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TRANSCRIPT OF PROCEEDINGS

O/N H-1450933

FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES REGISTRY

JAGOT J
GRIFFITHS J
S C DERRINGTON J

No. VID 615 of 2020

VICFORESTS

and

FRIENDS OF LEADBEATER'S POSSUM INC

SYDNEY

10.32 AM, MONDAY, 12 APRIL 2021

MR I.G. WALLER QC appears with MR H.L. REDD and MS R.V. HOWE for the appellant
MR J. KIRK QC appears with MS J. WATSON for the respondent

MR I.G. WALLER QC: May it please the court. I appear with Mr Hamish Redd and Ms Rebecca Howe for the appellants.

MR J. KIRK QC: May it please the court. I appear with my learned friend Ms Watson .....

MR WALLER: Your Honours, we have prepared a summary of submissions of three pages, as requested by the court. May we hand that up? We have copies for our learned friends.

GRIFFITHS J: Thank you.

MR WALLER: Now, your Honours will see in the footnote that we are no longer pressing ..... the court and our learned friends that we are not pressing grounds 12, 16, and 19, and we have just now informed our learned friends that we are not pressing grounds 17, 22, 26, 27, and 28.

JAGOT J: All right. Now, I can see that you've made clear in paragraph 2 that ground 1 .....

MR WALLER: Yes, it is. Yes. That's a matter of course for your Honours. I did speak to my learned friend about the way in which your Honours wished to proceed generally, whether your Honours wished to hear from each of us ground by ground, or whether you wished to hear from the parties in respect of all grounds. We are in your Honours' hands. But we would say, your Honours, that ground 1 is dispositive, and ground 2, we say, is also dispositive in a manner that I can explain. Those grounds, we say ..... we say necessarily mean that the orders below would be set aside, and the orders sought in our notice of appeal ought be made.

JAGOT J: ..... paragraph 4, therefore all other grounds ..... consideration with the exception of, etcetera. That's – if ground 1 is upheld, then there are no other grounds that are potentially ..... every ground - - -

MR WALLER: Yes, it does.

JAGOT J: So it's in ground 2 – your argument on ground 2 as accepted, it's not wholly dispositive - - -

MR WALLER: There are two limbs, if I may say, in respect of ground 2. If ground 2 is upheld - - -

JAGOT J: And ground 1 not.

MR WALLER: Yes. That's right. If ground 1 is rejected, but ground 2 is upheld on the basis that the 2014 code is not referred to nor comprehended by the Central Highland Regional Forest Agreement, we say that, likewise, would have the effect of

the appeal being allowed. If ground 2 is upheld on the basis that even if the 2014 code is comprehended, but that noncompliance with clause 2.2.2.2 within that code ought not result in a loss of the exemption under section 38, then that would still leave for determination our grounds concerning what are described as the miscellaneous coupes, which rely on other clauses in the 2014 code.

So if your Honours – my learned friend mentioned that he wanted to raise the issue of our ability to rely on three documents, which we've included in part C. They are documents number 823, 828, and 829. 823 is the 1996 Code, which is referred to explicitly in the Central Highlands RFA of 1998. Document 828 is the 2007 Code, which we say came into force following the revocation of the 1996 Code. And document 829 is the 2020 amendment to the original Forest Agreement, which came into effect in March 2020, after the trial had been heard, but before judgment had been delivered.

Your Honours, we seek to rely on those documents for the following reasons: both the 1996 Code and the 2007 Code are referred to in the special question – separate question reasons as we describe them. Their relevance should also be apparent from paragraph 9 of our reply submissions, where they are referred to. We also refer, in that paragraph of our reply submissions, to the 2020 variation to the Central Highlands RFA.

In Forestry Tasmania v Brown, at paragraph 90, the court there dealt with an amendment to the Tasmanian RFA that had taken place after the trial, and there was a question raised about whether leave was required by either party to rely on it. At paragraph 90, the Full Court held that neither party required leave to rely on that amendment, and the Full Court, in fact, was obliged, in their words, obliged to take that document into account.

So far as the 1996 Code and the 2007 Code are concerned, we rely on section 143 of the Commonwealth Evidence Act, which allows the Full Court – any court, including the Full Court, without proof, to take judicial notice of the Codes as instruments of the legislative character. We don't rely on any specific provisions of either of those codes, but on the fact that both of them have been revoked, and that the 2007 Code and the 2014 Code were neither amendments nor consolidations of the 1996 Code, and for that reason, not comprehended by it.

We rely, in this regard, on the decision of the Full Court – of this court in Attorney General of the Commonwealth v Foster, the court comprising Von Doussa, O'Lachlan, and Mansfield JJ. Notice of this case was given to our learned friends this morning, and I was going to hand to your Honours a copy of it and a copy to my learned friend.

GRIFFITHS J: Why are you dealing with this? I understood that there's an objection that has been raised by Mr Kirk's side. Shouldn't we be hearing what the basis for the objection is first?

MR WALLER: That's probably right, your Honour. I - - -

GRIFFITHS J: Well, everything is a bit mixed up here, because I would have thought Mr Kirk would be over there, but in any event, you are the appellant, aren't you?

MR WALLER: We are. Yes, your Honour.

GRIFFITHS J: Yes. Well, I think we should hear - - -

MR WALLER: If your Honour pleases.

GRIFFITHS J: - - - from Mr Kirk on what the basis for the objection is.

MR WALLER: If your Honour pleases.

MR KIRK: Everyone sat down before I got here, so the Melburnians won the seating arrangements. To deal directly with the objection, in light of what my learned friend has said about the '96 code and the 2007 – and he relies on them effectively as legislative instruments and only – I think he said words to the effect – just to – not for anything specific, but to show that they had been revoked, and the 2014 Code is now the one in operation, so put as legislative instruments, and on that limited basis, the issue falls away. We don't object with your Honours having that.

GRIFFITHS J: Gee whiz. Saved a bit of time.

MR KIRK: In relation to the document which I think is either 828 or 829, but in any event, it's the amended version of the Central Highlands RFA, it's true, as my learned friend correctly says, that at paragraph 90 of Forestry Tasmania v Brown – and there's a similar issue about, I think, an amended version of the RFA or such like, and an issue came up about whether it could be brought before the court, and the Full Court said, at 90, yes, it can. It's new evidence, in effect, because it hadn't existed at the time of the hearing, so it can be brought before the court. And we don't dispute that it could be provided on that basis. But the court then said, as my friend correctly said:

> *Neither party required leave to rely on the amendments to the RAF, but the court is obliged to take them into account.*

With great respect, that appears a rather overstatement. There's no reason the court is obliged to take them into account. It's an appeal by way of rehearing but determining the issues presented to the court for argument. Our core concern about this document is that there are some significant amendments that have been made in the 2020 RFA, but no argument has been addressed to any significance of those. And so lest we suddenly find ourselves having to deal with a whole lot of new arguments which have not been the subject of any written notice in advance, that's why we're rather wary of it, with respect. And the timing is not unimportant here.

The amended version of the RFA, I'm instructed, was made on or about 30 March last year.

That was after, as my friend correctly said, the main hearing before Mortimer J. Her Honour delivered her liability reasons on 28 May last year, and then, of course, the relief judgment was not till 21 August last year. There was further argument, written and oral submissions, and as I understand it, nothing was made in the course of arguing about relief that any particular reliance should be placed on the amendments made in March 2020. So it could have been argued below, at least at the relief stage – or an application made to reopen. No such application was made. I don't think that's how my friends are seeking to deal with it, but we're just wary, particularly lest the matter go further, etcetera, that suddenly this document is in play which no one has addressed arguments to; hence the nature of the objection.

MR WALLER: The limited use that we're seeking to make of the 2020 amendment to the RFA, your Honours, is that it for the first time explicitly refers to the 2014 Code and also, in clause 3 of the RFA, it broadens the ambit of further replacements or re-enactments to the Code, words that did not appear in the 1998 RFA, and we say by distinction or by reference to that distinction it's plain that the 1998 RFA did not comprehend and could not comprehend the 2014 Code.

JAGOT J: We're happy to take it into evidence on that limited – confined to that limited basis.

MR WALLER: If your Honour pleases.

MR KIRK: Please the court.

JAGOT J: So we have those, do we, electronically?

MR WALLER: Yes. They are in part C. They are documents 823, 828 and 829. Your Honours, the decision under appeal was significant, because it was only the second Federal Court decision that imposed Commonwealth environmental protection law on a state ..... harvesting entity since the introduction of the RFA process in the late 1990s. The first such decision occurred in Brown v Forestry Tasmania in 2006, and that decision was reversed by the Full Federal Court the following year. I will return to that decision in due course.

Our first ground of appeal and principal ground of appeal focuses on the proper construction of section 38(1) of the EPBC Act, if I may so describe it, and section 6(4) of the RFA Act, which are in almost identical terms. In particular, your Honours, we submit that the primary judge erred in holding – at paragraph 155 and paragraphs 193 to 272 of the separate question reasons, which her Honour incorporated in the principal reasons at paragraphs 4 and paragraph 106 – that the actual conduct of forestry operations must be undertaken in accordance with the contents of the Central Highlands Regional Forest Agreement. That is, so she continued, in compliance with any restrictions, limits, prescriptions and the contents

of the 2014 Code of Practice for Timber Production 2014 in order to secure the benefit of the exemption in section 38(1) of the EPBC Act.

Those words are drawn verbatim from paragraph 155 of the separate question reasons. We subject the primary judge ought to have held that on the proper construction of section 38, subsection (1) of the EPBC Act, and section 6, subsection (4) of the RFA Act, any forestry operations that are forestry operations as defined by an RFA in force on 1 September 2001 and are conducted in relation to land in a region covered by that RFA, being land where those operations are not prohibited by that RFA, and which are undertaken pursuant to or under cover of an RFA, are exempt from the operation of Part 3 of the EPBC Act.

JAGOT J: I don't want to interrupt, but I thought we should just let Mr Kirk know we would like to hear him on ground 1 straight after you on ground 1 – or perhaps ground 1 and 2.

GRIFFITHS J: Perhaps – yes. I don't mind. I'm quite happy for 2 to be included.

JAGOT J: Well, maybe ground 1 and 2, and then we will hear Mr Kirk, and then we can hear the rest of it.

MR WALLER: Your Honours please.

JAGOT J: Okay. I just wanted to give Mr Kirk some advanced notice.

MR KIRK: I anticipated that was a possibility, so I'm not blanching, your Honour.

JAGOT J: Okay.

MR WALLER: Your Honours, this ground plainly raises questions of statutory interpretation. Let me therefore immediately emphasise some relevant principles of statutory construction which are well known to your Honours, some of which were cited by the primary judge but we say in some respects not properly applied by her in her separate question reasons, at paragraphs 44 to 46. The separate question reasons can be found the part A documents at tab 12 and at paragraph 44. Under the heading Making Constructional Choices, her Honour said the parties need ..... and your Honours would recall that both the Commonwealth and the State of Victoria intervened in respect of this hearing on the separate question.

GRIFFITHS J: Why aren't they parties to the appeal?

MR WALLER: They chose not to participate, your Honour. They had notice of the appeal and, indeed, the notice of appeal, and that ..... mentioned before the directions hearing before Justice Jagot when arrangements were being made for the filing of submissions and the like, and they gave indication that neither of them wished to take part in this appeal.

GRIFFITHS J: Yes.

MR WALLER: And her Honour goes on to say, in the end, the text, context, and purpose of the EPBC Act and, in a more restrictive way, the RFA Act ..... choice to be made by the court. Her Honour then cited the decision of the High Court in Esso Australia, which I will more beyond. At paragraph 45, her Honour then referred to the High Court decision in SZTAL.

That decision can be found in part A, Cases, tab 20A, and it might be better to go there, because her Honour's judgment ..... in the relevant footnotes. It's part A, Cases, tab 20A. Her Honour went immediately to paragraph 14 of that decision, a paragraph of that case which is cited frequently, and her Honour said ..... that paragraph, I should say, paragraph 14, says the starting point – and this was the decision of the plurality in that case:

> *The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute, whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage, and not at some later stage, and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of the word, namely, how it's ordinarily understood in discourse to the process of construction. Considerations of context and purpose simply recognise, but understood in its statutory, historical, or other context, some other meaning of the word may be suggested, and so, too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.*

GRIFFITHS J: No.

MR WALLER: Her Honour then went to Gagler Js decision in that case, noting that he was in dissent but not on the principles of statutory construction. Her Honour began looking at Gagler J - - -

JAGOT J: Sorry, I don't mean to interrupt ..... can take it that we're familiar with ..... so it would be more a matter of how they apply in the particular context of this – so it would help us, I think, more ..... statutes in question, and the context in question.

MR WALLER: Thank you, your Honour.

GRIFFITHS J: And while we have a pause, can I just say I would be more – speaking entirely for myself, I would be more greatly assisted if you could do what I thought you were going to do when we asked you to provide the three-page hand-up summary of your case, which is notable for not saying anything about the content of ground 1 at all, other than to confirm that if it is upheld, it is dispositive of the rest of the appeal, which was very helpful to have at that confirmation, because I don't think that that point was made so clear in your written submissions. But I would be more greatly assisted, if I may say so, if you could just step back for a moment and give

me a macro view of what you say is the proper construction of ground 1, and why her Honour erred in her construction.

MR WALLER: Her Honour erred in her construction because, first of all, her Honour discounted to a very large extent the extrinsic material that's relevant to the provision. Particularly when one has regard to what Allsop CJ said recently in CFMMU, which we refer to in our submissions, and which can be found in part A, Cases, at tab 20A, where the Chief Justice made it clear that context includes purpose, and secondly, his Honour said that ..... relevant considerations of context include secondary material.

What her Honour did, and we say erroneously, was to go through the exercise of statutory construction, and then, after that had been done, as a second exercise, look at the extrinsic material, which she said confirmed the construction that she had arrived at. And we say that that was an error. She ought to have considered closely the extrinsic material as part of the exercise of construction.

That is – that that is the way to approach it, we say, is made clear by a more recent decision of the Full Court in CPB Contractors v CFMEU, which is in part A, Cases, tab 7A, where O'Callaghan and Wheeler JJ had – with whom Flick J agreed – considered the use that could be made of extrinsic material in construing a statute, and said, at paragraph 60 of that decision, that it's permissible to have regard to extrinsic material in order to identify the context and purpose of a statutory provision, including the identification of any mischief to which the legislative amendment was directed, and that the examination of extrinsic material for that purpose may occur at the first stage.

JAGOT J: ..... this is orthodox ..... not really going to get ..... what is relevant to ..... issue is that what is it – what are the factors, what are the circumstances .....

MR WALLER: Well, we obviously - - -

JAGOT J: It's not that she discounted ..... she reached a different view about .....

MR WALLER: Well, we say that if her Honour had given consideration t o more than a paragraph of either explanatory memorandum in respect of each Act, she would have seen clearly the purpose for which those Acts were being enacted, and more particularly, section 38, or section 6, subsection 4.

JAGOT J: Are you going to take us to .....

MR WALLER: Yes.

DERRINGTON J: So what – I would like you to focus on exactly what you say the purpose of 38 and section 6(4) were in the context of this regime, particularly having regard to the fact that section 38 seems to exclude matters from part 3, and how this all works together.

MR WALLER: Yes. As your Honour notes, the language of section 38 differs from the language of the other ..... in that part. It excludes from operation of part 3 generally, whereas the other provisions simply say that approval is not required. The matter that the Full Court, in Wilderness Society v Turnbull, noted and described as a general ..... we say section 38 operates as a general exemption.

The only exceptions to the general exemption in section 38, we say, are those three exemptions or exceptions that are set out in section 42. But what her Honour did was to say that section 38 ..... exceptions, exceptions where if there's some noncompliance with any restriction referred to in the RFA, whether expressly or by implication, that that renders section 38 inapplicable.

We say that that cuts across the purpose – one of the central purposes of the EPBC Act, which was to avoid duplication, and to have the Commonwealth focus only on matters of national environmental significance. However, on her Honour's construction of section 38, the minister, under the Act, will be required first to determine whether the exception – the exemption in section 38 applies, and in order to do that, the minister needs to – on her Honour's judgment will need to determine whether or not there has been noncompliance with a Code provision, for instance, and in that way, we have the Commonwealth, through its minister, performing a task that the State regime was geared to perform.

It's the very duplication which the purpose of the EPBC Act was said to avoid, which is referred to in the explanatory memorandum, and I will come to, and it's – and referred to explicitly in section 3, subsection 2 of the EPBC Act, which states how the purposes of that Act are to be applied. Her Honour therefore, we say, ignored that central purpose of the EPBC Act. Her Honour treated the only relevant purpose of the EPBC Act as being environment protection, and obviously it's the Environment Protection and Biodiversity Conservation Act; however, when one has regard to the objects of the Act, which are set out in section 3, one sees that they include in subsection (b) then promotion of ecologically-sustainable development. Her Honour did not have regard to section 3A of the Act in her judgment, and section 3A of the Act deals with the principles of ecologically-sustainable development and states them as including:

> *Decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations.*

So we say her Honour looked at section 38 through the very narrow prism only of environmental conservation and discounted or ignored the fact that the objects of the Act are not singular, and when it came to the RFA Act, we say that occurred even to a larger extent, because the objects of the RFA Act plainly are to support the RFA regime which of itself involves a balancing between interests of conservation on the one hand and interests of the timber industry and the economic aspects associated with it on the other. So we say that her Honour's approach to the statutory construction so far as she relied on the issue of purpose were too narrowly focused on environment protection to the exclusion of everything else.

GRIFFITHS J: Well, I would have thought that at the forefront of your argument that you would be saying, wouldn't you not, that the primary judge failed to give effect to those objects of the Act in section 3(1) and (2) which refer to cooperation between governments?

MR WALLER: I'm coming to that, your Honour. That is so. Section (d) of section 3, as your Honour has noted – to promote cooperative approach to the protection and management of the environment, involving governments. And subsection (d) – to assist in the cooperative implementation of Australia's international environmental responsibilities. And subsection (2) of section 3, as I mentioned, says that these objects are to be facilitated by, among other things, a focus on intergovernmental cooperation that minimises duplication through bilateral agreements and promotes a partnership approach to environmental protection.

When one has regard to the explanatory memorandum that preceded the enactment of this Act, one sees set out explicitly the difficulties that ..... had applied in relation to there being a lack of clarity between that which the Commonwealth was involved in and that which the states were involved in and the fact that the Commonwealth was involved in matters that ought to be the province of the State. And we say that her Honour's judgment, rather than giving effect to the purpose, effectively reinforces the very mischief that the Act was designed to avoid, because it replicates or introduces this notion of duplication between the Commonwealth and the State, as I said earlier.

DERRINGTON J: Is it just duplication, or, if her Honour's construction is correct, do we ever get to the Commonwealth position, or do we ever to the – I'm sorry – do we ever get to the state position? Is one system not rendered redundant?

MR WALLER: Yes. It is – it may well be that if her Honour's decision is correct and the gateway to section 38 is whether or not the state regime has been complied with and that the Commonwealth, through the minister, therefore has to determine that issue, that it would not only be a duplication but possibly render the state system redundant. It may not stop people seeking to access the state system, but it would lead to great uncertainty as to which system is actually to apply.

And what was interesting or perhaps significant about this case is that it was, as I see it, only the second time where the Commonwealth legislation had been sought to be available by an applicant whereas in the past in cases like Brown Mountain and MyEnvironment it was the state system that was resorted to, and there was no suggestion that the state system didn't have the mechanism to afford the necessary protection. Injunctions were granted in those cases in some respects. But what happened here – the quantum shift here was that on the basis that the state system had not been complied with, resort was now had to a federal system, which federal system was always designed to be more specifically focused on matters of national significance.

Now, whether or not a particular geebung in a coupe in the Central Highlands has been torn down – whatever might be said of it, we would say it's not a matter of national environmental significance, and yet if her Honour's judgment is correct it would rob VicForests of the exemption it would otherwise enjoy and leave all of its operations open to scrutiny under the Act, and we say that this would not only undermine the purpose of the Act, which was to avoid duplication, but it would potentially tie up the entire process with the Commonwealth dealing with potentially a huge number of matters of state law, and it would lead to delays and inconvenience, all the matters that the explanatory memorandum to the EPBC Act said the Act was designed to avoid. If I could move, your Honours, to - - -

GRIFFITHS J: I'm not quite sure that I understand why you're emphasising the role of the Commonwealth minister in respect of what you have just described. This was not a judicial review case of any Commonwealth ministerial decision. This was a decision taken by the primary judge involving findings of fact made by her in response to the nature of the relief that was being sought, namely, declaratory and injunctive relief. What has the Commonwealth minister got to do with your argument?

MR WALLER: The reason I mention that, your Honour, is because under the ..... of the Act, if the primary judge's construction of section 38 is correct, then, pursuant to section 68, subsection (1) of the Act, VicForests must refer in future any proposal to undertake forestry operations in the Central Highlands which it thinks is or may be a controlled action to the minister to decide whether or not the action is a controlled action, and even if VicForests thinks its proposed forestry operations are not a controlled action, then under section 68, subsection (2) of the Act, it may refer such a proposal to the minister for decision.

Now, in deciding whether or not the proposed forestry operation is a controlled action, the minister under the Act would first need to determine whether section 38 exempts the proposed forestry operation from Part 3, and that would necessarily involve the minister considering the application of Victorian law before any consideration of matters of national environmental significance. So although the way in which the decision reached her Honour did not involve the intervention of the minister, if her Honour's decision is correct and stands as the law, then in future VicForests and any state timbering harvesting authority across Australia will need to invoke the provisions of this Act and seek approval for a minister to determine whether or not the exemption applies.

And we say that that cannot be what was intended where the Act was designed to minimise duplication. Section 10 of the Act, we say, importantly provides that unless a contrary intention appears, the EPBC Act does not exclude or limit the concurrent operation of state law. And we say that is important, because, as Justice Derrington perhaps alluded to, the Victorian Central Highlands region is regulated by a complex suite of state legislation, legislation which was invoked in other regions of Victoria, as I say, in the case of Brown Mountain and in the case of MyEnvironment and in other litigation that has been before the Victorian Supreme Court. Chapter 2

of the Act sets out provisions with respect to the protection of the environment, and it provides a basis for the minister to decide whether an action has, will, or is likely to have a significant impact on certain aspects of the environment. Yes.

GRIFFITHS J: Section 68, to which you referred in answering my question – and I'm grateful for your answer. Section 68's not included in your list of authorities. Is it? Where?

MR WALLER: Yes, we have included it. In the - - -

GRIFFITHS J: Is it in some supplementary - - -

MR WALLER: 27A. Yes, it's - - -

GRIFFITHS J: I beg your pardon?

MR WALLER: 27A. It's a supplementary - - -

GRIFFITHS J: No, no, I understand that. I've got the Act – I've got – in fact, there's two lots of the EPBC Act in behind tab 27. I'm saying if you look at the – if you look at your list of authorities, the actual index to it, under legislation, you've got the EPBC Act behind tab 27. I can't see any reference there specifically to section 68. That's my point. But you had it as quite an important provision.

MR WALLER: It is, and I apologise if it's not there. We referred to it explicitly in our written submissions, so it ought to have been referred to.

GRIFFITHS J: All right. Okay. Thank you.

MR WALLER: Par 3 in chapter 2 of the Act, and if we have the Act up, your Honours will see that part – chapter 2 of the Act is described under the heading Protecting the Environment. Part 2 of the Act is a single section providing a simplified outline of the chapter. And part 3 is headed Requirements for Environmental Approvals. Within part 3, there are two divisions.

The first division relates to requirements relating to matters of national environmental significance, and the second, protection of the environment from proposals involving the Commonwealth. Within division 1, there are 10 – there are 13 subdivisions, and the first 10, that is, subdivisions A to G, list matters of environmental significance. The remaining three deal with other miscellaneous matters.

Within part 3, the relevant subdivision for the purposes of this proceeding were subdivision C, which dealt with listed threatened species and communities, comprising sections 18, 18A, and 19. And 18 provides that a person must not take an action that has or will have a significant impact on a listed threatened species included in the extinct in the wild category, or is likely to have a significant impact

on a listed threatened species included in the extinct in the wild category. And then, other parts of section 18 deal with other categories of endangered species.

Section 18A provides, relevantly, when a person commits an offence, if an action is taken and the action results or will result in a significant impact on a species or the species is – and the species, I should say, is a listed threatened species. So it renders a breach of section 18 as a criminal offence, and section 19 provides that certain actions relating to listed threatened species are not prohibited.

It provides that a subsection of section 18 or section 18A relating to a listed threatened species does not apply to an action if an approval of the taking of the action by the person is in operation under part 9. And in subsection 3, it provides that a subsection of section 18 or section 18A does not apply to an action if part 4 lets the person take the action without an approval under part 9 for the purposes of that subsection.

Part 4 is the critical part of the Act for our purposes. It is the part that contains within it division 4 and section 38, to which I will come. An action is relevantly defined in section 523. I don't need to take your Honours to that at the moment. Part 4 of chapter 2, as I mentioned, provides for the cases where – in which environmental ..... are not needed. And these include actions covered by bilateral agreements, or actions covered by ministerial declarations, actions covered by regional plans, actions covered by conservation agreements, and for our purposes, most relevantly, forestry operations in certain regions.

JAGOT J: Sorry, what section are you in now?

MR WALLER: I'm in – it's an overview, your Honour, of part 4 - - -

JAGOT J: No, I know, but what – the last thing that you've just said, what section - - -

MR WALLER: That was section 38.

JAGOT J: That's 38 itself. Okay.

MR WALLER: Yes.

JAGOT J: So you're not ..... to the earlier - - -

MR WALLER: I will ..... What's clear from a review of part 4 is that the Act provides seven separate categories where an action can be undertaken by a person without attracting either a civil or a criminal penalty, or an injunction. And we say that section 38 stands apart from the other six divisions in a number of important respects. In this regard, if your Honours could go to section 38, your Honours will see that it states that part 3 does not apply to an RFA forestry operation that is undertaken in accordance with an RFA.

The expressions "RFA forestry operation" and "RFA" are defined terms. The definitions are set out in section 4 of the RFA Act, and I will come back to how the section operates when those definitions are inserted, but for now, your Honours, I would draw attention to the fact that the indefinite article is used in the second last word of that section. That is to say:

> *Part 3 does not apply to an RFA forestry operation that is undertaken in accordance with an RFA.*

It doesn't say a particular or the particular RFA. It talks about an RFA, that is to say, an agreement between the Commonwealth and the State which meets certain preconditions, as per the definition in section 4 of the RFA Act. If your Honours could look at section 29, which is the first division in part 4, your Honours will see that, relevantly, that provision provides that an action declared by bilateral agreement not to require approval under part 9, because it has been approved in accordance with a bilaterally accredited management arrangement or a bilaterally accredited authorisation process, and the action is taken in accordance with the bilaterally accredited management arrangement or bilaterally accredited authorisation process.

What section 29 makes clear is that there needs first to be a bilateral agreement, and within that bilateral agreement, or under that bilateral agreement, there is then a specific bilaterally accredited management arrangement, or a specific bilaterally accredited authorisation process. And the exemption applies here only where the action is taken in accordance with that specific bilaterally accredited management arrangement, or that specific bilaterally accredited authorisation process. The use off the definite article, we say, is important.

Similarly, in the next division, division 2, which begins relevantly at section 32, there the exception applies where an action is declared by the minister not to require approval under part 9 because it has been approved in accordance with an accredited management arrangement or an accredited authorisation process, and the action is taken in accordance with the accredited management arrangement or accredited authorisation process. Again, we emphasise the use of the definite article in section 32. The next division, division 3, begins relevantly at section 37, and it provides, relevantly, that an action will note require approval where it's an action declared by the Minister not to require approval under part 9 because the taking of the action is in accordance with a particular, we would say, regional plan, and the action is taken in accordance with the plan.

DERRINGTON J: So, Mr Waller, are you saying that the use of the indefinite article in section 38 does not refer back to the list of RFAs as defined in section 4 of the RFA Act?

MR WALLER: What I'm saying, your Honour, is that it is the cover of the RFA process generally that gives the basis for the objection under section 38, not the fact that any specific RFA is referred to, let alone the prescriptions that might be referred to either expressly or indirectly in that RFA.

DERRINGTON J: So this doesn't refer back to an RFA – a Victorian RFA as defined in section 4 of the RFA Act?

MR WALLER: It's referring generally to an agreement between the state and the Commonwealth, but it is not relevant, we say, for the operation of section 38 that one has any regard to any particular RFA, let alone the clauses within the RFA for the exemption to apply. And we say the court is made even more clearly by division 3A, which begins, relevantly, at section 37N where the exception applies where the action is declared in the conservation agreement not to require approval under part 9 because the taking of the action is in accordance with a particular – by regional plan, and we emphasise the following words:

> *The action is taken in accordance with the conditions if any specified in the declaration.*

So where the legislature wanted to be specific about what had to be done to have the benefit of an exemption, and where what had to be done was compliance with conditions in a specified instrument, the legislature said so, especially in section 37N. Now, her Honour, in her Honour's judgment, went through these various provisions. Her Honour did not refer to the text at section 37N, for instance, or, indeed, nor did her Honour refer to the differences between the definite and indefinite article. Indeed, what her Honour was said was that the language in all of these definitions was, in her words, uniform. Her Honour said that - - -

JAGOT J: Well, in once sense it is, because – I mean, in my mind, this whole indefinite definite doesn't go anywhere at the moment, but I don't think your argument depends on it in any event. But it's defined to – so when it says an RFA, you have to read into it the defined term in 2, which ends up being equivalent to the RFA. Now, I just – I mean, I don't see anything, myself, turning on any of this.

MR WALLER: Well, I'm grateful for your Honour's indication, but we say that if the legislature wanted to condition the exemption on strict compliance with the conditions or prescriptions – matters of that kind, as her Honour did, then they did it in section 37N. They could have done it in respect of section 38. There are two aspects, there. There's the definite indefinite, but there's also the addition of the words, in 37N, of:

> *In accordance with the conditions specified in the declaration.*

JAGOT J: Either that's different:

> *In accordance with the conditions, if any, specified.*

But not the "the".

MR WALLER: Yes.

JAGOT J: The "the" doesn't seem to me to go anywhere.

MR WALLER: No. I - - -

JAGOT J: That's just for my own part, anyway. I just don't see anything turning on an an and a the when you've got a defined term.

MR WALLER: Well - - -

JAGOT J: But, certainly, the substance of the "in accordance with" – one is in accordance with the conditions, others are in accordance with the plan or the declaration or things like this, and you would think that in accordance with is consistent throughout the – this part of the legislation. You would think that you should give it a consistent meaning. That I would accept.

MR WALLER: Except this, your Honour, that the history of the insertion of section 38 is ..... unusual. The Act inserted section 38 in a different form when it was enacted in 1999. It referred to – and her Honour dealt with that in her judgment. The language was expressed as – she dealt with this at paragraph 97 of her separate question ..... where she says – 99, I should say:

> *It's worthwhile noting two matters about the original 38.*

So 38, when it first came in, if we go back to 97 – so it might be earlier, 96. When it first came in, it was expressed as:

> *A person may undertake RFA forestry operations without approval under part 9 for the purposes of a provision of part 3 if they're undertaken in accordance with the regional forest agreement.*

Then, in subsection 2, it referred to the definitions as having the same meaning as in the Regional Forest Agreement Act in 1999. Now, that Act was never enacted. So there was an anomaly whereby the cross-reference to those terms didn't go anywhere. When section 38 was reintroduced in the RFA Act, the language changed, and we say it changed so as to be expressed as a general exception. It no longer talked about a person A. It was – it didn't refer to part 9. It only referred to part 3. It gave, we say, a general exemption to RFA forestry operations. And for that reason, given the legislative history, we say that section 38 can be regarded as sort of generous in a sense that it wasn't introduced at the same time as all of its companion provisions.

But the extrinsic material – that is to say, the explanatory memorandum, the environment protection and biodiversity conservation bill makes it clear in numerous paragraphs throughout the explanatory memorandum that forestry operations covered by the regional forest agreement process do not need approval. If your Honours go to part A legislation , item 30, your Honours see that on page 2, the general – on page

1 – page 2, I'm sorry, the general outline of the Act is explained, and at the very top of page 3 it said:

> *Before there's any discussion about the purposes of the Act or, indeed, any of its clauses, that in addition, actions taken in accordance with the Great Barrier Reef marine Park Act of 1975 or ..... under that Act, and forestry operations covered by the regional forest agreements process do not need approval.*

That is to say it's – the fact that these operations are covered by a process that gives them the exemption, not that they are undertaking in strict compliance with any particular terms and conditions set out in the particular RFA. If one moves to page 5 of that document, under the heading financial impact statement, there's a subheading Problem. And these were the problems that the Act is designed to address. At page 6 there's a subheading, What is the Problem Being Addressed. And it says that:

> *On taking office the Howard Government was faced with a division of the responsibilities between Commonwealth states and territories together with a series of governmental environmental processing in which we needed reform. The reforms were necessary to remove unnecessary impediments to business industry or improving effectiveness of environmental protection measures when not optimally protective.*

The Government also inherited an environmental law regime which, you know, looking at the headings, developed in an ad hoc and piecemeal fashion. Secondly, does not reflect an appropriate role for the Commonwealth in environmental matters. And there it said in the second sentence:

> *Commonwealth environmental legislation is triggered by matters which are more appropriately the responsibility of local or state governments.*

Next, it said:

> *There was a ..... of time when most states did not have any significant environmental legislation. However, most states now have enacted relatively comprehensive environmental law regimes. In fact, some states have recently enacted their second or third generation of environmental statutes. The evolution of state law has not been adequately recognised in the Commonwealth's legislative framework, thus hindering seamless and productive inspiration of Commonwealth and state laws.*

Next:

> *Largely fails to recognise and implement the principles of an ecologically sustainable development. The principles of an ecologically sustainable development are now universally accepted as the basis upon which environmental, economic and social goals should be integrated in the development process. The failure to fully recognise and implement the*

principles of an ecologically sustainable development is regarded as a fundamental deficiency in the Commonwealth's existing regime.

Then under the heading Objectives on page 7, it's said about point 8 down the page that:

The objective of the review –

this was the review conducted by the Council of Australian Governments –

was to develop a more effective framework for intergovernmental relations on the environment which will provide greater certainty for participants in environmental issues, minimise duplication of effort to achieve common goals and facilitate improved environmental outcomes.

At page 8 the COAG review process is referred to. And at the bottom of page 8 there's a heading Objectives of the Bill Flowing from the COAG Review. It says:

In summary the major outcomes of the review process to be reflected in the Environment Protection and Biodiversity Conservation Bill 1998 are first, the Commonwealth focusing on matters of national environmental significance. This will result in the Commonwealth not being involved in matters of only state or local significance. Next, that for activities or proposals involving both the Commonwealth and a state, the Commonwealth environmental assessment and approval process will be triggered only by those actions which may have a significant impact on matters in national environmental significance.

And leaving the next two bullet points – I'm sorry, the next one is:

Improving the efficiency and timeliness of an environmental and development approvals process – processes.

Leaving the next one:

A reliance on state processes and managemental approaches which will, as appropriate, accommodate Commonwealth interests.

Then options are set out. The first option is retaining a status quo. And again, it's somewhat repetitive. It repeats at the top of page 10:

The Commonwealth environmental assessments and approvals being activated by ad hoc triggers that are not directly related to the environment.

Next, I will leave the column in one:

Commonwealth environmental assessments and approvals being triggered at any stage in the development –

And next, "proponents". That is:

> *Those taking or proposing to take an action which may require assessment under the Act have no certainty about whether Commonwealth processes will be triggered by their activities or proposals.*

Next:

> *Procedures for accrediting state processes and decisions with no registered process annexed, the Commonwealth environment – environmental statutes largely failed to recognise and implement the principles of ecologically sustainable development.*

Option 2, which was the reform option, was to give effect to the COAG review. And it says at the bottom of page 10:

> *The features of the Bill –*

that is, the bill that pertains to this Act –

> *are first the Commonwealth environment and environmental assessment and approval process is focused on matters of national environmental significance.*

Next, at the top of page 11:

> *A motion of ecologically sustainable development –*

Leaving the next two:

> *A transparent legislative mechanism for accreditation of state assessment processes and in some cases state decisions will be adopted. The goal will be to maximise the allowance on state processes which meet appropriate standards.*

There's then, as often is the case, the impact analysis. And they are repetitive, but - - -

JAGOT J: Well, some of those are relevant too. They're repetitive, but the first one under Reform of Commonwealth – fourth one in particular - - -

MR WALLER: The fourth one, yes.

JAGOT J: - - - seventh and the last.

MR WALLER: Yes. And then there's the cost benefit analysis in respect of both options. Again repetitive, but again emphasising the key purposes of the Act and the mischief that it was designed to address. And then on page 19 there's a question:

Is the preferred option clear, consistent, comprehensive and accessible to users?

And it's said:

Environmental – environment assessed within approval procedures will be simplified and streamlined. Circumstances under which Commonwealth processes are triggered will be much clearer than at present and clear timeframes will be set out.

And then there was some notes on the causes. I should say that none of that material that I've just taken your Honours to was referred to by her Honour when her Honour dealt with the extrinsic material associated with the EPBC Act. The notes on the clauses are significant in as much when part 3 is dealt with, and your Honours will remember part 3 were the key provisions dealing with when which requirements relate to matters of national environmental significance which included within it section 18 dealing with listed threatened species. Throughout the – the explanatory memorandum, in respect of each division of this part, the following appears. So at paragraphs 16 it says – I'm sorry, this is page 22 of that document. And – yes, paragraph 16, one sees:

In addition, actions taken in accordance with forestry operations covered by the regional forests agreement process do not need approval.

And that wording appears again at paragraph 22, again at paragraph 26 – sorry, 36 – again at paragraph 47, again at paragraph 57 and again at paragraph 84. And at paragraph 90 and at 97. It's a repetitive statement, we would say emphasising the exemption that is offered to forestry operations covered by the regional forest agreement process. The word – the wording differs slightly in respect of a couple of those that I've just taken your Honours to where in dealing with world heritage, which is subdivision A, or Ramsar wetlands which is subdivision B, the wording is that – "certain". So:

In addition, actions taken in accordance with and certain forestry operations covered by the regional forests agreement process do not need approval.

And we would submit that the word "certain" there is a reference to the exceptions that are set out in section 42 which take out of a section 38 exemption Ramsar wetlands and world heritage land. And that's why the word "certain" appear in those descriptions whereas in every other case we say the exemption is to operate generally. When the explanatory memorandum then went on to deal more specifically with section 38 or clause 38, and remembering, your Honours, this was the clause that had the defect that was corrected later – and no commentary is offered in relation to clause 38. There is some commentary offered in relation to clause 39.

GRIFFITHS J: Well, just hold on a minute. Maybe I'm misunderstanding this, but if you go to page 38 of the explanatory memorandum, paragraph 12:

RFA forestry operations that are undertaken in accordance with a regional forest agreement do not require approval.

No language of process there. No language of process there. It's in accordance with a regional forest agreement.

MR WALLER: I don't understand what your Honour means by language of process.

GRIFFITHS J: Well, you have been emphasising in all the other paragraphs, like paragraphs 22, 36, 47, 57, 84, 90 and 97 - - -

MR WALLER: Yes.

GRIFFITHS J: - - - the reference to the use of the concept of a process.

MR WALLER: Yes.

GRIFFITHS J: I'm simply drawing to your attention that the language of 112 appears to be more definite than that. There's no reference to process. There's reference to a regional forestry agreement.

MR WALLER: And my submission to your Honour is that the use of the indefinite article is consistent with the description of the process being the element of coverage and the critical element that provides for the exemption rather than a compliance with any particular part of a particular regional forest agreement. All that clause 112 does is to pick up the language of the section that is ultimately enacted, but what the explanatory memorandum does throughout, as I've identified, is to speak to the purpose of that clause and the effect that it's to have on all those other elements of Part 3 in providing the exemption.

The only part of the explanatory memorandum that her Honour referred to was paragraph 113, which in respect not of clause 38 but clause 39, and this was a clause that was also referred to by the Full Court in Forestry Tasmania v Brown, a case, again, which did not deal with clause 39 but with clause 38. What's clear, though, from clause 113 of the explanatory memorandum is the last sentence, which says:

The objects of this Act will be met through the RFA process for each region, and, accordingly, the Act does not apply to forestry operations in RFA regions.

That again invokes the notion of the RFA process generally rather than any specific RFA. And clause 42, which are the exceptions to the general exemption, simply says:

This provision does not apply to forestry operations in a world heritage list or a Ramsar wetland.

And also there's a third exception that was the subject of detailed consideration in Wilderness Society v Turnbull, which is not relevant to our case, your Honours. We have - - -

JAGOT J: Sorry. Is one way of looking at this, not getting too caught up in the a's or the thes or the process – because ultimately the section does say "in accordance with an RFA", so we have to find some RFA that it's in accordance with, a thing that exists, a definite article, if you like, one of the nominated, defined RFAs. But in conceptualising "in accordance with" or any other formula of words that you could possibly think of, "authorised by", "permitted by", whatever it be, whatever the formula you use, it's capable of attaching itself to sort of – at two levels.

One is the level where something is – action A is permitted by and authorised by or not prohibited by instrument B, but instrument B, in addition, says in carrying out that action you have to do it in a particular way, so, "We are telling you you can do this action, but you must do it in a particular way". All your argument really is, at the end of the day, that the right level of attachment is level 1, and their argument ultimately is the right level of attachment are both levels.

MR WALLER: Yes. That is certainly one way of looking at it, and one of the cases we refer to ..... which her Honour looked at, a decision of the New South Wales Court of Appeal, which considered the words in according with a mining Act or some such, and the court found that even though there was not strict compliance with a time limit set out in that, it was still undertaken in accordance with the Act on the basis that it satisfied, in your Honour's terms, level 1; it was pursuant to the Act even though - - -

JAGOT J: If you've got ambiguity, which arguably you do, then, you know, context becomes everything. The reading which best gives you a coherent statutory scheme – that must mean coherent at Commonwealth and at state level, because at state level the laws are preserved by and operate in accordance with the Commonwealth laws, so aren't you just – you know, the best coherence might be the guide rather than trying to – I don't know. I mean, it is true that some parts of this do seem to be working at a fairly high level of generality in the explanatory memorandum, and, therefore, you could say, well, that supports your argument.

MR WALLER: And there are other clauses, for instance, 37M, which seems to work at lower level of generality where it speaks about the conditions specified in the declaration.

JAGOT J: Yes. Yes. You can see a clear difference of wording there.

MR WALLER: But we say that when one has regard to the purposes for which the Act was enacted coupled with the purposes for which the RFA ..... I will come to, one sees that there's a clear intention to have the Commonwealth focus on specific matters of national significance and to allow the state regime to do its work separately and not - - -

JAGOT J: Yes. And for people to know up front.

MR WALLER: Yes.

JAGOT J: Part of your case is you can never know up front, because in carrying out the activity you might be – at any point, you might be flipped from one regime to the next.

MR WALLER: Yes. And a proponent acting - - -

JAGOT J: And then it's too late, because you've already offended - - -

MR WALLER: Well - - -

JAGOT J: - - - criminally.

MR WALLER: Yes. That's so.

JAGOT J: You've already exposed yourself to civil penalty.

MR WALLER: Yes.

JAGOT J: Yes.

GRIFFITHS J: Doesn't this use of – I must agree with what the presiding judge has just put to you. This notion of process I don't find all that helpful, I must say. The emphasis that's given to the notion of process – doesn't that simply reflect the fact that when this explanatory memorandum was drafted RFAs had not been put in place for all the particular regions and that some were still under negotiation?

MR WALLER: Plainly some were still under negotiation. There were some in some regions, but it's, we say, significant that throughout the explanatory memorandum this notion of an RFA process is used rather than the particulars of a particular RFA, if that was what was intended. And the fact also that section 39, when it came into being – and it's still part of the Act, and it still operates – applies to give a complete exemption even if there is not yet an RFA in place but there are negotiations ongoing, and we know from the trial judge's judgment that at least in one area in south Queensland that continues to be the case.

And, of course, these RFAs, as your Honour would know, have a limited time span – 20 years, usually. They can be extended. But if they came to an end, then we would say section 39 would continue to have operation, because it would still be an RFA area, but it wouldn't be subject to an RFA, and, therefore, we say the exemption would kick in, and it would be a very curious situation if in the areas which did not have an RFA there was a complete exemption yet in areas where there was an RFA the exemption only applied where strict compliance could be established with a state regime referred to either explicitly or by implication in that RFA.

And likewise we point to the fact that the language of section 42 speaks – seeks to contrast RFA operations on the one hand, which is a reference to section 38, with forestry operations on the other, which is a reference to section 39 to 41. Nothing more is said to qualify RFA forestry operations. It doesn't say, "In accordance with an RFA." It's simply RFA operations simpliciter on the one hand and forestry operations on the other hand, which again emphasises that it's really the RFA forestry operations – that is, "What is being done, is it forestry operations pursuant to an RFA?" One goes to the definition. One sees timber harvesting, for instance. In an RFA region, one sees Central Highlands. So if there are forestry operations being conducted in the Central Highlands, we would say under the rubric or under the cover of an RFA which is the case, then the exemption ought apply.

GRIFFITHS J: Is the Central Highlands identified as a region in a regulation rather than in the Act?

MR WALLER: It's not referred to explicitly in the Act - - -

GRIFFITHS J: Well, that's why I'm asking the question.

MR WALLER: Yes.

GRIFFITHS J: Don't take up time now, but if we can get a reference to where - - -

MR WALLER: Yes.

GRIFFITHS J: - - - we have that identified as a region - - -

MR WALLER: Yes, your Honour.

GRIFFITHS J: - - - I would be grateful. Thank you.

MR WALLER: Yes. If I could move – I should say just while I'm on this that the Full Court in Forestry Tasmania did have regard to elements of this explanatory memorandum but only to a limited extent, and her Honour referred to that as well, but in paragraphs 61 of that decision which can be found in part A cases item 11 one sees reference to the explanatory memorandum accompanying the bill – that's the EPPC bill – and that is a reference to what appears at paragraph 114 of the explanatory memorandum. There is a typo, regrettably, in the authorised report at the very bottom of page 50. It should say, "The objects of this Act will be met."

And what their Honours said at the end of paragraph 61 on page 51 of the report, in our view the emphasised passage, which is the last italicised sentence, indicates that the Act does not apply to forestry operations in RFA regions. And the way in which the objects of the Act will be met in relation to those operations is to be ascertained by reference to the relevant RFA. Then in paragraph 62, reference is made to the explanatory memorandum for the RFA Act which I will come to, but while we're

here your Honours will see the commentary in relation to clause 6(4) which became section 6(4), and that provides in the explanatory memorandum to the RFA Act.

This clause provides that forestry operations in regions subject to RFAs are excluded from certain Commonwealth legislation. This is because the environmental heritage values of those regions have been comprehensively assessed under relevant legislation during the RFA process, and RFAs themselves contain an agreed framework on the ecologically sustainable development of these forest regions over the next 20 years. Again, the message is that the Act, that is, the EPPC Act does not apply to forestry operations in RFA regions and the regime applicable in those regions is found in the RFAs themselves. That is to say it's a matter of State concern as to how those activities might be undertaken. And it was the fact that the Commonwealth was prepared to accredit the State system as it does in all of the relevant RFAs that provides comfort to the Commonwealth of knowing that Commonwealth law need not apply.

And in the recent decision of Bob Browne Foundation, your Honours will know that attention was directed to the Tasmanian RFA and in particular the notion of accreditation within that framework and it was said at paragraph 88 – I will come back to the decision – that the notion of a credit or accreditation is used in the sense of recognising the standards have been met rather than in the sense of giving official authorisation of a particular process, and we would say that is how the notion of accreditation operates in RFAs generally. It's the way it operates in respect of the Central Highlands RFA. It is the Commonwealth recognising that standards have been met as at 1998 but not requiring strict compliance with a particular process to have the benefit of the attention.

And, of course, section 38 and section 6 subsection (4) have to be read as applicable to every RFA context, not just to the Central Highlands or Tasmania. So only limited assistance can be gained by looking at the RFAs themselves, but they do operate, as is apparent at least from the decided cases that are dealt with, in a more or less uniform way. And the notion of accreditation is used as the basis on which the Commonwealth is prepared to allow or to enter into the RFA for its part, and we would say the corollary of that is that exemption where there is an RFA in place is provided under section 38. If I could move to the RFA Act - - -

DERRINGTON J: Just before - - -

JAGOT J: Just – sorry. After you. After you.

DERRINGTON J: Are we getting too bogged down in the term "process" and using it at too granular a level? The passage you took us to at paragraph 62 in Forestry Tasmania v Brown where it speaks during the RFA process, is the RFA process not the identification of the comprehensive, adequate and representative reserve system and the ecologically sustainable management and use rather than any of the underlying process – I can't think of a better word - - -

MR WALLER: Prescription.

DERRINGTON J: - - - but the underlying prescriptions - - -

MR WALLER: Yes.

DERRINGTON J: - - - that come and sit below that. And if we cease to use the word "RFA process" in the sense that I think we've been led down the garden path to think of it, we're actually talking about it at a much higher level.

MR WALLER: Yes. I would accept that, your Honour, in the sense that it's the fundamental features of the RFA process which are - - -

DERRINGTON J: They are the two, the CAR and the SGM.

MR WALLER: Yes. And also the fact, as has been noted in, I think, Bob Browne Foundation and other cases, that the whole RFA structure is, I think ..... with compromise between environmental concerns on the one hand and industry concerns on the other. And it's the RFAs that provide or are intended to provided the 20 years of certainty to enable activity to go on in the knowledge that there were processes in place that the State ..... provided protection. But your Honour is quite right that it's those key matters that your Honour has referred to, the CAR reserve system and - - -

DERRINGTON J: The ESMF, I think.

MR WALLER: Yes, the – that's right, the ecologically sustainable forest management ..... the critical criteria, as it were, of what constitutes an RFA. And that's why, if I can pick up that ..... article again, that it's the – it's the fact that there is an RFA. We don't need to trouble ourselves with what it necessarily says, provided it's an RFA. What's an RFA? One goes to the RFA Act and one sees section 4 says it's an agreement between a Commonwealth and a State which satisfies certain conditions, and those conditions are matters of the kind your Honour has referred to. Once that's established, without worrying about the minutia of that particular agreement, one can be satisfied that the exemption order applies.

JAGOT J: Sorry. Just before you move on, from what you've said, I've got a list of matters that you say her Honour's approach does not coherently resolve in the sense of achieve the objects or achieve the statutory purposes, but you might, at some point, let me know if – I mean, these overlaps – so they're, you know, not actually standalone issues, but based on the explanatory memorandum and the statutory provisions I've gone, one – the sort of object of simplifying the interaction between the Commonwealth and State systems of environment regulation, two, doing so by non-duplication, three, doing so by giving effect to Commonwealth State cooperation of areas of environmental responsibility.

Three, enabling the Commonwealth to focus on – four, enabling the Commonwealth to focus on matters of national environmental significant, and the corollary of that, I

guess, five, enabling the State, would you say, to focus on matters of non-national environmental significance? And then, last one, as a result of all of the above, giving upfront certainty to people involved in the process as to which regime applies – and they apply exclusively. They're mutually exclusive. You can't start under one regime and be flicked into another.

MR WALLER: Yes. And perhaps if your Honour has ..... the timeliness of the process, as well – it's supposed to happen quickly, and if one injects into that process questions about whether or not state law has been complied with or not as the gateway to the 38e exemption, then of necessity, the process is going to be bogged down ..... I should say that there's one other provision of the EPBC Act that I want to come to. The only other place in the Act where the forestry operations are referred to is section 75. Section 75 was amended in 2006, and with the introduction of section 75(2B) - - -

JAGOT J: Sorry, which subsection are we looking at?

MR WALLER: We're looking at 75(2B).

JAGOT J: Yes, yes.

MR WALLER: So these are matters that the Minister has to take into account during the assessment process, and (2B) says that:

> *Without otherwise limiting any adverse impacts, the Minister must consider under (2A). The Minister must not consider any adverse impacts of any RFA forestry operation to which, under division 4 of part 4 part 3 is not applied, or any forestry operations in an RFA region that may, under provision 4 of part 4 be undertaken without approval under part 9.*

The explanatory memorandum for that inserted provision can be found in part A legislation item 29. This was the environment and heritage legislation amendment bill number 1 of 2006, and if you go to that at paragraph 82 – 81, I should say – these items are in section 75 of the Act by inserting new subsection 75(2A) and 75(2B). And then paragraph 82 deals with 75(2B). It says:

> *The new subsection 75(2B) is to clarify the making of a controlled action decision in relation to proposed developments, such as a factory, which will use timber from an RFA region. The Minister must not consider any adverse impacts of any RFA forestry operations as defined in section 38 or a forestry operation in an RFA region as defined by section 40. Sections 38 and 40 of the Act exempt RFA forestry operations and forestry operations in RFA regions from the need for approval under the Act.*

So, again, what was considered to be the essential element of the exemptions in section 38 was that they were RFA forestry operations. That's not to say that the words in accordance with an RFA are therefore redundant, although there is

authority, as your Honours know, that statutory construction can involve treating words as redundant, although meaning ought be – one ought strive to give meaning to every part of the legislation, and our – we certainly do not contend that those words are otiose as might have been suggested in our learned friend's submissions. We say the work that is to be done by in accordance with an RFA operators – the presiding judge said – in a general sense rather than in the specific sense that the primary judge adopted, where she paraphrased that as compliance with the proscriptions, regulations, etcetera, contained in the Central Highlands RFA.

But what is apparent from this explanatory memorandum, at least, is that regard is had principally not to those words "in accordance with an RFA" and they're describing what the operation of section 68 is, but rather it's the fact that they are RFA forestry operations which, under the definition, answers two questions: what is being done, and where is it being done.

And, in accordance with an RFA answers, perhaps, a third question: how is it being done, or under what rubric is it being done. And, as I say, the most important aspects are the what and the where, rather than the how. Now, if we go to – the SG one is Justice Griffith's question. I'm told the Central Highlands region itself is defined in clause 4 of the Central Highlands RFA as the area covered by this agreement. Is the Central Highlands region as shown on a map accompanying the agreement – and I think one gets to the RFA through the general division, and then one finds the particular parameters of that region in the RFA itself. If I could move - - -

JAGOT J: Are you going to take us to the RFA, or - - -

MR WALLER: Yes.

JAGOT J: You are. Yes.

MR WALLER: What I propose to do next is go to the RFA Act, and then I will go as quickly as I can to the RFA. The RFA Act is a very short Act. It only has 10 or so provisions. It has – there's an explanatory memorandum about 10 pages. It's the revised explanatory memorandum, which is at our legislation item 33. The object of the Act – perhaps if we go back to the Act itself. The object of the Act - - -

JAGOT J: Sorry, the Act is in – I'm just looking at my copy.

GRIFFITHS J: Tab 32. Tab 32.

JAGOT J: 32.

MR WALLER: Tab 32, sorry. The object of the Act is not to give effect generally to the provision of an RFA. The Full Court recently, in Bob Browne Foundation, which is in the cases at tab 5, said at paragraph 16 that:

The RFA Act does not give statutory force to any of the obligations imposed on a state by an RFA.

It's intended to give effect to certain obligations of the Commonwealth, and in section 3 of the Act, those particular obligations are referred to. So the objects of the Act are, A, to give effect to certain obligations of the Commonwealth under regional forestry agreements, and B, to give effect to certain aspects of the national forestry policy statement, and C, to provide for the existence of the Forest and Wood Products Council.

So the obligations of the Commonwealth are threefold we say: first, to remove RFA wood or RFA forestry operations from the ambit of certain Commonwealth Acts, and that's where section 6, subsection (4) becomes relevant, because it provides that:

Part 3 of the EPBC Act 1999 does not apply to an RFA forestry operation that is undertaken in accordance with an RFA.

The other obligations are dealt with in section 7 and section 8. Section 4, relevantly, provides definitions, which definitions, of course, have to be inserted also into section 38. It defines a:

RFA or Regional Forest Agreement means an agreement … is in force between the Commonwealth and a State in respect of a region or regions, being an agreement that satisfies all the following conditions.

And the conditions are then set out. And, again, the balance, as it were, is reflected in conditions (a)(i) which it focusses on environmental values and (a)(iii) which focussed on economic values of forested areas and forest industries. Likewise, as Derrington J referred to:

(b) the agreement provides for a comprehensive, adequate and representative reserve system –

the CAR system:

(c) the agreement provides for the ecologically sustainable management and use of forested areas in the region or regions;

(d) the agreement is expressed to be for the purpose of providing long-term stability of forests and forest industries –

again, an acknowledgement of the economic side, perhaps, of the equation and, finally:

(e) the agreement is expressed to be a Regional Forest Agreement.

So those are the indicia of an RFA. RFA forestry operations is defined also in section 4, and our relevant subsection is (b). So they are:

> *forestry operations (as defined by an RFA as in force on 1 September 2001 between the Commonwealth and Victoria) that are conducted in relation to land in a region covered by the RFA (being land where those operations are not prohibited by the RFA).*

And to the extent that, for instance, an RFA prohibits, as we know the Central Highlands RFA does, any forestry operations in rainforest, for instance, then that is covered by a definition of "RFA forestry operations" because that would be land where those operations are prohibited by the RFA. So one may have regard to the specific RFA to determine whether there is any land where operations are prohibited – expressly prohibited, we would say – but when one comes to the words "in accordance with an RFA", one is now back from the specific to the general, and looking at the "pursuant to the RFA" in the sense the presiding judge referred to earlier, category 1.

So it can't be said that VicForests can go away and harvest rainforest without regard to what's in an RFA if the RFA specifically prohibits that activity. But, here, that is not the case that was put against VicForests. It wasn't that VicForests doing something that was expressly prohibited by the RFA or, I should say more accurately, doing something on land where those operations were expressly prohibited. What was said was there's a reference to the accrediting system including a code and the code is not being complied with, essentially.

JAGOT J: Yes. But, I mean, we wouldn't be here, I guess, if 38(1) said "that are conducted in relation to land in a region covered by an RFA" being land where those operations are not, you know, prohibited, etcetera. The very source of the ambiguity is the fact that we're not using words like that. We're using this formula, which - - -

MR WALLER: Yes, that's right.

JAGOT J: - - - gives us the ambiguity - - -

MR WALLER: Yes.

JAGOT J: - - - and it says we have to go to context and purpose.

MR WALLER: That's so. Now, could I go, your Honours, to the relevant extrinsic material and go back to the revised explanatory memorandum, item 33. And your Honours will see, as we move to the next page, that first there's an outline. And it notes in the second paragraph that:

> *Since February 1997, 10 Regional Forest Agreements … have been concluded –*

so we're now at 2002. So in that five-year period there were 10 RFAs –

> *between the Commonwealth and the Victorian, Tasmanian, New South Wales and*
> *Western Australia … a key feature of the National Forest Policy Statement of 1992, the RFAs have a 20-year life and have delivered a CAR reserve system of 10.4 million hectares … 20-year certainty in resource supply; $100 million in Commonwealth … to encourage more value-adding of native timber; and participation of local community and stakeholder groups in the assessment of environmental, social and economic values.*

If one moves to the next page, one sees reference to an introduction. This goes back to the issues that arose in the 1970s colloquially referred to as the "forest wars", which led to, ultimately:

> *The National Forest Policy Statement of 1992 provided a framework agreed by Commonwealth and all State Governments for a long-term and lasting resolution of conservation, forest industry and community interests and expectations concerning Australian forests.*

Under the heading The Problem – I'm sorry. Then it says that:

> *These assessments formed the basis of negotiated RFAs.*

The problem is then said to be:

> *Conflict over the use of native forests had established a climate of uncertainty for*
> *investors and contributed to community uncertainty that environmental values were*
> *being adequately protected.*

Then under the heading Objectives of Government Action – and this goes to the purpose of this Act:

> *The Government seeks to provide a 20-year framework for continuous improvement in forest use and management through a comprehensive regional assessment process on forest uses and values; a comprehensive, adequate and representative reserve system based on nationally agreed criteria; 20 years certainty of access to forest resources for the timber industry –*

and if I could move to the last point:

> *…sustainable forest management of the whole forest estate.*

Options are then referred to, which are said to include:

…environmental impact assessments … banning harvesting of certain forests and
Commonwealth/State bilateral agreements … The options were only partially successful and new conflicts emerged subsequently.

Then the proposed option is set out. And reference is made, more specifically, to the National Forest Policy Statement of 1992, which I won't read, but which again sets out the background and that the assessments that are conducted would form the basis of negation with the RFAs. And then it's said that:

RFAs have now been agreed in 10 regions.

And what it then says is important:

The RFA Bill seeks to underpin the agreements by –

I won't read the first point, but the second point, we say, is most relevant:

preventing application of Commonwealth environmental and heritage legislation as
they relate to the effect of forestry operations where an RFA, based on comprehensive regional assessments, is in place (reflecting provisions already in the
EPBC Act).

So there's a reference, although not explicit to section 38, and that is also said to be one of the purposes of this Act. And obviously this Act replaced 38, dealing with the anomaly that I mentioned. Then under the heading Impact Assessment, it is said that, if I could move further up, beginning – no, sorry, further down, beginning with the words "provision" ..... yes, there it is, at the top of page 6:

The provision in the bill that part 3 of the EPBC Act does not apply to an RFA forestry operation has no new implication ..... or the environment, since it reflects section 38 of the EPBC Act.

Again, in this explanatory memorandum, as we saw in the 2006 amendment, the emphasis placed on the exemption is that it does not apply to an RFA forestry operation. The words "in accordance with an RFA" are certainly omitted from that description. And then - - -

GRIFFITHS J: But I don't see – what's – so I'm – you know, I ask, so what? I mean, we're here to construe legislation. The fact that the draftsperson of this explanatory memorandum chooses to use a shorthand expression of RFA forestry operation and not say anything about "in accordance with", where does it get us?

MR WALLER: Well, I think it shows that "in accordance with" operates that the higher level than the lower level of generality. And it's repeated when one goes to

clause 6 of the bill, if we could scroll down to clause 6. The commentary on clause 6, page 7 of the document. One sees that:

> *This clause provides that forestry operations in regions subject to RFAs are excluded from certain Commonwealth legislation, and this is because the environmental and heritage value for those regions have been comprehensively assessed under relevant legislation during the RFA process, and the RFAs themselves contain ..... framework on ecologically sustainable development of these forest regions over the next 20 years.*

Subsection 4 provides – it says that:

> *Part 3 of the EPBC Act does not apply to RFA forestry operations.*

And we say that to the extent that the explanatory memorandum, as relevant extrinsic material, reflects the purpose which the Act, and this clause in particular was designed to address and achieve, the use of language is important, and it certainly is entirely consistent with the words in accordance with an RFA being treated as operating at a high level of generality. The Full Court, as I say, in Forestry Tasmania v Brown, referred to that section of the RFA explanatory memorandum at paragraph 62. I won't go there.

If I could now move to the – before going to the RFA itself, we would say that the clear purpose of this Act and of the RFA process, generally, was to assist and provide certainty to the timber industry, which, again, is a matter we say was not taken into account by her Honour in considering the provisions. Her Honour accepted at paragraph 109 of ..... that – she says – her Honour said on the third line of 109:

> *..... is correct to emphasise that the system that RFA ..... place given to them through the RFA Act was wider than simply the protection of the environment. The RFA Act and the RFA system itself were intended to create a new model through which the conservation used in the development of Australia's forest resources would occur.*

To recognise that fact is not inconsistent with giving section 38 of the EPBC Act and section 6(4) of the RFA Act a construction which advances the environmental protection and biodiversity conservation ..... of the RFAs, the RFA Act, and the EPBC Act. Industry development objectives and environmental protection and conservation objectives are not necessarily mutually exclusive, and the RFA scheme does not make them so.

But her Honour, we say, gave too narrow a focus, and ignored the fact that the RFA Act was designed to provide certainty to the timber industry for 20 years, and despite that, she has – her Honour has construed it, we say, through a very narrow lens. If I could move to the CHRFA, the Central Highlands RFA, itself. And again, although not part of the statutory framework – it's tab 153 – it's necessary to consider the

destruction ..... not the least because the definition of "RFA forestry operation" indirectly draws attention to the terms of an RFA. And tab – it is tab 153 in part C.

JAGOT J: Do we know what volume? Four or - - -

GRIFFITHS J: It's volume 3 of 5 for me.

JAGOT J: I've got – yes.

GRIFFITHS J: But mine are printed double-sided.

JAGOT J: Yes.

GRIFFITHS J: Do we know whether all the paper produced came from the Central Highlands or not?

MR WALLER: I've tried to do this electronically.

GRIFFITHS J: So just before you go in here, where is the map that you referred to in answer to my question?

MR WALLER: I think it's the very last page, as seen on the screen, I'm told.

GRIFFITHS J: But where – how does that correlate with paragraphs E to G of section 41 of the Act? And is this an area – is the Central Highlands in the Gippsland region, in the northeast RFA region, or the west region?

MR WALLER: Those are areas, your Honour, at 41, that are not covered by an RFA.

DERRINGTON J: Because they relate to 40.

MR WALLER: Yes.

DERRINGTON J: Yes.

MR WALLER: They are in that subdivision that – although they're called RFA regions, they are where the process of an RFA has been negotiated, and the Central Highlands is picked up by section 38, which is where there is an RFA.

GRIFFITHS J: I see.

JAGOT J: I can't read this .....

GRIFFITHS J: No.

MR WALLER: It's around Healesville, if that helps.

GRIFFITHS J: That's where all the bad fires were, wasn't it? Around Healesville, I thought.

MR WALLER: Yes, your Honour. In Wilderness Society v Tasmania, a case we refer to at tab 23 ..... Full Court said that the RFA Act and Tasmania RFA ..... they were then dealing with were contextual material which provides some ..... construction of section 42 of the EPBC Act, and we would say the same applies here in respect of section 38. The Full Court considered the text of the Tasmanian RFA also in Forestry Tasmania v Brown, and more recently in Bob Browne Foundation, a case – judgment delivered earlier this year. And the primary judge dealt in some detail with the terms of the Central Highlands RFA. It's an agreement entered into between the State of Victoria and the Commonwealth.

GRIFFITHS J: I think special lead has been sought in respect of that.

MR WALLER: And the purpose of the Central Highlands RFA, according to ..... is to establish the framework for the management of the forest in Central Highlands. The agreement is divided into three main parts with attachments. Part 1, which is clauses 1 to 15, applies to the whole agreement, and it sets out the agreements, definitions, and general provisions that operate throughout the agreement. Clause 7 provides that the parties confirm their commitment to the goals, objectives and implementation of the National Forest Policy Statement.

And then if I could just go back to – recital C makes the point that the agreement is divided into parts. Part 1 applies to the whole agreement, and Part 2 is not intended to create legally-binding relations. Part 2 comprises clause 16 to 86. The provisions on which our learned friends relied at trial were provisions within Part 2, notably, clauses 40 and 47. And Part 3 is said to be intended to create legally-binding relations. The attachments are not intended to create legally-binding relations except to the extent necessary to give effect to Part 3.

The definitions are contained in section 2. I will come back to those as necessary. And then if I could go to Part 2 in more detail, we would say at a general level the provisions included in Part 2, which is non-binding, is they provide generally for further development of agreements and frameworks, and we say that they have an aspirational tone in many respects. They also set out a range of provisions which explain or clarify the relationship between the interlocking statutory obligations, and I'm referring, in particular, to clauses 18 to 34. Clause 23 is important, we say. It provides:

> *The Commonwealth, in signing the agreement, confirms that its obligations under the Environment Protection (Impact of Proposals) Act 1974 have been met. The Commonwealth also confirms that under the administrative procedures of the Act any activities covered by the agreement, including the five-yearly review and minor amendments to the agreement, will not trigger further environment impact assessment.*

We say that's a clear indication that there is not to be Commonwealth assessment overlayed on state matters. Her Honour dealt with clause 23, and her Honour noted in the separate question reasons that the clause, in her Honour's words, may be of limited utility or little ongoing utility, her Honour said, at paragraph 44 of her judgment, on the separate question. Her Honour said:

> *Taking into account this agreement was made in 1998, the reference to the Environment Protection (Impact of Proposals) Act 1974 might be send to render clause 23 of little ongoing utility.*

The EPIP Act was repealed, your Honours, in July 2000. We say that her Honour's comment is significant, because we would say the same ought be said of the 1996 code, which also ceased to have operation in 2007. The fact that legislation referred to in the agreement is superseded, we say, does not affect the purpose of the agreement, which was to provide the framework between the Commonwealth and the state rather than to be a complete repository of up-to-the-minute legislative instruments in operation in any particular region.

If I could go now to the issue of accreditation – and here I'm referring, in particular, to clause 40 – under the heading Ecologically Sustainable Forest Management, first of all, again, clause 39 is aspirational in tone:

> *The parties agree that ESFM, ecologically sustainable forest management, is an objective which requires a long-term commitment, and the key elements for achieving it are –*

those elements. 40:

> *The parties agree that Victorian processes and systems provide for ecologically sustainable management of forests in the Central Highlands and that these processes and systems are accredited in clause 47 of this agreement.*

And in clause 47, dealing with – first, 46, dealing under the heading Accreditation:

> *Parties agree that Victoria's forest management system, including its legislation, policies, codes, plans and management practices, as described in the state-wide assessment of ecologically sustainable forest management, and including responses reports in chapter 5 of a Central Highlands RFA directions report, provides for continuing improvement in relation to ESFM.*

Although not capitalise, the expression "forest management system" is a defined term in clause 2, and forest management system is defined to mean:

> *The state's suite of legislation, policies, codes, plans and management practices and processes as described in the Victorian state-wide assessment of ecological sustainable forest management published by the Commonwealth and Victorian RFA ..... committee in 1997 as varied by this agreement.*

So, again, we would note that that description is fixed at a point in time subject to any other provisions of the agreement that might give it more ambulatory effect. Then clause 47 provides:

> *The Commonwealth accredits Victoria's forest management system for the Central Highlands as amended by this agreement. The system includes the forest management plan and the process for its review, the Flora and Fauna Guarantee Act of 1988, the process for forecasting ..... and sustainable yield in the Central Highlands and the systems and processes established by the Code of Forest Practices for Timber Production and the Code of Practice for Fire Management on Public Land.*

GRIFFITHS J: Could you just remind me, please, what is the source statutory for the power of the Commonwealth to accredit such systems.

JAGOT J: Wasn't it under the ..... Act at the time?

MR WALLER: Yes. I think.

JAGOT J: This plan predates the EPBC Act, but that's relevant because presumably the drafters of the EPBC Act knew about how these RAFs worked, the ones that existed, at least. I mean, it's still relevant.

MR WALLER: I think the answer to your Honour's question is as the presiding judge said the ..... which ceased to operate in 2000 – the reference to the Code of Forest Practice for Timber Production in the fourth bullet point takes us back to the definitions where the Code of Forest Practices for Timber Production is said to mean, on page – I'm not sure what page it is – yes. It's on the screen – means the Code of Forest Practices for Timber Production, revision number 2, 1996, developed in accordance with the Conservation, Forests and Land Act of 1987.

Now, clause 3 of the Act – of the agreement, I should say, includes a statement at 3(d) that a reference to a code or other instrument includes any consolidation or amendment thereof. The material before the court, we say, demonstrates that the 1996 Code was revoked in 2007. It was replaced by a new Code which was neither a consolidation nor an amendment, and the 2007 Code was in turn replaced in 2014 by the 2014 Code that was neither a consolidation nor an amendment. The government gazettes which refer to these matters are in the material, and I will come to those, if necessary.

JAGOT J: Can I just ask a – a new question? This map, this very troublesome map, does it have – is it showing on the right-hand side somehow the – the CAR reserve system dedicated to ..... may be coloured white or something – is that showing areas where you can't undertake timber or forestry operations?

MR WALLER: Yes. My understanding is that that is the case. And in the CAR reserve there is no ability at all to take - - -

JAGOT J: To take out – yes.

MR WALLER: - - - to take forestry operations.

JAGOT J: And then in the coloured bits where there is such capacity, what the clauses or provisions of this agreement say are, for example, you can't do it for rainforests.

MR WALLER: Yes.

JAGOT J: But the rainforests aren't actually shown on here. It's not at a scale where you could possibly show rainforests I would assume.

MR WALLER: No.

JAGOT J: And that probably explains, does it, why somewhere in this says – a provision that says by 1998 or something, that has to do a bit more mapping, sort of show things more clearly like – anyway, it's somewhere in here I saw that. Because it's a very high-scale map. So that at least we can work on the assumption that the map has areas within – shown within which are part of the CAR system, within which there could be no forestry.

MR WALLER: Yes. That's so.

JAGOT J: Right.

MR WALLER: And that's made clear by clause 61 of the RFA:

> *The parties agree that the CAR reserve system as identified on map 1 and described in attachment 1 satisfied the JANIS Reserve Criteria and Victoria agrees to implement the CAR reserve system described in attachment 1 and identified on map 1.*

And then in clause 65:

> *Victoria agrees to produce and publish by 30 June 1998 their forest management plan reflects the outcome of this agreement.*

And 66:

> *Parties recognise that all Victorian rainforest is protected from harvesting through the range of mechanisms described in attachment 1.*

But I don't think it goes as far as showing on the map as - - -

JAGOT J: I think there is a clause somewhere. I mean, I did see something about mapping something a bit better.

MR WALLER: Yes.

JAGOT J: But that's all right. I mean, it's somewhere in here. I can probably find it.

MR WALLER: Now - - -

DERRINGTON J: Before you – before you move away from this part of the agreement, can you explain to me please what the primary judge meant by referring to clause 36 as not being a compliance condition?

MR WALLER: Your Honour, it's – the history of this proceeding was that the case initially brought against VicForests was that there had been non-compliance with the – with the RFA in that the five-yearly reviews were not conducted as between – or by the State of Victoria. And her Honour rejected that argument. And as a consequence of her Honour rejected that argument the applicant below amended the proceeding so as to then rely not on non-compliance with clause 36 but on non-compliance with clause 47, bringing into play the code – the 2014 code in whether compliance had been had by VicForests. References in the separate question relating to the five-yearly review – clause 36 again – are therefore no longer relevant. But that's why they were referred to.

JAGOT J: That then – provision I am thinking of is page 39, last ..... of the page, CAR reserve system covers an area except – but not one illustration says, and then Victoria will produce a map by 30 June which includes the special protection zone within state forest ..... Australia, on that one.

MR WALLER: Yes.

JAGOT J: I'm not sure what that means. But presumably there's something about the special protection zone somewhere in here.

MR WALLER: Well - - -

MR KIRK: Sorry, your Honour. Which – which clause was that? I just didn't pick it up.

JAGOT J: I'm looking at page 39 which is attachment 1.

MR KIRK: I have different page numbers.

JAGOT J: And I'm just reading the last four paragraphs of that. And the second last paragraph is about Victoria producing a – a plan by 30 June which includes a special protection zone.

MR KIRK: I understand. Thank you, your Honour.

JAGOT J: And I'm assuming – well, I don't know. Maybe forestry is or is not allowed in a special - - -

MR WALLER: It's not.

JAGOT J: It might infer that it's - - -

MR WALLER: No. An SPZ is an area on which no harvesting can take place.

JAGOT J: How do we get that? Where do we get that? I can see the definition of SPZ halfway – page 19, but where do we get that you can't harvest there? Or that you can't harvest in a CAR, for that matter?

MR WALLER: I think the answer is that – I will need to – I will need to check. Certainly I think it's referred to the – in the National Forests Policies - - -

JAGOT J: Perhaps you could have a look at that over the lunch adjournment? I've just noticed the time.

MR WALLER: Yes.

JAGOT J: I think we were proposing to adjourn until 2.15? Yes? Okay, well adjourn until 2.15. Thank you.

ADJOURNED **[12.46 pm]**

RESUMED **[2.15 pm]**

MR WALLER: Your Honours, before the break, I was asked what the source of the SPZ characterisation is. The source is the forest management plan, which is the first of the four bullet points referred to under clause 47 of the CH RFA. An extract of the forest management plan is in the appeal book – but not the whole document – but that is where a description of the various zones is contained. The - - -

JAGOT J: Does that also describe the fact that you can't undertake forestry in the CAR? Is that - - -

MR WALLER: Yes.

JAGOT J: Right.

MR WALLER: Yes, it does. And that point is made perhaps explicit in the negative in clause 67 of the CH RFA, which under the heading Industry Development, says:

The Parties agree that State forest outside the CAR Reserve System is available for
timber harvesting in accordance with the Central Highlands Forest Management Plan and the Code - - -

JAGOT J: Where is that? Sorry.

MR WALLER: That's clause 67.

JAGOT J: Sorry. My mistake.

MR WALLER: So outside of the CAR reserve, subject, of course, to any other zoning that might apply - - -

JAGOT J: Yes.

MR WALLER: - - - prescriptions in the Forest Management Plan or the 1996 code there referred to.

JAGOT J: One of which is SPZs.

MR WALLER: Yes - - -

JAGOT J: Yes.

MR WALLER: - - - that's right. SPZ, SMZ, special management zone. And SPZ is special protection zone.

JAGOT J: Yes.

MR WALLER: SMZ is special management zone and GMZ is general management zone. And there are different prescriptions that apply in respect of those various areas. The second under the heading Industry Development also emphasises this balance that I've referred to several times and, in particular, clause 69:

The parties acknowledge that the forest-based industries in the Central Highlands
make a significant contribution to both … regional and State economies and are an essential component of many communities in the region. The Parties intend that this agreement will enhance opportunities for further growth and development of forest-based industries in the Central Highlands and provide long-term stability for these industries. The parties therefore acknowledge that this agreement must provide enhanced security of access to resources on forested land for the life of the agreement.

The third part of this agreement, part 3, which begins at clause 87, is, as we've seen, intended to create legally enforceable rights and obligations between the

Commonwealth and the State of Victoria. And those provisions deal with the fact that the Commonwealth, in clause 89, will:

> *Maintain accreditation of Victoria's forest management system for the Central Highlands as amended by this agreement providing changes to the system are consistent with the provisions of this agreement.*

So if Victoria decided to radically alter its forest management system by amending legislation which the Commonwealth regarded as inconsistent with the provisions of this agreement, then there would be a breach of the agreement and the Commonwealth might have rights of dispute resolution and, ultimately, termination. Obviously, if the RFA was terminated, then the exemption under section 38 will fall away, there no longer being an RFA at all. Clause 90 deals with compensation. And clause 91, I need not worry about. Clause 92, Termination: either party may terminate the agreement in different circumstances. And the Full Court in Forestry Tasmania v Brown adverted to rights of termination as being the operative rights of the parties to the regional forest agreement to take action if the agreement was not being honoured.

The clause 47, on which the applicant relies, does not, in terms, impose any obligation on anyone. As we've seen, clause 47 merely states that the Commonwealth accredits Victoria's forest management system for the Central Highlands and describes elements or components of that system. And as I've mentioned, the notion of accreditation we say is used in the sense of recognising that standards have been met rather than giving official authorisation of a particular process, let alone, we would say, imposing any obligations on a non-party to the agreement, such as VicForests. Your Honours, that's what I wish to say about the RFA.

If I could now summarise the position on ground 1. In summary, we say that orthodox principles of statutory construction dictate that when courts are faced with what are described as competing constructional choices, they are to adopt a construction which best aligns with the language of the provision and the context and purpose of the statute and that regard must also be had to the consequences of competing constructions. And these principles are plainly established in Project Blue Sky and are then repeated in many cases since.

We say the constructional choice which this court should make is the one which was described as meaning 1 by the presiding judge earlier today, that is, the words in accordance with an RFA in section 38 and in section 6, subsection (4) operate at a high level of generality such that forestry operations or RFA forestry operations, as defined, which are undertaken under cover of an RFA are exempt from part 3 of the Act and the courts ought not – this court, I should say, ought not adopt a constructional choice as made by the primary judge which makes the section 38 exemption contingent upon a finding of strict compliance with all of the many layers of detailed state legislative regulation; that strict compliance with that regime is a

matter for the states and the courts of the state not a matter for the Commonwealth or the Commonwealth courts, such as the Federal Court.

In terms of the text, we say that, as has been noted, the words "in accordance with" are ambiguous and different constructions are reasonably open, but when one has regard to the context and purpose we say that our construction advances the statutory object of intergovernmental cooperation and the statutory object of reserving to the Commonwealth only those matters of national environmental importance or significance and that further support for our construction is to be found in the numerous indicators in the extrinsic material which I have taken the court to, none of which contemplate anything like the requirement of strict compliance adopted by the primary judge in order to enliven the exemption.

The context, we say, also includes the surrounding provisions. And when regard is had to the other exemption provisions and, in particular, section 37N, it's clear that where the legislature intended to require strict compliance for an exemption to arise, it did so in clear and unambiguous language. When construing the EPBC Act, we say regard must also be had to the principles of ESFM, Ecologically Sustainable Forest Management, and, relevantly, those principles dictate a nuanced balancing of competing interests, including both long-term and short-term economic, environment, social and equitable considerations. And the primary's judge construction, which insisted on strict compliance, does not best balance, we say, those various competing objectives.

As to the consequences which flow from the different choices, we say that the constructional choice that we favour and which we submit is appropriate results in administrative efficiency, a reduction in duplication. It advanced certainty for forestry and industry participants whereas the primary judge's construction results in administrative inefficiency. It will mean that forestry operations are at all times within the reach of two different regulatory regimes and will cause time delay and uncertainty for the industry participants. We say that section 38 operates as a general exemption. That's how it was described by Branson and Finn JJ in Wilderness Society v Turnbull at paragraph 32, which is at part A, case folder tab 2, where their Honours said, at paragraphs 32 – if we go further down – that:

> *The text and structure of Division 4 of Part 4 of the EPBC Act reveal the clear legislative purpose that, save in the three excepted instances specified in section 42, Part 3 is not to apply to an RFA forestry operation. The reason for this general exemption, which is reiterated in section 6 of the RFA Act, is that the RFA Act itself makes provision for a separate regime built upon RFAs which itself takes account of environmental and other values in relation to forests and forestry operations that are subject to such an RFA.*

We say that in her Honour's decision on the separate question, in paragraph 53, her Honour deals with the use of extrinsic material, and her Honour says, at paragraph 56:

At times, the submissions of the parties and the interveners appeared to encourage the court to resort first to the extrinsic material before or as a substitute for close examination of the legislative schemes of the EPBC Act and the RFA Act. I have not taken that approach, although in my opinion the extrinsic material confirms the construction I have reached or at least is not inconsistent with it.

And then in 57:

The use of extrinsic material to confirm a meaning at which the court has arrived by reference to the text, context and purpose of the provision in its legislative scheme is a legitimate use of extrinsic material and expressly contemplated by section 15AB of the Acts Interpretation Act.

We say that this was a case where her Honour ought to have had regard to the extrinsic material as part of the exercise rather than as an act of confirmation after she had arrived at a construction, and her Honour's reference in paragraph 57 to the text, context and purpose separate from extrinsic material appears to treat extrinsic material as not part of context or purpose, which is at odds, we say, with the cases that I went to at the beginning. When regard is had to the extrinsic material, which we say is important in this case, one sees that the construction or choice for which we contend is, we say, the appropriate one. Your Honours, those are my submissions in relation to ground 1.

I will move now to ground 2, which we press as an alternative to ground 1. We say that if the court determines that the exemption in section 38 only applies where RFA forestry operations are undertaken as the primary judge where there is strict compliance with any restrictions, limits and prescriptions contained in a particular RFA, then we submit the primary judge nonetheless erred in holding that non-compliance with clause 2.2.2 of the 2014 Code, being a failure to apply the precautionary principle that would result in the loss of the section 38 exemption, and we say that for two reasons: first, because we say the 2014 Code is not a prescription contained in or referred to by or comprehended by the 1998 Central Highlands Regional Forest Agreement with which the primary judge was concerned.

As we've seen the Central Highlands RFA was executed in 1998. It does not in terms refer to the precautionary principle. It refers to the Code of Forest Practices for Timber Production, revision number 2, 1996, and that document likewise makes no reference to the precautionary principle. Express reference to the precautionary principle was introduced by the 2007 Code of Practice for Timber Production and appears also in the subsequent 2014 Code of Practice for Timber Production. Section 32 of the Conservation, Forest and Lands Act 1987 of Victoria, which is in part B, legislation tab 16, is the legislation under which codes such as the codes that I've been referring to are made.

If we scroll down the table of provisions to 32, we see the heading of Part 5 is Codes of Practice. Section 31 – if we can go to that in the body of the document – states that:

> *The minister may make codes of practice which specify standards and procedures for the carrying out of any objects or purposes of the relevant law. The code of practice may apply, adopt or incorporate any matter contained in any document, standard, rule, specification or method formulated –*

and on it goes:

> *…whether wholly or partially or as amended by the code of practice or as formulated, issued, prescribed or published at the time the code of practice is made.*

Section 32 provides for either the variation or revocation of a code of practice. It says:

> *The minister may vary or revoke a code of practice at any time.*

And section 37 provides that after considering any submission made in relation to a draft code, the minister may make the code of practice, variation or revocation. And then subsection (2):

> *After the making of the code of practice or variation of a code, the minister must ensure the code of practice or variation is published in full in the next government gazette.*

Subsection (3):

> *If the code is unsuitable to be published in full, a notice of the making of the code of practice and where it is available must be published in the next government gazette.*

And in subsection (4) – sorry.

JAGOT J: Can you just tell me where – which folder is this in?

MR WALLER: I'm sorry. It's - - -

MR KIRK: Part B tab 16.

JAGOT J: Part B. Sorry, it just helps if you say which folder before you start rushing through it, because - - -

MR WALLER: Yes. I'm sorry. It's - - -

MR KIRK: - - - part B of my friend's – there it is.

MR WALLER: I think it's the second folder.

JAGOT J: It's just hard to follow when you're trying to tag it up and - - -

MR WALLER: Yes, I'm sorry.

JAGOT J: It's not in part A, that's for sure, behind tab 16. So it's part B.

MR WALLER: No. Part B of our authorities, tab 16.

JAGOT J: Thanks.

MR WALLER: And – and then subsection 4, having dealt with variations, subsection 4 says:

> *After the making of a revocation of a code, the minister must ensure the revocation is published in the government gazette.*

And in subsection 5:

> *A code of practice or variation or revocation of a code of practice takes effect on the date on which the variation revocation or code is published under the gazette.*

In July 2007 the 1996 code was revoked and replaced with a 2007 code. The – if I could ask that the operator go to part A, tab 30A.

JAGOT J: So part A, tab 30. 30A.

MR WALLER: 30A.

JAGOT J: And where is that in the folders? Is that – is that in here? Sorry to be a pain about it.

MR WALLER: Part A, volume 3 of 3 of the VicForests list of legislation and authorities.

JAGOT J: Sorry. It's just that I've decided to work off the hardcopy and having done that I would like to stay with it.

MR WALLER: No, certainly.

JAGOT J: Yes.

MR WALLER: Does your Honour have that? 30A?

JAGOT J: Yes. Yes, yes.

MR WALLER: It's I think a single sheet. It's an extract of the Victorian Government Gazette of 19 July 2007. Under the Conservation, Forests and Lands Act it says:

> *The Minister has prepared a variation to a code of practice.*

And then it says:

> *From 1 August 2007 the Code of Forest Practice for Timber Production revision number 2, November 1996 is revoked and will be replaced by the Code of Practice for Timber Production 2007.*

It's an unfortunate use of the word "variation", we would submit, not having regard to the provisions of the relevant Act which allow for either a revocation or a variation. And it's plainly stated the 1996 code is revoked and replaced by the 2007 code. That is made clearer by the next document in that folder which is tab 30B. This is from the government gazette of October 2014. And it makes clear that the Code of Practice for Timber Production 2007 is revoked, and the Code of Practice for Timber Production 2014 has been made. And that's under section – notice is given under section 37 of the Conservation Forest and Lands Act. We submit that these codes were not variations of the 1996 code, nor were they codifications. They were entirely new codes. The RFA itself was substantively amended in March 2020. And the amended RFA is in part C tab 828. And it contains short - - -

JAGOT J: Is that in volume 5, or - - -

MR WALLER: It's – five, yes. It contains a deed of variation of only a few pages. And then it contains a marked up version of the RFA tracked to show what has been added and what has been deleted. And then it contains after that a clean copy of the same document with all those changes having been accepted. One can see that numerous changes have been made tot his RFA, but of relevance – when one goes to clause 47, which was under the heading Accreditation, but is now under the heading Forest Management System on page 31.

GRIFFITHS J: Page 31 of what? Which version? I'm looking at the untracked version that's on page 29.

MR WALLER: Right. Then it's 29 of the untracked and 31 of the tracked.

GRIFFITHS J: All right.

MR WALLER: One sees clause 47 now refers to an additional piece of legislation, the Sustainable Forest Timber Act of 2004. And the last bullet point refers to the systems and processes established by the Code of Practice for Timber Production and another code. That code is then defined on page 4 of the tracked version as the code

developed in accordance with the Conservation of Forest and Lands Act. And the definition – I'm sorry, clause 3, subsection – subclause (d) which is on page 13 of the of the tracked version and 12 of the untracked version now contains an expanded definition:

> *A reference to a code or other instrument includes any consolidations, amendments –*

and the following words are now added, "re-enactments or replacements thereof":

> *…and also includes any consolidations, amendments, re-enactments or replacements of documents incorporated into the code or other instrument.*

So it can be contrasted, we say, with the similar clause in the 1998 RFA which did not have so expansive a definition. And it's plain that now attention is being given to the fact that replacements and re-enactments were not referred to in the first version but are now referred to and perhaps – well, they would have the effect of – if the 2014 code is replaced then any replacement would be picked up by that definition, whereas under the 1998 RFA that would not be the case. The result, we say, of that is that the 2007 and the 2014 codes, being entirely new codes not comprehended by the CH RFA of 1998, means that the substratum of the applicants case and indeed the primary judge's decision falls away. In the decision both in the separate question reasons and in the primary judgment, her Honour moved between references to the '96 code and the 2014 code without any explanation as to how that could be done. Paragraph – if one looks at paragraph 107 of the primary judgment - - -

JAGOT J: Sorry, which tab is that - - -

MR WALLER: That is in - - -

JAGOT J: Do you mean the liability judgment, or the - - -

MR WALLER: Yes. It's the main judgment, the liability judgment. I think it's tab 14. I will check that.

JAGOT J: Yes, yes. It is.

MR WALLER: Yes. Tab 14. Paragraph 107 of that judgment, her Honour referred to her separate question reasons and quotes what she said there about clause 40 and clause 47 and sets out the elements of clause 47 as being the four components of the accredited system, the last being the Code which we know to be the '96 Code. And then, in 108 – because the word "forest" only appears in the '96 Code, and that's a quote from clause 47 of the 1998 RFA. And then, in 108, her Honour says, "Thus, the Code", with a capital C, which she has previously defined as the 2014 Code – we will find that - - -

JAGOT J: You've only taken us to 107, which is the 1996 Code, you say.

MR WALLER: That's right. Yes.

JAGOT J: Yes.

DERRINGTON J: Can I just ask at that point, Mr Waller, did the 2007 Code make any changes that are material to the matters we are discussing?

MR WALLER: The 2007 was that wholesale shift away from the '96 Code. The 2014 Code is closer to the 2007 Code, but it still has some differences.

DERRINGTON J: So the Sustainable Forest Act wasn't referred to in the 2007 Code.

MR WALLER: I suspect it was. That Act came into being in 2004.

DERRINGTON J: In 2004.

MR WALLER: And I can come back to that if your Honour gives me a moment. Yes. Paragraph 124.

JAGOT J: 124. I've also just noted 6(b). The principal finding is VicForests did not apply the precautionary principle as required by 2.2.2.2 or whatever of the Code 2014.

MR WALLER: Yes.

JAGOT J: So that's what she's applying.

MR WALLER: So - - -

JAGOT J: Yes. And then – what did you say? 104.

MR WALLER: 124.

JAGOT J: 124. Hang on. That rather suggests that the Code she's referring to at 107 – no. No. That is a different name, isn't it?

MR WALLER: Yes.

JAGOT J: No. Hang on. Yes, it is. No "forest".

MR WALLER: If the word "forest" appears in the title, it can only be the '96 Code.

JAGOT J: Yes.

MR WALLER: The '07 and '14 Codes have the same nomenclature. In the - - -

JAGOT J: She says in 124 that she was told that there's no difference between 2007 and 2014.

MR WALLER: Yes. So far as the precautionary principle was concerned.

JAGOT J: Right.

MR WALLER: And that was – yes. And that was because arguments were made about the construction adopted by Osborn J in other cases dealing with the 2007 Code. In - - -

JAGOT J: So where does all of this go? I'm a bit lost as to where all of this goes, this ground 2.

MR WALLER: The short point, your Honour, we say, is that if her Honour is to be accepted in terms of the constructional choice she made, namely, that in order to have the benefit of the exemption one must comply with prescriptions referred to in the RFA, then the 2014 Code is not a prescription referred to in that RFA.

JAGOT J: Right. Because it's - - -

MR WALLER: Because it's not comprehended by the definition of the Code, which is limited to the '96 Code or any variation or consolidation of it. The 2014 - - -

JAGOT J: Because there was no variation – there was no amendment of the RFA to incorporate that till 2020?

MR WALLER: Yes.

JAGOT J: Is that how it goes?

MR WALLER: Yes. If we were dealing with this today in respect of the 2020 RFA, yes, we would concede that the 2014 Code is referred to as a prescription, but the difficulty, we say, with this reinforces the argument that the construction can't be right, because it would mean until March 2020 the gateway to section 38 depended on compliance with a repealed Code and that there would be operating at the Commonwealth level a '96 Code that had to be complied with in order to have the benefit of the exemption, but in Victoria, operating under Victoria's suite of legislation, one had to comply with the 2014 Code. That's why we say that underlies why specific compliance with prescriptions referred to directly or indirectly in the RFA is inconsistent, we say, with the purposes and also has the consequences – possibly absurd consequences might result by reason of those matters.

JAGOT J: But you wouldn't construe two pieces – you wouldn't construe section 38 by reference to a – even if there is a bizarre anomaly in a particular RFA, you would never – that anomaly didn't arise until the gazette – on your case, the gazette created an anomaly.

MR WALLER: That's true.

JAGOT J: It wasn't there at the beginning. Well, you've never construed the legislation - - -

MR WALLER: No.

JAGOT J: - - - by reference to that.

MR WALLER: No. That's true. But in the same way - - -

JAGOT J: So it doesn't really help your construction argument at all.

MR WALLER: Except in the same way that her Honour said there was limited utility or limited ongoing utility of clause 23 because the EP had been repealed, we would say there is limited ongoing utility of the dot point number 4 in clause 47, because the Code had been revoked.

DERRINGTON J: Doesn't this detract entirely, though, from what the whole purpose of the RFA regime was and is: to allow for adaptive management of the forest as science progresses and as new forms of forestry and conservation are developed? Hence in the original RFA, you've got the state suite of legislation and policies as varied by the agreement ..... then the various state legislation is adapted and updated and modernised, picked up, then, in 2007 variation. Do you say that the Code is contemplated by that variation?

MR WALLER: The Code stands in a class of its own. It has its own definition in the RFA. The RFA does say that - - -

JAGOT J: Surely – sorry to interrupt here. I had another question. Just as night follows day, you would have to read the variation as including the ..... because otherwise you're just rendering the whole thing nugatory, and none of this is saying anything against your first argument.

MR WALLER: Yes.

JAGOT J: It's just, like, why are we bothering with this second argument.

MR WALLER: Well, we say that this, in a sense, highlights the difficulty with the construction that her Honour - - -

JAGOT J: No, it doesn't. It doesn't do anything. The mere existence, on your construction, which doesn't exist on anybody else's construction, of an anomaly in the functioning of the RFA can't possibly – that came in years afterwards – it only arose in 2007. It can't speak to a construction of the legislation at all. Okay. All it rather suggests is this is a big – you know, going down a rabbit hole we don't need to go down. You know, not that any of this detracts from ground 1 - - -

MR WALLER: Yes.

JAGOT J: I'm not suggesting it does. It just doesn't seem to – anyway, it seems a bit unnecessary.

MR WALLER: Well, we only have to go down the rabbit hole if the construction that the primary judge contended for is correct. If it's not, then we avoid this completely.

JAGOT J: Yes. No. No. I understand that.

MR WALLER: So in a sense what I'm saying, if not a separate ground in itself, fortifies what I've said about ground 1 and the way our construction ought to be accepted.

JAGOT J: Well, I don't think it does fortify it. I think it's something separate and not very useful, from my point of view, but anyway - - -

DERRINGTON J: And this has got nothing to do with the interpretation that her Honour put on the precautionary principle.

MR WALLER: No.

DERRINGTON J: Ground 2 is simply about whether it's relied upon – incorporated at all.

MR WALLER: Correct, correct. That's another ground altogether. But we would say the uncertainty surrounding whether or not the 2014 Code is comprehended by the RFA is another difficulty confronting those at ground level, who have to determine whether their operations are going to have a benefit of the section 38 exemption, and it's yet another piece of uncertainty that has to be grappled with. One picks up the RFA, one looks at it, one sees that it refers to a '96 code, without any ambulatory effect if the code changes. One then is in a state of confusion as to whether or not one is complying, and if complying, complying with what? "Do I need to comply with the '96 code, a 2014 code, and if I don't comply with it, are my operations then going to be subject to scrutiny by the Minister for matters of national significance?". So - - -

JAGOT J: It's not very difficult, because all you do is read "variation" as a sort of common-sense sort of way, and there is no anomaly, and there is no problem. And it doesn't blister or undermine your ground 1 argument either way.

MR WALLER: Yes. The second limb of our ground 2, we've spelled out in writing. In essence, it's that if we accept the logic of the primary judge in her separate questions, as to which sorts of prescriptions ought be those that could lead to a loss of the exemption, that the precautionary principle which is set out in clause 2.2.2.2 of the 2014 Code ought not be one such prescription, in circumstances where

it involves matters of degree and subjective judgment as opposed to a prescription that says, "if you find a particular creature of this kind, you create a 20-metre buffer", as opposed to the precautionary principle which involves questions of weighing up risk, working out which of a number of potential actions might be taken to ameliorate the risk.

And in those circumstances, especially where part 3 creates criminal offences that a construction which promotes clarity and an understanding of what practically is required to comply with the law, would be preferred over one which creates ambiguity or uncertainty. And the precautionary principle of its nature is one which as a grey zone much greater than, we would say, other prescriptions of the kind her Honour referred to in her separate question reasons. For that reason, our submission was that even if the Code of 2014 is to be complied with to enjoy the benefit of the exemption, compliance with the precautionary principle ought not be included within that for the reasons that we have set out.

JAGOT J: So where is the 2014 Code in the folders. Is that - - -

MR WALLER: Yes.

JAGOT J: - - - just out of - - -

MR KIRK: Volume 3 of part C.

JAGOT J: Thanks. Sorry?

MR KIRK: Volume 3 of part C has the Code and the RFA - - -

JAGOT J: ..... the RFA. So which tab is the Code?

MR KIRK: - - - and the management standards and procedures. So it's the most useful of - - -

MR WALLER: One-fifty.

JAGOT J: Is it tab 50?

MR WALLER: One-fifty. One five zero. So, your Honours, unless there are any questions, those are our submissions in relation to ground 1 and ground 2.

JAGOT J: Yes. Okay. Just out of curiosity, was it sort of thought that maybe you should have an argument about section 38 and just decide that alone, and then have any appeal?

MR KIRK: Well, I think that was the – so the issue really arises, actually, because they didn't seek leave to appeal from the separate question.

GRIFFITHS J: Yes. Quite.

MR KIRK: Well, at – well, they say they won which is why we spent the last three and a-fifth – three hours, 15 minutes complaining about their win. That's the issue.

JAGOT J: They won? Well that - - -

MR KIRK: Well, they – they – and I will explain that in a second, because the – the context perhaps would not be entirely clear from what has fallen in the last three hours and 15 minutes. Can I start by addressing what is really a – I am going to turn straight to the text after one minute, because the text is where statutory construction should begin. Before I do, can I just make one - - -

GRIFFITHS J: Where's your three-page hand-up?

MR KIRK: Sorry, yes. So good I forgot it.

GRIFFITHS J: And I hope it's more illuminating than your opponents.

MR KIRK: Sorry, your Honours. Here's – here's three copies of the three-page. I'm not sure it's going to be highly illuminating but somewhat.

GRIFFITHS J: Thank you.

MR KIRK: It's very propositional. Now, I was going to start with one brief introductory remark before turning to the text. There's been a, if you will forgive me, a bit of a heresy underlining a lot of what has gone on in terms of submissions from my learned friend this morning about – the effect of it, if I may paraphrase, is that we foresters shouldn't have to worry about complying with federal law because what we do is not a matter of national significance. Repeatedly my friend kept saying, "not a matter of national significance. Not a matter of national significance". Can I seek just at the start to indicate why it is? The Leadbeater Possum is one of nine species listed as critically endangered, that being the – the category just below extinct in the wild.

And of the nine one of them is probably now extinct in the wild, just to give your Honours a reference for that without going to it, the main judgment para 622. If I was a jury advocate, I would refer your Honours to the photo at paragraph 80 of her Honour's judgment, but I'm not so I won't. The greater glider is a vulnerable species. It is listed under section 179 sub 5 of the EPBC Act. Regrettably, you will be unsurprised to hear that it is a much longer list of vulnerable species in Australia. But the Leadbeater possum in particular, as I said, is much rarer. The reason that is of national significance – and this also picks up a point your Honour Griffiths J raised – is that under a – I think there's probably a range of international conventions to which Australia is party, but including the UN convention on biological diversity, which is referred to without going to it in the EM for the EPBC Act at clauses 18 and

19, imposes obligations on Australia to take steps, you will be unsurprised to hear, to protect endangered species.

We are here because of the threat to a critically endangered species, the leadbeater possum, and a vulnerable species, the greater glider. And all this special pleading from VicForests about, "Well, we shouldn't have to worry about this" ignores the fact that, but for section 38 – about which we're arguing, of course – they would be governed directly by the EPBC Act insofar as it has an effect on relevantly those types of species and insofar as what they do may have a significant impact. Because it should be recalled that, as your Honours would all be very well aware, that the federal regulation is only for certain area – for topics and only for certain degrees of impact. Namely, a significant impact where significant is not further defined, as we know, but has been addressed. Branson J in Boothby, I think, is often cited in that regard as to what significant means. So that is the starting context in which we work.

JAGOT J: Can I just raise that, accepting what you say – because we're only at section 38 being relevant because we do have matters of national environmental significance.

MR KIRK: Exactly.

JAGOT J: So the whole NES sort of focus starts to me seem a little off – off at the mark. But because we have 38, it's saying even if you do have a matter of national environmental significance otherwise, if it's subject to this regime of agreement between state and Commonwealth, the EPBC Act does not apply to that – to that area. And this all does come back to playing ambiguity in the words in accordance with the RFA. And what do they mean? And what level does that attach at? Does it mean land covered by an RFA where it's not – where forestry is not prohibited? Or does it mean in accordance with all of the specifications or prescriptions of an RFA that apply to an activity?

MR KIRK: One of the other problems, with great respect for my learned friend's submissions, is that there has been a clear articulation neither of what the primary judge actually found in respect to the construction, because it's not all aspects of the RFA.

JAGOT J: No, no. She didn't. That's true.

MR KIRK: Nor has there – sorry, I didn't mean to cut across your Honour.

JAGOT J: True. No, no, that's true.

MR KIRK: I apologise.

JAGOT J: No, no.

MR KIRK: Nor has there been a clear articulation – and I will come to this in a moment – of what my friend – learned friend's construction is because we've had about four variants. But can I start with her Honour's. And incidentally I – I do understand about the issue about duplication and so forth, and your Honour Griffiths J referred to the objects and I will deal with that – I will deal with it. But can I start with the text and then sort of work towards that?

JAGOT J: Sure.

MR KIRK: Because I fully understand the importance of that issue. So starting with the text. Obviously enough your Honour is quite right that the words we're focused on is "in accordance with". We would say the ordinary meaning is "in compliance with". There's not a lot of ambiguity about that. But that's not a full answer to your Honour's point because I accept there can still be a kind of level of generality issued. As to what her Honour articulated, because of – as picking up on my learned friend's retort to me saying they didn't appeal, in a sense we – we did lose. My client lost the argument it was putting in the separate question. But that's not to say VicForests won because the construction her Honour adopted was that put by the Commonwealth intervening and supported, albeit with sort of waxing and waning enthusiasm by Victoria. The Victorian attorney intervened.

JAGOT J: Well, I would count that as a bit of a loss for VicForests. It could be – it could have been appealed.

GRIFFITHS J: But that's also when you amended your case - - -

MR KIRK: No, that's right. That's right.

GRIFFITHS J: - - - significantly to reflect that separate question. Yes.

MR KIRK: But I'm just putting it – no, no. Indeed. Exactly. The argument that was – the case that was first pleaded, and that led to the second question, was – it was a very simple point, much simpler than the case that ended up being running – which was the RFA requires five-yearly reviews. You have not undertaken five-yearly reviews. You have not complied with the RFA. Therefore, you lose your exemption. It was – it was sort of elegantly simple. But her Honour found – and I will show the sort of key parts of her Honour's judgment in a moment – to pick up the language of section 38, part 3 doesn't apply to an RFA forestry operation that is undertaken in accordance with an RFA.

In effect, her Honour – as I will show you in a second – held, the focus has to be undertaking RFA forestry operations, not flying between Melbourne and Victoria to engage in reviews and bureaucratic processes and so forth. It's about what happens on the ground. Now then, if I can take your Honours to key parts of the judgment very quickly, para 149 – this is the separate question reasons, sorry, which is tab 12 of the part A volume. And it's in the recorded version. So page 38 of the – of 260 FCA 1. It's actually para 148 and 149. So there's a reference in 148 to the four

components of the Victorian regulatory system which are accredited under clause 47 and your Honour knows those – your Honours know those dot points. At 129:

> *The last component bears directly on the conduct to forestry operations in the central highlands RFA region.*

Then if your Honours turn over the page to 155 – actually, the last sentence of 154:

> *It is the content of the regulatory outcome of this work, the actions, statements, recovery plans and management prescriptions which will govern the conduct of forestry operations –*

that construction is consistent with the construction I've referred in relation to 38(1):

> *…the actual conduct of forestry operations, being an action for the EPBC Act, must be undertaken in accordance with the contents of the RFA, ie, in compliance with any restrictins, limits, prescriptions, contents of the Victorian Code of Practice –*

being the relevant thing –

> *in order to secure the benefit of the exemption in 38(1).*

And then – well, I will come back to 157. And her Honour touches on it again at para 175 on page 44. So that's para 175. It's about the fifth line:

> *However, as the Commonwealth submitted, insofar as any of those action plans or recovery statements themselves contained proscriptions or limitations on the manner in which forestry operations may be conducted, then in order to secure benefits –*

blah, blah, blah. So it's about proscriptions and limitations going to the manner in which forestry operations may be conducted. So the five-yearly review is not covered. It's not part of what's picked up by section 38. That is her Honour's construction which we come here to defend. The construction put by my learned friends rather waxes and wanes. So there's one construction put in the notice of appeal. It means forestry operations – this is para 2 of the notice of appeal:

> *As defined by an RFA as enforced on 1 September 2001, conducted in relation to land in a region covered by the RFA, and where those operations are not prohibited by the RFA.*

There's another slightly different formulation in the reply – our learned friends' reply at paragraph 3 – where my friends focus on land where those operations are not prohibited. And then, this morning my learned friend has used the words "an undertaking pursuant to an RFA". So his first formulation right at the beginning this morning was her Honour ought to have held that forestry operations as defined by an

RFA enforced on 1.1.2001 and conducted on land being land where not prohibited and undertaken pursuant to an RFA is what the definition should be.

Your Honours will notice a gloss undertaking pursuant to an RFA – it's a paraphrase of "in accordance with" – and then later this afternoon, my learned friend picked up what had fallen from Jagot J – not that your Honour was seeking to articulate an exact formulation, with great respect to your Honour and my friend – but my friend ..... as advocate picks that up and says, "operated a high level of generality such that RFA forestry operations, which are undertaken under cover of an RFA, are exempt from application in the Act". So we're slipping between "under cover", "in accordance with", "land", etcetera. There is actually a very clear articulation of what we think Vicforest means, and it's found in section 4 of the RFA Act.

JAGOT J: Well, that's the one we've pointed out, isn't it? If it had used that language, we wouldn't be here.

MR KIRK: Not a small point, with respect. Not a small point. So if could trouble your Honours to go back to it - - -

JAGOT J: Where did I put it. That's in - - -

MR KIRK: I'm sorry, your Honour. That's tab 32 of – in my volume 2 – of my friend's part A. I think it's in ours as well, but I will use theirs. So part A, volume 2, tab 32, the RFA Act. And it's the definition in section 4 on the second page thereof, of RFA forestry operations, and it suffices to focus on B, which is the Victorian one, but I think they're all materially the same. Does your Honour the presiding judge have that?

JAGOT J: Yes, I have. Is this the definition of RFA forestry operations?

MR KIRK: Yes. So looking at RFA forestry operations means B:

> *Forestry operations as defined by an RFA –*

And I will come to the RFA shortly:

> *...that are conducted –*

So that's the operations:

> *...that are conducted in relation to land in a region covered by the RFA, being land where those operations are not prohibited by the RFA.*

JAGOT J: Yes.

MR KIRK: That's pretty much what – they're slipping and sliding around.

JAGOT J: Definitely.

MR KIRK: That's pretty much what they mean.

JAGOT J: I mean, this post-dates the EPBC Act.

MR KIRK: Yes and no.

JAGOT J: Yes and no. Okay.

MR KIRK: Because section 38 – my learned junior might correct me if I get this not quite right – I think was completely re-enacted – in any event, relevantly, amended. I think my friend actually took your Honour to where Mortimer J discussed that - - -

JAGOT J: Yes.

MR KIRK: - - - but her Honour made the point it wasn't a material change - - -

JAGOT J: What was the date of that? Yes.

MR KIRK: - - - the language is just slightly different. But they're read together. They're enacted together.

JAGOT J: Is that right? They're part of the same package.

MR KIRK: Yes, yes.

JAGOT J: I see. I had missed that somehow.

MR KIRK: And it's partly for that reason that in the separate question reasons – I forget quite where – but her Honour says it's legitimate – let me go back a step. There was a little technical error dispute about whether the exemption in section 6 sub (4) matters more than section 38. It doesn't matter, because it's the same language, but her Honour said, "look, I think it's section 38 because you're operating in the edges of section 38". But it's legitimate for me to take account of the EM for the RFA Act, because section 38 was – yes, my learned junior reminds me that para 100 – without going to it – on the separate questions reasons, her Honour says:

> *Apart from the change in formulation and voice, the substance of the exemption remains as it was enacted with the EPBC Act in 2000.*

But it was changed, at the same time. So going back to my point - - -

JAGOT J: Yes. They didn't seem to change it to match it up with that.

MR KIRK: But they did.

JAGOT J: Sorry?

MR KIRK: But they did, because where they meant that - - -

JAGOT J: Yes.

MR KIRK: - - - they said it. They said it eight times. Or, I'm sorry, four times – A to D.

JAGOT J: Yes.

MR KIRK: If they had meant that in section 38(1) as enacted at the same time – the first point – they would have said so in these thoughtful words. But they didn't. My friend seeks to read in those words, enacted at the same time, as though they slip into section 38 – first point. But then second point – you might want to, your Honours, keep a finger there – go back to section 38 of the EPBC Act. You will see what's coming. Tautology. Part 3 doesn't apply to a forestry operation conducted in relation to land in a region covered by the RFA being land where those operations are not prohibited by the RFA, that is undertaken in accordance with something undertaken in land in a region covered by the RFA, being land where those operations are not prohibited by the RFA. That is the effect of Vicforests' construction.

JAGOT J: I've just missed the redundancy point, sorry.

MR KIRK: Because all of the work they seek to do is covered by the definition of RFA forestry operations, which is a seventh – I might get the numbers wrong – but the eight, ninth and tenth words of section 38(1), before you get to the words we're construing, that is undertaken in accordance with an RFA. That is the phrase we're construing. But on their construction, all of the work is already done.

JAGOT J: I see. Yes. I am with it, of course.

MR KIRK: It's already done by the definition of RFA forestry operation. It is the most unlikely of constructions for any Parliament, let alone – forgive me for saying this, I say it regularly – the constipated drafting of the Commonwealth, where they're very careful about what they mean.

DERRINGTON J: But they were similarly not careful in the original version of the definition there, in section 38.

MR KIRK: That – well, that would – sorry. Sorry.

DERRINGTON J: Which pre-dates the 2002 amendment in the RFA – done by the RFA Act.

MR KIRK: It may be so, but they went to the bother of re-enacting it at the same time as they enacted the RFA Act.

DERRINGTON J: We ..... see you make a note about that.

MR KIRK: There is no other – well, it would make little sense - - -

DERRINGTON J: I'm sorry.

MR KIRK: - - - otherwise, where it's not as though – sorry.

JAGOT J: They could have just ended it on – sorry, sorry. I'm thinking out loud while you're talking. I'm sorry.

MR KIRK: No, no.

JAGOT J: Sorry.

MR KIRK: Sorry, I'm - - -

JAGOT J: To put it on your argument, it literally could have one. 38.1 could have ended after "forestry operation". Full stop.

MR KIRK: Correct. Correct.

JAGOT J: But maybe they are thinking that - - -

MR KIRK: Sorry, there is - - -

JAGOT J: - - - there's still ambiguity in my view.

MR KIRK: Sorry. Well, can I come back to that. There is no – I was just laughing a little to myself when Derrington J raised the questions. I was thinking of what I was arguing earlier today. Commissioner of Police v Eaton [2013] – I forget the reference, but paragraph 78, which is about construing the Police Act and the Industrial Relations Act of New South Wales together actually says, "you should apply" – it's quite an interesting – an underrated judgment, actually. "You should apply the Project Blue Sky approach of harmonious construction, para 69 to 70 to construing two Acts of the same legislature – not quite stated, but sotto voce – more than getting hung up on notions of implied repeal. Here, even more so where it's enacted at the same time as part of the same package.

Now, then to move on with the textual argument. So I will move on from what I've said about that definition in section 6, sub (4). 38(1) talks about "an RFA forestry operation that is undertaken in accordance with", so it's about verbs; it's about doing stuff, doing stuff "undertaken in accordance with an RFA" forestry operation. It's not about identifying land, it's about doing things. What things, if I can just to try

and foreshorten the time, if your Honours turn over to section 40, sub (2), there's a definition of "forestry operations", note not RFA forestry operations, which talks about the planting of trees, managing of trees and the harvesting of forest products. There's a similar definition in the RFAs of RFA forestry operation, and that's no coincidence. Section 40 is dealing where there isn't yet an RFA picking up the same notion. So your Honours will find that in – I forget what the clause is of the RFA, but it's in the definition, of course.

All of those things are, you will forgive me for the year one-ism, they're action words: the planting of trees, the managing of trees, the harvest of forest products. The exemption applies to actions; that is the focus of it. It's not focussed on identification of some particular part of land. In our respectful submission, the construction of VicForests is seeking to put a very substantial gloss if not, indeed, a rewriting, where if they had meant what my friends say, they would have picked up the sort of wording in section 6, sub (4). My learned friend referred to section 37N, which, your Honours will recall, that's of the EBC Act just on the previous page, which uses the words:

> *…and the action is taken in accordance with the conditions, if any, specified in the declaration.*

Well, it's true that that language is used in 37M, which was added later, but lots of other sections – and I won't go through them all – but there are references replete in chapter 2 to "acting in accordance with" and her Honour's construction is consistent and coherent with all of them. And that then leads me to this point, which picks up on some of the points your Honours have raised this morning. Let me approach it this way: it is not as though – this is quite important, the sort of issue your Honour Justice Jagot was raising about maps, and so forth, so pardon me for being a bit slow about it, but it's important. It's not as though the construction put by VicForests is going to create an objective – my friend might have used the word "mathematical" or "mechanical" – type of delineation of what's in and what's out. There is the start of that with the map that your Honour was looking at right the end of the RFA, because there's the comprehensive reserve system, but it becomes much more complicated than that.

Can I start with a simple example and then I'm going to get more complicated. In my learned friend's written submissions and at paragraph 16 to 17 of their primary submissions – and I think my friend repeated it again this morning – they accept that a prohibition on, as we understand it – they accept that a prohibition on harvesting rainforest is covered by their ..... so as I understand it, they say, "We accept we can't harvest rainforest," and at paragraph 17, I think they talk about "clear and practically applicable management prescription" and give the example of rainforests. Is that geographic or not? Because if I can use a shorthand label for their construction, which is it's all about just objective geography.

When one actually goes to the RFA it's not identified in objective terms. So the RFA is in that e-volume 3 of part C behind tab 153. And I think it's touched on in a

few places, but it comes up particularly in attachment 1, which is page 27 using the big, fat numbers on the right-hand side. So that's where attachment 1 starts. Then if you jump to page 30. Sorry. You've got this rainforest protection and if your Honours look at that:

> *All rainforest in Victoria including a surrounding buffer is excluded from timber harvesting. This is achieved through a hierarchical rainforest protection reserve system.*

Reference to a technical report. And then next para:

> *Rainforest stands are protected through all CAR reserve components.*

And it's:

> *Protection is effected through implementation of the code. The key elements of the code with respect to rainforest and conservation includes defined areas of rainforest –*

second dot point:

> *In the absence of detailed strategies, prescriptions for stands of lesser significance.*

It's an evaluative notion. Next:

> *The requirement that rainforest be identified on each coupe plan –*

so that's done by the forester, not by Victoria or the Commonwealth, it's done by them as they prepare to harvest –

> *and the protection of buffers from damage.*

JAGOT J: So, well, I was led to believe by the appellant that CAR reserves, you couldn't do forestry operations in at all.

MR KIRK: Correct.

JAGOT J: All right.

MR KIRK: But outside CAR reserves you can. I think it's - - -

JAGOT J: Why does it then say "rainforest stands are protected through all CAR reserve components"?

MR KIRK: I think that means CAR reserves, inter alia, would pick up rainforest bits, but there may be other bits outside the CAR reserves. And clause 67, I think it

is – without going back to it, my friend went there a couple of times – said that you can harvest outside the CAR reserve system if you do so in accordance with the code.

JAGOT J: I see. And then - - -

MR KIRK: So then you come back to this - - -

JAGOT J: 66 is:

> *Parties recognise that all Victorian rainforest is protected from harvesting through the range or mechanisms described in attachment 1.*

That's the substantive clause.

MR KIRK: Yes, yes.

JAGOT J: Yes. Okay.

MR KIRK: Sorry, your Honour, I should have gone to that.

JAGOT J: Yes. No, no, that's all right.

MR KIRK: I apologise. So my point about rainforest – and it's just an illustrative point, it's not a simple matter of applying a mechanical or mathematical standard and then you can come up with your lovely covered map and say to Jill and Joe the forester, "You can't go there, but you can go there." There needs to evaluations made. So this hunt for certainty is, with respect, a mirage. Then if I can seek to put that in a slightly broader context, if I can start with – and I will come back to the RFA, so your Honours might just want to keep that handy. But if I could go to the separate question, reasons, at tab 12 of part A, starting at page 44, paragraph – I think I've already referred to para 175. And para 176 of her Honour's judgment, clauses 60 to 66 of the RFA deal with reserve system. Then there's a reference to attachment 1, and I think we referred to this morning:

> *The CAR reserve system –*

so I'm going on to make a point about the CAR reserve system itself –

> *has the following three components as described by the genus reserve criteria: dedicated reserves, informal reserves –*

and then (3):

> *values protected by prescription.*

I'm told, by the way, that although "prescription" has a capital P, it is not, in fact, defined in the RFA:

> *This comprises those element of SPZ protected by regional prescriptions, including stream buffers.*

Her Honour then says at 180:

> *The category of reserve at para 3 is critical to an understanding –*

I would invite your Honours to read para 180 and 181, and then also 186, your Honours. And then I referred your Honours to 186, as well. So that's how her Honour dealt with it. Can I then take your Honours briefly to a couple of documents which are not in part C, which were before the court and which are listed in the part B index, and my friend ..... copies. There's actually two documents here. There are tabs on it just indicating their part B reference. I will actually go to the second one first. The second one is – yes – for reasons a bit beyond me known as JANIS. So that's the one that has this front page comprehensive adequate and represented reserve system. I think it's called JANIS because if you look down the bottom it's report by the joint something national implementation subcommittee.

JAGOT J: Yes.

MR KIRK: JANIS.

JAGOT J: Okay.

MR KIRK: So this document is referred to in the RFA in the context of articulating values and prescriptions. Now, then, if your Honours go to big page 13, internal page 8, which is headed Values Protected by Prescription – and if I could invite your Honours just to read under that subheading, beginning, "Where the nature of a forest value". And then if I could ask your Honours to turn within the same document to big number 16, internal 11, headed Criteria for the CAR Reserve System Forests, and just, to begin with, that first paragraph at the top of the page:

> *This section proposes national criteria for the conservation of forest, biodiversity, old growth forest and wilderness ..... bearing in mind the uncertainties regarding forest values and their conservation status and differences between regimes.*

And then towards the bottom of that page, the third-last and second-last paragraph:

> *Priority attention should be given to rare, vulnerable and endangered ecosystems and species.*

And then:

Reservations ..... biodiversity needs to focus on the continued viability of species and ecosystems rather than the attainment of Ariel targets.

whatever that means.

JAGOT J: We don't know what that means. Ariel. No. I don't get that, either.

MR KIRK: I don't know what that means. Part of the reason I also show that is that I'm not just going to be – the fact that there's no sort of mathematical certainty, but also, to pick up a point your Honour Justice Derrington made, this needs to be adaptive and dynamic, because even just referring to continued viability of species, the viability of the Leadbeater Possum today might be better or worse – likely worse – than it was 20 years ago. It might be different in 10 years again. No one would sensibly understand this system as not having to be responsive. Then if your Honours turn over to page 18 – big numbers – in the middle of the page – yes – where it says:

In terms of rare, vulnerable and endangered species and ecosystems, it's recognised that a range of approaches, ranging from preservation to prescription management, and the development of species recovery plans will be needed.

GRIFFITHS J: Where are you reading from?

MR KIRK: Sorry, your Honour. Right in the middle of the page, just above - - -

GRIFFITHS J: Right. I've got it. Thank you.

MR KIRK: - - - number 4.

GRIFFITHS J: Yes.

MR KIRK: So this is this notion of prescription management, so in other words, more evaluative management. So that the JANIS document which is referred to in the RFA. And then if I can turn to the other document, which is the National Forest Policy Statement, which – it was very much part of the driver of the development of the RFA. I think that's explained in her Honour's separate question reasons. It was big sort of intergovernmental effort. Within that document, if your Honours go to big number 6 – yes. So just on the left-hand side, the first three lines:

Managing Australia's forests in a sustained manner calls for policies by both government and landowners that can be adapted to accommodate change. Presses for change may result from new information about forest ecology.

Then on the next page, page 7, there's a heading National Goals, and then the first dot point is conservation, and it talks about maintaining extensive and permanent

native forest estates – reference to biological diversity. And then, turning to big page 9, heading 4.1, Conservation, the first para:

> *Two of the principal objectives of this statement are the maintenance of an extensive permanent forest estate.*

Then jumping to the third paragraph:

> *The protection of the full range of forest ecosystems and other environmental values is fundamental to the SFM.*

And then on the third column on that page, so the one where the first words are "forest communities", within that first paragraph, it says, about eight lines from the end:

> *Second, there will be complementary management outside reserves in public native forests –*

and so forth. What all that illustrates is that – and the reference to JANIS within the RFA is at para – there's one reference, I think – there may be others – is para 61 – sorry – clause 61 of the RFA on page 15, so that's the one behind tab 153 of volume 3:

> *The parties agree that the CAR reserve system as identified on that one described in attachment 1 in conjunction with the arrangements proposed for private land satisfies the JANIS Reserve Criteria.*

And then the second reference is on page 27 within attachment 1, which is the point her Honour Mortimer J made:

> *The CAR reserve system has the following three components as described by the JANIS Reserve Criteria, values protected by prescription.*

GRIFFITHS J: I'm just having a little difficulty understanding what significance you say attaches to documents that are dated 1992 and 1997 respectively to the task of construction.

MR KIRK: The JANIS document, in particular, helps to elucidate which is referred to in, for example, attachment 1, where it talks about values protected by the prescription, a notion which is otherwise not self-evident but which gains its meaning from the JANIS document. And although I accept that this is only one RFA amongst however many there were, there's reason to infer that JANIS – there's no doubt that the JANIS process was a key driver of it, and this is illustrative of the sort of approach taken to RFAs generally.

GRIFFITHS J: I must say, as I was preparing for this I was intrigued by the different uses of the word "value" and what "value" actually means. Is there any express reference to "value" in the Commonwealth Act?

MR KIRK: In the Act?

GRIFFITHS J: In the Act.

MR KIRK: The EPBC Act. I don't – I don't think so. I will be corrected - - -

GRIFFITHS J: Because I don't think I could find it. I'm just wondering, it's – it goes back – it goes back to this point that has been raised earlier today, namely:

> *Where the task is one of statutory construction, we're allowed to have regard to intrinsic –*

But what – what value do we really get out of going down to this sort of history material in construing 38?

MR KIRK: Because what I'm grappling with just – as regards this. It is in part the argument put by my friend in part – the issue raised by the bench that a – a possible construction is to say, well, it's all – it's geographic, it's certain and it's as specified in a map. And it isn't. So that's – that's – so I don't sort of need all the details. In the end, that's the argument I'm responding to. It is not mechanical. It is not certain. Even on VicForests' case. To put it another way, what my learned friend suggests – this was one of his formulations – but my learned friend rather pithily said at one point, "His construction is about the where and the what, not the how."

The trouble is that the what overlaps, and indeed the where overlaps with the how. They tend to merge because you need to engage in evaluative judgments at least in part. Now, sure, there are some – there are some bright lines, but they're CAR bright lines. But that's not what this case is about. It's about outside the CARs where logging is permitted but on conditions. My learned friend made something about the definite use of the definite – indefinite article. Can I just say about this very briefly. Plainly the use of the indefinite article in 38(1) is just identifying an RFA which applies. There could not be a sensible construction which my friend seems to flirt with that VicForests could say, well, we're permitted to do this under the New South Wales agreement.

So what are you complaining about? It would be absurd. My friend – although he didn't address – my friend touched on this a bit. Sorry, I'm just dealing with some textual matters and then I'm going to come to some purposive matters in the issue of duplication. My friend, in writing and a little bit this morning, spoke about the context in section 40 and section 42. I think I will just rely on what we say in writing about this. Save – save for this, my learned friend, in relation to 42 in their written reply, put an argument which is a little hard to deconstruct but which I think is this. So this is reply at paragraph 5. And I just want – I don't know how to articulate the

argument and respond to it. The argument seems to be section 42 is intended to create an exception to the exemptions in subdiv A and B. So subdiv A and B creates exemptions, 42 qualifies that. It's the first point. The second point:

> *He must therefore read section 42 and it's only intended to apply to situations exactly reflecting what is exempted by those subdivisions. (3) –*

this is my articulation –

> *section 42 doesn't disapply the subdivisions only insofar as operations are undertaken in accordance with an RFA.*

Thus section 42, quote:

> *…makes clear that the only circumstances where the section 38 exemption does not apply to RFA forestry operations are those set out in 42(A) to (C).*

Well that's, with respect, a very odd argument. Section 42 makes no such thing clear. Section 42 is pretty simple. If it's World Heritage List or covered by the Ramsar convention you don't get the exemptions. If it's incidental to something else, you don't get the exemptions. That doesn't tell us anything about how we construe section 38. My learned friend made an argument this morning, and he took your Honours to section 68 and 75. And it suffices to go section 75 of the EPBC Act which is behind tab 26 and volume 2 of my friend's material. And so this is the argument in effect that my friend relied particularly on 75(2)(B):

> *Without otherwise having any adverse effects that the Minister must consider –*

this is when she/he is considering an application for an approval –

> *the minister must not consider any adverse facts – sorry, impacts of any RFA forestry operations covered by the exemption.*

And so the aim, it seems to be, it's a very complicated process. It's not really, because if the Minister was faced with such an application, she or he – and on Mortimer J's construction – she or he would say, well, first – okay, tell me what you want to do and is that in accordance with the code. And if it's in accordance with the code, you don't need my approval. If it's not in accordance with the code, all right, I can see you will need my approval. Tell me why I should give you approval. It's not terrible difficult at all. Now, can I then turn to purposive considerations?

JAGOT J: I mean, one thing that is concerning is the idea of being slipped out of section 38 exemptions and into the EPBC Act scheme when you're happily, in one sense, going along. You – there's loads of restrictions, you doing something – something that's not in accordance with the code even if you're in an area where you can do forestry operations but you don't comply with the conditions. And then you –

you've lost everything and the whole of it – everything you've done until then becomes illegal, doesn't it?

MR KIRK: Well, can I – sorry.

JAGOT J: No, no, you've – get your breath - - -

MR KIRK: Just water went down the wrong way. Haven't suddenly got COVID. That – so that in a sense is the – is one way of putting the duplication argument. So can I – can I come at it this way? First – this is not really in answer to your Honour's point, but I just want to build up to it. One would have to stand back and say, well, what sensible construction does either – either one serve? How does it fit in with the purposes and the objects and so forth? We would say – I think we said this in writing – that the approach put through by VicForests is – tries to be very black and white. That's consistent with what I've said. It's kind of all in, it's all out, it's very clear.

It's all or nothing, to which we would say there's no reason to think ..... would've intended such a black or white operation. And there are conditions which are going to be grey. Is it geographic, is it not geographic? So to give an example of that, what about a requirement that you can log a particular area contingent on having an X metre setback from Y protected interest? Is that geographic or is that not geographic? Now on her Honour's construction, if it's a prescription or conditional limitation on forestry limitations it's covered. On the approach put by my learned friends it's very hard to see if that is in or out. So purposively her Honour's construction is, with respect, much more sensible.

Now then to come more to, at some point your Honour, your Honour Jagot J raised with me. And it comes back in a way to where we started. So that the start – the starting point, not the end point of the argument but the starting point is we were only dealing with this because it's a matter of national significance. Section 38 is a carve-out, an exemption, from regulations dealing with matters of national significance. It's a conditional carve-out.

The benefit that VicForests and Forests Tasmania, and I don't know what New South Wales' one is called or the Queensland one or the WA one, but the benefit they all get is that where they operate within the RFA, they're removed from the EPBC Act scheme. And that is a very significant benefit. So there are things they can do which otherwise may well lead to a contravention of the EPBC Act. That is the benefit that they get. But there's a condition, namely if you breach the restrictions and limitations in the way her Honour articulated, vis-à-vis a matter of national significance, you're back within the Federal realm. So to put it very simply, where the starting point is national significance, but there are some things that foresters do that other people might not be able to do in terms of affecting protected species, for example, but they only get that benefit on condition.

Now, part of the way it was put this morning was to say, well, this is all very duplicative because it may mean that if you breach the requirements of the Code, you're liable for penalty under two regimes, which is true. But first we would say the starting point shouldn't be thinking about breach. I'm not saying you ignore it. But the starting point is it's not as though they get no benefit otherwise. The benefit they get is the one I just articulated, and it's a substantial benefit. They are removed from complying with federal law where other people have to.

But as to duplication, there is no reason to say that is contrary to a – or construction – or section 3, which I will come to, because if Vicforests does something or proposes to do something which threatens Leadbeater Possums, one of the nine, or greater gliders, or other such species, they're affecting something of federal significance; of national significance. And there is no reason that they should not be subject to the high penalties in the federal regime, as opposed to whatever the other penalties are for the state regime, because they have breached the terms, we would say, of their exemption from the federal regime.

It's not necessary to go into the detail of what the state regime and whether it's higher or lower – but the state regime inevitably has a state focus. They're – I don't know quite what the Victorian Act says, or the New South Wales Act says, or the Queensland Act, but they're protecting the environment generally, in various regards, in their state system. That says nothing about the breach of Australia's international obligations if Vicforests does something to threaten one of nine species which are critically endangered. The Federal Government has a legitimate, proper interest – one might say obligation – in that circumstance, to say "that's our business".

And there may also be some penalty under state law for breach of a state norm – is no answer to that infringement of the federal interest, in our respectful submission. As to section 3, the objects provision – your Honour, I think Griffiths J referred for example to section 3(2)(b), minimising duplication and strengthening intergovernmental cooperation. And we accept that that is an object, and that it is possible that one might say if you've breached the Code you may breach federal and state law, that to that extent you may not be minimising duplication. But that is one of the objects where other objects include those in section 3(1) – in fact, section (2)(b) is not even an object, it's a means of ..... the object.

The objects include the protection of the environment, promoting ESD, promoting the conservation of biodiversity, and so forth. It's not as though every provision implements each and every one of the objects equally. It's a comprehensive scheme, and if I could – it's not quite the same point, but if I can echo what Gleeson CJ said in Western Australia v Carr, reflected then in CFMEU v Mammoet about – as they put it in Mammoet:

> *No obligation pursues its purposes at all costs.*

Picking up what the chief justice had said. As he explained in Carr, well, you know, different purposes may be there but achieve to different extents ..... different

provisions, and that's the point, in a sense, we're seeking to make. And as to – my learned friend referred to the various divisions of the EPBC Act, which have the various carveouts. If I could actually take your Honours back to the separate question reasons of Mortimer J, as her Honour dealt with these arguments below, and with great respect well. So para 78 on page 23 – I will try not to be too tedious, but there's a heading there, part 4 of chapter 2, "The exemptions and exceptions in part 3".

And what her Honour then does is go through the divisions. So these are the various types of exemptions. So para 80, for example, she is talking about div 1, talking about bilateral agreements, and her Honour then articulates that. And then, at 84 – para 84 – her Honour says:

> *In other words, the two processes of bilaterally accredited management arrangement and a bilaterally accredited management process or processes, the scheme intends to be substitutes for the assessment and approvals process under part 9. Actions taken in accordance with these processes are therefore assessed in a different way, but they're still assessed by reference to the same underlying criteria.*

I don't want to get bogged in the detail of the scheme because your Honours have some familiarity with it, and your Honours will go back and read it. But there's a whole range of potential intergovernmental agreements here. RFAs are just one example, and other means of achieving the so-called avoidance of duplication are found in other provisions in the scheme. Her Honour then goes through the remaining divisions, through – I think – to paragraph 94. And I won't read them all out to your Honours.

It's also worth noting, if I can then jump ahead in the judgment to page 40 – this is perhaps a slightly different point – but her Honour talks at 157 about – "there are a series of specific provisions dealing with threatened flora in the RFA". Forward to the parties' agreement of the statutory/regulatory framework. Blah, blah, blah. Then, there's a reference to clause 57, "continue to consult". That illustrates the point I was making earlier about it's a dynamic process. It's self-evident there needs to be a dynamic process. Para 160:

> *As clause 57 indicates, attachment 2 to the RFA sets out the parties' agreed priorities and commitments.*

And then, her Honour goes on to talk about the example of the baw baw – B-a-w – frog. I won't go through it all, but that then leads up to the part I've shown to your Honours at para 178 and 180, about the specific circumstance here. So that reinforces the point I was seeking to make about the nature of this and the lack of certainty, on any view. One other point I should make about that duplication point, just to be clear – I think I noted earlier – it's only significant impacts which are going to be caught by the prohibition sections, relevantly section 18.

So it's not as though any breach of the Code is going to necessarily bring you within federal territory. There will still be state territory because of the way the federal law works. My learned friends complain in writing, and my friend referred to it, I think, this afternoon, "we're not even a party to the RFA". That doesn't matter. Its obligations are statutory, which arise under the EPBC Act, qualified by an intergovernmental agreement which they seek to rely on. They can't have it both ways.

There is an element, with respect, of special pleading in the whole case by Vicforests. "How unfair it is that we actually have to comply with the conditions of the instrument which exempt us from having to comply with the EPBC Act". That's the nature of the statutory scheme, and the law is replete with examples where evaluative judgments need to be made with the prospect of criminal sanction or civil sanction. And again, if you will forgive me, with my fading memory I can remember about two cases at a time – so if you will forgive me referring to last weeks case, last weeks case I was acting for four trade union officials who had entered a site in Brisbane purporting to rely on section 117 and 118 of the fairly uniform WHS Act, relevantly, the Queensland one, but it's uniform except for Victoria and WA. And without getting bogged in detail, that gives them the right, we say, to trespass, but on any view it's conditional, and you have to have a reasonable apprehension, relevantly, of a contravention of WHS obligations there.

And so if people like my clients, the union officials, genuinely suspected there had been – this wasn't actually the issue, but if they had genuinely suspected there had been a contravention that reasonable person in the George v Rockett sense wouldn't that would be criminally liable, and, indeed, the case I was appearing in was a criminal prosecution for trespass of union officials concerned about health and safety at a worksite having to make evaluative judgments. So the special pleading from VicForests – "Goodness me. We might be subject to criminal penalty or civil penalty because we have to make uncertain evaluative judgments" – is special pleading and should be seen as such.

Can I then deal with the extrinsic materials. This is the end of my argument as opposed to the beginning. I hope you will forgive me for not starting with the extrinsic materials. The high point of my learned friend's submissions about this seems to be two points, without going back through it. In a couple of places, the EM says forest operations covered by the RFAs do not need approval – see, for example, I think it's page 22, para 16. That's point 1. And point 2 was the process point. As to "covered", that's a reasonable shorthand for "in accordance with" and doesn't throw any light on whether our construction or theirs should be adopted, and even then, my friend had to sort of read away para 36 at page 25, which spoke about certain forestry operations and said, "Well, that's something different".

As to the process point, in the sense that was ..... raised by your Honour Justice Derrington, which is it's talking about a process of development, not giving some carte blanche to the process of foresters undertaking their operations. But in any event, your Honours start with the text – see Consolidated Media Holdings,

paragraph 41 or whatever it is. Statutory construction starts with the text and so must it end. Pardon me for not having that reference. And also I think it's Saeed in the High Court – S-a-e-e-d – where the High Court said, if I can paraphrase this, "Let's not get hung up on construing intrinsic materials. Let's construe the text". And that was one of those cases, if I recall correctly, where extrinsic material seemed to suggest quite a different construction, but the High Court said, "No, no. We're construing the text".

But since we're talking about extrinsic materials, I won't go back through the EM, because there's barely a paragraph not touched upon this morning of any relevance, although it was notable that the one paragraph my friend wasn't very enthusiastic about was the second one, if ..... para 36 – was the one dealing with the very section – page 38, section 112 – which just repeats the statutory language, so as usual ..... doesn't tell us much. That's what the actually – the drafter of the EM actually meant ..... she or he was talking about it. But since we're talking about extrinsic materials, it's worth having a little look at the second reading speech of the EPBC Act, which is at tab 25 of volume 2 of the VicForests part A bundle.

Now, I do recognise this is about the EPBC Act, not about the RFA amendments and so forth, but it's worth going back to this. My learned friend said this morning, reflecting, with great respect to him, the special pleading, this is only the second case where – goodness me – a forester has been held to account under the EPBC Act, and Lord knows there are not many cases where the EPBC Act has had a lot to do to protect the environment. Perhaps this is one of them, and perhaps the Liberal government which introduced this law meant it to mean something. And the second reading speech was given by Senator Kemp in the Senate, and if your Honours go to the first page, third paragraph:

> *Reform is necessary because the existing suite of Commonwealth law does not ensure high environmental standards in the area of Commonwealth responsibility.*

True:

> *It doesn't provide the community with certainty as to the Commonwealth's role.*

So again we've got two objects. A bit further down that page, the third-last and second-last paragraph:

> *As a result of the previous Labor government's neglect, the Commonwealth's environmental law regime has not evolved to keep pace –*

etcetera:

> *…not in accordance with best practice. The bill will establish a new framework – blah, blah – to meet the environmental challenges of the 21st*

century with renewed comments, will promote, not impede, ESD and will conserve biodiversity.

Then is your Honours look at the next page, about halfway down the page, there's a reference to an activity – matters of national significance. We're all familiar with that. And then, on the third page, under the heading Biodiversity Conservation:

The loss of biodiversity represents the greatest environmental challenge facing Australia. The Howard Government has demonstrated its commitment to addressing this challenge by establishing the largest environmental program in Australia's history – the National Heritage Trust. The bill now provides a substantially improve legal framework for the conservation and sustainable use of Australia's biodiversity. To complement the National Heritage Trust, some features of the bill include –

The second dot point:

…enhancing protection for threatened species through improvements to the listing process providing for the recognition of vulnerable ecological communities –

etcetera. And then, finally, on the last page, second-last paragraph:

In conclusion, the bill enables the Commonwealth to join with the states in providing a truly national scheme of environmental protection and biodiversity conservation, recognising our responsibility to not only this but also future generations.

It may have been something of a disappointment in practice, but it was meant to have a role in protecting biodiversity and protecting the environment, and the fact that this is a rare case where it may have had that effect is not a cause for regret or exceptionalism. It's a cause for saying, well, perhaps the Act is, at least in this respect, achieving its purpose.

JAGOT J: Sorry. What about the concepts that are in the EM and here, as well, of up-front certainty from the outset? It's a little inconsistent with that, isn't it, that you could be trundling along in an area where forestry operations are authorised by an RFA, and you're doing it accordance with the RFA; then you do something that's not in accordance with the RFA in the same area and you're – this is the concern, isn't it, that you're out, then, on that construction?

MR KIRK: And that's how we seek to answer it, because the presupposition of that is breach.

JAGOT J: Yes.

MR KIRK: It comes - - -

JAGOT J: Breach of the - - -

MR KIRK: - - - back to the point I sought to make - - -

JAGOT J: Yes. The RFA. Yes.

MR KIRK: Yes. And breach of the obligations - - -

JAGOT J: Or - - -

MR KIRK: - - - which - - -

JAGOT J: - - - under the RFA.

MR KIRK: Correct.

JAGOT J: Yes. Yes.

MR KIRK: Which arise under it. So it comes back to the point it's not as though they get no benefit. Comply with the RFA and the regulatory regime associated with it, and you can do things other people can't. You have the benefit of the protection of the RFA. They get benefits out of it, because we, as lawyers, tend to see this is all about laws and restrictions. It's also about the things you can go and do. But in doing those things, you are subject to these restrictions. So go forth; chop down trees and so forth; but do it in terms with what is agreed and allowed. And if you go beyond that, you are back in – you're affecting matters – insofar as you are having a significant impact on matters of national significance, then you're back in the federal regime. In the end, it's not - - -

JAGOT J: Well, when – sorry. When you say back in the federal regime, that's the least of your – one might be that you're okay up to that point, that you did something wrong and then you're out ..... going forward or everything you've done up to that point might be illegal, because - - -

MR KIRK: Well, that's going to depend a bit on the particular - - -

JAGOT J: Wording of the obligation.

MR KIRK: Correct. The norm in question and so forth.

JAGOT J: And it comes up in other grounds, doesn't it?

MR KIRK: Yes. And there's one ground which – I forget which one it is, but one ground which raises an issue about that. I think it's 3 or 4.

JAGOT J: But you accept that, well, at the least on the primary judge's construction, you can be doing one forestry operation, get to a particular point for

each and, at the least, you will have half of it that you've done – maybe it was okay, and not regulated by the EPBC Act, maybe depending on the wording, and the rest of it's not. The rest of it, you had to - - -

MR KIRK: That could potentially be right. But that doesn't mean you breached the EPBC Act necessarily. It just means that you are subject to the federal law again.

JAGOT J: Yes. You would have to go off and get ministerial approval for a controlled action, wouldn't you?

MR KIRK: There's two ways of doing it. Sorry. I will start again. There is two broad aspects to the regime, as your Honours well know, just if I can put it my way: I'm talking about the issue of potential problem with section 18, for example, a potential problem with a controlled action. You've got, broadly, two choices. You can go off and seek approval under part 9, I think it is, or you can try to comply with it. And you may breach it. Even then, you only breach if there's a significant impact. But it's not as though you have to go off to seek approval. You might just say, "All right. Well, I'm potentially affecting Leadbeater possums here or greater gliders, so I'm going to try to comply with my obligations.

JAGOT J: But it isn't - - -

MR KIRK: Just comply with the law. So it's not as though you necessarily need to go off and get approval in advance for things. Just comply with the law.

JAGOT J: But if you're within an RFA and you are doing it, say, in accordance with an RFA, it doesn't matter that you might have a significant impact on a critically endangered species, does it? You're still outside the EPBC Act even if what you're doing is going to have a critical impact. Isn't that how it works?

MR KIRK: Sorry, your Honour. I'm being a bit slow. It's late in the day. Could your Honour just say that again.

JAGOT J: Well, if something you do in accordance with complying with an RFA actually, in fact, is going to have an impact – a significant impact – on a threatened species, otherwise regulated by the EPBC Act, section 38 operates in any event; right? It doesn't matter that you're going to have the significant impact, provided you're in accordance with the - - -

MR KIRK: Correct.

JAGOT J: - - - RFA, you're okay. You're not regulated by - - -

MR KIRK: That's what I call the benefit of the RFA.

JAGOT J: Yes, the benefit.

MR KIRK: Yes.

JAGOT J: But this is – say - - -

DERRINGTON J: Well, for example, in this case where one tree is removed. So ex post facto you have to decide whether that's a significant impact. Who's going to decide that it was a significant impact? Once you've removed the tree, you can't possibly be inside the code swing it back again – that doesn't work – so you've lost your exemption. And on her Honour's construction, you lose it for everything in that relevant coupe.

MR KIRK: Well, I'm not quite sure – there's kind of two issues there: so one is losing the benefit of the exemption, and two is the extent of the loss of the exemption. And I'm not sure if you necessarily – well, I think it may depend on the terms of the norm. That's not to shy away that we certainly support what her Honour said about having lost it here. But because of the nature of the precautionary principle, at least on the construction her Honour adopted, which is also an issue, is requiring an evaluative process which your Honour found was not properly engaged in. And so one can see how that might have broader effects than, for example, just cutting down a tree. So it does depend a bit on the norm. Then, at to the second point, if you have cut down a tree – geebung, I think is the example my friends put in their written submissions – you don't get to an EPBC Act problem unless you've got a Code problem, or whatever the relevant norm is under the state regime. So you only get to first base if they breach the law by cutting down that tree. So it's not as though they're being saintly in cutting down the tree. They have breached the law.

JAGOT J: Yes. Say the Code says you can't cut down a tree of species X. Now, what else do you do? Like rainforests, or something.

MR KIRK: Yes, that's right. So if they cut down - - -

JAGOT J: But they do it. They accidentally cut down one tree while they're otherwise doing something that would be fine, and they go "whoops".

MR KIRK: Well – and that – there is then an issue as to whether there is – certainly in terms of any prosecution. I recognise that's not quite the issue your Honour is raising. Any prosecution or civil penalty proceeding will depend on significant impact. So cutting down one tree is not going to give rise to that issue. Can I just have a moment. There is also a portion of her Honour's judgment where she touched upon something to do with that. I'm just asking Ms Watson to turn that up. Whilst Ms Watson is doing that, can I just go back a step to something Griffiths J asked about the term "value". Ms Watson tells me there's no definition of that in the EPBC Act, but in section 4 of the RFA Act – yes. So in element A in the definition of RFA, there is a reference to environmental values. I'm not sure that's meant to be - - -

GRIFFITHS J: Yes, I see that.

MR KIRK: - - - co-extensive, or co-terminus, but it is at least some aspect to that.

GRIFFITHS J: So is that the source, then, of the primary judge's reasoning in talking about biodiversity values, you read as a biodiversity value a species per se, because of that – in the second line of (i), a reference to endangered species?

MR KIRK: Ms Watson tells me she thinks that's in the Code, actually.

GRIFFITHS J: That's clause 2.2.2.2.

MR KIRK: Yes, and related divisions, apparently. Your Honours, I think I've nearly finished, subject to suggestions from my team in relation to ground 1. I won't be super long in relation to ground 2, but probably a bit more than is comfortable today. So is that a convenient time?

JAGOT J: Is 10.15 all right for everyone, tomorrow?

MR KIRK: Yes.

JAGOT J: Great. Okay. Thank you.

MATTER ADJOURNED at 4.17 pm UNTIL TUESDAY, 13 APRIL 2021