

FEDERAL COURT OF AUSTRALIA

Brown v Forestry Tasmania (No 4) [2006] FCA 1729

SUMMARY

ROBERT BROWN v FORESTRY TASMANIA, COMMONWEALTH OF AUSTRALIA AND STATE OF TASMANIA

TAD 17 OF 2005

**MARSHALL J
19 DECEMBER 2006
HOBART**

1 In accordance with the practice of the Federal Court in some cases of public interest, importance or complexity, the following summary has been prepared to accompany the Court's reasons for judgment published today. This summary is intended to assist in understanding the outcome of this proceeding and is not a complete statement of the conclusions reached by the Court. The only authoritative statement of the Court's conclusions is contained in the reasons for judgment which will be available on the internet at <http://www.fedcourt.gov.au>. This summary will also be available on the internet.

2 The proceeding involves an application by Senator Brown made under s 475 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act') concerning alleged contraventions of s 18(3) of the EPBC Act by Forestry Tasmania. Senator Brown has alleged that Forestry Tasmania's forestry operations and proposed forestry operations in the Wielangta State forest are prohibited in the absence of approval by the relevant Commonwealth Minister. It is said that this is because the forestry operations have had or will have a significant impact on three threatened species. Those species are the Tasmanian wedge-tailed eagle, the broad-toothed stag beetle and the swift parrot.

3 The hearing took place over 33 sitting days in Hobart. In addition, the Court conducted site visits over one and a half days at Wielangta and Bruny Island.

4 The Court granted leave to intervene in the proceeding to the Commonwealth and the State of Tasmania, but only with regard to certain issues in an agreed list of issues filed by the parties.

5 The Court agreed that it would provide answers to the agreed issues in a judgment and then hear submissions later about the orders which should be made as a result of those answers.

6 In this judgment, the Court has set out the likely extent of forestry operations in the Wielangta area beyond August 2008 and identified which part of the Wielangta area will be, or is likely to be, subject to forestry operations by Forestry Tasmania in the next 15 years or so.

7 The Court has also identified the extent to which each of the beetle and the parrot is present, or is likely to be present, in the Wielangta area and the extent to which the eagle has nest sites in or adjacent to coupes within the Wielangta area.

8 The Court has found that the forestry operations and proposed forestry operations of Forestry Tasmania in the Wielangta area are likely to have a significant impact on all three species, having regard to their endangered status and all other threats to them.

9 The Court has also found that the Regional Forest Agreement ('RFA') between the Commonwealth and the State of Tasmania is an 'RFA' within the terms of the *Regional Forest Agreements Act 2002* (Cth) ('RFA Act').

10 However, the Court has found that Forestry Tasmania does not have an exemption from relevant provisions of the EPBC Act by virtue of exemption provisions in s 38 of that Act and s 6(4) of the RFA Act. This is because the Court has formed the view that the relevant forestry operations will be, and have been, carried out otherwise than in accordance with the RFA.

11 It will be necessary to allow the parties and the interveners time to reflect on the reasons for judgment and to program the hearing of any further submissions concerning the content of any orders the Court may make as a consequence of the reasons for judgment. For that purpose, a directions hearing will be held at 10am tomorrow, Wednesday, 20 December 2006.

FEDERAL COURT OF AUSTRALIA

Brown v Forestry Tasmania (No 4) [2006] FCA 1729

ENVIRONMENTAL LAW – application for injunction to restrain contravention of *Environment Protection and Biodiversity Conservation Act 1999* (Cth) – forestry operations – Wielangta State forest – threatened species – broad-toothed stag beetle – Tasmanian wedge-tailed eagle – swift parrot – likely extent of forestry operations in Wielangta – whether forestry operations are actions under the EPBC Act – extent to which the beetle and the parrot are present in Wielangta – extent to which the eagle has nest sites in or adjacent to coupes within Wielangta – future forestry operations – whether forestry operations have a significant impact on the three threatened species

ENVIRONMENTAL LAW – Regional Forest Agreement between the Commonwealth and Tasmania – whether a Regional Forest Agreement within the terms of the *Regional Forest Agreements Act 2002* (Cth) – whether forestry operations exempt – whether RFA forestry operations undertaken in accordance with the Regional Forest Agreement – whether forestry operations carried out in accordance with the Regional Forest Agreement

Environment Protection and Biodiversity Conservation Act 1999 (Cth) ss 3(1)(c), 3(2)(e)(i), 18, 18(3), 18A, 19(3)(a), 38, 40(2), 42, 139, 179(3), 179(4), 475, 475(1)(b), 475(6), 523, 523(1)(a), 523(1)(c), 523(1)(d), 524, 524(1), 524(1)(e), 524(2), 524A

Flora and Fauna Guarantee Act 1988 (Vic)

Forest Practices Act 1985 (Tas) s 17(4)

Forestry Act 1920 (Tas) ss 4(1), 8(1)(c)(i)

National Parks and Wildlife Act 1972 (SA)

Regional Forest Agreements Act 2002 (Cth) ss 3, 4, 6(4)

Threatened Species Conservation Act 1995 (NSW)

Threatened Species Protection Act 1995 (Tas)

Booth v Bosworth (2001) 114 FCR 39 referred to

Coote v Forestry Tasmania (2006) 227 ALR 481 referred to

Minister for Environment and Heritage v Queensland Conservation Council Inc and Another (2004) 139 FCR 24 applied

Minister for Immigration and Ethnic Affairs v Ah Hin Teoh (1995) 183 CLR 273 applied

Re Dittfort; ex parte Deputy Commissioner of Taxation (1988) 19 FCR 347 distinguished

Save the Ridge Inc v Commonwealth and Another (2005) 147 FCR 97 distinguished

South Australia v The Commonwealth (1961-62) 108 CLR 130 distinguished

Stocks and Parkes Investments Pty Ltd v The Minister [1971] 1 NSWLR 932 followed
Universal Music Australia Pty Ltd v Sharman License Holdings Ltd (2005) 220 ALR 1 cited

**ROBERT BROWN v FORESTRY TASMANIA, COMMONWEALTH OF
AUSTRALIA AND STATE OF TASMANIA**

TAD 17 OF 2005

**MARSHALL J
19 DECEMBER 2006
HOBART**

GENERAL DISTRIBUTION

**IN THE FEDERAL COURT OF AUSTRALIA
TASMANIA DISTRICT REGISTRY**

TAD 17 OF 2005

BETWEEN: ROBERT BROWN
Applicant

AND: FORESTRY TASMANIA
Respondent

COMMONWEALTH OF AUSTRALIA
First Intervener

STATE OF TASMANIA
Second Intervener

JUDGE: MARSHALL J

DATE OF ORDER: 19 DECEMBER 2006

WHERE MADE: HOBART

THE COURT ORDERS THAT:

1. The proceeding be adjourned to 10am on Wednesday, 20 December 2006 for a directions hearing to allow submissions to be made on the orders which the Court should make as a consequence of the accompanying reasons for judgment.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

**IN THE FEDERAL COURT OF AUSTRALIA
TASMANIA DISTRICT REGISTRY**

TAD 17 OF 2005

BETWEEN: ROBERT BROWN
Applicant

AND: FORESTRY TASMANIA
Respondent

COMMONWEALTH OF AUSTRALIA
First Intervener

STATE OF TASMANIA
Second Intervener

JUDGE: MARSHALL J

DATE: 19 DECEMBER 2006

PLACE: HOBART

REASONS FOR JUDGMENT

1 Tasmania is an island of unparalleled beauty. It contains wild and picturesque landscapes. Among those landscapes is the Wielangta forest. Wielangta means ‘tall forest’ in the language of the ‘Palawa’, the indigenous people of Tasmania.

2 Wielangta is about 50 kilometres north-east of Hobart, near the towns of Orford and Copping. The forest consists of two principal types of eucalypt – dry and wet sclerophyll. It is home to, or used by, a variety of species of wildlife, including the swift parrot, the broad-toothed stag beetle and the Tasmanian wedge-tailed eagle.

3 The applicant, Senator Robert Brown, commenced this proceeding under s 475 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (‘EPBC Act’). He seeks an injunction to restrain the respondent, Forestry Tasmania, from undertaking any forestry operations, or any activities in connection with forestry operations, in the Wielangta forest. He also seeks the following declarations:

- that the Tasmanian Regional Forest Agreement 1997 (‘RFA’) is not a regional forest agreement within the meaning of the EPBC Act and the *Regional Forest Agreements Act 2002* (Cth) (‘RFA Act’);

- that Forestry Tasmania's forestry operations in the Wielangta forest are likely to have a significant impact on:
 - the broad-toothed stag beetle;
 - the wedge-tailed eagle; and
 - the swift parrot;
- that Forestry Tasmania's forestry operations in the Wielangta forest have not been undertaken in accordance with the RFA; and
- that Forestry Tasmania's forestry operations in the Wielangta forest will not, under the present forest practices system in Tasmania, be undertaken in accordance with the RFA.

4 Pursuant to s 475(1)(b) of the EPBC Act, an interested person (other than an unincorporated organisation) may apply to the Court for an injunction if another person has engaged, is engaging, or is proposing to engage in conduct constituting an offence or other contravention of the Act.

5 Section 475(6) defines 'interested person' with respect to individuals. The definition includes an Australian citizen who has engaged in a series of activities for protection or conservation of, or research into, the environment at any time in the two years immediately before the conduct or, in respect of proposed conduct, two years before the making of the application for the injunction. It is not in dispute that Senator Brown is an interested person for the purposes of the EPBC Act and has the standing to seek the relief sought in the application. There is a dispute, however, about whether issues concerning the RFA are justiciable in this Court.

6 Forestry Tasmania is a corporation established under the *Forestry Act 1920* (Tas). It has extensive functions, including the exclusive management and control of all State forest in Tasmania.

7 The State of Tasmania and the Commonwealth of Australia are the parties to the RFA and have been permitted to intervene in the proceeding. The interventions are limited to certain issues contained in a list of issues agreed between the parties.

THE AGREED LIST OF ISSUES

8 The parties requested the Court to deal with an agreed list of issues in the proceeding prior to making any orders. The Court agreed to do so. The issues identified in the amended agreed list of issues dated 15 September 2005 are:

- 1 the likely extent of forestry operations in the Wielangta area beyond August 2008;
- 2 whether forestry operations in WT017E and WT019D and proposed forestry operations in coupes other than WT017E and WT019D are actions for the purposes of the EPBC Act;
- 3 the extent to which the beetle is present or likely to be present in the Wielangta forest area;
- 4 the extent to which the wedge-tailed eagle has nest sites in or adjacent to coupes within the Wielangta forest;
- 5 the extent to which the swift parrot is present or likely to be present in the Wielangta forest area;
- 6 what part of the Wielangta forest will be, or is likely to be, subject to forestry operations by the respondent in the next approximately 15 years;
- 7 whether the forestry operations referred to in paragraph [issue] 2 are likely, having regard to the endangered status of the three species and all other threats to the three species, to have a significant impact on the three species;
- 8 whether the RFA is an RFA within the terms of the RFA Act;
- 9 (a) whether the respondent has an exemption from Part 9 of the EPBC Act by virtue of section 38 of the EPBC Act and section 6(4) of the RFA Act; and
 (b) whether forestry operations in the Wielangta forest area will be or have been carried out in accordance with the RFA by reference to clause 68.

9 These reasons for judgment address the amended agreed list of issues only. I set out below my findings of fact and determination of legal issues on those matters. I make no orders at this stage, other than adjourning the proceeding to permit submissions to be made on the orders which should follow from these reasons for judgment.

THE SPECIES

The eagle

10 The Tasmanian wedge-tailed eagle is one of two subspecies of the wedge-tailed eagle. The other is found on the Australian mainland and in New Guinea. The Tasmanian subspecies is Australia's largest bird of prey. It is almost one metre long, it can weigh up to 5.3 kilograms and have a wing span as wide as 2.2 metres. It builds large nests. The eagle has a large wedge-shaped tail which, when combined with its low wing-loading, facilitates slow flight through forest. It also has very good braking and manoeuvrability for a bird so large.

11 The eagle has been isolated in Tasmania for about 10 000 years, since Bass Strait last formed. It is not capable of crossing Bass Strait. It has a key ecological function as a top-predator. According to the report of the Court appointed expert on the eagle, Mr Nicholas Mooney, it also has a special value to Tasmanian aboriginals who, like many Europeans and other Australians, regard it as an icon.

12 The eagle is also territorial, sensitive to disturbance and is a shy breeder, mainly nesting in old growth eucalypt forest in large, stable trees, sheltered from prevailing winds.

The broad-toothed stag beetle

13 The broad-toothed stag beetle is one of the rarest animals in Tasmania. Stag beetles (family *lucanidae*) comprise a small group of about 950 species worldwide. They are believed by scientists to have originated more than 200 million years ago and were once more common. They are mainly found in old growth forests in tropical areas and in moister parts of temperate zones.

14 Stag beetles usually breed in rotting wood on the forest floor in old growth or largely undisturbed forests. They are one of the first group of insects to abandon disturbed forests and can be an indicator of forest decline. As a witness in the proceeding, Mr Jeffrey Meggs, accepted, 'the planet could survive perfectly well without human beings, but would die without ants' and that if the world did not have beetles it would be 'a very different place'.

The swift parrot

15 The swift parrot is a small, fast-flying, nectarivorous parrot which exists predominantly in eucalypt forests in south-eastern Australia. It only breeds in Tasmania. It crosses Bass Strait to Tasmania from August to September and returns to the mainland in March to April. It is bright grass green, with red, bordered by yellow, on the throat, chin and forehead. It has blue markings on the crown, the cheeks and the wings, as well as red patches on the shoulder and under the wings.

16 The swift parrot's main breeding range is on the east coast of Tasmania extending from Binalong Bay in the north to Southport. Within this range, breeding swift parrots are concentrated in an area of about 500km², ranging from Little Swanport in the north to Woodbridge and Bruny Island in the south. This area includes Wielangta.

ISSUE 1: THE LIKELY EXTENT OF FORESTRY OPERATIONS IN THE WIELANGTA AREA BEYOND AUGUST 2008

The Wielangta area

17 For the purposes of this proceeding, the 'Wielangta area' is the area of State forest contained within the Wielangta Forest Block. The Wielangta Forest Block comprises forested and non-forested land, including agricultural land. There are different types of tenure within the Block, including private land, reserved land, Crown land and State forest.

18 The Wielangta area is close to the east coast of Tasmania, near Maria Island. It is constituted by varied topography. It has a diverse mix of forests. There are patches of rainforest and much wet forest where blue gum and swamp gum trees flourish. It also has dry forest where peppermint, stringybark, black gum and white gum trees are found. Much of the area is 'old growth forest', containing trees of at least 110 years of age.

19 In the 1820s, sheep farmers established sheep runs and shepherds' camps in the Wielangta forest. Private land owners engaged in uncontrolled clearing until 1910 when the State of Tasmania gazetted 6000 acres as a timber reserve.

20 In 1911, the East Coast Timber Company built the Wielangta Mill. It also purchased the rights to log the entire 6000 acres of timber reserve. The Wielangta Mill operated from

1911 to 1925, when it was abandoned. It was destroyed by fire in 1928.

21 Logging has occurred within the Wielangta area in varied forms (including clear felling) until very recently and, but for this proceeding, further logging would have occurred.

Forestry operations

22 Activities which fall within the term 'forestry operations' as defined by s 40(2) of the EPBC Act and which are relevant to this proceeding are:

- the managing of trees before they are harvested;
- the harvesting of forest products (live or dead trees, ferns or shrubs or parts thereof);
- related land clearing;
- regeneration (including burning); and
- transport operations.

23 Section 4(1) of the *Forestry Act* refers to 'access construction' in its definition of 'forestry operations'.

24 Forestry Tasmania contends that, for the purpose of this proceeding, the Court should limit the definition of 'forestry operations' to those mentioned in the applicant's second further amended application, that is:

- the harvesting of timber and the clearing of trees; and
- the construction of a road in connection with the harvesting of timber and the clearing of trees.

25 Forestry Tasmania also submits that in considering 'forestry operations', the Court should restrict itself to a consideration of the harvesting and road construction activities 'that are alleged to be causative of a significant impact to each of the three species the subject of the application'.

26 The proposed limits on the term 'forestry operations' urged by Forestry Tasmania would exclude activities such as burning and regeneration. The parties requested that I deal

with the likely extent of forestry operations in the Wielangta area beyond August 2008. That issue, as drafted, was not confined to the grounds referred to in the application. The application is not a pleading. In any event, the evidence traversed the issue of burning and regeneration, especially with reference to the broad-toothed stag beetle. I see no basis for any such restriction.

The likely extent

27 Forestry Tasmania refers to its statutory functions in s 8(1)(c) of the *Forestry Act*, which gives it, ‘the exclusive management and control of’:

- ‘(i) all State forest; and
- (ii) all forest products on State forest including the processing, removal, selling or other disposition of those forest products; and
- (iii) the establishment and tending of forests, and all forest operations, on State forest; and
- (iv) the granting of all permits, licences, forest leases and other occupational rights, and the making of all contracts of sale, under this Act.’

28 Forestry Tasmania contends that in carrying out those statutory functions it is likely that it will engage in ‘the managing of trees before they are harvested’. However, it submits that whether there will be further ‘forestry operations’ within the Wielangta area beyond August 2008 is a matter of speculation. More accurately expressed, it is certain Forestry Tasmania will manage trees before they are harvested, the real question is whether it is likely that any harvesting will occur beyond August 2008 and, if so, to what extent.

29 Forestry Tasmania plans its harvesting operations by dividing State forest into coupes. These coupes are given designations, such as WT017E and WT019D (colloquially known as 17E and 19D), which are the coupes referred to in the applicant’s second further amended application. The ‘WT’ stands for Wielangta and the numbers and additional letter are the particular coupe designation.

30 State forest in Tasmania is classified as within one of three primary zones: production, conditional or protection.

31 State forest within the Production Zone is available for wood production. These areas include planned coupes. Areas within the Conditional Zone are usually small and considered

to raise operational problems making harvesting or regeneration difficult. The Protection Zone consists of land from which wood production is excluded, except for the purposes of approved research or salvage operations, in order to protect special values.

32 Areas of State forest given a coupe designation are areas which Forestry Tasmania plans to harvest in the future. Ordinarily, provisional coupes intended for harvesting over the next three years are listed in the annually produced Three Year Wood Production Plans. Ten year 'tactical scenarios' covering the ensuing years four to 10 are also developed from time to time but are not usually definitive.

33 The Three Year Wood Production Plans and the 10 year tactical scenario had not been completed for 2005/2006 when Mr Thomas Kelley gave evidence. Mr Kelley, a Resource Analyst employed by Forestry Tasmania, gave evidence in May 2006 that:

'there is a three year plan that has almost been concluded now because it's almost June and we're hoping that the planners will be able to move on beyond the three years for it to move to a five or 10 year scenario by August or so.'

34 Mr Michael Miller is employed by Forestry Tasmania as the Planning Co-ordinator for the Derwent District. Wielangta is within the Derwent District. Mr Miller acknowledged that the Three Year Wood Production Plans identify a series of contingency coupes which can be 'brought on line' at short notice if the need arises. Mr Miller also said that the Plans are the best prediction available for what will occur within a three year time frame.

35 Forestry Tasmania acknowledges there are areas of State forest within the Wielangta Forest Block, constituting about 10 per cent of the Block, which are potentially available for harvesting in the future. This is because there are unharvested areas within the Wielangta area which are referred to in relevant mapping as 'provisional coupes'.

36 The applicant points to 11 coupes provisionally planned for logging operations between 2008 and 2013. He also refers to many other provisional coupes which are available to be logged after 2013, or before then, if Forestry Tasmania varies its production plans.

37 The applicant submits there are 17 coupes in the Wielangta area that are provisionally scheduled for harvesting between now and 2013. He contends that while the total number of

hectares for each coupe to be logged cannot be known until a Forest Practices Plan is certified by Forestry Tasmania, or even perhaps until the operations are completed, the history of logging in the area points overwhelmingly to the conclusion that provisional coupes will be logged over the next 10 years.

38 The Wielangta area has been a constant source of wood products for many years. There is no reason to suggest, particularly having regard to the evidence of Mr Kelley, that Forestry Tasmania no longer desires that it be a source of wood products. A map tendered in the proceeding and labelled exhibit BQ shows the scheduling of coupes in Wielangta until 2013.

39 Forestry Tasmania contends that in the absence of any current certified Forest Practices Plans, or other evidence of proposed forestry operations, it would be mere speculation to make any findings about the likelihood of forestry operations in the Wielangta area beyond August 2008.

40 To deal with an agreed issue titled 'the likely extent of forestry operations in the Wielangta area beyond August 2008', necessarily involves the Court looking to likely future conduct. The best guide to future conduct is past conduct. The past conduct of Forestry Tasmania in using the Wielangta area as a source of wood products and its planning to do so in the future makes it reasonable to predict that, in the ordinary course of events, forestry operations will occur in the Wielangta area beyond August 2008. In all likelihood, on current planning, this will extend to 2013 and perhaps beyond then.

ISSUE 2: WHETHER FORESTRY OPERATIONS IN WT017E AND WT019D AND PROPOSED FORESTRY OPERATIONS IN COUPES OTHER THAN WT017E AND WT019D ARE ACTIONS FOR THE PURPOSES OF THE EPBC ACT

The setting

41 The applicant contends in his second further amended application that Forestry Tasmania's forestry operations in coupes 17E and 19D constitute the taking of an 'action' for the purposes of s 18(3) of the EPBC Act.

42 Section 18(3) of the EPBC Act provides:

'A person must not take an action that:

- (a) has or will have a significant impact on a listed threatened species included in the endangered category; or*
- (b) is likely to have a significant impact on a listed threatened species included in the endangered category.*

Civil penalty:

- (a) for an individual – 5,000 penalty units;*
- (b) for a body corporate – 50,000 penalty units.'*

43 Each of the swift parrot, the broad-toothed stag beetle and the Tasmanian wedge-tailed eagle is listed as an endangered species pursuant to the EPBC Act and the *Threatened Species Protection Act 1995* (Tas).

44 Under s 179(4) of the EPBC Act, a native species is eligible to be included in the endangered category at a particular time if, at that time, it is not critically endangered and 'is facing a very high risk of extinction in the wild in the near future...'. Section 179(3) makes a native species eligible to be included in the critically endangered category at a particular time if, at that time, 'it is facing an extremely high risk of extinction in the wild in the immediate future...'.

Are the relevant forestry operations capable of constituting an 'action' under the EPBC Act?

45 Chapter 8 of the EPBC Act is headed 'Definitions'. Sections 523, 524 and 524A deal with what is and what is not an 'action' for the purposes of the EPBC Act.

46 Under s 523, action 'includes' a project, a development, an undertaking, an activity or series of activities and any alteration of any of these things. There is no reason to doubt that forestry operations would fall within s 523.

47 Section 524 is headed, 'Things that are not *actions*' (original emphasis). Under s 524(2), a decision by a government body to grant 'a governmental authorisation (however described) for another person to take an action is not an ***action***' (original emphasis). Section 524(1) defines 'government body', in s 524(1)(e), to include 'an agency of a State...'.

48 As Black CJ and Moore J said in *Save the Ridge Inc v Commonwealth and Another*

(2005) 147 FCR 97 (*Save the Ridge*), 105 at [19]:

‘The apparent purpose of s 524 is to take the process of authorisation by governments or government agencies outside the purview of the EPBC Act by excluding certain decisions by those bodies from the concept of relevant “action”.’

49 Forestry Tasmania is an agency of the State of Tasmania. It submits that as such it has granted to Gunns Limited (*‘Gunns’*) a ‘governmental authorisation’ under s 524(2) to conduct forestry operations in coupes 17E and 19D. It relies on *Save the Ridge* where a Full Court of this Court held that Ministerial approval and gazettal of changes to the National Capital Plan of the Australian Capital Territory, necessary to permit the construction of a road, was a decision of a Commonwealth agency to grant a governmental authorisation to the Australian Capital Territory. Forestry Tasmania contends that an authorisation, when issued by a government body, will be a ‘governmental authorisation when issued by the governmental body in its capacity as such’ under s 524(2) of the EPBC Act.

50 Forestry Tasmania says the Forest Practices Plans for coupes 17E and 19D constitute the formal documents by which it authorised Gunns to conduct forestry operations. It submits that on this ground alone the application before the Court must fail.

51 The applicant contends that the submission of Forestry Tasmania referred to above depends on a characterisation of Forestry Tasmania’s actions (*‘that is, logging, roading and the like’*) not as the physical activities involved, but as a product of a process where it authorises such activities to occur.

52 The applicant submits that his case is not directed to, and does not seek to impugn, the granting of any authorisation by Forestry Tasmania but is directed to the carrying out of forestry operations, which are actions within the EPBC Act and are not governmental authorisations.

53 On this aspect of the proceeding, I prefer the applicant’s submission. *Save the Ridge* is distinguishable because the attack in that case was on the steps taken to amend a plan which would authorise the construction of a freeway extension. There was no attack on the construction of the freeway extension. Here, there is no attack on a Forest Practices Plan, but

on the work which is planned to take place under a Forest Practices Plan.

54 Further, it is not to the point that the actual forestry operations will be undertaken by Gunns, or sub-contractors to Gunns, when s 8(1)(c)(i) of the *Forestry Act* vests in Forestry Tasmania exclusive management and control of all State forest. See also *Coote v Forestry Tasmania* (2006) 227 ALR 481 at 487, per Gummow J.

55 The Commonwealth, which was granted leave to intervene with respect to issue two, did not support the submission of Forestry Tasmania on the application of s 524(2) of the EPBC Act.

Should the Court decline to make findings about proposed forestry operations in coupes other than 17E and 19D?

56 Gunns completed harvesting in coupe 17E on 16 August 2005. Mr Alec Dean, the then supervising officer from Forestry Tasmania, signed the final Forest Harvesting Monitoring Report on 25 August 2005. There is a current certified Forest Practices Plan for coupe 19D. It estimates that harvesting would have been completed by 30 June 2006. This proceeding ensured that did not happen. The Forest Practices Plan for coupe 19D expires on 31 August 2008. Implementation of that Plan will see the completion of roading and the harvesting of trees in the coupe. Roading is intended to be carried out by Gunns and harvesting by a contractor engaged by Gunns.

57 Forestry Tasmania contends that the applicant does not allege any forestry operations, other than the harvesting of trees and road construction potentially conducted by it, as causing a significant impact on any of the species the subject of the proceeding.

58 Forestry Tasmania submits that no evidence has been led by the applicant concerning forestry operations undertaken by it at any other coupes at Wielangta. Consequently, Forestry Tasmania contends that the Court should not make any findings in relation to any coupes, other than 17E and 19D.

59 The applicant contends that Forestry Tasmania has misunderstood his case. He submits that apart from the effect of roading and harvesting, he has adduced evidence of the impact on the broad-toothed stag beetle of regeneration burns and machinery disturbance and

the impact on the Tasmanian wedge-tailed eagle caused by general human activity associated with forestry operations.

60 The Commonwealth, supported on this aspect of the proceeding by the State of Tasmania, also contends there is no meaningful evidence before the Court concerning the precise scope, location or timing of any 'proposed forestry operations' except in respect of coupes 17E and 19D.

61 The Commonwealth submits that in the absence of sufficient detail about proposed forestry operations, it would be inappropriate for the Court to determine whether such proposed operations are actions for the purposes of s 523 of the EPBC Act.

62 This approach complicates a simple issue. The forestry operations in coupes 17E and 19D constitute an action for the purposes of the EPBC Act. Forestry operations conducted and to be conducted in those coupes fit within the definition of 'action' in s 523. When forestry operations which are proposed to be carried out in other coupes are actually carried out, those operations will also constitute an action within s 523. Additionally, insofar as coupes have been identified as available for harvesting in the medium term such as in exhibit BQ and exhibit S, such planning is 'a project' under s 523.

63 On one view, the actual or likely impact of any proposed forestry operations outside coupes 17E and 19D is a different issue from whether forestry operations in the 11 coupes planned provisionally for harvesting between 2008 and 2013 also constitute an action for the purposes of the EPBC Act. However, it is artificial to seek to break down the forestry operations of Forestry Tasmania in Wielangta into a series of individual actions and thereby avoid scrutiny under the EPBC Act. I accept the submission of counsel for the applicant that the relevant 'action' for the purposes of this proceeding is Forestry Tasmania's forestry operations in Wielangta. Although there are varying degrees of certainty concerning the extent of forestry operations in individual coupes, there is evidence that harvesting operations are planned for Wielangta up to and including 2013.

64 Areas of Wielangta which are planned to be harvested have been assigned provisional coupe numbers. As at 25 October 2005, Forestry Tasmania's 'current tactical plan' identified the following coupes as being available to be logged 'post 2007': 9F, 12C, 19B, 43E, 10G,

17D, 19C, 44A, 10B, 17F and 19E. Additionally, Forestry Tasmania's Three Year Wood Production Plans 2004-2005 to 2006-2007 refer to coupes including 19C, 19D, 42C, 44G and 43I.

65 I accept the submission of counsel for the applicant that the provisional coupling of Wielangta is analogous to the concept of sub-dividing land for the purpose of performing work on that land. The activities in total constitute a 'project' for the purposes of s 523(1)(a) and/or an undertaking for the purposes of s 523(1)(c) and/or an activity or series of activities for the purposes of s 523(1)(d) of the EPBC Act.

Answer to issue two

66 The answer to issue two is that the forestry operations of Forestry Tasmania in coupes 17E and 19D and proposed forestry operations in coupes other than 17E and 19D constitute an 'action' for the purposes of the EPBC Act. If that view is wrong, at least there is no dispute that the forestry operations in coupes 17E and 19D are an 'action' for the purposes of the EPBC Act.

67 Whether the 'action' or 'actions' answer the description in s 18(3) of the EPBC Act so that the 'significant impact' aspect is satisfied is examined later.

ISSUE 3: THE EXTENT TO WHICH THE BEETLE IS PRESENT OR IS LIKELY TO BE PRESENT IN THE WIELANGTA FOREST AREA

68 There is no dispute that the broad-toothed stag beetle is present in the Wielangta forest area in wet and damp forest. The applicant contends, and Forestry Tasmania denies, that the beetle is also likely to be present in areas of dry forest.

69 The evidence before the Court given by expert witnesses supports the view that the beetle is found in areas of both wet and damp forest. One of the applicant's expert witnesses, Dr Peter McQuillan, has found it in dry forest. Mr Meggs, an expert witness called by Forestry Tasmania, speculated that the specimen found by Dr McQuillan 'may have randomly dispersed from adjacent wet forest habitat'. I accept that the beetle has been found by Dr McQuillan in dry forest and have no reason to disbelieve him when he says he found it there. At the very least, I am satisfied the beetle is likely to be present in damp areas or

transition zones within dry forest.

70 The extent to which the beetle is likely to be present in areas of dry forest is largely unknown, but the evidence of Dr McQuillan, under cross-examination, suggests that one beetle may be found for every 50 hectares or more of dry forest.

71 The beetle is classified as endangered because it is extremely rare. It has a very low population density within its known range. I accept the submission of the applicant that the low density of the beetle makes it difficult to identify the actual, as distinct from potential, habitat.

Answer to issue three

72 The answer to issue three is that the beetle is likely to be present in the Wielangta forest area in low population densities mainly, but not exclusively, in areas of wet and damp forest and also in damp areas or transition zones within dry forest, albeit in even lower densities than in areas of wet and damp forest.

ISSUE 4: THE EXTENT TO WHICH THE WEDGE-TAILED EAGLE HAS NEST SITES IN OR ADJACENT TO COUPES WITHIN THE WIELANGTA FOREST

73 There are six eagle nest sites adjacent to coupes within the Wielangta forest. There are a few other nest sites elsewhere within the Wielangta Forest Block. So much is clear from the evidence of Ms Vanessa Thompson, a Senior Forest Planner, Derwent District employed by Forestry Tasmania and the evidence of Mr Mooney, the Court appointed expert witness on the eagle.

74 Forestry Tasmania, in its written submissions, concedes that it is possible that there are other nest sites within Wielangta that are currently unknown. However, it contends that the likelihood of further nest sites being found in Wielangta is very low. In this regard, it refers to Mr Mooney's evidence that there is only one 'projected territory core' which may add to known nests. Forestry Tasmania also says that any new nests are likely to be located prior to any harvesting commencing. These are reasonable predictions.

75 Mr Mooney gave oral evidence that he did not have contemporary knowledge (as at 6

February 2006) of every one of the sites of the six nests adjacent to the coupes, but said that only two or three of them were undisturbed sites in all likelihood containing one or two pairs.

Answer to issue four

76 The answer to issue four is that the eagle has six nest sites adjacent to coupes in the Wielangta forest, with two or three of these being undisturbed. It is possible that there are also undiscovered nests.

ISSUE 5: THE EXTENT TO WHICH THE SWIFT PARROT IS PRESENT OR LIKELY TO BE PRESENT IN THE WIELANGTA FOREST AREA

77 The parties agree the presence of swift parrots in Wielangta depends on the flowering of *eucalyptus globulus* (blue gum) in or near the area during the spring breeding season. This is because swift parrots feed on the nectar of blue gum flowers.

78 In breeding seasons when the blue gum is not flowering in the Wielangta area, the swift parrot is not likely to be present, perhaps other than in small numbers. In spring 2005, the blue gums were not flowering in Wielangta. The only record of swift parrot activity at that time was that two swift parrots were observed by Mr Simon Kennedy, an expert witness called by the applicant, who referred to that observation in his expert report. Mr Kennedy said he observed two swift parrots in coupe 19D on 16 October 2005.

79 Although there has been no major swift parrot activity in Wielangta since spring 2001, it is not reasonable to conclude, as Forestry Tasmania suggests, that the swift parrot is only an occasional visitor to Wielangta.

80 This is because the unchallenged evidence of Mr Peter Brown, a retired Ornithologist who was called as an expert witness by the applicant, is that Wielangta contains some of the finest swift parrot breeding habitat he has seen.

Answer to issue five

81 The answer to issue five is that the swift parrot is likely to be present in the Wielangta forest area during the spring breeding seasons in relatively large numbers when the blue gums

in the vicinity are flowering, and in relatively small numbers, or not at all, in the spring breeding seasons when the blue gums are not flowering.

ISSUE 6: WHAT PART OF THE WIELANGTA FOREST WILL BE, OR IS LIKELY TO BE, SUBJECT TO FORESTRY OPERATIONS BY THE RESPONDENT IN THE NEXT APPROXIMATELY 15 YEARS?

82 It is difficult to determine what parts of Wielangta will definitely be subject to forestry operations over the next 15 years. The only exception is coupe 19D where there is a current Forest Practices Plan which expires in August 2008.

83 Having regard to the Court's findings on issue one, it is likely that the following coupes will be subject to forestry operations up to 2013: 9F, 12C, 19B, 43E, 10G, 17D, 19C, 44A, 10B, 17F, 19E, 19C, 42C, 44G and 43I.

ISSUE 7: WHETHER THE FORESTRY OPERATIONS REFERRED TO IN PARAGRAPH [ISSUE] TWO ARE LIKELY, HAVING REGARD TO THE ENDANGERED STATUS OF THE THREE SPECIES AND ALL OTHER THREATS TO THE THREE SPECIES, TO HAVE A SIGNIFICANT IMPACT ON THE THREE SPECIES

The eagle

Why is the eagle listed as endangered?

84 'The key threatening processes' accounting for the eagle's endangered listing are, according to Mr Mooney: '...loss and disturbance of critical nesting habitat and unnatural mortality mainly due to persecution and accidents'.

The other threats to the eagle

85 Apart from the clearing and degradation of nesting habitat, the disturbing of nesting, loss of hunting habitat and planned fires associated with forestry operations, the other current threats to the eagle include:

- natural threats – starvation, accidents, indigenous disease, severe weather and wildfires;
- unnatural threats – collision with human items, electrocution, non-target killing and incapacitation, persecution, trophy hunting, competition with exotic carnivores, arson,

pollution, exotic disease; and

- combined natural and unnatural threats – loss of nesting and hunting habitat to tree ‘dieback’, predation, territorial fights and escaped fires.

The impact of forestry operations in Wielangta on the eagle

86 Mr Mooney’s report states at [125]:

‘A lowered breeding success of one pair and the loss of about 100 ha of hunting and potential nesting habitat are likely the only detectable effects on the Tasmanian Wedge-tailed Eagle by forestry operations in coupes WTO17E and WTO19D. In my opinion, [they] do not constitute a significant impact considering all other threats to the Tasmanian Wedge-tailed Eagle.’

87 At [124] of his report, Mr Mooney states:

‘I understand... “significant impact” ...to be an impact that is important, notable or of consequence having regard to its context or intensity and can include an “impact” that is not confined to direct physical effects but extends to effects which are sufficiently close to allow it to be said that they are consequences of forestry operations.’

88 Mr Mooney said that it is likely that logging in coupe 17E caused eagles to abandon two inactive nests (as at 23 October 2005) and build another nest in a less disturbed place in their territory.

89 Mr Mooney did not believe a lowered breeding success of one pair of eagles and the loss of habitat and disruption to nesting caused by the forestry operations in coupes 17E and 19D constitute a significant impact on the eagle considering all other threats.

90 In respect of proposed forestry operations in Wielangta in coupes other than 17E and 19D, Mr Mooney said disturbance at four of the known nests, involving two of six pairs of eagles, may occur as a result of logging. However, Mr Mooney also said he did not consider ‘these problems as a significant impact given other threats the species faces in the State’.

Significant impact

91 Mr Mooney’s evidence supports the view that the forestry operations in Wielangta in coupes 17E and 19D and the proposed forestry operations in Wielangta in coupes other than

17E and 19D are not likely to have a significant impact on the eagle, having regard to its endangered status and all other threats to the eagle. However, despite that view, a question arises about whether, as a matter of law, an impact may be significant because of its 'cumulative' or 'potential' impacts; see *Minister for Environment and Heritage v Queensland Conservation Council Inc and Another* ('Queensland Conservation Council') (2004) 139 FCR 24 at [60].

92 As a Full Court said in *Queensland Conservation Council* at [53]:

'It is unhelpful, we consider, to attempt to paraphrase the expression "all adverse impacts" in s 75(2)(a) of the EPBC Act by recourse to phrases like "inextricably involved" or "natural consequence". "Impact" in the relevant sense means the influence or effect of an action: Oxford English Dictionary, [2nd ed] 5. As the respondents submitted, the word "impact" is often used with regard to ideas, concepts and ideologies: "impact" in its ordinary meaning can readily include the "indirect" consequences of an action and may include the results of acts done by persons other than the principal actor. Expressions such as "the impact of science on society" or "the impact of drought on the economy" serve to illustrate the point. Accordingly, we take s 75(2) to require the Environment Minister to consider each way in which a proposed action will, or is likely to, adversely influence or effect the world heritage values of a declared World Heritage property or listed migratory species. As a matter of ordinary usage that influence or effect may be direct or indirect. "Impact" in this sense is not confined to direct physical effects of the action on the matter protected by the relevant provision of Pt 3 of Ch 2 of the EPBC Act. It includes effects which are sufficiently close to the action to allow it to be said, without straining the language, that they are, or would be, the consequences of the action on the protected matter. Provided that the concept is understood and applied correctly in this way, it is a question of fact for the Environment Minister whether a particular adverse effect is an "impact" of a proposed action. However, we do not consider that the Environment Minister did apply the correct test in answering the question of fact which had arisen in the present case.'

93 Mr Mooney's definition of 'impact' as embracing effects 'significantly close to allow it to be said that they are the consequences of forestry operations' provides a more limited view of the word 'impact' than that adopted by the Full Court, that is, the influence or effect of an action.

94 Even though forestry operations in Wielangta (in coupes 17E and 19D) and the proposed forestry operations in coupes other than 17E and 19D will cause a loss of breeding and foraging habitat for the eagle which is relatively insignificant in the context of other

factors causing loss to such habitat, that loss can still be considered 'significant' in the context of legislation which is designed 'to protect native species (and in particular prevent the extinction, and promote the recovery, of threatened species)...'. Loss of habitat caused by forestry operations, while small when compared to other causes, has a significant impact on a threatened species where 'to protect' is seen as a duty not just to maintain population levels of threatened species but to restore the species.

95 As the applicant submits in his written submissions:

'...the ecology and biology of the eagle means that actions in a given area will contribute to a cumulative impact on the species but are highly unlikely ever, on their own, to be capable of affecting the population as [a] whole. To have its intended protective effect, s 18 [of the EPBC Act] must be able to deal with these differences in ecology and biology. It can only do that if the concept of impact includes not only indirect effects, as the Full Court has already found, but cumulative effects as well.'

96 According to Mr Mooney, at the minimum, one of the conservation aims for the eagle is to preserve those parts of its territories across the whole of Tasmania that deliver the best breeding success and that even those areas that are not the best for breeding success should be preserved. He also said:

'Remember that the aim of it should be to maintain an ecologically functioning species, not a museum piece. Not something that's just there to be ecologically functional. The species has to be very near its capacity to be carrying out its roles as an agent of evolution or preying on the sick and the deformed and all the rest of it. The species has to be near its carrying capacity.'

Mr Mooney acknowledged that the eagle's carrying capacity is 'very widely spread'.

97 In circumstances where the eagle is below its carrying capacity, any increase in disturbance to its nesting activities with resulting losses in fecundity will aid in the decline of a declining species. In context, that is a 'significant impact' in relation to legislation which is designed 'to protect native species (and in particular prevent the extinction, and promote the recovery, of threatened species)...'.

98 As Mr Mooney said, under cross-examination, protection of what is presently undisturbed ought to be given some priority. He went on to say:

'The area is about .5 of 1% of the area of Tasmania but it holds about 1.5% of eagles...measured as territories or nests. So what you have...[in] Wielangta on an average is...a very high value, it's a good spot for eagles.'

99 Mr Mooney considered it was important to minimise disturbance to the six breeding pairs in the vicinity of the Wielangta forest and agreed with the proposition that 'the more forestry operations that occur, the less likely you are to be able to minimise disturbance'.

100 Mr Mooney also gave evidence about 'disturbance creep', saying:

'...as each year goes by more nests are disturbed and very, very few nests become undisturbed that were disturbed before so you have nests slipping steadily into increasing disturbance. There is a pool of nests in remote areas that were undisturbed and remain undisturbed. The problem with that is as they become more disturbed the breeding success inevitably slips.'

101 Disturbance to any eagle nesting areas in circumstances where population numbers are low and breeding success is fickle is a 'significant impact'. A draft recovery plan prepared for the eagle shows that breeding success for active eagle territories for the period 2000-2003 was a mere 0.5 offspring per active territory. This results in a fairly small number of new additions to the species in any year. It also must be borne in mind that the eagle relies, in part, for its breeding success on nesting at relatively long distances from other breeding pairs. Also, eagles are very shy nesters and are very fussy in their choice of nesting sites.

102 I agree with the submission of the applicant that the present and likely future forestry operations of Forestry Tasmania in Wielangta will, in the context of the EPBC Act, have a significant impact on the eagle, notwithstanding the presence of other impacts which may be even more significant, such as the factors identified at [85] above. The forestry operations of Forestry Tasmania will, as the applicant contends, 'have a significant impact on the eagle because they form part of the well established cumulative impact of native forest harvesting in Tasmania on the eagle'. This is in the context of such operations being controlled by one operator, Forestry Tasmania. Population decline caused by forestry operations in one area of the State impacts on the species generally by adding to its demise in circumstances where eagles have, as Mr Mooney said:

'...very little flexibility built into their biology to allow them to compensate for an unnatural low productivity...'

103 The applicant also relies on the evidence of Dr Sarah Bekessy, a university lecturer and an expert on population viability issues, to the effect that, based on a study of the Bass District, the eagle will be extinct in that area in 200 years. Her 2002 study and 2005 revision support the view that habitat disturbance caused by timber harvesting means the eagle population would decline substantially.

104 Forestry Tasmania challenged the reliability of this evidence. Its written submissions point to some of the problems which underlie its theoretical nature. It is not necessary to make a finding about this evidence on the current issue. I prefer to rely on the evidence of the Court appointed expert, Mr Mooney, who the parties accepted as the pre-eminent authority on the eagle.

The beetle

Why is the beetle listed as endangered?

105 The beetle is listed as endangered because of its low population density and low dispersal range. It has only been found in Wielangta and on Maria Island. There is a difference of opinion in the evidence of the expert witnesses on the beetle as to whether the population on Maria Island is genetically distinct from the population in Wielangta. It is not necessary to resolve this issue because the effects of Forestry Tasmania's forestry operations on the beetle in Wielangta constitute a 'significant impact' on the beetle, having regard to its endangered status and all other threats to the beetle.

The other threats to the beetle

106 There are no other unnatural threats to the beetle of any significance apart from forestry operations. There are some natural threats from predators including birds and other types of beetles.

Significant impact

107 The applicant contends there are at least three kinds of 'impact' on the beetle caused by Forestry Tasmania's forestry operations in Wielangta and likely to be caused by proposed forestry operations in Wielangta. They are:

- the initial physical interference with beetle population and its immediate habitat;
- the edge effects of wildlife habitat clumps and streamside reserves; and
- the reduction of coarse woody debris as the forest regenerates.

108 The initial physical interference includes interfering with the interface between fallen logs and the soil, where most beetle activity occurs. In such a disturbed environment, beetles are at risk of death from the impact of machinery and from predators. Fires will also affect surviving beetles.

109 The edge effects of wildlife habitat clumps and streamside reserves means that the edges have greater exposure to wind and sunlight, causing them to dry out.

110 The reduced availability of coarse woody debris from fallen logs (by natural causes) is obvious when one considers the consequences of the removal of mature trees which would, but for harvesting, have been a source of coarse woody debris, in the future.

111 As with the eagle, the impact of Forestry Tasmania's forestry operations on the beetle is cumulative; as each coupe is harvested it is unlikely to provide suitable habitat thereafter. Loss of habitat is crucial to a species with very low population levels and densities and poor dispersal.

112 The five paragraphs above are a persuasive summary of the evidence on the 'significant impact' of Forestry Tasmania's forestry operations on the beetle in coupes 17E and 19D and its likely future forestry operations in Wielangta.

The challenge to the applicant's submissions on significant impact

MR MEGGS

113 Forestry Tasmania relied on the expert evidence of Mr Meggs, a Consultant Biologist and former employee of Forestry Tasmania.

114 Mr Meggs gave evidence that partial harvesting, of the sort which has occurred and is proposed within Wielangta, has never been identified as a specific threat to the beetle. He also identified coupe 17E as part of the species' range. Mr Meggs opined that within the

species' range, potentially 'threatening processes' are not occurring at a sufficiently high rate to suggest that the beetle is facing a very high risk of extinction in the near future. Mr Meggs said there was 'some limited evidence' that the beetle may be able to survive in or recolonise areas previously subjected to partial harvesting.

115 Mr Meggs considered that harvesting in coupe 17E would only have a minor and short term impact on the species and that 'sufficient habitat will be available throughout the silvicultural cycle to maintain the local population in the area'. He also said, 'WT019D largely constitutes unsuitable habitat', so the harvesting of that coupe will have 'minimal, if any impact' on the beetle. That is notwithstanding his concession in cross-examination that the beetle can exist in dry forest, of which coupe 19D is an example.

116 The applicant relied on the evidence of Dr McQuillan and Dr Karyl Michaels. Dr Michaels is a Project Officer with considerable experience in the study of various beetles, including the broad-toothed stag beetle. Like Dr McQuillan, Dr Michaels noted that the beetle had been found in areas of dry forest. Dr Michaels also differed from Mr Meggs in her consideration of the effect of partial harvesting on the beetle. She considered such forestry operations cause fragmentation of beetle habitat as well as constituting a danger to the beetle. She also considered that streamside reserves and wildlife habitat clumps were not suitable areas of habitat for the beetle. Dr McQuillan's evidence was consistent with the summary contended for by the applicant and referred to at [107] to [111] above.

117 Where the evidence of Mr Meggs differs from that of Dr McQuillan and Dr Michaels, I prefer the evidence of Dr McQuillan and Dr Michaels. Under cross-examination, Mr Meggs was frequently evasive and appeared to me to be much more of an advocate for the cause of Forestry Tasmania than an independent expert. I accept the applicant's submission that Mr Meggs was a 'partisan polemic' and a 'so-called independent expert'; see *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1 at [26], per Wilcox J.

118 The worst aspect of Mr Meggs' lack of independence was his preparedness to alter his affidavit evidence based on 'suggestions' by senior employees of Forestry Tasmania.

119 Mr Meggs gave evidence that his affidavit received 'peer review' from the following people:

- Dr Sarah Munks from the Forest Practices Authority;
- Dr Stephen Read, the Chief Scientist of the Division of Forest Research and Development from Forestry Tasmania;
- Dr Hans Drielsma, the then General Manager of Forestry Management for Forestry Tasmania;
- Mr John Hickey, the Manager of the Planning Branch (formerly the Principal Research Officer of the Native Forests Branch) of Forestry Tasmania; and
- Dr Marie Yee from Forestry Tasmania.

120 Mr Meggs gave evidence that he changed no matter of substance in his affidavit in consequence of this 'peer review process'. That evidence is false. Mr Meggs did change matters of substance as a result of the peer review process. He excised parts of his draft affidavit which were helpful to the case of the applicant but unhelpful to Forestry Tasmania.

121 At the urging of an officer or officers of Forestry Tasmania, Mr Meggs deleted the following sentence from his affidavit:

'The longer the status quo of conservation management for this species is maintained the higher the risk of extinction to the species based on current knowledge.'

122 Mr Meggs claimed he excised that sentence because he made the point elsewhere in his affidavit. After trying to avoid answering the question, when asked where else in his affidavit he made the point, Mr Meggs was not able to identify where he had done so.

123 Mr Meggs denied deleting the sentence because Dr Drielsma and Mr Hickey wanted it deleted. I do not accept that denial.

124 Also, at the urging of Dr Read, Mr Meggs omitted sections from his draft affidavit which referred to the inadequacy of existing monitoring programs and the 'somewhat patchy' implementation of 'adaptive management strategy for conservation' of the beetle.

125 The manipulation of Mr Meggs' expert evidence is regrettable. In light of the above, I do not accept the evidence of Mr Meggs where it conflicts with that of Dr McQuillan and

Dr Michaels. I accept the evidence of these two witnesses which supports the summary of 'significant impact' contained in the submission of the applicant and summarised at [107] to [111].

DR ROBERTS

126 Dr Sandra Roberts is a Research Officer in the field of forest hydrology employed by Forestry Tasmania. She sought to contradict Dr McQuillan's evidence about, among other things, the edge effects in forests and about areas of dry forest being in transition to wetter forest types. Where her evidence conflicts with Dr McQuillan, I prefer his evidence.

127 Dr Roberts' role in the proceeding was as an advocate for her employer. She said she was approached to give evidence to respond to Dr McQuillan's evidence but agreed she had been approached because, as an employee, she could provide cost free services to Forestry Tasmania. Dr Roberts also admitted to taking on other roles in the case. For example, she assisted with finalising 'the preparation of affidavits by Forestry witnesses' at the request of Dr Yee from Forestry Tasmania. Dr Yee was in court throughout most of the proceeding, but did not give evidence.

128 Dr Roberts described her other role as:

'...to really be the final proof reader, to collate the attachments, prepare the certificates for the exhibits, to provide assistance with researching materials and obtaining documents, and I took on a role in photocopying and preparing the documents.'

129 Dr Roberts said she:

'...was also involved in preparing some materials for Marie Yee, obtaining reference materials for her. For example, I went through all of the applicant's affidavits reference lists and I talked to the librarian in obtaining those reference materials.'

130 Dr Roberts gave evidence of proof reading affidavits filed on behalf of Forestry Tasmania and, in one case, rearranging the chronological sequence of events in an affidavit of a Forestry Tasmania witness.

131 Dr Roberts said her role included providing advice to Forestry Tasmania as to how its

case may be researched and structured. She agreed she had a role 'in assisting in the formulation of aspects of the case'. She said she attended meetings at which discussion occurred about the progress of the preparation of affidavits and which counsel and the instructing solicitor attended.

132 I am not satisfied Dr Roberts is an independent expert witness. She was at the heart of guiding Forestry Tasmania's overall strategy in this case. Her evidence does not assist me.

MR WAPSTRA

133 Mr Mark Wapstra is an Environmental Consultant who was called as a witness by Forestry Tasmania. He was formerly employed by the Forest Practices Authority. Among other things, he gave evidence about the different types of vegetation in Wielangta and the different forest types. Mr Wapstra said: 'Dr McQuillan's claim that the BTSSB uses dry forest is, in my opinion, not backed up by rigorous scientific method'. That evidence does not contradict the fact that Dr McQuillan found a beetle in other than wet forest and shows that the drawing of hard lines between wet and dry forest will not assist in the conservation and protection of the beetle.

DR LAFFAN

134 Dr Michael Laffan is a Senior Soil Scientist in the Plantations Branch of the Division of Forestry Research and Development, Forestry Tasmania. He gave evidence that 'any adverse impacts on soil disturbance and compaction following partial logging in WT017E and WT019D are expected to be minor'. However, under cross-examination, Dr Laffan could not answer a question about the adverse effect on regeneration by the presence of a snig track in a coupe, saying, 'I'm a soil specialist, not a forester'. His evidence provides little assistance. He was not in a position to contradict the view that broad-toothed stag beetles may exist in dry forest or dry patches of damp forest or in transition zones.

THE RICHARDS REPORT

135 In what appears to have been an effort to undermine Dr McQuillan's evidence about finding the beetle in dry forest, Forestry Tasmania sent an expedition into the forest to look for the rare beetle at 21 sites between 28 November 2005 and 15 December 2005. No beetles

were found at any of those particular sites in dry forest but one beetle was found at a damp forest site and three beetles were found at wet forest sites. The report of this survey, known as 'the Richards Report', states:

'Further work is needed but these preliminary results suggest that in some areas at least, where the species was known to occur prior to logging, the retention of a network of unlogged suitable habitat has assisted maintenance of the species in the local area.'

136 This is small comfort to the species and is tantamount to saying that logging did not destroy the species completely in the relevant coupe because not all of its habitat was destroyed. The Richards Report does not assist me; its timeframe and limited sampling does not provide any basis for discrediting the evidence of Dr McQuillan.

Conclusion on the beetle

137 For the reasons stated above, it is likely the forestry operations in coupes 17E and 19D and the proposed forestry operations elsewhere in Wielangta have or will have a significant impact on the beetle, having regard to its endangered status and all other threats to it.

The parrot

Why is the parrot listed as endangered?

138 The swift parrot is listed as endangered because of its low population numbers and its loss of habitat. The most reliable estimate is that there are about 1250 breeding pairs remaining. Unlike the eagle and the beetle, the parrot is not confined to Tasmania. It breeds in Tasmania, arriving from the mainland in late winter (August) and early spring (September). The parrot returns to the mainland in early autumn and is found in Victoria, New South Wales, south-east South Australia, the Australian Capital Territory and southern Queensland. As well as its listing under the EPBC Act and the *Threatened Species Protection Act*, it is also listed as 'endangered' under the *Threatened Species Conservation Act 1995* (NSW). It is listed as 'vulnerable' under the *National Parks and Wildlife Act 1972* (SA) and as a 'threatened taxon' under the *Flora and Fauna Guarantee Act 1988* (Vic).

Other threats to the parrot

139 Apart from the loss of habitat for breeding purposes, the major threat to the parrot is collision with man-made structures. This is especially a problem when the fast-flying parrot is attracted to flowering eucalypts in urban areas.

The experts on significant impact**MR PETER BROWN**

140 Mr Peter Brown is widely acknowledged as the leading expert on the species. In his expert report, he provided the following important information:

- the swift parrot breeds mainly in eastern Tasmania, usually within 10 kilometres of the coast;
- during breeding season, two eucalypt species provide the majority of its nectar food source. They are *eucalyptus globulus* (blue gum) and *eucalyptus ovata* (black gum). Blue gum nectar is the parrot's primary food source from October to December. Black gum flowers in August and September and provides a food source at that time when the blue gum is not flowering;
- the coastal area of Tasmania between Marion Bay near Dunally and Orford, which includes Wielangta, is 'a particularly important breeding area for the species';
- after breeding, other eucalypt species commence to flower and the parrots then disperse within Tasmania until migrating to the mainland in March/April;
- the key to the long term survival of the swift parrot is the availability of feeding and nesting habitat during the breeding season, particularly in primary or optimal habitats, including Wielangta;
- swift parrots require tree hollows of a certain diameter in mature eucalypt species in which to nest. It is important that nesting sites contain appropriate hollows. For this purpose, the trees have to be old enough for the requisite hollows to have formed;
- swift parrots regularly nest close to each other;
- the best breeding habitat is in forest that has not been logged or has not been subject to logging within the last 50 years, and then only selective logging;

- the first survey undertaken in 1988 estimated 1320 breeding pairs. The 2001 survey estimated 1000 breeding pairs.

141 Mr Peter Brown gave evidence that:

'Timber harvesting activities within the breeding range of the Swift Parrot has (sic) the potential to impact greatly on the Swift Parrot. Any food resource trees harvested reduces that resource and old growth forest harvesting reduces the nest sites available to all hollow nesters.'

142 Mr Peter Brown also said:

'In all the swift parrot nests I have seen I have never found one in a forest which has been harvested in the past 10 years that I can recall.'

143 On the topic of partial harvesting, Mr Peter Brown said:

'Swift Parrots have been shown to prefer to nest in areas of continuous forest and I believe that leaving individual trees, small clumps or copses will not retain breeding habitat.'

144 Mr Peter Brown also said:

'I would find it difficult to argue that forestry operations in individual Wielangta coupes would cause a significant impact on the Swift Parrot, but the cumulative impacts of ongoing timber harvesting throughout the area will in my view significantly impact on the species.'

145 In support of that statement, Mr Peter Brown said 'at best' the current population of swift parrots is stable, with the possibility of it 'undergoing a decline'. He also described the population of the swift parrot in the area between 'Marion Bay and Orford' (which includes Wielangta) as 'the most dense and secure throughout its breeding range'. He stated further:

'...although there have long been forestry activities to parts of the area, there are still large tracts of prime undisturbed habitat. I believe the long term security of this species lies in its maintenance as prime habitat and minimizing any threats to it. As such, ongoing destruction of habitat will constitute a "significant impact" on the species.'

146 The evidence of Mr Peter Brown, set out above, was not subject to any serious challenge. I accept it. It leads to the conclusion that the cumulative effect of logging in the coupes in Wielangta, taking into account the endangered status of the parrot and all other

threats to it, is likely to have a significant impact on the species by removing progressively part of its prime breeding habitat; being habitat which it will use when blue gum nectar is available. This has occurred in the past and there is no reason to suppose that it will not occur in the future. Mr Peter Brown also gave evidence, under cross-examination, that the swift parrots come back to areas including Wielangta, 'time and time again'.

MR KENNEDY

147 Mr Simon Kennedy is a GIS Analyst employed by the Environmental Protection Authority of Queensland and has had considerable experience in observing swift parrots and taking part in swift parrot surveys. He studied the swift parrot between 1998 and 2001, on the mainland and in Tasmania. He has published papers on the swift parrot and is a co-author of the Swift Parrot Recovery Plan 2001-2005.

148 Mr Kennedy largely agreed with Mr Peter Brown, but gave the following important evidence about the swift parrot on behalf of the applicant:

- seventy five per cent of all recorded swift parrot nests have been found on Bruny Island, Maria Island, in Wielangta and the Fern Tree/Mt Nelson area;
- south-eastern Tasmania within five to 10 kilometres of the coast supports almost the entire wild population of swift parrots during the spring, with large numbers going elsewhere in Tasmania during summer;
- it is projected that the population of swift parrots will decline unless action is taken to address threats to the species.

149 Mr Kennedy also gave evidence that:

*'...the Wielangta operations are likely to impact on the Swift Parrot population. Large numbers of **mature trees** will be removed from areas of Swift Parrot nesting habitat and reducing habitat quality across broad areas.'*
(original emphasis)

150 Mr Kennedy said further, 'Wielangta is the site of more than 20% of all recorded Swift Parrot nests'. If forestry operations are conducted in the same manner as those carried out in coupe 17E in winter 2005, Mr Kennedy estimated that '80% of potential Swift Parrot nesting trees...will be removed in each coupe'.

151 Mr Kennedy also noted:

'The number of Swift Parrots visiting Wielangta changes from year to year according to flowering events in the nearby foraging sites in the lowlands. Therefore the number of nests used varies. If the site is surveyed in a below average year of Swift Parrot activity when few nests are occupied, there is a risk that many nests not used in that year will be destroyed.'

152 Further, as Mr Kennedy said, it is important to bear in mind:

'Not all retained hollow-bearing trees will be suitable for Swift Parrot nests. The hollow may be too wide, shallow, facing the wrong way [towards the prevailing winds] or occupied by other fauna.'

153 Mr Kennedy gave evidence that in coupe 17E, some 80 per cent of large trees had been removed. He said that he visited coupe 19D on 16 October 2005 and 'found it to be high quality **old growth** habitat with high densities of tree hollows' (original emphasis). He said:

'Two Swift Parrots were observed. I observed no eucalypt flowering here or in the immediate area at the time. It is therefore probable that Swift Parrots were nesting in northern Wielangta in spring 2005, as they are only likely to be in an area for foraging or nesting during mid October...'

154 Mr Kennedy estimated that after logging in coupes 17E and 19D, '**Swift Parrot nesting habitat** in these coupes will be reduced by more than 70%' (original emphasis). He went on to say:

*'Swift Parrots may continue to use the remaining habitat, but are likely to do so in reduced numbers for the next 100 years until the regrowth areas begin to produce hollow-bearing trees. This does not equate to "**protection**" of Swift Parrot populations, but rather the result will be a less severe decline than applying no prescriptions.'* (original emphasis)

155 Mr Kennedy considered:

*'...the net effect of the logging operations [in Wielangta] will be a significant reduction in **Swift Parrot nesting habitat** for the next 100 years.'* (original emphasis)

156 I accept the above evidence of Mr Kennedy. Save for an attack on his formal qualifications, and his concession that Mr Peter Brown had greater expertise on the swift parrot in Tasmania, his evidence was largely unchallenged by Forestry Tasmania.

DR SHIELDS

157 Forestry Tasmania relied on the evidence of Dr James Shields. Dr Shields is the Wildlife Manager for Forests NSW. He has much scientific and management experience concerning parrots but does not have the depth of knowledge about the swift parrot possessed by Mr Peter Brown. Where his evidence conflicts with that of Mr Peter Brown, I prefer the latter.

158 Under cross-examination, Dr Shields said he had no knowledge which would enable him to disagree with the statement that there are 'no records of swift parrot nesting in forests of less than 50 years'. Dr Shields also did not disagree with the proposition that 'over 90%, if not 100% of nests found, have been located in patches of forest greater than 100 hectares'.

159 Dr Shields admitted, under cross-examination, that the limited availability of nesting habitat within foraging range of available foraging habitat is a significant threat to the parrot. Dr Shields also conceded that foraging habitat is capable of regrowing in considerably less time after harvesting than nesting habitat.

160 In some respects Dr Shields' evidence was a little bewildering, which makes me concerned about its overall reliability. For example, in cross-examination he was asked about a statement made in a document produced by Tasmania's Department of Primary Industries and Water ('DPIW') (formerly the Department of Primary Industries, Water and Environment) about the swift parrot. The document became exhibit CP. Senior counsel asked him:

'And the next statement that is made, well, that is a statement of opinion, is:

"Protecting nesting and foraging habitat away from built up or developed areas is crucial to reducing swift parrot collisions."

Now you wouldn't dispute that statement?'

Dr Shields answered – *'No. It's not important, but it is crucial.'*

161 Unfortunately, Dr Shields appeared to me to be more concerned to be an advocate for Forestry Tasmania than being an independent expert assisting the Court.

Conclusion on the parrot

162 The forestry operations in coupes 17E and 19D and the proposed forestry operations in other coupes of Wielangta identified in issues two and six are likely, having regard to the endangered status of the swift parrot and all other threats to it, to have a significant impact on the swift parrot by reducing part of its prime nesting habitat, being habitat used by it when suitable foraging conditions exist.

ISSUE 8: WHETHER THE RFA IS AN RFA WITHIN THE TERMS OF THE RFA ACT**The RFA Act definition**

163 Section 4 of the RFA Act defines 'RFA' as an agreement that is in force between the Commonwealth and a State in respect of a region or regions and which satisfies the conditions referred to in the section including, in so far as is material, that:

- '...
- (b) *the agreement provides for a comprehensive, adequate and representative reserve system; and*
 - (c) *the agreement provides for the ecologically sustainable management and use of forested areas in the region or regions...*

The comprehensive, adequate and representative reserve system is referred to as the 'CAR Reserve System'.

164 Section 4 of the RFA Act also defines 'RFA Forestry Operations' as including:

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

The RFA

165 The Commonwealth of Australia and the State of Tasmania made the RFA on 8 November 1997.

166 Paragraph A of the recitals to the RFA commences:

'The State and the Commonwealth have agreed to establish a framework for the management and use of Tasmanian forests which seeks to implement effective conservation, forest management, forest industry practices and in particular:

- provide certainty for conservation of environment and heritage values through the establishment of a CAR Reserve System; and*
- provide for the ecologically sustainable management and use of forests in Tasmania...'*

167 Paragraph D of the recitals provides:

'This Agreement is divided into Parts. Part 1 applies to the whole Agreement. Part 2 is not intended to create legally binding relations. Part 3 is intended to create legally binding relations. The Attachments are not intended to create legally binding relations except to the extent that this is necessary to give effect to Part 3.'

168 So far as is material, 'CAR Reserve System' is defined in cl 2 of the RFA as:

'...areas under any of the following categories of land tenure – Formal Reserves including Dedicated Reserves, Informal Reserves and other areas on Public Land which have CAR values protected by prescription...This reserve system is based on the principles of comprehensiveness, adequacy and representativeness, as described in the JANIS report.'

169 'CAR Values' is defined as '...the conservation values as described by the JANIS Reserve Criteria embodied in the CAR Reserve System'.

170 'Ecologically Sustainable Forest Management' or 'ESFM' is defined as:

'...forest management and use in accordance with the specific objectives and policies for ecologically sustainable development as detailed in the NFPS.'

171 'NFPS' is defined as:

'...the National Forest Policy Statement 1992 endorsed by the Commonwealth and all State and Territory Governments.'

172 Forestry Operations is defined as:

- '(a) the planting of trees; or*
- (b) the managing of trees before they are harvested; or*

(c) *the harvesting of Forest Products*

for commercial purposes and includes any related land clearing, land preparation and burning-off, and transport operations.'

173 'JANIS report' is defined as:

'...the report published by Joint ANZECC/MCFFA National Forests Policy Statement Implementation Sub-committee in June 1997 titled "Nationally Agreed Criteria for the Establishment of a Comprehensive, Adequate and Representative Reserve System for Forests in Australia".'

174 'Priority Species' is defined as:

'...those Tasmanian forest associated species listed in the schedule of the Endangered Species Protection Act 1992 (Cwth) or the Threatened Species Protection Act 1995 (Tas) or in Attachment 2 of this Agreement.'

175 'Recovery Plan' is defined as:

'...a recovery plan made under s 25 of the Threatened Species Protection Act 1995 (Tas) or a recovery plan made under Part 3 of the Endangered Species Protection Act 1992 (Cwth).'

176 Clauses 10 to 15 of the RFA provide a mechanism for the resolution of disputes between the Commonwealth and Tasmania, inferentially in relation to matters covered by the RFA.

177 Part 2 of the RFA commences with cl 18 which states:

'This Part is not intended to create legally binding relations and provisions in Part 1 in so far as they relate to Part 2 are also not binding.'

Part 2 extends from cl 18 to cl 91.

178 Prior to cl 19 there is the heading:

'Basis of Agreement – National Forest Policy Statement (NFPS).'

Clause 19 then (so far as is material) provides:

'The Parties confirm their commitment to fulfilling the goals, objectives and implementation of the NFPS by:

- *developing and implementing ecologically sustainable forest management and use; and*
- *establishing a CAR Reserve System ...*

179 Under cl 24, Tasmania undertakes to manage areas in the CAR Reserve System, with
the exception of Commonwealth owned or leased land.

180 Clause 38 provides:

'The Parties agree that Attachment 2 identifies the status of recovery action for threatened species relevant to this Agreement and which are listed under the Endangered Species Protection Act 1992 (Cwth) or the Threatened Species Protection Act 1995 (Tas).'

181 Prior to cl 48 is the following heading which governs cls 48 to 51:

'The Comprehensive, Adequate and Representative (CAR) Reserve System.'

Clause 48 provides:

'The Parties agree that the CAR Reserve System is to be established for the purpose of ensuring the long-term conservation and protection of the values defined by the JANIS Reserve Criteria and the land required to achieve this specified in Attachments 6 and 8.'

182 So far as is material, cl 49 states:

'The Parties agree that the CAR Reserve System established in accordance with this Agreement, will comprise:

On Public Land as described in Attachment 6:

- *Dedicated reserves and other Formal Reserves; and*
- *Informal Reserves; and*
- *areas with CAR values protected by prescription...*

183 Clause 51 provides:

'The Parties agree that they will each take appropriate action:

- *to establish the CAR Reserve System on the Public Land described in Attachment 6 and, where appropriate, shown on Map 1; and*
- *to manage that system to maintain CAR Values of that land in a*

regional context consistent with the management objectives for each element of the reserve system as specified in Attachment 7.'

184 Under cl 62 of the RFA, ESFM is referred to as an objective requiring 'a long term commitment to continuous improvement', with the establishment of the CAR Reserve System as a key element for achieving it.

185 In cl 64 of the RFA, the State of Tasmania agrees, in providing for ESFM, to amend its 'Forest Management Systems' to reflect certain undertakings and in particular those undertakings 'specified in Attachment 10'. Clause 13 of Attachment 10 commits Tasmania to:

'Ensuring that management plans for Formal Reserve and Informal Reserve elements of the CAR Reserve System clearly identify the CAR values identified in the CRA [Comprehensive Regional Assessment process] and the actions being taken in each reserve to appropriately manage those values.'

186 Clause 68 is under the heading 'Protection of priority species' and provides:

'The State agrees to protect the Priority Species listed in Attachment 2 (Part A) through the CAR Reserve System or by applying relevant management prescriptions.'

Each of the species the subject of the proceeding is listed in Attachment 2 (Part A).

187 Clause 70 provides:

'The Parties agree that management prescriptions or actions identified in jointly prepared and agreed Recovery Plans or Threat Abatement Plans will be implemented as a matter of priority.'

188 Clause 71 provides:

'The Parties recognise that Priority Species may change and that new or altered management prescriptions may be needed during the term of this Agreement to take account of changes in the status of species, additional information and evolving forest management practices. Alterations in prescriptions will be in accordance with processes described in Clause 96.'

189 Clause 96 states:

'The State agrees that any changes to the Priority Species in Attachment 2

including new or altered management prescriptions developed over the terms of the Agreement will:

- (a) be adequate to maintain the species identified;*
- (b) have a sound scientific basis;*
- (c) be endorsed by the Tasmanian Threatened Species Scientific Advisory Committee where relevant; and*
- (d) take note of public comment.'*

190 The applicant submits that s 38(1) of the EPBC Act does not apply because the 'action' is not undertaken 'in accordance with' the RFA. He also submits that the RFA is not an RFA within the meaning of the RFA Act because it fails to meet the definition of RFA in s 4 of the RFA Act.

191 Clause 97 of the RFA provides:

'A Management Prescriptions Database and a Response to Disturbance Database have been prepared as part of the comprehensive regional assessment for species identified as priority for protection by reservation and/or management prescription. The State agrees to maintain these databases and to update them as necessary and also confirms that they will be used as a basis for updating relevant State management documents including the Threatened Species Database, Listing Statements, the Management Decision Classification System, the Forest Botany Manuals and the Threatened Fauna Manual. Updated hard copies of the database contents will be made available periodically for public comment.'

The applicant's contentions

192 The applicant submits that the RFA is not an RFA within the meaning of the RFA Act because it does not meet the preconditions set out in subparagraphs (b) and (c) of the definition of RFA in s 4 of the RFA Act. The applicant contends the words 'provides for' in subparagraphs (b) and (c) of the definition should be construed to mean 'requires or establishes' rather than merely 'planning towards' a CAR Reserve System or the ecologically sustainable management and use of forested areas.

193 The applicant points to the use of the phrase 'provides for' in s 3 of the RFA Act which states one of the main objects of the Act is:

‘...

(c) *to provide for the existence of the Forest and Wood Products Council.*’

This is achieved by s 11 which requires:

‘...the Minister must take all reasonable steps to ensure that, at all times, there is in existence a committee that is known as the Forest and Wood Products Council...’

194 The applicant also says the RFA is not an RFA under the RFA Act because the provisions of it which aspire to a CAR Reserve System and ESFM are expressly said to be ‘not intended to create legally binding relations’. As there is no way to enforce the provisions of the RFA dealing with a CAR Reserve System and ESFM, it is contended that the RFA does not provide for such matters, as in, require them.

The Commonwealth’s contentions

195 The Commonwealth submits the phrase ‘provides for’ in the definition of RFA in the RFA Act does not mean ‘requires’ or ‘establishes’ in a legally enforceable manner. All that is relevantly required, according to the Commonwealth, is that the RFA establishes a structure or policy framework which facilitates or enables the creation or maintenance of a CAR Reserve System and the implementation of ESFM practices.

196 The Commonwealth notes the use of ‘provides for’ instead of ‘provide’ and refers to dictionary definitions of ‘provides for’ which emphasise the making of arrangements for, rather than the actual provision of, something.

197 The Commonwealth and Forestry Tasmania refer to the judgment of the Full Court of the Supreme Court of New South Wales in *Stocks and Parkes Investments Pty Ltd v The Minister* [1971] 1 NSWLR 932 (*Stocks and Parkes Investments*) at 940, where the Court said:

‘There is a great difference between the verb “provide” and the verb “provide for” or “make provision for” and it is this difference which gives a clue to the construction of cl. 16. The difference between “provide” and “provide for” is that the former means to give or to make available in fact, while the latter looks to the planning stage alone. You provide for a school site by “looking forward” and planning accordingly. You provide a school

site by actually making it available.'

Consideration

198 I accept the submissions of the Commonwealth and Forestry Tasmania concerning the meaning of 'provides for'. I see no reason to doubt the analysis of the Full Court of the Supreme Court of New South Wales in *Stocks and Parkes Investments*.

Does the RFA plan for or make arrangements for a CAR Reserve System?

199 The recitals to the RFA refer to the establishment of a CAR Reserve System. 'CAR Reserve System' is defined in cl2. The RFA refers to the JANIS Report and defines it. The JANIS Report contains agreed criteria for the establishment of a CAR Reserve System. Clause 48 of the RFA commits the parties to the establishment of a CAR Reserve System by reference to JANIS Reserve Criteria. Clause 49 (and the attachments it refers to) goes into some detail about how the CAR Reserve System will be established by referring to different types of reserves and the protection of CAR Values by prescription. Clause 51 refers to an agreement to take appropriate action to establish a CAR Reserve System on Public Land described in an attachment and by reference to a map. It also commits the parties to manage that system and maintain CAR Values consistent with expressed management objectives. Clause 68 contains an agreement to protect Priority Species through the CAR Reserve System or by applying relevant management prescriptions.

200 Given the above, and in the context of the meaning of 'provides for' contained in *Stocks and Parkes Investments*, I consider the RFA meets the definition contained in subparagraph (b) of the definition of RFA in s 4 of the RFA Act, in that it 'provides for a comprehensive, adequate and representative reserve system'.

201 The provision for a CAR Reserve System does not mean that legally enforceable rights to the creation of such a system must be available. That may be the case if there was an obligation to 'provide' a CAR Reserve System, but that is not the obligation contained in the RFA Act. The same may be said of the lack of a legally enforceable obligation to provide ESFM.

202 The applicant's reference to s 3(c) of the RFA Act concerning the Forest and Wood

Products Council is of no assistance. But for the obligation in s 11 of the RFA Act, it would be difficult to see any enforceable obligation on any person to ensure that such a body is set up. If s 11 is considered to be the partner of s 3 in compelling the establishment of the Council, no counterpart to s 11 is aligned to subparagraphs (b) or (c) of the definition of RFA in s 4 of the RFA Act to enforce any obligation referable to a CAR Reserve System or ESFM.

Does the RFA plan for or make arrangements for ESFM?

203 The recitals to the RFA include to 'provide for the ecologically sustainable management and use of forests in Tasmania...'. ESFM is defined in the RFA by reference to 'specific objectives and policies' detailed in the National Forestry Policy Statement 1992 ('NFPS'). In cl 19, the parties confirm their commitment to the NFPS, by developing and implementing ESFM. Clause 62 refers to ESFM as an objective which requires a long term commitment to continuous improvement. The applicant refers to that clause as an inspirational statement which does not make arrangements for ESFM. However, that submission does not give sufficient recognition to the documented commitment to ESFM contained in the NFPS. In any event, ESFM is, by its nature, a matter requiring a commitment to continuous improvement. Importantly, cl 62 identifies the establishment of a CAR Reserve System as a 'key element' for achieving ESFM. Further, cl 64 illustrates how ESFM is provided for, by Tasmania agreeing to amend its Forest Management Systems.

204 Having regard to the above, and in the context of *Stocks and Parkes Investments*, I consider the RFA meets the definition contained in subparagraph (c) of the definition of RFA in section 4 of the RFA Act, in that it 'provides for the ecologically sustainable management and use of forested areas in the region or regions'.

Answer to issue eight

205 The RFA is an RFA within the terms of the RFA Act.

ISSUE 9(A): WHETHER FORESTRY TASMANIA HAS AN EXEMPTION FROM PART 9 OF THE EPBC ACT BY VIRTUE OF SECTION 38 OF THE EPBC ACT AND SECTION 6(4) OF THE RFA ACT

206 Under Pt 9 of the EPBC Act, the Minister can approve the taking of certain actions

pursuant to an approval process set out in that Part. Section 18(3) of the EPBC Act, referred to at [42] above, is found in Pt 3 of the Act. Part 3 deals with the requirements for environmental approvals for actions. Part 4 provides for exemptions from Pt 3. Section 38 is found in Pt 4. It may be that the issue would have been better expressed by referring to an exemption from Pt 4 as well as, or in lieu of, the reference to Pt 9.

207 The real question for determination under this issue is whether s 38 ousts the operation of s 18(3) when the relevant action is an RFA forestry operation undertaken in accordance with an RFA.

208 Section 38 provides:

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

(2) *In this Division:*

RFA or regional forest agreement *has the same meaning as in the Regional Forest Agreements Act 2002.*

RFA forestry operation *has the same meaning as in the Regional Forest Agreements Act 2002.* (original emphasis)

209 Section 42 provides an exception to s 38 where RFA forestry operations, or forestry operations, are in a property included in the World Heritage List, a wetland included in the List of Wetlands of International Importance kept under the Ramsar Convention or are incidental to another action whose primary purpose does not relate to forestry. Section 19(3)(a) provides that a subsection of ss 18 or 18A does not apply to an action if Pt 4 lets the person take the action without an approval under Pt 9 for the purposes of the subsection.

210 Section 6(4) of the RFA Act mirrors s 38 of the EPBC Act.

211 The legislative intent behind ss 18, 19(3)(a) and 38 of the EPBC Act, when read together, is that the objects of the EPBC Act will be met, in a forestry context, through the RFA process, apart from the exceptions provided by s 42.

212 The applicant submits that ss 19(3)(a) and 38 of the EPBC Act and s 6(4) of the RFA

Act do not apply to the forestry operations of Forestry Tasmania in Wielangta but that s 18 continues to apply because those forestry operations are not conducted in accordance with the RFA. The applicant refers to cls 68, 70 and 96 of the RFA and asserts that the forestry operations are conducted in breach of those clauses. That submission goes to the issue raised by issue 9(b).

Answer to issue 9(a)

213 The answer to issue 9(a) is that Forestry Tasmania does have an exemption from Pt 3 and/or Pt 9 of the EPBC Act by virtue of s 38 of that Act and s 6(4) of the RFA Act provided that the forestry operation is undertaken in accordance with the RFA. I now turn to that issue.

ISSUE 9(B): WHETHER FORESTRY OPERATIONS IN THE WIELANGTA FOREST AREA WILL BE OR HAVE BEEN CARRIED OUT IN ACCORDANCE WITH THE RFA BY REFERENCE TO CLAUSE 68

214 It is worth repeating cl 68 of the RFA:

'The State agrees to protect the Priority Species...through the CAR Reserve System or by applying relevant management prescriptions.'

I now deal with the parties' and interveners' general contentions on this issue and will deal later with specific matters of fact.

The applicant's contentions

215 The applicant submits 'agrees to protect' means 'deliver protection of' and not 'agrees to try and protect' or 'consider protecting'. He contends that 'in accordance with an RFA' should be construed strictly. That is because it is part of a provision that provides an exemption from a statutory prohibition.

216 The applicant says that s 38 of the EPBC Act should be construed strictly as it exempts forestry operations from a stringent, time consuming, expensive and complicated environmental approvals process. He contends the by-passing of such a process is a privilege available only where there is strict compliance by those undertaking the forestry operations with the obligations provided in an RFA.

217 The applicant submits that the Court's task is to decide whether the forestry

operations of Forestry Tasmania in Wielangta are regulated in accordance with (as in precisely as prescribed by) the RFA. To do so, he submits the Court must construe what the RFA requires and assess whether the forestry operations, controlled by Forestry Tasmania on behalf of the State of Tasmania, are consistent with or comply with those requirements. This, in turn, necessitates an assessment and determination of what cls 68, 70 and 96 of the RFA each require and of whether the relevant action or actions taken by Forestry Tasmania have complied with each of those clauses.

218 Senior counsel for the applicant said in her oral submissions:

'If the RFA requires forestry operations to be done in a certain way, through clauses 68, 70 and 96...and forestry operations are not being regulated, controlled and conducted in that way in this State, then they are not being conducted in the way the RFA requires, and they are not in accordance with the RFA.'

219 The applicant submits the RFA is a parallel process to provide environmental protection to that otherwise provided directly by the EPBC Act. It is a process permitted by Pt 4 of that Act. Accordingly, so the argument runs, the RFA must deliver protection which prevents the occurrence of a significant impact on the relevant environment and the species which inhabit it. In that regard, he refers to the relevant portion of the Explanatory Memorandum accompanying the Bill which became the EPBC Act where it said:

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

220 The applicant submits that, to meet the objects of the EPBC Act, the RFA must provide real, practical protection to threatened species and facilitate their recovery to appropriate and sustainable population levels.

221 Otherwise, the applicant contends, the EPBC Act will fail to implement the international obligations on which it is founded. Accordingly, he contends, the RFA must be interpreted as a method of securing the aims of the EPBC Act which, in turn, implement international obligations, such that the approach to the interpretation of the EPBC Act and hence the RFA must not conflict with international law, as far as the language permits.

222 The applicant also submits that the interpretation of the EPBC Act and the RFA are informed by the precautionary principle. He says it is a principle which is fundamentally enmeshed in Australia's environmental policies. He traces the commitment to the precautionary principle from the Intergovernmental Agreement on the Environment, the NFPS (which is expressly stated to reflect resolutions from that Agreement) and the EPBC Act which states in s 391(2):

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

He also refers to s 3A of the EPBC Act which sets out the principles of ecologically sustainable development and includes at (b):

'if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.'

223 The applicant contends that:

'The precautionary principle enjoins decision-makers to undertake careful evaluation, assess the risk-weighted consequences of various options, and not to use lack of full scientific certainty as reason for postponing measures to prevent environmental degradation.'

224 Forestry Tasmania (in this regard supported by the State of Tasmania) submits that compliance by the State with its obligations under cl 68 of the RFA is a non-justiciable issue. In that regard, it refers to and relies on *South Australia v The Commonwealth* (1961-62) 108 CLR 130.

225 Alternatively, Forestry Tasmania submits that forestry operations are 'in accordance with the RFA' if they fall 'within the parameters of the RFA and [do] not conflict with the terms of the RFA, considered broadly and not by weighing its words as if they are diamonds'.

226 Further, Forestry Tasmania submits the protection contemplated by cl 68 of the RFA is 'systemic species protection rather than some guarantee of some right to survival of some individual or individuals forming part of a threatened species...with a view to ensuring survival of [that] species in the long-term'.

227 Forestry Tasmania describes ‘the process contemplated under the RFA’ as ‘dynamic’
and said ‘compliance...cannot be determined at a point in time or in relation to an individual
or limited group of individual members of a threatened species’.

228 The State of Tasmania submits:

‘it is wholly inapt to construe clause 68 as simply imposing an unqualified obligation to ensure the protection of species. The State’s obligation is satisfied, not through the actual protection of species...but through the employment of the CAR reserve system.’

The Commonwealth’s contentions

229 The Commonwealth submits that compliance with cl 68 cannot be considered in the
context of whether any particular forestry operation is consistent with the protection of a
species, in order to see if the forestry operation is undertaken in accordance with the RFA.

230 The Commonwealth submits the Court must assess the CAR Reserve System and
relevant management prescriptions across the whole of the relevant Priority Species’ known
and likely range. It contends:

‘there is simply insufficient evidence before the Court about the likely impact of forestry operations in any areas beyond WT019D and WT017E to enable the Court to conclude that clause 68 of the RFA has not been complied with or that there has been a failure to protect, through or by means of the CAR Reserve System or the management prescriptions.’

231 The Commonwealth also contends:

‘in circumstances where it is non-controversial that significant tracts of habitat for the three threatened species currently before the Court are made available in CAR reserves, the Court can safely conclude that the species are protected “through” the CAR reserves.’

232 The Commonwealth contends that the applicant’s reliance on the precautionary
principle ‘would not in the present case support the cessation of all activity which may have
environmental consequences, such as the harvesting of forests, until such time as full
knowledge is obtained’.

Is this issue justiciable?

233 Counsel for the applicant described this question correctly as a 'red herring'. The applicant does not seek enforcement of the RFA against the Commonwealth or the State of Tasmania. The applicant contends that the RFA is not being complied with, in material respects, in order to make good a submission that no relevant exemption is available under s 38 of the EPBC Act for Forestry Tasmania's forestry operations in Wielangta.

234 This proceeding is distinguishable from *South Australia v The Commonwealth* where a party to an inter-governmental agreement sought to enforce it against the other party. The relevant obligation sought to be enforced did not contain a precise time for its enforcement. The High Court considered the matter to require political rather than judicial resolution.

235 The State of Tasmania refers the Court to *Re Ditfort; ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 ('Ditfort') where Gummow J said at 370 there would be no 'matter' before the Court if it was required to consider 'undertakings and obligations depending entirely on political sanctions'. His Honour described such 'non-justiciable issues' as including 'agreements and understandings between governments within the federation'. It is noteworthy that in *Ditfort*, Gummow J held, at 373, that the non-justiciable principle did not apply because the Court had jurisdiction to deal with the matter in question and the issue of inter-governmental relations arose in the course of dealing with issues which were elements of the matter within jurisdiction.

236 I am not required to consider undertakings and obligations which depend entirely on political sanctions. I am required to consider whether s 38(1) of the EPBC Act applies and to perform that task properly I am required to consider whether Forestry Tasmania's forestry operations in Wielangta are conducted 'in accordance with' the RFA. If, in completing that task, this Court finds the RFA is not being applied to Forestry Tasmania's forestry operations in Wielangta, that does not mean the Court must cease dealing with the application, which is unquestionably within jurisdiction.

237 For the above reasons, I reject the contention that the Court cannot consider whether Forestry Tasmania's forestry operations in the Wielangta area will, or have been, carried out in accordance with the RFA by reference to cl 68. It is wrong to say that issue is non-

justiciable. It is an issue on an amended agreed list of issues that the parties filed in the proceeding. It is an issue central to the proceeding, in that it must be answered in order to determine whether the s 38 exemption applies under the EPBC Act. I answer it below.

Meaning in s 38 of 'in accordance with an RFA'

238 I agree with the applicant's submission that the exemption provided by s 38 provides an alternative method by which the objects of the EPBC Act may be achieved in a forestry context. Accordingly, it is not sufficient (for the s 38 exemption to apply) that there is mere lip service paid to an RFA. The State of Tasmania is obliged to ensure that forestry operations carried out in the State through Forestry Tasmania are conducted in accordance with the RFA, otherwise the s 38 exemption will not apply to those operations. Forestry operations will be conducted in accordance with the RFA if they are conducted in accordance with requirements set out in the RFA. The applicant has fastened to the requirements set out in cls 68, 70 and 96 of the RFA. The agreed list of issues refers only to cl 68, but cl 70 and cl 96, insofar as they deal with 'management prescriptions', are related to cl 68 and inform its content.

Meaning of cl 68

239 Under cl 68 of the RFA, the State of Tasmania agrees to protect certain Priority Species, including the three species the subject of this proceeding, 'through the CAR Reserve System or by applying relevant management prescriptions'.

Meaning of 'protect'

240 An agreement to 'protect' means exactly what it says. It is not an agreement to attempt to protect, or to consider the possibility of protecting, a threatened species. It is a word found in a document which provides an alternative method of delivering the objects of the EPBC Act in a forestry context. So much is clear from the excerpt from the Explanatory Memorandum referred to at [219] above.

241 The method for achieving that protection is through the CAR Reserve System or by applying relevant management prescriptions. Does that mean the State's obligations are satisfied if, in fact, the CAR Reserve System or relevant management prescriptions do not

protect the relevant species? I do not think so. If the CAR Reserve System does not deliver protection to the species, the agreement to protect is empty (in the absence of relevant management prescriptions performing that role). If relevant management prescriptions do not perform that role, the State should ensure that it does, otherwise it is not complying with its obligation to protect the species. To construe cl 68 otherwise would be to turn it into an empty promise.

A confinement of the issue

242 The agreed issue is expressed infelicitously. It should have been limited to the three species the subject of the proceeding, by adding as concluding words ‘insofar as they affect or impact upon the swift parrot, the broad-toothed stag beetle and the Tasmanian wedge-tailed eagle’. I will consider the issue further in that context.

The CAR Reserve System

243 As its definition suggests, the CAR Reserve System involves the setting aside of public lands, in the current context, through dedicated and informal reserves. The CAR Reserve System flowed from the NFPS (see [171] above).

244 Dr Rhonda Dickson is an Assistant Secretary, Infrastructure and Regional Policy Branch with the Department of Prime Minister and Cabinet. She has substantial experience in the area of developmental implementation of forest policy on behalf of the Commonwealth.

245 Dr Dickson gave evidence that NFPS ‘specifically envisaged that a comprehensive, adequate and representative...network of dedicated and secure nature conservation reserves for forests and reserves for protecting wilderness would be set aside’.

246 Dr Dickson also gave evidence that:

‘As required by the NFPS, National Forest Reserve Criteria were agreed upon which set out the criteria for the creation of CAR reserves. These criteria are commonly known as the “JANIS criteria” and were documented in a report which was prepared jointly by the Australian and New Zealand Environment and Conservation Council and the Ministerial Council of Forestry, Fisheries and Aquaculture in 1997 – the Nationally Agreed Criteria for the Establishment of a Comprehensive, Adequate and Representative Reserve System for Forests in Australia.’

247 Dr Dickson referred to the following 'two key principles' as underlying the CAR reserve criteria:

- '(a) *species with known distributions should be adequately reserved at the regional level; and*
- (b) ...known species with unknown distributions are addressed through reservation of broad "surrogates" of biodiversity such as forest types (or forest ecosystems) which are mapped out at an appropriate scale.'*

248 Dr Dickson said the CAR Reserve System also envisaged, where possible, conservation of old-growth forest and wilderness in a dedicated reserve system on public land. Alternative approaches were described (in a public land context) as:

- '(a) *the establishment of informal reserves on public land, set aside specifically for conservation purposes and reserved under a secure tenure or management arrangement such as approved forest management plans;*
- (b) protecting values through prescription – where the nature of the forest value that is required to contribute to the CAR reserve system makes inclusion in a dedicated or informal reserve impractical (for example, very rare values, values with fragmented distributions, or values naturally occurring in linear form), then protection may be prescribed in codes of practice or management plans...'*

Relevant management prescriptions

249 The term 'management prescriptions' is not defined in the RFA but 'Management Prescriptions Database' is defined as:

'the database described in the Tasmanian-Commonwealth Regional Forest Agreement Supplement to Environment & Heritage Report Vol VI; Processes and guidelines for determining the conservation requirements for priority flora and fauna species in the Tasmanian comprehensive regional assessment, Tasmanian Public Land Use Commission, April 1997.'

250 Clause 70 requires 'management prescriptions' identified in recovery plans to be implemented as a matter of priority and cl96 requires new or altered management prescriptions developed over the term of the RFA to be adequate to maintain the species, be soundly based scientifically, be endorsed by the Tasmanian Threatened Species Scientific Advisory Committee (where relevant) and to take note of public comment.

251 Clause 97 refers to the Management Prescriptions Database and the need to maintain and update it. It is said to form part of the comprehensive regional assessment of Priority Species for protection 'by reservation and/or management prescription'.

Forest Practices Plans

252 Although Forestry Tasmania exclusively manages and controls operations in State forests when it conducts or permits operations in State forests, it does so on permission given to it under Part III of the *Forest Practices Act 1985* (Tas). The permission is given by the Forest Practices Authority by way of Forest Practices Plans.

253 The management prescriptions referred to in the RFA are effectively the Forest Practices Plans issued pursuant to the *Forest Practices Act*. Section 17(4) of the *Forest Practices Act* provides:

'A person who is a responsible person in relation to any land must not carry out, or cause to allow the carrying out of, an activity of the following kind on that land unless a certified forest practices plan exists in respect of that land when that activity is being carried out:

...

(b) the harvesting of timber;

(ba) the clearing of trees;

(c) the construction of a road in connection with an activity referred to in paragraph...(b) or (ba)

...'

254 Under s 25A of the *Forest Practices Act*, a responsible person for a certified Forest Practices Plan is obliged to provide Forest Practices Plan compliance reports to the Forest Practices Authority and lodge a final forest practices certification report stating whether or not the Plan has been complied with.

255 As the applicant submits at [88] of his closing written submissions:

'The [Forest Practices Plan] is the principal mechanism for delivery of management prescriptions at a coupe level. The process of developing the FPP is designed to embrace all relevant information, and is to accord with the Forest Practices Code...The Code itself does not deliver any prescriptions

relevant to threatened species but instead provides that management of threatened species in wood production areas is to be in accordance with procedures agreed between FPA and DPIW. The agreed procedures are at Exhibit MW3 to the affidavit of Mr Wapstra at CB 2011-2013.'

256 In the procedures document, cl 3.1 deals with 'endorsed management prescriptions' for fauna. It refers to the 'Threatened Fauna Manual for Production Forests in Tasmania' ('Manual') and the 'Threatened Fauna Adviser Expert System program' ('Adviser') as 'the basis for providing management prescriptions at the operational (coupe) scale'.

257 The Manual and the Adviser are required to be updated regularly as new information becomes available and should be reviewed at least every five years to coincide with reviews under the RFA. For that purpose, consultation is expected between specialists within the Forest Practices Authority, DPIW, Forestry Tasmania and Forest Practices Officers, and any changes are subject to formal endorsement by bodies established under the *Threatened Species Protection Act* and the *Forest Practices Act* and further subject to assumed endorsement in the event of a lack of response by such bodies within three months.

258 Forest Practices Officers are compelled to consult the Manual 'to determine whether an operational area contains or is likely to contain threatened species'. They are required also to consult the Adviser 'to determine the appropriate endorsed management prescription' and to 'seek further specialist advice' from the Senior Zoologist of the Forest Practices Authority where required by the provisions of the Adviser. There is a further requirement to notify the Senior Zoologist 'where an operational area contains or is likely to contain threatened species'.

259 Under cl 3.1.6 of the procedures, where a Forest Practices Officer seeks further advice in accordance with the Adviser, or where endorsed prescriptions are not appropriate, the Senior Zoologist is to consult with DPIW 'to determine an appropriate management prescription...advice will be provided within six weeks, otherwise the Forest Practices Officer may proceed on the basis of best available information'.

Has the State protected the beetle through the CAR Reserve System?

260 The applicant relies on the evidence of Dr McQuillan that the CAR Reserve System

leaves very large areas of the beetle's range unprotected and that it does not protect the beetle. He also relies on Dr McQuillan's evidence that the CAR Reserve System is intended to deliver conservation outcomes for particular forest types.

261 Forestry Tasmania did not produce any evidence which contradicts Dr McQuillan in that respect. In fact, Mr Meggs conceded, under cross-examination, that 'the current reserve system is inadequate to preserve the beetle...'.
262

The evidence before the Court on this issue supports the applicant's submission. The State has failed to protect the beetle through the CAR Reserve System. As the applicant observed in his written submissions:

'with the exception of the wet forest on Maria Island National Park, suitable habitat for the beetle is poorly reserved. Just over half of the potentially suitable habitat for the species is categorised as production forest, primarily used for timber production.'

Has the State protected the parrot through the CAR Reserve System?

263 Mr Peter Brown gave evidence, which Mr Wapstra accepted, that the CAR Reserve System may assist in the survival of the parrot but is unlikely to assist in the recovery of this species in isolation. In other words, more is required by way of management prescriptions.

264 Protection is not delivered if one merely assists a species to survive. Protection is only effective if it not only helps a species to survive, but aids in its recovery to a level at which it may no longer be considered to be threatened. Whatever protection may be provided to the parrot by the CAR Reserve System is minimal, as the evidence discloses that only a small part of the parrot population is likely to use the CAR reserves which are too small to be of any real assistance to the parrot.

265 Exhibit AV in the proceeding is a paper whose principal author is Dr Munks. The co-authors include Mr Wapstra. At page 22 of the paper, the authors say the CAR Reserve System is inadequate by itself:

'to retain the hollow reserve for maintenance of populations of hollow dependant fauna across their range, and highlights the importance of effective "off reserve" management prescriptions to complement the reserve system.'

266 The major reason why the CAR Reserve System has not protected the parrot is that most of its nesting and foraging habitat lies outside the dedicated reserves.

267 Having regard to the above, the State has not protected the parrot through the CAR Reserve System.

Has the State protected the eagle through the CAR Reserve System?

268 The majority of the eagle's territories and nests are outside the CAR Reserve System. As Mr Mooney said in his oral evidence: '...wedge-tailed eagles were not an absolute priority in the CAR system'.

269 Mr Mooney also agreed with the proposition: '...their territories are not sufficiently protected that they have lost their priority in the CAR Reserve System'.

270 The evidence supports the view that the State has not protected the eagle through the CAR Reserve System.

Will the State protect the three species through the CAR Reserve System in the future?

271 The best indicator of future behaviour is past behaviour. There is no evidence on which to conclude that the State can or will protect the species through the CAR Reserve System, in isolation, in the future.

Has the State protected the beetle by applying relevant management prescriptions?

272 The management prescriptions which apply to the beetle have the following defects:

- they make no provision for the possibility that the beetle can be found in dry forest, despite Dr McQuillan discovering the beetle in dry forest in coupe 17E;
- the Manual describes the beetle's habitat as ranging from 'patches of wet forest within dry eucalypt forest (especially drainage lines and wet gullies) to wet eucalypt forest and rainforest'. Problems of identification of patches of damp forest in dry forest may arise. Under cross-examination, Mr Wapstra said what is 'damp eucalypt forest' is

poorly understood by many people and that 'it's perhaps only some botanists that well understand the concept'. Mr Wapstra conceded that the Adviser's application to damp forests carried a degree of risk;

- top disposal and regeneration burns are not covered by management prescriptions thereby providing inadequate protection to the beetle;
- the management prescription dealing with post-harvest firewood collection is not applicable to areas of dry forest; and
- no management prescriptions require surveys for the beetle prior to logging or the undertaking of other forestry operations.

273 These deficiencies show the State has not protected the beetle by applying relevant management prescriptions.

Has the State protected the parrot by applying relevant management prescriptions?

274 The management prescriptions which apply to the parrot have the following defects:

- they do not acknowledge, with one minor exception, that the breeding habitat of the parrot depends more on adequate hollows for nesting rather than the presence of any particular type of tree (the only exception is the requirement that wildlife habitat clumps contain at least two hollow bearing trees);
- of the three management prescriptions relevant to the parrot in Wielangta:
 - the first does not refer to the breeding habit trees (*eucalyptus pulchilla*, *eucalyptus obliqua* or *eucalyptus delegatensis*) and does not take into consideration the age of the trees or the number of adequate hollows;
 - the second relates only to foraging habitat (*eucalyptus globulus*);
 - the third refers to the protection of known or suspected nest sites and not potential nesting habitat;
- the Adviser's management prescriptions for the parrot do not refer to the requirement to protect potential nesting habitat; and
- in the absence of appropriate surveys of the nesting colonies in Wielangta of the parrot (as to which I accept the evidence of Mr Kennedy) management prescriptions

are inadequate. The need for more detailed surveys was referred to by Mr Wapstra in his affidavit where he said, '...more detailed surveys will be undertaken in several coupes ...'. However, there was no evidence that any detailed surveys were actually planned.

275 These deficiencies show the State has not protected the parrot by applying relevant management prescriptions.

Has the State protected the eagle by applying relevant management prescriptions?

276 Mr Mooney's gave evidence that:

'CAR Reserves and Management Prescriptions can both prevent extinction in the short to medium term (up to 50 years) and buffer some deleterious effects of development but alone they cannot protect the Tasmanian Wedge-tailed Eagle.'

...

'CAR Reserves and Management Prescriptions are vital to reduce...attrition and allow the population to stabilise at a point above that which would otherwise happen but as they stand, they alone cannot protect the Tasmanian Wedge-tailed Eagle.'

277 Management prescriptions prevent forestry activities within one kilometre of the line of sight of a known active eagle nest. However, as the applicant submits in his written submissions:

'...the restriction of nest searches "adjacent" to the coupe areas to within 500m leaves a significant chance of nests within the 1 km line of sight not being found. Operations then might proceed in the breeding season well inside the 1 km limit that would otherwise apply to known nests.'

278 The management prescriptions for the eagle refer to the breeding season as August to January. Mr Mooney considered the breeding season should really be July (or even earlier) to January and that the official dates (August to January) are 'a compromise with industry'. This demonstrates a further deficiency with the management prescriptions.

279 Importantly, Mr Mooney gave evidence that the following proposition put to him was inevitable: '...there are a host of risk factors introduced for eagles from forestry operations

even with management prescriptions...’.

280 Mr Mooney also questioned the thoroughness of the searches for nests during logging.

281 I do not consider that the State has protected the eagle by applying relevant management prescriptions. Management prescriptions have helped to slow the eagle’s extinction but have not protected it in the sense of either maintaining existing numbers or restoring the species to pre-threatened levels.

Will the State protect the three species by applying relevant management prescriptions?

282 It is unlikely the State can, by management prescriptions, protect the eagle. As to the beetle and the parrot, the State must urge Forestry Tasmania to take a far more protective stance in respect of these species by relevant management prescriptions before it can be said it will protect them. On the evidence before the Court, given Forestry Tasmania’s satisfaction with current arrangements, I consider that protection by management prescriptions in the future is unlikely.

Clause 70

283 An additional reason for finding the State has not protected the species through relevant management prescriptions is its failure to comply with cl 70 of the RFA. This, in turn, is a breach of cl 68 because the management prescriptions referred to in cl 68 are the same management prescriptions which cl 70 requires to be ‘identified in jointly prepared and agreed Recovery Plans’ and implemented ‘as a matter of priority’.

284 There has never been a Recovery Plan for the beetle. The previous Plans for the eagle and parrot expired in 2003 and 2005 respectively. When in existence, the Plans for the eagle and parrot were not fully or even substantially implemented.

Clause 96

285 It is unnecessary to consider whether this clause has been breached. As referred to above, there is ample material before the Court to demonstrate the applicant’s case that relevant management prescriptions have not protected the three species the subject of the proceeding.

Adaptive management

286 There was much debate about whether what Forestry Tasmania calls ‘adaptive management’ protects the species in question. Forestry Tasmania asserts that ‘adaptive management’, or learning from mistakes or engaging in a process of trial and error or however it is described, is being delivered by management prescriptions. The relevant management prescriptions have been found wanting in their ability to protect the three species, as has the CAR Reserve System.

287 There is no utility in traversing argument and counter-argument about whether adaptive management is the answer to the cl 68 issue. Clause 68 has not been complied with and, in all likelihood, will not be complied with in the future because the CAR Reserve System and relevant management prescriptions, as defined in the RFA and informed by cl 70, do not and will not protect the relevant species.

288 As counsel for the applicant pointed out in final oral submissions, the existence of management prescriptions designed to aid in ‘adaptive management’ is one thing, but their implementation is entirely another. For example, the evidence disclosed that in December 2001 representatives of Forestry Tasmania, including Mr Miller, met with officers of DPIW to discuss the outcomes of a swift parrot survey. It was noted that swift parrot activity was recorded in coupes 12F and 13D. Recommendations to protect this nesting habitat, in accordance with a then extant Recovery Plan, were discussed at the meeting and areas of high swift parrot breeding activity were marked in green on a map and were to be excluded from harvesting operations. The relevant recommendation in the management prescriptions in the Adviser was:

‘known nest sites on State forest have been protected under the Forestry Tasmania Management Decision Classification system. If new sites are found they will be added to this system.’

Mr Miller rejected the recommendation to add the newly identified breeding areas to the ‘protected areas’ saying:

‘I don’t think we want to do this. Reasons being that if further studies are undertaken and other habitat is discovered, then it may emerge that some of these may be more important for reservation. Besides, I don’t think we would want to reserve areas prior to any “Management agreement” process coming

into being.'

289 Further, in coupe 17E, Forestry Tasmania ignored a recommendation from the Senior Zoologist and logged areas of that coupe identified as prime swift parrot breeding habitat, reducing the relevant area's protection to a skyline constraint and five wildlife habitat clumps.

290 The practical effect of the evidence of Dr John Whittington, General Manager, Resource Management and Conservation Division of DPIW, is that recommendations from senior zoologists in accordance with the Adviser are negotiable, if Forestry Tasmania objects.

291 There was also evidence of a reservation area in coupe 17E, designed to protect the swift parrot, being logged 'by mistake' as well as evidence of a road being put through a swift parrot reserve area 'by mistake'.

292 These matters illustrate the difficulty not only in having adequate management prescriptions to protect threatened species, and promote their recovery, but also the difficulty of actually implementing management prescriptions.

Answer to issue 9(b)

293 Forestry operations in the Wielangta forest area have not been carried out in accordance with the RFA by reference to cl 68. I am not confident that they will be carried out in accordance with the RFA by reference to cl 68 in the future. Consequently, s 38 of the EPBC Act does not exempt Forestry Tasmania's forestry operations in Wielangta from the provisions of Pt 3 of that Act. The same applies with respect to s 6(4) of the RFA Act.

THE EPBC ACT – APPROACH TO CONSTRUCTION

294 The view I have taken about the construction of the EPBC Act is informed by the following matters.

295 Construction of the EPBC Act is informed by the Conventions which it implements in compliance with Australia's international obligations. So much was recognised by a Full Court of this Court in *Minister for Environment and Heritage v Queensland Conservation Council Inc and Anor* (2004) 139 FCR 24 ('*Queensland Conservation Council*') at [2]:

'The EPBC Act was enacted to implement the provisions of the Convention on Biological Diversity 1992, and other international environmental agreements into Australian law. It also represents an attempt to consolidate and clarify the Commonwealth's responsibilities for environmental protection within the Australian Federation (see Second Reading Speech, House of Representatives, Hansard, 29 June 1999, at 7770). The objects of the EPBC Act are set out in s 3(1) as follows:

The objects of this Act are:

- (a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; and*
- (b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and*
- (c) to promote the conservation of biodiversity; and*
- (ca) to provide for the protection and conservation of heritage; and*
- (d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples; and*
- (e) to assist in the co-operative implementation of Australia's international environmental responsibilities; and*
- (f) to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and*
- (g) to promote the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.'*

296

In *Booth v Bosworth* (2001) 114 FCR 39 at [115], Branson J states:

'In weighing the factors which support an exercise of the Court's discretion in favour of the grant of an injunction under s 475(2) of the Act against those factors which tell against the grant of such an injunction, it seems to me that it would be a rare case in which a Court could be satisfied that the financial interests of private individuals, or even the interests of a local community, should prevail over interests recognised by the international community and the Parliament of Australia as being of international importance.'

297

The Biodiversity Convention referred to by the Full Court in *Queensland Conservation Council* underpins the EPBC Act. It obliges Australia to take steps to promote conservation and the recovery of threatened species; see Arts 8(d), (e) and (f).

298 Australia is also a signatory to the *Convention on Conservation of Nature in the South Pacific* (done at Apia, Western Samoa on 12 June 1976), otherwise known as the Apia Convention. Australia acceded to the Apia Convention on 28 March 1990 and it came into force in Australia on 26 June 1990. It requires Contracting Parties to:

- '1. ... in addition to the protection given to indigenous fauna and flora in protected areas, use their best endeavours to protect such fauna and flora (special attention being given to migratory species) so as to safeguard them from unwise exploitation and other threats that may lead to their extinction.*
- 2. ... establish and maintain a list of species of its indigenous fauna and flora that are threatened with extinction. Such lists shall be prepared as soon as possible after this Convention has come into force and shall be communicated to the body charged with the continuing bureau duties under this Convention.*
- 3. ... protect as completely as possible as a matter of special urgency and importance the species included in the list it has established in accordance with the provisions of the last preceding paragraph. The hunting, killing, capture or collection of specimens (including eggs and shells) of such species shall be allowed only with the permission of the appropriate authority. Such permission shall be granted only under special circumstances, in order to further scientific purposes or when essential for the maintenance of the equilibrium of the ecosystem or for the administration of the area in which the animal or plant is found.*
- 4. ... carefully consider the consequences of the deliberate introduction into ecosystems of species which have not previously occurred therein.'*

299 Section 139 of the EPBC Act implements these two Conventions by providing:

'In deciding whether or not to approve for the purposes of a subsection of section 18 or section 18A the taking of an action, and what conditions to attach to such an approval, the Minister must not act inconsistently with:

- (a) Australia's obligations under:*
 - (i) the Biodiversity Convention; or*
 - (ii) the Apia Convention; or*
 - (iii) CITES; or*
- (b) a recovery plan or threat abatement plan.'*

300 Promotion of the conservation of biodiversity, as s 3(1)(c) of the EPBC Act requires, in context, can only be achieved by favouring a construction of the EPBC Act which views

protection of the environment as an act of not merely keeping threatened species alive, but actually restoring their populations so that they cease to be threatened. Section 3(2)(e)(i) says it all when it stresses the promotion of the recovery of threatened species.

301 The requirement in s 18(3) of the EPBC Act that an action not occur which is likely to have a significant impact on a listed threatened species must be seen in the context of an Act and Conventions which underlie the promotion of recovery of threatened species. Similarly, the exemption for RFA forestry operations in s 38 of the EPBC Act must be seen, in context, as providing an exception only if an alternative means of promoting the recovery of a species is achieved by a Regional Forest Agreement. Such an approach is consistent with the High Court's view of the influence of Conventions as an aid in interpreting domestic legislation designed to give effect to them; see *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 at 287 where Mason CJ and Deane J said:

'It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law.'

That proposition, their Honours said, required courts to:

'...favour a construction, as far as the language of the legislation permits, that is in conformity and not in conflict with Australia's international obligations.'

I have adopted that approach in this judgment.

I certify that the preceding three hundred and one (301) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Marshall.

Associate:

Dated: 19 December 2006

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Solicitors for the second intervener:	Office of the Director of Public Prosecutions
Dates of Hearing:	5-9, 12-16 December 2005, 6-10, 14, 15 February, 1-5, 8-12, 15-19 May, 29, 30 August 2006
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