise at this stage or - - -  
30

MR D. GUNSON: Would it be your Honour's intention at the end of that period - assuming we go through on evidence - to then accede to my learned friend's - what I think is a very sensible suggestion that we have a break for the purpose of doing an outline of submissions and then speaking to that?  
35

HIS HONOUR: I think that is right. May is Full Court month. What I would propose to do is I am presently minded to tell the Chief Justice that I will not sit in Full Courts in May, that I will probably early May allow you to speak to your written submissions and get a move on to - in the balance of May in writing.  
40 Starting to write. That is my current plan.

MR D. GUNSON: Yes. Yes, I am content with that, your Honour.

HIS HONOUR: All right. And maybe abandoning intentions to take long  
45 leave shortly thereafter.

MR D. GUNSON: Just one matter across the bar table to my friend. Notice to produce you were going to deal with that now.

5 MS MORTIMER: Oh, yes, your Honour, there has been a notice to produce issued by us that we appear to have reached an agreement with my learned friend, Mr Gunson, about. Now, before I deal with that formally I would just like an opportunity to check the rules about that.

HIS HONOUR: Yes.

10 MS MORTIMER: But I can tell my learned friend in open Court that we don't press it and I just want to look at the rules about what we do about it hereafter.

HIS HONOUR: Can that wait till Wednesday morning?

15 MR D. GUNSON: Yes, indeed, your Honour.

HIS HONOUR: Yes, all right. Well, everyone who is coming to Orford will see them at 9.30 in accordance with the document handed up by Ms Mortimer.

20 MS MORTIMER: If your Honour pleases.

HIS HONOUR: And the Court will now adjourn to a view at Orford at 9.30.

25 **MATTER ADJOURNED at 3.10 pm UNTIL  
WEDNESDAY, 7 DECEMBER 2005**