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TRANSCRIPT OF PROCEEDINGS

O/N H-1450934

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

10.16 AM, TUESDAY, 13 APRIL 2021

Continued from 12.4.21

DAY 2

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

JAGOT J: So just before we start, we understand that there's agreement that there's a slip in order 3 of the primary judge's substantive orders insofar as they refer to clause 2.2.2.4. We're wondering does that also apply to orders 4 and 5, which also refer to 2.2.2.4? Don't know.

MR KIRK: Can I take that on notice?

JAGOT J: Yes. And if it is agreed, we are of the view that rather than it forming part of the appeal, it would be a clear slip and, really - - -

MR KIRK: Just make the orders now.

JAGOT J: - - - contact should be made with the primary judge before we make any order in the appeal - - -

MR KIRK: I see.

JAGOT J: - - - asking for the order to be varied to correct any slip. But it may be that it's the same slip in 4 and 5. I'm just not sure.

MR KIRK: Ms Watson is whispering to me it's only one slip.

JAGOT J: Okay.

MR KIRK: She's the one who probably knows, but we might – we may have a discussion between ourselves and - - -

JAGOT J: Well, you can clarify that, then you can contact the primary judge and get that fixed up rather than us having to fix it up.

MR KIRK: My learned friend, Mr Waller, says he agrees with Ms Watson - - -

JAGOT J: Yes. Okay.

MR KIRK: - - - whispered. So there's unanimity about it amongst those who really know.

JAGOT J: Yes.

MR KIRK: Okay. Any other housekeeping, your Honours or - - -

DERRINGTON J: No.

GRIFFITHS J: No.

MR KIRK: For us, just let me just articulate where I'm going. I've still got ground 2 to deal with, not that I will be super-long dealing with that. And I just wanted to make a few more submissions, if I may, about ground 1. I'm just going to start with a few preliminary points, picking up some rats and mice from yesterday. And then I will seek to grapple a bit more with that exemption point that your Honours were raising with me yesterday about the loss of the exemption. But can I deal with a few odds and ends first. I will just come back again to your Honour Justice Griffiths' asking about value. If I can just give your Honours a couple of references without going to it. The trial judge in the main judgment at paragraph 835 touched upon it. Yes. So that's all I wanted to say about that.

Relatedly, your Honour was also asking me about references to the NFPS, the National Forest Policy Statement. Just to give your Honour some references without going to it. There's a reference to that within section 3, sub (b) of the RFA Act, that's the object provision which says that one of the objects – I'm paraphrasing here – is to implement I think at least part of the NFPS. It's also referred to in the RFA at issue here at clause 7. And then again in clause 2, which is the definition clause, in the definition of "ecologically sustainable forest management" and cross-refers to the NFPS. And that issue of the NFPS and its significance is also addressed by the trial judge in the separate question reasons at paragraphs 110 to 122 and then her Honour returns to it at 138. So that's a little bit of referencing then.

GRIFFITHS J: Thank you.

MR KIRK: Then as to the issue which I touched on yesterday – I won't go back over it, but just to add a couple of points about certainty and the necessity for the system to be adaptive and dynamic and evolve. If I can just take your Honours briefly to the RFA. So that's in volume 3 of the part C book at tab 153. And if I could go first – thank you – to clause 39, which is page 13 using the big numbers down the bottom, your Honours will see in the chapeau to clause 39, it says:

> *The parties agree that ESFM –*

ecologically sustainable forest management –

> *is an objective which requires a long-term commitment to continuous improvement and the key elements are –*

and they then spell it out. But including the last dot point:

> *…capable of responding to new information.*

And then a bit later on page 33, using the big numbers again. So that's page 45 at the top. This is within attachment 1, which is, your Honours will recall, about the CAR system. So this is headed – so 33 at the bottom, 45 at the top.

GRIFFITHS J: Yes.

MR KIRK: Your Honours will see under the heading:

> *Where proposed changes to the CAR reserve system are made in accordance with the following guideline, the Commonwealth agrees to accept those changes.*

There's then a guideline outlined. And I draw to attention the first five dot points under Management Guidelines:

> *...and prescriptions may be reviewed under the following circumstances.*

And that's all fairly unsurprising, but it just illustrates that, of course, it's going to be dynamic and evolutionary. I would also just draw attention, for the purposes of ground 2, to the last of those dot points:

> *...as required by new legislation, policies or action statements.*

So in terms of that argument that it was only ever meant to be the 1996 Code and it couldn't be anything else, one would take account of that. I will come back to that, but I won't go back over the ground. So we would respectfully submit that one doesn't dispute that – well, first, certainty is a legal value. And, secondly, that certainty is one of the things where a greater degree of certainty is one of the things, no doubt, that the RFAs aimed for. But for reasons I put yesterday – and I won't go back over – on any view, you're not going to get complete certainty about what I put yesterday is a mathematical or mechanical application. And it is one value amongst others to be balanced up with the other considerations, including the need to protect the sorts of values and prescriptions identified here and the need to adapt to change.

I just wanted to actually – just one other point that's a little bit perhaps – it's perhaps a jury point, but forgive me. Whilst you're in this volume, if your Honours could go to the Code. So that's the 2014 Code of Practice.

JAGOT J: Tab - - -

MR KIRK: Page 3, your Honour. Tab 150: one-five-zero. And if your Honours go to page 75, right at the back – it's the fourth-last page – that's it. And your Honours will see appendix A provides a list of legislation, regulations and policies applying to timber harvesting operations in addition to the Code. Appendix A is not an exhaustive list. And your Honours might just flick over that. Now, I'm not seeking here to express any sympathy with VicForests, but it's a highly regulated area; that's the point. I then wanted to – and I'm still just dealing, perhaps, with the last rats and mice before I come to the loss of exemption point.

If I just go back very briefly to issues of statutory construction. And can I just hand your Honours extracts. So I'm just handing your Honours the extracts from the two cases. They're familiar, so forgive me for referring to them. But in light of my friend's submissions yesterday, I thought it worthwhile just going back to them. In

fact, I referred to them yesterday without giving references. The first is Saeed v Minister, 241 CLR 252 and, in the plurality judgment perhaps starting at paragraph 28 – I think Heydon J wrote separately, there's a reference there to a previous Full Court decision which had then been applied in the Full Court decision under review in this case. And that previous Full Court had been particularly influenced on an issue about – a mere issue about procedural fairness by the extrinsic materials.

And if your Honours then jump to para 31 at the bottom of the next page, I invite your Honours to read para 31. Then, I invite your Honours to read paras 35 and thirty – sorry, 33 and 34. Apologies. 33 and 34. Consistently with that, this is a paragraph your Honours will be all well familiar with, but just to go back to what they said in Commissioner of Taxation v Consolidated Media, at para 39, which was a joint unanimous judgment.

This paragraph often gets quoted, but it's entirely consistent with what the plurality said in Saeed. If I can then turn to the issue that came up at the end, yesterday, about the loss of exemption, and make a few points – or perhaps four points about it. Starting with how her Honour approached the issue. So if I could take your Honours to the primary judgment in part A, starting around 773 – paragraph 773.

GRIFFITHS J: Just on that statutory construction point, I realise fully that one or two members of the High Court – and it may have been more than one or two members of the High Court – have talked about constructional choice. I find the notion of choice in this context unhelpful. You can have constructional views – you can have competing views about what the correct construction is, but the notion of choice carries with it a concept that, well, there are available – there are two proper constructions that can be used, and you have to choose between two proper and available constructions. There can only be one proper construction of any piece of legislation. I find "choice" unhelpful.

MR KIRK: I might be wrong. I think it's a phrase that came from French CJ, which then sort of permeated outward a bit. I think the point – and if I'm right about that, I think the point his Honour was seeking to make by that sort of language is to recognise, consistent with what his Honour has said a number of times, a number ..... the judges do have choices to make, it's not all purely objective, and so forth.

But your Honour's really raising a slightly different point about there only being one right answer. There's no doubt, legally speaking, there is only one right answer. That has been said many, many times about statutes. Also about contract, as well ..... where there's only one right answer. But that, in the sense that for unconscionability, there is only one right answer, even though it's plainly .....

GRIFFITHS J: Yes. And legal unreasonableness. Legal unreasonableness.

MR KIRK: Well, I had the sense, your Honour - - -

GRIFFITHS J: Close to my heart, but can only be one correct answer. Can't have degrees of it.

MR KIRK: I wasn't going to mention that case, partly because I can't remember the initials, but I'm sure your Honour remembers the case. But just, actually, on the issue - - -

GRIFFITHS J: SZHFW, from memory.

MR KIRK: Just on the issue of unconscionability, because I accepted expressly earlier that certainty is a legal value, to make a broad statement. But it has to be balanced with other values, and so, unconscionability is the classical example of that. It's plainly a criterion which is ..... or general or it's evaluative, depends on what circumstances, reasonable people can take different views.

And so, in ASIC v Kobelt, you had the seven, presumptively, best legal minds in the country divided four-three. And where are the four – I forget how the Full Court had gone. Anyway, they divided four-three. That's not to undermine the importance of unconscionability; it just illustrates different minds can reach different views. But ultimately, there's one right legal answer. And for Mr Kobelt, he got off by four to three. Could easily have gone the other way. But he's someone running a shop out in the outback without the levee of advices that big forests has, someone like that having to comply with that long list of laws.

So yes, it is important, but you have to recognise that in our legal system, there are other values sought to be achieved as well. Now, then, if I can move back to loss of exemption, I was just starting with how her Honour dealt with it below. I had taken your Honour, I think – your Honours to around about para 773. And then, her Honour quotes from the separate questions reasons just to illustrate how she approaches it, and I won't read all that out. It will be recalled that the text of 738 is part 3 doesn't apply to an RFA forestry operation.

JAGOT J: Sorry, where are you now?

MR KIRK: Sorry, I'm actually just – I've moved on a bit. I'm just reciting – I'm just identifying a passage. I'm going to identify a few more. I'm just reminding your Honours that section 38(1) says:

> *Part 3 doesn't apply to an RFA forestry operation that's undertaken in accordance with an RFA.*

So the subject is the RFA forestry operation. That's what – that's the subject that gets the exemption. Her Honour's conclusions – and it starts at 773. Above 781, you will see the subheading, "When is the Section 38 Exception Lost?" She goes through the arguments. And then, at 787 – well, I might just invite your Honours to read 787 to 9. So on any construction of section 38, the subject being the RFA forestry operation, one has to identify, well, what is the RFA forestry operation that

gets the exemption or does not, having been undertaken or not in accordance with an RFA.

And the way her Honour approached it is, effectively, well, that's a matter of characterisation and fact. So if your Honours go back to para 746 – or, actually, the start of 745, and then perhaps through to 748. 745 to 8. Now, there's a parallel here with action, because your Honours will recall that under the series of prohibitions, section 18 is a good enough example:

Person must not take an action that has or would have a significant impact.

And your Honours would know from past EPBC Act cases that an issue of characterisation arises – I'm not sure if your Honour Jagot J has written about it. What's the action? So – and, if you will pardon me referring to something in my mind, in the ..... litigation, at various ..... Williamtown. There was a cause of action under the EPBC Act, and so, was the action some particular fire truck, having put firefighting ..... or was it fire trucks generally, or was that a high level of characterisation – it's a characterisation issue. And a similar thing arises for the undertaking the – sorry, the forestry operations. And so, it's a matter of just – if you will pardon me saying it, being a bit sensible about it ..... ground level, and what are you doing? And that's effectively how her Honour approached it.

And in particular the focus was a coupe-by-coupe level, and so, at – the denouement of the miscellaneous breach case comes after para 1457, so right near the end of the primary judgment. So just after para 1457, there's a table. Yes, that's it. And – table 14, summary of findings. And so, her Honour just goes through, identifying – so the first column is the coupe group, coupe number, the coupe name. Self-evidently, coupes were in groups. Login status, so logged or scheduled. And then the reason the section 38 exemption was lost.

And then, GG is Greater Glider significant impact, and LPB is Leadbeater Possum significant impact, so your Honours have summarised it all that way. Those miscellaneous breaches, by the way, I think there are some 95 or so of them. So that was, I think – I think it was – sorry, that was Ms Watson's example ..... most of the breaches that we allege, the miscellaneous breaches, were established. There were a handful that weren't. And they fall into five categories. So there's however many there are here. There's about five categories, and we captured those five categories in our written submissions, right at the start.

GRIFFITHS J: But are you saying that – in the appeal, are all of the adverse findings on miscellaneous breaches challenged, or is it only a selected few?

MR KIRK: They're – I'm not sure – first part of my answer is I'm not sure what was challenged. In terms of what remains challenged, there are challenges to two of the five groups.

GRIFFITHS J: All right. Thank you.

MR KIRK: Yes. And so, sorry, if your Honour just gives me a second. In our written submissions, right at the start, at paragraph 8B, we list the five types of breaches. So – yes. So of the – there are five of them. Failure to protect – there are five of them. The first, failure to protect mature tree geebung, which is no longer in issue. Second, failure to protect zone - - -

GRIFFITHS J: Did you say 8B of your submissions?

MR KIRK: Yes. Sorry, 8A, I apologise. 8A.

GRIFFITHS J: 8A. Thank you.

MR KIRK: Just the last - - -

GRIFFITHS J: Yes. Five breaches. All right.

MR KIRK: Yes. So the first one, failure to protect mature tree geebung, we understand, no longer an issue on the appeal. Secondly, failure to protect zone 1A habitat is in issue on the appeal. Thirdly, failure to identify a Leadbeater Possum colony is not in issue on the appeal. Fourthly, failure to screen timber harvesting is in issue in an appeal. And the final one, failure to ensure gaps, is not in issue in the appeal.

So going back to the exemption issue, the first point I've sought to just make is how her Honour approached it, reflecting the language of the statute. Secondly, and consistently with what I've said on any construction, this type of issue is going to arise. So my learned friend, Mr Waller, yesterday, in the transcript page 30, between about lines 9 and 30 without going to it, accepted, as we understood it, that the exemption would be lost if VicForests harvested rainforest. So that was an example my friend gave of something – yes, we can live with that.

Similar questions would then arise as to – or are – well, first is the issue of what constitutes "rainforest", which I addressed yesterday about the certainty issue. To what extent did they harvest rainforest? Is it to an extent sufficient to lose the exemption? And if so, how far does the loss go? And we would say – and this shades into ground 4, so I won't fully develop the submission, but we would say, consistently with what her Honour found, you lose it for the forestry operation that is the subject matter of the exemption.

And that brings me back to where I started yesterday, that we're only in this ballpark because it's affecting matters of national significance. And as I said yesterday, foresters get substantial benefit from the RFAs, further benefits conditional. An issue was – a concern was raised yesterday that the exemption might be lost halfway through a forestry operation.

JAGOT J: You mean forestry operation on a coupe basis.

MR KIRK: Yes. Yes.

JAGOT J: Yes.

MR KIRK: Yes. And if I could just make some brief points in response to that.

GRIFFITHS J: Sorry, just – you're saying that the exemption is lost only in respect of a – more correct, perhaps, an RFA forestry operation in a particular coupe.

MR KIRK: It's the characterisation issue, but if the characterisation is correctly identified as the coupe, then yes.

JAGOT J: Because that's the action?

MR KIRK: Correct. Well, nearly.

JAGOT J: Nearly. Not quite.

MR KIRK: Because that's the forestry operation. That's the thing being done. The reason I say it's not quite the action, because you only get to action at the next stage of saying, "All right. We've lost the exemption. Now, let's see if you've done a section 18 breach."

JAGOT J: I see. Yes. I understand what you mean.

MR KIRK: And very much the same sort of issue will arise, and it's very likely the same level of characterisation will be applied to exemption and action.

GRIFFITHS J: When does the issue of significant impact come in on your analysis?

MR KIRK: At the action stage.

GRIFFITHS J: At the action, not at the preliminary stage of loss of the exemption.

MR KIRK: Correct.

GRIFFITHS J: Okay.

MR KIRK: But – and so, I recognise that, in one sense, slightly reduces the relevance – somewhat reduces relevance to a section 38 point, save for this: if one is concerned about consequences of these construction, and the sort of questions the court was raising yesterday were very much about consequences, one has to look through the full regulatory impact of the scheme, and so one does take account of the fact that section 18 and so forth only applies where there's significant impact. And I will say something more about that shortly.

So coming back to the loss of the exemption, you would only lose it if you breach the Code. That's obvious. It's – to put perhaps a simplistic point that's worth stating, you're not going to get the clear forest back. It is not inappropriate, then, in our respectful submission, that if the impact was significant, that you may be subject to sanctions under section 18 or the related provisions. The ultimate consequence is that foresters like VicForests have to take their legal obligations seriously. That is hardly the end of the world.

JAGOT J: Do you mean if past conduct involved a significant impact - - -

MR KIRK: Correct.

JAGOT J: - - - and exemption lost, it's not inappropriate - - -

MR KIRK: Correct.

JAGOT J: - - - that the EPBC Act should .....

MR KIRK: Correct. So that ties back to the submissions I was making yesterday. Remember, the starting point is we're only in the realm because it's a matter of national significance. If VicForests does something which breached the Code, the rubber – pardon the cliché. The rubber only hits the road for them when you get to section 18 and so forth. As I've already said, the loss of the exemption is logically and legally distinct from the section 18 application or question of significant impact. But it only affects them, ultimately, if there's a legal consequence.

JAGOT J: Yes. If there is a significant - - -

MR KIRK: Which depends on there being a significant impact. So one can't ignore the fact, in terms of figuring out a rational construction of section 38, that it's only going to have consequences for VicForests and other foresters if they get through the significant – if they meet the significant impact threshold. And if they do meet the significant impact threshold on a matter of national significance, there is good reason to apply the EPBC Act, in our respectful submission.

Now, then, if I can turn to my third point, which is an example – and here I'm not just making a jury point, because I'm using the example chosen by my learned friends, the tree geebung to illustrate the points I've just been making. Can I just take your Honours to how her Honour addressed the tree geebung. It sounds like a name from a Banjo Patterson poem, but it's actually quite a remarkable thing. If your Honours to paragraph 1188, one-one-eight-eight, there's a heading Failure to Protect Mature Tree Geebungs. So starting at 1188, the relevant prescription is actually the management standards and procedures which is picked up by the Code. And the obligation is to:

...apply management actions for rare and threatened flora identified within –

the particular table. It's a long table. The relevant extract in the table is at 1189:

> *For the tree geebung … protect mature individuals from disturbance where possible.*

Then if one goes to paragraph 1199, if I can just invite your Honours to read that, beginning "It is important to commence" and the extract from evidence as well. So highlighting some matters that emerge particularly from the evidence of Mr Mueck: the tree is endemic to the Central Highlands, so it's not found elsewhere; it's listed as vulnerable under the State regime:

> *…prolific flowering and fruiting –*

amazingly –

> *is restricted to mature individuals over 100 years old.*

And:

> *Larger specimens - - -*

GRIFFITHS J: Sorry. Where does the 100 years come from?

MR KIRK: That is in the second paragraph of the extract of evidence.

GRIFFITHS J: Sorry. It's just not coming up on the screen, that's all.

MR KIRK: That's the next page.

GRIFFITHS J: Right. I see. Right.

MR KIRK: It's an extraordinary species and it's vulnerable. And it's no criticism of the tree, but it's no surprising it's vulnerable when it only reproduces after it gets to 100 and may live to be 400. Now, within the judgment, if one then turns to para 1212, if I can invite your Honours to read 1212 and 1213. So emerging from that about the Code, it protects something extremely valuable. The prescription is not unreasonable, namely, requiring people to conduct forestry operations to avoid to disturbing them where possible. It's not hard to comply with. And there was a clear breach.

GRIFFITHS J: What's a "snig track"?

MR KIRK: I was worried you were going to ask me that where they drag the logs out of the forest.

GRIFFITHS J: I assumed that was it. Yes.

MR KIRK: "Snig" must refer to some chain mechanism. Mr Waller says yes. Yes.

GRIFFITHS J: And these tree geebungs, the particular species that are apparently unique to Victoria, are they thin-leafed or thick leaf? Because I saw a geebung tree on the weekend on the banks of the Hawkesbury and it had a very, very thin leaf, and yet this evidence is that this tree geebung is unique to the Central Highlands of Victoria. Maybe it's an escapee that I saw.

MR KIRK: Your Honour should probably call someone about that.

GRIFFITHS J: I thought you would have this at your fingertips, Mr Kirk.

MR KIRK: Thin?

GRIFFITHS J: Thick-leaved.

MR KIRK: Thinnish, says Ms Watson.

GRIFFITHS J: All right. Thank you.

MR KIRK: I just wanted to then take your Honours briefly to one aspect of the separate question reasons. If your Honours go back to that at paragraphs 208, 209. So that's page 52 of the reported version. And I might just invite your Honours to read 208 and 209. So that reinforces the point that it's going to be everything – every breach – which is going to lose the exemption; it all depends on the nature of the norm and whether a breach of that norm can be said to be not in accordance with. And they will be that it's possible that, in some instances, some substantial compliance would be enough; it all depends on the norm, just as would arise, instantly, in any prosecution of breach of the Code under the Victorian legislation.

The fourth point I wanted to make – the final point about the exemption issue is just to briefly refer to some other evidentiary matters just to show that, in this case, it wasn't, following the discussion in 208 and 209, certainly as regards to miscellaneous breaches, it wasn't as though there was a near miss by VicForests. There was complete or significant failure. I have already noted that they have not – I have noted the table at table 14, after – right near the end of the judgment there's a long list of breaches. I have noted that VicForests no longer presses its appeals in relation to three of the five types of breach, so they don't press re the tree geebung; they don't press in relation to the Leadbeater's possum colony.

And finally – and I just want to show your Honours some reference and an illustration of the last one they don't press – the failure to keep a 150 metre gap. Failure to have no more than 150 metre gap between retained vegetation. In other words, when you're clearing, don't make the gap more than 150 metres for obvious reasons about animals moving around. Just to show your Honours where her Honour dealt with that, at paragraph 1273 of the main judgment.

JAGOT J: Well, these are the not pressed ones, are they?

MR KIRK: Correct.

JAGOT J: Yes.

MR KIRK: So this is no longer in dispute, which is one of the reasons I'm taking your Honours to it.

JAGOT J: Yes, yes.

MR KIRK: The norm is at paragraph 1274:

No gap between retained vegetation to be greater than 150 metres.

If your Honours then jump to 1286 and if your Honours then read 1286.

JAGOT J: And we can take it this all under the 2014 Code, isn't it? That's the one her Honour is working off?

MR KIRK: Yes.

JAGOT J: Yes. Sorry. 1286?

MR KIRK: Yes, 1286.

JAGOT J: Yes.

MR KIRK: Tab 77. Then just to – your Honours will see a reference to Ms Mitchell's maps. Just to show you those documents, if we can go to tab 77 of part C, which in volume 2. So tab 77, within volume 2 at part C.

GRIFFITHS J: Just before we go there, Mr Kirk, you might be able to help me with one other thing. Your client elected to take the course which has resulted in this appeal by bringing proceedings in the court. Is there any evidence of any other action taken by your client to have the various breaches dealt with under the state regime?

MR KIRK: I might just get instruction - - -

GRIFFITHS J: Thanks.

MR KIRK: - - - on that, and then I will come back to that, your Honour. Now, these aren't the maps that I'm going to show you, but these are photos which illustrate the same point. So tab 77 is actually a report from Mr Mueck, I'm not sure how you say that, M-u-e-c-k. And if your Honours turn to page 17, which is after page 16, but 17 is a bit hard to find. Yes. It's probably actually easier to see on the

screen, in fact, because – I don't know about your Honours' copies, but mine is black and white. So just looking at page 17, the red line is the coupe boundary. So we've actually got – we've got one main coupe at the top there, and your Honours will see various lines drawn across, the longest of which is 816 metres, and so that just illustrates one.

And then if we go down to the next one, for just an example. The longest one there is 582 metres. And then if you go to the next one, one more. We've got 393, but then there isn't a north-south line. The north-south line is going to be ..... So the breaches which are no longer in contest were very substantial indeed. That's all I wanted to show with that document. If I can then just briefly summarise our position in relation to ground 1, and then I will turn fairly quickly to ground 2. VicForests' construction is unclear as to exactly what it is. That's what I started with yesterday. It departs from the fact that the text is fundamentally about regulating the doing of things, not the identifying of geography.

It's about undertaking the forestry operations. It is a highly unlikely construction, given the point I made about the definition of RFA forestry operations in the RFA Act enacted simultaneously. Similarly, it renders section 38 tautologous, or to put it another way, it renders the words after "forestry operations" superfluous.

JAGOT J: Sorry. I just missed the first one. I got - - -

MR KIRK: Sorry, your Honour.

JAGOT J: Sorry. I missed your first point. Sorry.

MR KIRK: Not at all. So first, it's unclear as to exactly what it is. Your Honour might recall I started my submissions about the text by identifying a few variations of how - - -

GRIFFITHS J: Yes. Four. Four variations, you said.

MR KIRK: - - - it had been put my learned friend Mr Waller.

JAGOT J: So when you say unclear what it is, you mean their .....

MR KIRK: Their construction. Yes. Yes.

JAGOT J: I see.

MR KIRK: No. I'm starting by being negative. I was - - -

JAGOT J: No, no. That's all right. I just meant that – but you accept there is – it's ambiguous, 38 itself.

MR KIRK: I wouldn't quite put it that way, actually, that it's ambiguous. I - - -

JAGOT J: Notwithstanding all the words that have been written about it, but - - -

MR KIRK: No. But - - -

JAGOT J: - - - the fact that the judge didn't accept anybody's view below. Surely, it's a little ambiguous.

MR KIRK: Not ambiguous now that we've lost our argument the first time around. No. I was getting to a "but." I'm not sure ambiguous is quite the right word in a sense, although in substance, I'm not going to be disagreeing with your Honour, because it comes to the way your Honour put it, in a sense, of - - -

JAGOT J: ..... one right, but I mean - - -

MR KIRK: The – but – sorry.

JAGOT J: - - - you can see how reasonable minds could reach a different view about it. I mean, you know, there is an element of - - -

GRIFFITHS J: That's her choice.

MR KIRK: It comes down to – that's why – I was getting to a "but." It comes down to the level at which it attaches, in a sense. Yes.

JAGOT J: Yes. I think that is ultimately, because it occurred to me that even the so-called extremely clear wording of the RFA Act covered by the RFA (and not prohibited by the RFA), is it? Yes. Something like that. That's not that clear either, when you think about it. You would actually get into the same argument about what "not prohibited by" means, because you would say that there are plenty of prohibitions at the level that you want to say, including the 150-metre. Now, they've accepted that now, but it's the same argument, really, isn't it?

MR KIRK: There's a lot of force in that, and in a sense, the issue at the heart of that version of the point is where did – where - - -

JAGOT J: What's going on? We've got chimes ringing out some - - -

MR KIRK: That's not clearing over there. Where you draw the line on what a prohibition is, because the word prohibition is actually used in some of my learned friend's formulations.

JAGOT J: Yes.

MR KIRK: But one of the points I sought to make yesterday is that a conditional prohibition is still a prohibition.

JAGOT J: Yes.

MR KIRK: And so that gets into that issue of characterisation. So to go back to my little summary point. So first, it's unclear as to exactly what VicForest's construction is. Second, it departs from focus on doing things. Third, it's unlikely because of section 4 definition in the RFA Act. Fourth, it renders part of section 38 tautologous or superfluous, and if you will forgive me quoting words we all almost know by heart, a court construing a statutory provision must strive to give meaning to every word of the provision, Project Blue Sky 194 CLR 355, para 71. Fifth, it – VicForests' construction purports to have greater certainty but in fact does not give uncertainty as to where the line is drawn, as I articulated, or sought to do so, yesterday.

Sixth, VicForests has relied on the principle that it should be capable of application on the ground, to which we would rhetorically retort, what is simpler for a forestry manager to ask themselves once they contemplate a coupe? First, is this a rule, as I read the code, regulating forestry operations? If so, I have to comply with it with federal and state consequences. Or – so that's the primary judge's construction. Is this a rule which can be characterised as geographical or as not a prohibition with a variant of the argument they put or relating to an area of land where logging is not prohibited? On the ground which is simpler to apply, is this a rule regulating forestry operations, or is this a rule characterised as geographical or relating to an area of land where logging is not prohibited.

Seventh, VicForest claims to have the benefit of avoiding duplication, but at best, it only reduces duplication. At because, there will still – on any construction, there are to be breaches. There's going to be a loss of exemption. It's only an issue of extent, which leads to the eighth point. Whilst avoiding duplication is an object of the Act, it's not the only object. Protecting biodiversity is a fundamental object, and your Honours will recall what Senator Kemp said about that. Ninth, so moving to more positive territory, for reasons I've sought to articulate in writing and orally, the text and the context point in the direction of the judge's construction, so too does the purpose in a meaningful sense, recognising that purpose pulls in slightly different directions, her Honour's construction is clear and certain and, with respect, she was correct.

I will say this from the bar table. It strictly probably requires evidence, so you may choose to ignore it. To answer your Honour Griffith J's question, there was correspondence by my client with VicForests and the Victorian department – sorry, it is referred to in her Honour's – you can take ..... para 1214 to 1249 of the primary reasons.

GRIFFITHS J: Thank you.

MR KIRK: In summary, I am told, we did correspond with VicForests and the Victorian department about the zone 1A Leadbeater Possum habitat issue. The department refused to do anything about it, because they have a policy, I am told, that is narrower than the Code proscription. In other words, they're not going to enforce everything in the Code.

GRIFFITHS J: Right. I remember reading – yes. Yes. So there was no audit carried out.

MR KIRK: And apparently this is the subject of ground 18 in some way, I should indicate to explain my ignorance. Ms Watson is going to deal with those grounds. So that finishes what I wanted to say about ground 1, unless your Honours had any questions. So I might then move fairly briefly to ground 2.

JAGOT J: Can I just ask one question, of course, as a thought bubble ..... but could you achieve the sort of object of knowing upfront where you're in – which scheme you're in, State or Federal, if it's not – I know we will still get into all the disputes, but it's permitted, even if it's conditionally permitted, in the area of the coupe. Okay. So – and you intend – your proposal is to comply with State regulations, so the Code, whatever, the RFA, so that any noncompliance doesn't flip on the Commonwealth legislation.

So, provided you identified an area where it's conditionally permissible, if your proposal is to comply with all of the conditions, are you then wholly within the State regulation and only subject to penalty and injunction? It's not like there's no recourse under the State legislation; there obviously is. Is that a way of avoiding a lot of confusion or potential for confusion, I mean, is that legitimate?

MR KIRK: The simple answer to your Honour's question is no, and it comes back to something in my list of points ..... steps. First, prospectively - - -

JAGOT J: Yes. It's prospective. So I suppose I should look - - -

MR KIRK: So, prospectively, no problem.

JAGOT J: - - - at section 38, shouldn't I?

MR KIRK: Well, just to take it in steps. Prospectively, no problem. Because in this case, for example, we have an ex-post facto element and a prospective element, so your Honours would have seen that there's log coupes and scheduled coupes scheduled to be logged.

JAGOT J: Yes.

MR KIRK: We established a whole lot of breaches in relation to the log coupes, including the one still on the screen there. But we were doing that very much with a view to showing, and similar things are likely to happen in the scheduled coupes so give us injunctive relief in relation to the schedule coupes. So there was disputes about that, but we were – your Honour was persuaded that similar things would happen, etcetera. So, prospectively, in your Honour's example, they say, "We truly are going to try to comply, but we wouldn't have got an injunction if her Honour was persuaded that we wouldn't have got an injunction." No problem.

But implicit in your Honour's example is the "what if there's a breach on the ground" as they implement. So whatever head office says in Melbourne, things go wrong on the ground because the forestry manager just wants to keep things simple and go through and clear fells ..... like that one there. On either view, on either construction, there may be a loss of exemption. The question then is what distinguishing criterion is applied to determine when there is and when there isn't.

JAGOT J: Maybe I'm coming up with a third – yet another ..... ambiguous. There we go. Maybe it should be read, "That is to be undertaken in accordance with" - - -

MR KIRK: Sorry.

JAGOT J: - - - "38(1)." I don't know. I mean, 38(1), if you understood it to mean that is to be undertaken - - -

MR KIRK: I think – sorry, I hadn't understood your Honour's construction; now I do. I think we would just say it's present tense.

JAGOT J: Yes, I know. It would be a lot neater, wouldn't it?

MR KIRK: It would make – well, yes. We wouldn't like it very much, but yes. It would, but it's not what it says.

JAGOT J: No. It would at least make it not totally redundant.

MR KIRK: It would also – it's neater in one way. It still would raise issues, though, because just if one thinks about how a case like this would play out – so if one thinks about this very case. So if we say, "Look, your Honour. Look at that. Look at that." And they're going to do exactly the same in the scheduled coupes. And then VicForests will say, "No, no, no. Here's our plan."

JAGOT J: Yes. "I will comply."

MR KIRK: "I will comply." There's – read the plans, hundred pages long. It's full of wonderful statements how we comply. And so, then you get into a similar issue about, well, so how would the argument run? We would presumably have to say it's effectively a sham, ought to be given - - -

JAGOT J: Well, no. Just that the way that the evidence purports that they're not going - - -

MR KIRK: But what would be the test? Because if it's purely prospective, and they say, "No. Look, we've had our general manager, Central Highlands, give evidence that this is the plan they propose to implement," and there's no reason to distrust what Ms Smith says, how does the court then deal with it? If it's purely prospective on that construction, one might say – Mortimer J might have had to say, "Well, they

say that's the plan, and I have real doubts about whether they're going to implement it, but section 38(1) just requires them to have a plan."

It's not a very attractive construction, actually. And so, then we might be forced to say it's a sham plan. In any event. Yes. To be clear, we did say the new plans shouldn't be believed, but that was in the context of the injunction point based on the construction I put. All right. Unless there's anything further about ground 1, I might finally move to ground 2. There's actually - - -

JAGOT J: Can I ask maybe a dumb question about ground 2. In this 2014 Code, is it just a simple sort of "you must comply with the Code"? Does that exist?

MR KIRK: Yes.

JAGOT J: Where is that provision?

MR KIRK: Yes.

JAGOT J: And then they accredit it, but I can't actually find the - - -

MR KIRK: Sorry. There's bits in the Code, and then it's probably in the Act. If I can start with the Code, and then maybe someone could show me where it's in the Act.

JAGOT J: I'm in the 2014 Code.

MR KIRK: Yes. So the 2014 Code – it's in volume 3 of part C, tab 150. Just – if I can just postpone your Honour's question – I can postpone your Honour's question for 30 seconds just to contextualise this a little. My learned friends have now sought to articulate two strands to ground 2, one of which is in the notice of appeal and one of which isn't.

JAGOT J: No, that's right. It's in the reply very vaguely.

MR KIRK: Correct. But I'm a big boy, so - - -

JAGOT J: You will cope.

MR KIRK: - - - I will cope. But I do note that the second is ..... notice of appeal. The ground in the notice of appeal - - -

JAGOT J: The subjective ground.

MR KIRK: - - - is the uncertainty point. It's all too uncertain, and so forth.

JAGOT J: Yes. The subjective ..... I'm calling them 2A and 2B - - -

MR KIRK: Yes. The 2B point is "gotcha". It's not the 2014 Code, because there's no reference to it.

JAGOT J: Yes.

MR KIRK: Can I deal with the first point, which your Honour calls ground 2A, first, because then, that way, I will also address your Honour's question. There is – and again, let me contextualise it a bit.

GRIFFITHS J: Page 23.

JAGOT J: Okay. Sorry, I'm working off the version of the 2014 Code at 828 so I can – tab 828, so I can see the changes.

MR KIRK: Can I - - -

GRIFFITHS J: 1.2.6.

MR KIRK: Yes. That might – my friends say that might be the RFA, not the code, but - - -

JAGOT J: That's the RFA. Yes. No. No, you're right. I've got the Code somewhere else.

MR KIRK: Can I - - -

GRIFFITHS J: Tab 150.

MR KIRK: Can I start by putting the argument in context, because, with great respects to my friend's learned – my learned friend's written submissions, my learned friend did not address orally at any length on what your Honours call ground 2A. It's a rather opaque argument, but there is a major premise and a minor premise. The major premise relates to the issues of what sorts of conditions in an RFA are required to be complied with in order for the actor to be seen as acting in accordance with the RFA for the purposes of 38(1). So what sorts of conditions in an RFA are required to be complied with in order for the actor to be seen to be acting in accordance with the RFA for the purposes of 38(1). That's the major premise. The minor premise – minor premise issue: is clause 2.2.2.2 such a condition as to fall within the category identified in the major premise?

So if I can just – and I will come to your Honour's question. That raises – that arises at the minor premise level. In terms of the major premise, on her Honour's construction – I've covered this already, really – it's the actual – it's parts of the Code which address the actual conduct of forestry operations so that the forestry operations must be undertaken in compliance with any restrictions, limits, prescriptions in the Code. I articulated that yesterday. I will remind your Honour of the paragraphs in the separate question reasons 148 to 9, 155, 175. So that's the

major premise: restrictions, limits, prescriptions relating to the conduct of forestry operations. And I'm not sure – leave aside ground 1. For the purpose of ground 2, I don't think the major premise is in issue. I think what they're challenging, although it's far from clear, is the minor premise. They say clause 2.2.2.2 cannot possibly be such a condition. It's too uncertain; it's too hard. No, that's 2A. That's the one they pleaded.

JAGOT J: I've got them around the other way.

MR KIRK: Yes. Sorry. My - - -

JAGOT J: I've got the – it's not in the 1996 Code.

MR KIRK: Sorry. Okay. Sorry. I misapprehended your Honour.

JAGOT J: Sorry.

MR KIRK: I'm calling that 2B. Or not.

JAGOT J: 2B or not 2B.

DERRINGTON J: The minor premise ..... 2B.

MR KIRK: I'm dealing with 2A. So if I – sorry. Every barrister is a thespian. Can I deal with the minor premise, clause 2.2.2.2, and whether it is properly characterised as a restriction limit prescription. So here, I'm finally getting to your Honour's question. If your Honour goes to the Code, which is volume 3, part C, tab 150. To put it in context, if your Honours go first to page 21 using the numbers at the bottom right-hand side – actually, the third-last and second-last paragraph. "In 1989" – so this is just some intro, but it helps explain it. It was first ratified in 1989, revised in '96. Consistent with what my friend said yesterday, reviewed and published in 2007, blah, blah. "This version of the code builds on the 2007 review." Then if one goes to – over the page, headed The Code of Practice for Timber Production, 1.2.2, purpose of the code:

> *Provide directions to timber harvesting managers.*

So just pausing there, by the way, for the purpose of my ground 1 argument, it's what the Code is supposed to do. It's supposed to be fairly plain English telling timber harvesting managers what to do and so on through the dot points. Then 1.2.3, how the Code is made, it's made under – as my friend said yesterday, under the 1987 state Act. It's a legislative instrument. Then if your Honours go to the next page, under the heading Description of Land to which the Code Applies, second para:

> *Compliance with this Code on public land – which is dealt with in chapter 2 – is required under the conditions of licences and authorities issued under the provisions of the 1987 Act and the 2004 Act.*

And your Honours don't need to go to it, but the 2004 Act, Sustainable Forest (Timbers) Act, is found, without going to it, in part A, tab 35. Section 46 says:

> *The following persons must comply with any relevant code of practice relating to timber harvesting: (a) VicForests.*

There's a (b), but who cares?

JAGOT J: Is there something in the RFA that picks up "you must comply with the Code"?

MR KIRK: No.

JAGOT J: No.

MR KIRK: No. So that's picked up through – sorry. I withdraw that answer. Yes. I was thinking of the RFA Act. I apologise.

JAGOT J: No, I mean the RFA itself.

MR KIRK: Itself. Yes. No. And that's explained by her Honour's judgment. It comes back to – it's clause 47 and then, I think, possibly 67 of the - - -

JAGOT J: But 47 accredits it ..... at 67.

MR KIRK: Maybe I'm wrong about that.

JAGOT J: 47 is the accrediting provision.

MR KIRK: Yes.

JAGOT J: The Commonwealth accredits.

MR KIRK: And then – yes. So 47 is, as you say, the accreditation. And then - - -

JAGOT J: 67 has been deleted, it looks like.

MR KIRK: Sorry. I may have misremembered that. No, 67 is on point. Yes.

JAGOT J: So in the 2014 – sorry, the – I know what I'm looking at. I'm looking at the 2020 version and I shouldn't be.

MR KIRK: Well, no, don't do that.

JAGOT J: Yes. No, I know what the problem is. Okay. So I need to go back to - - -

MR KIRK: So it's at tab 153.

JAGOT J: 153, yes.

MR KIRK: Page 28. The first sentence, which is:

> *The parties agree that state forest outside the CAR reserve system is available for timber harvesting in accordance with Central Highlands Forest Management Plan and the Code of Forest Practices for Timber Production.*

JAGOT J: Right.

DERRINGTON J: Does clause 47 of that agreement pick up the Sustainable Forests (Timber) Act?

MR KIRK: I'm sorry, your Honour, I didn't quite hear that.

DERRINGTON J: Sorry. Clause 47 of the relevant version of the RFA: does it accredit the 2004 Act?

MR KIRK: No, because, as both sides are whispering to me, the 2004 Act was post the RFA. So it's not referred to in the text here, but it should be noted that although the – although I've just quoted you the 2004 Act, as explained in the Code, it's also a condition under the – what's the other Act? The - - -

DERRINGTON J: .....

MR KIRK: - - - 1997 Act, I think it is. There's a Conservation, Forests and Lands Act 1987. Sorry, '87, not '97. And although that Act too is not mentioned in 47, because that's the source of the Code and because the Code is referred to in both clause 47 and clause 67, the fact that the particular Act is not mentioned has no particular significance, in our respectful submission. So then if I can go back to the Code. So this is tab 150. I've just identified the second para of 1.2.5. Then on the same page, which is page 23, under 1.2.6, compliance on state forest, so there's then a reference to the 2004 Act, mandatory - - -

GRIFFITHS J: So what's the section? You gave us section 46, which was - - -

MR KIRK: Yes. That's section 46 of the state Act.

GRIFFITHS J: So 46 applies – you said VicForests is named in section 46 as being bound to the Code in respect of public land.

MR KIRK: Yes.

GRIFFITHS J: Is there a separate provision in the 2004 Act relating to state forests that also picks up VicForests in name?

MR KIRK: I'm not sure, but I suspect it's the same point, because state forests, I think, is going to be public land, isn't it? And I don't think any of this is in dispute, by the way.

GRIFFITHS J: Yes.

MR KIRK: I'm just grappling with your Honour's point.

GRIFFITHS J: Yes.

MR KIRK: So codes of practices ..... under part 5 of the 1987 Act. Then further down, just to explain something, at the bottom of that page, page 23, there's a subheading Incorporated Documents, which refers to:

> *…the management standards and procedures are incorporated into this Code.*

One of the examples I dealt with this morning, I forget if it was tree geebung or the 150 metre rule, but it emerged from the management standards and procedures, so that's part of the Code, though actually it's a separate document. That document, by the way, is found at tab 151, without going to it. And then if I can turn to page 25 – and this is important. So at the end of this introduction section 1, is the heading 1.2.8 – actually, it's not quite the end of the introductory section – Terminology. And there's a pretty clear delineation: (1) code principles, that's the broad outcomes; (2) operational goals:

> *…desired outcome or goal for each of the specific areas of timber harvesting operations.*

The third, mandatory actions, which is pretty clearly identified to be mandatory. And then if your Honours turn to page 34, there's the heading 2.2.2 Conservation of Biodiversity. So looking at the first two paragraphs, you've got the operational goal there, the principles are described there. Let's not worry about them. So you've got principles earlier. Operational goal, the first two:

> *Timber harvesting operations in State forests specifically address biodiversity conservation risks and consider relevant scientific knowledge at all stages of planning and management.*

The next:

> *Harvested State forest is managed to ensure that the forest is regenerated and the biodiversity … is perpetuated.*

And then if one scrolls down a little, you've got mandatory actions in which it explores 2.2.2. So how VicForests can say this is not the sort of thing which is picked up as a condition – sorry – prescription is very difficult to understand.

JAGOT J: This is the subjective point you're on?

MR KIRK: Correct.

JAGOT J: Yes. Okay. Not the variation point.

MR KIRK: Correct, correct. I'm stealing dealing with my 2(a), your 2(b).

JAGOT J: Yes, your 2(a).

MR KIRK: It's carefully delineated and it's meant to be mandatory. And is it a completely certain application? No. Welcome to Australian legal regulation. But wait, there's more. In my learned friend's written submissions on this point, they say, at the end of their submissions, by the way, it can all be enforced by injunction under the Victorian legislation and has been in, I think it was the so-called Brown Mountain case. So if it can be enforced by injunctive relief by a court, how can it be said it's so uncertain that they can't comply with it? It's not surprising, with respect, my learned friend didn't address it orally yesterday.

So then if I can turn to what I venture to call 2(b), the Code point. I will be brief on this. Dealing with 2(b), one has to go, here, to the RFA. So if one goes to the RFA, the unamended version. I should say something about the amendment. As your Honours all well know, it's a classical argument of construction to say they amended it later to make it clear. And there's always two ways of viewing this: are they just making clear what was implicit or are they changing it? But merely to say it has been amended later poses the question, but doesn't answer it.

So then one just looks to the language here. And so the relevant language is – I think one goes through the definition in the RFA. So the argument goes that, on page 4 of the RFA, which is at tab 153, there's a definition of "Code of Forest Practices for Timber Production", which says means the Code of practice developed – it identifies the 1996 one developed in accordance with the 1997 Act. So they say, right, well - - -

JAGOT J: Then you've got 3(d), I think.

MR KIRK: Sorry. 3(d), your Honour?

JAGOT J: 3(d) of the RFA.

MR KIRK: Correct. So then one comes to 3(d). And 3(d) is hideous, as your Honours saw yesterday "any consolidations or amendments thereof", and so my friend makes the point, well, it's not an amendment, it's a new Code.

JAGOT J: It's not all replacements, where you look at all the - - -

MR KIRK: And it doesn't say - - -

JAGOT J: You look at (c) and that actually bothers to have "or replacements".

MR KIRK: Yes. Whether this was drafted by the Parliamentary draftsman, one might rather doubt it. But it says "any consolidations or amendments". Now, the word "consolidation" itself is a rather old fashioned odd sort of word. I'm not quite what it means these days, because we don't really consolidate things. We just re-enact them. So it's apparently meant to – we would say it's meant to be an encompassing word as a matter of text. It's plainly capable of being an encompassing word. And so then one comes to considerations of context and purpose. And the point is pretty - - -

JAGOT J: I have to say – sorry to interrupt you yet again. But if you look at (c), I mean, (d) itself may be redundant, because the Code is an instrument made under a statute or an ordinance and is expressly included within (c) anyway. So this is all just getting a bit bizarre, really, isn't it?

MR KIRK: That's a pretty good point, with due respect.

JAGOT J: Is this pressed, this ground? Well, it is not a ground, of course. It's not actually in your notice of appeal. It just popped up in your reply submission. Someone had a bright idea obviously. So you look at (c). I mean - - -

MR WALLER: Yes, your Honour. I will give consideration to it while my friend finishes his case.

MR KIRK: Sure. Okay. Well, I've almost finished, if that's – I'm sorry I didn't think out that point.

JAGOT J: No. It's just as one sort of wends ones way through this - - -

MR KIRK: A powerful point, with respect, but - - -

JAGOT J: - - - it all becomes a little more bizarre.

MR KIRK: And the reason it's bizarre anyway is that, just for the purpose of construction – and I'm not going to go back to everything I've said – but this document is replete with references to needing to adapt. It would be a nonsense to say that one of the fundamental instruments, if it's not amended, but re-enacted - - -

JAGOT J: Yes.

MR KIRK: Just one final brief point on this as a matter of fact, in the 1996 Code, which was one of the documents admitted yesterday, so that's at tab 823 in volume 5. So tab 823, volume 5. This the '96 Code, which is the one referred to. If you go to page 3, using the numbers at the top.

JAGOT J: So are you going to 823?

MR KIRK: Yes. And on that page on the bottom right-hand side, there's that subheading Review of the Code. It's page 3 at the top. That's right. The heading at the top is Terminology. But then it's the bottom of that page it has got Review of the Code:

> *The Code will be reviewed at least every 10 years to take account of new research information.*

So the '96 Code itself, as referred to in the RFA, contemplated its own evolution. If your Honours just give me a moment. Unless your Honours have any further, they're our submissions on grounds 1 and 2.

JAGOT J: Okay. So we will hear your reply - - -

MR WALLER: If that's convenient, your Honour.

JAGOT J: - - - on grounds 1 and 2.

MR WALLER: Yes. Your Honours, in relation to ground 1, my learned friend characterised our proposed construction as involving a tautology at transcript 60 of yesterday, at lines 17 to 30, Mr Kirk said – 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 a land – in a region covered by the RFA, being land where those operations are not prohibited by the RFA. That is effect of the forest's construction.*

Your Honour, that is not our position and has never been said to be our position. The way I opened my submissions yesterday morning, at transcript page 6, lines 5 to 11 – and this was contrary to what my learned friend said yesterday at transcript 57 45, where he said:

> *This morning, my learned friend has used the words "undertaken pursuant to an RFA", so his first formulation right at the beginning this morning was her Honour ought to have held forestry operations as defined by an RFA enforced on 1 January 2001 and conducted on land, being land not prohibited, and undertaken pursuant to an RFA is what the definition should be. And then later this afternoon, my learned friend picked up what had fallen from Jacobs JA - - -*

GRIFFITHS J: It's not the afternoon yet.

MR WALLER: I'm sorry, your Honour?

JAGOT J: You said "later this afternoon"; we haven't got to the afternoon yet.

MR WALLER: No, I'm referring to yesterday's transcript - - -

GRIFFITHS J: Right.

MR WALLER: - - - of what my learned friend said, your Honour.

GRIFFITHS J: But can I just say this: look – and I talk entirely for myself – I don't find this very helpful advocacy, if I can put it to you, Mr Waller. I would much rather hear you say that – you've started off with saying that Mr Kirk said that there's some tautology if your construction is adopted. Tell me what your response to that is before you go into the detail that you're going into now, because I'm sitting here scratching my head, thinking I've got to absorb all these transcript references and I don't know where you're going. I don't know what the point is and I shouldn't have to wait till the end to find out what the point is. Tell me what the point is, please - - -

MR WALLER: Your Honour - - -

GRIFFITHS J: - - - then go to the detail.

MR WALLER: Yes. Well, I will repeat what I said at page 6 of yesterday's transcript, your Honour, at the beginning, which is that our – we submit – line 5 – the primary judge ought to have held, on the proper construction of section 38 of the EPBC Act and section 6, subsection (4) of the RFA Act, that any forestry operations that are forestry operations defined by an RFA in force on 1 September 2001 and 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. That is the construction for which we contend.

JAGOT J: I know, but it does involve necessarily – there's just no avoiding it. I'm not saying it means you're wrong, but it means there is tautology – redundancy – okay, on your construction. There necessarily is, because it could equally end at the word – but just before – you could put a full stop before "in accordance with" and they add nothing to your construction.

MR WALLER: With respect, your Honour, we say no. Let me explain why. What one has to do with section 38 is to insert the definitions from the RFA Act. And once those definitional terms are inserted, then the question of what may be done and where it may be done are answered, but no more. So one inserts RFA forestry operations and one is told the what is forestry operations that are defined in the RFA, and that will include, for instance, timber harvesting for commercial purposes. That's the what. One reads on:

> *…which are conducted in a region covered by an RFA on land not prohibited by that RFA –*

that tells you where you can conduct it, and the answer in our case is the Central Highlands of Victoria. That's all the definitions tell you to that point, even though they refer to an RFA several times: they tell you what you're doing and where you are doing it. The additional words "in accordance with an RFA" address the question of how it is being done, and the answer to that question, we say, is it is being done pursuant to or under cover of an RFA. That's how I opened the matter yesterday. That way, work is being done by every element of section 38.

We do not say that this is simply a question of, in my learned friend's words, "geographical objectivity" or mathematical or mechanical precision. We do say that one has regard to the RFA to determine what areas of land are prohibited, but we say in that respect one would be limited to those areas on the map, for instance, which are specifically characterised, for instance, as a reserve or an SPZ – and the RFA specifically refers to that. It may be that rainforest – although my learned friend says we have conceded, it may be that although there is an expression in the RFA that rainforest is not to be harvested, that the way in which rainforest would be dealt with is, in a sense, to be dealt with by the Victorian regime, rather than being prohibited – that is to say land which is prohibited – by the RFA. It's not prohibition generally. The definition in section 4 says – in respect to the question where this may be done, it says you can do it in an area – in a region covered by an RFA on land that is not prohibited. So we tie the prohibition – the word "prohibition" is very much tied to the geography. That's in respect to the where. As to the how, we say, it's at the higher level of generality that your Honour Justice Jagot referred to yesterday. Nowhere, we say, is there any mandate, we say, in the context or purpose for the specific, strict compliance with terms, conditions, prescriptions contained in the RFA. One only has to go back to the pleading on which this case rests.

JAGOT J: I must say – I'm sorry to interrupt you, but I'm not following this formulation that the what and the where is covered by the definition of RFA forestry operation, the how is covered by "in accordance with". Then you said the how attaches – there's a question of the level of generality.

MR WALLER: Yes.

JAGOT J: But what is – I previously understood what I thought was your argument, which was you were looking for a prohibition that was, sort of, geographical. Now I'm thinking the how – well, I don't understand what criterion or criteria of distinction you're drawing. I mean, why is the primary judge wrong in the words "in accordance with" regulating how you might do something? How – what is the basis upon which you distinguish - - -

MR WALLER: You're doing it - - -

JAGOT J: - - - something that is – that you do have to comply with or which has been flipped into the Commonwealth legislation? I just don't now get this.

MR WALLER: Well, it's covered by an RFA. What you're doing, how are you able to do it – it's covered by an RFA. Everything you've been told today, when one looks at the definition, is what you may do – you may do timber harvesting – where you may do it – in the Central Highlands – but that's all. It doesn't tell you that you're working under the rubric of an RFA.

JAGOT J: But I still – why is clause two point – leaving aside your argument about it's too subjective – leave that aside - - -

MR WALLER: Yes.

JAGOT J: - - - 2.2.2 is too subjective, because that's not a construction issue. That's a different issue altogether. Why, under ground 1 does clause 2.2.2.2, that's about the how. How you do it, you must comply with precautionary principles.

MR WALLER: No, your Honour. We say it's not operating at that level. It's operating at the higher level - - -

JAGOT J: Well, what higher level?

MR WALLER: The higher - - -

JAGOT J: Where's the line between the higher – I understood the line I thought you were drawing between conditionally permitted on land. Another way of looking at that is, of course, conditionally prohibited on land. They mean the same thing. I understood what you were says is if it's only – if it's only about how you do the action, that's not part of in accordance with the RFA. But now you seem to be saying that is in part of accordance with the RFA, and then I'm saying, well, what's different about 2.2.2.2?

MR WALLER: Well, your Honour, we say that in the same way – let me put it this way, that - - -

JAGOT J: I mean, this is different, I think, from your written submissions, I think. But anyway – maybe I'm alone in that, but anyway - - -

MR WALLER: Well, your Honour, we're trying to give work to the words "in accordance with an RFA" and not have a position where they're rendered tautologous. The work that we say they do is connecting that which you're doing with a regime, it's covered by an RFA. But there's no suggestion, we say, that each and every prescription, if such prescriptions are to be found in an RFA, are to be complied with in order for the exemption to continue to operate.

DERRINGTON J: So what I understand your argument to be, and this – I may be entirely wrong too. I understand, or perhaps the way this operates is that the how under or pursuant or covered by an RFA as you would have it picks up what it is in clause 46 and 47 of the RFA itself. In other words, doing it under, in accordance

with an RFA means in accordance with Victoria's suite of management systems. Legislation, policies, procedures, and the like, and that that might have the consequence that the only remedies available are those that sit within the Victorian suite of legislation, not the Commonwealth. But that doesn't seem to be your argument either.

MR WALLER: No. That is consistent with our argument in the sense that what you're doing and where you're doing it takes you so far. How you are able to do it has regard to the fact that the Commonwealth has accredited the state and the state system and has the comfort of knowing that there is a state system that will look after the way in which things are done in the forest, but not that the precise compliance with every element of that state system is a condition precedent to the operation of the exemption.

DERRINGTON J: With the exemption. Yes. I understand that.

MR WALLER: And that, we say, is consistent with the way in which the words "in accordance with" were dealt with by the New South Wales Court of Appeal in Re Hestelow, which is a decision referred to by her Honour in the separate question reasons, and I think my learned friend went to that paragraph earlier today. I won't take your Honours to that case, but it's in tab 9A of our list of cases, and in that case, the court had to consider whether a failure to strictly comply with a time requirement under the Coal Mine Regulation Act meant that furnishing a plan was not in accordance with that Act for the purposes of these provisions, and Jacobs JA found that or held that in accordance with in the context of that Act did not convert what was a statutory requirement under that Act into a condition precedent to the validity of the action that was being taken, and we say here because the operations are being done under cover of or pursuant to another regime doesn't mean that that other regime is a condition precedent to the operation of the exemption.

That is entirely consistent, we say, with the objects of the EPBC Act, some of which were dealt with by my learned friend in his address, but not all, where there is to be a simplified interaction between Commonwealth and state systems and where the Commonwealth is given the task of focusing only on matters of national environmental significance. We say that my learned friend's submissions suggested that VicForests didn't have to worry about complying with federal law because it would only operate if there were matters of national significance that were involved, but as I said yesterday, there are two aspects to this. There's the retrospective aspect and the prospective aspect.

In relation to the prospective aspect, section 68 of the Act requires a person proposing to take an action who thinks there may be or is a controlled action to refer the proposal to the Minister for decision about whether or not the action is a controlled action, and section 68(2) provides that a person proposing to take an action that they think is not a controlled action may nonetheless refer the proposal to the Minister for the same decision, and when the Minister under section 75 has to deal with that referral, the Minister has to decide whether the action that is the

subject of the proposal is a controlled action, and if so, which provisions of part 3 are controlling provisions.

Now, we say that if VicForests is about to embark on a forestry operation, acting prudently, even if it thinks it is not a controlled action, it may refer that proposal to the Minister and in deciding whether the proposed operation is a controlled action, the Minister first needs to determine whether section 38 applies, and that would necessarily, we say, involve the Minister, Commonwealth Minister considering the application of Victorian law before considering any possible application of federal environmental law, and we say that's contrary to the objects of the Act, which plainly seek to focus the Commonwealth involvement on matters of national environment significance to promote intergovernmental cooperation, to avoid fragmentation and minimise duplication.

Now, all of that was made clear in the Second Reading Speech of Senator Kemp in a paragraph that my learned friend did not go to yesterday. That's in part A of the legislation, tab 25, and - - -

JAGOT J: Well, hang on. Maybe we had better go to that if - - -

MR WALLER: And if your Honours look at that - - -

JAGOT J: Part A - - -

MR WALLER: Part A, legislation tab 25.

JAGOT J: Which volume of part A is that in? Is it - - -

MR WALLER: Volume 2, I'm told.

JAGOT J: Yes. Okay.

MR WALLER: So in a section at the bottom of page 210 titled "An efficient environmental assessment and approval process," the Senator said:

> *The bill implements a modern environmental assessment and approval process that will transform the Commonwealth process from its archaic 1970s structure.*

That's at the top of 2011:

> *Reliance on direct environmental triggers will substantially increase the certainty and efficiency of the assessment and approval process.*

It goes on to say:

The proponent may trigger the process, avoiding the current delays under the EPIP Act.

And then, a couple of paragraphs later:

Commonwealth assessment is confined to impacts on the matters of national environmental significance. The Commonwealth will not assess matters which are more appropriately the responsibility of the states.

JAGOT J: Yes. But the problem with this is that these would otherwise be matters of national environmental significance, because you've got the threatened species. So they would otherwise be, except you've got the section 38 exemption relating to the forestry operations.

MR WALLER: You don't know which one comes first. If the Minister under section 75 has to determine whether or not the action that is subject of the proposal is a controlled action, then one might first go to see whether the exemption applies. If the exemption applies, then that's the end of the story.

JAGOT J: This is – this is what we're all about. This is – obviously, you go first to the exemption. We're trying to work out what it means, that's all.

MR WALLER: But the – that's right, but on her Honour's construction for which my learned friend contends, one has to, at a Commonwealth ministerial level, delve into the minutia of the Victorian State system which, as my learned friend correctly says, is complicated and has been described as labyrinthine.

JAGOT J: Not if you comply – on their construction, if you comply, you're wholly within the State's system. If you comply with what you need to comply with for the actual carrying out of the forestry operations, you're wholly within the – you never worry about the EPPC Act. It's only non-compliance.

MR WALLER: That's so, but if the effect of non-compliance is to render illegal that which hitherto has been legal.

JAGOT J: Yes.

MR WALLER: Acting prudently, VicForests would be going to the Minister in advance and saying, "This is what we want to do," especially when there are issues like the precautionary principle which is such a nuanced subjective area of play. Because if it were later in the situation where someone in the position of my learned friend's client said, "You've just logged that coupe, and we say that when you logged that coupe you did not apply the precautionary principle and therefore everything you've done in that coupe is now the subject of Commonwealth law. And we say that significant impact has been caused to a range of values, and in those circumstances you're liable, potentially criminally, certainly civilly, and in circumstances where the RFA forestry operation that is the subject of this on her

Honour's judgment is not just related to a single coupe because her Honour said that it" - - -

JAGOT J: Look, we understand that you're saying there's an impact or undesirable consequence of what the applicant – of what the primary judge found, but, ultimately, we still have to determine what the words mean.

MR WALLER: Yes.

JAGOT J: And I'm still not with – unless it is what Justice Derrington said, I'm still not with what you actually say it means because you didn't actually embrace what Justice – you said it was a bit different - - -

MR WALLER: I do - - -

JAGOT J: - - - but I haven't actually worked out – maybe it's me.

MR WALLER: No, I do - - -

JAGOT J: I don't actually know what you're now saying.

MR WALLER: I do embrace what Justice Derrington said on the basis that it's consistent - - -

JAGOT J: No, no, but that's not – consistent with doesn't mean you're embracing it, it just means you've got another interpretation that leads to a similar result - - -

MR WALLER: It – yes – no - - -

JAGOT J: - - - but I don't get what you're – is it just me?

MR WALLER: Well - - -

JAGOT J: I don't actually now understand what your construction is.

GRIFFITHS J: Can I attempt to assist? Isn't your proposed construction of section 38, with particular reference to the phrase "in accordance with", a construction which asks the court to read the words "in accordance with" as purely and as not imposing any requirement of compliance.

MR WALLER: Yes.

GRIFFITHS J: Thank you.

MR WALLER: Descriptive of the fact that there's an RFA process or, in fact, an RFA agreement which meets certain conditions that are set out which the Commonwealth can have faith and has given credit to as being a basis on which it

can be satisfied that environmental concerns are being dealt with at a State level by the State.

GRIFFITHS J: And what you would also say, would you not, is that if the intention was to have the – I'm not going to use the word exemption. If the intention was that the carve out only apply where a forestry operation is being carried out in strict compliance with every aspect of an RFA, you would expect such an obligation to be imposed not in a provision like section 38 but in a separate provision which expressly said that was the intention.

MR WALLER: Yes, we would agree with that and we would also say that where greater specificity of compliance with conditions was in the mind or intended by the legislature, they use specific words such as 37M. It is unfortunate that in the same part the words "in accordance with" are used in neighbouring provisions, and we would say in different ways, but that might partly be explained by the haphazard way in which section 38 came to find its way into the current Act. And it's clear that the language of the current section 38 is expressed in much more general terms than its predecessor.

JAGOT J: Can we just – I ..... and you saying that reminded me, do we have the Act which put the amended version of section 38 into the Act?

MR WALLER: Yes, it's the RFA Act and it's a schedule to the RFA Act.

JAGOT J: So we've got that behind tab - - -

MR WALLER: I think it should be behind legislation.

JAGOT J: We've got it somewhere, haven't we?

MR WALLER: Is it tab 32?

JAGOT J: 32. So that's volume - - -

GRIFFITHS J: 3.

JAGOT J: - - - 3.

MR WALLER: I fear there may only be extracts, but the – if one goes down to the very last part - - -

JAGOT J: So where do we go? No, I don't see it. It's – I'm not sure it's there.

MR WALLER: it's regrettable that an Act of only 12 sections stops at section 7, but if one looks - - -

GRIFFITHS J: Which tab is it again, please?

MR WALLER: Tab 32.

GRIFFITHS J: Thank you.

MR WALLER: And we can arrange for the whole Act to be provided, but - - -

JAGOT J: It's still there ..... let me look up - - -

MR WALLER: If we were to google it immediately, we should find it. And from memory, I think section 11 or section 12 deals with it.

JAGOT J: No, it's not in there. So where did this version of section 38 come from? The reason I understand to ask is because Mr Kirk said it came in at the – not as part of the RFA but at the same time as the RFA, the Regional Forests Agreements Act. I'm looking at the current version of it and it's definitely not there.

MR WALLER: Yes. Well, then, I stand corrected and I need to check it. I think certainly with - - -

JAGOT J: I mean, that would sort of help to know that because that did help me a little bit.

MR WALLER: Yes. Yes, but although the primary judge didn't place any weight on the language being changed from the passive – from the active, I should say, to the passive and – nor from the fact that the initial provision referred to not needing approval under part 9 and the current version being directed at a high level that part 3 does not apply at all, but we say they're indicators that this exemption was to have a broad operation - - -

JAGOT J: Your point was – you were making is, "Look, section 38 came into the EPPC Act in a somewhat haphazard way," and then I interrupted you, sorry, to say, "Well, exactly how did it come in?"

MR WALLER: Yes.

JAGOT J: We don't know, but we presumably would be able to find out.

MR WALLER: And that might explain - - -

JAGOT J: The - - -

MR WALLER: - - - why there isn't a complete symmetry, harmony - - -

JAGOT J: Right.

MR WALLER: - - - between all of its clauses in the same path. But what is, we would say, clear - - -

JAGOT J: Well, in fact, your point is that it's hard to reconcile what you say the proper meaning of 38(1) is with the way that the other provisions use the words "in accordance with." That's your point.

GRIFFITHS J: Yes.

MR WALLER: Yes. And in particular, yes, 37M.

JAGOT J: So in one sense, they might have – who knows, but an explanation might be that they picked up the language of the other provisions "in accordance with" when it's, you say, not actually well adapted to what they were trying to achieve - - -

MR WALLER: Yes. That's so.

JAGOT J: - - - and it should be construed with that in mind.

MR WALLER: Yes.

JAGOT J: Leading you to Griffiths Js way of reading it.

MR WALLER: Yes. And I would say Griffiths Js way, with respect, and Derrington Js way are in a sense two sides of the same coin, in that Griffiths J focuses on the strict language and Derrington J focuses on the reason behind it operating in that way. That is to say the commonwealth, as I've said, being prepared to give faith and credit or a credit, recognise another regime but by no means requiring that regime to be a condition precedent to the operation of its regime.

And one steps back and one looks to the pleading of the case, and originally, as your Honours know, our learned friends focused on clause 36, which required five yearly reviews. When that failed, they moved back and then focused on clause 47. But clause 47 does no more than say the commonwealth accredits. It doesn't say – it doesn't actually impose an obligation on anyone, let alone on VicForests. It's a statement of fact that the commonwealth has given acknowledgment, faith and credit to another system. And yet what the primary judge did was to take 47 and read into it and through it into section 38 an obligation of compliance with prescriptions that are referred to - - -

JAGOT J: Sorry, someone has just found – it's up on your screen now.

MR WALLER: So it came in as amendment to the EPBC Act.

JAGOT J: EPBC Act. And when was that amended? At the same time as the – okay. You put in the current version or something like that or compilation, so we need to find – that is the 2002 version.

MR WALLER: Well, that – so that restores my faith at least in that aspect.

JAGOT J: Thank you.

MR WALLER: So what we say, your Honours, is that the issue of the commonwealth's focus, which was the object – one of the objects of the EPBC Act to begin with, is maintained by this construction, because the commonwealth focuses on its matters of national environment significance and the state government, which is accredited to do so, focuses on its matters, and as your Honour Justice Jagot said, there's no suggestion that the state regime, complicated as it is, isn't well capable of protecting the environment. And in terms of upright certainty, yesterday at transcript 64, line 28, my learned friend said:

> *The hunt for certainty is a mirage because evaluations need to be made on the ground.*

And example was given of the geebung. The geebung is not an example, your Honours, that we came up with in order to prove or show graphically how the consequences may unfold. It's an example drawn directly from the pleadings in this case where our learned friends relied on a failure to comply with the prescription concerning the tree geebung to render inapplicable an exemption that had hitherto operated in relation to a coupe or various coupes and bring them under the scrutiny of the EPBC Act regarding impact or significant impact that was said and found to have happened or affected the Leadbeater Possum or the glider. We consider the possibility that your Honour Justice Jagot referred to of VicForest being flipped out or flipped into another universe as being a real difficulty that our learned friend's submissions have not addressed.

GRIFFITHS J: Yes.

MR WALLER: The timeliness of the process we say also, your Honour, is an issue. Plainly a system that was supposed to be timely, certain, is going to be made more uncertain and more delayed by what has been said. Can I say, your Honours, that it was said at the outset of Mr Kirk's submissions yesterday that – or in relation to a question from the bench, we could have perhaps appealed her Honour's ruling on the separate question reasons.

Your Honour's order that followed the separate question reasons, which is at tab 18 of the part A of the appeal book, made on 20 April, was an order that, in answer to the separate question that was stated by the court, insofar as logging in the coupes described has been carried out or will be carried out, the exemptions in section 38 and 64 are not rendered inapplicable by the failure to carry out the review. That is an order that we embraced, although the reasons, of course, then led to the case moving onto a different course. We could not have appealed those orders because they were orders that we agreed with, and even though her Honour has effectively incorporated by reference all of the reasoning of the separate question reasons into the primary judgment and used that as a basis for the orders from which we now appeal, and that's why we raised ground 1 in the way that we have.

JAGOT J: Just in case you're going to move to a new point after that, we propose to let Mr Kirk say anything more he wants to say about what was the whole dialogue that has happened now, because I think it is a bit different. But you finish your - - -

MR WALLER: At paragraph 786 of the primary judgment, her Honour made it clear she accepted that section 38s operation was both prospective and retrospective, and we – that was a point that we accepted ourselves. There's no reason why section 38 should be read in any other way. And it's for that reason that we feel exposed in respect of forestry operations we may have conducted for a period of time across a large part of the area of land that might suddenly become subject to a regime that we hitherto thought we were exempt from.

Her Honour, in defining forestry operations for the purpose of this case, accepted that forestry operations, because of the way the case had been pleaded, were not limited only to coupe by coupe analysis but could be groups of coupes or the whole series of activities.

And if, on that basis, the loss of an exemption late in the piece in respect of what was described or could be described or characterised as a very large forestry operation would cause even greater concern than if it occurred very early on into the process. When I come to deal with ground 4, accepting that her Honour's construction is correct and that the exemption is loss for all purposes and in all respects, it's not limited to values, that is to say, only in relation to the Leadbeater Possum, but it applies generally to the action of forestry operation as a whole, then we say that reinforces the construction for which we contend that it cannot have been the intention of parliament in enacting section 38 or section 64 for that uncertainty, duplication, inconvenience, to be the result. We say that there is plainly ambiguity that was evidenced by the proceeding before her Honour - - -

GRIFFITHS J: I know.

MR WALLER: - - - on the separate question, where four separate parties each had different approaches. It's evident by what has happened in the last two days before your Honours. We understand what Justice Griffiths says about the notion of constructional choice and the difficulty that that might present, and we're happy to adopt a more neutral term of "optional view" or – but, in any event, we say that whatever formal word is used, the construction for which we contend is one that is consistent with the text, viewed in the context and having regard to the purpose of the Act and also has consequences that are much more sensible than would be the case if the primary judge's construction is upheld.

In relation to ground 2, your Honours, we do not press, in light of what Justice Jagot has identified in the RFA clause 3(a) – sorry, 3(c), the argument, although it is curious that clause 3(d) appears if it's covered by 3(c).

JAGOT J: Well, if you don't press it, you don't need to - - -

MR WALLER: We don't press it.

GRIFFITHS J: Quite.

JAGOT J: - - - worry about the curiosity.

MR WALLER: Well, we don't press it.

JAGOT J: Okay.

MR WALLER: And we don't wish to say any more than we've said already in relation to 2(b) or the other one.

JAGOT J: Okay. Well, we had better give Mr Kirk a go at what has emerged on ground 1.

MR KIRK: Thank you, your Honour. I won't be very long. Just a small point, by the way. The amendments to the – to section 38 are also mentioned in the EM to the RFA Act, right at the bit at the end. But doesn't throw enormous light on it, perhaps, so – my learned friend has now adopted a construction at the heel of the hunt that, in accordance with in section 38, to pick up something that fell from your Honour Justice Griffiths, should be read as purely descriptive, as not imposing any requirement of compliance. I think that's what your Honour said.

GRIFFITHS J: Or imposing any legal obligation, as such.

MR KIRK: Yes, indeed. So can I say this in response to that variation, then I will also ..... briefly about your Honour Justice Derrington's suggestion. So first, to an extent, it begs the question of what does "purely descriptive" mean, but it seems to lead to this point. The words mean nothing. They just don't do anything at all because it seems as though what – where VicForests has now landed – well, it's still not quite clear where they've landed because what about the rainforest? Do they still accept that they're subject to any restrictions? That's a bit ambiguous. What about the CAR reserves? Can they go and log CAR reserves without federal sanction?

JAGOT J: Well, isn't that prohibited by - - -

MR KIRK: So – and prohibited by - - -

JAGOT J: Under the definition of - - -

MR KIRK: Yes. So – sorry.

JAGOT J: Yes.

MR KIRK: I was about to get there, sorry, your Honour.

JAGOT J: Yes, okay. Sorry.

MR KIRK: It was a dramatic pause as - - -

JAGOT J: .....

MR KIRK: If they do – it's a bit ambiguous, but if they do, because, presumably, my friend says, "Oh, no, no. Well, no, we wouldn't touch CAR reserves. No, no, no." And why not? Well, presumably because they would say, "Well, that's all covered by the definition in section 4 of the RFA forestry operations," and so that's where we come back to. You cut out everything after the word "operation" in section 38(1). The words "undertaken in accordance with an RFA" do nothing because you're just doing a forestry operation, all the content of which is provided by the definition in section 4. So my friend has not responded to the tautology/superfluous point as embraced.

And there's another core problem which has emerged in the last 10 minutes. My friend said words to the effect of – well, emerged within the last 10 minutes – in response to something your Honour Justice Jagot said – he effectively said, and no doubt I don't have the words quite right, that the wording of the section is not well-adapted to what was intended. That's a familiar argument. If I can give your Honours one reference. I don't have the full reference, but you will know it. Clause – sorry – para 47 of the decision of Alcan, which has been cited hundreds of times, and just one sentence:

> *The language* –

it says –

> *which has actually been employed in the text of legislation is the surest guide to legislative intention.*

There's then some other High Court cases – I confess I can't currently recall them – there's one about a Children's Court, I think – where various judgments of the High Court have said it is fundamental error to start with an ascription of purpose and then seek to read the text accordingly – and that is exactly what my learned friend as sought to do in the last 10 minutes: to say, "Look, they haven't worded it very well," to paraphrase, "but what they really mean is this." And where does he get the what does it really mean: presumably from the generic statements in the ex mem that we went through at tedious length yesterday, to which I would – I referenced Consolidated Media Holdings. So the construction which my friend adopts in the end – and it's not quite consistent – clear how that relates to all the geographical variants that my friend has put, but – just drives home the problems with it, in our respectful submission.

As to the version suggested by your Honour Justice Derrington which my friend says was consistent with his construction, it probably leads to the same place, I think. As

I understood the suggestion, it was that compliance with the Code is enough and that the sanctions are under the state regime. That, in the end, is a way of saying there is no federal work to be done here; and that's a way of saying the words "undertaken in accordance with an RFA" have no work to do. So insofar as, for example, they accept they can't log car reserves. That presumably falls back into the definition of forestry operations in section 4. Beyond that, we are free to do what we like and the sanction is just in the state system, and that's just the same – it ultimately gets, I think, to the same place as the construction put by his Honour Griffiths J.

One other point, by the way – in a sense, I touched on this this morning, but it's just made a bit clearer here. Even if your Honours accepted the construction my friend has now put, we don't give up, because we say, consistent with an exchange I had with your Honour the presiding judge this morning, well, we then rely on the word "prohibited" in the definition in section 4. Now, that might be a slightly harder argument for me than "in accordance with", but we still say there's lots of things prohibited in the regulatory regime.

GRIFFITHS J: So in section 4 of what?

JAGOT J: RFA Act.

MR KIRK: Of the RFA Act.

GRIFFITHS J: Of the RFA Act?

MR KIRK: Because the definition of forestry operations means forestry operations as defined - - -

GRIFFITHS J: I see: "not prohibited". Yes.

MR KIRK: And so we say, well, it was prohibited. And with great respect, your Honour the presiding judge caught it very nicely this morning: any licensing system says you shall not do X unless Y. Any licensing system is underpinned by a norm of you shall not do X, and then there's an unless Y, and sometimes the unless Y is you've got a driver's licence. That's the reason we actually have a licence. And sometimes the unless Y is you've got a driver's licence and you don't – you know, if you're on your Ps, you don't drive with more than .01 – blah, blah, blah. All of those are elements of a prohibitory scheme, so there's no – coming back to the question your Honour asked my learned friend – with respect, he never answered – what is the criterion or criteria of delineation of what counts as a prohibition or a geographic element or whatever you phrase it and what isn't. And he never supplied – VicForests has never supplied an answer – and even any attempted answer would be unsatisfactory. They're our submissions in rejoinder.

JAGOT J: Okay. Just one question - - -

MR KIRK: Sorry, your Honour.

JAGOT J: I don't want to take too much time here ..... Has this all been put, this prohibition argument, below – this section 4 RFA argument – or is this - - -

MR KIRK: Their argument?

JAGOT J: No, your argument.

GRIFFITHS J: Your argument.

JAGOT J: The argument that if 38 – if you're wrong about 38, then you link on to section 4 or whatever it is.

GRIFFITHS J: Yes.

MR KIRK: I think the answer is no, but the reason is because the argument had not advanced at that point. I don't think this area of the argument has been put so clearly as it has now been put, for example, in the last 15 minutes.

JAGOT J: Okay.

MR KIRK: And so it having been put in those terms, we say, well, if you're putting all your eggs of restriction – that's a very strange metaphor. If you're putting all your eggs of restriction in the section 4 definition, we say, well, those eggs of restriction are still enough for us. That's how the argument arises.

JAGOT J: Yes.

MR KIRK: If you will pardon the terrible metaphor.

JAGOT J: No. No, that's fine. Well, it's a day and a half down and we've done two out of twenty – however many grounds. We're going to have to divide the time up, because we've got a day and a half left - - -

MR KIRK: Yes.

JAGOT J: - - - and that's it. So back to you.

MR WALLER: With that in mind, your Honour, I will attempt to be briefer than I would have been otherwise.

GRIFFITHS J: Well, you do – I mean, you were given a bit of a privilege in terms of the length of the written submissions that have been filed. I mean, they're 35 pages. Very generously given, if I might say so. So hopefully what you want to say is in the written submissions and in your written reply, which of course we will read very carefully.

MR WALLER: Yes. We certainly rely on what we've said in writing and - - -

JAGOT J: Just make sure you divide up the time in some fair way - - -

MR WALLER: Yes.

JAGOT J: - - - we will – you – we can adjourn. Okay.

MR WALLER: Could I move to grounds 4 and 5 next, and I will return to ground 3 shortly. These grounds arise only if grounds 1 and 2 are not allowed. We submit that the primary judge erred at paragraph 789 of the principal judgment in finding that if the forestry operation as pleaded was not undertaken in strict compliance with the 2014 Code in one respect, then part 3 of the Act applied to that forestry operation as an action, and the exception under section 38 was lost in every respect and for the entire forestry operation. And we submit that she ought to have held that since the only alleged non-compliance with the RFA for the schedule coupes and the log coupes – for both – involved a failure to apply the precautionary principle in respect of the greater glider, that any loss of exemption under the Act in respect of those coupes should be limited to the forestry operation insofar as it was not undertaken, on her construction, in accordance with the RFA. But the exemption, we say, ought to continue to apply to forestry operations that were undertaken in accordance with the RFA in every other respect. So for instance, the loss of exemption should be limited to those forestry operations that affected the glider, but questions of significant impact ought not apply to other values, such as the Leadbeater's Possum.

And we have to frankly say that if her Honour's construction is correct and one focuses on the words "forestry operation", which seems to be used in section 38 as a synonym, perhaps, for action, that it is very difficult to divide up a single action or forestry operation in the way that we've submitted.

But we call this ground in aid of ground 1 as demonstrating the difficulty of the construction if it were accepted, and we say that it's inconsistent with what we've said is the purpose of the EPBC Act and the RFA Act and, indeed, the RFA itself, which were, on the judge's – the primary judge's analysis, intended – she said to create a substitute regime through which the use of the forest would be regulated, because her analysis would ignore that substitute regime. The substitute regime is quite specific as it applies to particular values. There are proscriptions that are particularly focused on Leadbeater Possum, others that are focused on the glider. The range of regulation is vast. But if all of that is swept aside because there's a breach of the Code in respect - - -

JAGOT J: This is back to ground 1, which you've had a full go of.

MR WALLER: Yes. So - - -

JAGOT J: ..... get the point on ground 4 - - -

MR WALLER: Yes. So all we do, really, is rely on what we've said in writing, but we do accept the difficulty of the argument. Ground 5 does follow on from ground

4, and will rise in 4 accordingly. Ground 3, your Honour, is – deals with a different matter. Her Honour, we say, erred at paragraph 720 to 721 of her primary judgment in holding that the harvesting of forest products referred to in paragraph C, the definition of "forestry operations" in the CHRFA, the Central Highlands RFA, included the preparation and promulgation of the timber release plan.

Your Honours will now know well that the definition of RFA forestry operations directs attention first to forestry operations defined in an RFA, and the forestry operations defined in this RFA were set out in the definitions section, on page 5 of document ..... as meaning – and there are three subcategories. The planting of trees or the managing of trees before they are harvested.

JAGOT J: Sorry, what's this? We were in the - - -

MR WALLER: Sorry, in the RFA itself.

JAGOT J: In tab - - -

MR WALLER: 153.

JAGOT J: 153.

DERRINGTON J: Mr Waller, does this get you very far? If you're in breach of subclause B, you're in breach. Does it matter whether it has been - - -

MR WALLER: Well, only for this reason: her Honour accepted that she would determine the case as it was pleaded, strictly on the pleadings, and she rejected a submission of our learned friends at trial that a separate and distinct forestry operation may be the production and promulgation of the TRP. On that basis, that submission was rejected, but her Honour, notwithstanding this was never submitted, went on to hold that she regarded as – she regarded the production and promulgation of the TRP as fitting within sub C of the definition, rather than subparagraph B.

This was never the case that was pleaded or prosecuted at trial. It came about in final oral and written submissions at the very end of a long case, where, perhaps sensing that there was difficulty in establishing with precision what the forestry operations were in relation to the scheduled coupes in circumstances where those operations had never happened, obviously, and there were, on the evidence, no coupe plans that were in existence or which were up to date where it was, on our case, a situation of there being no advanced plans that you could assess what was actually going to happen in those coupes against that our learned friends sought to hitch their wagon to an argument that forestry operations in relation to the scheduled coupes could separately include the mere production of a timber release plan in respect of those schedule coupes which designated in the timber release plan the method or methods by which those coupes might be harvested.

Now, the evidence was that the method in the TRP was simply the most extreme method that might be used, and that other methods, less extreme, might be used. But what her Honour did, as I say, was rejected that approach that it could be so characterised, but found that the focus of the case had been on harvesting, logging, but that logging, effectively, included the preparation and timber release plan. Our submission is that - - -

JAGOT J: Where does this go in the case? Where does it end up?

MR WALLER: It goes – it feeds into the grounds we prosecute in relation to the proportionary principle, and those other grounds, for instance, ground 10, where we say that there were no sufficiently advanced proposals to conduct timber harvesting operations in any of the scheduled coupes that would enable a threat to be identified. What her Honour did was by characterising the forestry operations and the scheduled coupes, including the production of the TRP, as part of that operation, she said that there was therefore greater definition and certainty about what might happen in those scheduled coupes. Now, if she was incorrect in treating the TRP production and promulgation as part of subparagraph C of the definition, then she ought not to have had regard to the timber release plan at all.

JAGOT J: All right.

MR WALLER: At paragraph 414 of her principal reasons, her Honour accepted that our learned friends, at trial, had not pleaded at any point that the preparation and publication of the TRP and any decision-making about its contents in respect of the log coupes or the schedule coupes was a forestry operation. She repeated that at paragraph 716 of her principal reasons. And her Honour said, at paragraph 418 of her principal reasons:

> *The court will not resolve the issues in the proceeding in a way which includes any argument to the effect that the preparation and promulgation of the TRP is an RFA forestry operation for the purpose of section 38.*

However, when her Honour later came to ask and consider the question, "What is the RFA forestry operation to which the applicant below's pleaded allegations are to be applied?" her Honour said that its use of the term "forestry operation" referred to activities which take place when VicForests is engaged in timber harvesting in and around the coupes. That was at paragraph 714 of her primary judgment. So, despite having said her Honour would not accept arguments inconsistent with the pleadings concerning the timber release plan being the forestry operation – an RFA forestry operation, at paragraph 717 of her judgment, her Honour then went on to say:

> *The preparation and publication of the TRP and its content may be relevant to the applicant's arguments as pleaded, because those activities are one of the ways in which VicForests must consider how the precautionary principle applies to the forest it is deciding to harvest, how the precautionary principle*

should guide its decision making about the method of harvest, and what the area of harvest should be.

And at paragraph 721, her Honour found that the preparation and promulgation of a TRP was therefore included in the third limb of the definition, not as had been argued by our learned friends below, but her Honour said it came within the third limb, and we say that that constituted an inconsistency with a finding she earlier made, and her Honour referred to the fact that we had submitted in response that if the TRB had any relevance at all to the forestry operation, it fell within the second limb – that is, subparagraph (b) – and we explained that by reference to the Act ..... Victoria under which the timber release plan was made.

JAGOT J: Yes, but if it did fall within (b) b

MR WALLER: Yes.

JAGOT J: Is there any difference to what you did with it at the end? Where does it bite? Where does she take the TRP and say, well, that proves that you are going to do something. I mean - - -

MR WALLER: Where it bites is in her findings, at 11.60, where she says:

That is why, in my opinion, the correct approaches for the court to rely on was included in the timber release plan, which includes the schedule purchase, especially since the timber release payments ..... in the issue in April 2019 shortly before trial, and these coupes were kept on a timber release plan and kept with clearfell as the predominant silvicultural method. And – so that's what she said in relation to those coupes in paragraph 11.78, when she said her conclusion on the scheduled coupes – under that heading, she found 11.77:

I find that in planning –

She refers to, in 11.75, 11.76 and 11.77 a planning for them, which is a reference, we say, to the timber release plan, which is included in her analysis of what the RFA forestry operation was.

JAGOT J: Yes, but that's – if it's (b) anyway, then what difference does it make? If you accept that it's (b), it doesn't matter if it's (b) or (c).

MR WALLER: Well, we say that that was not the case that was made below, and she accepted that she would find the case on the basis that it was (b). We might have run the case differently if that had been the case we were meeting blow. And she accepted that she would not do that.

JAGOT J: All right. So where is it? Did she record your saying it might be (b), if anything?

MR WALLER: Yes. She refers to that at paragraph – paragraph 7(2)(i).

JAGOT J: .....

MR WALLER: Yes.

JAGOT J: Right. Okay. All right. This is really a procedural fairness point, isn't it?

MR WALLER: Yes. I suppose it is, your Honour, in the sense that - - -

JAGOT J: If you accept that it was (b), there's no difference whether it was (b) or (c). You're just saying - - -

MR WALLER: Well - - -

JAGOT J: You said that she didn't do this, or something, or we might have run the – had we realised - - -

MR WALLER: We might have run the case differently for focus of the argument at the outset as being on the TRP. There may well have been other arguments that were open to us if she had accepted that it was (b), and in our closing submissions we actually made arguments that if it was (b), then that would not, in fact, assist, because the injunction that was being sought was in respect of conduct that had breached the Act, and if the conduct that had breached the Act was in fact the promulgation of the TRP, that would not be the same conduct that would be undertaken in the future. Therefore, she – her Honour had to align the relevant conduct with the logging itself as being the relevant RFA forestry operation. So, your Honours, that's what we want to say about background. Are your Honours rising at - - -

JAGOT J: Yes. Okay. So we will adjourn till 2.15. Thank you.

ADJOURNED **[12.45 pm]**

RESUMED **[2.15 pm]**

MR WALLER: May it please the court. I will now turn to ground 6, which is a ground that really does no more than rely on other grounds in support of a submission – or ground that her Honour erred in holding at paragraph 6E of the primary judgment that none of the 66 impugned coupes are subject to the exemption, and we submit that her Honour ought to have held, by reason of the grounds of appeal that we rely on, generally, obviously, principally ground 1 that even the more subsidiary grounds in the notice of appeal that each of the 66 impugned coupes remained subject to the exemption under the Act.

If I could now move to ground 7, which deals with the precautionary principle. Grounds 7, 8, 9, and 10 are grounds which concern the proper construction of the precautionary principle, which is found in clause 2.2.2.2 of the 2014 Code. And these grounds only arise for consideration if grounds 1 and 2 are not allowed. Ground 7 is that the primary judge erred in holding that the precautionary principle in that clause of the Code is not subject to two conditions precedent, namely that there is a threat of serious or irreversible environmental damage, and secondly, scientific uncertainty as to that environmental damage.

We submit that the primary judge ought to have held that the application of a precautionary principle in the Code and the need to take precautionary measures if the Code – if the precautionary principle is enlivened is triggered by the satisfaction of two conditions precedent, as I've mentioned. And we make six submissions in respect of this ground. The first submission is that the judge erred in departing from the construction that Osborn J of the Victorian Supreme Court had placed upon the precautionary principle as it appeared in the 2007 code, where he accepted that there are two necessary preconditions which have to be satisfied before the precautionary principle is engaged. His Honour did that in the Brown Mountain case, which is in the folder of cases at tab 9B.

DERRINGTON J: Mr Waller, before you go too far down this track, can I ask whether it matters, given that at paragraph 829 of the principal judgment, her Honour held that she would have found the same way even if she had adopted Osborn Js approach.

MR WALLER: Yes. Most of her Honour's reasoning is directed to a position that is at odds with Osborn J, and then, as your Honour quite rightly points out, in that paragraph, her Honour says that even if she had accepted, she would nonetheless have found that the precautionary principle had not been complied with. We take issue with that on the basis that the evidence, considered as a whole, we say, does not establish a threat of serious or irreversible damage by reason of some factual matters that we rely upon. What her Honour did - - -

DERRINGTON J: That's a different point to whether she's fundamentally wrong in her approach, whether the evidence .....

MR WALLER: Well, what her Honour said at 829 – I think it's 829:

> *The applicant makes an alternative case, applying the approach taken by Osborn J in Brown Mountain, contends that in any event, there is sufficient scientific uncertainty on the evidence about how to manage the threats to the two species. And given the views she has reached, it's not necessary to take this approach, but if it were, I would have accepted the applicant's submissions on the matter.*
>
> *It will be apparent from other parts of these reasons that I have found the forestry operations in the CHRFA region do pose a serious threat to the*

greater glider, and that I found, based on Dr Smith's evidence, that there is still much that is not known about the glider and how the glider is able to cope with the impacts of forestry operations in and around its habitat.

We take issue with that finding. Plainly, we don't take issue with the alternative approach, because the alternative approach is the approach we say is the correct one. But we say that even if she had applied the alternative approach – the Osborn approach, she ought not to have found that it was met. In terms of why we say those preconditions are necessary, as I said, if we go to Osborn J at tab 9A.

GRIFFITHS J: Well, are you sure it's 9A?

MR WALLER: 9.1, I'm sorry.

JAGOT J: 9.1.

GRIFFITHS J: You're talking about Environment East Gippsland v VicForests, aren't you?

MR WALLER: Yes, I am, your Honour.

GRIFFITHS J: All right. Well, that's tab 9.

MR WALLER: All right. I think – yes. There's a medium neutral citation because the reported case in the Victorian reports is not a complete version of the delivered judgment.

GRIFFITHS J: All right.

MR WALLER: It leaves out some fact-specific matters, and that's why - - -

GRIFFITHS J: Okay. So you want us to go to the media neutral one, which is behind the report ..... do you?

MR WALLER: Yes. I'm content for your Honours to go to the reported one, in fact. It's in – the paragraph I want to take your Honours to is there.

GRIFFITHS J: All right.

MR WALLER: And the paragraphs in particular are paragraphs 187 and 188, where his Honour Osborn J said:

In the present case, EEG must demonstrate a failure to apply the precautionary principle in a specific way before its breach can justify the grant of injunctive relief. The threshold components of the precautionary principle were characterised on behalf of EEG as integral components of it, rather than preconditions to its application. In the present context, I accept VicForests'

submission that they are preconditions which EEG must demonstrate as satisfied.

And in 188:

I respectfully accept the careful analysis of the precautionary principle by Preston CJ in Telstra Corporation v Hornsby.

GRIFFITHS J: Chief judge.

MR WALLER: Sorry, Preston CJ in that case, and sets out his Honour's conclusion in that case of the need to satisfy two conditions of precedent. Her Honour did not adopt the reasoning of Osborn J; nor did she find that Osborn J was plainly wrong, despite the applicant below inviting the primary judge to do that, and despite VicForests submitting to her Honour below that Osborn J was not plainly wrong, rather than finding that he was wrong or plainly wrong, her Honour sought to distinguish Osborn J. And she did that on the basis, so it was said at 818 of the reasons, that the argument which is now put on behalf of the applicant was not put to Osborn J. And we submit that whether or not an argument was raised before Osborn J is not a sufficient basis to distinguish that case without determining that Osborn J was plainly wrong.

And the fact that the argument or an argument may not have been put is not sufficient. We rely on the Federal Court decision, Full Court decision, of this court in BHP Billiton which is referred to or can be found in tab 4 of our folder of authorities, and in particular at paragraph 83. In its responding submissions, our learned friends seek to rely on McHugh Js comments in Coleman v Power, and we say that reliance is misplaced because it cannot be said that this particular point was not in dispute before Osborn J as is apparent from paragraph 187. EEG argued that the components were integral components rather than threshold preconditions and his Honour did not accept that argument.

The second submission we make in this regard is that there is a presumption that when Parliament repeats words which have been judicially construed, it is taken to have intended the words to bear the meaning attributed to them judicially. We rely on the decision of Re Ackland which is in our folder of authorities at tab 19, and in particular in the reported decision at page 106, the decision of the court. At that page, without going into it, their Honours said:

There is abundant authority for the proposition that where the Parliament repeats words which have been judicially construed, it is taken to have intended the words to bear the meaning already judicially attributed to them although the validity of that proposition has been questioned.

They go on to explain that there has been some criticism of that proposition as being artificial, but despite that, as McHugh J pointed out in Electrolux which is at tab 8 of our cases in a later case, where one is dealing with a specialised field with a

designated Minister and department, which of course is the case so far as the management and the regulation of the Victorian forests are concerned, other examples are industrial relations or tax, to use the words of McHugh J, it is no fiction to attribute to the Minister and his or her department and through them to the Parliament knowledge of court decisions which deal with that portfolio.

And we say here we have a situation, as your Honours now know, that the code, that's the 2014 code, was made by the Minister for Environment and Climate Change in Victoria under part 5 of the Conservation, Forests and Land Act in 2014. It post-dates the decisions of Osborn J in EEG, the Brown Mountain case, and the MyEnvironment case which Osborn J heard at first instance in 2012. And in both Brown Mountain and MyEnvironment, Osborn J was construing the 2007 code where we say the precautionary principle is expressed in near identical terms as the primary judge in our case at paragraphs 815, 818, 832, and 845 appeared to accept. At – if your Honours are still in the Brown Mountain decision - - -

JAGOT J: Have you got the page reference for Elextrolux?

MR WALLER: Yes. It's paragraph 81. The relevant expression of the precautionary principle in 2007 can be found in the Brown Mountain decision at paragraph 168 and paragraph 176. And in that case, his Honour Osborn J described the statutory framework in which the 2007 Code formed a part as labyrinthine – that's at 89 of the Brown Mountain decision – and we would say that given the specialised field and the background to this Code and the fact that the 2014 Code includes a definition of precautionary principle in near-identical terms, that it may be presumed that parliament intended the precautionary principle definition to bear the meaning already attributed to it by Osborn J.

Our learned friends rely on Murphy v the State of Victoria for the proposition that the re-enactment presumption has limited force where a first instance decision is in question, and we would point out that both Brown Mountain and MyEnvironment were decisions of Osborn J, who was the most senior judge in environmental and planning or on the Supreme Court of Victoria at the time. He had been elevated to the Court of Appeal by the time he heard the MyEnvironment case, sitting as a trial judge despite that elevation, and the appellant in MyEnvironment did not seek to challenge Osborn Js decision regarding the application of the precautionary principle in their appeal to the Court of Appeal.

JAGOT J: But we can't really take those kinds of matters into account, but – you know, that a judge - - -

GRIFFITHS J: Very ad hominem.

JAGOT J: Yes. We just can't ..... or that someone didn't appeal or anything ..... we can't - - -

MR WALLER: Yes.

JAGOT J: - - - give those .....

MR WALLER: Your Honour pleases. The third submission we make in this regard is that the definition of the precautionary principle in the Code of 2014 and its broadest statutory context supports the construction that was adopted in Brown Mountain. The principle basis upon which the trial judge – principal judge criticised Osborn Js approach was through – was by reason of the fact that Osborn J had accepted the analysis of the precautionary principle of Chief Judge Preston in Telstra, and the primary judge said that Telstra and its context could hardly be more different than the situation her Honour was dealing with, because the precautionary principle in Telstra – I'm sorry. Because the – yes.

The precautionary principle was set out there in the context of how the legislature saw the objective of ecologically sustainable development being achieved, and her Honour doubted Preston Js position that the widely-employed formulation of the precautionary principle was set out in section 6(2)(a) of the Protection of Environment Administration Act 1991 with which his Honour was there dealing with in that case.

Now, what – it's clear that the precautionary principle is expressed in different language in different places, but the definition of the principle in the New South Wales Act that Chief Judge Preston was dealing with is identical to the definition in the Sustainable Forests (Timber) Act of 2004, in particular section 5, subsection (4)(b), and that has been described by the Victorian Court of Appeal in MyEnvironment as a statutory expression of the precautionary principle. And again, that expression in that section makes express the fact that it's conditional on the two preconditions being met. It's through section 46, as your Honours have heard this morning, of the Sustainable Forests (Timber) Act that VicForests must comply with the Code. So - - -

JAGOT J: Well, for the purposes of state regulation, isn't it?

MR WALLER: Yes.

JAGOT J: Not for the purposes of EPBC Act regulation.

MR WALLER: I will come to that in a moment, because we go on to say that – one moment.

JAGOT J: Well, I should say, on this ground we are in state regulation anyway, aren't we?

MR WALLER: Well, we are. We are.

JAGOT J: .....

MR WALLER: As your Honours know - - -

JAGOT J: .....

MR WALLER: - - - the EPBC Act itself refers to the precautionary principle in two places: in section 3A of the Act and in section 391, subsection (2) of the Act. Again, the expression of the precautionary principle is slightly different in terms of the wording, but we say that the precautionary principle has emerged as a legal concept through the cases and despite it being slightly differently expressed, it ought be given uniform meaning and application.

In the case that Justice Griffiths dealt with, Australian Conservation Foundation, his Honour was dealing with the precautionary principle as it appeared in section 391 of the EPBC Act and adopted the approach of Chief Judge Preston in the Telstra case, even though the language was somewhat different. In the Telstra case section 6(2)(a) – and this can be found at paragraph 113 of the Telstra case, which is tab 22 of our list of authorities – it's expressed as – in these words:

> *If there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, public and private decisions should be guided by (1) careful evaluation to avoid wherever practicable serious or irreversible damage to the environment, and (2) an assessment of the risk-weighted consequences of various options.*

That was the – those were the terms of the precautionary principle Chief Judge Preston dealt with. The form of words in section 391 of the EPBC Act is as follows – this can be found in our legislation folder, behind tab 27:

> *The precautionary principle is that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage.*

So despite the difference in the expressions, as I say, Justice Griffiths in the Australian Conservation Foundation case adopted the Chief Judge Preston approach, and as did Osborn J in dealing with the 2007 Code, which can be found in part C documents behind tab 829. And again, the language of the 2007 Code and the 2014 Code is different again, and, your Honours, I won't take your Honours to the language but, your Honours, an examination of the language shows that sometimes the clauses are reversed, but despite that, certainly Osborn J regarded the approach of Chief Judge Preston as the appropriate one.

We say that for those reasons, her Honour ought to have followed the approach and that the textual differences between the various formulations are not substantive, and for that reason, there was an error on her part. We say that the construction that had been adopted by Chief Judge Preston and Osborn J is also harmonious with the

statutory expression of the precautionary principle in the Sustainable Forest Timber Act that I referred to earlier.

And that purpose – and the purpose of the Code in which it appears is also a reflection of the balancing that needs to occur in the concept of ecologically sustainable development, that is to say, to permit an economically viable, internationally competitive, sustainable timber industry, and to provide for the ecologically sustainable management of making forests.

And given that the Code and the SFT Act are part of a comprehensive legislative mechanism to regulate timber harvesting in Victoria, we say the precautionary principle in the Code should be construed in harmony with the expression of sustainable development in the Act, which gives it legislative force. The fourth submission we make is that where there are two Australian legislatures who have largely contemporaneously adopted similar or identical language in pursuit of a common statutory purpose, the coherent development of the law in Australia would not be promoted by courts of one jurisdiction adopting a different construction to those of another.

And here, it's – not only is there an identical definition of the precautionary principle in the New South Wales Act that Chief Judge Preston was dealing with. The Victorian Act, section 5(4) of the SFT Act, but also section 3A(b) of the EPBC Act, and that was the his Honour Griffith J dealt with that, as I say, and referred to that as another expression of a precautionary principle, although his Honour, in that case, was dealing with 391 sub 2.

391 sub 2 of the EPBC Act requires the minister to have regard to the precautionary principle in dealing with proposals, and it would be a curious situation applying the logic of the primary judge's construction if, at one level of the analysis, one is applying the precautionary principle in one way, and at another level of the analysis, one is applying the precautionary principle in another way. And for that reason, we say there ought to be one approach to its application.

Her Honour did not construe – this is our final submission. Her Honour did not construe the precautionary principle to have the conditions precedent before it was engaged, except for a requirement that any decisions relating to timber harvesting or planning must be capable of affecting for the environment, which we say means that on that construction, the precautionary principle would be permanently engaged. And at a practical level, it would be very difficult for anybody, and we say VicForests in particular, to demonstrate compliance. Whereas the Code is intended to balance competing uses of forest resources and a construction that elevates environmental protection above all else is a construction that should not be preferred.

Now, we say that if her Honour had applied the approach of Osborn J and had – and found that there were conditions precedent that needed to be met, that her Honour would not have been able to do that, despite what her Honour has said in her

judgment, primarily because there were no sufficiently advanced plans or proposals to conduct timber harvesting, and I will come to this in a related ground.

Could I move, now, to ground 8. I will deal with that matter in relation to ground 10. Ground 8, we raise the following, that the primary judge erred at paragraph 626 to 632 and paragraph 834 of her primary judgment in construing the precautionary principle in the Code as requiring that measures be taken that assist in arresting and reversing the decline, and therefore facilitating the recovery of the relevant species.

Her Honour ought to have held that properly construed, the precautionary principle in the Code is not directed to the avoidance of all risks. As I've mentioned, the Code in which the precautionary principle appears is intended to balance competing uses of forest resources, and in Brown Mountain, Osborn J observed that – and relying on what Chief Judge Preston had said in Telstra, that the precautionary principle is not directed to the avoidance of all risks. His Honour said that at paragraph 203 of Environment East Gippsland, relying on what Chief Judge Preston had said at paragraphs 157 to 160 in Telstra.

Likewise, his Honour Osborn J held that the precautionary principle requires a proportionate response, and that, his Honour referred to at paragraph 207 of Environment East Gippsland, again citing Telstra at 166, and what it required was a degree of cautiousness, and his Honour made that point at paragraphs 185 to 186 of Environment East Gippsland, and repeated it in the MyEnvironment decision at first instance at paragraphs 261 and 262.

His Honour finally said that a reasonable balance must be struck between the cross-burden of the measures, on the one hand, and the benefit derived from them, on the other. And that was at paragraph 208 of Environment East Gippsland, again in reliance on Telstra at 167 to 171.

In the MyEnvironment case in the Court of Appeal, Tate JA, with whom the other judges agreed, at paragraphs 138 to 140 said that:

> *The understanding of the legislative scheme in which the Code operates as having a singular purpose is misconceived … such an understanding fails to recognise that the legislative scheme has a multiplicity of purposes, not only the conservation of the Leadbeater Possum but also the sustainability of the timber industry. Thus, for example, the Code, promulgated under the Conservation, Forests and Land Act, establishes seven Code Principles to achieve a balance between environmental protection and timber production that include, not only 'biological diversity and ecological characteristics of native flora and fauna within forests are maintained' but also that: The ecologically sustainable long-term timber production capacity of forests managed for timber production is maintained or enhanced.*

And at paragraph 140, her Honour said:

There was a recognition that the Code was aimed at managing the 'multiple roles of our forests and plantations in maintaining our natural heritage, biodiversity, health, wellbeing and prosperity'. The Code emphasises the utilisation of scientific knowledge to ensure that timber harvesting is conducted so as 'to manage the impact on soil, water and other values, including biodiversity and cultural heritage'.

And although her Honour and the court there were dealing with the 2007 code, we would say the same applies to the 2014 code which contains six code principles to similar effect in clause 1.3, which can be found on page 26 of the document at part C, tab 150.

So for the reasons mentioned so far, we say her Honour's departure from Osborn Js construction, to the extent we say that that ought to have required a finding that his Honour was plainly wrong in circumstances where there was no such analysis undertaken by her Honour, and to the extent that her Honour construed the principle as requiring measures to be taken to arrest and reverse a decline of a species, that was to elevate a purpose of environmental protection above all other purposes, including timber production, and her Honour erred in approaching the precautionary principle in that way.

The next ground is ground 9, and again dealing with precautionary principle, we say that her Honour erred at paragraphs 847 to 850 of her primary judgment in holding that clause 2.2.2 of the code – 2.2.2.2 of the code required VicForest to take a precautionary approach when it was "dealing" with a situation where there are threats of serious or irreversible damage irrespective of the source of those threats and her correlative finding that as a consequence, much of Dr Davey, who was an expert called by VicForest's – much of Dr Davey's opinions were of marginal relevance because his analysis assumed the relevant question was whether forestry operations in the logged coupes proposed a serious or irreversible threat to the glider.

We contend her Honour ought to have held that the code required focus to be on the relevant forestry operation and that it had to be the activity which posed a threat of serious or irreversible environmental damage before the precautionary principle could be engaged, and that Dr Davey's opinions which were directed to that question were therefore directly relevant.

And we say that her Honour's attempt to broaden the scope of the precautionary principle to a situation where it is triggered in the sense of when one is dealing with a situation of threats of serious or irreversible damage, irrespective of their source, that her Honour misread the language of the principle as it's expressed in the code, because the first sentence of the code, 2014 code, expressing the precautionary principle, in the definition – so one moves from clause 2.2.2.2 to the definition of "precautionary principle" in the glossary at page 15 – and we say the focus of that sentence when contemplating decisions that will affect the environment, the decisions which will affect the environment to – and then later "wherever practical, avoid serious or irreversible damage to the environment", that where the second

sentence goes on to say "when dealing with threats of serious or irreversible damage", the reference to "serious or irreversible damage" in the second sentence must be understood as a reference to the same serious or irreversible damage to the environment referred to in the first sentence, and therefore the threats referred to in the second sentence must be related to decisions that will affect the environment within the meaning of that sentence.

And the relevant decision in the context of this proceeding was the conduct of timber harvesting. So those operations ought to have been the subject of the analysis as to whether they constituted threats of serious or irreversible environmental damage rather than looking at the position at large.

That is the way Osborn J construed the precautionary principle in both Brown Mountain and MyEnvironment. That is to say, he focused on the specific action said to constitute the breach of the precautionary principle in both cases, which was logging, timber harvesting, and it was that activity that had to constitute a threat for the purpose of determining whether or not the condition's precedent had been engaged.

The primary judge's approach, which is to move away from the specifics of the logging to a position more generally we say led her to further err by discounting as marginally relevant Dr Davey's opinion. When Dr Davey was asked, for the purposes of his report, "Has VicForest breached the precautionary principle in conducting forestry operations in either the logged coupes or the scheduled coupes", his answer was no. He said in his reports which are before the court in part C, tab 94 in respect of the logged coupes at page 137 to 139 and in respect of the scheduled coupes at pages 175 to 176 – his Honour – sorry, Dr Davey said for the reasons given in that report at pages – paragraphs, I should say, 267 to 276, there would be no threat of serious or irreversible environmental damage caused by the logging in question

If I could move now to ground 10. We say the primary judge erred in her finding expressed in a summary form at paragraph 6(d) and in more detail at paragraph 1178 of her primary judgment.

JAGOT J: Sorry, what was the first one?

GRIFFITHS J: 6(b).

MR WALLER: 6(d). 6(d).

JAGOT J: 6(d). That's the summary. Yes.

MR WALLER: The summary. That undertaking forestry operations in the scheduled coupes, VicForests was not likely to apply the precautionary principle to the conversation of biodiversity values in those coupes as required by clause 2.2.2.2 of the Code. And we say her Honour ought to have found, first, that there were no

sufficiently advanced proposals to conduct timber harvesting operations in any of the scheduled coupes to enable any threat to be properly identified and analysed with respect to the scheduled coupes so that the condition precedent for engagement could not be satisfied. And secondly that considering the evidence as a whole, there was no proper for her to be satisfied that there was a threat of serious or irreversible damage to the greater glider posed by reason of VicForests' proposed operations in the scheduled coupes.

In MyEnvironment, Osborn J at first instance dealt with a very similar situation. There were three coupes the subject of that proceeding. Two of the coupes called Freddo and South Col were coupes which had not yet been harvested and in respect of which there were coupe plans – I'm sorry, neither of them had coupe plans. The third coupe, Gun Barrel, had been partly harvested, but these two had not and nor were there any coupe plans. And his Honour found that, in those circumstances, there was insufficient evidence to enable any threat to be properly identified with respect to them. his Honour said at paragraph 276 in MyEnvironment, which is behind tab 16 in the cases, that – 216.

GRIFFITHS J: 276.

MR WALLER: I'm sorry. 276, yes. Tab 16.

GRIFFITHS J: You've set this out in your written submissions.

MR WALLER: Yes, we have.

GRIFFITHS J: And you've set out the paragraph. I mean, there's no need for you to - - -

MR WALLER: Yes.

GRIFFITHS J: - - - read or paraphrase your written submissions.

MR WALLER: If your Honour pleases.

GRIFFITHS J: Time is precious, like forests.

MR WALLER: We rely on that and we say there's no proper basis on which to distinguish what occurred here in circumstances where, likewise, there were no coupe plans in respect of the scheduled coupes, certainly no up-to-date coupe plans. Only 11 of the 40 scheduled coupe have coupe plans but they were at least many years old. I think one was eight years old. There was simply no way her Honour could have known with sufficient certainty how the logging or harvesting would be conducted in the coupes.

And the alternative basis upon which we take issue with her Honour's finding is based on factual matters. We rely on the evidence and we've given a reference to

certain parts of closing written submissions, but in brief summary, her Honour, we say, didn't take account of the fact that the greater glider, although listed as a threatened species, was listed only on the basis that it satisfied one criteria only – one criterion only and did not meet eligibility requirements for classification under criteria 2, 3, 4 or 5. Her Honour did not take into account the very wide distribution along the east coast of Australia of the greater glider, encompassing not just the Central Highlands but other parts of Victoria, East Gippsland, New South Wales and Queensland, and that the extent of its occurrence was estimated in the evidence to be 1.58 million kilometres squared and that its area of occupancy was estimated at 16,000 kilometres squared. Those were figures accepted by Dr Smith, the expert called by the applicant, and in order to qualify for eligibility for listing under criterion 2, which deals with geographic distribution in the vulnerable category, the extent of occurrence has to be less than 20,000 square kilometres and the area of occupancy 2000 square kilometres.

So here, the situation on the ground was 80 times larger than the minimum requirement for eligibility for listing in the vulnerable category, and we say her Honour didn't give attention to that in circumstances where she found that there would be a threat of serious or irreversible damage. Dr Smith also did not take into account in his evidence in forming his opinions the populations of greater gliders in New South Wales or Queensland or East Gippsland. Dr Smith's opinions as to both the threat of serious or irreversible damage and significant impact were therefore limited geographically and there was no evidence that VicForests' proposed operations in the scheduled coupes, to the extent that they could be ascertained at all, we say, constituted a threat of serious or irreversible damage to the greater glider when considered across its whole species distribution across Australia.

The evidence also showed that the number of mature greater gliders was estimated to be greater than 100,000 in Australia and Dr Smith agreed with that estimate. And that can be compared with the species that Osborn J was dealing with in Brown Mountain when he came to apply the precautionary principle; for instance, in respect of the spot-tailed quoll, where it was found to be one of the last functional populations of the species. We would say when it came to the greater glider, the population across the whole east coast of Australia, including parts of Victoria, were simply not taken into account. To satisfy other criteria, criteria 3 of the listing, the number of estimated mature individuals for the vulnerable category have to be less than 10,000. As I say, here, the number was 10 times that amount. And there was no population viability analysis undertaken for the species as a whole, and therefore, the final criterion was not met either.

DERRINGTON J: But is that a challenge to whether the species should have been listed at all? Is that where this is going?

MR WALLER: No, but it goes to whether or not the forestry operations that were to be conducted in the scheduled coupes, vague as we say the evidence was, was sufficient to establish a threat of serious or irreversible damage to the gliders in circumstances - - -

DERRINGTON J: But the primary judge surely wasn't required to go behind - - -

MR WALLER: No.

DERRINGTON J: - - - the listing of the species.

MR WALLER: No. But she was entitled to take into account the fact that the species had been listed having satisfied one out of five criteria only in determining the degree of threat that was in play or envisaged by the forestry operations.

GRIFFITHS J: Well, I must say, I'm having great difficulty with this argument too. I've had to deal myself in the last 12 months with a case seeking to protect the greater glider in the southern part of New South Wales. Merely because there might be 100,000 of these creatures nationwide doesn't mean that VicForests doesn't have its obligations, surely, to protect the Greater Glider in the area that's the subject of this proceeding. It can't get away from that by pointing to the fact that there might be more over the border. Don't you want the Greater Glider in Victoria, Mr Waller?

MR WALLER: Well, of course we do, your Honour.

GRIFFITHS J: Okay.

MR WALLER: But - - -

GRIFFITHS J: I just can't see how, looking at this from a national perspective, answers the question.

MR WALLER: Well, it's a question of what constitutes a threat of serious or irreversible damage.

GRIFFITHS J: Yes, indeed.

MR WALLER: And - - -

GRIFFITHS J: In the area that is being logged.

MR WALLER: Yes. And the question is while obviously the loss of any creature is regrettable, it doesn't meet the standard of a threat of serious or irreversible environmental damage, and in circumstances where the plans to harvest in these scheduled coupes were in a state of – well, they have not been prepared. There was no clear evidence about how the coupes would be logged, in what configuration, how much of the coupes would be unlogged and at what time. For her Honour to find that these logging operations would necessarily cause or on the balance of probabilities would cause this threat and therefore the precautionary principle is engaged, we say, was an error.

As to whether it was irreversible as opposed to serious, there was no evidence before her Honour that any forestry operations in the scheduled coupes would likely result in the extinction of the Greater Gliders. And we say the fact that VicForests' forestry operations in the scheduled coupes occur in a relatively small proportion of the total area of habitat occupied by the glider is a relevant matter in the same way that it was relevant to Osborn J in Brown Mountain in dealing with the various species he was there concerned with. His Honour there had to deal with the Giant Burrowing Frog and the Large Brown Tree Frog where the proposed harvesting was going to occur in relatively limited parts of Victoria where each of those species had been detected.

JAGOT J: You can't really go – you can't go to another case like that ..... because that was found in those practical circumstances which are undoubtedly incredibly complex. Somehow there's some sort of imprint that you put on these facts that necessarily leads to – you can't reason in that way. You have to deal with the facts as you've got them.

MR WALLER: Yes, but the facts before her Honour included that the total net area of the scheduled coupes that were to be logged, assuming they were all logged, constituted .14 per cent of the total Central Highlands RFA area and constituted .02 per cent of the Victorian forests estate. We're talking about a very small fraction of area. And Dr Smith accepted those figures were correct, but it - - -

JAGOT J: Is this in your written submissions ..... point 2 and .....

MR WALLER: It is by reference to our earlier submissions. It's – we refer to our – well, I think we refer to part of our closing submission, but I can give your Honours the references.

JAGOT J: Where do you refer to it in your earlier submissions? We're in ground – is this still ground 9?

MR WALLER: This is ground 10.

JAGOT J: We're in ground 10. Sorry.

MR WALLER: Paragraph 62 of our closing submissions - - -

JAGOT J: I see. So the evidence summarises section ..... it's there. Okay.

MR WALLER: Yes. Yes. Yes. Again, the total – having regard to the extent of occurrence of the glider across more than one and a half million square kilometres and its occupancy across 16,000 square kilometres, the total net area of the scheduled coupes, the evidence showed, as a proportion of those areas was .00057 per cent of the extent of occurrence of the glider, and .056 per cent of the area of occupancy of the greater glider. And her Honour, we say, also did not take account of the abundance of reserve of forest in the car reserve and national park in coming to her decision.

Dr Smith accepted that the car reserve system contains 45 per cent of total mountain ash forest types in the Central Highlands, and Dr Smith's – Dr Smith acknowledged in his evidence that he had only had regard to the structure and layout of the reserve system in a limited way by reference to what he described as broad SPZ mapping, and without any site inspection.

And we say the components of the car reserve system that we've spoken about, dedicated reserves, informal reserves, values protected by proscription on public and private land are and embodiment, themselves, of the precautionary principle, and that Dr Smith, although accepting that national parks and reserves are reasonably widely distributed throughout Victoria, did not consider that the reserve areas ameliorated the threat to the glider, and her Honour accepted that.

JAGOT J: Sorry, where are your submissions below? Where do they live in the court book?

MR WALLER: ..... part C.

JAGOT J: They're in part C .....

MR WALLER: And 825.

DERRINGTON J: So do you say that that – these findings of fact were simply not - - -

MR WALLER: Yes.

DERRINGTON J: - - - open to her Honour on the evidence?

MR WALLER: We say that her finding – the ultimate finding of fact concerning the threat posed by the forestry operations in the schedule coupes to the greater glider were not open, having regard to these matters that I'm putting to your Honours and which are set out in more detail in those submissions. Her Honour also, we say, gave insufficient weight - - -

JAGOT J: So does this have meet a – what standard does that have to meet? Glaringly improbable?

MR WALLER: Glaringly improbable. The evidence was that VicForests was moving towards a more adaptive suite of silvicultural practises, and as a result of that, whatever harvesting might occur in the schedule coupes, that – those coupes would need to be replanned in accordance with that new adaptive silvicultural system policy, and we say for those reasons her Honour simply could not draw any inference or make any finding with the requisite certainty as to what silvicultural system would be used in the schedule coupes, and let alone make a finding that whatever was done in the schedule coupes would have – would cause a threat of serious or irreversible threat to the greater glider.

GRIFFITHS J: But we don't know either, because this is all still, to use the presiding judge's words, nothing better than thought bubbles. Because we're talking, here, about – your footnote 91, we're talking here about a document which is version 1.1, Draft for Review and Stakeholder Input.

MR WALLER: Yes.

GRIFFITHS J: And you're saying that, therefore, the judge should proceed on the basis in making a finding of fact that something – something – we don't know what it is, but something is going to happen from that that's going to cause VicForests to adopt different silvicultural practices to those which otherwise were in place. Is that your proposition?

MR WALLER: Yes. Because how can she find, in contrast to that with the requisite degree of likelihood that anything would happen in the ..... schedule coupes.

GRIFFITHS J: She's a judge, not a prophet, Mr Waller. She has to proceed on the basis of the evidence that's before her, including making an assessment of the uncertainty of the nature and character of the proposals which were the subject of some consideration of VicForests but with no confidence at all as to what the outcome might be.

MR WALLER: Yes. Well, we say, your Honour, that where there was that degree of uncertainty, that would feed into an inability to make a decision concerning the schedule coupes rather than an ability to .....

GRIFFITHS J: Well, that would just defeat the whole purpose, though, wouldn't it? Because all it would mean is that VicForests would always have to have in place some draft formulations about what its practices might be down the track to defeat the object of the legislation on the assumption that ground 1 was incorrectly decided. I have to say, for my own part, when you get into the detail of these other grounds, it causes me to give serious thought back to ground 1.

MR WALLER: But, your Honour, there is no difficulty in moving against VicForests when there are plans in place. But our learned friends moved against VicForests when there were no plans in place.

GRIFFITHS J: And after all of the gliders have gone. Is that what you're saying, Mr Waller?

MR WALLER: No. There was no logging to happen in the schedule coupes. It was not as if VicForests was going ahead in the schedule coupes to continue logging. Our argument is it was too premature for her Honour to have come to that finding. If there had been coupe plans in place with a detailed schedule of what was to happen and how it was to happen and where it was to happen, then there would be something against which to measure the threat. But we say, in respect of the schedule coupes, it was too premature in the same way Osborn J said it was too premature in respect of

Freddo and South Col. We're not saying we don't get a get out of jail card by having on the shelf some new harvesting system. But what has to be done, we say, is there has got to be a realistic appraisal of what is to happen in the coupes by reference to real fact, not speculation; simply that. Your Honours, if I could move now to ground 11, which we place as an alternative to ground 10. We say that her Honour erred in finding that VicForests would not use less intensive silvicultural methods in the schedule coupes than it had historically.

JAGOT J: But this is about the admission of evidence, isn't it, this ground 11. So there has to be some error in the admissions there.

MR WALLER: No, that was ground 12 that we're no longer pressing, your Honour.

JAGOT J: Okay.

MR WALLER: Ground 11, we press on the basis that her Honour – we accept that her Honour admitted the tendency evidence, but we say that it did not rationally affect the question of the configuration in which the forestry operations would be conducted if at all on the schedule coupes.

JAGOT J: This is your same point as ground 10, which is there wasn't enough - - -

MR WALLER: Yes, it's related to ground 10 and it's focussing, in particular, on the silvicultural that would be used.

JAGOT J: Yes. But this is the point we're coming back.

MR WALLER: Yes.

JAGOT J: You say were proposed to be – you know, the version 1.1 draft should have led her Honour to the view that different methods would have been - - -

MR WALLER: That's so. She ought to have taken into account the fact that different and better methods were to be used. Her Honour has discounted that and instead relied on the way in which other coupes had been logged as a basis for the way in which these coupes would be logged. In that regard, we rely on what we've said in writing in relation to ground 11. If I could move to ground 13. Again, ground 13 does no more than rely upon ground 11 or ground 10 on the basis that her Honour erred in making the ultimate finding that VicForests was unlikely to comply with the precautionary principle in the schedule coupes for the foreseeable future. So, your Honours, those are the submissions in relation to those grounds. The next five grounds are going to be dealt with by Mr Redd. So if I could allow him to.

MR REDD: Can your Honours just give me a moment just to move my - - -

JAGOT J: Of course.

MR REDD: - - - computer and notepad across. Your Honours, just briefly, because obviously, we have decided not to press certain grounds which we made clear at the start of the hearing of the appeal. And some of the grounds that I'm going to address your Honours on – and I will identify – will rely on our written submissions but there are some aspect about which I would like to expand or clarify some matters. But in so doing, I recognise that these grounds are very much of a different nature to the alternative ground, being ground 1, and so I don't wish to unduly labour the points.

Your Honours, ground 14 concerns the primary judge's use of Professor Woinarski's to justify a finding of a specific example of VicForests' failure to comply with clause 2.2.2 of the Code. The relevant part of the reasons, for your Honours' reference, is from paragraphs 1354 to 1369, but it's at 1369 where her Honour makes the finding sought to be impugned by this ground. We've explained in our written submissions that there was no allegation against VicForests about a failure to comply with the Code – clause 2.2.2 of the Code in relation to any difficulties highlighted by Professor Woinarski concerning THEZs. Now, I just wanted to explain briefly what THEZs are, because it might not be immediately apparent; they're timber harvesting exclusion zones.

Your Honours will find that is a defined term in the primary reasons at 475, but the term itself actually doesn't arise from the Code or the management standards. The relevant requirement for a timber harvesting exclusion zone is, for your Honours' reference, in table 3 of the planning standards. That's part C of the appeal book at tab 152 at page 22. I don't think I need to take your Honours to it, but that's where you find what's this THEZ that Professor Woinarski is talking about? It's when, consequent upon a detection of Leadbeater possum, a 200 metre radius of SPZ needs to be created where harvesting cannot occur.

But raised against us in my learned friend's submissions is that, well, actually the issue with the THEZs and their effectiveness was all in the ring, but the point is – and the paragraphs that my learned friends rely on do, in fact, refer to some parts of the judgment talking about THEZs. That was all to do with Leadbeater possum, obviously, and significant impact. There was no pleaded case against VicForests about a breach of the precautionary principle for Leadbeater's possum. It wasn't a case that was pleaded. It wasn't one that was opened and, therefore, it wasn't one that VicForests focussed on. So we simply say that in making that finding, her Honour, at 1369 of her reasons – and I will just get them up at my own end – does acknowledge of course, it was not part of the pleaded case, but her Honour goes on to say:

> *…it is an example which confirms my satisfaction about the findings I have on the applicant's pleaded case.*

So for the reasons we've set out in writing, we maintain that's an error of law, and we've cited a decision of Bell J in the Astvilla case. I don't need to take your Honours to it; you've got the pinpoint reference.

GRIFFITHS J: But to the extent that this is the complaint of procedural unfairness, where do you stand on the need to establish practical injustice for that to have any force?

MR REDD: Well, if it been opened and alleged that the THEZes themselves, our failure to deal with – when I say "our", I mean VicForests' failure to deal with Professor Woinarski's view about the difficulties of THEZes, we would have spent a lot more time adducing evidence about the efficacy of THEZes and how we would say that, relevantly, the conditions precedent to the engagement of the precautionary principle aren't engaged. But that was never the focus of the case. This was a very incidental issue, and to the extent it was relied on by my clients, it was very much on a sort of ..... argument, if I could put it that way, and it was to do so about significant impact in that context. Well, we would say that was one of the ameliorating factors insofar as that question arises for Leadbeater possum, that there is this requirement for THEZes. But it had never been put squarely to us that this it's going to be raised. It wasn't put by the applicant below, of course. They never submitted to that effect. But as I say, to answer your Honour Justice Griffiths' question, we would have adduced further evidence and focused more squarely if that was going to be an adverse finding.

GRIFFITHS J: So what you're saying is that the primary judge wasn't encouraged by anything that the applicant said to come to this conclusion. You're saying you were just completely caught by surprise when the primary judge, in her reasons for judgment, made the finding that she did in this regard.

MR REDD: Yes, that's so, because there was never a precautionary principle case about Leadbeater possum. That was always glider. Consequent upon that, it was said to open up significant impact questions on Leadbeater's possum by reason of exemption being lost and so forth. But there was never a precautionary principle case about possum and none of the experts were asked questions about the relevant conditions precedent for Leadbeater possum. Those questions were always for glider.

GRIFFITHS J: I understand. Thank you.

DERRINGTON J: Can I just ask; is this only confirmatory of her Honour's satisfaction?

MR REDD: That's so.

DERRINGTON J: It doesn't inform any of her primary findings, does it?

MR REDD: I accept that. I mean, I – her Honour - - -

DERRINGTON J: So it really doesn't take us anywhere.

MR REDD: It doesn't go very far; I accept that.

DERRINGTON J: Thank you.

MR REDD: Ground 15, we're content to rely on our written submissions. Ground 18 is a ground that concerns, ultimately, an allegation springing from clause 2.1.1.3 of the management standards and procedures. So the relevant allegation in the pleading – you will find the pleading in tab 6 of appeal book A – is contained in paragraph 113C. And the particulars – it's just being brought up on the screen. The particulars under 113C – just keep scrolling down, please. Yes, just down a bit further there on page 50. You will see there the allegation that VicForests failed to identify an area of Leadbeater's Possum Zone 1A Habitat in Blue Vein Coupe. And then, contrary to clause 4.2 of the management standards and procedures, failed to follow clause 2.1.1.3 of those procedures by applying to the secretary to create a special protection zone.

So when your Honours go to clause 2.1.1.3 of the management standard and procedures, you will find them, for your Honours' reference, at part C of the appeal book at tab 151 at page 23. Yes. Just scroll down to 2.1.1.3. Yes. Just up – sorry, just up a little bit further. So that's the part of the management standards and procedures which, I think, as has already been demonstrated, are incorporated into the Code. That's the part that it alleged VicForests breached by failing to apply to the secretary for the creation of an SPZ. So the secretary is a body corporate created under the Conservation and Forests Land Act, just so your Honours are aware, and it's the secretary that has the management of the zoning scheme. For instance, VicForests can't create an SPZ; it has to – it's the secretary who creates an SPZ, either of its own motion of consequent upon an application.

So that's a point to understand, because when one actually looks at the chronology of what occurred here – and the relevant parts of the judgment for your Honours' reference is 1214 to 1249 concerning this particular ground – one can see that the department had satisfied itself that there was, in fact, no Leadbeater's Zone 1A in this coupe that required the creation of an SPZ. And in that regard, I would like to take your Honours to 1223 of the judgment.

GRIFFITHS J: I'm trying to find out what the acronym SPZ means.

MR REDD: That's special protection zone.

GRIFFITHS J: Okay. I assumed that might have been the case. Thank you.

MR REDD: And I think your Honour will find that in the Code. So there's three zones under the zoning scheme: GMZ, which is general management zone, so harvesting can occur subject to all other requirements; there's SMZ, which is special management zone, which usually means a plan has been provided to the department for approval to modify harvesting because of sensitive values that may be present; and then there's SPZ, where no harvesting can occur.

GRIFFITHS J: All right. Thank you.

MR REDD: That's the special protection zone.

GRIFFITHS J: Thank you.

JAGOT J: ..... which paragraph?

MR REDD: Yes, your Honour Justice Jagot. Paragraph 1223.

JAGOT J: Yes.

MR REDD: This is the coupe that my learned friend Mr Kirk mentioned in response to a question from your Honour Justice Griffiths about engagement with the state system a bit earlier today. So this coupe had a contentious history and it's set out in this part of the judgment, but I don't need to take your Honours to that part of the judgment. But what in fact occurred in the engagement with the state system, if I can put it that way – the relevant part of the chronology I want to take you to starts at 1223 where her Honour there reproduces the relevant part of a survey standard that the department uses to satisfy itself as to whether zone 1A is present or not. So her Honour introduces that at 1223, and at 1224, you can see her Honour has extracted the relevant parts of this survey standard. That's a departmental document, not a VicForests one, but that's what the department uses to determine for itself whether zone 1A is present or not.

And it was the part in (ii), the requirement that no side of the polygon be greater than 100 metres and its perimeter is as short as possible, that the applicant below and her Honour took issue with, finding, in essence, that that was a gloss, I think, on the requirement under the management standards and procedures. But the point I wanted to raise is that – and we see this at 1227 of the reasons – is that the department, in fact, conducted its own surveys not long prior to the trial commencing in this coupe because it had had a contentious history – and there was correspondence between the parties about it – and applying its own survey standard, it had found that there wasn't any zone 1A in this coupe. And it informed both the applicant below and VicForests to that effect.

So the department having formed that view, in our submission, construing the obligation correctly – that is, the obligation in 2.1.1.3 – with that circumstance, it would be a nonsense to say to VicForests, "Well, you've got to apply to the secretary for SPZ." Because the secretary, through its department, has satisfied itself that value is not there. So it may be that the applicant had an issue with the secretary and the way it interprets zone 1A and the way it has developed its survey standard, but that's an issue vis-à-vis applicant and secretary, we say, and it's a construction argument about the obligation relied on, we say, in circumstances where the secretary has satisfied itself that that value is not present that that clause of the management standards and procedures does not require VicForests to apply for SPZ. Because, clearly, there would be no utility, the secretary would say, "We're not doing that." So that's what I wanted to raise by way of a bit further explanation. That's really, I think – it does come out of our written submissions, but I wanted to

amplify that aspect of it so your Honours could see the context of that particular issue. Could I move, then, to grounds 20 and 21. These grounds, your Honours, rise or fall together, so we accept that. They're both two sides - - -

JAGOT J: Sorry to be – sorry to be painful, but where does that go, other than 1248?

MR REDD: Sorry, where does?

JAGOT J: Where does the whole point go about ground whatever it is - - -

MR REDD: Well, because we say properly construed, that obligation in clause 2.1.13 of the MSPs did not require VicForests to apply to the secretary for the creation of SPZ, because the secretary had already satisfied itself that the very value that would be the subject of the application was not present. So, in other words, VicForests hasn't breached the management standards and procedures in that circumstance is our submission. So that's – I just wanted to make that clear to your Honours. That's why I orally addressed on that point.

Moving to grounds 20 and 21, these are the last grounds of the so-called miscellaneous allegations pressed. These particular grounds, as I say, rise or fall together. The particulars of the allegation about this ground are set out in 113E of the pleading. So we had, again, at tab 6 of appeal book A, if you go down to page 51, please. Thank you. So you will see here that – if you could just scroll down a bit further.

It's really – this issue really is a construction issue about clause 5.3.1.5 of the management standards. There's no debate as to the operation about the earlier clauses relied on by the applicants and how they funnel through to the management standards and procedures. But here, it is alleged that VicForests failed to apply this particular requirement, and the reasons of the primary judge on this issue, for your Honour's reference, is from 1263 up to 1272, the judgment.

So, going back to the management standards procedures, they're at tab 151, and if we could go to – it's big number page 43 down the bottom right. Think we've passed it. Yes. That's – thank you. Yes. So 5.3.1.5 is the clause of the management standards said to be breached. And there's no dispute on the facts that the particular coupes where her Honour found had – did not have the vegetation buffer, in fact, did not have the vegetation buffer. So that's not the dispute.

The dispute is what did this obligation require VicForests to do? And in our respectful submission, what the primary judge failed to do was give enough attention to the subheadings that are in this part of the MSPs, the management standards and procedures. So if we could just scroll up just a bit higher so we can see above the foreground, you will see here this is a landscape requirement for the Central Highlands forest management areas.

It has some requirements at 5.3.1.1 down to 5.3.1.3, which clearly apply across all the FMAs in the Central Highlands. But then, we have a subheading that says Foreground: zero to 500 metres. So, in our submission, the requirements under 5.3.1.4 and 5.3.1.5 are only triggered when one is within the foreground, that is, zero to 500 metres of what's called scenic drives and designated lookouts – I'm reading here from 5.3.1.4:

Listed in table 9 of appendix 5 of the planning standards.

Now, true it is that 5.3.1.5 doesn't also expressly condition itself in that way, and when one goes down to 5.3.1.6, we can see under the subheading Middle-Ground, "Okay, if you're in 500 metres to 6.5 kilometres of," to use a slightly different language, "features listed in table 9 of appendix 5 of the planning standards:" you do A and B. But here, we say that the heading makes clear – those headings make clear that the obligation in 5.3.1.5 is only when you're in the foreground, that is, zero to 500 metres of certain features – or of the features listed in table 9 in appendix 5 of the planning standards. The reference for where that is, if your Honours would like it, is tab 152 of the appeal book, and I just bring it up so your Honours have an appreciation of - - -

GRIFFITHS J: Just before you do bring that up, so what – are you saying that the issue is one of construction as to whether the heading, Foreground, zero to 500 metres, applies not only to 5.3.1.4 – it plainly does, given the introductory words – but also applies to 5.3.1.5?

MR REDD: That's so, your Honour. And in our submission, it does. Now, bearing in mind this is a departmental document. I think my learned friend Mr Kirk mentioned earlier today that one doesn't approach these with all the felicity that one would a statute. There's cross-referencing errors in these documents and other anomalies, to put it politely. So in a perfect world, it would be completely clear that that is what applied, but we say, paying proper attention to the structure of that section and the subheadings, and it's legitimate to do so, we've put in part B of our legislation folder – and your Honours don't need to look at it now, but it's at tab 17A.

We've put in section 36(2A) of the Interpretation of Legislation Act 1984 Victoria. So that Act makes clear that in Victorian subordinate legislation, headings form part of this bodied instrument. That's not a position that's in all jurisdictions, as I understand it, but I wanted to draw that to your Honour's attention, because it is the case in Victoria.

GRIFFITHS J: But are they – what has that got to do with these planning stands? Are you saying these are a legislative instrument for the purposes of Victorian State Law?

MR REDD: Yes.

GRIFFITHS J: All right.

MR REDD: So the clause is in the management standards and procedures, and the planning standards which have been brought up now – and I'm going to take your Honours, just so – how you can see what these so-called features are that the clause speaks of. They're an appendix to the management standards and the procedures. So each of the planning standards, the management standards and procedures, form part of the Code. They're incorporated into the Code of Practise. That's the Code made under part 5 of the Conservation Forests of Land Act, and it's prescribed to be a legislative instrument.

But, just to show, for completeness, your Honours, where these features are, if we go to pages 141 to 145 of this document, and I think it's an extract, so we will jump numbers down that bottom-right – yes. So we're ..... now. If you could just scroll up a bit, please. You will see here there's all these – it starts at 141 and goes for about – these are the table 9, landscape management, FMZ rules. So when we were looking at the management standards and procedures and it said zero to 500-metre foreground for your 20-metre vegetation buffer, you need to be within zero to 500-metre foreground of the features listed in this table. So that's how it works.

Now, it's not in dispute, as I understand it – certainly not – wasn't said against us below, and it's not said against us in writing on this appeal that, "Oh, well, hang on, even if you're right about that construction, there was evidence that these coupes that her Honour said where this clause hasn't been applied, that they were relevantly within 500-metre foreground of any of the features in this table." So there was no evidence to that effect, and we don't apprehend that to be factually in dispute. That's why I say it's all a construction issue.

If our submissions are accepted as the proper construction of this clause, we say that that appeal ground must succeed. Conversely, if we're wrong about that, both grounds go, because there was no dispute that the no vegetation buffer applied in these coupes, but we just say the obligation hadn't triggered. So it's a discrete ground, but I wanted to explain that, understanding, of course, as I - - -

GRIFFITHS J: Thank you.

MR REDD: - - - said earlier, the limited nature of that allegation and the import relevant – relative, I should say, to earlier grounds in the notice. They were the submissions I wished to make on those miscellaneous grounds, your Honours. Unless there's any questions about those.

GRIFFITHS J: No.

MR WALLER: Your Honours, if I could turn to the remaining grounds that we press in relation to significant impact, and there are five, but they're – sorry, there are four. Grounds 23 and 29.

JAGOT J: So it's 22 not pressed, is it?

MR WALLER: 22 is not pressed.

GRIFFITHS J: I think 22 you rely on the written submissions, do you? Mr Redd, I assumed that that's what you were doing.

MR REDD: 22 is not pressed.

MR WALLER: Not pressed.

GRIFFITHS J: Gone. All right. Thank you.

JAGOT J: ..... gone.

MR WALLER: 23 deals with the issue of significant impact, but it does mirror the submissions that we've made in relation to the satisfaction and precautionary principle.

JAGOT J: Your written submissions say you rely on what you say in grounds 10 and 11.

MR WALLER: That's so. And that's all I wish to say. In relation to grounds 24 and 25, we say her Honour erred in finding that the forestry operations in the scheduled coupes and in the logged coupes were likely to have had or likely to have a significant impact on the greater glider species as a whole and the Leadbeater Possum species as a whole in circumstances where there was no sufficient evidentiary foundation to find that the forestry operations in the scheduled coupes or the logged coupes would have such a significant impact on those species as a whole.

Your Honours know that the notion of impact or the term "impact" is defined in section 527E of the Act, that the term "significant" is not defined as my learned friend said yesterday, but a number of cases have dealt with the issue, including Booth v Bosworth, which is in the folder of authorities at tab 6. And they have held that that expression "significant" should be interpreted as meaning "important, notable, of consequence having regard to its context or intensity". That is paragraph 99 Booth v Bosworth, a decision of Branson J.

We say that the word "significant" on the authorities operates as a limitation to exclude impacts which are minor or unlikely to impact on a listed threatened species. We rely on the decision of Dowsett J in Krajniw v Brisbane City Council, which is in our folder at tab 14 and paragraph 10, and the decision of Cowdroy J in Northern Inland Council, which is in our folder at tab 18 at paragraphs 91, 92 and 119.

It's a question of fact as to whether any particular action has had or will have a significant impact on a listed threatened species included in the critically endangered category or the vulnerable category, and we say the outcome of that inquiry must

take into account what's meant by "listed threatened species" included in those categories.

This requires us to go back and look at the text of the Act. Part 3 of the Act prohibits actions that have or are likely to have a significant impact on a matter of national environmental significance unless the person taking the action has the approval or is otherwise exempted. And although the term "national" or "matters of national environmental significance" is not defined in the Act, your Honours know that matters of national environmental significance presently are included in the Act in certain divisions, and they include, relevantly, nationally threatened species and communities, which are dealt with in sections 18 and 18A.

So far as the greater glider is concerned, section 18(4) deals with the position so far as a vulnerable species is concerned, and for the Leadbeater Possum, section 18(2) deals with a critically endangered species, and both prohibit a person taking an action that has or will have a significant impact or is likely to have a significant impact on that species, and as your Honours know, section 18A makes it a criminal offence if a breach of section 18 occurs.

It is the listing of the species which triggers the operation of part 3 which relate to matters of national significance so far as species are concerned. If I could ask your Honours to look at the explanatory memorandum to the EPBC Act again, but in this context, so far as it relates to matters of national environmental significance, and in particular at page 2, where it's said that the bill applies to an action that has, will or is likely to have a significant impact on a matter of national environmental significance, and there lists those, and then if we could scroll to clause 49 on page 27, where it said in the explanatory memorandum that:

> *…not all actions affecting a nationally threatened species or community will have or are likely to have a significant impact on that species or community, for example, approval will not be required for some actions which are carried out on commonwealth land would require a permit under chapter 5. Injury or death to one member of a species will, except in the case of the most endangered species, not have a significant impact on the species. This clause therefore does not regulate all actions affecting members of a species or community.*

And then we would say when it comes to these grounds 24 and 25, the primary judge rejected VicForest's submission that a proper construction of section 18 of the Act required the primary judge to be satisfied and the applicant to lead evidence that forestry operations at an individual coupe level, at a geographic coupe level and at the level of the totality of the logged coupes or the scheduled coupes were likely to have had or to have a significant impact on both of the species as the whole.

And I refer to her Honour's principal reasons at paragraphs 1294 to 1309. Her Honour said at paragraph 1304 that the text of section 18 plainly refers to impacts on the species and that is the statutory question. But her Honour found that the evidence

of detections of individuals and the evidence about the effects of forestry operations on individual members of the species which were using the native forest that was the subject of the proceeding was capable of being probative of the impact on the species as a whole. Now, when it comes to the greater glider, as I've mentioned, where its distribution is across a wide part of Australia, we say this is particularly relevant. Less so, we would accept, in relation to a Leadbeater Possum. But we say that the evidence was simply not there for her Honour to have made a factual finding about significant impact on the species as a whole having regard in particular to the evidence that was led concerning the scheduled coupes, either at an individual level or taking into account all of the coupes together.

Her Honour seems to have focused, as I say, at 1304 on the words "the species" but then moved to findings concerning the species as a whole notwithstanding that the evidence, such as it was, was very much limited to the geographic area in which the forestry operations were to take place. So for those reasons, your Honours, we submit that her Honour erred in the finding she made, and her Honour ought to have found that there was not sufficient evidentiary material to find that the forestry operations in any of the coupes were likely to have the significant impact that she found. We otherwise rely on what we've said, your Honours, in writing both in chief and in reply, and that's all we wish to say on significant impact. Mr Redd will now deal with the final two grounds dealing with issues of relief.

MR REDD: Your Honours, again, very briefly, just addressing 30 and 31 because we've already put matters in writing which I don't wish to repeat save for I need to correct a footnote reference which we had in our written submissions. At paragraph 182 – sorry, footnote 182 of our written submissions, we referred to:

> *See Humane Society (55 per Allsop J).*

We defined Humane Society earlier to be other Humane Society decision at footnote 181. The decision we had intended to refer to there was Human Society International Inc v Kyodo Senpaku Kaisha Limited at 165 of the FCRs 10, and the paragraph reference is correct. So I just wanted to clarify that aspect. Secondly, it's raised against us that a House v King – an error of the nature discussed in House v King is required for discretionary matters such as relief of this nature. We would accept that to be so. We rely on the matters we've set out in support of a submission that in regards to both ground 30 and 31 the discretion miscarried or was not reasonably open for her Honour to exercise it the way she did. They were the only matters I wished to address apart from what's in writing. May it please the court.

MR KIRK: Your Honours, I too am going to split the submissions with my very learned junior. I'm going to deal with grounds 3 through to 9 and also the two at the end about injunctive relief, and then the other grounds which are more factual will be dealt with by Ms Watson. What I might do now is just deal very briefly with the two grounds at the end which my learned friend Mr Redd has just addressed on, and then it might be cruel and unusual to go any further today. So - - -

JAGOT J: What did her Honour actually do? She didn't – she ..... exempt the prospect that they could get an approval under part 3, is that what you say she has done wrong?

MR KIRK: No, she made – so that's raised by ground 31. So just dealing with those grounds, the actual orders – they're probably conveniently found at the front of the relief judgment which is at tab 15. So her Honour wrote a separate judgment on relief. And so the orders commence at small heading 2 or, actually, a bit before that, but the injunctive relief – there's a whole series of declaratory forms of relief. The injunctive relief is at heading 6 – sorry, page VI, grounds 16 to 19. And so the simple answer to your Honour's question is: yes, that's correct. So 16 is subject to order 17 below. There is a restraint from conducting forestry operations in their scheduled coupe and then a qualification to that in 17.

JAGOT J: But if you actually get an approval, the injunction is not automatically lifted, is that how that's working?

MR KIRK: Yes, but then they – but that's addressed in the judgment that they can just get a variation of the orders. Now – so that's raised by ground 31. And so if I can take your Honours to the reasons her Honour gave for that, so it's paras 57 of the relief judgment through to 70.

JAGOT J: That's - - -

MR KIRK: So it's only page 15 of the relief judgment. Sorry, and just to be clear this is tab 15 of part A.

GRIFFITHS J: But can I just ask: is the wording of orders 16 to 19 wording that was arrived at by her Honour independently of what was put to her by the parties, or does this reflect a formulation that was put forward by the parties and in particular agreed to by VicForest?

MR KIRK: I'm sorry, your Honour. If I could just - - -

GRIFFITHS J: Sure.

MR KIRK: They reflect our proposal. And the other side, I think, did not agree to that sort of unconditional form. That's how I understand it. No doubt I will be corrected if I'm wrong. So in terms of her Honour's reasons on this issue about why unconditional – the reason actually starts at para 49. Your Honours will see a heading Whether The Prohibitory Injunction Should Be Conditional. There's then a reference to Allsop J in the whaling case where his Honour, Your Honour Justice Jagot may recall, somewhat reluctantly, having been overturned by the Full Court, made an injunctive order which your Honour Justice Jagot later made a contempt ruling on, but that's by the by. So then over the page at para 57 or para 56:

I accept that orders framed in this way or the way proposed by VicForest expressly ..... operation of other parts of the Act, but there are at least two reasons. So, first, despite having the opportunity to do so, VicForests didn't adduce any evidence intended to apply for approval under part 9 of the Act.

And so then jumping to para 62, having – well, actually, it's para 61:

There are a number of possibilities open to VicForests –

which her Honour articulates, one of which is deciding to apply for approval, but her Honour is effectively saying, the last couple of sentences:

There's lots of possible courses. There may be more. No evidence before me as to which.

So then at 62:

In those circumstances, whether VicForests will seek approval is no more than hypothetical possibility. I'm not inclined to include a hypothetical possibility in an injunctive order.

And then para 63, secondly or second:

Including a condition introduces uncertainty into the operation of the injunction which I consider is undesirable and not appropriate.

And then jumping to 66:

Whether the condition is expressed, unless part 3 is rendered inapplicable or otherwise, there will almost inevitably be further dispute between the parties when that condition crystallises.

The next sentence captures something:

The parties in this proceeding agree on very little.

I don't think that's in dispute, that sentence, but maybe it is.

JAGOT J: How dare you say we don't agree.

MR KIRK: So they're the reasons her Honour gave, and they're – you know - - -

JAGOT J: And I can see that it's because it was, "Unless part 3 is rendered inapplicable," which is a little bit - - -

MR KIRK: Yes.

JAGOT J: - - - up in the air.

MR KIRK: It becomes – that's right. So, look – no, other judges might have done other things, your Honours might have done other things, but my learned friend Mr Redd has correctly conceded it has got be a House v The King error and her Honour chose to exercise the discretion in this case, with these parties who love each other so much, in this way. That's not a House v The King error.

DERRINGTON J: Can I just ask a pedantic question about order 17, because we spent quite some time this morning discussing whether planning was encapsulated within sub (b) or sub (c) of the definition of forestry operations and now we have this tautology where planning forestry operations is embraced in that order. Does that cause any difficulty?

MR KIRK: None that has been articulated in any of the written submissions, I don't think.

DERRINGTON J: No, I haven't found anything in the written submissions, but I wonder if - - -

MR KIRK: Well - - -

DERRINGTON J: - - - depending on what view we come to, that that - - -

MR KIRK: About that particular ground - - -

DERRINGTON J: Yes.

MR KIRK: - - - which is ground 3, I think.

DERRINGTON J: 3 or 4.

MR KIRK: Three, which I will say something about tomorrow.

DERRINGTON J: Well, perhaps you can deal with that tomorrow, then.

MR KIRK: Yes. First, I hope I can satisfy you on ground 3, but if not, at least I can say this: I don't think any separate arguments have been addressed by my learned friends to seek to tie that problem to this particular ground, but I understand your Honours raised the issue. But there's not really anything I can respond to as to why that might be particularly problematic.

Can I then just go back to ground 30. So I've dealt with ground 31, which was the conditionality. Ground 30, which is that her Honour shouldn't have granted injunctive relief in relation to the logged coupes as opposed to the scheduled coupes. There's complaints about this in writing. First, that it hadn't been sought in the pleading, but as we noted in our response that that's true, but it was sought after the

primary judgment and then given, and VicForests conceded no prejudice, see relief judgment para 108.

As your Honours know, pleadings can be amended, even on appeal. So if they can be amended even on appeal, there's just no substance to that point. Secondly, it's a complaint there was no evidence of any intention on the part of VicForests to further harvest the log coupes, and by the way, they offered in an undertaking not to do it, and my friends say in writing that's powerful discretionary consideration against the grant of injunctive relief. That's still not ..... error, despite what my friend, Mr Redd, said.

But there's just two other points that we didn't make in writing I just wanted to add to. (1), the proposed undertaking that they offered her Honour considered was ambiguous. Without going to it, it's paras 74 to 78. So it's not as though the undertaking was going to solve all problems with these parties. Secondly, if your Honours go to para 27 of the relief judgment, referring to the Wayland case, the point I can put fairly simply is this, is the Full Court, or I should say perhaps the majority of the Full Court in Humane Society, the Wayland case. And it's quoted in para 27 of her Honour's judgment, at para 22 of the majority in the Wayland case.

If I can put it this way: there is an educative effect, the majority considered, to giving injunctions under the EPBC Act, taking account of the objects of the EPBC Act, namely to make clear, you know, these are important rules which have to be complied with, and everyone should understand that, the respondent, but also any other parties. And her Honour refers to that at paragraph 30 of her judgment.

So that's a particular reason that her Honour thought that an undertaking was not an adequate response. There should be relief of the court. So that's no cause for complaint. Otherwise, we rely on our written submissions, and that might be a convenient time, your Honours. I should note that in light of, with great respect to my friends, their great economy this afternoon, there's no doubt we will finish tomorrow.

JAGOT J: Yes. Yes. I assumed that. We're grateful to the parties. All right. So 10:15 tomorrow. Yes. Okay.

MATTER ADJOURNED at 4.13 pm UNTIL WEDNESDAY, 14 APRIL 2021