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Ordered by: Emily Giblin
For: Environmental Justice Australia
Email: emily.giblin@envirojustice.org.au

TRANSCRIPT OF PROCEEDINGS

O/N H-1450935

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, WEDNESDAY, 14 APRIL 2021

Continued from 13.4.21

DAY 3

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

MR KIRK: May it please the court. Your Honours, most of such time as we have today will actually be taken up by my learned friend, Ms Watson, dealing with the factual grounds, but I will spend hopefully no more than an hour dealing with the more legal grounds, starting with ground 3. So I will go back to just going through numerical order. So ground 3, your Honours will recall, is the one about the tender release plan and how that fits into the pleaded case. The main complaint, your Honours will recall, seems to be that having held that my client's case was not addressed to the managing of trees, but instead to the harvesting of trees, it was then unfair of her Honour to take account of the TRP, the timber release plan, because – and this is the key point – that should be characterised as only about the managing of trees and not about the harvesting of trees.

Now, that's the key premise of the 8. It's not clearly stated, but that's the key premise. It characterised the TRP is only about managing, not about harvesting.

If I can take your Honours to the key parts of the judgment. I'm trying to be quick. So it starts around paragraph 715 of the primary judgment, 715. Your Honours will see there's a heading – sorry, I will just wait till it comes up. Thank you. So if you just scroll down. So we can see the heading above 714, which is what is the RFA forestry operation to which the applicants plead allegations are to be applied. 715, there's a quote about the definition of forestry operations that we're all familiar with. We've looked at (b) and (c). Your Honours would just note – I forget the French term, but the anti-chapeau – chaussette – refers to commercial purposes and includes any related land clearing, land prep and regeneration.

GRIFFITHS J: Le pied, perhaps. The foot.

MR KIRK: Ms Watson will give me ..... 716, her Honour says:

> *I have found above that in its use of the term forestry operation, the applicant's pleaded case refers to the activities which take place when VicForests is engaged in timber harvesting.*

So my friends rely on that. And then her Honour goes on the next sentence:

> *I have found the applicant has not pleaded that the prep and publication of the TRP and the decision making about its content is a forestry operation, despite a solitary plea at 8.*

And jumping to 717:

> *I also found that the prep and publication of the TRP may be relevant –*

I'm skipping a bit –

> *as explained in this section. That's because those activities are one of the ways in which VicForests must consider how the precautionary principle applies to*

the forest it's deciding to harvest and how the precautionary principle should guide its decision making about the method of harvest and what the area of harvest should be.

So pausing there. There's no conceivable dispute that this case was very much focused on the precautionary principle, but TRP is a key part of identifying what coupes are to be harvested – that's one of the core roles of the TRP – and, broadly speaking, how they're going to go about it. So one could not conceivably consider how the precautionary principle applies to the schedule coupes without taking account of the TRP. And that's the point that her Honour makes in the following paragraphs. And if I could just invite your Honours to skim over 718 to 722, that's the point her Honour is making. The error in my learned friend's submissions, with respect, is a sole characterisation error that just because the TRP may relate to the managing of trees, therefore, it cannot relate to the harvesting of forest products. The logic does not follow. A sufficient denouement of her Honour's reasoning – I'm using French again – is paragraph 731, where her Honour says:

I've accepted that what's done in the forest also reflects what has been planned to occur or what is required to occur in the TRP standards and ..... all these planning steps are reflected ..... what is done in the forest and are, in my opinion, within the applicant's pleaded case.

I won't go through the statement of claim because to do so would be tedious, but the first reference to the TRP is, I think, at paragraph 6 of the statement of claim and then it builds on that. The core case – well, an aspect of the core case being, "Here's what you've –" just to paraphrase broadly, "Here's what you've done in the log coupes, here's what you're going to do in the scheduled couples. We refer to the TRP for what you're going to do in the scheduled couples. Notably, you haven't complied with the precautionary principle in the log coupes. You're not going to comply with the precautionary principle in the scheduled coupes. You have breached. You've lost your exemption. You have breached section 18, and you will breach section 18 in relation to the schedule coupes, with particular regard to the precautionary principle, which necessarily looks to –" the precautionary principle is inherently forward looking in a sense. It's about deciding what we're going to do, taking account of risks.

So there's no grounds for complaint here. As I said, it's built on a false claim that, if it relates to management of the forest, it cannot in any way relate to harvesting of forest products. And that's all we seek to say about ground 3. Ground 4 is about whether breach of the code leads to the loss of exemption. I really addressed that yesterday, and I won't go back over what I said yesterday morning, save to note that my learned friend, Mr Waller, said yesterday, we do accept the difficulty of the argument, that is to say, his argument. If I could move then – sorry – I should note grounds 5 and 6 don't seem to add any distinct points, so I think we're kind of building on 1 to 4, so I won't say anything about those.

Can I turn, then, to ground 7, which is the first one in part B, dealing with the precautionary principle. Your Honours will recall this is the argument, to put it simply, that her Honour erred in departing from Osborn Js approach in what was called the Brown Mountain case, Environment East Gippsland v VicForests (2010) 30 VR 1.

In the construction of clause 2.2.2.2, which is the – and more specifically, construction of the precautionary principle that's defined in the Code, which is picked up in 2.2.2.2. The focus of this argument, again, must be the text, but can I deal with some preliminary points first. My learned friends say that her Honour was bound by what Osborn J had said in the absence of finding that his Honour was plainly wrong. Can I make two brief points about this. Right or wrong, it's of no great assistance to this court. It's dealing with an issue of construction. As I put to your Honour Justice Griffiths yesterday, issues of construction have a right or wrong answer in the law. So your Honours are not bound by what Osborn J said, leaving aside the presumption of re-enactment argument for a moment.

In any event, we referred in our written submissions to what McHugh said in Coleman v Power, namely cases are only authorities for what they decide. If a point is not in dispute in the case, the decision lays down no legal rule concerning that issue. The High Court also touched on that in CSR v Eddy, which we have referred to in our written submissions about whether some ..... in the New South Wales Court of Appeal. Leeming J, in another case we cite in our written submissions, Lazarus v ICAC, said – and just to quote a sentence from his Honour:

> *Decisions in which the question under consideration was not raised cannot be treated as authorities on that question.*

And two of your Honours also touched on this issue in Bob Brown Foundation in paragraph 35. My learned friends seek to limit that in their reply, which at least what Hughes J has said to "where parties agree on something". It's not just where parties agree on something, it's about resolving arguments: a case is authority for the resolution of the argument. That's why sometimes new constitutional implications are discovered decades later, despite not having been discovered in lots of cases before, because no one has argued them before.

Now, it's true, as my learned friend, Mr Waller, said yesterday – without going back to it – that in Brown Mountain – I think it's around paragraph 187 to 188 – his Honour refers to a – it seems to have been a dispute about whether the precautionary principle should be seen as having integral components, it's all part of the one, or whether, rather, there should be two preconditions, as my friends argue, namely, (1) a threat of serious or irreversible environmental damage; and (2) scientific uncertainty as to the damage. So there does seem to have been some dispute in Brown Mountain. Quite what it was is not entirely clear. But Mortimer J, who, like my learned friend, Mr Waller, had been counsel in the case, presumably had some idea. In any event, her Honour, at para 827, states pretty clearly in the second sentence:

> *So far as the reported decision in Brown Mountain discloses, no submission was made to Osborn J that he should not adopt what was said by Preston CJ because of the very different context –*

etcetera. As I said, in any event, it doesn't really matter in my reason I gave first. Turning then to the substance of the argument, my friend's submission comes down to this: the precautionary principle is a notion that has been significant in environmental law for the last little while and – I might not have the exact words – my learned friend said words to the effect of "it ought to be given uniform meaning and application". There could hardly be a clearer invitation to error by this court than to say, as my learned friend said, the text doesn't matter, let's just talk about the vague concepts even though it's put in different terms by different legislatures in different places. Just – I barely need authority, but it's quite a useful comparison actually. If I could take your Honours briefly to Baini, B-a-i-n-i, v R, 246 CLR 469, which is in our list of authorities. I don't know if your Honours have a separate bundle for our list.

JAGOT J: Yes.

MR KIRK: Paragraphs 14 and 15. Does your Honour not have it?

GRIFFITHS J: No, I've got it. I was just wondering what that noise was, Mr Kirk.

JAGOT J: He had to pull his chair.

MR KIRK: That was my squeal of anticipation as your Honours read these two paragraphs. Can I just invite your Honours to read paragraphs 14 and 15. The context of this is, itself, enlightening. Your Honours will be see the reference in 15 to Weiss, W-e-i-s-s, v R, in which – I will just give your Honours the sentence. The court stated at 9:

> *It is the words of the statute that ultimately govern, not the many subsequent judicial expositions of that meaning which have sought to express the operation of the proviso to the common form criminal appeal provision by using other words.*

So just to put that in context, your Honours will recall that Weiss was the quite significant shift that the High Court took to the proviso in the common law criminal provisions, where they said, yes, we know we ourselves have said various things dozens of times and lots of other courts have, but let's go back to the words and turf all that. Now, the Victorian Parliament then responded to that by altering things slightly. And the point the High Court is making in Baini is, you know, and more clearly, yes, it still uses the language of substantial miscarriage of justice, but in a new statutory context and that's what we must give effect to. And the same point may obviously be made about the precautionary principle.

If I can then start with the anti-text, as it were. So if your Honours go to the judgment at page 825 – sorry – paragraph 825 of the primary judgment. And your Honours will there find language familiar, at least, to some of your Honours, from section 6, sub (2) of the Protection of the Environment Administration Act 1991, I think, a New South Wales statute. Your Honours might just read that definition. So the point the Parliament is making – the New South Wales parliament is making is that ESD:

> *…can be achieved through the implementation of the following principles and programs.*

And your Honours may recall that there's a list, I think, of four things, intergenerational equity, and so forth; one of them precautionary principle. So then if one looks at (a):

> *the precautionary principle – namely, that if there are threats of serious or irreversible environmental damage, lack of full … certainty should not be used as a reason for postponing measures.*

It's a class if-then formulation; plainly conditional. And then the next subparagraph:

> *In the application of the –*

PP, if I can call it that – so in other words, once you've got through the first paragraph, then public and private decisions should be guided by careful evaluation, etcetera, and assessment. It's very clearly and expressly conditional. And your Honours might perhaps keep that open and then go to the definition of the precautionary principle in the Code at issue here. So that's tab 150, volume 3 of part C, at page 15. If I can just make a few points about this text - - -

JAGOT J: You're where the glossary is?

MR KIRK: Yes, your Honour.

JAGOT J: Yes.

MR KIRK: That's right. And it's about point 7 of the page. I will just let your Honours read it first and then make some points. The first point – and I've been practising this submissions – means means means. Where it says "precautionary principle means", that's what it means. And it means when contemplating decisions that will affect the environment careful evaluation be undertaken – mandatory language – to wherever practical avoid serious or irreversible damage to the environment. So if one compares that to the New South Wales POEA Act definition, you don't have that contingency. The order is reversed, and my friends say, "The order is reversed. What does that matter?" The word "means" matters. The word "if" matters in the POEA Act.

DERRINGTON J: Mr Kirk.

MR KIRK: Sorry, your Honour.

DERRINGTON J: If this is all leading, then, to potential liability under the EPBC Act, should we not be focused on the definition of the precautionary principle in that Act, which is different from the Code ..... and does seem to preference where there threats, although it doesn't say "if there are threats". It could have said at the end of the definition ..... it says, "You should do all of this where there are threats".

MR KIRK: In the EPBC Act - - -

DERRINGTON J: Yes.

MR KIRK: - - - definition? Yes. Well, your Honour is quite right, with great respect, that this is a different definition, but as to the primary proposition your Honour ..... absolutely not, because we are not at this stage of analysis applying the EPBC Act. We're applying the Code by a different drafter in a different jurisdiction. Now, true, you only get to the Code if you've lost your exemption under section 18, but the issue here is have you lost your exemption under section 18 by not complying with the Code, so this is a logically prior step for the purposes of the analysis. So there are lots of formulations of the precautionary principle out there, and, yes, there's some broad themes which come through, but language matters.

JAGOT J: So once you get to "significant impact", assuming you've gone through the Code - - -

MR KIRK: Correct. You would be back in EPBC land.

JAGOT J: - - - and its PP, then you're back in the - - -

MR KIRK: Correct.

JAGOT J: - - - EPBC Act - - -

MR KIRK: Correct.

JAGOT J: - - - for "significant impact" - - -

MR KIRK: Correct.

JAGOT J: - - - and it picks up its PP definition.

MR KIRK: Correct.

JAGOT J: Yes.

MR KIRK: Correct. Correct. So one can't just ignore the formulation here or sort of blur it all together or merge it all together. And just to illustrate that in another way, your Honour, consistently with what I've said earlier, what your Honour is doing here is construing what's ultimately a legislative provision, albeit in a – it may not have been fully legislatively drafted, but it's a legislative provision. The answer ..... give is good for Victoria, so if and when there's a case under the Code in the Victorian Supreme Court - - -

JAGOT J: Sure. They should be - - -

MR KIRK: - - - they will say, "Well, the Federal Court in blah, blah said this", and so that construction can't be effective with considerations of the EPBC Act, because it's a question of construction. And just whilst I'm dealing with what the situation is in Victoria – sorry. I will come back to that. Let me just finish saying a couple of things about the text. So I made the point about means. I've referred to the mandatory language in the first sentence: "be undertaken wherever practical" – the next clause – "and to properly assess". And then the next sentence is a flow-on from that, so, yes, the order is reversed, and that is significant. The second sentence here is actually contingent on the first, not the other way around, as in New South Wales.

Now, my learned friends in writing and, I think, my learned friend Mr Waller yesterday referred to their construction being harmonious with the statutory expression of the precautionary principle in the SFT Act, Sustainable Forests (Timber) Act, which is a Victoria Act. Can I show your Honours that formulation briefly. It's in my learned friend's bundle, volume 2 of authorities – volume 2, tab 35. This is the Sustainable Forests (Timber) Act. And if you go to section 5, page 10 - - -

JAGOT J: I've got it, I think, in volume 3, but - - -

MR KIRK: That might be Part B. Volume 2. Is it tab 35, volume 2?

JAGOT J: It's tab 35, volume 3 of 3 in mine, but .....

MR KIRK: Page 10, down the bottom, at least on my print-out.

JAGOT J: Yes.

MR KIRK: And it said, "Part 2, Sustainable Forest Management". So your Honours will see section 5, Principles of ESD, subline:

In undertaking sustainable forest management –

Blah, blah:

...regard is to be had to the principles of ESD set out in this section.

And then jumping to 4, so down the bottom of the page:

> *The following principles are considered as guiding principles of ESD development.*

And that's pretty much it. I mean, you know, there's other stuff, but in terms of seeking to attach a label of precautionary principle, that's pretty much it. It uses some of the same words but much less of them. It's a different concept again. So you can't just sort of blur all these together in a blender and say, you know, "Let's take the average or the whole vote as to what the different drafters mean". Can I deal briefly with my learned friend's submission about the presumption of re-enactment. We put in writing – and my learned friend referred to this yesterday – that the ..... has limited force where the judicial decision is one of first instance and relatively recent.

My learned friends in writing and orally said some nice things about Osborn J, that the court can't engage in a sort of status assessment of particular judges let alone speculate as to what level of respect the drafters of the Code held that judge in, tempting as it may be, in some cases. My learned friend in writing and yesterday said that Osborn J – I think it's paragraph 89 of Brown Mountain, without going to it – described the statutory framework, including the Code, as labyrinthine, which is certainly true, and that means it's less likely, in our submission, that the ..... been taken to pick up one decision on one labyrinthine aspect of that by a first instance judge as being definitive.

Finally, in terms of the weight of the principle, if I can take your Honours to one authority in our bundle – that's Flaherty v Girgis, tab 12 of our bundle, 162 CLR 574, at page 594. And if I could just invite your Honours to read the page from the top to the last three lines. So it all depends. I'm not saying it never has any weight. Sometimes it does. I think there's at least one High Court competition or judgment. I think it was in South Sydney or – one of those cases in the early 2000s, where there was an issue about whether a particular purpose was subjective or objective and the members of the court said, "Well, look, you know, this was resolved 20 years ago by the Federal Court. There have been numerous decisions since. There have been numerous enactments since, and so we're not inclined to overturn them." But that's a very different sort of circumstance to the ones my friends rely on here.

And in any event, as indicated by Dixon DJ, in the end, it's the text which governs. The argument I'm putting – perhaps I shouldn't criticise counsel for the applicant in Brown Mountains, given who it was, but perhaps surprisingly this argument wasn't put. Perhaps it didn't matter so much in that case. But clearly, the text is fundamentally different and that matters. Finally, on this issue, the issue of materiality, and your Honour Justice Derrington asked my learned friend about this. Your Honours will recall, if we go back to her Honour's judgment, that her Honour indicated, at paragraph 829, that:

> *If I'm wrong about construction, I would have reached the same view anyway.*

And her Honour says similar things at paragraphs 846 and 850 to 851. In their written submissions – so we made this point, obviously, in writing. Our learned friends, in their reply – we made this point at paragraph 39 of our submissions. In their reply – I'm not quite sure of the paragraph – they say the error was material to the outcome and then give a reference to paragraph 20 of the notice of appeal, which relates to ground 10. And I clarified yesterday with my learned friend, when he was finishing this ground, that, yes, indeed, the materiality point relates to what is said vis-à-vis ground 10.

So even her Honour is wrong in constructions, contrary to the submissions I've made, this ground rises no higher than ground 10 as to materiality. Yes, it's paragraph 23 of the reply that my friends made that reference. That's all I wanted to say about ground 7. Ground 8, I will be brief on. So this is a ground about balancing competing purposes within the code and within the precautionary principle in a sense. And VicForests says, to quote the notice of appeal:

> *The code is not directed to the avoidance of all the risks.*

The problem with this ground – with the oddity of it, with respect – is that neither in my learned friends' written submissions, nor in their oral submissions, did they take your Honours to any particular paragraph of the judgment where this error is supposedly manifest. What they said in writing in their primary submissions, at paragraph 55, is that:

> *It is at least implicit that the primary judge didn't consider the principles identified by Osborn J above, as encompassed in the preferred construction of the precautionary principle.*

The complaint seems more theoretical than real. Her Honour didn't find that all risks must be avoided. And if I could just take your Honours to paragraph 846, briefly, of the primary judgment, that seems a rather apposite point, with great respect to her Honour. That's all I wanted to say. I should add there's no reply to what we've said about this in my learned friends' written reply.

Ground 9 is about the precautionary principle and damage, and the complaint is that:

> *Her Honour erred in holding that the precautionary principle requires VicForests to take a precautionary approach when it's dealing with a situation where there are threats of serious or irreversible damage –*

this is the complaint –

> *irrespective of the source of those threats.*

And they complain that Dr Davey's opinions shouldn't have been dismissed as of marginal relevance. They say:

The reference to damage in the code is only to damage that may be inflicted by the decisions being contemplated.

Can I take your Honours to paragraph 843 of the primary judgment. This is the heart of what her Honour considered the precautionary principles, as set out in the code, required, therefore, blah, blah, blah. But it's:

Therefore, in its timber harvesting operations and in the planning for them, VicForests must do those things.

So it's very focused on the timber harvesting operations. And then, if we just jump over to paragraph 849, her Honour said:

In conducting timber harvesting operations or RFA forestry operations –

blah, blah –

VicForests is dealing with that threat of serious damage. The threat of damage to the greater glider is present and VicForests must deal with it. It must deal with it in the manner I've set out in paragraphs 841 to 844 above.

Which includes, of course, 843. And so far as we can detect, VicForests doesn't complain about 843. Its complaint seems more about the discussion in 845, 6, 7 and 8. 848 is the one which talks about Dr Davey's opinion. But can I put this in context. What her Honour found is that, when considering timber harvesting operations, as per 843, VicForests was obliged by 2.2.2.2 and the precautionary principle to assist the possible consequences of its actions on the greater glider, and that has to be understood in the context of the greater glider – pardon the cliché – in the real world, in the environment as it is, facing the threats that it does.

So if there's a range of threats of serious or irreversible damage to the greater glider, of one which is habitat loss – but that's not the only one – in terms of assessing, per 843, how the timber harvesting operations might have effects on the greater glider, you have to look at the actual context in which it lives. And so you can't ignore, for example, the fact there's bushfire risks. I'm not talking about bushfires caused by VicForests. It's a fact of Australian life, to state the bleedingly obvious, that there are bushfire risks and so one of the threats that greater gliders face in this habitat is loss from bushfires.

And so, in a context where they're vulnerable, that's the reason – I will leave aside the fatalistic – broadly speaking, they're vulnerable. That's why we're worried about them and the code applies to them. In terms of assessing how timber harvesting operations may affect them and, you know, what their prospects are in relation to how timber harvesting operates, you look at their prospects in the real world. That doesn't mean VicForests has to become a firefighting agency. It's just that, in assessing the consequences of its actions, it's looking to the actual environment as it is.

The position is analogous, in our respectful submission – it's a broad analogy, but it's useful – to that taken in relation to significant impact in the EPBC Act provisions. I alluded in my earlier submissions but didn't give the reference – my learned friend helpfully gave the reference – to what Branson J said in Booth v Bosworth (2001) 114 FCR 39, at 99. Don't need to bring it up. It's in my learned friends' authorities at tab 6. But in terms of what a significant impact is, it's one that is:

> *Important, notable or of consequence, having regard to its context or intensity.*

You look at context in terms of assessing significance of impact, and that's effectively all that her Honour was saying here, too. And then to turn to paragraph 848 about Dr Davey. Dr Davey was focused very much on, as her Honour notes in the third sentence, I think – was based on the assumption the relevant question was whether forestry operations themselves posed a serious or irreversible threat. Her Honour says:

> *Those questions may be relevant to the section 18 issue.*

Dr Davey was asked to answer a question, which is not the question posed by clause 2.2.2.2:

> *That requires VicForests to take a precautionary approach when it's dealing with a situation –*

etcetera –

> *irrespective of the source of those threats.*

And then the point about wildfire. So in the end, it's just saying look at the thing in context when assessing how your actions may invoke the precautionary principle. There's then a further materiality point about this. Even if her Honour erred, which we submit she didn't, it wouldn't be material. At para 50 of our submissions, we list numerous paragraphs supporting that submission. My learned friends say in reply at para 25 that the paragraphs we identify:

> *…do not reveal any coherent analysis of how the proposed forestry operations, ie, logging, in the schedules coupes constitute of themselves the threat of serious and irreversible damage to the Greater Glider. That being so, the error remains material.*

And that's the extent of their submission on that point. This issue, in any event, will be wrapped up in what my learned friend Ms Watson addresses. She will be dealing with the factual matters. That just – now, grounds 10, 11 and 13 are also factual, so – passing. I will deal briefly and finally with grounds 14 and 15. Ground 14, your Honours will recall, is about the THEZes, the timber harvest exclusion zone, and what Mortimer J said at para 1369. So it's the - - -

GRIFFITHS J: But having regard to Mr Redd's, if I may say so, proper acknowledgement - - -

MR KIRK: Sorry?

GRIFFITHS J: Having regard to what Mr Redd quite properly said yesterday in response to Derrington Js comment, the complete answer to this complaint lies in the fact that her Honour used this finding simply to provide confirmatory support. In other words, where's the adverse effect on any of the rights and interests of VicForests to give rise to any procedural unfairness?

MR KIRK: Yes. What my learned friend Mr Redd said, according to my note, doesn't go very far. I accept that. That was talking about the last sentence in response to your Honour Derrington Js question. That is a complete answer. It's hard to know, with great respect, why the ground is still pressed. It was a passing finding confirmatory of independent findings in the context where there's no doubt THEZes were in dispute as part of VicForests' answer to say, "Look, don't you worry about the future. We've got it all sorted out". Anyway, I've said enough about that. As I say, it's not clear, really, why the ground is pressed.

Finally – and I will also be brief – in relation to ground 15, this is about the findings her Honour made at paras 234 to 235 vis-à-vis Professor Baker. Can I make one brief point and then one mildly longer point. Can I simply commend – I won't read it. I won't even ask your Honours to read it now, but can I commend to your Honours the entirety of para 232 to 235. What her Honour says there is reasoned, fair and pre-eminently a matter appropriate for a trial judge to assess about the weight the evidence of a particular witness should be given and how he presented in court.

I just want to explain the context a little. Perhaps this leads into what my learned junior is going to address. Because it also underscores the surprisingness of this ground. Where the rubber really hit the road, if I can use that cliché again – if your Honours go to para 453, there's a heading – sorry. 455. My apologies. There's a heading above 455 Modelling Versus Detection-based Methods. At 455, her Honour says:

> *One of the major areas of difference in the methods adopted by the experts concerned reliance on modelling versus reliance on detections and ground observations and surveys.*

And I think my learned friend Mr Waller yesterday was extolling the virtues of modelling. If your Honours look at 457, the last half of it – so scroll down a bit – yes. Sorry. It's actually 458. If I could invite your Honours to read 458 – so this is cross-examination of our expert, Professor Woinarski. And then also 460. Well, I can see why Mortimer J might have thought that the approach of Professor Woinarski and similarly Dr Smith had a bit more weight than the approach taken by

VicForests. And just one more brief paragraph: 462. I think it's about the fourth sentence. Just scroll down to 462. Her Honour says:

> *Modelling is no doubt attractive at an organisation and planning level as it enables much work to be done at the desktop; however, I'm satisfied by the opinions of Dr Smith and Professor Woinarksi that in the situation of ..... what parts of native forest should be protected and conserved, etcetera, modelling is inadequate as a primary method, which in my opinion is how VicForests seeks to use it and how VicForests sought to present modelling in its defence in this proceeding on the ground researchers and surveys and detection of work may be more labour-intensive and time-consuming, but it's clearly more reliable.*

And that's the work that my client's witnesses did. There was, as I understand it, as my friend will explain, a very substantial amount of actual factual material, and because it's public ground we had people going out and inspecting it and observing it, finding these habitats. And that's very much part of the context of the case. One final point from me, which is really a very final point, but since I'm about to sit down, if for any reason we are unsuccessful in the appeal, we seek to be heard separately in relation to costs.

MS WATSON: Your Honour, there are two categories of grounds that I'm going to deal with. The first category are the evidence grounds, and the second category are the miscellaneous breaches grounds, which are now reduced to just two grounds. I'm going to spend most of my time on the evidence grounds, and in essence there's a number of evidence grounds. There's 10, 11, 13, 23, 24, 25, 29.

JAGOT J: Is 29 pressed?

MS WATSON: 29 is pressed, your Honour. Yes.

JAGOT J: It is, is it?

MS WATSON: Yes, it is, your Honour.

JAGOT J: Yes. You're right.

MS WATSON: It's the correlative of - - -

JAGOT J: Can you just – so 10, 11, 13 - - -

MS WATSON: 23, 24, 25 and 29.

JAGOT J: And 29.

MS WATSON: But there is a very substantial degree of overlap in these grounds, and what they reduce to, in essence – they reduce to two essential contentions. And the first contention is there was insufficient evidence to make out the applicant's case

on serious damage or significant impact in the scheduled coupes. And the second contention is in the alternative the evidence showed that VicForests was moving to new, better methods in scheduled coupes. There are some discrete aspects of those grounds, and I will come to those, but those two essential contentions answer most or are in issue in most of those grounds.

And to answer those two central contentions, I would like to take your Honours through the trial judge's consideration of the evidence relevant to those grounds and her findings about that evidence, and that will demonstrate why her findings were amply supported by the evidence. And once I've gone through her Honour's reasons, I will be able to move through the grounds quite quickly on the discrete aspects of those grounds, but it will take me a little bit of time to go through her Honour's reason. And I apologise at the outset for that, but I think it's incumbent on me to take your Honours through that because of the challenges that are made to her Honour's reasons.

Before getting into the substance and getting into those reasons, I will make one brief observation about the nature of the factual findings in issue and how that affects the standard of review in this case, and that point was going to take longer, but my learned friend helpfully conceded yesterday that the standard is the glaringly improbable contrary to incontrovertible facts standard of review. And that was the transcript at 142, lines 36 to 39. I will just give your Honours a reference to Aldi Foods v Moroccanoil Israel (2018) 261 FCR 301 that we say is very apt in the circumstances of this case. That authority is in the respondent's cases at part A, at tab 5. I'm just going to take your Honours to one passage of that. So, in that case, Allsop CJ observes at paragraph 2 that:

> *The High Court held in Robinson Helicopter that there are some circumstances in which a trial judge –*

Sorry, your Honours:

> *…there are some circumstances in which an appeal court should not overturn a trial judge's factual findings in the absence of that higher standard of review.*

And those circumstances are set out at the end of paragraph 3. So onto the next page. So your Honours will see about halfway down the paragraph:

> *The findings of fact of the trial judge in Robinson Helicopter were made after a trial of five weeks in which close to 20 witnesses gave oral evidence whose evidence had to be assessed, balanced and evaluated as the case unfolded. The trial judge had the advantages of seeing lay and expert witnesses in assessing their credit and reliability and he also had the advantages of the kind discussed in another case, including the unique benefit of viewing two helicopters of the kind which crashed and the opportunity to consider all of the evidence in its totality and to reflect upon its interaction.*

Now, we say the factual findings that the trial judge made in respect of the scheduled coupes were made in, relevantly, the same circumstances as those I've just taken your Honours to. Those findings were made after a three-week trial. While there were only seven witnesses who gave oral evidence, six of those witnesses were cross-examined extensively, with Mr Paul and the experts being cross-examined over a number of days each. And in her reasons, the trial judge relies heavily on the impressions that she formed of these witnesses and her evaluation of their evidence in the context of the other evidence in the case.

The trial judge also had the benefit of the view and her Honour refers to the view throughout her reasons and I will draw your Honours' attention to that as I move through her Honour's reasons. That said, even if we didn't have to meet that standard of review, we would say that the evidence in this case – this was not a case in which there was insufficient evidence. There was an abundance of evidence. So, your Honours, I will now turn to the relevant parts of the trial judge's reasons in tab 14.

So first, can I take your Honours to paragraphs 852 to 857, and I will deal with these paragraphs in some detail before moving to a higher level because these paragraphs set up the framework for dealing with the evidential questions. Now, it starts, perhaps – it starts with that quote at the top of the page, which is actually an extract from the applicant's submissions below, but her Honour goes on to accept most of that submission, so I would like to just draw your Honours' attention to two parts of that submission. We said what clause 2.2.2.2 requires is a process, and the process required is one of carefully evaluating management options and properly assessing the risk or consequence of those options, so it's a process, and there's that two limbs to that process.

And at 853, the trial judge accepts that, and she says conscientious and careful engagement in a process designed to be attentive to the protection and conservation of threatened fauna and flora is likely to comply with that obligation. And she says for the reasons that she comes to VicForests did not adopt a process of that kind. At 854, her Honour says, "Here's what I have to decide". At 856 to 857, her Honour says, "Here are the matters that I need to consider in deciding the questions in 854", which is really just that two-limb process in the logged and scheduled coupes. Her Honour said:

> *On the evidence, what management options did VicForests evaluate to wherever practical avoid serious damage to the Greater Glider? And on the evidence, what assessments of the risk or consequence of various options did VicForests undertaken in relation to the Greater Glider?*

So that was the evidence that her Honour was looking at to decide these questions. The factual findings begin at paragraph 860. And your Honours will – in fact, if we just scroll up to 859, her Honour makes an observation about what kind of findings she's going to make. So she says at 859 that the first category of findings made are relevant to both the logged and the scheduled coupes. She goes on to make

observations about two essential topics. The first general observation is about what is certain and uncertain about the damage to the Greater Glider from forestry operations, because that will tell us what a precautionary approach might look like.

And if we scroll down to 865, her Honour goes through the evidence of the experts, and she says she accepts the evidence in the preceding paragraphs that the short-term impact of timber harvesting is that all of the gliders in that coupe will either die at the time of harvesting or shortly thereafter. And the clearest explanation of why that's the case is in the extract of evidence at 864, and that's basically because the gliders have – their food is of such low nutritional density that they can't fly very far – they can't glide very far, they can't go to new coupes, they don't move to new coupes. They just stay where they are, and within about a week there's no gliders left. So her Honour said the short-term impact is they all die.

JAGOT J: So where is that one?

MS WATSON: That's at 854, your Honour. I have paraphrased that evidence a little bit.

JAGOT J: Sorry, I'm at 865. Sorry.

MS WATSON: Sorry, your Honour. The 865 is the acceptance of the evidence and 864 - - -

JAGOT J: 864.

GRIFFITHS J: Yes, 864.

MS WATSON: Sorry, your Honour. I might have misspoken. 864 is what I think encapsulates the best explanation of what the short-term damage is.

JAGOT J: So where do we get that from .....

MS WATSON: It's 864. This is consistent with a passage in Tyndale-Biscoe's Life of Marsupials. If you scroll down, in the middle of the paragraph that's currently on the page, you will see, in about the middle of the paragraph:

> *So it's not an lack of unoccupied den sites that prevents gliders surviving, but rather that they are unable to move to and occupy strange habitat.*

I will let your Honours read the balance of that.

JAGOT J: .....

MS WATSON: And if you just scroll to the end of that extract from Tyndale-Biscoe. So then there was a study conducted and you will see, in the paragraph at the top of the page:

In the logged area of the home ranges, the greater gliders were reduced to the unaffected parts of their former home ranges and remaining den sites.

None moved into other unlogged forest and that's – they all died, is the short point. Her Honour then also accepted the evidence that this is likely to be a long-term impact. So it's not just a short-term impact, but it's a long-term impact because the habitat was destroyed and there's no certainty that the gliders will be around to recolonise that forest when it grows back, so this is just – this is the evidence her Honour accepted about what is the impact of timber harvesting operations on the Greater Glider. So her Honour said again 865:

The precautionary approach might be to not harvest the coupes until there's more certainty that adequate habitat corridors would exist for Greater Gliders to survive in and then recolonise the forest.

So that's really just given this risk, given this damage, what might a precautionary approach look like. She then turns to, well, is there anything like that in the evidence. Is there anything suggesting a precautionary approach in the evidence? And she moves to her second category of general observations, and I will move to a high level at this stage, and that is to make observations about VicForests' Interim Greater Glider Strategy. For your Honours' reference, the operative provisions of the Interim Greater Glider Strategy are set out at paragraph 900, which is at 326 of the report.

GRIFFITHS J: Why is it interim?

MS WATSON: It's because there were not prescriptions in place for the Greater Glider under the state regime. There was a draft action statement, and pending those prescriptions – pending the state creating a prescription, VicForests was doing something, so I will take your Honours later to – VicForests recognised that its timber harvesting productions were impacting the Grater Glider. It recognised it had to do something, and what it did was to create the Interim Greater Glider Strategy, but her Honour considered that in great detail and said, at paragraph 1010, the strategy was flawed in design and barely implemented in practice, and I will take your Honours to the evidence of Mr McBride, who was the VicForests employee responsible for designing it, and he conceded that it was unreliable and had very little use as a conservation strategy.

GRIFFITHS J: Was Mr McBride the only witness who was called by VicForests to say anything about what actually happened in the real world?

MS WATSON: There was Mr Paul, who was - - -

GRIFFITHS J: Mr Paul.

MS WATSON: - - - the institutional witness, and he really gave an - - -

GRIFFITHS J: Thank you.

MS WATSON: - - - extensive amount of evidence. Mr McBride was the environmental – the manager – Mr Paul was the manager of environmental performance, and Mr McBride was the manager of biodiversity conservation and research.

GRIFFITHS J: Thank you.

MS WATSON: And he really gave in his cross-examination an extensive amount of evidence that ultimately supported the applicant's case.

GRIFFITHS J: Thank you.

MS WATSON: So the punch line about the Interim Greater Glider Strategy is the judge says it's no good. Her Honour considered that. Sorry. I will just give your Honours a reference. At paragraph 911, the trial judge said that this is the only document produced by VicForests which reals in any detail with the Greater Glider, so this is the whole Greater Glider Strategy. It's everything they're doing for the Greater Glider in the logged coupes. And so her Honour went through the evidence about that strategy very carefully at paragraphs 866 to 941. So her Honour considered evidence about the development of it, Mr Paul's evidence on it, the application and implementation of it, the text of it, the problems in the evidence about it, including significant problems identified by VicForests employees, employees who were not called.

And I commend those paragraphs to your Honours in full, but I will just emphasise a few paragraphs for your Honours now. If your Honours turn to paragraph 920, this was the evidence of Mr McBride about it, and I will just let your Honours read that paragraph. So then the trial judge goes on at paragraphs 921 to 926 to make observations about criticisms made by VicForests employees, and her Honour refers to – there was a draft document that had been marked up by VicForest employees saying, "It's not going to achieve anything. Here are some things you need to do to make it better", and none of those things were done. So that's really covered off at 921 to 926.

At 927 to 931, there's further concessions by Mr McBride, and he was the person who developed the strategy, and he accepted that he didn't take into account how far gliders can glider, which I think in the evidence was about 100 metres, but they need a certain height to glide 100 metres. He didn't take into account how big trees need to be for gliders to land on them, because gliders are quite big, so they need a tree with a diameter of 40 centimetres. And it didn't take into account the fact that the gliders would be pretty nervous about gliding through open territory, because that's where they get picked up by powerful owls.

Sorry. Just in case I didn't take your Honours to it out loud, but the strategy is just to retain where possible in modelled higher quality Greater Glider habitat – VicForests

will endeavour to retain within coupes additional live large hollow-bearing trees that occurred within 75 metres of retained habitat. So that's really that last point about owl predation. Greater Gliders are a keystone food sources for powerful owls. So Mr McBride made further concessions that it wasn't a very good strategy.

At 932, Dr Smith gave evidence that the – and the trial judge accepted that the strategy would have negligible ameliorative benefits for protecting and preventing the decline in numbers of the Greater Glider. At 935, the trial judge observed that there was no evidence, in any event, that it had been implemented, so it's a terrible strategy – hasn't been implemented. And at 937 – I will just take your Honours to the right part and let your Honours read it. From about five lines in, her Honour says:

> *The Interim Greater Glider Strategy was not and is not a careful evaluation of management options to avoid further serious damage to the Greater Glider.*

And I will just let your Honours read the balance of that paragraph. So that paragraph is quite important for the standard of review again, because ..... taken your Honours to. There are observations about largely Mr McBride and the trial judge's impression of Mr McBride. And then at 924 the trial judge says that all of her findings are about the – all of her findings about the Interim Greater Glider Strategy were confirmed by what she saw on the view, so, again, we would say that's important for the standard of review. I will let your Honours read 942.

So just moving to a higher level of generality, the trial judge then turns at 943 to 962 to look at, well, what's the evidence about whether VicForests failed to comply with the precautionary principle in the logged coupes. At 943, her Honour says when those forestry operations were conducted the only protective prescription in place was the Interim Greater Glider Strategy. At 944, she repeats her finding that the strategy cannot be described as the management option carefully evaluated and used by VicForests to wherever practical avoid serious damage to the Greater Glider. So she says, "Well, that's no good. Is there anything else?" Then her Honour turns to 945 to 949. She says there's no surveys in the forest, so that's no good. That's not a careful evaluation of management options. At 950, her Honour concludes that there was:

> *No evidence of any kind that VicForests has assessed the risk or added consequences of a more proactive strategy which was more protective of the greater glider.*

And her final finding is 951 to 956 – her Honour says:

> *All coupes were harvested using high-intensity silvicultural methods, and the evidence –*

At 953, her Honour says –

is that those methods were not designed to avoid, wherever practicable, further damage to the greater glider.

So at 958, her Honour concludes that the forestry operations and the logged coupes didn't comply with the precautionary principle, essentially because nothing of any consequence was done in those coupes to address the threat to the greater glider. It's not a case for margins. It's a case where nothing was done. So then, turning to – and what happened in the logged coupes informs what the trial judge found about the schedule coupes. That's why I have taken your Honours through that in some detail. Her Honour then turns to whether VicForests was likely to fail to comply in the scheduled couples, and that's dealt with at 963 to 1178. Her Honour says:

the real question is –

And this is at 963. Perhaps if you go to 963, and she notes the VicForests offence and the relevant point is the third point, the point being:

If VicForests moves to new silvicultural methods that are better in the scheduled coupes, perhaps then they will comply with the precautionary principle.

So that's really what is in issue in the schedule coupes. Because if they do what was done in the logged coupes, that planning won't comply. And although there are three limbs there, her Honour says at 964, in the first sentence:

It's really only the third point which addresses the meaning and content of the obligation in the precautionary principle.

Now, just a framework paragraph and then there's two paragraphs that summarise the evidence. So I'm not going to take your Honours through it in too much detail, but the framework paragraph of how her Honour considered the evidence in relation to the scheduled coupes is at paragraph 989. So they're the two questions her Honour is deciding:

Does the evidence establish that VicForests will implement these new methods?

That's the first question – and the section question, at (b):

If it does, will those methods comply with the precautionary principle?

Now, your Honours will recall that we're talking about this because the ground that was put against us is that there was insufficient evidence to know what was going to happen in the scheduled coupes and, if there was sufficient evidence, then the court should have been satisfied that VicForests would move to those new methods. So it's an evidence ground and, if your Honours just turn to paragraph 992, here is the evidence. Her Honour summarises the evidence which she considered to answer that first question, will VicForests move to the new methods. And there's just – I'm not

going to take your Honours through it in light of the time that we have, but I will just draw two aspects of that to your Honours' attention, which is (d) and (e).

So (d) were observations that the trial judge made in respect of the structural and organisational features of VicForests and we say that goes to the standard of review. The trial judge was best placed to make those observations and had a real advantage because she had that direct experience with the witnesses and their conduct throughout the trial. And those observations are highly critical of VicForests and the findings are very critical of VicForests and the trial judge has very little confidence that VicForests will move to those new methods. That's what in those paragraphs.

And the other matter going particularly to the standard of review is the Castella Quarry example. So that was a coupe that was visited on the view, and that was VicForests' example coupe of its new methods. So they said, "These are our new methods. You can be assured we will use these methods and they will be better." But your Honours will see, at 1132 to 1156, that the trial judge was not inspired that the new methods would be any better. So that's the question of is there enough evidence to satisfy the trial judge – or was – sorry, I withdraw that. Was the trial judge satisfied that VicForests was likely to implement the new approach? That's the evidence she considered. It's quite substantial.

We then to paragraph 1038, and if we just scroll down to the (a), (b), (c), (d), (e). That's a summary of the evidence the trial judge considered in reaching the conclusion that the new methods would not be any better. And, again, relevantly to the standard of review, it has the Castella Quarry example and the structural or organisational features about VicForests. So I'm not going to take your Honours through that in any more detail. I'm going to move to the grounds of appeal, but we do say there was clearly a substantial amount of evidence that was carefully analysed by her Honour, both about the impact in the logged coupes, what was likely to happen in the scheduled coupes.

So ground 10, there's three limbs to ground 10. They're quite different. The first limb is that there were no sufficiently advanced plans for the scheduled coupes to enable the court to identify and analyse any threat for the purposes of the precautionary principle. Now, this ground actually misfires. It's directed towards the wrong issue is what I ultimately say, and I do that by taking your Honours to the case on which the ground is premised and then to some findings the trial judge made. So it was said yesterday, and it's said in the submissions of VicForests, that the basis of this argument is a finding that was made in MyEnvironment v VicForests [2012] VSC 91.

That's at part A, tab 15 and what I would like to do is just give your Honours the paragraph references – so we might go to it, but just briefly – so that your Honours have the references to understand what was the finding that was made in that case, why was it made and why was her Honour correct to dismiss this argument at 1126 to 1127 of her Honour's reasons. So tab 15, the case is – the response ..... sorry – sorry. So if we just go to paragraph 13. So what – and your Honours weren't taken

to this yesterday, albeit that it was relied upon. So if we go to paragraph 13, what the case was about was that the applicants sought to restrain forestry operations in three coupes, and this was on the basis that they comprised or contained Zone 1A habit for the Leadbeater's Possum. And if you just go to 13, it tells you about the coupes. There's three coupes proposed for logging: Freddo, Gun Barrel and South Col. And if we go down to 16 - - -

GRIFFITHS J: Are those three coupes among the mini coupes in this proceeding.

MS WATSON: No, your Honour.

GRIFFITHS J: I thought I had seen references to Gun Barrel and - - -

MS WATSON: Are they?

GRIFFITHS J: Gun Barrel is certainly - - -

MS WATSON: Gun Barrel and South Col. So ultimately, they weren't harvested, even though that this case didn't succeed. I apologise, your Honour.

GRIFFITHS J: All right. So two of the three pop up here.

MS WATSON: In any event, your Honour, that's so. I'm grateful to my learned friends for that correction. The basis on which – there were two limbs to the case in MyEnvironment, and it's only the first one, so 16(a):

The logging is unlawful because they comprise or contain zone 1A habitat.

So logging had commenced in Gun Barrel and was intended to be commenced in Freddo and South Col. If you go down to paragraph 17(b) and (c), VicForests' contention was, well, Gun Barrel doesn't have any zone 1A and (c), and importantly, there are no final coup plans that have been developed in Freddo and South Col. And VicForests doesn't intend to log any parts of that. So that's VicForests' defence: there isn't any habitat in the first and we don't intend to harvest the zone 1A in the second two.

If we then go all the way down to 251, the trial judge accepted that the evidence didn't establish that there were zone 1A in the first coupe. Sorry, your Honours. It's paragraph ..... that. The trial judge accepted that there was an obligation to protect zone 1A, but then, at 254 and 257, the trial judge says but there isn't any zone 1A in the coupe where harvesting had commenced. If we then go to 258 and 259. So there just simply wasn't the habitat that would have – that was the basis for seeking the injunction. And at 258 to 259 – I will just let your Honours read that.

The evidence was there aren't any coupe plans and there was no evidential basis for concluding that VicForests proposed to harvest the zone 1A in those coupes. So it was really based on the evidence. There might be zone 1A in there. Until there's a

coupe plan, you don't know the precise configuration of what will be preserved and what won't be preserved, because zone 1A is obviously a geographical area, and there's no evidence for concluding that VicForests would harvest it, and that's quite important. So where the applicant's case in MyEnvironment failed because of uncertainty, that's because the allegation was that VicForests – the allegation was that VicForests would log zone 1A, but it failed because it was not established that there was any zone 1A in the first coupe and there was no evidenced on which the judge could conclude that it was likely that VicForests would harvest the zone 1A in the schedule coupes, so it was an evidential finding.

In this case, by contrast, by reference to the evidence I took your Honours to earlier, the trial judge says there is an ample basis to conclude that VicForests will carry out forestry operations in the scheduled coupes; that will happen. If it happens by reference to their current methods, there will be serious damage of significant impact, and I'm not persuaded that they are going to move to new methods and, even if they do move to new methods, they won't be any better. And that's really what the trial judge says. And the critical paragraphs if you want to read her Honour's reasoning are at 1123 to 1125. At 1123 and 1124, she says there's "ample probative basis for my conclusions about what will happen with scheduled coupes. Her Honour describes that basis at 1124, a reference back to her Honour's earlier findings.

And then as against the weight of all that evidence that her Honour considered, VicForests says, no, but those findings weren't open because there were no coupe plans. Now, that ignores the fact that, at 1125, the trial judge rejected the evidence of Mr Paul that the coupe plans would need to be substantially revised. So their argument is based upon, "Well, the coupe plans aren't finalised, so we don't know what we're going to do." The trial judge says, "Well, I don't really accept that. I consider that the coupe plan is pretty reflective of what you will do." And so VicForests says no finalised coupe plans. The trial judge says that doesn't matter. VicForests then says, "Well, you don't know precisely how the coupes are going to be harvested." And that harks back to that MyEnvironment, "Well, you don't know if they're going to take out the zone 1A." But this - - -

GRIFFITHS J: I can't see any reference at what is on the screen, at least, to a coupe plan, as such, in 1125.

MS WATSON: Sorry. So at the top.

JAGOT J: Right at the top. Yes.

MS WATSON: Sorry, your Honour. I should have taken you to it specifically:

> *Although Mr Paul gave evidence to the effect that VicForests would need to "fully replan [the harvesting of the scheduled coupes and other coupes]* - - -

GRIFFITHS J: All right.

MS WATSON:

> *- - - according to [its] new … principles", I do not accept … that the changes are as wholesale or fundamental as VicForests suggests –*

and then she goes on to say and in any event, I don't accept that they:

> *…will … fundamentally alter its forestry operations, and … not in any way that better complies.*

GRIFFITHS J: Okay. Thanks.

MS WATSON: So the other submission put by VicForests which is a variation on a theme is – or perhaps an extension of it – just scroll to the end of the paragraph, but don't go past it. My leader points out that the final sentence that commences "That will, I am satisfied on the balance of probabilities" is consistent with the submissions that my leader was making earlier about threats and threats in the context, and I will just let your Honours read that. So the second point I wanted to make is just that nothing turned on the configuration of the coupe plans in this case. It wasn't that there would be a specific prescription applied and there was no basis to presume it wouldn't be applied. The evidence was all of the methods caused a serious damage. The Interim Greater Glider Strategy was flawed in design and barely implemented in practice. And nothing else would be done. So it's just quite a different evidential context to that in MyEnvironment. And that's what the trial judge at 1126 top 1127. She said what happened in MyEnvironment, that was based on different evidence. It doesn't have direct application in this case. It was just an evidential, factual finding that was made in that case. It's not a legal principle. And we that her Honour was plainly correct to reach that conclusion.

So we say that first limb of paragraph 10 must fail because there was ample evidence upon which the trial judge acted and her Honour carefully and comprehensively assessed that evidence and made findings and no issue was taken with how her Honour did that, it's just said there was insufficient evidence. Well, actually, so that was in the written submissions. A few new arguments emerged in oral argument yesterday. And I will just – I can deal with those quite quickly, because those arguments were all to the effect that the trial judge simply didn't consider various matters. So there's a new argument – this is at transcript 138.45 – and that argument was that the trial judge didn't take into account the basis on which the greater glider was listed; that can be simply answered by referring your Honour's to paragraph 47 of the reasons.

JAGOT J: Sorry. What paragraph?

MS WATSON: Paragraph 47. And that reflects what your Honours Justice Griffiths and Justice Derrington said yesterday: it's not for the trial judge to go behind that listing. Once it is listed, that's what's relevant; it can't seek to avoid providing protection to the species because of the basis on which it was listed. It was

also put, at transcript 139, line 5, that the trial judge didn't take account of the distribution of the Greater Glider up and down the east coast of Australia. I'm actually going to come to that in some detail under grounds 24 and 25 where that argument was originally put in the written submissions, because there are a lot of answers to that. And at transcript 141, line 40, there was another new argument under ground 10, which was that the trial judge simply failed to have regard to the occurrence of the Greater Glider across 1.5 million hectares, the fact that the scheduled coupes were a small fraction of that and the abundance of the Greater Glider and reserves and national parks.

And, again, that can all be simply answered, because her Honour did consider each of those matters, and she rejected the contentions that VicForests put below on the evidence. In terms of the 1.5 million hectares, I think below is the impact – 1.2 million hectares was the contention, and that's dealt with at paragraph 425 to 430 of the reasons. Your Honours will see at 425 – I will just let your Honours read 425 and 426. Now, your Honours would see at 426 that her Honour said, "Well, that modelling is based on a strategy which doesn't predict actual occupancy or presence". And her Honour goes on to consider the evidence of Dr Smith at 427 and 428. And if your Honours go to 429, the second extract at paragraph – in the start of the full paragraph:

> *Dr Smith found that the use of the Greater Glider high quality class 1 –*

That's the mapping:

> *…to be unreliable and inaccurate.*

And if your Honours go to 430, Dr Davey, the expert for VicForests, agreed in the extract in cross-examination that that mapping system was not reliable. So there isn't really 1.5 or 1.2 million hectares. The trial judge said, "Well, that's actually just based on an unreliable mapping system". Then at 935 to 977, her Honour addresses the contention that the impugned coupes were a very small proportion of a total native forest estate, if you want to go to 974. And we see there, at 974:

> *VicForests ought to make a different point which related to the abundance of Greater Glider in reserves and national parks. This was mostly an assumption rather than a proven fact.*

And at 977, the trial judge accepts Dr Smith's evidence that:

> *Dr Smith said the fact that the scheduled coupes were a small fraction of the total forest estate was irrelevant if the evidence showed, as it did, that Greater Gliders were living in and using that fraction.*

So, really, her Honour deals with each of the contentions that habitat for Greater Gliders is over a million hectares, deals with the contention that the scheduled coupes were a small fraction of that and deals with the contention unsupported by

evidence that there was an abundance of Greater Glider in reserves and national parks, so she does deal with it. She simply rejects the contentions that were made below as unsupported by the evidence. She has dealt with it. There's one further matter I will deal with under 10(c) before I move on to the next ground or the next limb of the ground, which is – it was said by my learned friend yesterday that – this is at transcript 143, lines 34 to 36:

> *There's 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. And it was said, "Well, you should just wait until there are plans in place".*

If we just go to paragraph 1122, at the bottom of the paragraph, the last line – I will just let your Honours read the last line: "As I have already found". Sorry. The last two sentences. So it's very difficult to find out – third parties – her Honour found it's very difficult for interested parties to find out when and how VicForests intends to harvest a coupe. The only way to do it is to go and look and see if they're harvesting, but of course – or to take issue with the coupes on the TRP, because there's otherwise no public information about what is happening and when it's happening.

So they were just some discrete aspects that emerged in oral argument yesterday that weren't in the written submissions. The second limb of ground 10 is that the trial judge erred in concluding that the evidence as a whole did not establish a threat. The only submission made in support of that is a reference to the submissions below, and we say plainly that doesn't establish any error in the trial judge's reasons. It doesn't show why her Honour accepted certain evidence, why her Honour rejected certain evidence. It doesn't take any issue with what the trial judge actually found, and it's not for your Honours to have to go back to that reasoning and conduct effectively a de novo review of the evidence. If it hasn't – if the error hasn't been identified, then that's as far as your Honours need to go, and your Honours can dismiss that limb of that ground.

If I move to third limb of ground 10, which is very similar to ground 11, that's that the trial judge should have found that VicForests would move to new better methods and that they would comply with the precautionary principle on the evidence. It said on the evidence the trial judge should have been satisfied of that. Now, I really rely on the passages that I took your Honours through earlier. We've seen what the trial judge was satisfied of. Her Honour carefully considered the evidence, and her Honour carefully analysed the evidence. It's clear what the evidence established, and simply saying as a conclusory statement in a ground, "Well, her Honour should have come to a different conclusion", doesn't establish any error in the very careful analysis of her Honour.

VicForests takes issue with a handful of pieces of evidence that were considered by the trial judge, and we've dealt with those in writing, so I'm not going back to those. But I did want to emphasise one further matter that's not in the written submissions –

not in our written submissions, which is that VicForests says the trial judge didn't consider the evidence about VicForests taking into account pre-harvest surveys that were to be conducted by the department. And we say it's quite surprising that they would rely on that evidence, because the trial judge's findings about that evidence was wholly unfavourable to VicForests.

I will just give your Honours three references. If we go to paragraph 1009 – so just while we're finding that, I will give your Honours some context. The trial judge found there were no surveys in the logged coupes and said this was probably a good method – if you're going to take a precautionary approach to the Greater Glider, the first thing you might want to do is work out if they're there. And if they're there, maybe you do something about it. And VicForests said, "Well, it's fine. In the scheduled coupes because we're going to take into account the department is developing a pre-harvest survey system and we're going to rely on that. So we will have surveys in the new coupes." That was the contention, but the trial judge, at 1009 – this is evidence of Mr Paul. Sorry, your Honours. I will just find the line I want to take your Honours to. So first of all, in the first line, your Honours, it said there was last minute evidence about the development of pre-harvest surveys by the department, and that's really just because that evidence came up – I think that evidence came up in the course of the trial.

GRIFFITHS J: Were the pre-harvest surveys in place for the logged coupes?

MS WATSON: No, your Honour. The passage I wanted to take your Honours to – I commend the whole paragraph to your Honours, of course, but about six lines from the bottom, her Honour says:

> *Mr Paul, in substance, mentioned the DELWP surveys in passing. I find that approach is consistent with the view I've formed about the attitude of VicForests to the conservation of threatened species, including the greater glider, that it is an inconvenience, an interruption to its timber harvesting programs, not a topic it wishes to be pro-active about and something about which it has a defensive and negative approach. None of that is consistent with the precautionary principle.*

And then the final two lines:

> *In the way Mr Paul's evidence was presented about the relatively new department program, I saw no basis to find that this attitude was likely to change in the foreseeable future.*

So that's some evidence about the surveys, that those findings are quite critical of VicForests. If we then go to 1166, you will recall the contention that's put, including on appeal, is that, "Well, now their surveys will comply with the precautionary principle." But the trial judge found, at 1166:

I accept there's some evidence that the department is developing a pre-harvest survey program, but it's not at the comprehensive stage at which Mr Paul's evidence suggested.

And the existence and policy content of the program were not sufficient to affect the view that the trial judge had reached about non-compliance. And then one further paragraph, or final paragraph, at 1173. So these were department surveys. VicForests says, "Well, we will factor these into our forestry operations so that they comply with the precautionary principle." And the trial judge found, at 1174 – I will just let your Honours read 1174. So none of those findings are challenged in the appeal, and we say it's really very unclear how any of those findings made about the pre-harvest surveys could support the conclusion that VicForests would comply with the precautionary principle in the scheduled coupes.

Ground 11 – sorry, your Honours. That completes the three limbs of ground 10. Ground 11 is, in effect, the same as the third limb of ground 10. It's that the trial judge out to have found that VicForests would move to the new, less intensive methods in the scheduled coupes and those methods would comply with the precautionary principle. I rely on what I've said about that already under the third limb of ground 10. I will just add one matter, which is that VicForests previously contended under ground 11 that the trial judge's conclusions were informed by tendency evidence which ought to have been admitted. And we've addressed that extensively in our written submissions, about what the tendency evidence was and what her Honour's findings were, and that was relevant to the scheduled coupes.

And VicForest has now abandoned that ground, which means that they accept the tendency evidence was relevant, they accept the probative value of that evidence and they accept that the trial judge's conclusions were properly informed by that evidence. And the tendency ruling is in the court book part C, tab 792, and we commend that to your Honours, but it is addressed in the written submissions. Significant probative value.

GRIFFITHS J: I mean, when you've got a – each case, obviously, necessarily turns on its own facts and, of course, it's uncontroversial that VicForests carry the burden of making good their grounds of appeal, but when you're dealing with a judgment – the ..... judgement – it's 440 pages long. That's an extraordinarily lengthy judgment by any measurement, and the paragraph that you've taken us to very helpfully, Ms Watson, show the extraordinary detail in which the trial judge has gone to in her endeavours to deal with the evidence. It makes it a very, very difficult task for VicForests to persuade us that the findings made by her Honour were not open on the basis of the evidence, given this quite remarkable detailed reasons for judgment.

MS WATSON: I embrace what your Honour has said. With respect, I embrace all of that. It is a very difficult task, and I would add it's not met because nothing is identified which is said to be glaringly improbable or – sorry, I just wanted the actual standard – contrary to incontrovertible facts. There's a careful assessment of the evidence. The trial judge had an abundance of advantages. It's very carefully and

comprehensively analysed, and no issue is taken with her Honour's reasons. Largely, the issue is taken with her Honour's conclusions, but there's very little to suggest actual error in the reasons and we say that's a flaw that flows throughout a number of the grounds. There is simply no issue taken with the reasons. It's effectively treated as a de novo type hearing, which, of course, as your Honours well know, it's not.

Ground 13 – moving to ground 13 – is that the additional coupes evidence was not rationally capable of affecting the issue of what VicForests was likely to do in the scheduled coupes. What that evidence was was evidence of 18 coupes that VicForests had harvested in the central highlands since the commencement of the proceeding, using the existing silvicultural methods. Not moving to the new methods. Using the existing methods it used in the logged coupes. And that evidence was the basis of the tendency ruling. And the trial judge, in fact, found in the tendency ruling, "This is not tendency evidence. My primary finding is it's just relevant. It's plainly relevant to what VicForests is going to do." But her secondary finding was, "If I'm wrong about that and it is tendency evidence, well, it has significant probative value." And the trial judge deals with that at 1077 to 1117, with the additional coupes evidence.

JAGOT J: Sorry. What was that paragraph number?

MS WATSON: Sorry, your Honour. 1077 to 1117.

JAGOT J: 1077 .....

MS WATSON: Yes, 1077.

JAGOT J: Sorry, my brain.

MS WATSON: Sorry. No, no, there's a lot of numbers.

JAGOT J: Big numbers - - -

MS WATSON: So this is probably a materiality ground in any event because the trial judge says – perhaps go to 1078:

> *At the outset, I should make it clear that even without this evidence I would have reached the same conclusions that I already have.*

So VicForests says on appeal this evidence wasn't relevant, and we say – our first response is, well, it's not material. Her Honour would have reached the same conclusions. In light of that, I'm just going to make three very short points, if your Honours will permit me, about ground 13. The first is it wasn't put to the trial judge that it was irrelevant.

JAGOT J: That it was?

MS WATSON: That it was irrelevant.

JAGOT J: Okay.

MS WATSON: So what's put on appeal is that it was irrelevant, using the language of section 55 of the Evidence Act. So that's why I say it's put that it's irrelevant. What was put below at paragraph 1083 was about the permissibility of drawing inferences. Now, it may be that there's only a small difference but it's not – that's not the same thing. It wasn't put to the trial judge that it wasn't relevant. And nothing is done to identify error. VicForests does nothing to identify error in this part of the judge's reasons, where her Honour said, "I can draw this inference". So no issue is taken with the actual reasoning of the trial judge. That's the first point.

The second point is the trial judge explains how that evidence is relevant at 1088 and 1089, and VicForests doesn't attack that reasoning. They say it wasn't relevant, but they don't say why the trial judge was wrong in concluding that it was relevant. There's no identification of error in the reasons. It's just a conclusory assertion. And then, the third and final point, which is made at 1090, is simply that the trial judge observes – well, VicForests said to the court, "you can have regard to what we're doing at Castella Quarry because this is what we're likely to do in the new schedule coupes", but then VicForests says in the same breath, "but you can't have regard to the 18 coupes that we actually harvested in the last 18-odd months. That's irrelevant".

So really, if Castella Coupe was relevant to the judge's task, then plainly enough the coupes that VicForests was actually harvesting on an ordinary business basis were relevant. But ultimately, the point is not material because it simply confirmed her Honour's finding – well, because it was not necessary to her Honour's finding. That concludes ground 13. Ground 23 – I'm just jumping out of order a little bit to stay with the evidence grounds. Ground 23 turns on the same issues as ground 10. It said that there was insufficient evidence because there weren't finalised coupe plans, but instead of being in relation to the precautionary principle, it's about significant impact.

And if we just go to paragraph 1293 – it's 410 of the report, I think, if that helps. Maybe it doesn't. That's where her Honour deals directly with that uncertainty argument, and her Honour adopts her reasoning about whether there was a sufficient probative basis for the court to make findings in the schedule of coupes in relation to the precautionary principle, in relation to whether there's a sufficient probative basis to make findings about significant impact. So she says at – I will just let your Honours read 1293. So really, everything I've said about ground 10 goes equally to ground 23 in terms of it simply being a misconceived argument that just goes to the wrong point.

It's not how the case was put below, and in any event the trial judge rejected the evidence of Mr Paul that there would need to be replanting, and there was an abundance of evidence on which the trial judge reached findings in the schedule of

coupes, equally for significant impact as there was for precautionary principle. Ground 29 is the parallel ground for ground 11. So it's the ground that, in terms of significant impact, the trial judge should have found that the new methods would be implemented and they would be better, so there was – the trial judge shouldn't have concluded that there would be a significant impact, and your Honours will see at paragraphs 1436 to 1437 – at 1436, her Honour adopts her earlier reasoning about whether VicForests would move to the new methods, and you can see that in her Honour's conclusion at 1436.

Then, her Honour goes on to make some additional observations about why she's satisfied that there will be significant impact. So really, unless – in order to make out this ground, VicForests would have to establish that part of her reasoning that I took your Honours to earlier in that painful detail – there was an error in that reasoning or there was insufficient evidence, or the evidence – somehow that the evidence supported a conclusion that VicForests would move to new systems, and that – what VicForests contends is wholly against the weight of all of that evidence that was analysed, and accepted and rejected by the trial judge. So we say both 23 and 29 should be dismissed for the same reasons as 10 and 11.

There's just two further matters about the evidence grounds, in grounds 24 and 25, but these will take a little bit of time. But after that, there will only be some quite short points to make, just so your Honours know where I'm going. Grounds 24 and 25 – in the written submissions, the argument that is put is about whether there was a sufficient evidentiary basis for the trial judge to make certain findings in the schedule of coupes. That's what's in the written submissions, not the grounds in the written submissions. A different argument emerged yesterday which is not in the written submissions, but I will address it now, which is to the effect that her Honour erred in finding that the damage or destruction of individuals in a species amounts to significant impact, and that's not what the trial judge found.

It's not what the trial judge said about significant impact, but the contention that is put is that somehow the trial judge did err in saying, "well, you were taken to an explanatory memorandum where it said destruction of one individual is not significant impact". That is not what the reasons found, and they were far from this, and far more complex. So if we turn to the significant impact section of the reasons – if we turn to 1343, there her Honour says how the case was put. I will just let your Honours read the first two or three sentences.

So how the case was put – it was put – significant impact at a coupe level, at a coupe group level and at the level of all scheduled coupes and all logged coupes. And your Honours will recall, without taking you to it, that the definition of "action" in section 523 of the EPBC Act, which is at tab 27 – I won't go there – that defines "action" as including a series of activities. So we're no longer restricted to looking at the forestry operation in one coupe, because her Honour could look at an action. She could look at the action which was a single coupe but also a series of activities, being logging, across the Central Highlands in the logged coupes and the scheduled coupes.

So it was put at each of those levels, and her Honour said, "Well, the principal findings I've made are at the much higher level once the threat is aggregated". So her Honour was satisfied about – and I will take your Honours to it – significant impact at an individual coupe level, and that was not because of the destruction of an individual animal – I withdraw that. The major premise, really, was the destruction of habitat. So with the Leadbeater's Possum, because it's so endangered, destruction of colonies was said to be significant, but really, of the Greater Glider, it's put more at the level of destruction of habitat, because that's an enduring loss. So at 1346, her Honour said:

> *The principal basis on which I would express my conclusions about significant impact is either the geographic coupe group level or at the level of VicForests and forestry operations as a whole in the logged coupes as a series of activities or in the scheduled coupes as a planned series of activities.*

And this is where the landscape scale effect is more obvious. But the trial judge says – and if we go to 1348 – even if we descend to the coupe level, the individual coupe level, you still get significant impact. At 1348, she notes that the Leadbeater's Possum has been reaffirmed as critically endangered at the time of the trial. I'm just going to give your Honours some broad references. At 1354 to 1382, her Honour says:

> *The existing prescriptions for the Leadbeater's Possum have no arrested decline.*

At 1383 to 1421, her Honour says:

> *Harvesting has a significant impact, because it doesn't just destroy the possums; it destroys their habitat.*

And this is a point perhaps best expressed at 1386. And that's where her Honour refers to the evidence of Professor Woinarski where he explained that the fate of the Leadbeater's Possum is inextricably linked with the fate of its habitat. So you might kill one possum, but if you leave its habitat, it can be repopulated. But if you kill a possum and you destroy all of the habitat, which then takes – you know, the habitat trees take 100 years to develop hollows starting from the start – then that's a far more enduring impact on the Leadbeater's Possum. Her Honour said at 1425 that:

> *The loss of habitat by timber harvesting for the Leadbeater's Possum is exacerbated by the loss of habitat from wildfire.*

And at 1426 to 1430, her Honour says that the CAR reserve system does not mitigate or ameliorate the effects of forestry operations. So in terms of the important conclusions for significant impact for the Leadbeater's Possum, those are at 1430 and 1431. This is where her Honour summarises that evidence. I will just let your Honours read 1430 and 1431. And the main point I wanted to take from 1431 was that her Honour says the Leadbeater's Possum is critically endangered for a species

in this state in this condition where none of the prescriptions are doing anything to arrest its decline. The removal of habitat in a coupe – so that's really what her Honour is referring to at five hectares to 34 hectares – is a significant impact.

And your Honours will recall the evidence was the Leadbeater's Possums were in the scheduled coupes. They were using the scheduled coupes. And it's at the start of the reasons – they live in families of two to 12 individuals. SO it's quite possible that a significant number of Leadbeater's Possums would be destroyed, and your Honours will also recall there's only 2500 to 10,000 Leadbeater's Possums left – is the estimate. So her Honour said, "Well, in the case of the Leadbeater's Possum, one coupe can be a significant impact".

For the Greater Glider – her Honour then turned to the Greater Glider significant impact at 1435. And her Honour says, well, the Greater Glider is not in as bad a situation as the Leadbeater's Possum, because the Greater Glider is not critically endangered. It only faces a high risk of extinction in the wild in the medium-term future. So it's not about to become extinct, but it's still pretty bad. And her Honour recalls the basis for the listing is the 87 per cent decline in population.

Her Honour also recalls at 1435 that the Central Highlands population is an important population, and I'm about to come to what that means in a minute. Her Honour adopts the findings about what's likely to happen in the scheduled coupes and her Honour has made earlier that I took your Honours through, and she emphasises a number of further matters as to why you would find significant impact at the coupe level. Sorry. I withdraw that. She emphasises a number of further matters about why you would find significant impact. At 1439, her Honour says, well, there's no current protective prescriptions for the Greater Glider, so timber harvesting is not going to be conducted by reference to any protective prescription, so it's more likely to have a significant impact than if there were exclusion zones.

And at 1440 to 1442 – and this goes directly to what was said yesterday – the trial judges says we're not talking about one glider. She refers to Dr Smith's evidence, and Dr Smith went to the logged coupes and counted the tree stems in the coupes, and his evidence is extracted about what he estimated – what density of gliders those logged coupes would have supported, and that's extracted at 1440, and this was an example where my leader referred earlier to the applicant's experts going out to the coupes and doing the actual work on the ground to work out where are the gliders, how many gliders would there be, rather than just doing best top modelling that was found to be inaccurate and unreliable.

At 1441, her Honour records that VicForests' experts accepted that Dr Smith's estimates of how many gliders would have been supported in the logged coupes was reasonable. So the experts agreed about how many gliders would have been supported by those coupes. And at 1442, the trial judge does the maths. So she says there's 17 logged glider coupes. The gross area of those coupes is 540 hectares. Based on Dr Smith's estimates, there may have been populations of up to around 600 affected by the forestry operations. So it's very from a case about there being an

impact on one glider being a significant impact. Her Honour has made a finding at a much higher level in the logged coupes, that an impact of 600 greater gliders is a significant impact. And her Honour goes on in that paragraph to say, "Why? Why is that a significant impact?". Just scroll up a little. Yes. So just in that second half of the line at the bottom:

> *While there may be a point at which the impact of an action on individual members of this threatened species is so negligible as not to be capable of contributing to a finding of significant impact, these numbers that the trial judge is dealing with are beyond negligible. They are a notable effect. Why?*

And her Honour goes on to say:

> *Because they're capable of affecting the genetic diversity of the population of greater gliders in the Central Highlands.*

And then, at 1443 to 1445, her Honour also makes the same observation that was made in respect of leadbeater's possum, which is that the loss of high-quality habitat is a very significant factor in assessing significant impact. It's not just the loss of the gliders who could repopulate, it's the loss of the habitat in which they live, and which takes a much longer time to regenerate. And then, at just one further final reference. At 1447, the trial judge found that the CAR reserve system doesn't ameliorate the impact from forestry operations because you can't assume that there are robust populations in the CAR reserve system. And her Honour, in that paragraph – Dr Smith is being cross-examined, and it's put to him:

> *I want to suggest to you that the conservation advice doesn't mention … in the known regions and sites where greater glider populations are relatively stable and not in decline, many of which are now in the reserve systems.*

This was put to him in cross-examination, and Dr Smith says:

> *I'm not aware of any surveys which have identified stable, large populations which are not in decline. You would need to point me to that reference.*

And the trial judge goes on to say no reference was provided. So the trial judge's conclusions about significant impact on the greater glider are at 452 to 454, and really the point to be made is the findings are made at a landscape level, and those easily qualify as significant impact. But given the value of the habitat in individual coupes, her Honour was also – there was also sufficient evidence for her Honour to make a finding of significant impact at a coupe level.

JAGOT J: Yes. That's at 1455 as well.

MS WATSON: Yes, yes.

JAGOT J: And 1454. You're right. Yes

MS WATSON: Yes. I think at 1452 to 1455 – well, the conclusions on significant impact generally are at 1455, but the conclusions about the greater glider and significant impact are at 1452 to 1454. And just observe there, your Honours, at 1454 her Honour says – what's being said there is that the evidence was:

> *There's a grim picture for the leadbeater's possum. If everything continues in the same manner for the greater glider, we're going to end up in the same place with the greater glider. It's going to be critically endangered.*

And then her Honour finds at the landscape level, etcetera, that the impact is significant. Now, there's one further matter under this ground, which is something that arose yesterday as well, which is the submission that Dr Smith didn't take account of the broader population of greater gliders, and it was said yesterday in oral argument that the trial judge also failed to take account of the greater gliders up and down the eastern coast of Australia. Now, that contention is flawed at a number of levels. I think I've got about four.

First of all, there was no evidence in the proceeding that there are substantial populations of greater glider in New South Wales, Queensland, or East Gippsland. If your Honours turn to 44 of the reasons, this is where the trial judge first deals with the population of greater gliders, and this is where her Honour addresses the basis for the listing, which is that significant decline in population. Now, at 48, her Honour refers to the conservation advice, which states that:

> *There's no reliable estimate of population size for the greater glider, and despite it having a presumed large population, not much is really known about the greater glider population.*

There is, in 49, an estimate that the current population is 100,000 mature individuals across the range. That's an estimate. Your Honours will see at 50 that – sorry, the second half of the paragraph:

> *No population viability analysis had been conducted across the greater population as a whole.*

So really, there's really a state of uncertainty as to what the actual total population is, and the evidence that there is – which is then addressed in paragraph 51 – is about this massive decline in the population. And I will just refer your Honours to four points in 51. So at (a):

> *There's no robust estimate of total population size, but there's declining numbers, occupancy rates and extent of habitat at many sites where it's actually recorded.*

At (b), your Honours will see that:

The most comprehensive monitoring program for greater gliders is in the Central Highlands.

At (d), it says – over the last – over the period 1997 to 2010:

There had been an average decline of 8.8 per cent.

And at (e), that extrapolates to a decline of 87 per cent over a 22-year period, which I believe is three generations. And (n) – and your Honours will recall that it's said in VicForests' submissions – just go down to (n) – that her Honour didn't take account of the population in East Gippsland. It's said at (n) that:

Other evidence supports decline in East Gippsland, in a particular forest in a place where roadside spotlighting used to record frequent sightings: 10 to 15 animals on each occasion. Only a single greater glider was sided in the 18 months leading up to November 2015.

So there's certainly no evidence of there being a robust population of greater gliders. The evidence is to the contrary, and her Honour said at 611 that what is relevant is the decline. So that's my first point about why the contention is flawed. The second point is it's too simplistic to say that, well, there's 100,000 so it's fine. The point that was made by the experts – and I won't take your Honours to it, but this is at 604 to 606 – is that these populations are fragmented, and where they're fragmented, each population needs to be large enough to remain viable, in terms of genetic diversity, in order to survive. So if they're fragmented, it doesn't really – it doesn't – the total number doesn't matter. It matters how big are the populations, are they sustainable where they actually exist.

The third reason that VicForests' contention is flawed, and this is a very short point, is that Dr Smith was clearly cognisant of the complete distribution of species. I won't take your Honours to it, but it's in part C, tab 52. It's the PDF page 11. Dr Smith puts a map of the total distribution into his first report, and it records the distribution up down the east coast. So he has taken that as a premise of his reports that there is this distribution and yet he has given the opinion he has about timber harvesting in the Central Highlands and the impact on the species.

The fourth and final point – and this concludes the evidence grounds – is more substantial, and that is that the VicForests contention fails to take into account the complexity of what is required to conserve a species, and that complexity is addressed at 612 to 616 of the reasons. And we might go there. If your Honours turn to 613. You will see in the first line:

Dr Smith and Dr Davey agree that the greater glider population in the Central Highlands is an important population for the greater glider as a species.

And her Honour goes on to say:

This is a term drawn from the significant impact guidelines.

And those guidelines say:

> *An action is likely to have a significant impact if there is a real chance or possibility that that impact will lead to a long-term decrease in the size of an important population.*

So it doesn't really matter if the greater glider is up and down the east coast, to the extent that it is, which – of course, there's no evidence. What was critical in this proceeding was the experts agree the Central Highlands population was an important population and any impact on that population would be a significant impact because of what an important population it is. And her Honour goes on to describe what an "important population" means. At 613 – at 614 – sorry, your Honours – Dr Davey recognises that the Central Highlands – and this will be the centre of the extract, just – yes:

> *The Central Highlands is close to the limit of the gliders' distributional range.*

So he treats it as an important population. And the reason that a population at the limit of the range is important is given in Smith's reasons – sorry, your Honours – in Smith's opinion at 615. Sorry, your Honour. I just missed the – perhaps, your Honour, if I just take your Honours to 616, which is her Honour's conclusion as to why – the final sentence of 616:

> *Key to the maintenance of genetic diversity is the maintenance of viable separate populations of the species across the geographic range and in locations which are sufficiently widely distributed that events such as wildfire are less likely to destroy all or most populations.*

If your Honours will just give me a minute. There is one other point I wanted to take your Honours to. Sorry, your Honours. It was in 612, in the extract of Dr Smith's evidence. The reason that populations at the limits of the distribution are important is captured in what's said at 612, which is:

> *Loss of populations at extremes results in a loss of genetic diversity.*

So that's why a population is important. It doesn't matter too much for the purposes, in a sense, why it's important. The experts agreed it was an important population, it wasn't in contest that it was an important population and the experts agreed that an impact on an important population was a significant impact. So it was a much more nuanced analysis of what is necessary to conserve an animal than simply saying, "Well, there's plenty of gliders left, so it's okay to destroy the gliders and their habitat in the central highlands." Okay. So we say Dr Smith and the trial judge plainly had had regard to the species in its context, including the evidence about population and including the evidence about the central highlands being an important population.

So your Honours, that concludes the evidence grounds. I have two miscellaneous grounds to deal with. I should get through the first one, potentially, before lunch. The first one – that might be a bit ambitious. The first one is the failure to identify and protect Leadbeater's Zone 1A habitat. So that's ground 18. It's dealt with in the trial judge's reasons, commencing at paragraph 1214, and the relevant descriptions, other than clause 2.2.2.4 of the code, are set out here. And what is immediately relevant are that, under clause 4.2.1.1, VicForests must:

> *Apply management actions for rare and threatened fauna identified within areas affected by timber harvesting operations as outlined in appendix 3, table 13.*

That's then set out at one – it's not set out there, your Honours. Sorry, your Honours. I will go to 1216:

> *where evidence of a value that requires a protection via the establishment or amendment of a SPZ is found in the field, application must be made to the secretary.*

So the issue here was was their Zone 1A habitat in Blue Vein coupe, and this was addressed yesterday at transcript 147. And the way it was put as a ground of appeal yesterday was the department, to whom application would have to be made for an SPZ, had determined that there was no Zone 1A. So that was said to relieve VicForests of any obligation, under 2.1.1.3, on the basis of what appears to be a submission of futility, that there's no point because they won't make one.

Now, there's no authority for that point, but putting that to one side, that doesn't grapple with the trial judge's reasons because you weren't told something very significant yesterday about why the trial judge reached the conclusion she did about breach. What you weren't told was that, separately and independently to these clauses, the department had produced a policy document titled, Threatened Species Survey Standard Leadbeater's Possum. You were told about the policy. I apologise, Hamish. You were told about the policy. There is something you weren't told. I will get to that.

And in that policy, there was a rule that, when identifying Zone 1A habitat, you would create a new patch where any tree was more than 100 metres from another tree. Now, that 100 metre rule is not in the code. It's in the policy. It results in the creation of smaller patches of Zone 1A habitat, and it is, effectively in a different context. We might say it's an impermissible fetter on the provisions of the Code, and that was what was relevant to the trial judge's reasons. So her Honour dealt with that, and I will just deal with this, your Honours, before lunch. Her Honour deals with that at 1247. So we will just scroll down to the balance of the paragraph. So at about four lines down, her Honour says:

Why DELWP decided to take such a technical approach is not revealed by the evidence, and in any event not relevant to the resolution of the applicant's allegations.

Which she says the present context is different:

In the present context, what regulates the conduct of forestry operations under section 38 is the Code and the management standard procedures, and the planning standards.

And she said:

The management standard procedures have a clear prescription about zone 1A habitat, and they say nothing about the need for a less than 100-metre gap between hollow-bearing trees.

And then, she repeats what the actual standard is in the planning standards, which doesn't include that 100-metre gap. And what underlines that reasoning, I say – or we say – is the difference between the legislative instrument which section 38 – which was engaged under section 38, and what that instrument required – and that's what's relevant to section 38: a policy document which is effectively an impermissible fetter on the legislative instrument that is not relevant to how section 38 applies. So we say the trial judge didn't err in finding that the 100-metre rule was not relevant to whether VicForests ultimately breached clause 2.2.2.4, which leads to this zone 1A habitat rule. And we say the trial judge would in fact have erred if she had taken that 100-metre rule into account. Your Honours, I have one more miscellaneous breach to cover, and then I'm finished. But that might be a convenient time.

JAGOT J: How long will that take you?

MS WATSON: Perhaps if that's a convenient time, your Honours, and then I will - - -

JAGOT J: That's fine. We've got to come back anyway, because we've got the reply ..... problem. Okay. Thank you. We will adjourn till 2.15.

ADJOURNED **[12.48 pm]**

RESUMED **[2.16 pm]**

MS WATSON: Your Honours, there's two more grounds, but there's really just one point, and it's grounds 20 and 21, which is the failure to screen timber harvesting from view; that's what's in issue. Both 20 and 21 concern the trial judge's finding

that VicForests had failed to screen its timber harvesting operations from view. Ground 20 is a construction ground and ground 21 is an evidence ground. Now, the trial judge's reasons are at 1263 to 1272. The construction is at 1270. We're not going to take your Honours to that, because it's very short. The only thing I wanted to do was take your Honours to the actual provision in question. I believe it's in part C, tab 151. I will just see if we get the right document. It's at PDF page 33.

JAGOT J: So that big number 33?

MS WATSON: Yes, yes. So it's big number 33 and it's also – it was big 43 and it's PDF 33. Yes. And that's the clause we're looking at. Now, the construction ground is about 5.3.1.5, so it's the lower part of the page there. And what's in issue is whether the words "within 500 metres" and as "seen from the features listed in table 9" should be read into 5.3.1.5. And what we say is those words aren't in the provision. When one looks at the surrounding provisions, these are very prescriptive provisions. So the draftsperson has been very careful to add defined distances where necessary. So if we scroll to the top, there's "within 20 metres"; there's "apply 50 metres"; "apply 50 metres"; that's very careful drafting. 5.3.1.4, "within 500 metres"; it's expressly stated. 5.3.1.5, "no such distance prescription" – and I will come back to the heading – there's no such distance prescription in that. And if we scroll down to the next two clauses, 5.3.1.6, there's a prescription both "between 500 metres and 6.5 kilometres" and "seen from the features listed in table 9".

Now, VicForests, by ground 21, contends that the trial judge erred in not reading "within 500 metres" and as "seen from the features listed in table 9" into 5.3.1.4. So if you could just scroll that up to 5.3.1.5. The point we make is very simple: those words could have been included. The draftsperson had clearly directed their mind to including those prescriptions in other provisions – the surrounding provisions – and the draftsperson did not include them. I accept the heading says Foreground, zero to 500 metres, but, ultimately, what we say is the actual text of the clause is what must govern here. So where those words have been included in the other surrounding provisions that are not included here, there has been a deliberate decision and your Honours wouldn't override that deliberate decision by reading those words into it.

GRIFFITHS J: Do you accept that the standards are to be construed by reference to principles which guide the construction of subordinate legislation?

MS WATSON: Yes, your Honour. And that's addressed in the trial judge's reasons at paragraph 125. What's said there is in relation to the Code, but these documents are incorporated into the Code.

JAGOT J: So does it work by saying – I think their argument was actually not that you read the heading into 5.3.1.5, but you read the opening words of 5.3.1.4 into 5.3.1.5. Isn't that right? Well, what I mean - - -

MS WATSON: That was not my understanding, but - - -

JAGOT J: Well, they're saying read the heading in. Sorry.

MS WATSON: Sorry. I may have been mistaken, your Honour. Either way, our submission would be - - -

JAGOT J: I just - - -

MS WATSON: - - - whether the words are in the heading or whether they're in another clause, if they've been deliberately excluded from the clause in issue, one wouldn't read those words into that clause where they've been left out.

JAGOT J: Do you say that the obligation in 5.3.1.5 applies to the middle ground, as well as the – do you know what I mean? That it sort of sits by itself in that it applies everywhere.

MS WATSON: Yes, applies generally. And that – perhaps if we go to her Honour's reasons, at paragraph 1270.

JAGOT J: Yes.

MS WATSON: It's quite a short – her reasons are, with respect, quite short.

JAGOT J: And that would be the same then for 5.3.2, which also contains the same formulation.

MS WATSON: Yes. Well, really, it's just each clause should be read on its terms.

JAGOT J: Yes. No, I just mean East Gippsland FMA has got the same - - -

MS WATSON: Yes. Yes, your Honour. Yes, and your Honour will see throughout these standards - - -

JAGOT J: Yes.

MS WATSON: - - - that they're addressed to different forest management zones, and they are all slightly different. So there has been careful attention to providing precise prescriptions. They're not all the same. They do differ. And where you've got – where there has been that careful attention to precisely how the clause will be expressed and what distances apply, we say there's no room to read it into a paragraph that has been left out.

JAGOT J: .....

MS WATSON: And your Honours, I just refer your Honours to 1270. The trial judge concludes that:

Its meaning is plain in my opinion. All timber harvesting operations are to be screened from view, and the screening is 20 metres.

GRIFFITHS J: Where are you reading from in 1270?

MS WATSON: Sorry. Sorry, your Honour. It's just at the bottom of paragraph 1270, and it's about four or five lines from the top at the end of the line, starting .....

GRIFFITHS J: 1270?

MS WATSON: Sorry, your Honour. I misspoke. Four or five lines from the bottom. So four or five lines from the bottom - - -

GRIFFITHS J: Okay. Right. Thanks.

MS WATSON: Sorry. So I don't put anymore submissions about that, other than what I've already said, and unless there are any further questions, we - - -

JAGOT J: So your evidentiary submission - - -

MS WATSON: They're finished.

JAGOT J: That's it.

MS WATSON: Sorry, your Honour. And we would accept that it all rises and falls on the construction ground.

JAGOT J: I see. Yes, yes.

MS WATSON: And ground 21 really follows.

JAGOT J: Follows, yes. Okay.

MS WATSON: Otherwise, we rely on our written submissions.

JAGOT J: Thank you. Mr Waller ..... you've got till 4.15. Is that okay?

MR WALLER: Your Honours, we don't wish to say anything in reply.

JAGOT J: Nothing in reply?

MR WALLER: No, your Honours.

JAGOT J: Okay. All right. So - - -

GRIFFITHS J: You've made my day, Mr Waller.

MR WALLER: I'm very happy to hear that.

JAGOT J: We will reserve - - -

GRIFFITHS J: No.

JAGOT J: Urgency. We've got to ask the parties about urgency. No one has known why it got a special fixture in April, but it did. Is there some kind of urgency that we're not familiar with?

MR KIRK: My recollection is it was hard to find common dates in the May sittings.

JAGOT J: In May. Is that what it was?

MR KIRK: And in part, I think that was actually my fault because - - -

GRIFFITHS J: You're a very busy man, Mr Kirk.

MR KIRK: I was a very busy man, and then the Takata airbags case settled. But I think it's actually my fault that - - -

JAGOT J: Okay. So there's no particular urgency with the judgment or anything like that.

MR WALLER: No, your Honour.

JAGOT J: No, okay. All right. Well, in that event, thank you all for your assistance. We will reserve the decision. We've heard what you say about costs, so I think, you know, we will take that into account, obviously, that people would like an opportunity to be heard on costs, and we will let you know when the judgment is ready. You will be notified. Thank you.

MR WALLER: May it please the court.

JAGOT J: Court adjourned.

MATTER ADJOURNED at 2.26 pm INDEFINITELY