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TRANSCRIPT OF PROCEEDINGS

O/N H-1233656

FEDERAL COURT OF AUSTRALIA

VICTORIA REGISTRY

MORTIMER J

No. VID 1228 of 2017

FRIENDS OF LEADBEATER'S POSSUM INC

and

VICFORESTS

MELBOURNE

10.15 AM, WEDNESDAY, 8 JULY 2020

MS J. WATSON appears for the applicant
MR I. WALLER QC appears with MR H. REDD and MS R. HOWE for the respondent

HER HONOUR: Please call the matter for hearing.

ASSOCIATE: VID1228 of 2017, Friends of Leadbeater's Possum Inc v VicForests for hearing.

MS J. WATSON: May it please the court, I appear for the applicants.

HER HONOUR: Thank you, Ms Watson. I think you're on mute, Mr Waller.

MR I. WALLER QC: Apologies, your Honour. I'm still getting used to this. May it please the court, I appear with Mr Redd and Ms Howe for the respondent.

HER HONOUR: Thank you, Mr Waller. Counsel can take it that I've read their submissions. I have a number of questions but I will ask them along the way, as you each develop your submissions. Yes, Ms Watson.

MS WATSON: Your Honour, there are some matters that are stated to be in dispute that are not in dispute and I can clarify those as I address your Honour. There is a slight change in position from the applicants about one of the orders and about a source of power, so I will also address your Honour on that. And it's not something that I have raised with the other side, so it will be new to them to hear that today and I apologise for that, but I think it's incumbent upon me to address your Honour on those matters.

HER HONOUR: Well, let me say, Ms Watson – well, to both of you. I mean, I'm not proposing to make any orders today. I'm proposing to reserve my decision and think about what the parties have said. So if anybody needs to add to what they say today in writing, they can have a chance to do that.

MS WATSON: If your Honour pleases. The matters that aren't in dispute are that the applicant doesn't resist the respondent's proposal for our current order 16 or the prohibitory injunction to permit for the exemption by the Minister under 158 of the EPBC Act. So there's already in order – our order 16 provision for VicForests to apply for approval from the Minister and we don't resist adding to that VicForests proposed reference to 158 of the EPBC Act. So there's no resistance about that particular part of the respondent's proposed orders or their submissions. The applicant also doesn't object to using the definition of "timber harvesting operations" from the Sustainable Forests (Timber) Act and that – we agree that that definition provides for more clarity. So the - - -

HER HONOUR: Sorry, where's that in the - - -

MS WATSON: So it's – there was originally some – the applicant had originally proposed that the respondent be restrained from conducting forestry operations in the scheduled coupes. And I think what happened was we received the respondent's proposed orders shortly before we had to file submissions and I don't think there was

time, perhaps, for the parties to resolve that question before submissions were filed and before proposed orders were filed. But your Honour will see in our order 16 that we've in fact proposed that VicForests is restrained from conducting timber harvesting operations within the meaning of section 3 of the Sustainable Forests (Timber) Act.

HER HONOUR: All right. Well, I will need explanation about that, Ms Watson, because it's not the statutory term under the statute that I'm dealing with.

MS WATSON: Yes. Well, that was the basis upon which the applicant had originally proposed forestry operations and certainly the applicant doesn't resist the use of the term "forestry operations", but if VicForests otherwise persuades the court that the definition of "timber harvesting operations" from the Sustainable Forests (Timber) Act is appropriate, then we don't resist that, on the basis that we would be content with that. So it's not really – I accept that "forestry operations" is the term that's used in the EPBC Act and we've defined "forestry operations" in the proposed orders, in order to facilitate use of that term. So "forestry operations" is defined in other matters and it's defined there because we didn't have a definition such as that in the Sustainable Forests (Timber) Act, so we considered it was necessary to define it that way.

HER HONOUR: Is that – and that's the definition that's taken from the RFA Act, is it?

MS WATSON: It reflects the reasons, I think, your Honour. So it takes part of it but then it adds "all necessary planning and preparatory phases". And it takes, your Honour, the definition that your Honour found that we agitated in relation to forestry operations and we have pleaded.

HER HONOUR: Well, all right.

MS WATSON: It is – the - - -

HER HONOUR: The definition what's in your client's form of orders has "and all necessary planning and preparatory stages – phases", but then if I remember rightly, there's a carveout of that later on, isn't there?

MS WATSON: Yes, in order 17, your Honour.

HER HONOUR: Yes. So – all right.

MS WATSON: So it's the difficulty between selecting from the – perhaps the statutory definition and the findings and the definition that's in the Sustainable Forests (Timber) Act, which is potentially clearer than that which is – than the way "forestry operations" is defined in the RFA Act. So I think it's the competing questions. I accept, your Honour, that the most accurate definition may be that

which is in the RFA Act because that is – your Honour is administering the federal scheme and that's the appropriate definition in the federal scheme.

HER HONOUR: All right. Well, perhaps you can deal with that in reply, once I've heard how Mr Waller puts it.

MS WATSON: So your Honour, I did – one of the positions I wished to slightly change was that the applicant would like to make a slight amendment to the proposed order 16. And proposed order 16 is the prohibitory injunction. And the amendment would be to add a reference to the logged coupes.

HER HONOUR: Well, I was going to ask about that. I haven't gone back and looked in detail, I'm afraid, I haven't, at my findings on – well, not the findings so much, but the evidence about the logged glider coupes and the logged Leadbeater Possum coupes. But I wasn't sure if there was some coupes that were only partially harvested that were in those groups or were subject to, for example, retention harvesting and that is whether there's anything that VicForests might be proposing to still do in the logged coupes would be the first question. But the second question then is whether, in any event, it's said there's any significant impact even if that's the case.

MS WATSON: Well, I was going to address it from a different perspective and I can take your Honour to those matters. But the reason that the applicant was seeking to make that amendment is because of section 479 of the EPBC Act. I will just let your Honour - - -

HER HONOUR: Yes. Well, no, no, because that was – that was on my list of questions too. I didn't quite know where that fitted in to the parties' arguments.

MS WATSON: Yes. I think it's possible that it hasn't yet been fitted into them, but I'm about to attempt to do so, your Honour. That provision states – so that provision is, of course, about prohibitory injunctions and it informs how the court might make an order granting a prohibitory injunction, and it states that the court may grant an injunction restraining a person from engaging in conduct whether or not it appears to the court that the person intends to engage again or to continue to engage in conduct of that kind.

So that would suggest that your Honour doesn't have to be satisfied that further timber harvesting will occur in those coupes, providing that it has, in fact, occurred in the past. So it takes the power to grant prohibitory injunctions slightly outside what the circumstances in which ordinarily a prohibitory injunction would be granted. Because ordinarily, of course, such an injunction would be granted to restrain conduct. And if there was no conduct to restrain, no injunction would be granted.

But this really changes the matters that inform the court's decision to make such an order. And so in my submission, it relieves your Honour of having to find that there

is conduct to be restrained, because your Honour doesn't have to be satisfied that VicForests is intending to engage in timber harvesting again in those coupes. Your Honour only has to be satisfied that it has engaged in conduct which consists of an act or omission that constitutes an offence or other contravention of the Act.

HER HONOUR: What do you submit is the purpose of 479(1)(a)?

MS WATSON: Well it fits, your Honour – in fact, it assists in understanding why 475 subsection (3) is, in fact, available as a source of power to make mitigation orders. So – and that was a matter I was going to come to, and perhaps I will just address how 475 – how the applicant says 475 works, because 479 is quite integral to that operation. Because I think the respondent's submission, if I'm putting it correctly, is effectively that 475 subsection (3), the power to make additional orders, is constrained by 475(2), which is the power to make prohibitory injunctions. And my submission on that is that it's too narrow to just focus on subsection (2) and subsection (3). It's in fact necessary to look at the whole of 475 and to look at how that's informed by 479.

So your Honour will – if we start with 475 subsection (1), that is the – provides the basis on which an applicant can seek to invoke the jurisdiction of the court. And it's important to have a look at that provision because the jurisdiction of the court can be invoked on the basis that a person has engaged, is engaging or proposes to engage in conduct. So the circumstances in which relief can be sought extend to those three circumstances. It's not just where a person is proposing to engage in conduct; it's also where conduct has occurred in the past. And that – the circumstances in which a person can approach the court inform the relief that can be granted. So - - -

HER HONOUR: Well, I understand – I certainly understand 479(1)(b), because that's dealing with a situation where the action – harking back to the way I expressed these matters in my reasons – the action hasn't actually occurred. No, I suppose it doesn't. (b) enables the restraint, perhaps, of conduct that's different to the contravening conduct, doesn't it?

MS WATSON: Yes, your Honour. Yes, your Honour. It quite expands the circumstances in which a prohibitory injunction can be granted and relieves your Honour of certain limitations that might otherwise apply in the course of granting an ordinary injunction. And it fits quite neatly, your Honour, with subsections (2) and (3) of 475 because, of course, 475(2) allows for the prohibitory order, but that does not – the nature of the order that can be granted under 475(2) is much broader because of 479. The court is not restricted to – sorry, your Honour. 475 subsection (2) appears on its face that the court has to grant an injunction restraining the person from engaging in conduct. And what that appears to suggest, in the absence of 479, that your Honour would need to identify specific conduct and then your Honour could only grant an injunction in respect of conduct which that person was engaging in or proposed to engage in.

So 475(2), on its face, looks narrower. It looks as though the court has a narrower power. But when your Honour reads it with 479, it quite expands the scope of a prohibitory injunction and it really relieves your Honour of any limitation to grant an injunction only in respect of conduct which a person is proposing to engage in.

And then this feeds into 475 subsection (3) because what is put is that 475 sub (3), the additional orders, are really confined by the scope of the injunction that's granted. And what's put is that the scope of the injunction that can be granted is limited to the scheduled coupes, for example, to put it in a factual context. But if the scope of prohibitory injunctions that can be granted is expanded, then it's not limited to, for example, the scheduled coupes, and the injunction can be granted over the logged coupes. And then what that means is that the power in 475(3), the additional orders, is plainly available in respect of both the scheduled coupes and the logged coupes.

HER HONOUR: What would be the form of an injunction over the logged coupes?

MS WATSON: So, really, your Honour, I was going to propose that order 16 would simply have the words "the logged coupes" inserted before "the scheduled coupes". So it would read – I'm just getting a note. So, your Honour, it might either read – the prohibitory injunction would read – instead of reading – instead of only referring to the scheduled coupes, which your Honour will see in the second-last line of proposed order 16, it could either refer to the logged coupes and the scheduled coupes or it could refer to the 66 impugned coupes, which is defined in other matters. Because your Honour would have power to make that order because your Honour is not constrained by having to find that VicForests is going to engage in that conduct.

HER HONOUR: So what the applicant is seeking by this is that – still that the conduct – if one looks at the language in 475(2), the conduct that's being restrained is still the carrying-out of either forestry operations or timber-harvesting operations. So you don't seek to change the content of the conduct.

MS WATSON: That is correct, your Honour. And it's the – the conduct is the unlawful conduct that was found to occur in the logged coupes and the scheduled coupes. So it very much was the subject matter of the court's reasons.

HER HONOUR: Well – but if an injunction was made in those terms over the logged coupes, that would prevent, for example, VicForests going back and thinning or burning or – would it? Or engaging in any click salvaging?

MS WATSON: Yes.

HER HONOUR: I don't know. It would – on your submission, would all those matters be covered in respect of the logged coupes?

MS WATSON: Yes, your Honour. Yes. Unless they are somehow carved out, it would be – that would be the key effect of such an order; or unless they applied for

approval or an exemption. I might just seek instructions on that point for a moment, your Honour. Sorry, your Honour.

HER HONOUR: The – but just to pin you down a bit, Ms Watson, about the purpose, if that's the case, that order's not being made for the purpose of preventing or mitigating any significant impact on the two species in the future, is it? It's being made as a springboard for the applicant. I'm not saying this is impermissible; I'm just trying to pin you down. It's being made as a springboard for engaging 4753 for the mitigation orders?

MS WATSON: It – that would depend on the evidence. Where there's some forest left, the order may preclude any further damage to the species. But where there's no forest left and it's been burned and it's – cannot recover, then it would be a springboard, your Honour. But - - -

HER HONOUR: I mean, some of the coupes – and, again, I'm just going on my memory, here, which may not be reliable – but some of the logged coupes, I think, had buffers and things like that. That is, in the gross harvest area.

MS WATSON: That's right. Yes.

HER HONOUR: Which may either adjoin an unlogged area of forest or - - -

MS WATSON: Yes.

HER HONOUR: Right. So - - -

MS WATSON: In fact, in most coupes, your Honour, I believe there's retained – there will be some retained forests, because they're usually parts excluded. So I could certainly – we could certainly work that out for your Honour and put in any further submissions on that. It would be the case that, in most coupes, there will be some retained forest because of the way that their planned with a gross coupe area and then a net harvest area within the coupe.

HER HONOUR: Well that's – that's, really – the context in which I was raised – I wanted to ask the question about the absence of any injunctions over the logged coupes. Because it – what I was not sure about was whether, if there were no injunction over the logged coupes, then the remainder of the coupes were exposed to harvesting or were not. Mr Waller might tell me they're not because that's some – that would be inconsistent with some aspect of the management standards or the code, I don't know.

Because I guess they're – if they're – they were buffers when they were – if they were buffers on the coupe plan, they're still buffers – I don't know. But that was my concern. I didn't know what the consequence of completely leaving out the logged coupes was in that situation. But I understand the way that you're putting it, Ms Watson. And where that leads the applicant is to the submission that a mitigation or

a – yes. A miti – an – what we're loosely calling a mitigation order, an order requiring a person to do something, would be available under 4753.

MS WATSON: Yes. And that would be available even on the respondent's interpretation of 4753. So that – so - - -

HER HONOUR: Are you putting – the applicant's putting that in the alternative?

MS WATSON: No, that's the primary position. So this is a bit of a shift in position, your Honour, and we would be content to reflect it in written submissions if that would assist your Honour. But the primary position is that a prohibitory injunction should be made in respect of the scheduled and – the logged and scheduled coupes, and that such an order that – the court's able to make such an order because of 479, subsection (1)(a). And that once that prohibitory injunction is in place, any dispute about whether there's a basis for an order under 475 subsection (3) falls away because there is a prohibitory injunction in respect of the logged coupes.

HER HONOUR: Well, I understand all that. But just, again, so I'm clear about what the applicant's position is, one of the questions I was going to ask Mr Waller – just giving Mr Waller a heads-up, here – was that I wasn't sure whether VicForests submissions were to the effect that there was no power under section 23, or whether the power should not be exercised, because it would extend further than the regime set out in the EPBC Act. But – and I won't necessarily hold you to this, Ms Watson, until you hear how it's developed. But is the applicant pressing section 23 as a source of power or not?

MS WATSON: Yes. Yes, your Honour. So the primary position is that we seek the broader prohibitory injunction. That's the primary position. The – then, your Honour, we say 475 – even if your Honour doesn't make a prohibitory injunction over the logged and scheduled coupes, and even if the only prohibitory injunction that there is is over the scheduled coupes, then my submission is that section 475 sub (3) still provides power to make the mitigation orders.

And that if your Honour doesn't find that that's the case, then I do rely on section 23, and I can take your Honour through why I say that the respondent's submissions on that point should not be accepted. So I can address section 23 first, or I can address why there's still power even if all we have is a prohibitory injunction over the scheduled coupes, and we're seeking mitigation under 4753.

HER HONOUR: Well, you better develop both if you've got both in your arguments, Ms Watson.

MS WATSON: So if I just move to why – if your Honour only makes a prohibitory injunction in respect to the scheduled coupes, then my submission is that 475 subsection (3) does provide a power for mitigation orders in respect of the damage to the logged coupes. And that's, really, because one has to read the whole of section

475 and construe what's in 4753 by reference to the whole section, and not just subsection (2). Now, subsection (1) defines the circumstances in which an applicant can approach the court for an injunction. So that, also, tells, you something about the relief that the court will be able to grant, because the relief should reflect the circumstances which justify the approach to the court.

Subsection (2) is, then, the – obviously, allows for the prohibitory injunction. And we accept that that states that the court can grant an order – an injunction restraining the person from engaging in conduct – that does have to be read in the light of 479. Subsection (3) is then a separate and different power. And although that power does depend on the existence of an injunction, my submission is that it's a power that allows for additional orders, not orders which are confined by the scope of the injunction. And that's because the way that section – subsection – sorry, your Honour. The way that section 475, subsection (3) is phrased is – there's the precondition of the injunction. And then the basis of the order is that it's in the court's opinion that it's desirable to do so. So it's a precondition, but this is a separate power for an additional order that can accompany a prohibitory injunction.

It's not a subsection to subsection (2), it's an independent source of power. Just as section 475 subsection (4) is an independent source of power to make a different type of order, just as 475 subsection (5) is an independent source of power to make a different type of order. So the structure of this section is that (2), (3), (4) and (5) each provide independent sources of power, each of those sources of power should be construed according to their terms, and it would be artificially narrow to confine the power granted by subsection (3) by reference to subsection (2).

We accept, of course, that it requires a prohibitory injunction, but that really just demonstrates the flow of the provision. Sub (1) allows for application for an injunction. Sub (2) allows for an injunction. Sub (3) says, "If you have an injunction," so if you've succeeded in your application, "the court can make other orders if it's desirable to do so in the court's opinion." So that's the submission on why 475(3) provides a source of power to make mitigation orders in respect of a logged coupes even if the only prohibitory injunction is one in respect of the scheduled coupes. Now - - -

HER HONOUR: So that means that – because I think one of the matters VicForests highlights is that the only person who can seek a remediation order is the Minister under 480. Is that .....

MS WATSON: Yes, your Honour. That's the only person who can approach the court to make an application for such an order independent of an injunction, but 475 subsection (#) does state that the court can make an order requiring repair or mitigation. So there has to be – for the court to make a mitigation order under subsection (3), the court has to have found that a person has engaged, is engaging, or is proposing to engage in conduct consisting of an act or omission that constitutes an offence or a contravention. So the court is more confined under section 475.

The court couldn't go straight to a remediation order without an injunction but, providing there is an injunction, the court has a broad power under subsection (3) to make a mediation order. And it just wouldn't be consistent with 479 to limit subsection (3) to orders relating to the restraint of conduct, because the court is not required to consider that – to conclude that a person intends to engage again or continue to engage in conduct of that kind. If the court concludes that that conduct has occurred, that's sufficient for a prohibitory injunction under subsection (3), even though the order the court marks is an order restraining the person from engaging in that conduct. So the court doesn't have to - - -

HER HONOUR: So just to take another example – I'm trying to think of examples outside this case just to test how this works. So if you had, for example, a farmer who had been discharging fertiliser into a wetlands that was covered under part 3, on the applicant's submission you could have a prohibitory injunction against further discharge, you could have a prohibitory injunction in relation to the past discharge, and you could have an order that the farmer remediate the wetlands somehow. I don't know, flush it or whatever might need to happen to get rid of the poison or the excess fertiliser - - -

MS WATSON: Yes.

HER HONOUR: - - - is that how you say it can work?

MS WATSON: Yes. Yes. So whether or not it appeared that the farmer was going to continue discharging waste into the wetland, the court could make a prohibitory injunction restraining the farmer from doing that. And what - - -

HER HONOUR: In the future, irrespective, yes, of whether the farmer – so even if the farmer was, perhaps, believed on her or his oath, "I will never do that again," the injunction could still be made. That's how 479 would work.

MS WATSON: Yes, your Honour.

HER HONOUR: The court could say, "Well, I believe you will never do it again, but I'm still going to issue the injunction and make you fix it up."

MS WATSON: Yes. Yes. And that's – in that respect, your Honour, it is a springboard, perhaps, but it's because that's not – that's not necessarily a pejorative term because what the Act is trying to do is protect the environment, it's not just – this is not just an Act about injunctions, it's an Act to protect the environment. So it's unsurprising in that context that the relief the court might grant is not just, "Stop, don't do it," it's, "You need to remediate it." And that's the only way that 479 and sub (2) and sub (3) can make sense altogether, it's because this is not an ordinary injunctive regime, it's a particular statutory regime, and in the context of that regime it shouldn't be surprising that the court can make an order restraining a person from engaging in conduct, and then – even if it's satisfied that the person will not do so, and then make an order to remediate the damage caused by that conduct in the past.

HER HONOUR: All right. Well, I understand how that's put.

MS WATSON: And then it turns – sorry. Well, I move to section 23, your Honour.

HER HONOUR: Yes. Thank you.

MS WATSON: So the applicants submit that it's plainly a broad power available to the court where it's exercising jurisdiction otherwise conferred upon the court. In this statutory context, there is a scheme for relief, we don't resist that, but section 480 and section 480A clearly state that the scheme for relief in the Act does not limit any other powers of the court. So there's no room for an inference that this is a complete regime which is intended to exclude or otherwise limit the power conferred by section 23. That's the essential statutory sort of analysis, your Honour.

HER HONOUR: Is that how you seek to distinguish the cases that VicForests relies on, is it?

MS WATSON: Well, those cases are in fact about remitted grants of jurisdiction. So if your Honour turns to Dates, and I believe your Honour has a copy of Dates.

HER HONOUR: Yes, I do.

MS WATSON: Dates v The Minister for Environment, Heritage and the Arts. And if your Honour turns to paragraph 22, which is the paragraph that's relied upon.

HER HONOUR: Yes
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MS WATSON: Now, what's said there is – sets out the terms of section 23, and then it says that:

> *The section does not itself confer jurisdiction.*

Now, of course, your Honour, there's a distinction being drawn there between the power that's conferred and the conferral of juris. And then what's said is:

> *Where jurisdiction is conferred by an Act that provides an exhaustive code of available remedies and otherwise limits the power of courts to grant, section 23 is not a basis for transcending that limitation on jurisdiction.*

And those cases, and I will take your Honour to both of the cases that are referenced in that paragraph, they are about limited grants of jurisdiction where the jurisdiction that is granted is granted by a reference to particular forms of relief. So if I take your Honour to Thompson Australian Holdings Pty Ltd v Trade Practices Commission [1981] 148 CLR 150.

HER HONOUR: Yes.

MS WATSON: And your Honour turns to page 158 I will attempt to crystalize the nature of the dispute there in relatively brief terms. When your Honour has 158.

HER HONOUR: Yes, I've got that.

MS WATSON: Your Honour will see at the bottom of the page that the Full Court of the Federal Court thought that:

> *The court's power to grant injunctions was necessarily limited by section 80 of the Trade Practices Act –*

And then the terms of section 80 are set out there. And this was the power to grant injunctions. So it's not the conferral of jurisdiction; it's a power to make orders. Your Honour doesn't need to read section 80 now but it's just there in case your Honour wishes to refer to it. If your Honour then turns to page 160.

HER HONOUR: Yes, I've got that.

MS WATSON: Your Honour will see in the centre of the page that:

> *The Commission's case was that the power to grant injunctions was not limited to section 80.*

Because the Commission said there's also a power to grant injunction by sections 22 and 23 of the Federal Court Act. Now, we don't need to understand everything about how they put their case. If your Honour turns to the bottom of page 161.

HER HONOUR: Yes, I've got that.

MS WATSON: Your Honour will see the last paragraph states that:

> *The Commission rightly emphasises that in general a distinction is to be made between the jurisdiction of a court to hear and determine a matter and the power of that court to grant relief of a particular kind.*

And the Commission points out that the relevant grant of jurisdiction to the Federal Court is to be found not in section 80, because that's the provision referring to power, but in section 86 and the Commission said:

> *Once is it perceived that the grant of jurisdiction flows from section 86 it becomes apparent that there is attracted to the exercise of the jurisdiction all powers in the Federal Court of Australia Act.*

So that was what the argument – the Commission was putting. And then the court says at the end of paragraph on 162, or at least the majority, your Honour:

This is to assume, wrongly as it transpires, that in this case the grant of jurisdiction is quite independent of the grant of power to grant relief.

And then in the next paragraph the majority says:

Section 86 is not a self-contained grant of jurisdiction. It operates by reference to proceedings for which provision is made elsewhere in part 6, proceedings which are described in terms of the particular relief which the court is empowered to grant.

So the point that's being made there is the grant of jurisdiction is tied to the form of relief and because the grant of jurisdiction was limited in that way section 23 did not have any operation because it was necessarily excluded. And your Honour will see the end of the paragraph in the middle of 162:

Section 86 therefore grants a jurisdiction which is specifically linked and limited to proceedings for relief sought under certain parts. The section does not set out to give the court jurisdiction to hear and determine proceedings for any other relief it does not, for example, confer jurisdiction in proceedings for relief under the Federal Court Act.

So it's really a case about a limited grant of jurisdiction which necessarily excluded the power in 23. And just to finish that case off, your Honour, the majority says:

The final answer to the Commission's argument on this point is that section 80 proceeds on the footing that it constitutes the Federal Court's excusive charter to grant injunctions restraining or relating to contraventions of the Trade Practices Act.

So the majority was saying when you read section 80 it is an exhaustive statement of the relief that can be granted. And the final line in that paragraph:

The inference is irresistible that parliament looked upon section 80 as a complete and comprehensive statement of the circumstances in which injunctions might be granted in respect of relief sought under the Trade Practices Act.

Now, that's a very different statutory context to this statutory context where 480 and 480A state that:

The powers conferred on the court by the Act are in addition to and do not limit any other powers of the court.

Such as, your Honour, section 23 of the Federal Court Act or the powers granted under that section. So in that respect Thompson Australia is quite different. It's quite a different statutory context and it's not in any way analogous to the statutory context that we're dealing with. And I will just take your Honour very quickly to

Patrick Stevedores v Maritime Union of Australia [1998] 153 ALR 643. There's only two paragraphs that your Honour needs to turn to.

HER HONOUR: Yes.

MS WATSON: If your Honour turns to page 655, it's paragraphs 27 and 28.

HER HONOUR: Got those.

MS WATSON: So your Honour will see – really, your Honour, I rely on both of those in their entirety; 27 and – really, just 27, your Honour, is sufficient.

> *Once the jurisdiction conferred on the Federal Court is invoked the court has power under section 23 to make the relevant orders. The power may be exercised in any proceeding in which the Federal Court has jurisdiction unless the jurisdiction invoked is conferred in terms which expressly or impliedly deny the section 23 power.*

And then it goes on to say:

> *But this is not such a case.*

So really, your Honour, in my submission the relevant provisions of the EPBC Act cannot be read as expressly or impliedly denying the section 23 powers because 480 and 480A expressly state that such powers are not limited. And in the absence of 480 and 480A there might be a more complicated process of statutory construction about whether the relief in the EPBC Act was an exhaustive statement of the relief but that dispute just has no legs where the Act expressly states that it doesn't limit the other powers of the Federal Court.

HER HONOUR: And where that leads though, Ms Watson, on your argument is that the court still has to be satisfied the orders are appropriate.

MS WATSON: Yes, your Honour.

HER HONOUR: Yes.

MS WATSON: Then, your Honour - - -

HER HONOUR: Appropriate not just at a factual level perhaps but also appropriate taking into account the statutory setting in which they're being exercised.

MS WATSON: Yes, your Honour. Yes. So it is – it's a very broad power. It's confined only by what the court considers or thinks is appropriate and what the court thinks is appropriate will, of course, be governed by the statute in which the court is exercising – or pursuant to which the court is exercising jurisdiction. So your

Honour's exercise of the power in 23 would be informed by that statutory context. But it is a very broad power, your Honour.

HER HONOUR: I suspect I know the answer to this question but I will ask it anyway. Is this the first case that you're aware of where the court has been asked to make remediation orders under section 23?

MS WATSON: Yes. Yes, your Honour. Yes.

HER HONOUR: All right. Thank you. And what about 475(3).

MS WATSON: To the extent that I'm aware, your Honour, but I have looked. It may be that some cases have evaded me but I have looked.

HER HONOUR: Well, as far as you've been able to find, there haven't been any. Is that right?

MS WATSON: Yes, your Honour. And if otherwise become aware, your Honour, I will speak to my learned friends about it but that's my state of awareness.

HER HONOUR: All right. All right. Well, I understand that.

MS WATSON: So then, your Honour, I think the only other matter in issue is – I was – sorry, your Honour, there are a couple of things in issue. The next – moving on from the mitigation orders - - -

HER HONOUR: Are you going to say anything about why they're appropriate or - - -

MS WATSON: Well, in that respect, your Honour, I was - - -

HER HONOUR: - - - are you just going to rely on your written submissions about that.

MS WATSON: In that respect, I would rely on my written submissions. It is said in the respondent's submissions that we didn't provide a basis, but I think that's simply because the parties were somewhat rushed in putting those orders and submissions in. But in any event, there is a clear basis. The basis on which the mitigation orders have been formulated is by reference to – it's set out in the applicant's submissions. And your Honour will see that our primary position is that the mitigation orders should be made by reference to the gross areas lost to the unlawful conduct. And that the alternative submission is that the mitigation orders should be made by reference to the net area lost, so the net area harvested. And we have identified in the submissions that your Honour found that the habitat value was of a similar value in the schedule of proofs because the evidence of the applicant was that this was all critical habitat.

So, of course, your Honour, it will never be possible to replace the exact habitat that was destroyed with habitat and the scheduled coupes because, of course, there will be different landscape features of all kinds. But the best that can be done is to take habitat of a similar value and quality in a similar area and simply set aside a similar area that was destroyed for each species. And that has been quite carefully set out in the written submissions, your Honour, and there is a - - -

HER HONOUR: I've got another table, Ms Watson.

MS WATSON: Yes, yes. Well, sometimes that - - -

HER HONOUR: One can never have enough tables.

MS WATSON: It was intended in an attempt to condense information, your Honour, and, hopefully, it will be helpful in some respects.

HER HONOUR: No. But, look, they were all very helpful and, as you see, I had a couple of my own so, yes, it is necessary when you've got – dealing with this many coupes, I think.

MS WATSON: Yes. And so, really, it has been – on the basis of the expert evidence in the case, it has been assumed that the nature of the habitat will be similar. And then, really, what has been done is just to set aside a similar area that was harvested, either by reference to the gross or, in the alternative, the net area impacted. I do have some minor corrections to the adding up of the hectares. I can provide an amended table with the corrections, if that's easier for your Honour, rather than me telling your Honour that one calculation was out by .2 of hectare and another calculation was out by another .3 of a hectare.

HER HONOUR: Yes. It might be better just to provide an amendment. Mr Waller, do you have any difficulty if that occurs?

MR WALLER: No, your Honour. Given the way this matter has evolved, I think that's going to be necessary.

HER HONOUR: Well, there might be a number of things that the parties want to tidy up by way of further written submissions and I'm – at the moment, I'm not inclined to prevent that occurring, provided it's fair. So where is – sorry, I've lost that table.

MS WATSON: Sorry, your Honour. It's right at the end of the - - -

HER HONOUR: Document.

MS WATSON: - - - submission. So it will be page 6 of the applicant's submissions. It's in between the submission and the proposed amended orders.

HER HONOUR: Got it. Yes. Got it. So just so that Mr Waller can understand it and I can understand it, the corrections you're talking about are in that – the last column in the – each side of the table. Is that right? That some of those where it has got 25 hectares net, 33.8 hectares gross, it's some of those ones that need a bit of correction, is it?

MS WATSON: No, your Honour. It's just the total.

HER HONOUR: It's just the total. So it is just a matter of the wrong button on the calculator when the amounts were being added up. So it's just the bottom row – rows. The 404.02 and the 403.

MS WATSON: Well, your Honour, so your Honour is now in the alternative annexure. So there's two - - -

HER HONOUR: Sorry.

MS WATSON: - - - you have – there's two pages. The first annexure - - -

HER HONOUR: Yes.

MS WATSON: - - - which is about page 6, that is – that's by reference to the gross areas. And there I believe it should be 868.7 hectares rather than 869.7 in that very right-hand bottom-hand corner box.

HER HONOUR: Well, all right.

MS WATSON: Sorry, your Honour.

HER HONOUR: So that's just a matter of arithmetic, is it?

MS WATSON: Yes.

HER HONOUR: Is that the only correction?

MS WATSON: There's – I think, your Honour, there's three but they're all arithmetic.

HER HONOUR: Well, why don't we just go through them. I think that's probably easier and Mr Waller can hear them and see them.

MS WATSON: Okay. The – so in that bottom corner where we just were, the total gross – sorry, your Honour, I'm in the wrong box. Not in the – in the central column at the bottom row the total area of all logged coupes is 868.7 rather 869.7.

HER HONOUR: Okay.

MS WATSON: Then – your Honour, now I'm having – perhaps if we might just come back to that, your Honour, and I will just – I did have them before but now I've lost them. I will – can I just come back to that in a moment, your Honour.

HER HONOUR: Yes.

MS WATSON: I did .....

HER HONOUR: So how much longer are you going to go, Ms Watson?

MS WATSON: Not very long, only another couple of minutes.

HER HONOUR: All right. Thank you.

MS WATSON: So, your Honour, there's only two – other than those corrections, there's only two matters on which I need to address your Honour. The first is the respondent objects to mitigation orders on the basis they should be permitted to harvest timber if it obtains approval or exemption from the Federal Minister. Now, that – in my submission, that position mistakes the effect and purpose of the mitigation orders. So the mitigation orders are not to prevent VicForests from engaging in unlawful harvesting of timber. That's what the probatory injunction does. And it's in respect of that order that VicForests can seek approval or exemption from the Federal Minister.

But the mitigation orders are intended to address the damage that has already been caused by VicForests and their unlawful harvesting. So the Minister – while the Minister can give approval or exemption to allow VicForest to engage in what would otherwise be unlawful conduct, the Minister can't interfere with an order of the court requiring VicForest to mitigate damage that it has caused. So there doesn't need to be any carveout, in my submission, for the mitigation orders. The only carveout is in respect of the restraint of ongoing unlawful conduct.

HER HONOUR: Well, I - - -

MS WATSON: Yes.

HER HONOUR: - - - only for the injunctions for the scheduled coupes.

MS WATSON: Yes, your Honour. If that remains the form of that order. If that order is explained to logged and scheduled, then – well, sorry, your Honour, I withdraw that.

HER HONOUR: No, that's – well, that's the point I was making.

MS WATSON: Yes, yes.

HER HONOUR: Your submission is that you only need to carveout and acknowledge in the orders the prospect of approval for exemption in relation to injunctions for the scheduled coupes.

MS WATSON: Yes, your Honour. I have one other point to make and then I will take your Honour to the schedule. The – I only wish to make one point about the costs of the separate question because, in that respect, I rely on my written submissions and that includes written submissions that have been filed earlier in the proceeding about the costs of the separate question. In – and I just wanted to make one more point about those submissions that have been filed on 3 April 2018. In that – in those submissions, the applicant submitted that costs should not be ordered because it was a public interest case. And all I would add to that is that that has been amply demonstrated by the outcome of the proceeding. The court has, ultimately, found that VicForest has engaged in unlawful conduct. And given this outcome, that's an additional reason that the court is justified in ordering that the parties bear their own costs. But I otherwise rely on my written submissions on that point. Now, your Honour, if I just turn back to the annexures at pages 6 and 7.

HER HONOUR: Yes, yes.

MS WATSON: So we've corrected – we're on page 6 and in the central column at the bottom we've corrected 869.7 to 868.7.

HER HONOUR: Yes.

MS WATSON: If we move across and up one, so total coupes over which mitigation is sought for damage to Leadbeater's Possum.

HER HONOUR: Yes.

MS WATSON: That should be 441.3.

HER HONOUR: Yes. Thank you.

MS WATSON: And in the – if your Honour goes then down to the next box in the very corner, the total all coupes over which mitigation is sought for damage to both species, that should be 870.1. Although, your Honour, as I read that, I'm not sure that can be right because there has been .3 added to the previous box and then we now seem to have an addition of .4.

HER HONOUR: Well, maybe you can seek some instructions and you can deal with that in reply.

MS WATSON: Yes. Thank you, your Honour. I might do the same for – I might – we might just take the time to do the same, because there's one other correction, but we will take – we will do that while we're – Mr Waller is on his feet.

HER HONOUR: Yes. Or not on his feet.

MS WATSON: Or – yes, your Honour.

HER HONOUR: Yes. Thanks, Ms Watson. Yes, Mr Waller.

MR WALLER: If your Honour pleases. Your Honour, can I say that we are somewhat surprised by the approach taken by the applicant given that it is now six weeks to the day since your Honour handed down the reasons and your Honour did give us ample time prepare orders and submissions and much of what my learned friend has said this morning we are hearing for the first time. In particular, her reliance on section 479 and her extension of the prohibitory injunctive relief over logged coupes well. So while we appreciate we will be given time to respond to that in writing, we think that the way in which this has transpired is unsatisfactory and puts us at an unfair disadvantage, certainly as far as making submissions today with a view to finalising the orders.

HER HONOUR: Well, Mr Waller, I'm – I mean, I understand what you've just said. I was going to raise section 479 anyway but you should be confident that if – not only if your client wants to make further written submissions it will be given that opportunity, but if you say it's unfair not to be able to develop them orally I'm more than happy to have another hearing because I do want everybody to make sure that they feel they've been able to say what they want to say about the court's orders which are, after all, the pointy end of this - - -

MR WALLER: We agree. With that said, your Honour, could I move through the areas that I understand are now in issue. One matter that my learned friend didn't mention, I think, in her submissions was the definition of coupe in other matters. We have proposed that coupe has the same meaning as in section 3 of the Sustainable Forest Timber Act 2004, whereas our friends have proposed that a coupe means an area or patch of forest in which logging occurs. Now, we say that the SFTA definition is appropriate because the statement of claim of the applicant referring to coupes and developing them by reference to logged coupes, scheduled coupes and Leadbeater's Possum coupes and logged glider coupes, all of those references were linked to their listing on the timber release plan picking up the definition effectively of coupes in the SFTA. Similarly, the relief that was already granted, that is, in – the interlocutory injunctive relief – was likewise, I think, reflected in that approach and for that reason we think it appropriate that the final orders reflect the definition of coupes referred to in that Act since that is, effectively, what the applicant had done in their pleading and in the way the interlocutory case was developed.

HER HONOUR: Mr Waller, do you think it – I mean, I'm just looking at that now, having not really presently my principal focus, but does it need to be defined? Because every single one of the coupes about which there will be orders has a number and is a number identified by the TRP, so if – I might be wrong about that, but I don't think - - -

MR WALLER: I think that the - - -

HER HONOUR: - - - the parties are asking for any declaratory or other orders.

MR WALLER: Yes. It's simply other internal definition, so if your Honour looks at forestry operation, for instance, there's a reference to capital C coupe. There's no – the word coupe, your Honour is quite right, doesn't find expression in the substantive orders as a standalone expression. It's just the internal referencing.

HER HONOUR: Yes. Well, I'm just – I don't want to introduce any debates that could be avoided and I can see why the applicant's proposed definition may well do that, but I'm also not at the moment sure why – it might be also caught up, Mr Waller, with what you're going to develop about the definition of forestry operations.

MR WALLER: It's related only because there we favour the SFTA definition as well but - - -

HER HONOUR: Well, if we put the word in there, because it's not in the RFA Act definition of forestry operations.

MR WALLER: I'm sorry. I missed that, your Honour.

HER HONOUR: The word coupe is not in the RFA definition of forestry operations.

MR WALLER: No. But it's certainly the way in which the case was pleaded by the applicant, we say, and - - -

HER HONOUR: Well, I understand all that, but that brings me back to what I just said. We've got – we're only talking about 66 coupes that are identified by numbers.

MR WALLER: That's so.

HER HONOUR: And we're not, for example – I mean, this would have been a very different matter if – on a very different case the court was being asked to restrain forestry operations in some way that wasn't identified by the timber release plan and a number, but at the moment I don't see why it's necessary, but - - -

MR WALLER: We're inclined to agree that that perhaps standalone definition of coupe may be perhaps dispensed with and some minor amendment made to any internal definitions to avoid any confusion and we can certainly address that in anything we might put in writing. It's not a big point, and your Honour is quite right that when it comes to any of the specific coupes they're identified quite precisely. In terms though – and I think this is where your Honour discussed the matter with my learned friend – in terms of the operation of order I think it's 16 when we get to injunctive relief and the restraint that is in place, being a restraint from conducting, we would say that timber harvesting operations within in the section 3 of the

Sustainable Forest Timber Act 2004, now, we had understood that that was not a matter in issue and that in the orders finally proposed by the applicant they had agreed with that language. Your Honour did raise an issue or a question with my learned friend, but we have understood certainly from their filed material that that was not a matter in issue.

HER HONOUR: Well, that might be right, Mr Waller, as between the parties, but it – they're the court's orders and I've got an issue with it.

MR WALLER: Can I say, then, that our concern was whether one was to define the conduct to be restrained as timber harvesting operations within the meaning of section 3 of the SFTA, which is what we have proposed, or forestry operations which might have been what had been proposed, I think, initially by the applicant, we wanted to ensure that the injunctive orders made it clear that VicForests would be permitted to apply for any necessary approval exemption and that because forestry operations might include all necessary planning and preparatory phases of such conduct as defined, it would potentially restrain VicForests from undertaking the very planning that would be necessary for it to seek approval for exemption.

We also thought that it was therefore better that VicForests' definition be used because planning is not included in that definition and therefore there could be no confusion about it. The other point, your Honour, was that the definition in the SFTA Act, which of course is very much focused on these sorts of activities, whereas the EPBC Act deals with a wide range of environmental issues, not timber harvesting per se, is that it clearly identifies, for the purposes of any final injunctive relief, the actual conduct to be restrained on the ground and that definition, we say, is also consistent with interim interlocutory relief that's already been granted by your Honour in this proceeding and by Steward J, who dealt with the matter right at the outset. So there would be a consistency in the form of injunctive relief that has been ordered by the court.

HER HONOUR: Sorry, so just run that past me again, Mr Waller. The existing injunctions use the SFT Act definition, is that what you're saying?

MR WALLER: Yes. So your Honour's – look at your Honour's order, for instance, of 2 May 2008 ..... sorry, 2018.

HER HONOUR: Did you say 2 May?

MR WALLER: 2 May 2018. May. That was an extension of Steward J's order. One moment. In the order of 24 April 2018, Steward J's order provided that until 4.15 on 2 May 2018, the respondent ..... be restrained from conducting timber harvesting operations within the meaning of section 3 of the Sustainable Forests (Timber) Act 2004. And your Honour extended that order. I apologise. Your Honour extended that order without your Honour employing that language expressly.

HER HONOUR: Yes. Although – yes, well, I take that point, Mr Waller, and I will consider it. But I'm not sure that it's a fact – it's obviously a factor, but I'm just - - -

MR WALLER: We also would make this point and we've made it in our written submission. That the definition of "forestry operations" includes "all necessary planning and preparatory phases of such conduct". And we say that the use of the word "necessary" inserts a subjective element, which is, we think, problematic, especially when an injunction must be in certain terms, so that a party knows precisely what they may or may not do. That is avoided by the use of the expression in the SFTA Act. So because of that potential ambiguity and imprecision, that was another reason why we favoured the language that's set out in the Act and in our order.

HER HONOUR: I mean, one of the problems this introduces is how the declarations are to be understood. I mean, I had not framed – the declarations would be quite differently understood if the SFTA Act were to be used and, again, I'm going on memory here, Mr Waller, I haven't checked, but I don't think I phrased my reasons like that.

MR WALLER: I'm just looking at that.

HER HONOUR: And some of the declarations are about the scheduled coupes, you see. In proposed – I'm looking at paragraph 9 of your proposed orders. In proposing to undertake a forestry operation in each of the scheduled coupes. That's reflecting my findings, which as I understand it, are made on the basis of the RFA Act definition. Again, going from memory, what I recall is that I did make some findings that, for example, things like the preparation of coupe plans and those sorts of things are part of that forestry operation.

MR WALLER: Indeed. No, your Honour is quite right. We don't cavil with the definition of "forestry operation" in other matters in this order, which, consistent with your Honour's reasons, includes "all necessary planning and preparatory phases of such conduct". And we accept that it is that expression that is employed in relation to declaratory relief. We are simply saying that when it comes to injunctive relief, rather than using the expression "forestry operation", we use instead "timber harvesting operations". So it doesn't – my submission should not impact at all in relation to any preparatory relief. It simply really bites in respect of the prohibitory injunctive relief.

HER HONOUR: I'm just looking. Well, that introduces – and you say, as I understand it, for a purpose, but it does introduce a disconformity between the declarations and the injunctions in the scope of the conduct. I meant – am I – I'm correct, am I, Mr Waller, in understanding that VicForests' concern is that it might be somehow caught by the injunctions from doing what needs to be done to apply for either an exemption under section 158 or approval; is that right?

MR WALLER: That is precisely the position because the injunctions are, in a way, conditional, that is to say, they may be – they may be removed, as it were, if approval or exemption is provided. We wanted to ensure that the restraint ..... as it were of the approval or exemption. And for that reason we say - - -

HER HONOUR: But I could make that clear in the reasons, Mr Waller.

MR WALLER: Yes, your Honour could. And that's why we've said in our submission, our written submission, that – in paragraph 7. Whether one defines the conduct to be restrained as "timber harvesting operations" under the SFTA Act or "forestry operations" which was the applicant's initial proposal and appears to be your Honour's preference, we wanted to make it clear that the injunctive orders needed to make it absolutely clear that VicForests were permitted nonetheless to apply for the necessary approval and exemption. And we thought that was more easily achievable without a potential ambiguity or imprecision by employing our definition. But if your Honour were to employ the "forestry operations" language, but made it abundantly clear both in the language of the orders and in any reasons, then that would satisfy that concern, your Honour.

HER HONOUR: Do I need – I might be getting overly worried. You might tell me about things I don't need to be worried about. But do I need to have any evidentiary base to include in these orders references to part 9 approvals and section 158 exemptions? Because I don't have any.

MR WALLER: Well, we say no, your Honour. Those matters are apparent on the face of the Act. The Act provides for approval and provides for exemption in certain cases and all the carveout to the injunction does is to make it plain that those procedures are nonetheless available.

HER HONOUR: But are they – do they – they don't – one of the things I wondered about was whether they exhaust the universe of ways that part 3 might end up not applying. So there are a whole lot of other ways in which part 3 is rendered inapplicable under the EPBC Act, some of which involve inter-governmental agreements. But we are dealing with a state agency, here.

So one of the things I wondered about – and this, again, this is because, as I said, the orders are the court's orders, and I need to be satisfied as the judge of this court that's making them that they are appropriate even if the parties don't put matters to me. I wondered whether, because of that possibility, because if there are other ways in which part 3, in theory, could be rendered inapplicable to these forestry operations, is it better that there's no reference?

Because I'm not being faced by evidence on affidavit from VicForests saying on, "On X date, we commenced the process to apply for an exemption under section 158 on why don't we commence the controlled action process." It may be better that they don't refer to any of it; that is, any of the ways in which part 3, in theory, could be rendered inapplicable. And the appropriate thing might be that if an approval was

granted under section 75, and was a final approval in all senses, then the injunction would be discharged – must be discharged. Why isn't that the appropriate approach?

MR WALLER: The concern is that the order's injunction as framed, your Honour, would prevent us from even applying for the approval because of planning.

HER HONOUR: Well, put to one side that, Mr Waller, because I would make that clear in the reasons and, if need be, in the orders, just in the way that there's already been – isn't there another thing in the orders which is a clarification? Nothing in the orders prevents the – well, I've got – we've got the order.

MR WALLER: We do.

HER HONOUR: Nothing – so - - -

MR WALLER: But – we do. And that, as it were – this evolved. Originally, the applicant's order was absolute in terms. We, then, have proposed the language of 16 and 17. And that appears, now, to have been accepted, both as to approval and exemption. Would it be – the order could be expanded so as to say nothing in order 16 prevents VicForests from planning forestry operations in a scheduled coupe for the purpose of applying for approval or exemption or – and I'm thinking – picking up your Honour's that there may be other avenues by which the operation of part 3, say, or part 4 could be addressed so as not to make it prescriptive.

I – or under basis or on any other basis permitted by this Act. They would be examples, but they wouldn't be exhaustive.

HER HONOUR: Yes. Again, I'm just concerned we don't come back with an argument that somebody makes saying, "Well, you're allowed to do those two things, but you're not allow to do anything else," or – these are not easy issues.

MR WALLER: If it's made clear that the injunction is not intended to prevent the potential, you know, operation of those parts of the Act that allow for this to happen, subject to a further exemption or some other basis, then your Honour's concern might be addressed. Our concern – if it were silent completely, then - - -

HER HONOUR: I understand that. I understand that. But if it was to say something like nothing in order 16 prevents VicForests from participating in any process under the Act for the purposes of – I don't know, for the purposes of part 3 rendered inapplicable to the forestry operations in the scheduled coupes.

MR WALLER: From participating in any process that might - - -

HER HONOUR: Any process under the Act - - -

MR WALLER: Yes. That might - - -

HER HONOUR: - - - for the purposes of part 3 being rendered inapplicable to the forestry operations and the scheduled coupes.

MR WALLER: Yes. Well, if that – that would certainly meet our concern, and it would also – I think it would address your Honour's concern that we not be proscriptive. That will allow into the processes that were available under the Act to be available.

HER HONOUR: That would be the intention that – because, as I say, there are a number of processes.

MR WALLER: Yes.

HER HONOUR: Some of which require political cooperation, but they are all there in the scheme of the Act for a reason, and they are all intended in the circumstances for which they provide to render part 3 inapplicable.

MR WALLER: Yes. So - - -

HER HONOUR: Well, that's nothing more than a proposal, Mr Waller. So I understand that you will need to discuss that and get instructions, but - - -

MR WALLER: Well, certainly we were concerned that any order – and injunctive order which would grow from your Honour's reasons was not one that ..... ourselves of those processes that are available under the Act, and if we can form a – we can put out a form of words that does that perhaps more generally without the need to refer in terms to approval or exemption, we will look at that. We understand what your Honour has said. A general - - -

HER HONOUR: Well, I do have a very sort of – I think I'm going to be hard to dislodge, Mr Waller, on my concern about not using the forestry operations definition that comes from the legislation that the court has been dealing with. Even though I understand all that Victorian legislation is incorporated.

MR WALLER: Yes. And what your Honour has done, though, is to take that definition and to put a gloss on it, and we don't criticise that for the purpose of working out orders that are consistent with your Honour's reasons, but we say that because that gloss includes planning and ..... work, which words are not to be found in that definition – then it does present the problem that we're grappling with here. And we're sure we could circumvent that by going back to a statutory definition that did not include those assets. But we understand your Honour wants to maintain usage of that definition, then we will need a form of words that allows us to maybe clear beyond doubt what we can still do.

HER HONOUR: I'm just – just pardon me a moment, I'm just looking up the RFA Act. I've forgotten where we go. Where do we go from the RFA Forestry Operation?

MS WATSON: Yes, it's just at 715 of your reasons, if that might be an easier place to go.

HER HONOUR: Thank you. Yes, it might be. Thank you.

MR WALLER: And your Honour sees - - -

HER HONOUR: Yes.

MR WALLER: - - - it was the planning and preparatory work, so to speak, was – I said your Honour's gloss. Your Honour regarded that as part and included in the meaning of forest preparation, and that's why it has been ..... - - -

HER HONOUR: Well, did I, Mr Waller, or was that in the concept of action? I think it might have been in the concept of action. That is, it might have been in the section 18 part, I think.

MR WALLER: No.

HER HONOUR: No?

MR WALLER: I think it was when your Honour was dealing with section 38 ..... exemption, if I'm not mistaken. That your Honour developed that, but – because this section is under the heading of The Issues Raised About Section 38, which begins at paragraph 711.

HER HONOUR: Yes.

MR WALLER: And you want to – one of the questions in 713 was:

> *What is the RFA forestry operation which the applicant's pleaded allegations are to be applied?*

And I think it was in this context, dealing with various – the competing submissions of the parties that your Honour came to the view that the ..... - - -

HER HONOUR: Yes. Yes, you might be looking at 719.

MR WALLER: That was the initial - - -

HER HONOUR: Yes.

MR WALLER: - - - outline or - - -

HER HONOUR: Well, Mr Waller, with respect, you might, in a notice of appeal, call it a gloss, but it might not be good advocacy to call it that now.

MR WALLER: That's why I – I apologise for – I didn't mean to use it in a pejorative way, but simply to explain, your Honour, why forestry operation as defined in the orders, in other matters, is at odds, as it were, with the definition in the RFA. There is a difference, and the difference is that it includes those preparatory aspects. And it was the inclusion of those preparatory aspects that led to our concern when it was employed in the injunction, and that's how we got here.

HER HONOUR: So your client doesn't object to seven – so the definition out of the Central Highlands RFA being picked up?

MR WALLER: Well, it wouldn't object to that, but that doesn't, I think, cover – yes. To answer your question, it wouldn't. But whether that's entirely consistent then with your Honour's reasons is another matter. And we've been mindful in, obviously - - -

HER HONOUR: Well, I think it is, because if I reasoned the way that you're describing, and I'm not suggesting I'm disagreeing with you at the moment, because I simply can't remember – whatever – well, let's put it this way. At the moment, VicForests' only concern – and I think this the important issue – is that if it decides you're not telling me – well, I've got no evidence. So we're all in the hypothetical land at the moment. But if it decides that it wants to avail itself of some process that's available under the Act to render the prohibitions in part 3 inapplicable, it doesn't want to – it doesn't want there to be any doubt that the injunction does not prevent it from doing that.

MR WALLER: That's so.

HER HONOUR: And there's no other reason.

MR WALLER: There's no other reason at this stage, no, in relation to the framing of the order as to why we have any difficulty with that language.

HER HONOUR: All right. Then, it seems to me that – circling back, I think, to where we may have been about half an hour ago – that if the carve out in what's the respondent's proposed 17 is clear enough, then that will do the work that VicForests submit that's – submits needs to be done. In – 16 has changed to forestry operations within the definition of the central highlands RFA - - -

MR WALLER: Which - - -

HER HONOUR: - - - and the – the RFA Act. And – it has to be both, doesn't it, really? And then the carve out is along the lines that we discussed.

MR WALLER: Well that would put it beyond doubt. Because the definition in the RFA doesn't, in terms, include the planning parties. So it wouldn't, necessarily, cause us any difficulty.

HER HONOUR: Well, the carve out will put it beyond doubt.

MR WALLER: Indeed.

HER HONOUR: Let's put it that way, Mr Waller.

MR WALLER: I accept that. The carve out would put it beyond doubt.

HER HONOUR: Yes. All right. Well, I'm sorry to have plugged on about that for a little while, that's been very helpful, thank you.

MR WALLER: Yes.

HER HONOUR: We will see what Ms Watson has to say in reply when we get to it.

MR WALLER: Yes. If I could then move to what we say is, really, a fundamental shift that we've heard about today; namely that what is now sought to be the subject of the prohibitory injunction is not just all of the scheduled coupes, but some, if not all, of the logged coupes.

And we apprehended – as, I think, your Honour did – that this was really being done not because prohibitory injunctive relief was seen as necessary in respect of the logged coupes, but to provide a springboard for obtaining orders under 4753; mitigation orders which related not, then, to the scheduled coupes but to the logged coupes, which would then be the subject of the prohibitory injunction.

Now, we will need to develop a more comprehensive answer in writing. But, can I say this, your Honour; that, first the fundamental issue that we see with what was put forward and, to some extent, is still being put forward is that any order under 4753 is described in the legislation as additional and, I think, in your Honour's reasons as ancillary. That is to say, it is not to be seen as the primary order being made, but is additional to the prohibitory injunctive release that's granted on ancillary, as I say your Honour explained it.

Now, in circumstances where all of the scheduled coupes are to be subject of what I've described as conditional injunctive relief because of the carve out that is built into the order, it would be, we think – we say, not ancillary or additional, but frankly inconsistent to then effectively render some of those scheduled coupes as effectively the subject of a permanent injunction for all time and without any exception. Because that would be effect of the mitigation order that's sought; namely that they be excluded from forestry operations conducted by VicForests. Excluded, as I say, without exception and without qualification. And we say that cannot be a proper operation of 475(3), bearing in mind that it is to be additional to or ancillary to 475(2).

Now that, obviously, is the case where the prohibitory injunctive relief relates to the scheduled coupes. Now, what we've heard today is that there's a basis, bearing in

mind the language of 479, to extend the prohibitory injunctive relief beyond the scheduled coupes to the logged coupes. Now, 479 is not a section that your Honour dealt with in your Honour's primary reasons. And these orders, which are to be consistent with your Honour's primary reasons, would need to take account of the fact that your Honour in your reasons – and I'm looking at, for instance, paragraph 1459 of your Honour's reasons – said:

> *I accept – I do accept the thrust of VicForests' contentions about 475(2). I accept the Act intends there to be a correlation between offence or other contravention and the injunctive relief granted. That is apparent from at least two textual matters. First, the use of the phrase "conduct constituting" and, second, the use of the phrase "the conduct" at the end of 475(2).*
>
> *The conduct said to be the contravention is the conduct the court has power to restrain. That is not to say that in certain factual circumstances, the court is limited to granting injunctive relief which precisely correlates with the conduct constituting the contravention; however, the premise of 475(2) is that there must be substantial equivalence before the power arises.*

It is that argument – submission that your Honour accepted which formed the basis of an argument that any injunctive relief had to have the conduct – the contravening conduct plainly in mind, and what appears to be done now is to potentially seek to potentially attack that finding or that approach by reference now to 479.

HER HONOUR: Well, but I didn't say anything about 475(3), did I?

MR WALLER: Yes.

HER HONOUR: Other than the – where did I say that?

MR WALLER: No, your Honour spoke about 475(3) in a slightly different context.

HER HONOUR: But in this part, I'm talking about the scope of 475(2).

MR WALLER: Correct. But it is – it seems that what is being sought in relation to not mitigation, the first stage of the springboard approach, if I can call it that, is first to get prohibitory injunctive relief in respect of the logged coupes. The second stage is once that is done, to seek mitigation orders under 475(3) by reference to logged coupes extending over the scheduled coupes. Looking at the first stage of that argument, extending injunctive relief over the logged coupes, my learned friend ..... 479. And on the basis that – if your Honour just bears with me –

> *that the Federal Court may grant an injunction restraining a person from engaging in the conduct whether or not it appears to the court that the person intends to engage again or continue to engage in conduct of that kind.*

And (b):

Whether or not the person has previously engaged in conduct of that kind.

It is a potential inconsistency in the argument that is being made now to form a basis for prohibitory injunctive relief over the logged coupes, with your Honour's finding that there needs to be a correlation between the conduct the subject of the contravention and the injunctive relief. And we haven't had an opportunity to address 479, and - - -

HER HONOUR: Well, as I said, Mr Waller, I was going to raise it anyway, I'm just having checked whether anybody made any submissions about it at trial, but the only purpose – I thought I had made this clear in the reasons, but the only purpose I said anything about relief was in order to introduce at least one stage of clarity about what would happen next, and I hope – I mean, I intended to make it clear, I thought that's what I was doing at 1464, that I would be listening to submissions about orders.

MR WALLER: That is so, but your Honour did say at 214 that:

> *It is not appropriate in these reasons to make any findings about whether injunctive relief should or should not be granted. However, it is appropriate to make findings about the parties competing construction of section 475(2) as this will assist the parties in discussing and agreeing, if possible, on appropriate orders to reflect the court's reasons. And the availability of injunctive relief and its scope as a matter of law under 475(2) as opposed to whether it should be granted, was a matter fully addressed by the parties and on which the court should express its conclusions at this stage.*

And we would say it's those conclusions which have informed our approach to the final orders and the way they've been expressed, and that what is now being sought to be done, we say, by reference to 479 which we do not believe was the subject of argument - - -

HER HONOUR: Not a single hit, Mr Waller, on anybody's submissions, so unsurprising that I haven't referred to it - - -

MR WALLER: No - - -

HER HONOUR: - - - but we can't ignore it, Mr Waller.

MR WALLER: Well - - -

HER HONOUR: We can't pretend it's not there in the Act. And if I'm wrong in something I've said, because nobody has referred me to section 479, then I should be correcting that in what I'm doing now. We can't ignore it.

MR WALLER: Well, as I say, 479 - - -

HER HONOUR: Are you submitting I should ignore it?

MR WALLER: I'm submitting, your Honour, that it's just another – well, it's unfortunate that it's being raised by my learned friend today. We had no advance notice of it. We need to understand how it fits together with what has occurred so far, and we say that, in any event, it is a device which has been deployed to give a jurisdictional basis to a mitigation order in circumstances where our learned friend, we say, has come to perhaps appreciate the difficulty of seeking a mitigation order either under section 23 or on the basis of injunctive relief only in respect of the schedule coupes. And in those circumstances, we are put at a disadvantage, but it is, we say – well, we say that, your Honour, it's - - -

HER HONOUR: Well, it might not be fair, Mr Waller, for me to ask you too many questions about it, but – because you're, I accept, doing this on the run, and that's undesirable.

MR WALLER: We say, your Honour, that – and I can address your Honour separately on section 23 as to why we say section 23 ought not be a separate jurisdictional basis - - -

HER HONOUR: Maybe, Mr Waller, the best thing is, because I don't want you to be doing things on the run, and I also do always derive assistance from the oral argument as well as the written argument, so we might just have to come back. And if that's what we have to do, that's what we have to do. And if you want to address me on the matters that you came prepared to address me on, then you should do that, and then what I'm minded to do is give each of the parties a chance to put in short additional submissions with the applicant going first so, Mr Waller, you can understand – once and for all, Ms Watson, no more moving around, the applicant's proof to pass master at the end of this proceeding and it's going to come to an end. And then once you see how it's put, you can respond, and then we can come back for another half a day because I'm not really comfortable doing this aspect of it on the papers alone.

MR WALLER: Yes, your Honour. I understand what your Honour has said, and we are certainly at a disadvantage in the way this has developed, and we would seek to cooperate and bring this matter to a conclusion as soon as reasonable possible. With that in mind, let me deal with the matters that I can deal with.

HER HONOUR: Yes.

MR WALLER: The basis on which – I should note that in the applicant's third amended statement of claim, the only basis on which mitigation was to be sought was section 575(3). In the orders proposed, and in the submissions filed, the basis upon which the orders were sought was section 23 and only section 23 until today. Section 23, we say – your Honour, there were two aspects. One is whether jurisdiction is conferred in circumstances where the EPBC Act does deal with mitigation orders in great detail. We say section 23 does not of itself confer jurisdiction. That's plain on the authorities. Your Honour has been taken to Dates and other cases.

And, secondly, that it is other statutes, here the EPBC Act, which confers jurisdiction on the Federal Court by reference also to section 39B of the Judiciary Act. Section 23 empowers the court to make the kinds of orders which it considers are appropriate in the exercise of its jurisdiction, so there are two matters: first, whether jurisdiction is available under section, and secondly, even if it is, whether it is appropriate your Honour can make a mitigation order under section 23. As to the first matter, we say, your Honour, that, notwithstanding section 480, in circumstances where this Act has gone into great detail about the circumstances in which mitigation orders may be made, either at the behest of the Minister or at the behest of a party, under section 475 sub (3), that what has been said in Dates and other cases about the limitations of section 23 nonetheless apply and that - - -

HER HONOUR: Well, does that mean that there is – VicForests submits there's no power, section 23 is not available, it's incompatible with the scheme.

MR WALLER: Yes, our primary submission is that there is no power, that it isn't compatible with the scheme, and that, in those circumstances, if mitigation orders are to be made, they can only be made under section 475(3) or section 480A – not orders, but – yes, 480A, of course, only at the behest of the Minister.

Our secondary submission, your Honour, is that if your Honour is nonetheless of the view that section 480 keeps alive section 23 as a power that it is not appropriate in the language of section 23 if your Honour can make a mitigation order using section 23 because those very detailed powers are contained in the Act itself. And if, for whatever reason, they are not available, not appropriate, the pre-conditions haven't been met, then it would not be appropriate to use the very general language of section 23 to fill that gap. As Bennet J said in Dates, section 23 will not generally be read as giving power to grant official remedies of the kind already specifically provided for in other legislation, which can be seen as a comprehensive statement of the remedies there available.

Now, section 480 doesn't turn its mind to mitigation orders in particular. There may well be other areas that are not covered by the EPBC Act where section 23 might step in. But where mitigation orders are concerned, we say the EPBC Act provides an exhaustive code, an exhaustive statement of what those mitigation order remedies are.

HER HONOUR: Well, an obvious example of the operation of section 480 is the power to grant declaratory relief.

MR WALLER: Yes. And we have not raised this argument as a bar to your Honour making declaratory relief. But that's because the power to make declarations is not referred to in terms of the EPBC Act. But when it comes to mitigation orders, there is chapter and verse. And for that reason we say section 23 ought not be used through a backdoor, as it were, in circumstances where, for whatever reason, those comprehensive provisions cannot lead to an order being made. So it goes – it assists our power argument, and it certainly assists our appropriate orders argument. Both

..... inclusion that if our friends cannot make out their case for mitigation orders under 4753 then there ought not be in any mitigation orders made under section 24.

HER HONOUR: Yes. Well, I understand how that's put.

MR WALLER: And that – so that deals with ..... about mitigation orders. So far as the costs of a separate question are concerned, we rely on our written submissions. We also rely on the written submissions that we filed on 29 March 2018. My learned friend referred to the submissions that the applicant filed. In the end, your Honour, considering those provisions on final orders following your Honour's separate questioned reasons determined to reserve the costs. And it's for that reason that they are being dealt with now. But we nonetheless rely on what we say ..... we would emphasise, your Honour, that costs ordinarily ought follow the event.

The event was a proceeding that had been commenced by the applicant seeking particular relief based on its interpretation of the various instruments. Your Honour's separate questioned reasons found against the applicant and would, in ordinary circumstances, but for a serendipitous from the applicant's point of view, series of events, namely that no defence had been filed thereby giving the applicant the rightful ..... but for that, your Honour has indicated the proceeding would have been dismissed. In those circumstances, ordinarily, the costs, we say, ought to have followed the event. And even though the applicant's particular argument regarding the separate question was not accepted, the result ..... is contending was achieved, namely, that that application would be unsuccessful.

And that reason costs would follow the event. But the fact that it was regarded as public interest ..... we say it does not of itself provide a sufficient basis to justify a departure from the usually order that costs follow the event. And my learned friend, with the benefit of hindsight, can say, well, your Honour should have regard to what has now occurred in dealing with the costs of the separate question we say is not appropriate. And we don't cavil with - - -

HER HONOUR: ..... right, Mr Waller, in a situation where I reserve them?

MR WALLER: Sorry, your Honour?

HER HONOUR: Is that correct in a situation where I expressly reserve them, the parties having made submissions? Is it right? I'm just asking is it right that I can't have regard to what has happened afterwards?

MR WALLER: Well, we say that - - -

HER HONOUR: You usually would, if you reserve costs.

MR WALLER: Yes.

HER HONOUR: You would usually then look at what happens after that's done in the litigation.

MR WALLER: Well, what has happened thereafter demonstrates the – or underlines, as it were, the failed approach the applicant undertook to begin with. It was only when it recast its case completely that it was able to achieve the outcome that it achieved. And in respect of that outcome – of course, we don't cavil with an order for costs – but that success in relation to a completely different case ought not render – ought not, we say, give a loss to what had occurred in the first instance. It's true your Honour reserved those costs, but we say that your Honour ought not take account of what occurred later, except by contrasting it with what occurred and in respect of which the costs would incur.

The applicant decided to commence a proceeding on a particular basis that would have failed – in fact, did fail – and ordinarily another proceeding wold have had to have been commenced. As I say, it was really only through serendipity that they were able to keep the initial proceeding alive. And for that reason we say it ought be the case that – because costs which had been expended in defending an action that your Honour had decided was flawed and would have failed that we have those costs.

HER HONOUR: Yes. Well, I understand how that's put, Mr Waller. Can I just ask both counsel – as you were just making your submissions, Mr Waller, I looked at what the rest of the cost orders the parties were seeking were, and I noticed you've agreed on a taxation in default of agreement. Was there consideration given to lump sum costs order and an agreement that that wouldn't be appropriate? Because taxation can be a bit – and particularly in a matter like this could be enormously expensive and time consuming, and a lump sum process might be preferable.

MR WALLER: Your Honour, because this has been a complex matter, it may well be that we can reach agreement, and we've certainly allowed for agreement in the first instance. But we're concerned that a lump sum approach may be difficult to achieve in circumstances where there could be some ..... that have been undertaken, and in light of that an appropriate lump sum – your Honour would need to be satisfied that the costs were reasonable – it's a complex exercise. It's going to put – however, it's going to require your Honour to get involved in some of ..... of the costs that were incurred in this matter and we - - -

HER HONOUR: Or a registrar can do a lump sum process just as well as a taxation but one is a lot more complicated than the other.

MR WALLER: Well, we have, I think, in my environment case there was a – is an ordinary agreement of taxation defaulted again in that situation. I don't know that we had a lump sum order made in any of the environmental cases of this kind to date. Certainly we have thought of the more traditional approach of agreement failing which taxation which would be dealt with as well by the registrar, we assume is appropriate and we have thought our learned had agreed that - - -

HER HONOUR: Well, it's the same form again, Mr Waller. They're my orders and I'm – you may describe taxation as traditional but not all traditions are good. And that's why the court has moved in a policy sense towards lump sum cost orders and taxation can impose enormous burdens, particularly where there may be a resource imbalance and that is the fact in this case. So I will think about it. Another option is that I simply make orders giving the parties an opportunity to agree costs and if you can't agree costs then I refer you to a registrar and you can make your arguments before the registrar about whether there should be a taxation or a lump sum. In a way that might be better because the registrar will be a lot more familiar than I am with each of the two processes and the merits and can then look at this case and give you probably a much more informed view than I would about which is objectively appropriate.

MR WALLER: Yes. I would agree, your Honour, that that staged approach, where the registrar might make a determination, might be better for reasons your Honour has mentioned. Can I mention one other matter, your Honour, before I conclude.

HER HONOUR: Yes, of course.

MR WALLER: That is that I'm omitted to say that any mitigation orders that are made and indeed any injunction that's granted, we say, ought not prevent VicForests being able to undertake regeneration activities and at the moment if there were to be an injunction in respect of the logged coupes then I think as your Honour mentioned that would potentially, as framed, prevent those regeneration activities being undertaken which regeneration activities, of course, are a benefit on the environment and for the regeneration, obviously, of the forest. So not an issue that would have arisen in relation to the scheduled couples, plainly, because nothing has happened. But if we're to be prevented from doing anything by way of forestry operations in the logged coupes then we don't want that to prevent regeneration activities.

HER HONOUR: Well, what about any further timber harvesting in the logged coupes. You heard the exchange I had with Ms Watson based on my very imperfect recollection about that.

MR WALLER: My understanding, and I can confirm this part, is that there is no further harvesting to be undertaken in any of the logged coupes save for any regeneration activities which are, of course, a mandatory requirement of VicForests and - - -

HER HONOUR: What does that mean again, Mr Waller, just remind me if you wouldn't mind. Is that – it's not just planting. Is it planting?

MR WALLER: ..... – it's – I think it's some burning to effectively unlock the seeds which then - - -

HER HONOUR: Have they not been – have they not had their regeneration burns? Some the coupes? Was that the evidence?

MR WALLER: I would need – yes, I – I have to check the evidence and - - -

HER HONOUR: Yes.

MR WALLER: Yes, it's either burning or manual planting, or potentially manual disturbance. Your Honour might remember where they disturb the land in order to promote regeneration of the seeds. But all of that is – would be characterised as forestry operations, and would need to be carved out.

HER HONOUR: Yes. Yes, well, I understand that. And that's all the more reason why your client needs an opportunity to think about this a bit more, to make sure that there are – nothing else like that that gets left out under the applicant's revised proposal. I agree that's an important consideration. Give me a moment. Well, Mr Waller, what do you submit should be the process from here on?

MR WALLER: Well, we think the applicant ought provide further written submissions and the final form of its proposed orders within seven days. As I say, your Honour, it has been six weeks since your Honour's reasons were delivered, and I imagine Ms Watson didn't make her submissions without thinking about them first today, so they must have given some thought to what they want and why they want it. If they can provide that within seven days and VicForests have - - -

HER HONOUR: Yes.

MR WALLER: We've - - -

HER HONOUR: I just – it reminded – well, it's six weeks, Mr Waller, because the parties asked for some more time.

MR WALLER: That's so. And - - -

HER HONOUR: It's not six weeks because I've waited six weeks.

MR WALLER: No. Absolutely. I – my criticism is directed squarely at the applicant because the applicant asked for more time, and even with the provision of more time changed its position several times, and now has radically changed its position meaning that we can't – we couldn't finalise the matter today. Notwithstanding your Honour would have reserved. If the applicant has seven days we require seven days thereafter, and then it will be a matter for your Honour as to whether your Honour is satisfied based on what your Honour receives that that is enough, or whether your Honour wishes to hear from us further.

HER HONOUR: All right. And do you submit that – well, is it sufficient that I ask the parties to indicate in any further supporting submissions whether they want to be heard orally or not, and I will then take that into account. Again, even if both of you say no I may still want it. It depends on how I'm going with my thinking about it.

MR WALLER: Yes, your Honour. We think that would be appropriate. Certainly, for the reasons your Honour has said, at least we can give an indication, but obviously the ultimate decision is your Honour's and if your Honour would be assisted by hearing us further, or if your Honour has any further questions we will cooperate to satisfy your Honour in that regard. But we would hope that the applicant is able in writing to finally and clearly explain what it wants and why it says it is entitled to those orders. And we can then respond, hopefully clearly as well, and that will provide the assistance your Honour needs.

HER HONOUR: Yes. All right. Thank you, Mr Waller. Is there anything else you want to say?

MR WALLER: No, your Honour.

HER HONOUR: Thank you very much. Ms Watson.

MS WATSON: Your Honour, I have got a few matters in reply, but they could equally be dealt with in the written submissions at some – I'm happy to sort of briefly go through them now, but I anticipate there will be the - - -

HER HONOUR: No. You should do your reply submissions as far as you can now, Ms Watson.

MS WATSON: The first matter was the applicant would embrace the idea of the definition of forestry operations being used in the orders. That is addressed in your Honour's reasons at paragraph 715 to 743. Now, what your Honour there said was that the applicant's case was limited to timber harvesting but also included planning and preparatory conduct. If your Honour wanted to use the definition of forestry operations from the Act or from the RFA, your Honour, the way to address the additional matter of planning and preparatory conduct might be to state that in the declaration. So to use the defined term, forestry preparations, which is defined by reference to the RFA. And then if it's necessary to reflect the reasons, to include planning and preparatory conduct that might be reflected in the declaration rather than in the definition of forestry operations. But that is a matter we can reflect in the proposed orders.

The applicant is content with the reframed proposed order 16 with the proposed carve-outs, and we will reflect that in the revised proposed orders. The submission by the respondent has been that the definition of forestry operations is too unclear. Now, that's a definition that's in legislation and in an RFA pursuant to which VicForests conducts its activities. If that definition is too unclear, that's a problem for VicForests. It's not a problem for this court. That's for VicForests to construe those words in that legislation and in the RFA and to give effect to them. If those words are in the legislation in those documents, this court can make orders by reference to those definitions. What the respondent's submission really amounts to is saying, well, VicForests doesn't know what its obligations are under legislation and under the RFA.

HER HONOUR: Well, I think to be fair, Ms Watson, Mr Waller did make it pretty clear that the only – there's no overarching concern by VicForests about the scope of the injunction if the RFA definition is used. The only concern is about that it not impede VicForests from taking any steps it is entitled to take so that the part 3 prohibition is not applicable.

MS WATSON: Well, in that respect, your Honour, we are content with the revised proposed – I think it's order 16 that your Honour suggested and will reflect that in the revised proposed orders.

Your Honour, we think it's – I'm not going to address this at any length, but plainly, there was nothing in the reasons about 475 sub (3). Your Honour hasn't been addressed on that. Your Honour hasn't been addressed on prior to today and your Honour hasn't been addressed on 479 prior to today and, in my submission, your Honour is of course – it's incumbent upon your Honour, of course, to take those matters into account in delivering reasons in relation to the orders that your Honour will seek to make, and that's entirely appropriate, so the applicant would resist any suggestion that those matters were canvassed in your Honour's reasons or otherwise confined by your Honour's reasons.

The applicant is content to – or would embrace putting in further written submissions with the seven-day timetable and revised proposed orders. We will seek further instructions about regeneration and ..... in those matters and address those in the written submissions. And finally, your Honour, the applicant would embrace a lump sum order. Now, if the parties are given some time to seek to agree that, that would seem appropriate. And the applicant would also embrace it being referred off to a registrar to be supervised by a registrar and – but would press that that referral be for the basis of a lump sum agreement and not for the taxing of costs. The applicant would press for the orders to be in the nature of a lump sum order process.

HER HONOUR: Why?

MS WATSON: Because of the prohibitive cost nature of taxation, your Honour. It's – I imagine we would need to put on some evidence, your Honour, but it's plainly a difficult process for the applicants, given the resources of the applicant, to go through the taxation process when that process can be achieved readily through a lump sum agreement. The costs of the proceeding, particularly given that the applicant's solicitors are not a large law firm, there's a limited number of people who have been working on this case, there's a limited number of solicitors, there's a limited number of counsel, there's a limited number of experts, really, it shouldn't be so complex that it can't be determined by a lump sum agreement. It would seem to be an inordinate waste of resources for it to be referred off for taxation now that those matters have been identified. So we would press for a lump sum order or a process seeking such an order.

HER HONOUR: Yes. Thank you. Is that all by way of reply?

MS WATSON: That's all by way of reply, your Honour.

HER HONOUR: Thank you. All right. Well, then, the orders I will make are that the applicant is to provide final proposed orders and supporting submissions by 4 pm on 15 July 2020, including indicating whether the applicant seeks to make further oral submissions; and that the respondent is to provide proposed final orders and supporting submissions on or before 4 pm on 22 July 2020, including indicating whether it seeks to make further oral submissions. Does that cover – is that sufficient?

MR WALLER: Yes, your Honour.

MS WATSON: Yes, your Honour.

HER HONOUR: All right. Well – and as soon – well, I will endeavour shortly after 22 July when those submissions come in to let the parties know promptly. If there is to be another short hearing, I will ensure it happens promptly after those submissions and – because I am conscious that the orders need to be made. And yes, the parties will be informed if it's going to require further hearing. The court is grateful to counsel for their submissions, as always. You both have been very helpful and responsive. Thank you very much. The court will adjourn.

MATTER ADJOURNED at 12.43 pm INDEFINITELY