

AUSCRIPT AUSTRALASIA PTY LTD

ABN 72 110 028 825

Level 10, MLC Court, 15 Adelaide St BRISBANE QLD 4000

PO Box 13038 George St Post Shop BRISBANE QLD 4003

Tel:1300 308 420 Fax:(07) 3503-1199

Email: orders@auscript.com.au Website: www.auscript.com.au

AUSCRIPT

TRANSCRIPT OF PROCEEDINGS

O/N 66039

FEDERAL COURT OF AUSTRALIA

TASMANIA REGISTRY

**BRANSON J
TAMBERLIN J
FINN J**

No TAD 21 of 2007

THE WILDERNESS SOCIETY INC

and

**THE HONOURABLE MALCOLM TURNBULL, MINISTER FOR
THE ENVIRONMENT AND WATER RESOURCES and ANOTHER**

HOBART

10.17 AM, WEDNESDAY, 17 OCTOBER 2007-10-17

DAY ONE

**MS D. MORTIMER SC appears with MR R. NIALL for the applicant
DR M. PERRY QC appears with MR D. BROWN for the Minister
MR G. UREN QC appears with MR T. WALKER for Gunns Limited**

Copyright in Transcript is owned by the Commonwealth of Australia. Apart from any use permitted under the Copyright Act 1968 you are not permitted to reproduce, adapt, re-transmit or distribute the Transcript material in any form or by any means without seeking prior written approval from the Federal Court of Australia.

MS D. MORTIMER SC: If the court pleases, I appear with my learned friend MR R. NIALL on behalf of the appellant.

BRANSON J: Thank you, Ms Mortimer.

5

DR M. PERRY QC: If the court pleases, I appear with my friend MR D. BROWNE on behalf of the Minister.

BRANSON J: Thank you, Ms Perry.

10

MR G. UREN QC: If the court pleases, I appear with my learned friend MR T. WALKER for Gunns Limited.

BRANSON J: Thank you, Mr Uren. Now, the Court has before it three notices of motion, and it may be convenient to deal with those first. The first of those, I think, is a motion by the appellant to amend the notice of appeal.

15

MS MORTIMER: That is so, your Honour. That is so. Indeed, your Honour, there are two motions. The first is to amend the notice of appeal, and the second matter that Mr Browne's affidavit deals with, which I will take your Honours to, is a motion which the rules under order 52, rule 36 say should be made orally on the start of the appeal to adduce some new evidence., and if I can take your Honours through the basis for both those motions, because they are related. As your Honours will be aware, no doubt, there have been some developments in fact in relation to the Commonwealth process around the pulp mill and the Minister has made a decision.

20

25

Now, our motion seeks to amend the notice of appeal only to enable the appellant, should it succeed on the appeal, to have, what in our submission is, effective relief. That is, not to make the process of the appeal futile, but to ensure that the process is effective by enabling the court to declare that the approval decision must also fall, if what we submit are the two preconditions to its validity are not met, and they are: a valid controlled action decision under section 75, and a valid assessment decision under section 87.

30

BRANSON J: Ms Mortimer, an issue that I think we would need to hear you on is whether this arises in the matter that was before the learned primary judge. The Federal Court jurisdiction, as you understand, is a jurisdiction with respect to matters - - -

35

MS MORTIMER: Yes, your Honour.

40

BRANSON J: - - - and this is an appeal in the matter that was in front of his Honour. These circumstances don't, at first glance anyway, appear to directly arise out of a controversy which was the subject of the matter in front of his Honour. They have somewhat the ring of a request for an advisory opinion about them.

45

MS MORTIMER: In our submission, your Honour, no, because they, as a matter of fact, could not have arisen before his Honour because there was no approval

decision. That was the state of the facts at the time. Our submission is that it was recognised by all parties that if we were – and I can take your Honours to the transcript of the injunction hearing that, in our submission, demonstrates that: that if we were successful in establishing an absence of jurisdiction in making the
5 controlled action decision, or an absence of jurisdiction in making the assessment decision, that the approval decision itself would fall for that reason.

We do not seek on this appeal to expand the challenge or create a challenge to the approval decision in any sense; that is, to create a new controversy about the appeal
10 decision – about the approval decision that is anything other than a consequence of the findings we ask this court to make about what we submit are the two preconditions to a valid approval decision.

TAMBERLIN J: But you're seeking a binding declaration of right in relation to something that wasn't argued. It may have been anticipated, it may have been
15 mentioned, but it wasn't fully argued or considered – couldn't have been – by his Honour.

MS MORTIMER: Could not, that is so, your Honour. That is so. And our
20 submission is that this court has power to do that under section 28, subsection (1), subparagraph (b) of the Federal Court of Australia Act.

BRANSON J: Is that notwithstanding that you accept, as I think you do, that
25 nothing in the third amended application or the statement of claim raises this issue?

MS MORTIMER: Well, your Honour, there is no statement of claim, but no, nothing in the third amended application raises it, and we understand that that's a point that our learned friends for the second respondents intend to make here, that we need to amend the application. That, of course, is something that your Honours have
30 power to do on appeal. That is a matter of form, not substance, in our submission, in the sense that if section 28, subsection (1) paragraph (b) of the Federal Court of Australia Act empowers this court to make such orders as the trial judge could have made, then, had events moved before his Honour gave judgment, then this is an order that his Honour could have made. The facts are not that. The facts are that the
35 decision was made after his Honour gave judgment.

So, in our submission, the logical alternative that perhaps our learned friends suggest we need to pursue is that if we are successful on this appeal and the court finds either that the controlled action decision is invalid for jurisdictional error, or that the
40 assessment decision is invalid, or both of them, that we must commence a new proceeding in the original jurisdiction of this court for the sole purpose of making a submission to a single judge that that judge is bound by the decision of the Full Court of this court, that those two preconditions to the validity of the approval decision mean that the approval decision must fall.

45 That does not, in our submission, advance the interests of the administration of justice at all. It imposes burdens, both on the court and on the litigants, that are not conducive to the finality of proceedings at all, and that is why we submit that the

most appropriate method – and we accept the court must be confident that we do not intend to expand our attack on the approval decision, and we do not.

5 FINN J: Could I ask you a question about what you have just said? Why should this court – if the court is of the view that we should not entertain the consequential relief you seek, why should we express any view at all about the validity or otherwise of that decision?

10 MS MORTIMER: Of the approval decision?

FINN J: Yes.

MS MORTIMER: No, I accept your Honours, in that circumstance would not.

15 FINN J: But you just suggested that a primary judge would be bound by a decision of the Full Court.

MS MORTIMER: As to the controlled action decision - - -

20 FINN J: Yes.

MS MORTIMER: - - - and as to the assessment decision.

25 FINN J: But that is all.

MS MORTIMER: Yes, your Honour.

FINN J: The effect of that is a completely different question, is it not - - -

30 MS MORTIMER: Well, your Honour, it - - -

FINN J: - - - that needs to be argued.

35 MS MORTIMER: That is possible, your Honour, but in our submission, particularly on the two construction grounds, there is only one answer and the respondents recognised that at the injunction hearing. Take the 170C ground.

BRANSON J: If they did there would be no dispute, Ms Mortimer; is that right?

40 MS MORTIMER: Well, we haven't heard that there's an opposition to that amendment, your Honour. We haven't heard from our learned friends whether they oppose the motion to amend. We understand that they say, both of them by their motions, that they want to make an argument about the discretion to refuse relief in relation to procedural fairness. We understand that. We don't oppose that at all.

45 BRANSON J: No. What I meant was, is there any dispute that you know of between the parties as to the impact of any judgment in this case on the more recent decision made by the Minister?

MS MORTIMER: On the limited ground in which we put it to your Honour, we have not heard that.

5 BRANSON J: That of itself is a bit of a handicap, isn't it? It would suggest there is no dispute between the parties for the court to resolve.

MS MORTIMER: In the sense that – that may well be, your Honour, because the respondents accept that it is consequential relief, they may not do that, your Honours. We haven't heard what they say about that.

10 BRANSON J: You haven't asked them?

MS MORTIMER: We haven't in the time – the last week, your Honour, things have moved quickly on the subject matter of this appeal.

15 TAMBERLIN J: Wouldn't we need to know more about the decision, though, the decision of – the recent decision of the Minister? And a declaration of right is a discretionary remedy as well, that's another factor one has to take into account.

20 MS MORTIMER: That is so, your Honour. That is so. We accept that.

TAMBERLIN J: But we would need to know more about the decision that has been made recently, which we don't have any material about, in order to make a binding declaration.

25 MS MORTIMER: Your Honour, we have sought to place before the court the decision itself - - -

TAMBERLIN J: Yes.

30 MS MORTIMER: - - - the approval decision itself and the conditions that are attached to it.

TAMBERLIN J: Yes.

35 MS MORTIMER: And in my submission, that is sufficient evidentiary basis, and the remainder of the argument really is to be drawn out of the statute.

40 BRANSON J: Ms Mortimer, perhaps we should hear what is said in opposition to this motion and hear you further in reply.

MS MORTIMER: If the court pleases.

45 BRANSON J: Dr Perry, what is your client's attitude to this motion?

DR PERRY: Thank you, your Honour. The Minister accepts that if the appellant were to succeed on grounds 1, 2 or 6, that the result would be that the final approval decision, which has been given by the Minister on 4 October this year, was invalid.

However, we don't accept that if the appellant succeeded on ground 3 of the notice of appeal that that would entitle the appellants to a declaration that the final approval decision is invalid. Now, if I might just elaborate for a moment on the difference between these, and particularly focusing on ground 3.

5

BRANSON J: Sorry, perhaps before you do, could you tell us whether you oppose the motion or you don't oppose the motion?

10 DR PERRY: We oppose the motion insofar as it relates to ground 3, otherwise we don't, your Honour. By ground 3 the appellants seek to challenge the Minister's conduct and the making of the assessment approval decision on the ground that, in making a decision on whether or not to approve the taking of the action, the Minister was required to, but did not in fact, give members of the public a reasonable opportunity to be heard or to make comments. So it is - ultimately the procedural
15 fairness ground, if I might loosely term it as such, is one relating to the validity of the final decision.

20 But, of course, the making of a decision to approve or not to approve is a process that runs right up until a final decision is made, and opportunities to be heard and to give comments aren't in fact restricted to events which might occur before the controlled action and assessment approach decisions under sections 75 and 87. Yet that is all that the appellant seeks to address itself to in these proceedings, to limit itself to attacking those decisions along the way by way of saying the ultimate decision is
25 invalid on procedural fairness grounds.

30 But it is our submission that in order to determine whether there has been a reasonable opportunity or a real opportunity to make comments, the court has to look at all of the circumstances up to and including the final decision itself, and that is not to say, as we say in our submissions, that this court shouldn't dismiss the appeal on the basis of the evidence before the trial judge, which is our primary contention.

35 But rather, if the court were to consider that the trial judge erred in dismissing ground 3 on the basis of his understanding of the Act or on the material before him, that we would then say that the court ought, in the exercise of its discretion, not to grant the relief that is sought, supposing for a moment that the amendment were made, or indeed even if the amendment were not made, because it would be deciding these questions based on an incomplete picture, which would not enable the court to determine the question of procedural fairness in all the relevant circumstances.

40 BRANSON J: If I could just interrupt, Dr Perry. Your client has a motion before the court as well - - -

DR PERRY: Yes, your Honour.

45 BRANSON J: - - - to amend its notice of contention and to place further evidence before the court touching on procedural fairness.

DR PERRY: Yes, your Honour.

BRANSON J: Assuming that motion were to succeed and the additional evidence received, and the court was in a position then to deal comprehensively with procedural fairness, would you continue to accept ground 3 from your opposition to this motion?

5

DR PERRY: Your Honour, our position is that we – it is slightly more complicated but we wouldn't oppose the amendments – the notice of appeal insofar as they related to ground three if the Minister's application to amend his notice of contention were allowed and if he were permitted to lead further evidence - - -

10

BRANSON J: Is that because your client concedes that if the decision that was the subject matter of the proceeding in front of the primary judge was affected by jurisdictional error then the more recent decision couldn't survive as a valid decision?

15

DR PERRY: Your Honour, that is so in relation to grounds one, two and six, but there is a lack of clarity, with all respect, with the way in which ground three is articulated, however - - -

20

BRANSON J: Well, if you meant that were fixed up and there was a finding that it fell for a denial of procedural fairness would your concession go that far?

25

DR PERRY: No, your Honour. If, in fact, it was said that the assessment approach decision were infected by jurisdictional error on the basis of a lack of procedural fairness in relation to that ground, because that seems to be used only as a springboard on which to challenge the final decision we would not accept that that alone would result in the final decision falling and being invalid. Rather if one were to say that the trial judge erred in relation to his consideration on ground three on the material before him, then two things would be open to the court, in our respectful submission. The first would be that the court could refuse to grant relief in the exercise of its discretion on the basis that it was now being asked to embark on a whole new process and to look at all the evidence afresh, and it really would be quite a different case.

30

35

The procedural fairness case would be quite different from the case run below. The alternative, we would say, is that the court would have to remit the matter back to trial judge to look at the question of procedural fairness afresh in light of all of the circumstances. So the position with respect to ground three is more complicated but the two are related. The objection that we have to ground three, at least in the way in which we understand it, would be "cured", if I may say, by the amendments being allowed to our notice of contention and by a motion, which we propose to make in due course to lead the further evidence, were allowed.

40

45

BRANSON J: Thank you. Anything further on this motion?

DR PERRY: No, your Honour.

BRANSON J: Mr Uren.

MR UREN: If the court pleases, our position is a bit like the curate's egg within the sense we are partly in favour and partly against what is proposed. I wonder if we could start off by referring to the additional evidence point. We don't object to the court receiving the additional evidence which is sought to be adduced by each party.
5 There are two reasons which might be advanced to that which relate to the question - - -

BRANSON J: We are concerned at the moment only with Ms Mortimer's motion.

10 MR UREN: Yes, this issue really relates to the question of the amendment because the fresh evidence can go to two issues. One is it can go to show the appeal is either wholly or probably in part moot. That's to say because of what has happened subsequent to the decision below facts have moved on and the decision which was the subject of the Minister's decision which was the subject of the proceedings below
15 has been supplanted by a final decision. And it may well be then that aspects of what happened below have become moot with the passage of time, and that - - -

FINN J: So when you say the appeal is moot are you saying in its entirety or only in respect of procedural fairness?

20 MR UREN: No, not in – probably in respect only of the procedural fairness issue. So the fresh evidence is related to that point. It is also related to the point that the proceedings before this court are proceedings by way of a rehearing, and that is on the facts and law as they exist at the present time. Nonetheless, as the High Court
25 has said, we can't obliterate the distinction between original and appellant jurisdiction. So juggling those two things together the court could receive further evidence in support of the original jurisdiction which has been exercised, but it can't receive the further evidence to hear what might be, in a sense, a somewhat different case. So the fresh evidence, or the further evidence rather, goes also to that issue.

30 Now, looking at the amended or proposed amended notice of appeal with those two things in mind one difficulty we felt with it, and this is something which we did take up with the other side by way of correspondence but go no real answer, is if the court looks at grounds F and G which would be – sorry, not grounds F and G, relief F and
35 G which is now sought, it can be seen that those declarations which are sought are not attached to any particular ground of the notice of appeal, the grounds themselves not being changed. And that is a matter of some significance. We take it, and we would presumably be told if this is wrong, that item F which is the declaration sought in respect of the decision made under section 75, that is to say the controlled action
40 decision, is really based on grounds one and two.

Now, grounds one and two are not grounds which require the additional evidence to be looked at except for the purpose of saying another decision has been made which might fall if what we previously told the trial judge and he disagreed with was a
45 wrong decision, so in other words there may be nothing particularly new there except the consequence of the controversy below now has an effect on something which has happened since. So that may be something which was not entirely out of the ambit of the court's regional jurisdiction bearing in mind the nature of the rehearing.

However, we have difficulties with grounds three and six in respect of declaration G. So declaration G relates to the decision of the first respondent made under section 87 and that is the assessment approach decision.

5 The difficulties which it gives rise to in the context of this case and what has happened since is that the line which has been taken by the appellant is to largely connect the improper purpose which is alleged in ground six, and the denial of natural justice which was alleged in – or procedural fairness which was alleged in
10 ground three, not only with the section 87 decision but with another decision under section 95, to fix a particular time for the purposes of making comment. The section 87 decision merely fixes on a process, the section 95 decision fixes on the time for public comment.

15 The application itself which was before his Honour was in respect of the section 87 decision, that is to say the process decision, not in respect of the time decision. This was a subject which we – a matter which we raised with respect to the issue of whether the section 95 decision was, in fact, before his Honour or not. The grounds appear to join the two together in some respect, possibly to avoid that difficulty, but if we go to the ground three first which was the procedural fairness ground and try
20 and relate this to the declaration which was sought, the ground in the first half a dozen lines asserts that:

The trial judge erred in finding that the assessment approach decision –

25 that's a section 87 decision –

...alternatively the conduct of the first respondent in relation to our final decision should not then be made involved no denial of procedural fairness to the members of the public interested in the assessment of the action.

30 Now, that was, in fact, not what his Honour found. His Honour found they were not entitled to procedural fairness because of 131AA. He has not, in fact, found they were denied procedural fairness at all, so that ground might require some reworking. But then there is a positive assertion of what his Honour should have found which is
35 tied up with the time decision in a way in which has an application with respect to the present proposal for amendment, which said that:

His Honour should have found that in making a decision whether or not to approve of the taking of an action –

40

now, we are leaving here the section 87 or 95 decision and looking forward to the decision under section 130 to approve the taking of an action:

45 *His Honour should have found that in doing that the Minister is required to afford members of the public a reasonable opportunity to be heard or to give comments under section 95(2)(c) and the Minister by setting a period under 95(2)(c) of 20 business days failed to afford such an opportunity.*

So the difficulty with the negative grounds, as his Honour didn't find it, the difficulty with the positive grounds is it seems to us to be inextricably connected with the opportunity to give comments under section 95(2)(c) or a reasonable opportunity to be heard at that stage. And the fact is that water has passed under the bridge to a
5 considerable extent since that decision was made and since that opportunity has passed, and it may well be said that even if the 20 days was not a period which was consonant with the dictates of natural justice if there was any to be given, nonetheless that the court would not strike out down the ultimate decision on the ground of the intermediate decision having failed in that respect either as a matter of
10 discretion or because it would concede that the meaning of the statute was not that – a non compliance with it had the effect of invalidating what has ultimately occurred if during the period between then and what ultimately occurred the problem had been rectified.

15 So this would, the way the ground reads, probably require the looking at what has happened since which is really impossible to be done in the context of an appeal we would think. Now, it's possible that the grounds might be divided into two, namely that the judge's role in finding that there was no necessity to give procedural fairness and that he should have found that procedural fairness had not been given, but we
20 don't read the ground as being divided into those two issues and it would be also a matter for the court as to whether they wish to – or whether the court wish to separate the totality of the final decision up into those two ingredients and decide the entitlement to natural justice first and then leave the question of whether natural justice had been given to a later fact-finding exercise by a trial judge in the event that
25 it was asserted on another application that natural justice had not been given in respect of the final decision.

The court might think it would be better if the meal was digested at one time rather than by courses separated by a period of weeks, months, or whatever the period
30 might be. So that was the difficulty which we had with ground 3. It would be impossible, we think, ultimately to take up the Commonwealth's suggestion that this court determine for itself whether procedural fairness had been given in the circumstances although it might be possible to determine whether procedural fairness was something which the public were entitled to. There is another difficulty too with
35 the way its put in the grounds of appeal, is that we don't actually know what the actual content of the procedural fairness is said to be.

Now, it's all very well to say you've got to give people a right to be heard but in the context of the public it is said that we should have given 20 days, 60 days, 50 days,
40 what about people living in Cape York, what about people living in Perth, what about some – etcetera, so - - -

BRANSON J: Mr Uren, I'm sorry to interrupt.

45 MR UREN: - - - what they are saying - - -

BRANSON J: I'm a little uncertain where you are taking us on because we're hearing you on a motion to amend in a very limited respect and this almost sounds like a strike-out application on the ground.

5 MR UREN: Well, I think we are saying that the waters in respect of natural justice have been so muddied by what has occurred since that it is probably not possible to proceed with ground 3 or with the relief sought in respect of it at all, especially the proposed amended relief unless the court thinks it would be convenient to divide up the matter into the legal issue of entitlement to natural justice and leave the factual
10 issue to be determined elsewhere. Now, going to ground 6, which is the ground related to improper purpose. We take it that declaration G is addressed to this ground as well although we're not told that it is, but nonetheless the question of improper purpose is in the ground related to the section 87 decision or the section 95(2) decision.

15 The improper purpose is the fixing of the process including the specification of the 20 day time limit so again what we have got is not really the process itself as a process of deciding to adopt a particular method, but including in that the specification of the 20 day time limit. Now, there again the point may well arise as
20 to what happens in the circumstances where the further time has been allowed in order to give people more time to tell the Minister things.

Those extra circumstances might cause the court to come to the view that what was done in relation to and associated with the section 87 and the section 95(2)(c)
25 decisions have been bypassed by events as well in which case it really wouldn't be possible to say that the final decision should be struck down on the basis of the – let's say the fixing of a 20 day time limit earlier in the piece, even if that was for an improper purpose if the ultimate decision has been made on the basis of purposes which are entirely proper. Now, the - - -

30 FINN J: Sorry, could I just understand what you are putting here? Are you saying that an improperly – a decision taken for an improper purpose can subsequently be validated by granting an extension of time?

35 MR UREN: No, it's that the ultimate - - -

FINN J: If you're not saying that - - -

40 MR UREN: The ultimate decision is not taken for an improper purpose.

FINN J: But that raises the question that was raised initially, if this decision is taken for an improper purpose is it a consequence, on the proper construction of this statute, that the subsequent decision is necessarily invalid?

45 MR UREN: No, it's not.

FINN J: Even if it's got no impropriety of purpose in it?

MR UREN: Yes, because time has slipped past the assessment decision day. What we have now is an actual thing on the grounds to say the approval has to be attached.

FINN J: I fully understand what purports to be an approval - - -

5

MR UREN: And the approval has to be attached.

FINN J: - - - and the sole question is, is a valid decision prior to that a necessary pre condition to the validity of the final decision. That is the sole point I'm raising with you.

10

MR UREN: No, it's not, but for the reason that it's not to be looked at the case of let's say, curing a denial of natural justice by giving people more time, that's a different thing. What we're looking at here is the necessity of the Wilderness Society to strike down the approval which was given and they've got to strike down the approval which was given, we would submit, on the basis of improper purpose if they want to, otherwise the point really which has to be made is that the making of the assessment decision, including the specification of the 20 day time limit for public consultation under section 95(2)(c) is a necessary statutory pre condition of the final decision.

15
20

Now, that presumably would have to be the ground, so what we are really saying is that the grounds have to be altered if they want to include the relief which is currently sought and it seems to us proceeding on the way things are at the moment is going to cause difficulty because the grounds are all addressed to what has previously happened. Things have happened since and if it's thought to strike down the ultimate decision on some basis then there ought to be grounds addressed to the ultimate decision, not grounds addressed to prior matters as to which one then has to scabble without the assistance of submissions, I may say, because none have been provided as to what the relationship of the grounds is to the relief which is sought with respect to the ultimate decision.

25

30

BRANSON J: Thank you, Mr Uren. Ms Mortimer?

MS MORTIMER: If the Court pleases, perhaps I haven't made myself clear and I will take your Honours to the two amendments in the notice of appeal. My learned friend, Mr Uren, is correct that ground F deals with – no, I withdraw that. The relief sought in paragraph F deals with grounds 1 and 2 because they are the only ones that attack the validity of the section 75 decision. The relief sought in paragraph G in our submission is available on findings on grounds 3 and 6 but would also flow on the same argument we make, if we are successful on grounds 1 and 2 because it is our submission that those three stages of decision making, controlled action, assessment and approval, the first two are pre conditions to the exercise of power, so that is how it's put. It's put no more broadly than that.

35
40
45

In relation to what my learned friend had to say about our expression of the ground 3 procedural fairness, we accept that what his Honour found was that section 131AA subsection (7) precluded an obligation arising and we will be submitting to your

Honours that that was an error but that conclusion itself means that his Honour found there was no denial of procedural fairness. One can't have a denial of procedural fairness if one doesn't owe an obligation to give it. That's how the ground is expressed. We accept, if the court pleases, that in relation to the procedural fairness ground there are really two stages of analysis that that ground requires. The first is –
5 well, perhaps three, if the court pleases. The first is whether there is an obligation to afford - - -

10 BRANSON J: Is this a necessary argument for you to put now on your application to amend?

MS MORTIMER: Only, your Honour, to clarify, by way of reply to the different positions put by the two respondents, where we stand on that because as we understand it the Commonwealth's submission is that it opposes the motion on the
15 basis that if there was a denial of procedural fairness it's been cured or alternatively, that if it's not a curing argument then that there was an incomplete factual basis for the analysis of the denial. Either of those arguments, in our submission, don't really go to whether the court ought to grant leave to amend but they go to how the court ought to dispose of the ground if it enjoys any measure of success, so they go to - - -

20 BRANSON J: I'm wondering if this is the time to deal with that. I - - -

MS MORTIMER: Well, that is the only point I wanted to make by way of reply to what my learned friend, Dr Perry, had to say, that is that it seems to me, with the
25 greatest of respect to my learned friend, that the Commonwealth's opposition to the motion really has to do more with what should happen if we enjoy any prospects of success on it, rather than should we get out leave to amend because the Commonwealth otherwise accepts that on the other three grounds the approval decision must fall if we succeed.

30 And in relation to what my learned friend, Mr Uren, had to say, the point of difference, as I understand it, is that he accepts that if we succeed on ground 1 and 2 the approval decision must fall, but he does not accept that if we succeed on ground 6, improper purpose, that it must fall, and in our submission there is no difference in
35 terms of the analysis around jurisdictional error to make a distinction between an improper purpose ground and a considerations ground, which is ground 1, and for that reason in our submission if the second respondent opposed the motion - the amendments on the basis to paragraph G we submit that there is no merit in that submission. If the court pleases.

40 BRANSON J: All right. Unless counsel think that it would be awkward from their point of view the court will hear the parties on all three motions and then briefly adjourn to consider the way forward. Dr Perry, I think that brings us to your motion.

45 MS MORTIMER: Oh, perhaps, your Honour, I ought formally – and I apologise, ought formally to have read Mr Brown's affidavit in support of both the amendment and then there is the issue of new evidence, your Honour. I'm not sure if the court - - -

BRANSON J: I think they go hand in hand, don't the?

MS MORTIMER: They do go hand in hand, so - - -

5 BRANSON J: No one has suggested otherwise, I think.

MS MORTIMER: I seek to read Mr Brown's affidavit and I don't understand there are any objections to it.

10 BRANSON J: That's right, Dr Perry?

DR PERRY: No, there aren't. We understand it only to be read on the notice of motion, your Honour.

15 BRANSON J: On the notice of motion. Any objection to the affidavit, Mr Uren?

MR UREN: No, your Honour.

BRANSON J: Thank you. Yes, Dr Perry?
20

DR PERRY: Thank you, your Honour. If I might then just deal with our notice of motion. As has really come out from the discussion already, the notice of motion of the Minister is quite closely inter-related to the notice of motion that is brought by the appellant although our notice of motion we would press in any event as
25 particularly the relief relating to the exercise of discretion. As to whether the court ought to grant relief remains relevant irrespective of the outcome on my learned friend's motion. The notice of motion seeks two orders. The first is leave to amend the notice of contention and in the terms contained in the draft notice of contention at annexure JDB1 to the affidavit of Mr Brown sworn on 11 October 2007.
30

And as your Honours will see, that ground is intended to raise the matters that I have already mentioned to the court, but in particular your Honours will see that the matters we have identified in paragraph D of the particulars to paragraph D identify a number of events as having occurred subsequently in support of the grounds that the
35 court ought refuse relief in the exercise of its discretion.

BRANSON J: Is that what the reference to contrary to the interests of justice is meant to encompass?

40 DR PERRY: It is said that it is contrary to the interests of justice to determine it on an incomplete set of facts and – I'm sorry, they are particulars to both grounds 2.1 and 2.2.

BRANSON J: Yes. The reference in 2.2 in the circumstances of the determination
45 that there was no reasonable opportunity to be heard or to give comments would be contrary to the interests of justice, I was wondering what is intended to be conveyed by that. Is that to say even though there was technically a denial, the court should

refuse discretion – in its discretion refuse to grant relief or does it imply something else?

5 DR PERRY: Your Honour, it is really more by way of elaboration of ground 2.1, the two are closely related. It's to say that it's not in the interests of the administration of justice for the court to make a determination of whether there's been a procedural fairness in circumstances which are incomplete, and in which the respondent has not been able to lead evidence of the complete picture. So perhaps the last part is not so relevant - - -

10 FINN J: So it is without having regard to the proper evidence or the evidence before it, is that what you are saying, that's the contrary to it.

15 DR PERRY: Yes, it's not in the interests of justice for the court to determine a breach of procedural fairness where it has – it is seized only of material relating to part of the circumstances relevant to a consideration of that question.

FINN J: Yes.

20 BRANSON J: And that will remain the position even if your additional evidence is received?

25 DR PERRY: No, your Honour, that would then be a question of whether the court considered it appropriate to embark upon effectively a trial of that issue, or to remit it to the trial judge. Your Honour will see – perhaps I should explain the way in which the notice of motion is structured and that might elucidate the contention a little more clearly. The first is to say that the relief sought by the appellant ought to be refused in the exercise of discretion. That is based as I've said on the fact that the trial judge determined this question on a particular pleading in circumstances where a final decision had not been made, and various other steps had not occurred and to now embark upon a consideration on whether the final decision was made in breach of a duty of procedural fairness, would involve an issue of an entirely different kind on which the court might now consider it inappropriate to do within the context of these proceedings.

35 BRANSON J: I didn't understand anyone to be asking us to work out whether the final decision was affected by a denial of procedural fairness.

40 DR PERRY: Your Honour, we understand that to be the purpose of the amendments which the appellant seeks to make.

45 BRANSON J: It wasn't my understanding. My understanding is that they are simply saying if they win on the grounds that they have, the final decision will necessarily fall no matter how it was arrived at.

DR PERRY: Well, your Honour, we would say that that position, we say, is an untenable one and it's not even a ground when one looks at the grounds of appeal, is one that is put. Your Honours will have seen from the elaboration of ground 3 in the

notice of appeal that in fact what is said is that the trial judge ought to have found that in making the final approval decision there was a denial of procedural fairness. So it is unquestionably the case that the appellant says that in making the final approval decision there was a breach of natural justice and that breach occurred by way of the method by which - method of assessment chosen and the number of days given for an opportunity to comment.

Now, it is quite clear, we would say, that a court cannot determine or ought not determine the validity of the final decision when it has only before it two of the relevant matters which deal with the question of procedural fairness in relation to the final approval decision. Your Honours would find a very clear statement of that in the decision – the recent decision of the High Court which appears on my learned friend’s supplementary list of authorities in SZBEL, that a question of procedural fairness can only be dealt with in light of the facts and circumstances of the whole of the case, the particular case, and not simply by plucking out one aspect in a hypothetical sense and saying, “Well, we were only given 20 days at this stage of the process,” so in some way that means a denial of procedural fairness so as to infect the final decision, when the respondents would clearly say, “Well, hang on a moment, you can’t focus your argument just on that step, other things have happened. There’s been another - - -

TAMBERLIN J: Isn’t that proposition self-evident that his Honour could not have made a conclusive decision on the propriety of otherwise of the conduct of the Minister in making the section 130 decision because he did not have any idea what that conduct might ultimately turn out to be.

DR PERRY: No, and in fact – that’s correct, your Honour, and in fact to some extent, as was said below, the application was premature in that sense because ultimately it was with the validity of the final decision which was yet to come, that the attack was really directly, because it wasn’t said – I’m sorry, your Honour.

BRANSON J: Yes. We can’t now embark on a case that wasn’t run. Now, as I understand it a case was run in front of his Honour saying preliminary steps were affected by a denial of procedural fairness and you now want to say, “Well, even so far as those preliminary steps were concerned, it’s proper to look at things that happened subsequently which were part of the entire process for allowing people to be heard.” That’s in part what you’re saying, I think, isn’t it?

DR PERRY: Well, your Honour, this difficulty arises in part from an ambiguity in the pleadings, but the way in which the case was run below and the way in which it’s sought to be run now is that there was a suggestion which his Honour addresses as to whether the assessment approach decision itself was infected by a failure to accord procedural fairness in choosing that method of assessment. And the judge looked at that. But ultimately if one looks at the way in which it was pleaded at first instance, if I just take the grounds of the application, ground 6 which appears at the appeal book at page 7. It is said:

The making of the 2007 assessment approach decision, alternatively the conduct of the first respondent in relation to the making of a decision under section 131 which is the final approval decision, involved –

5 BRANSON J: But that is not a decision under review as Finn J has pointed out, it couldn't have been, but moreover it expressly is not. The two decisions under review are identified in paragraphs 1 and 2.

10 DR PERRY: Well, your Honour, there is an inconsistency - - -

BRANSON J: We are dealing with an appeal from his Honour's review of those decisions.

15 DR PERRY: Your Honour, the evidence was all directed towards the question of whether the choice of assessment decision and the choice of a 20 day period for public comment were going to give people enough time and enough of an opportunity to be able to comment on the final approval decision.

20 BRANSON J: But presumably for the purpose of challenging one or other of the decisions that was under review, if it wasn't led for that purpose it should have been excluded as being irrelevant.

25 DR PERRY: Well, your Honour, if we perhaps – it's impossible I think to extricate the two, the way in which it was run and to say that it simply said that it is – to say that there is a denial of procedural fairness in relation to those decisions which doesn't in some way relate to the validity of the final decision.

30 BRANSON J: Well, you might well say his Honour wasn't able to make a decision to determine that either of these decisions failed or fell because of a denial of procedural fairness, because it was premature.

DR PERRY: Yes, your Honour.

35 BRANSON J: That's no reason for us to embark on a review of a final decision that didn't exist at the time of his Honour's hearing.

40 DR PERRY: No, your Honour. If I might just take your Honours to the way in which the submissions are now sought to be put on appeal, because we think again this shows that it's not a discrete exercise in terms of attacking the assessment approach decision as an end in itself which is sought to be undertaken by the appellant.

45 BRANSON J: Of course take us where you think we ought to go, but at least from my point of view, not forgetting what we're here to do and what his Honour sat to do which was to review two decisions nominated in paragraphs 1 and 2 of the further amended application.

DR PERRY: Well, your Honour, if I might just take you to the submissions that the Wilderness Society filed in this appeal.

5 MS MORTIMER: If the court pleases, I am happy to clarify the very limited scope
of our procedural fairness ground on appeal and I do apologise if it's not been clear
to our learned friends. But it is an absolutely discrete exercise and it is as my learned
friend, Mr Uren, took the court to, if one looks at ground 3 of the notice of appeal, it
is confined to what is the effect of 95(2)(c), the assessment approach decision, and
10 the obligation imposed by it. And our contention is that section 95, that the making
of an assessment decision is the method chosen by the statute for two things: to
inform the Minister about the adverse impacts for his ultimate decision and to afford
procedural fairness.

15 In choosing the method that the Minister has to afford procedural fairness, the way
that is delivered through the statute is 95(2)(c) and if there is a breach of that, that is
a breach of procedural fairness which we say the statute intends to vitiate the
assessment decision, a jurisdictional error. That is the entire scope of it. We
therefore say if the assessment decision is vitiated for jurisdictional error on the
ground of denial of procedural fairness, the approval decision must fall, just as it
20 must in relation to the other grounds.

And to make the point crystal clear, if the court pleases, suppose the Minister had
given no opportunity at all under section 95(2)(c), had simply not invited the public
to make comments at all, the same question arises. That is, what is the effect of the
25 breach of that statutory provision. We say it's a fundamental procedural fairness
provision, breach of which the statute intends to vitiate the decision. The
respondents may submit to the contrary. But that is the extent of the challenge on
procedural fairness.

30 DR PERRY: Well, your Honour, with all due respect to my learned friend her
submission makes it all the clearer that the further evidence that we seek to lead
would be relevant, if they are permitted to amend their notice of appeal in the way
that they suggest, because they are saying that the focus of the court ought to be
simply on the question of whether the method of assessment chosen and the number
35 of days within which the public may comment satisfy a requirement in section
95(2)(c). And if they don't, then it's her submission, as we understand, that the final
decision should fall. Now, that is not a matter which we would accept, we would
wish to dispute that.

40 TAMBERLIN J: Can I just ask you, are you putting this for the purposes of saying
you should adduce fresh evidence to show if at a particular period in time there
appears to have been a denial of procedural fairness, it has subsequently been cured,
in respect of the section 95(2)(c) matter? That I can understand. If you're arguing
that procedural fairness granted in respect of the taking of the final decision overall
45 cured it then I have some difficulty in seeing why we should entertain that.

DR PERRY: Well, your Honour - - -

BRANSON J: Put it another way, Dr Perry, do you press your motion if the motion of Ms Mortimer were to be refused?

5 DR PERRY: May I just have a moment, your Honour? Yes, your Honour, we would be content with that on the understanding as we - - -

BRANSON J: Sorry, content with what?

10 DR PERRY: Content with the - - -

BRANSON J: Your motion is put to protect your position against Ms Mortimer's motion succeeding, is that right?

15 DR PERRY: Yes, it's put to protect against – in part to protect against the possibility that – to protect against the final order that they now seek to invalidate the approval decision. But if that decision were not subject to attack on ground three then it would presumably leave our rights entirely intact to be able to argue in due course.

20 BRANSON J: So far as the final decision is concerned.

DR PERRY: So far as the final decision is concerned.

25 BRANSON J: You are not trying to supplement evidence of procedural fairness on the interim decision.

30 DR PERRY: It's a – I now have a moment, your Honour, just to think that through. I don't wish to make a concession precipitously. Your Honour, we may well put an argument in due course that there would be – I am sure that we will, in fact, that there would be no invalidity that would flow in any event from the number of specification of the number of days, but I think we would be content if their motion were refused - - -

35 BRANSON J: But what happens subsequently couldn't get you in a stronger position on procedural fairness in that decision.

DR PERRY: Yes, if the – I'm sorry, your Honour, I didn't mean to cut across you.

40 BRANSON J: That's all right.

DR PERRY: We would be content if their notice of motion were refused then not to seek to lead our further evidence on the basis that we understand our rights in relation to validity of the final approval decision would be preserved.

45 BRANSON J: Is that your position also, Mr Uren?

MR UREN: Regretfully, no. The reason why is this - - -

BRANSON J: Well, sorry, we have cut off Dr Perry, I don't know if there's anything further you want to say about yours, is there, Dr Perry?

5 DR PERRY: Well, I don't know whether I ought to put alternative submissions in the event that the other side's application were allowed. I would be happy to meet the convenience of the court on that, as to whether you would wish to make a decision on the appellant's notice of motion first and then depending on that hear me if need be further on our notice of motion.

10 BRANSON J: My impression is that you have rather said what you wanted to say about Ms Mortimer's, but if you think there is something else that can be briefly put do that. We were hoping to rule on three together to save coming in and out like yo-yos, but maybe we can't but if we can let us try.

15 DR PERRY: No, I quite appreciate that, your Honour. I think that the only other points I would have made are fairly trite, that the evidence itself is non-contentious and relates to events postdating the decision which falls in a category of evidence that the court has been more amenable to receiving under section 27, but otherwise I think essentially your Honours have the gist of our submissions.

20 BRANSON J: Thank you. Mr Uren, you support the Commonwealth's motion, I think, is that right?

MR UREN: We support the motion, yes, and our motion - - -

25 BRANSON J: No, sorry, as to – Ms Mortimer, is there anything you want to say additional in opposition to the Commonwealth's motions?

30 MS MORTIMER: No, your Honour, but there is one matter I should just draw the court's attention to because we gave our learned friends notice of it yesterday. Insofar as our learned friends seek to read the affidavits of Mr Brown and Mr Early, we gave our learned friends notice that we objected to this court receiving the evidence in paragraphs 4 and 5 of Mr Early's affidavit and exhibit GPE1 which is the Minister's press release. And we object on the grounds of relevance and hearsay.
35 That, as I understand it, your Honour, really doesn't in our submission affect the substance of the evidence that the Minister wants to address.

BRANSON J: So the paragraphs of Mr Early's affidavit, sorry?

40 MS MORTIMER: 4 and 5.

BRANSON J: 4 and 5.

45 MS MORTIMER: And exhibit GPE1 which is Mr Turnbull's media release commenting inter alia on the effect of his Honour – the learned trial judge's decision and - - -

BRANSON J: Well, I can understand that you might want to limit the use that we can make of it, but in an argument on procedural fairness the fact that he invited the public to do things would seem to have some obvious relevance, wouldn't it?

5 MS MORTIMER: Well, your Honour, that is precisely why paragraph 6 we do not object to which is the, in our submission, the admissible evidence and paragraph 7 and 8. Those are the substantive provisions and in our submission the media releases are not probative of very much at all.

10 BRANSON J: Yes, Mr Uren?

MR UREN: If the court pleases, our notice of motion exhibits to the affidavit of Shoshana May, a notice of – a proposed amended notice of contention which does two things. One is it excises some grounds which are not necessary to be argued in
15 view of the concessions which are made in the appellant's submissions, and that is ground 1.1 and 1.4. We should also add to that ground 1.2 because that now becomes redundant. The ground two mirrors the Commonwealth's grounds and what we want to say about that additional to what the Commonwealth have said, and perhaps in some opposition to a view which was taken, is that despite what is being
20 said the section 95 or the section 87 decisions are not attacked on the ground that in the making of those decisions procedural fairness was not given.

They are not the subject of attack on that basis. They are attacked on the basis that they are conductor matters which having been done the way they were denied
25 procedural fairness in respect of the making of the ultimate decision under section 130. It is not asserted and has never been asserted that before the Minister made the assessment approach decision he had to give procedural fairness in the making of that decision to the public. What is said is that his making of that decision denied them procedural fairness in respect of the ultimate decision. In other words these are
30 the ingredients of the asserted right to procedural fairness and what - - -

BRANSON J: Mr Uren, I have got paragraph 6 of the third amended application open, do you have it in front of you?

35 MR UREN: Yes, I do, on page 7 I think.

BRANSON J: Yes, the making of the 2007 assessment approach decision and then there's something in the alternative involved in denial of procedural fairness to the applicant.

40

MR UREN: Yes, that's right. In other words if it involved the denial of procedural fairness, not that procedural fairness was required in the making of it, but that it involved a denial of procedural fairness to the public the grounds or particulars of that are that in making a decision under section 130 or alternatively engaging in
45 conduct for the purpose of making that decision, and I can interpolate here, it seems to be argued that the intermediate decisions are conduct for the purposes of section 6 of the Act, the first respondent is required to afford members of the public and interested persons the reasonable opportunity to be heard not on the issue of what the

assessment process should be but on the issue about whether or not the taking of the controlled action should be approved.

5 So what the particulars – in particular A does is look forward to the section 130 final approval decision and say, “We are being denied natural justice in relation to that decision because you, the Minister, have fixed on an assessment process which is inappropriate to the giving of natural justice.” So it’s not that the assessment approach decision is attacked on the ground that natural justice was not given in the making of that decision, it’s that the members of the public have got a right to be heard in respect of the ultimate decision which was denied because the Minister fixed a particular process instead of having a full blown public hearing or something of that sort. Then particular B says:

15 *What procedural fairness required?*

Now, this again is procedural fairness about whether the taking of a controlled action should be approved looking to the ultimate decision. Procedural required that:

20 *The process for assessment under section 87 be fixed and periods of time be settled as would give people a reasonable opportunity to be heard about whether the controlled action should be approved and what condition should be attached to it and to ensure that the informed decision was made.*

25 Then it is asserted that here is the allegations of breach by reason of all the things which are set up in A and B down to G:

30 *The assessment approach decision and the time specified by the first respondent under section 95(2)(c) do not give the applicant or members of the public a fair or reasonable opportunity to be heard and thus cost a denial of procedural fairness.*

35 So it’s the decision which was made that didn’t give the applicant or the public an opportunity to be heard on the final issue because it was an inappropriate decision for that purpose, but it’s not attacked per se on the ground that – sorry, the 87 or the 95 decision are not attacked per se on the ground that natural justice was required to be given before those decisions were made. What is attacked is the fact that they set out a regime which did not give natural justice in the final issue. So it’s not true to say and it has never been the case that the assessment approach decision or the section 95 decision have been attacked on the ground that natural justice was denied in the making of those decisions.

45 What is being attacked is that the ultimate decision will be invalid because the conduct on the way to it, which includes the making of the decisions under these sections, doesn’t give fair and reasonable opportunity to be heard in the making of the ultimate decision. Now, that is why the evidence which is sought to be admitted doesn’t go to the 95 or the 87 decisions at all, it goes to the ultimate decision which is what the ground relates to. Now, if it were to be argued that there should be natural justice given in respect of the 2000 assessment approach decision and the 95

decision, the argument would have to be that in the making of those decisions the public should have been approached on each occasion but that has never been the argument nor is it the ground, and nor does it appear in the current arguments.

5 What the applicant has done – the appellant rather, is looked forward to the ultimate decision and said, “I have at this stage of the proceedings been denied natural justice in respect of my interest which is in the ultimate decision,” and that, in our submission, is why the new evidence is relevant on the basis which Dr Perry referred to, because if it – it’s difficult to see why the court should argue about whether
10 natural justice – hear argument about whether natural justice was or wasn’t given at a stage some months ago when subsequent facts bear on that issue in respect of the decision as to which it can be said natural justice had not been given which was the ultimate one.

15 BRANSON J: Mr Uren, is it open to you to place Mr Early’s evidence before the court if Dr Perry chooses not to?

MR UREN: I’m sure Dr Perry wouldn’t choose not to.

20 BRANSON J: I think she just did choose not to - - -

MR UREN: I don’t think she did.

BRANSON J: - - - if Ms Mortimer’s motion fails.
25

MR UREN: I thought it was a very conditional choice, but in any event it can certainly be retracted. But I would, if necessary.

BRANSON J: Is there anything you want to say about that, Dr Perry, before I call
30 on Ms Mortimer?

DR PERRY: I am not sure we can really say anything. No, your Honour, I’m not sure there’s anything more we can say on that, thank you.

35 BRANSON J: Ms Mortimer?

MS MORTIMER: I’ve nothing by way of substantial submissions to add to what I’ve already submitted to the court, save this: that as we had apprehended it the second respondent’s motion was unnecessary, if it pleases.
40

BRANSON J: On what grounds?

MS MORTIMER: Well, on the ground that it was the motion was being – the identical contention was being made by the first respondent and if it succeeds then it succeeds for the purposes of the appeal in total. Now, what I understand my learned friend now to be saying is even if the first respondent doesn’t press it the second respondent does. And in those circumstances then it may be necessary.
45

BRANSON J: The court will briefly adjourn.

ADJOURNED

[11.27 pm]

5

RESUMED

[11.38 am]

10 BRANSON J: The view of the court is that the motion of the appellant to amend its notice of appeal should be refused. Ms Mortimer, I noticed incidentally, the wrong order may have been invoked, but that's not a basis of the refusal.

MS MORTIMER: I apologise, your Honour.

15

BRANSON J: Ms Mortimer, the court is of the view that this is to extend the matter the subject of the appeal, but notes that there may be no controversy between your client and the Commonwealth on this issue in any event.

20 MS MORTIMER: If the court pleases.

BRANSON J: Dr Perry, the court would have been minded to make orders sought by your notice of motion but for your intimation that you didn't press them. Do you wish to reconsider your position?

25

DR PERRY: I do, your Honour. May I just have a moment?

BRANSON J: Yes.

30 DR PERRY: Yes, your Honour, we would. Thank you.

BRANSON J: Very well. On the motion of the first respondents, there will be orders in terms of paragraphs 1 and 2 of the notice of motion filed on 11 October of this year and on the motion of the second respondent, there will be orders in terms of paragraphs 1 and 2 of the notice of motion dated 15 October 2007.

35

MS MORTIMER: If the court pleases. If I can just perhaps outline to the court the way by which I propose to conduct the appeal on behalf of the appellant. I propose to take your Honours briefly to some of the evidence to expand a little on what's in paragraphs 5 to 8 of our outline and our chronology, but I will emphasise that will be brief. Then take your Honours to the legislative scheme in general, work your Honours through the Act a little and then turn to each of the four grounds, and as I deal with those, I will take your Honours in more particularity to the statutory provisions, any cases, our argument, the evidence, and it's at that stage I will take your Honours to the passages and the reasons of the learned trial judge to demonstrate why we say there's error.

40
45

So if I can start with the evidence and just take your Honours briefly, firstly, to volume 1 of the appeal book? The point in the chronology at which I propose to start just to draw your Honours' attention to some of the evidence is at the point at which the second respondent made its referral in 2005 to the Minister, and your Honours will find that at page 177 of the appeal book. And the reason I'm starting there really is to make good the proposition which may or may not be contentious, that this referral in 2005 was dealing with the same action and, in our submission, that is as the referral in 2007.

10 Your Honours can see that if your Honours look at page 178 of the appeal book under the heading Description of the Proposal, 2.1, provide a summary of the description of the action, and your Honours will see there a description that, in our submission, is materially identical with the description that is found in the 2007 referral. And the two components of the action which are identified on the next page, 179, under 2.4 are the construction and operation of the pulp mill.

So when one asks for the purposes of this Act, what is the action that the second respondent proposes to undertake, it was in 2005 and it remained in 2007, the construction and operation of a pulp mill at Bell Bay. The then responsible minister made a decision on that referral which your Honours will see at page 197 of the appeal book, that is, the decision under section 75 identifying, as your Honours will see, three sets of controlling provisions to the purpose of section 75, and they are relevantly the same controlling provisions that were nominated by the first respondent in the 2007 decision.

25 Your Honours, there is always a dilemma about whether to go to the facts or the law first and I will take your Honours back through section 75 to disclose the scheme of the Act, but essentially that was the decision that the then minister made. Your Honours will then see his reasons for that decision and immediately following that, at page 206, it is the decision under section 87 of the Act, what I think all the parties have been calling the assessment approach decision, and your Honours will see that the decision that the Minister then made was that the assessment was to – the action was to be assessed by an accredited process under the Tasmanian State Policies and Projects Act 1993. And the Minister's reasons for decision then follow.

35 Perhaps I should just draw to your Honours' attention because it was something that puzzled me for a moment, your Honours will see that the recitation of the legislation there starts with section 86, that section was repealed in 2006. So that's gone out of the legislation now. But section 87 was not, in our submission, materially different and I don't think was really different at all. In the Minister's reasons for decision, what he did – if your Honours turn the page to 208 – as he was required to do was to consider the matters in section 87(4) and measure them against what was proposed to be undertaken in the state.

45 So he first had to be satisfied under 4A that there was a process to be carried out under a law of Tasmania, and the Minister was satisfied of that, and then he had to be satisfied that it met the standards prescribed by the regulations. He then had to be satisfied that it would ensure that the relevant impacts of the action – and I pause

there to draw your Honours' attention to the fact that relevant impacts is a defined term in the Act and I will take your Honours to how it's defined – will be adequately assessed, and that's the subject of findings by the Minister at paragraphs 11, 12, and 13 of his reasons. He then also needed to be satisfied that he would receive a report of the outcome and he was satisfied of that in paragraph 14 of his reasons.

So having made that decision, the process was for the purposes of the Commonwealth legislation formally committed to the state. The RPDC which was in a form already seized of the matter - and there's a history to that which, in our submission, is not particularly relevant, but the RPDC then, certainly in a legal sense, in our submission, continued with the assessment the Minister had decided must be undertaken and if I can take your Honours to the relevant steps that then occurred, your Honours will see from the media release at page 210 and 11 of the appeal book that there was a vast amount of information that some eight or nine months later was submitted to the RPDC by the proponent.

And the RPDC then wrote to the proponent a couple of months later on 2 October 2006, at appeal book 214 to 215, setting out the process that it was proposing to undertake. And your Honours will see this is a letter written by the then executive commissioner of the RPDC, Mr Green. Your Honours will see that at the bottom of page 216. He subsequently resigned, but I will take your Honours through that.

What the RPDC, in our submission, was making clear in this letter is that – if your Honours look at the third paragraph on page 214, that it was going to conduct a process where all other parties and participants will be afforded the opportunity and time to comment on additional information provided by Gunns in their draft integrated impact statement. That's the large document that was submitted back in July. That the commission was at that stage still requiring what, in our submission, was quite a large volume of information from Gunns and it itemises that at page 215 of the appeal book in those dot points, and then makes the point that the further conduct of its inquiry will need to take account of how much more time is required for consideration of the documentation by the commission, its consultants, government agencies, non-government agencies, and the public. That, in our submission, is an accurate reflection of all the sources of information that are by the legislation contemplated as contributing to the assessment process.

FINN J: Can I just interrupt you on that point? I presume that this inquiry, in substance, is far more wide ranging than what is envisaged by the Commonwealth statute?

MS MORTIMER: Of course, your Honour. That's so, your Honour, it was. And that is, in our submission – when I take your Honours to section 87, it may become a little more clear, the point of the Minister being given a power to choose an accredited assessment process under a state law is to consolidate an assessment that is dealing with issues that are not properly the subject of the Commonwealth's jurisdiction under the EPBC Act. So that is right, your Honour.

And that's a point that the respondents make quite strongly against us, that this was a much more wide ranging inquiry and, in substance, our answer to that is this; that may be so, but nowhere in these materials will one find that distinction being drawn by the RPDC, that is, the commission charged with the assessment under the
5 Commonwealth legislation, nowhere in these materials says well, the Commonwealth matters are easy and straightforward and not complex and it's only the state matters that are complex and it's really only the state matters that we need all this input or time or resources for. That kind of distinction is never made by the body charged with the task of assessment.

10

It is of course the fact that their inquiry was more wide ranging, but, in our submission, the materials demonstrate that the commission considered that a full-testing inquiry was required to perform both its functions. And that kind of inquiry, as the letter to Gunns makes clear on page 216, was to extend to the – if your
15 Honours look at the dot points, exchange of expert witness proofs and copies required, reports, submissions, and preparation for a public hearing, site inspections, a date, time, and place for a public hearing proper.

20

The scale of that inquiry, in our submission, was precisely what the Minister was contemplating in his reasons for the assessment approach decision, was appropriate to inform him of the impact of this proposal. The commission then makes some directions, which your Honours will see on page 217 of the appeal book, and the transcript of the directions hearing, which appears at page 218 of the appeal book, describes the outcome of those directions. And your Honours will see that by this
25 stage – that is, by 22 February 2007, Mr Green had resigned, as had another member of the commission, and the Honourable Chris Wright QC was the chairman of the commission.

30

There is a description of those events given by the chairman at page 219 and I won't pause to take your Honours to that in any detail. What the chairman then, in our submission, goes on to say – this is by way of sort of an opening statement at this directions hearing, and your Honours will see by an examination of the progress of this directions hearing through the transcript the number of the people that hopped up to speak with all their different perspectives and interests on how this inquiry should
35 be being conducted, including somebody representing my client. What the chairman announced at page 220 of the appeal book, perhaps starting up the top, is:

40

That it was apparent to the commission –

45

I'm on the second line, if the court pleases -

That the processes and procedures were and remain completely appropriate to the task which we have undertaken and we feel that they should be followed by us in the future discharge of our duties.

50

Now, that is a prime example on which I'd rely for the submission that I just made to your Honours, that there is no distinction made by those charged with the assessment that the process is no longer appropriate for the Commonwealth issues, it's only

appropriate for the state, that we are taking up valuable time inquiring into things that don't deserve a thorough assessment on the Commonwealth side, nothing like that. There is then what we accept is an expression of the opinion of the chairman about who is to blame, so to speak, for the delays, and your Honours will see that at point
5 10 on the transcript.

MR UREN: I wonder if I could interrupt here if it's possible to do so. These matters were not before the trial judge's evidence of Mr Wright's opinions or otherwise, nor was he called as a witness or cross-examined. I'm not entirely sure
10 what the submissions have to do with any of the grounds which are raised, but if the court was to have the impression that anything that Mr Wright said was evidence before his Honour on any of the matters in this case, we would respectfully like to submit that they were not so and I'm not too sure what the purpose of referring to this matter is.

15

BRANSON J: Why do you take us to this material, Ms Mortimer?

MS MORTIMER: Your Honour, because it's important, particularly to the procedural fairness ground and the improper purpose ground, and to some extent the
20 proper construction of section 170C to demonstrate what the context of the decision making under the Act had been and what the circumstances that led up to an event which – namely the withdrawal of a referral, the effect of which is in contest in this proceeding. This material was before the trial judge, your Honour. It was received without objection, and if my learned friend Mr Uren is worried that I am going to
25 invite your Honours to make a finding that Gunns was responsible for the delays in the RPDC, I'm not going to invite your Honours to make that finding.

BRANSON J: What weight will you – will you ask us to find that we should accept Mr Wright's assessment about the appropriateness of procedures? It is one thing that
30 he had that view; it is quite another to ask us to form the same view.

MS MORTIMER: Yes, your Honour. It may not be necessary for us to go that far, simply to record that the evidence is that the commission had that view, that the commission had that view about the whole of its inquiry, including the
35 Commonwealth issues. That's all.

BRANSON J: Well, perhaps we can move on.

MS MORTIMER: All right. If the court pleases. The commission then goes on to
40 talk about the exhibition period that needs to be set for the material from the proponent, and at the bottom of page 220, to describe that – I withdraw that – to contemplate that there will be evidence, whether expert or otherwise, supportive of submissions. So that it's contemplating, in other words, a full inquiry, including the adducing of expert evidence. And the testing of that evidence is contemplated, if
45 your Honours look at page 221, at line 21. What, in the chronology, appeared to be significant, certainly from the second respondent's perspective thereafter, was the statement at page 220 of the appeal book at line 19, that:

The commission was looking at a completion date of late November 2007.

And your Honours will see that forecast picked up in some of the later material. Now, after that directions hearing was completed, materially the next step was, if
5 your Honours would look at page 265 of the appeal book, that the second respondent made a public notification that it had decided to withdraw from the RPDC assessment process, and it explained that – the reasons for its withdrawal – in a media release at page 266 of the appeal book, and the reasons that are given in that
10 media release, in our submission, are significant, both for the proposed operation that the respondents say can be given to 170C, but also for the improper purpose ground and the procedural fairness ground. What is nominated is, in the second paragraph:

That there is a lack of certainty over an end date for the pulp mill approval process.

15

And that that has placed Gunns in an untenable position which, in the fifth paragraph, Gunns describes as “commercially unacceptable”, and that it:

...no longer has confidence that the process can deliver the project approval –

20

Assuming there will be one –

in a reasonable commercial timeframe.

25 And at the bottom of that press release, on page 266, it makes the unambiguous statement that:

As the company has stated publicly, this requires a process that delivers a decision by 30 June 2007.

30

And at the very end of the press release that:

The RPDC process cannot deliver this and commercial reality means they have to withdraw from the process.

35

And as Gunns have said in the ASX release, the company had referred the project to the state government and the attitude of the state government to that decision by Gunns can be seen in the evidence at page 268 of the appeal book, where the Premier, on 15 March 2007 – so the next day – makes it clear that – well, in a
40 political sense, in our submission, second paragraph, that he is “not prepared to allow the project to lapse”, and he then goes on to repeat the view of Gunns about the commercial unacceptability of the timeline of the RPDC, and that he had been notified of that. He then, at the top of page 269, makes it clear that his concern – in our submission, again from a political standpoint – is that “Tasmania stands to lose
45 the project”, and the sense of what, in our submission, the Premier is saying there is that he doesn’t want that to happen:

...that the pulp mill will be the biggest private sector investment in the entire history of Tasmania.

5 That is about a third of the way down on page 269, and that he called a meeting of cabinet and that – if your Honours look about six or seven lines from the bottom of 269:

10 *...that the government has unanimously agreed to act decisively and to act now to make sure that we can complete the assessment process of the proposed pulp mill in a timely manner.*

In our submission, obviously in a manner that suits the timetable that Gunns have announced is necessary to meet its commercial imperatives. There is then, in our submission, quite legitimate kind of political comment that one would expect on this 15 occasion from a premier and if I can take your Honours then to the part of this where the Premier announces the solution from the state's perspective, and that is at page 273, about five paragraphs from the bottom where he announces that there will be special legislation prepared for a separate approvals process from the RPDC, that it will still require assessment against emission limit guidelines but it will have a 20 definite timeline, that being, of course, the thing that the proponent has said is concerning it, and that work has begun on the legislation and the House will be recalled to deal with it, and obviously the form of the legislation had to some extent been decided by then, if your Honours look at page 274, the third last paragraph because at that stage on 15 March the Premier was able to make it clear that it was up 25 to the Tasmanian Parliament to make the decision and that's in fact the form of the approval that was chosen under the Pulp Mill Assessment Act.

Your Honours then have the text of the Pulp Mill Assessment Act at page 275 but I don't pause to take your Honours through that, save to direct your Honours to the 30 part of it that is material for the Commonwealth assessment process, and that is on page 340 of the appeal book. Your Honours will see that this is the mechanism by which the order made under the State Policies and Projects Act, that is the State Act identified by Senator Campbell in his decision as the accredited assessment process, is revoked. Yes, and that flows from section 13 of the Pulp Mill Assessment Act 35 which your Honours will find on page 288. Now - - -

BRANSON J: While it may not be important, but what is the significance of the word "kraft" in the kraft pulp mill? Of bleached eucalypt kraft pulp mill? Kraft 40 sometimes has a capital K, sometimes it has a low k but I can't find what tells me what - anything that tells me what it means?

MS MORTIMER: Your Honour, my understanding is it's a proprietary name but I may be wrong about that. I don't know.

45 BRANSON J: We don't need to know about that.

MS MORTIMER: I apologise, your Honour. I don't it's material, I'm sure - - -

TAMBERLIN J: But on the curiosity principle?

MS MORTIMER: Well, of course a judge's question is always material, y our Honour, I accept that, but I understand it's a proprietary name, I don't know - - -

5

TAMBERLIN J: Is it state of the art type of pulp mill, is that all it means, or is it - - -

MS MORTIMER: Pardon, your Honour?

10

TAMBERLIN J: Is it a state of the art pulp mill, is that what it means and - - -

MS MORTIMER: It - - -

15 BRANSON J: Perhaps you could find out for us some time and tell us.

MS MORTIMER: Yes, I will.

20 BRANSON J: I don't like writing things that I don't know what they mean and I suspect sometime we will have to write this word.

MS MORTIMER: Yes. My present instructions are that it's a description of the pulping process but it's obviously - - -

25 BRANSON J: The process.

MS MORTIMER: - - - perhaps capitalised proprietary kind of description, someone has invented it and - - -

30 BRANSON J: Right. Nothing to do with the cheese that we regularly eat, I assume.

MS MORTIMER: Doesn't seem to, your Honour. I hope not. Now, sequentially in the appeal book, your Honours will see that we then come to a document at page 341 which comes off the Department of Environment's website. It's got some details
35 about withdrawal of the proposal but there are a few intervening events that I need to take you Honours to in the chronology before we get to 28 March 2007, so just to recap where we are in the chronology.

40 There's been an announcement on 14 March by Gunns; there's been a reaction at the state level to that announcement on the 15th and in our submission a fairly clear foreshadowing of the state's continued support for the project and determination to see a very quick process adopted to approve it at the state level and a revoking of the order which founded the accredited assessment process at the Commonwealth level and the Premier's announcement of all that was happening on 15 March.

45

Now, I need to take your Honours now to volume 4 of the appeal book and perhaps while I'm asking your Honours to get appeal books ready, can I ask y our Honours also then to have volume 2 at hand because that's where we'll go next. In fact, I will

take your Honours to volume 2 now because in that – what the evidence showed, if your Honours go to page 646, this is the affidavit of Mr Early who was the Commonwealth’s principal witness. As your Honours will see he is first assistant secretary in the Department of Environment and - - -

5

BRANSON J: He has taken a promotion since then I think. I think he’s now the deputy secretary, according to his later affidavit, I think.

10 MS MORTIMER: His evidence was, if the court pleases, and I will make this aside now and I’m sure my learned friend, Dr Perry, will correct me if I’m wrong, that insofar as responsibility within the department for the carriage of what was happening at this stage in relation to this action, he and a lady called Ms Dickman, who your Honours will see in some emails that I take your Honours to in a moment, were the two people principally responsible for it happening, and what relevantly in
15 the chronology, what Mr Early deposes to at paragraph 15 in appeal book 646, is that he received a telephone call on 14 March from Mr Carlton Frame of Gunns, and in paragraph 16 he deposes to the fact that that was the first time that anyone from Gunns had spoken to him about the withdrawal from the RPDC and that he was not aware that any other person in the department knew that that was about to happen.

20

Now, that conversation occurred and then there was a letter written by Mr Gay of Gunns to Mr Early which your Honours will find on page 697 of the appeal book. The chronology gets a little out of order here but if your Honours will just bear with me. This letter is dated 15 March and although it refers to conversations between Mr
25 Gay and Mr Early I think it was common ground before the learned trial judge, and Mr Early was not challenged on this, that Mr Early hadn’t spoken to Mr Gay the day before and that the hour is really a reference to a conversation between somebody from Gunns, Mr Frame, and Mr Early, and in essence that letter - - -

30 BRANSON J: Sorry, it may not matter, Ms Mortimer, but is the handwriting in evidence?

MS MORTIMER: The handwriting is in evidence, your Honour, and it was Mr Early’s evidence that that is his handwriting and that was a notation that he made, I
35 think, as the date reflects that it bears on the 22nd of the 3rd, because it was his evidence that he received this on 20 March. Gunns, in our submission, in this letter puts really the same position very firmly to the Minister in the – to Mr Early in the second paragraph:

40 *The RPDC assessment process could not deliver an approval for the project in a commercial timeframe and gave us no alternative but to withdraw.*

It then reaffirms a commitment to an assessment process, but in our submission making it plain that it’s one that they’re happy with. The next event in the sequence
45 that we wish to draw your Honours attention to is that on 16 March 2007, so the day after the Premier’s announcement in the Parliament and the day after this letter was written in any event - although not received. There’s a flurry of – in our submission, a flurry of emails passing from the Minister’s office to the Commonwealth

department and I'll take your Honours to that, and that's in volume 4. I will take your Honours first, if it please the court, to page 1721.

5 Your Honours are no doubt familiar with evidence of emails, we get chains of them and we have to start chronologically at the first which is 1721, an email from Peter Lane to Vicki Dickman. And the evidence below, if the court pleases, of Mr Early was that Peter Lane is an adviser to Minister Turnbull, that is working in Minister Turnbull's office. So at 10.32 am that morning the Minister's adviser sends to an officer in the department the letter and a draft that neither Helen - which Mr Early's
10 evidence was is a reference to another adviser of the Minister – and the Minister haven't seen it yet.

15 The key point that we wish to emphasise from that, if the court pleases, is that the first move in a Commonwealth sense, comes out of the Minister's office, not from the department, with a letter – which is a letter to Gunns, which I will take your Honours to, already drafted. That email is replied to at page 1720 by Ms Dickman to Ms Lane with some suggested edits to the letter and in our submission what is the first of several pieces of evidence that disclose that it was at this very early stage, a day after the Premier of Tasmania had said Tasmania was going to legislate to
20 accommodate Gunns' commercial imperatives, that there was a new process being talked about at Commonwealth level.

25 There had been no withdrawal or purported withdrawal of the referral. There had been no revocation of any decisions. There had been nothing by way of briefing or submissions about what might be a better assessment process, but what was already happening was that views had been formed that, in our submission, precisely fit with a choice of assessment process on preliminary documentation under section 87 and 95. And there's an acute awareness that they can't make the public comment period too short because they're going to get criticised because there's lots of material.
30

On the same day in the next email above, later in the day, it's plain that the second respondent is already agitating in our submission to meet with Mr Early and that there has plainly been some discussion about a new referral. Your Honours will see that from the second sentence:
35

This means we will not get a referral by 20 March.

40 There already is a referral, there already is a decision on it under 75 and 87, but obviously whatever solution has been hatched, in our submission, to the predicament that, in our submission, Gunns has created, has been already hatched by 16 March. And as events disclose subsequently, in our submission, the solution that both the Minister – that the Minister suggested and Gunns embraced was that it could withdraw under 170C, wipe the slate clean and start again. That fact becomes relevant in our submission in a couple of ways.
45

BRANSON J: But something had to be done, didn't it? Because the previous procedure had now been frustrated, hadn't it?

MS MORTIMER: There had been a voluntary decision by a proponent to frustrate the procedure and in our submission - - -

5 BRANSON J: Well, the parliament of Tasmania was going to be invited to undermine the very basis of the first decision, wasn't it?

MS MORTIMER: That's right, your Honour, and the question about whether something had to be done, in our submission, involves a number of considerations, and in part the argument of this appeal and before his Honour about 170C is all about
10 whether the something chosen properly construed could deliver the solution that the two respondents thought it could. And one of the issues, this is really not a submission about the construction of 170C at all but really a submission explaining how the issue may have come about, is that this chronology demonstrates that people were on the run very fast trying to hatch something.

15 BRANSON J: Well, you say hatch but moving very fast to act with propriety is not in itself a matter of criticism.

MS MORTIMER: No, your Honour.
20

BRANSON J: Now, you say what they did is ultimately unlawful, that's another matter but I don't know that your case is advanced by describing them as "hatching" whether you imply a plot of something else.

25 MS MORTIMER: Well, no, your Honour, I don't - - -

BRANSON J: Bureaucratic efficiency is normally to be commended.

MS MORTIMER: They were, in a sense – I use that description, your Honour, only
30 because it will be our submission that running – no, I withdraw that. Acting to a timetable of a proponent at a proponent's insistence is not contemplated by this scheme.

BRANSON J: But it may or may not be proper in the outcome. That will be a
35 matter to be assessed according to the law, won't it?

MS MORTIMER: Of course, your Honour. That's right, I accept that. And all I was seeking to do at this point was to really, by way of submission, point to the fact that things were moving very quickly and if, in the end of the day, the point is that a
40 solution was chosen that couldn't deliver the outcome this may explain why, in a sense - - -

BRANSON J: We are not concerned with why.

45 MS MORTIMER: - - - but your Honours are not concerned with that at all.

BRANSON J: It will either be valid or it will not be valid.

MS MORTIMER: Your Honours are concerned with what proper construction, in particular of 170C(4) is, I accept that. Now, the draft of the letter that is discussed in these emails appears at page 722 to 723.

5 BRANSON J: And that's a draft not a letter, is that right?

MS MORTIMER: Yes, your Honour, that's the draft, and your Honours will see that some – and these are really issues that we relied on at trial in submissions about what evidence could be looked at to infer improper purpose. And in particular what
10 we relied on in this draft was the language of the second last paragraph - - -

FINN J: Sorry to interrupt you again, sorry, what page was that?

15 DR PERRY: 1722 and 1723, your Honour.

FINN J: 1722, thank you.

MS MORTIMER: Sorry. And what we relied on here was, in particular, the language at the end of the second paragraph in 1723:

20 *...achieving a decision by the end of July 2007.*

And when I come to the improper purpose ground I will develop this a little more, but in substance it is that kind of language in the evidence combined with, at page
25 1726, the very early timeline planning of a timeline that reflected, in our submission, that a view had already been reached, that this would be done by preliminary documentation and done to a timeline that was consistent with the ones that Gunns said needed to be met. So this is the kind of evidence that we relied on for that submission. The final - - -

30 FINN J: Could I ask you one question? Are you suggesting that the proper construction of this is achieve a decision and achieve a favourable decision or, in fact, the matter will be decided? I'm just not quite certain what you suggest.

35 MS MORTIMER: Yes, the matter will be decided, the assessment will be complete such that a decision can be delivered. We are not suggesting that there was a prejudgment, in fact, by the Minister that an approval would be delivered. We do not suggest that, your Honour.

40 TAMBERLIN J: What's improper with that, just as a point of interest? Achieve it by the end of July, if Gunns can provide the information of quality that I think is enough, if they can't then it's limited, it will have to be another goal. What's wrong with that?

45 MS MORTIMER: Well, your Honour, the - - -

TAMBERLIN J: It's part of a mosaic, I understand, but just looking at it in itself - - -

MS MORTIMER: It, of course, and in a sense, this is the dilemma about taking your Honours to the facts before the statute, I accept that. The submission we make is that there are two purposes only for the exercise of the power under section 87 of the Act about choice of the assessment approach, those two purposes are to ensure
5 the Minister is properly informed about the relevant impacts and to provide a reasonable opportunity to be heard to a variety of interests including the public. And those are the two purposes and what is occurring here, in our submission, is a third purpose and that is choosing an assessment approach that will deliver a decision for a proponent in a timeframe that it asserts it needs.

10 TAMBERLIN J: Yes, but it said information of sufficient quality and address public concerns and they are objective factors perhaps and the Minister is going to take those into account. I just find that that right is pretty important.

15 MS MORTIMER: I accept that, your Honour, and that - - -

TAMBERLIN J: The Minister who decides whether it is sufficient quality might say it's terrible, he can't do it in the time. I mean, that's open on the reading of it.

20 MS MORTIMER: It's open, your Honour, and that is the – we accept and we are frank about it before this Court as we were before his Honour that that ground of improper purpose, impressionistic as it is, depends on looking at all this evidence and asking whether inferences can be drawn in the way that we submit they can be or they can't.

25 BRANSON J: But you would accept, would you not, that all efficiency consistent with the proper process would be legitimate?

MS MORTIMER: All efficiency consistent with an exercise of power - - -

30 BRANSON J: There is no public interest in delay of itself, is there?

MS MORTIMER: Your Honour, no. If I might, with respect, rephrase that in terms of the concession that we would make. We would concede that all efficiency
35 designed to achieve the two purposes of the section 87 decision that I've just outlined, it is entirely proper. So we don't suggest that there is any – should be any delay for delay's sake, but one has to, in our submission, examine what is driving the choice of assessment process. Is it being driven by what the Minister thinks he needs to be informed about, and reasonable opportunities to those the statute contemplates,
40 or is it being driven by a proponent who is saying, "We need a decision by a certain date." That is - - -

FINN J: Can I just interrupt, you say efficiency designed to achieve the two objectives, are you saying, in fact, that efficiency consistent with achieving the two
45 objectives?

MS MORTIMER: Yes, your Honour, exactly. Yes, yes.

FINN J: Yes.

MS MORTIMER: That is in that sense to – I respectfully adopt what your Honour, Justice Branson has said, that it's no part of this Act to delay for delay sake, we
5 accept that. Now, the final form of the letter that goes to Gunns, your Honours will
find on page – and this is the chopping and changing, I'm sorry, your Honours, on
page 695 of the appeal book in volume 2, and it's in this letter and in the drafts – it
doesn't really matter which one your Honours look at, but for this purpose page 696,
10 the final paragraph. It's in this letter formerly that the Minister invites Gunns to
withdraw its present referral and submit a new one, but, in our submission, by
reference to the emails that I took your Honours to on 16 March, that concept of the
use of 170C had its genesis a little earlier, but this is the formal manifestation of it,
and your Honours will – I withdraw that.

15 And our submission about the differences in the letter really amounts to again, on the
improper purpose ground, that the language of achieving decisions disappears and
you have a much more neutral kind of expression in the public document that is sent.
Although the language that is preserved in that paragraph – and your Honours will
see, in our submission, repeated in later pieces of evidence such as the briefing notes
20 that go to the Minister – is that the schedule needs to be agreed with the proponent
and again, in our submission, when one looks at the language of the assessment
decision, it's no part of section 87 or the provisions that follow it that there is a
negotiation – an agreement process between the decision maker and the person
proposing to take the action about what timing will be imposed on the steps to be
25 taken.

BRANSON J: Do you say there's something wrong with that?

MS MORTIMER: An agreement - - -

30 BRANSON J: Yes, it comes to my mind, judicial officers daily agree timetabling
schedules with litigations, for example, because they want to be confident that the
timeframes set are ones that can be met.

35 MS MORTIMER: Yes, your Honour, and that's because the purpose of the powers
that the court is exercising is to ensure the effective administration of justice and
that's why it does all come back to an analysis of the purpose of the power and it is
said by the Commonwealth on this appeal – as I recall it not so frankly said below
but certainly said on this appeal – that there is nothing wrong in a purpose of sense in
40 the exercise of the assessment decision with accommodating proponent's timelines.

BRANSON J: But the question is, do you say that there is something wrong?

MS MORTIMER: Yes, your Honour, we say it's a purpose that's extraneous to the
45 Act.

BRANSON J: Well, it would be a pity, wouldn't it, to set up a process in ignorance
of the fact that the important player in it simply couldn't meet the timeframes?

MS MORTIMER: There might be a natural-justice requirement, your Honour, that's so, but in terms of the decision making, the Act does not contemplate that the decision making is done by agreement.

5 BRANSON J: Does it prohibit it being done by agreement, that's the test I think?

MS MORTIMER: Our submission is that it does, your Honour, in the sense that it is a regulatory – a tight, regulatory system where the Minister stays in control of what happens and gives directions about what's going to happen, that is the system the Act provides for.

BRANSON J: And you say to take into account what the proponent says is the timeframe with which they can provide information is an improper consideration?

15 MS MORTIMER: No, your Honour.

BRANSON J: No?

MS MORTIMER: No, it's not an improper consideration, but to exercise a power on the basis that you are agreeing with a proponent, that notion is that if the proponent says I can't do it, the Minister will agree all right, you don't have to do it, and it's that extra step of involving the proponent in a – not a consideration sense, but a decisive sense, so that the proponent - - -

25 TAMBERLIN J: Where is that in this letter?

MS MORTIMER: Pardon, your Honour?

TAMBERLIN J: I'm sorry, where is that in this letter?

MS MORTIMER: It's the last paragraph on page 696 – well, the only paragraph on - - -

35 TAMBERLIN J: Yes:

Gunns will need to formally withdraw and submit a new referral to meet your mid-term goal -

MS MORTIMER: In order to meet your mid-year goal, a - - -

40 TAMBERLIN J: Yes.

MS MORTIMER: And, in our submission, Gunns' goal about when an assessment process ought to be completed, again it is no part of the structure of the provisions that give the Minister the power, it's not relevant in that sense.

FINN J: Would you say though that section 3(2) subsection (d) of the Act suggests in respect of that?

MS MORTIMER: This is section 87?

FINN J: Section 3 of the Act.

5 MS MORTIMER: Sorry, your Honour, yes.

FINN J: The objects clause of the Act.

10 MS MORTIMER: Yes, yes. Well, I was going to come to that, your Honour, when I take your Honours to the Act.

FINN J: Well, just because the language of the letter is the language of timeliness and the language of the statutes is the language of timeliness.

15 MS MORTIMER: Well, the language of – your Honour needs – in our submission the whole of paragraph (d) needs to be read. It's not timeliness for timeliness' sake. It's not timeliness for the convenience of the proponent, or the imperators of the proponent, it's timeliness that will ensure activities that are likely to have significant impacts on the environment are properly assessed.

20

So for example, in our submission, this is not an object of the Act, it's a function, firstly. But it's being misapplied by the respondents in the context of this case. What that is talking about is where one might have an urgent situation that needs to be addressed quickly because there is the risk of environmental damage. This provision exhorts the Minister to act in a timely and efficient manner for that purpose, so that whatever threats to the environment he has determined might exist can be properly assessed.

25

BRANSON J: I feel fairly confident that that's right, but if there were a proposal – and I speak at the moment hypothetically, although there's some hint of it in this case – if there were a proposal that could only be advanced if it could be advanced in a timeframe, perhaps for financial or other reasons; you know, the banker would only provide the funding if the process were underway by a certain date or something like that kind; planning approval only survive to a certain date. Do you suggest there would be something wrong in the Commonwealth doing what it could consistently with the requirements of the Act to protect the environment, in taking steps to ensure that the assessment was completed by that date?

35

MS MORTIMER: We do not suggest there would be anything wrong with the Commonwealth taking that fact into account in making the assessment decision, but if that fact - - -

40

BRANSON J: But if you couldn't assess by that date, obviously you couldn't, but if you could but only if you took some steps to act more expeditiously than you ordinarily would, do you suggest that would be improper?

45

MS MORTIMER: If it was driving the choice of assessment process it might be, your Honour, yes, we do make that submission. And it's very fact dependent.

BRANSON J: Yes.

MS MORTIMER: But it is no part of the choice of an assessment process, in our submission, to accommodate – no I withdraw that – to make agreements with
5 proponents on timelines that suit them.

TAMBERLIN J: But where is the agreement? Where is an agreement stated, as supposed to taking into account the needs of Gunns.

10 MS MORTIMER: Well, that is where - - -

TAMBERLIN J: I can see the overriding imperative is that you must ensure activities are properly assessed, that's the key thing, just looking at that objective and I can see that if you give dominance to another factor that might be an improper
15 purpose, but where is the agreement that they will?

MS MORTIMER: Well, your Honour, can I answer that question in two stages. Firstly, just to reiterate that the focus by the respondents on this function is misplaced and that's a construction argument we make about what subsection (d) is about.
20

TAMBERLIN J: Yes.

MS MORTIMER: And this is the only place in the Act where that language is found. But when one looks at the substantive provisions in the assessment part of the
25 Act, there's no indication whatsoever that the Minister – that the Act contemplates the Minister will agree things with a proponent, and this is the language of the documents and the evidence from the very start. From 16 March.

TAMBERLIN J: I wonder about the word “robust” decision, “A new schedule
30 which ensures a robust decision transparent will need to be made as soon as possible.” It's an odd word. Robust, seems to me an overriding sort of word, that is strong, forceful, I don't know what that means in that context, but I mean it's an unusual word. I can understand transparent decision, but robust is an odd word.

35 MS MORTIMER: There was no evidence, your Honour, at first instance about why that was chosen.

TAMBERLIN J: No, I know there wouldn't be, but it's a question of – yes.

40 MS MORTIMER: I can't assist your Honour really about that. I note the time, if the court pleases, I could probably – if I could have the indulgence of five minutes or so I will finish the chronology and that might be a convenient time, if the court pleases. So we had this letter on 19 March and if your Honours look at pages 702 to
45 3 of the appeal book – and I won't at the moment stop to take your Honours through this – but shortly after that letter was written, it's submitted that's a fair summary, there was some series of meetings between Gunns and various people in the department and there's evidence about that, from about 22 March onwards.

Then at page 704 of the appeal book, your Honours will see this is an email from Mr Frame at Gunns to Mr Early on 28 March at 5.07 pm and this is the end point of what was happening between the 22nd and the 28th, some to-ing and fro-ing between the department and Gunns of some drafting of documents and Mr Frame submits a draft referral. Bearing in mind at this point there's been no withdrawal. Then on page 740 - - -

BRANSON J: 740?

MS MORTIMER: 740, your Honour, yes. A short fact I need to check, your Honour, before I make a submission about it, but the letter at page 740 bearing the same date, 28 March, from Mr Gay to Mr Turnbull, gives notice in the second paragraph that Gunns will formally withdraw the referral and submit a new referral as the Minister had suggested to it and as obviously everybody contemplated would be happening and the reason I take your Honours to this really, although it's no longer a contested issue on the appeal, is that this is the first piece of evidence of two pieces of evidence that were relied on by the respondents as constituting the withdrawal of the second referral and the chronological issue I will just check and perhaps – that letter was sent electronically and I'm just not sure what time on the 28th it was sent, but it was sent that day, that's my recollection of the evidence if the Court pleases.

BRANSON J: You mean electronically?

MS MORTIMER: It was sent as an attachment in an email, yes, your Honour. Now, there was a few more to-ing and fro-ing between the department and Gunns, between the 28th and the 30th but then what happens on 30 March late in the evening, your Honours will find this at page 750 of the appeal book, 7.43 pm on a Friday night in true tradition of those who work hard, the new referral is lodged electronically, and as the email says a hard copy will be made, and the reason that I take your Honours to that is because that event, coupled with the terms of the referral itself, which is said by the respondents to constitute the withdrawal of the second referral, and that is because, if your Honours look at the third referral at page 343 which is in volume 1 of the appeal book.

I'm sorry, your Honours, I can't put my finger on it, but somewhere in that referral there is a reference to that referral replacing the second referral and it's that reference that the trial judge fastened on in his reasons in order to make the finding that the lodging of this - - -

TAMBERLIN J: It's under 3.5 I'm told.

MS MORTIMER: I'm grateful to your Honour's associate.

TAMBERLIN J: Is that the one?

MS MORTIMER: Yes. Yes, I'm grateful to your Honour's associate, and your Honours will see the first dot point that is where the language is which is replaced by

this report, so it was that piece of evidence that the trial judge relied on to make the finding that this document was the withdrawal of the second referral. Is that a convenient time, if the Court pleases?

5 BRANSON J: It is, Ms Mortimer. The hearing will resume at 21.15 this afternoon.

ADJOURNED [12.48 pm]

10

RESUMED [2.15 pm]

15

BRANSON J: Yes, Ms Mortimer?

MS MORTIMER: If the court pleases. Your Honour, Justice Branson, asked me about what a Kraft – capital K – process was.

20

BRANSON J: Yes.

25

MS MORTIMER: And if I can just draw your Honour's attention to what's on page 347 of the appeal book in volume 1, it doesn't quite explain it, but if my learned friends will bear with me with an expanded explanation and I will be corrected if I'm wrong, your Honours will see under the heading Operation Phase, there's a description in that first paragraph about the Kraft process and what I'm instructed is that it is from the German word and that it refers to a chemical process as opposed to – to create the pulp as opposed to a mechanical process.

30

BRANSON J: So it uses a waste product as part of the energy-generating system; is that right?

35

MS MORTIMER: No, it's the actual process for breaking down the wood into pulp. That can be one of two ways; either mechanically pulverising or chemically, and the chemical process is known as the Kraft process.

40

BRANSON J: But it just looks as though the wood residue is removed from the fibres are burnt to generate the energy, that's what – I wondered if that wasn't what made it efficient, no?

MS MORTIMER: That is what is then available as a consequence of a chemical breakdown, that what's left can be reused, burnt, and then generates electricity.

BRANSON J: And generate energy, all right.

45

MS MORTIMER: Yes, your Honour.

BRANSON J: Thank you very much, Ms Mortimer.

MS MORTIMER: Now, I was to take the court briefly to the legislative scheme and I will return to particular sections obviously dealing with each ground. I want to take the court first to section 3, the objects. Section 3, subsection (1). Those objects, in our submission, fall into three groups, (1)(a) to (ca) are all objects concerned with the protection of the environment in its widest sense in the conservation of biodiversity and that, in our submission, reflects the principal purpose and object of the Act.

The second group (d) and (e) are concerned with - as the Minister's second reading speech in 1999 which introduced this legislation bears out, in creating a more co-operative approach between the states and the Commonwealth in opposition to the fractured approach which was a feature of many pieces of Commonwealth legislation all operating on the environment before this and a great deal of controversy with the states about Commonwealth control of the environment. So we accept that that is what the objects in (d) and (e) are about and (f) and (g), the third category, are obviously concerned with the recognition and role and interests of indigenous people.

Therefore, in our submission, relevantly for this appeal, when construing section 75, subsections (1), (2), and (2B) in particular for our first ground; when construing section 170C for the second ground; when construing section 87(1), 95, for the procedural fairness ground; and when construing 87 for the improper purpose ground, it is to this subsection and those three categories of objects that the court must look for a purpose of construction. And what, in our submission, relevantly emerges from that is that the construction that ought to be favoured is one that facilitates the protection of the environment and the conservation of biodiversity. The scheme of the Act - - -

FINN J: Can I ask you a question just in relation to that?

MS MORTIMER: Yes, your Honour.

FINN J: 3(b) refers to ecologically sustainable development and then section 3A sets out principles and 3A(a) suggest a balancing of considerations, some to do with the economy, some to do with the environment, are they not the same things the Minister referred to in his final letter to Gunns on - the final version of the draft letter where he talks about the balancing of environmental and economic considerations and that?

MS MORTIMER: That's so, your Honour, but the - - -

FINN J: The reason I'm asking that is I - - -

MS MORTIMER: Yes, your Honour.

FINN J: It is hard to resist the impression from what you have been saying that there's no balancing process involved, that it is relentlessly concerned with the environment and that to have regard to commercial considerations - and the larger

considerations of the state of the Tasmanian economy is really not what one is to take account of at all. Now, I'm just trying to - - -

5 MS MORTIMER: No, I understand precisely what your Honour is putting to me I think and my response is this; the Act recognises particularly in section 136, which I will take your Honours to in due course, in the making of an approval decision that economic and social considerations are a mandatory consideration for the Minister, but one of the points which we make in our construction of the scheme in general is that at the assessment-process stage, the Act is very specifically confining the
10 Minister to a very different exercise and so there is a widening that the Act provides very carefully for of the considerations for the Minister once he is embarking on a decision whether or not to approve the taking of an action.

15 But the assessment process and the decision making around that has a much more confined role. So it is certainly not our proposition, your Honour, that at no stage in the decision-making process is the Minister entitled to look at economic considerations, including benefits to a state economy. It's not our contention.

20 FINN J: So you would go so far then as to say that in that first phase the Minister has to put those to one side even in a situation – I'm putting this as a hypothetical one – that if a particular course is taken the Minister knows he or she will never have to consider economic or social considerations because the project won't go ahead?

25 MS MORTIMER: There may be a number of solutions in the Act to that, your Honour, and our submission would be that the solution is not for the Minister's assessment decision to be driven by the commercial imperatives of the proponent. The Act accommodates, for example, variations in the proposal to take an action - a number of other things.

30 FINN J: Well, can I qualify – sorry to interrupt you again. You picked the word "driven", can I put a lesser phase as a possibility to you to see what your response to that is, can the Minister attempt to accommodate the commercial considerations of the proponent consistent with his or her responsibilities under the Act?

35 MS MORTIMER: And your Honour puts that question to me in exercising the power under section 87 subsection (1) to choose an assessment process, can the Minister choose one which accommodates - - -

40 FINN J: Yes.

MS MORTIMER: If that is the substantial purpose, our submission is no.

FINN J: Okay.

45 MS MORTIMER: There are only two lawful governing purposes and they are reasonable opportunities to be heard and making sure the Minister is properly informed about adverse impacts on the environment. That's our submission, your Honour.

FINN J: Well, could I put a third proposition to you, just to test it out, assume both the Mini Minor and the Rolls Royce will allow both of those objectives to be secured, can the Minister take the Mini Minor because it will accommodate the commercial imperatives of the proponent?

5

MS MORTIMER: Because coincidentally it will do that, your Honour.

FINN J: Yes, it's consistent with.

10 MS MORTIMER: Consistent with, yes, your Honour, because then it is not a substantial purpose. We accept – and I can well understand, if the court please, why the improper purpose ground is troublesome, we accept the threshold is high, we accept the cases say it must be a substantial purposes, and what that connotes – and that's why in making my submissions, if the court please, I do use the word
15 “driving” because if that is the impression that is created then our submission is that that is not a purpose for which the power is conferred.

TAMBERLIN J: Driving gives the impression of dominance, is that what you mean by driving?

20

MS MORTIMER: It does, your Honour, and - - -

TAMBERLIN J: Well, the only effect of pushing the factor – the factor that precipitates the decision - - -

25

MS MORTIMER: Well, again, your Honour, in unpicking what are the reasons behind the exercise of a power, those distinctions may be difficult to draw in any particular factual circumstance and that's why we accept that this is a matter of whether the inferences can properly be drawn from the evidence and if the only
30 threshold that can be reached on this ground is that the Minister exercises the power for the two purposes which, on our submission, are the lawful and dominant purposes – substantial purposes and it was otherwise happenstance of a coincidence or it fitted in with what the proponent wanted, if that's a level then it's not a substantial purpose and we haven't got over the threshold.

35

BRANSON J: But I was trying to follow, it may be entirely my fault, where we are going here. You are still concerned with the section 87 choice, aren't you?

MS MORTIMER: Yes, your Honour.

40

BRANSON J: Right. Section 87(3) identifies what the Minister must consider in making the choice, and it's likely to be a critical provision, I think. It either means that he must consider these things, but he may consider anything else within the spirit of the Act that seems to be relevant. Alternatively it means he must consider these
45 things and nothing else. Assuming we start there I am wondering what scope – if it means one or other of those what scope there is for improper purpose. He has either considered the things the Act requires him to or he hasn't.

MS MORTIMER: Because there is a difference in our submission, your Honour, between taking the matters into account that the statute requires the Minister to take into account and what else is operating on the choice, that is - - -

5 TAMBERLIN J: So do you say you can - - -

BRANSON J: So then you accept that this isn't an exhaustive list of the things he must consider, it only identifies the things he must consider leaving him free to consider other things, is that right?

10

MS MORTIMER: That is so, your Honour, and that's why – as is often the case in a judicial review proceeding, there may be other ways to characterise it and the proceeding below, Investors for the Future, characterised this error as an irrelevant consideration. And we characterised it as an improper purpose, and the tests are different but, in a sense, the proposition remains the same. Either it is extraneous to the power or it's not.

15

BRANSON J: Well, I raised it for this reason because some of the matters identified in the paragraphs of subsection (3) of section 87 are expressed very broadly. The capacity of the matter to be relevant but to fall outside them seems to me to be quite a limited capacity. So I have to say I had anticipated a submission that this was the exhaustive universe of the matters that could be considered, and I note in particular that by the time you get to 136 the Act draws a distinction between the principles of ecological sustainable development and what might be in the assessment report - - -

20

25

MS MORTIMER: Yes, your Honour, it does.

BRANSON J: - - - because they are both things the Minister can take into account.

30

MS MORTIMER: Yes, it does.

BRANSON J: So that we know that at least at that stage he can take into account the matters that Justice Finn earlier drew to your attention.

35

MS MORTIMER: Yes, your Honour, that's right.

BRANSON J: But a critical question, it seems to me, is what is the ambit of section 87(3), and in particular if it's the universe of matters that may be considered then or if it's only certain matters that must be considered leaving the Minister free to take into account other things.

40

MS MORTIMER: Yes, your Honour. Well, may I approach the answer to that in this way: since your Honour has referred to 136 there is no equivalent of section 136(5) which is an expressed prohibition on other considerations? So that is some textual suggestion that subsection (3) may not be exhaustive.

45

TAMBERLIN J: Although is it, because it says:

...matters the Minister is not required or permitted by this division to consider.

So it's permitted, not required.

5 MS MORTIMER: That is so, your Honour.

TAMBERLIN J: There's a distinction between "must consider" and "permitted to consider" I suppose.

10 MS MORTIMER: Which may, I accept, your Honour, involve matters that are not expressly set out - - -

TAMBERLIN J: Expressly not required.

15 MS MORTIMER: - - - but are within the scope subject matter and object.

TAMBERLIN J: Yes, can be relevant but not essential.

MS MORTIMER: Yes, your Honour. Yes, your Honour, I accept that.

20

BRANSON J: When you look at - I'm sorry to harp back to (3) - - -

MS MORTIMER: No, your Honour.

25 BRANSON J: - - - but when you look at (a) which is the information relating to the Act and given to the Minister in the referral, so that's the information in this case that has come from Gunns, isn't it?

30 MS MORTIMER: Yes, your Honour, in a document together with any cross-referenced documents and attachments, yes.

BRANSON J: So that one is pretty broad so far as getting the proponent of the proposal into the picture.

35 MS MORTIMER: Yes.

BRANSON J: But it's:

40 *Any other information available to the Minister about the relevant impacts of the action that the Minister considers relevant, any other relevant information received in response to an invitation and then prescribed matters.*

MS MORTIMER: Which there are none, is our understanding, so it's really (a), (b) and (c), your Honour.

45

TAMBERLIN J: Sorry, what do the guidelines add? Do they add anything?

MS MORTIMER: We don't understand there to be any, your Honour, but I might be wrong, I will stand corrected about that. No, I'm grateful to my learned friend, there aren't.

5 BRANSON J: So we have got everything put forward by the proponent, everything known to the Minister that is relevant, everything coming in from anybody else - - -

MS MORTIMER: Well, your Honour, (b) is rather narrower. It is only what is known to the Minister about relevant impacts of the action, and one is driven back to
10 the statutory definition of that, but that impacts on Part III prohibited matters broadly.

BRANSON J: Yes.

15 MS MORTIMER: So - - -

BRANSON J: It is fairly broad.

MS MORTIMER: They are broad, your Honour, but they don't get anywhere near
20 the timeline that the proponent insists must be met.

BRANSON J: No, but you don't argue that it expressly knocks them out.

MS MORTIMER: Well, it doesn't expressly knock them out, only for this reason,
25 your Honour: that there may be, and that's not an issue that has directly come up in this proceeding so I haven't thought it through, but there may be considerations not expressed there that are nevertheless within the scope subject matter and purpose of the assessment part of the decision, and therefore could be properly considered. As I stand here I am not able to give your Honour an example of that but it may be that
30 there are matters relevant to the assessment of impacts that are not set out there that it would be quite proper and lawful for the Minister to take into account, but your Honour is right – I withdraw that. Subsection (3) is one of the textual indications, in our submission, that timelines of the proponent, commercial imperators of the proponent, when it needs a decision by is not part of this decision, the assessment
35 process decision.

BRANSON J: Well, that's provided it doesn't come into (a) which was where I was leading. Why wouldn't information from the proponent saying, "This is what we
40 want to do and we are only going to be able to do it if we can get construction underway by the end of 2007," why wouldn't that be information relating to the Acts when given to the Minister in the referral of the proposal to take the action?

MS MORTIMER: It might meet the description in that sense, your Honour, I accept, but it is irrelevant to the task the Minister is undertaking which is the task that
45 is set out in section 87(1), and I was going to do this later but let's do it now, if the court pleases.

BRANSON J: So before you do that, is that going to lead you to an argument that if it's information relating to the action given to the Minister in the referral of the proposal to take the action, although the Minister is statutorily required to consider it he must then give it absolutely no weight?

5

MS MORTIMER: At this stage of the process the issues are limited. Let me give you an example, your Honour? The referral information may well contain an argument about why this project – the taking of the action is good for a particular economy, but that's not information, in our submission, that the statute contemplates will enter in to the Minister's choice of assessment process. That is something that will enter in to the Minister's decision later on. That the sole focus of the assessment process is on the concept of relevant impacts which is defined in section 82.

10

TAMBERLIN J: That's one of the them, but doesn't 3 dictate what must be taken into account under 1 in making the decision, that is the decision under 1 this information must be taken into account.

15

MS MORTIMER: Yes, your Honour, but the decision when one looks at it is which of the following approaches must be used for assessment of the relevant impacts and the relevant impacts of an action, as defined in section 82, are only the impacts that the action will have on Part III protected matters.

20

MS MORTIMER: It is an expressly confined process and that is because as your Honour Justice Branson pointed out, later on other information not only is fed into the process but is required by the Act under section 136 to be taken into account, but this part of the decision making process is aimed fairly and squarely at the protective function of the Act, nothing else. It is aimed fairly and squarely at that and making sure the Minister is fully informed from a variety of sources about impacts on the matters this Act protects and perhaps just to – I haven't taken your Honours to enough of the Act to make good that submission. Can I take your Honours to the contents really to emphasise the way the scheme works? Your Honours, I assumed, are all working off reprint three of the Act?

25

30

TAMBERLIN J: Yes.

35

MS MORTIMER: Yes. If your Honours could turn please to page (iii), the contents section and since it's such a large Act for this part of my submission I am really going to just work off the contents and take your Honours to the section if I need to. The protective function which we submit is dominant in the objects, is dealt with in chapter 2, protecting the environment and it is done through Part III by the imposition of a series of prohibitions in relation to matters of national environmental significance and that's why there are various references in the legislation to protected matters and your Honours will see that particularly in section 34.

40

The way this Act works is to protect subject matters which have been identified to be of national environmental significance and section 34 makes that clear. And the protection is delivered in the first instance by prohibitions which can be enforced either through civil penalty provisions or through the injunction provisions of the Act

45

and persons taking actions are relieved from those or may be relieved from those in a variety of ways. They may be relieved because they are taking the action with an approval under Part XV and that's the part with which we will be substantially concerned.

5

They may be relieved because they fall within Part IV, cases in which environmental approvals are not needed and that is the part of the Act that contains section 38, which is the forestry operations exemption, to which I will need to take your Honours, but there are a number of ways there, some of which your Honours will see from the contents, section 29 and following, implement the co-operative arrangement-kind of approach between the states and the Commonwealth. Another way to avoid the prohibitions still in Part IV – no, I withdraw that – in chapter 3 is through bilateral agreements which is a free-standing method, and then we get to chapter 4 which is the – if there is no other option for avoiding the prohibitions in Part III then a person needs to ensure there is no risk of exposure to those prohibitions, the person needs to go through the process in chapter 4.

That process has three distinct stages. The first is the stage in Part VII and this is how – the language, in our submission, is not insignificant. This is the beginning of how, in relation to the subject matter in Part III the Commonwealth controls what happens. The Commonwealth controls the taking of an action, so if your Honours turn to section 67 there is a definition of what is a controlled action, referring back to whether the taking of the action is going to contravene Part III broadly. There is then by operation of the Act itself another prohibition imposed, which is 67A, so outside the scheme in Part III there is a separate prohibition in 67A on taking a controlled action unless an approval is in operation, so that prohibition seems to contemplate that there is no other statutory mechanism which applies to relieve a person from the Part III prohibitions and therefore it's a reinforcement of the control of the Commonwealth over the taking of that action unless this part is complied with.

30

The triggering of the Commonwealth's control is not only in the hands of a proponent. The principal method in section 68, as your Honours will see, is that – no, I will withdraw that. A method is that the person proposing to take the action can refer it and if the person – I withdraw that also and start that proposition again. There is an obligation to refer the proposal if the person thinks it may be a controlled action and another method, another trigger method, section 69, is that a state or territory may refer a proposal, and a third method, section 70, is that the Minister may request referral but if the person proposing to take the action doesn't co-operate then the provisions of section 70 operate to deem a referral to have been made, so with or without the co-operation of a proponent an action likely to have a significant impact on a Part III protected matter not otherwise permitted to occur, is going to be drawn into this approvals process.

40

That, in our submission, is what the scheme of the Act intends to achieve. Once it is drawn into the process then the Minister – I withdraw that. There then commences a detailed series of obligations, statutory obligations and discretions that twist and turn, depending on the choices made along the process, but it is a very tightly controlled

45

process in our submission. It includes right from the start an obligation to consult the public and that is evident in section 74 subsection (3).

BRANSON J: Did you want to say anything about 72 subsection (3)(b)?

5

MS MORTIMER: No, your Honour, other than it is to be expected in order to define the taking of the action because as we will see when we work through this, action is a slightly difficult and ambulatory concept. It will be necessary to give that kind of information if we accept that.

10

BRANSON J: So that if the referral which may give the time frames with which the action is to be taken were to say well, we don't propose to start this action for five years, that would be a matter that the Minister could have regard to in deciding whether to move quickly or slowly, wouldn't it?

15

MS MORTIMER: Not in the choice of assessment approach, no, your Honour, no. In our submission, even if the proponent says well, we've got a long lead time into this action, that is irrelevant for the choice of a – if it is not irrelevant, it's marginally relevant to the choice of assessment approach, because the choice of assessment approach is all about what are the impacts of the action on the Part III matters.

20

BRANSON J: I can see that's of course so and I don't think speed could enable you to say, "Well, we'll do what would colloquially be described as a quick and dirty assessment here, because you want to start within a matter of months." But it might be appropriate, might it not, if there was extensive time to say, "Well, I think the public will feel more comfortable with this if we take a more comprehensive approach, even though a satisfactory outcome could be achieved by a faster approach."

25

30

MS MORTIMER: In our submission that is also likely to be an exercise of power not for the purposes for which the power is conferred under section 87. It's a very tightly confined power, in our submission. So looking at whether the public in general would like a slower process or not is also not the question the Minister should ask.

35

BRANSON J: Not necessarily, a process that in fact is slower, I mean you eschewed – and I'm not questioning the propriety of your eschewing – that 87(3) limits what the Minister can take into account. If a Minister can take into account other things, what would stop a democratically elected Minister taking into account the views of the public, that they might if time is available to them, want a more lengthy and more public process.

40

MS MORTIMER: As we have submitted, your Honour, one of the two purposes of the power under section 87 is a procedural fairness kind of purpose. Now, if what in making that kind of hypothetical decision the Minister is really saying is, a reasonable opportunity to be heard for the public for this kind of action in these circumstances should result in an inquiry, then that is an exercise of power for the

45

purpose for which its conferred. But if it's – because we say there are those two purposes, your Honour.

BRANSON J: I'm wondering if that could be right. I only question you to get the
5 benefit of your submissions while you're here, because this is an important matter. If
you had a proposal, the benefit of which to the nation was very limited because it
provided little employment, little economic or other benefit of any kind and wasn't in
any event going to take place, if at all, for five or six years you could imagine the
Minister saying, "Well, in this matter it would be unreasonable to expect the public
10 to down tools and put a lot of effort into getting their submissions ready and doing
the analyses they want to make in a short time frame." It would be reasonable to
give them 12 months or so, there is no urgency here.

But if you have a proposal that's likely to be of great national benefit if it proceeds,
15 but it will only proceed if it can proceed within a limited timeframe, it wouldn't be
unreasonable for the Minister to say to those concerned, "Look, for this matter
you've really got to concentrate your efforts. If you want to put material forward
about this proposal you better get moving, you've got to do it quickly." Surely that
must be proper. When is that improper?

20 MS MORTIMER: Your Honour, in my submission positing that scenario involves
two different things. The first example is positing considerations that we would
submit are within the choice – the assessment process decision because it's about
what's a reasonable opportunity to be heard. The second posits precisely what we
25 say is not lawful and that is that the proponent is saying essentially, "if you don't
adopt this process quickly, this action is not going to happen."

BRANSON J: I was putting to you that this would influence what was the model of
30 assessment, but assuming you've got a proper model. That is one that will give you
the information you need. You couldn't be wrong to say the timeframes are going to
be tightened up, would you, because of the national importance?

MS MORTIMER: Your Honour, so if the example is not that the imperatives affect
35 the choice of process, but having chosen the process the imperatives affect the setting
of time periods; is that the proposition?

BRANSON J: If the choice is sustainable that you then tighten up the timeframes in
40 the national interest, leaving them as timeframes that can be met, but which would
require people to prioritise their conduct to give attention to this ahead of other
things.

MS MORTIMER: Your Honour, the notion of what is a reasonable opportunity is
such a broad notion that I can't submit to your Honour that that would be irrelevant
45 in deciding what's a reasonable opportunity. That is the most malleable concept; we
accept that. Now, I was taking your Honours to the three stages in the decision-
making process and as I submitted this morning on the motions, our principal
submission is that this is an act that assumes there will be a valid decision at each

stage. So the first stage is the decision under section 75, the referral having being made, the Minister must decide whether the action is a controlled action.

5 That of course takes one back to the definition in section 67. And there are two things the Minister must decide, that question and then which provisions of Part III are the controlling provisions. When I come a little later to the 75(2B) ground I will be taking your Honours more carefully through subsection (1), (2) and obviously (2B). That's the first stage. There is some provision in that stage for other routes to be taken than proceeding directly to an assessment decision and your Honours will
10 see that in divisions 1 – division 3 in particular.

So for some circumstances there's the Act expressly provides that the Minister might reconsider his decision before moving to the next stage. But the next stage, as it's headed, Assessing the Impacts of Controlled Actions, and I think I've taken your
15 Honours sufficient in an outline form for that. We say that that is a precisely confined exercise, really looking, to put it another way, only at one side of the ledger. The Minister is required just to look at the bad things. And that is consistent with a scheme which sets out to protect and to adopt the precautionary principle.

20 Having done that, the product of that process, depending on which kind of assessment is chosen, but the product in each case will be a report to the Minister and your Honours can see that just through the contents section that there is each of them – each process, whether it's minimalist or inquiry based, contemplates that at the end there will be a report, again on the relevant impacts on the Part III protected matters.
25 Once that has occurred the third stage is reached and if I can take your Honours to section 130 of the Act which imposes the general obligation on the Minister to decide whether or not to approve and sets out what the timing of that must be. Your Honours will see under (1A) its prescriptive, but not entirely prescriptive. There are time periods set, but the Minister is able to extend them.

30 Each of them – and I just might make this point under (1B) talk about a series of business days, materially not very different as between them, but ranging from 20 to 40. Bearing in mind that that time starts to run after the report has been received. So to take the two extreme examples, under an assessment on referral information you
35 may have only a matter of weeks or months before the Minister is required to make a decision within 30 business days. Under the inquiry process, an inquiry may have gone for two years and yet the Minister is still required to make a decision within 40 days.

40 Describing the assessment process as requiring timeliness and efficiency, does in our submission, somewhat obscure the contemplation that is evident in this section, that some assessment processes might take a very long time and yet still the Minister will have to make a decision relatively quickly after it, so there is no overriding
45 requirement for fast or prompt decision making – well, I will withdraw that. The requirement for fast or prompt decision making – perhaps prompt is a better word – arises after the assessment process is concluded. Perhaps that is a better way to put it.

The provision which – no, I will withdraw that, and when I take your Honours back on the procedural fairness ground to the assessment process in a little more detail your Honours will see that it is in that process, the Part VIII process, that there are statutory obligations imposed on the Minister to seek input from members of the public. Once we get to the approval stage that is transformed into a discretion and that is apparent in section 131A, so there is no further obligation in relation to members of the community although in 131AA, which I will also return to, there is an obligation in relation to the proponent, but what we have described as the broader concept of procedural fairness in terms of obligations, is all found in Part VIII.

The decision whether or not to approve the exercise of power appears to be under section 133 and I say appears only because 130 imposes an obligation and then 133 appears to confer the power. In subsection (1) to approve and in subsection (7) to refuse to approve. That exercise of power is accompanied by conferral of power to impose conditions in section 134, and is constrained by section 136 and the only reason that I need to take your Honours to that is really because in our submission it makes good our proposition, the second principle source aside from the text of partes itself which makes good our proposition that the assessment process is much more confined because one can see immediately that under subsection (1) there are two mandatory considerations there (a) 136(1)(a) mirrors relevant impacts and then there is a much broader consideration, economic and social impacts matters, which have not been part of the Commonwealth's assessment process but are left for a much broader consideration at this stage by the Minister and that is again in the text of the Act, emphasised by subsection (2) which puts the assessment report, and that is defined, you Honours, through section 528, the dictionary, and section 130 subsection (2).

Essentially that's the credited assessment process so if there has been a co-operative state Commonwealth process then it's that creature that will be generated from it. If there has been another kind of assessment process, they're dealt with in BA, BC, C, CA and D, so from 2(b) through to 2(d) they cover whichever is the applicable outcome of the assessment process but it is obvious, in our submission, that there are a great deal many other matters aside from relevant impacts, that the Minister then considers at the approval stage.

BRANSON J: Ms Mortimer, I'm sorry, this is to take you back, but there was no direct challenge by your client, am I right, to the Minister's satisfaction under section 87 subsection (5)?

MS MORTIMER: There was, your Honour, because it was a ground of review before the learned trial judge through reliance on the Minister's reasons that the Minister had asked himself the wrong question and then in a sense had – our submission was that what 87(5) requires the Minister to do is to ask himself whether at the end of the assessment process he will have enough information to make an informed decision and our challenge was that on a reading of the reasons what the Minister had done was to say well, I'm already satisfied I'm going to have enough information now. I've got enough, and therefore I'll just choose that process, so we say it's sort of leapt ahead but it's not a challenge that we are pursuing on the appeal.

BRANSON J: All right. Well, if you don't challenge that we have the Minister who is satisfied, after considering the matters in subsection (3) which was what he was required to consider, that the approach will allow him to make an informed decision whether or not to approve under Part XIV. What scope is there left for your
5 submissions on purpose?

MS MORTIMER: In a sense, your Honour, the argument about improper purpose of course involves an attack on the formation of that satisfaction because it said that it was – the satisfaction was formed for an improper purpose. The satisfaction is
10 bound up with the exercise of the power and if the satisfaction is formed and the power is exercised for a purpose extraneous, then the satisfaction is impugned as well.

BRANSON J: Well, perhaps let's put it another way. Where in your notice of appeal should I look to find the challenge to the satisfaction that the Minister
15 presumably purported to have under 87(5)?

MS MORTIMER: Your Honour won't find it.

20 BRANSON J: Oh right. So - - -

MS MORTIMER: So, yes?

BRANSON J: - - - where does that lead us?
25

MS MORTIMER: Well, where it leads us, in our submission, if our argument is right and the power is exercised for a purpose that is extraneous that must infect the satisfaction because the satisfaction is not formed only on the basis of the purposes for which the power is conferred, so the state of mind that the Minister reached must
30 be affected if the power has been exercised for a purpose that is extraneous to the section. That doesn't mean, in our submission, that there has to be an independent challenge to the formation of the satisfaction. One can't – a decision maker can't lawfully be satisfied of a matter if the – and exercise a power if the exercise of the power is for a purpose that's extraneous to that for which power is conferred. The
35 two are bound together and that is why in our submission we don't need an independent challenge to the formation of the state of satisfaction.

BRANSON J: Well, subject to this, and it may not be saying anything different from what you were saying, but I just want to test it, subsection (5) authorises the
40 Minister to make the decision that you challenge if he is satisfied, after considering the five matters set out in subsection (3) that that approach will allow the Minister to make an informed decision whether or not to approve under Part XIV, the taking of the action.

45 MS MORTIMER: Well, your Honour - - -

BRANSON J: If he is so satisfied does his decision nonetheless crash because it takes into account something else?

MS MORTIMER: Your Honour, in my submission both 4(a) and 5 don't authorise, they constrain. The power – in fact it's not in a sense a power, your Honour, it's an obligation is in subsection (1) and it must be governed by the matters in (3) and it's constrained by (5).

5

BRANSON J: Even if he is so satisfied he can't do it because he's taken into account something extraneous?

MS MORTIMER: His satisfaction will not be a lawful satisfaction, your Honour, because the purpose for which the power is being exercised is an extraneous one. So his satisfaction, however it's formed, will not be lawful.

10

BRANSON J: But I think – I don't think that can be right. The purpose of it is a known purpose, it's a purpose to work out what method of assessment is to be chosen. That's what he's doing. That's his purpose. He is choosing the method. Now, in choosing the method there are things that it is legitimate and illegitimate to take into account.

15

MS MORTIMER: Yes, your Honour.

20

BRANSON J: Now, presumably the things that you complain about you would categorise as things that is illegitimate to take into account, they are irrelevant considerations in the technical sense. That is it's wrong to take them into account.

MS MORTIMER: Yes, your Honour.

25

BRANSON J: But subsection (3) says that if he's satisfied of the matters subsection (5) says – if he is satisfied that he will be able to make an informed decision, which is the critical thing, whether he can make an informed decision. And if he is satisfied that this approach will allow him to make an informed decision and he has taken into account the things that he's obliged to take into account, how is that going to fall on your argument?

30

MS MORTIMER: Your Honour, in my submission it's no different to the impugning of the formation of a state of satisfaction in any concept where that's a statutory – in any context where that's a statutory concept, because the formation – if for example there was a different failure, for example, the Minister had failed to take into account (3A), if he nevertheless said, "I am satisfied that preliminary documentation will allow me to make an informed decision," there's an unlawfulness about the formation of that state of satisfaction and one doesn't need to impugn the formation of it directly, because it falls for a failure to take into account the relevant consideration.

35

40

BRANSON J: Well, let's test this by what's a rather silly hypothetical example because they often can be helpful. Say you have an admission authority admitting people to legal practice and there's a requirement that they not be admitted unless they've passed the relevant academic qualifications and have the relevant experience and are of the right character. And the admission authority says, "Well, I'm obliged

45

to take these matters into account and I'm satisfied this person has the right academic qualifications, has the right practical experience and has the right personal qualities, and therefore I decide to admit this person. On the other hand looking at the next person I consider the same things and I find that they have the right qualifications
5 and the right experience, but they are of the wrong character. I don't admit them and I'm very pleased about that because the person is a woman with red hair and I actually prefer that women with red hair not be legal practitioners." It wouldn't bring the decision down would it?

10 MS MORTIMER: If that was an unlawful consideration it would, yes, your Honour.

BRANSON J: No, but the person didn't get admitted because they didn't have the right character, not because they were female or had red hair.

15 MS MORTIMER: Well, that would require an analysis on the evidence of whether it was a substantial purpose for making the decision.

BRANSON J: No. Well, here we know what the - - -

20 MS MORTIMER: Your Honour, the plain fact is, in my submission, that making out improper purpose in particular, or bias or those kinds of grounds, is always drawn from evidence and inference and not from the reasons of the decision-maker. The decision-maker doesn't say – or generally – “I did it for this reason.” Where it doesn't closely conform to the legislation. So the analysis in your Honour's example
25 and whether the satisfaction is impugned or not will depend on an analysis of the evidence about whether a substantial purpose for refusing the admission of that woman was really because she had red hair. Even though the decision-maker has said that, “I also don't like her character.”

30 BRANSON J: What I'm wondering is whether you're not seeking to ask us to infer that the Minister wasn't satisfied that the approach would allow him to make an informed decision, even though you don't say so. Because if he was satisfied that the process would allow him to make an informed decision, it's difficult to see why it
35 matters that he additionally wanted to comply with a timetable that the proponent thought was desirable.

MS MORTIMER: That, in our submission, will always fall to be determined on an analysis of whether it's a substantial purpose and if so whether it's extraneous. It may be that it's not extraneous, that's the respondent's argument in which case we
40 lose.

BRANSON J: Well, is there any evidence that you can point to independent of the information that you say suggest a ministerial desire to comply with Gunns timetable that suggests that the Minister wasn't satisfied that this approach would have been
45 adequate to allow him to make an informed decision? Or that he didn't take into account the matters identified in subsection (3)?

MS MORTIMER: Well, they are – they would be different grounds on which to impugn his decision, your Honour, in my submission.

5 BRANSON J: But nonetheless are there any such matters that you can point to?

MS MORTIMER: Well, may I take that question on notice, your Honour?

BRANSON J: Yes.

10 MS MORTIMER: And I will certainly deal with it.

FINN J: You would have to go far don't you?

MS MORTIMER: Pardon, your Honour?

15

FINN J: You would have to find something beyond because if you look at the reasons, you are saying that the reasons that are given which express all the satisfaction, they're boiler plate in a sense, of the statute - - -

20 MS MORTIMER: Yes, your Honour.

FINN J: They don't reflect the true purpose sought to be achieved, but you're effectively talking old fraud on the power talk, that this power is exercised for a purpose or a reason beyond or not justified by the power itself.

25

MS MORTIMER: Yes, your Honour, but not in a bad faith sense necessarily.

FINN J: Well - - -

30 MS MORTIMER: No, your Honour - - -

FINN J: I'm talking in classic equity fraud on the power terms, it's got nothing to do with bad faith, it's simply telling you whether a power has been given, and it's been exercised for a purpose that it countenances. And you're saying it's been exercised for a purpose that it's not been countenanced.

35

MS MORTIMER: That's so, your Honour.

FINN J: In so doing you are saying the reasons given are not the Minister's true reasons, or do not exhaust the universe of the Minister's true reasons.

40

MS MORTIMER: Yes, your Honour, we are saying that.

FINN J: There is another reason which is of such significance that it's a dominant reason. In so doing what you are saying is that something extraneous to what section 87 permits to be taken into account has been taken into account, and that results in a fraud on the power.

45

MS MORTIMER: Yes, your Honour, I accept that. I accept that.

FINN J: But then that involves going beyond saying simply that the Minister was actually satisfied about all these things and oh happy coincidence I can also meet the commercial imperative – accommodate the commercial imperative of Gunns.

MS MORTIMER: Yes, your Honour.

FINN J: Because if that's all you can show, you have got nowhere.

MS MORTIMER: Well, we don't succeed, your Honour, we accept that.

TAMBERLIN J: What you're saying is it's an operative purpose, it's not over and beyond, it's not - - -

MS MORTIMER: Yes, your Honour, substantial is the language of the authorities which we submit is correct, that's right. And if we don't get to that threshold then we fail on that ground. That's right, your Honour. Now, in terms of completing what I wanted to say by way of submission and overview, I think I've probably done that and I want to turn – except to draw your Honours attention to this and I'll be coming to this perhaps this afternoon. After Part IX approvals there is then another part that's relatively important to our 170C argument and that's Part XI which has a number of – a collection of different provisions about what can happen in various circumstances where changes need to be made in relation to the assessment of the taking of an action. I will come back to that because there are a number of provisions in there aside from 170C which we say are relevant.

I want to turn now, if the court pleases, to the ground that concerns section 75(2B) of the Act and this is a considerations ground in short summary that the Minister thought – our submission is the Minister thought he was prevented from taking certain impacts into account by reason of the operation of section 75(2B), and our submission is that he was not so precluded and he certainly could not have been so precluded without engaging in a fact finding exercise that he did not engage in. That's a summary of the ground, and if we are right, in our submission, that there was a fact finding exercise that he needed to engage in order to rule out – or in order to trigger 75(2B) and he didn't do that, in our submission we should succeed.

Now, the principal provision in section 75 is obviously section 75(1) and the principal governing consideration is found in section 75(2), so at this stage when the Minister is deciding whether it is a controlled action and which provisions are controlling provisions he is limited to, on the terms of subsection (2), the impacts of an action – I withdraw that, all adverse impacts of the action on Part III protected matters, and is precluded from looking at beneficial impacts of the action on a matter protected. So there is a broad obligation that is then cut down by the exemption in (2B), and before I develop the argument can I just take your Honours to how it was approached by the Minister and then I will develop the argument?

And if I can you your Honours to two documents, the first is the briefing note that went to the Minister, and your Honours will find that in appeal book volume 3, page 1208. So this is Mr Early's briefing note to the Minister before he made his controlled action decision and his assessment decision. The part about how the impacts of the construction and operation of the pulp mill should be assessed insofar as timber harvesting are concerned is dealt with on page 1214 under the heading Forestry Issues. Perhaps before I take your Honours to that, there is reference on page 1208 that is relevant. In the second last paragraph before the heading Recommendations, your Honours will see the briefing note says:

Most public submissions received on the referral argued the proposal should be a controlled action and that upstream forest harvesting operation should be considered. The sourcing of wood to supply the mill from forestry plantations under the Tasmanian RFA is not part of the referred actions, is exempt from assessment under the EPBC Act. Details, attachment C.

And that is, in our submission, a reference to certainly the writer's understanding of the operation of section 75(2B). Now, the next reference is picked up if the court turns, if the court pleases, to page 1213 and 14. So this is what is said to be attachment B to the briefing note, Summary of Key Issues. And your Honours will see on page 1214 a heading, Forestry Issues, and the second sentence in particular:

The sourcing for the proposed pulp mill is exempt from assessment under the EPBC Act given the protection already provided through the exhaustive RFA process.

And our submission is that that is really putting a gloss of 75(2B) and how it works in relation to the exemption of section 38. But it is too broad a statement, although that's really the approach the Minister ended up adopting. And similarly, at page 1216 in the part of the briefing note that is summarising the submissions that were made, your Honours will see at the top of page 1216 there is a summary of a submission about the adverse impacts on threatened species through the forestry operations. And the response in the briefing note particularly says that:

...75(2B) prohibits consideration of RFA forestry operations in making a decision on significance.

So it is put there as a blanket prohibition. And similarly, if your Honours go down to the fourth paragraph which is in the second bit of shading your Honours will see the submission summarised that the:

...impact of intensified forest harvesting must be part of the Commonwealth assessment because of the adverse impacts on listed threatened species.

And the answer to that in the briefing note:

This is not a relevant consideration because of the 75(2B) exception, eg provided forestry operations are in accordance with RFA the rate or nature of harvesting is not a relevant consideration.

5 And again, it will be our submission that that's a misunderstanding of the operation of 75(2B). Now, the next relevant reference in the briefing note is at page 1224 where, under the heading Forest Harvest, the author of this, Mr Early, recognises in the first paragraph that:

10 *The logging operations are a consequence of the operation of the mill.*

But goes on in the third paragraph to refer to the exemption in section 38 and then again to 75(2B) in this language describing the effect of 75(2B) as being that:

15 *The Minister must not consider any adverse impacts of any RFA forestry operations.*

Now, that again is, in our submission, a broader proposition than the one for which 75(2B) stands.

20

FINN J: Could you explain to me when the Act refers to an RFA forestry operation what should it be taken as referring to?

25 MS MORTIMER: Yes, your Honour, I will take your Honours through that in just a moment because one has to go from one piece of legislation to another and then to the RFA, so it is a cross-referenced term, so I will take your Honours to that. Now, the Minister's reasons for decision appear in the same appeal book at page 1482 and at page 1482 and 1483, the Minister sets out the relevant provisions of the Act from his perspective.

30

He then goes on to make findings on the impacts on Part III, protected matters, in terms of the analysis for the present, if the court pleases, really without reference to the downstream or upstream impacts in relation to forestry and that is dealt with instead at page 1487 to 1488 under the heading Other Relevant Considerations at paragraph 40. The finding is that woodchips required as feed for the pulp mill will be sourced from forestry operations undertaken in accordance with the Tasmanian RFA and that forest products will not be accepted unless they are sourced from that, and then the next sentence is the critical one:

40 *Therefore as required by 75(2B) of the Act, I did not consider any adverse impacts of forestry operations.*

45 So it is a plain discounting of consideration of adverse impacts of forestry operations. Now, if I can take your Honours back to the Act to take your Honours through the argument we make about why that is an error, your Honours will see in section 75 subsection (2) - and I don't understand this to be controversial - that the notion of impact until the end of 2006 was not the subject of any definition in the Act but since has been in section 5(2)(7E), not an exhaustive definition but one that for the

purposes of this case, in my submission, can be fairly summarised as encompassing direct and indirect impacts.

5 And again I don't understand it to be contentious, certainly between the appellant and the Minister, that the harvesting of timber for the mill is an indirect impact and but for 75(2B) just like the brining of water to feed the mill, would be something that would need to be considered to see whether there were any adverse impacts on Part III protected matters. Section 75(2B), as I have submitted, carves out something from the general obligation in subsection (2). And what it carves out relevantly –
10 and your Honours need only look at 2B subsection (a) because that's the relevant one, 2B subsection (b) deals with areas that are not like Tasmania and are not covered by regional forest agreement, but are covered by – are intended eventually to be covered by one.

15 What subsection 2B prohibits the Minister from looking at are not adverse impacts of any RFA forestry operation, that is the formulation, in our submission, that the briefing note adopted and that essentially the Minister has adopted. He has, in our submission, understood 75(2B) as imposing a prohibition on him of considering any adverse impacts of any RFA forestry operation and has drawn a line after the word
20 "operation", but the key part of the prohibition is what comes after that, in our submission, it is only any RFA forestry operation to which under division 4 of Part IV, Part III does not apply. A shorthand way of understanding that is to say, to which section 38 applies relevantly.

25 So our submission is that this prohibition mirrors the limited exemption that is given by section 38 of the EPBC Act and in order to understand that, I would ask your Honours to go to division 4 of Part IV, which commences with section 38. So your Honours will recall that this forms part – these provisions form part of the division that takes certain actions outside the prohibitions in Part III and the first one is
30 section 38, which, in our submission, is directed at those persons who are undertaking forestry operations because the undertaking of a forestry operation apart from the section will be the taking of an action.

35 And if I can just sort of restate that, the undertaking of an RFA forestry operation will otherwise be the taking of an action for the purposes of Part III. And this provision delivers relief from the prohibitions in Part III if you undertake that forestry operation in accordance with an RFA, but that is all it does. A similar exemption is delivered in section 40 – and this is a slight digression, but just to explain the operation of sections 39 and 40 – for regions where RFAs were still being
40 negotiated but were likely to end up being negotiated. So the time this legislation was dealing with, not all regions had got their RFAs through the process and so 39 and 40 are all about delivering the same kind of protection as 38 for regions that are not quite – haven't quite concluded their RFAs.

45 Now, it's important here to understand, as your Honour, Justice Finn, asked me what is an RFA forestry operation and your Honours will see in section – it's defined in section 38 subsection (2) by a cross-reference to the Regional Forests Agreement Act. Now, I'm not sure if your Honours have a copy of that? It ought to have been

on our list of authorities and it wasn't. If your Honours look at footnote 26 of our submissions, I will walk your Honours through how the definition arises, but we've set it out in footnote 26 of our outline of submissions.

5 Just to explain, if the court pleases, how that definition gets incorporated I start with section 38(2). That takes you to the Regional Forests Agreements Act and in section 4 of that Act, part (d), the definition in the Tasmanian RFA is picked up, and the definition in the Tasmanian RFA is what we have extracted in that footnote. So it's a slightly tortured route to the definition but it is only a defined term. Pardon me a
10 moment. And although – I am just checking, your Honours, before I make the submission but although section 75(2B) doesn't expressly cross reference itself back to that definition in section 38, our submission is that's what the term means in section 75(2B) when one understands how the scheme takes the decision maker back to division 4.

15 So RFA forestry operation in (2B) means in our submission – is given the definition in section 38 which takes one to the RFA Act and then back to the Tasmanian RFA itself ending with the substance in footnote 26. What that definition encompasses are a number of activities obviously, not just the harvesting of trees but stages of
20 activities for commercial purposes. In order to understand the limits of that exemption in section 38 one needs to turn to section 42, and section 42 is still part of division 4, so when one is looking at the composite phrase in 75(2B) any RFA forestry operation to which under division 4 Part III does not apply and when one is looking at what that means one has to look at section 42. Because what section 42
25 does is to bring back in to the scrutiny of the Act, there are probably a number of ways to describe it, bring back in to the purview of the prohibitions in Part III some forestry operations.

30 So section 38 provides an exemption to a person undertaking forestry operations in accordance with an RFA and then section 42 says, in effect, you do not get the benefit of that exemption in three defined circumstances. You do not get the benefit of that exemption if you are undertaking a forestry operation in a property included in the World Heritage List. You do not get the benefit of that exemption if you are undertaking a forestry operation in a Ramsar wetland, and you do not get the benefit
35 of that exemption if you are undertaking a forestry operation that is incidental to another action whose primary purpose does not relate to forestry.

40 FINN J: Can I just interrupt you again, this is so I can understand this? First, is one to assume that the Regional Forest Agreements Act itself contains some form of environmental protection regime?

MS MORTIMER: The Regional Forest Agreements do that, your Honour.

45 FINN J: Right.

MS MORTIMER: The Act doesn't, the Act is a piece of Commonwealth legislation that gives Commonwealth recognition to the fact of these intergovernmental agreements. It contains a mirror provision to section 38 but it doesn't itself deliver

the protection for the environment. That, under the scheme of the RFAs, is said to be delivered through the terms of each Regional Forest Agreement itself. So there is a Regional Forest Agreement between Tasmania and the Commonwealth - - -

5 FINN J: I'm trying to make sense of what the exception to the general exemption is
that goes beyond why you would exempt these particular things if there is some
environmental protection regime in the agreements themselves. I presume section
6(4) of the agreement has some bearing on what this is all about, although in the
absence of having a copy of it I haven't the vaguest idea what that part of the section
10 means.

MS MORTIMER: Of the RFA Act, your Honour?

15 FINN J: Section 42 when it says section 6(4) of the Regional Forest Agreements
Act - - -

MS MORTIMER: Yes, your Honour, that is the mirror provision of section 38.

20 FINN J: Right.

MS MORTIMER: So what that is picking up for the sake of completeness, is a
mirror provision in the other piece of legislation but it's expressed in the same terms
as section 38, so the exemptions that are recognised in the Act don't apply in three
factual situations.

25 FINN J: Yes, and can I ask you another question? I'm sorry, I'm just trying to
understand this.

30 MS MORTIMER: No, I understand.

FINN J: Relative to legislation and agreements I've not seen there are obviously
principal reasons why it would be inappropriate to leave, subject to the general
exemption in section 38 the three specified situations in section 42. Is that a correct
inference for me to draw in the absence of a statute?
35

MS MORTIMER: Well, I'm afraid, your Honour, the statute won't tell your
Honour any more.

40 FINN J: No – oh, the agreement, no, the agreement is what I am getting to. The
agreements have forms of environment protection which are not adequate, sufficient,
appropriate to or directed at the sorts of environment protection that might be
necessary if we were – I'm simply trying to understand the context of section 42.

45 MS MORTIMER: Yes, your Honour, yes, your Honour. Well – and it's a critical
issue. The answer, in our submission, is different for A and B to what it is to C. A
and B, in our submission, reflect a legislative decision not to surrender supervision of
forestry operations to the processes in the RFA, for - - -

TAMBERLIN J: Because they are of very special significance?

MS MORTIMER: For very – for two - - -

5 TAMBERLIN J: Exceptional international significance.

MS MORTIMER: Two matters and only two, of the six, that obviously there has been a legislative judgment made that they are of particular significance and any forestry operations that are occurring in that should not get the benefit of the section
10 38 exemption. Section 42, in our submission, which we submit is the relevant one, if any, on the facts here, reflects a different legislative judgment and that is that where you have another action which does require assessment because it is a controlled action, and you are looking at the impacts of that action, it is – if the primary purpose of that action doesn't relate to forestry, that is it is something else, but the impacts of
15 the action will be felt in the forests, the Act preserves supervision through the approvals process and that is because in a policy sense, in our submission, the exercise may be very different.

The one by one undertaking of an RFA forestry operation going into a coupe and
20 logging it, is precisely the subject matter that is protected by regional forestry agreement. There are management prescriptions, there are this and that. If you are taking a different kind of action that requires harvesting of trees, you are looking at a different kind of impact. You're not looking at a coupe by coupe, you may well be looking at, as in this kind of case in our submission, although we accept that was a
25 matter of fact for the Minister had he got to it, a global harvesting of a certain volume of trees from a variety of sources over a year and the impact of that as opposed to a coupe by coupe logging, is a very different question.

TAMBERLIN J: But you would have different transport situations too if you're
30 looking at – say, a pulping operation as opposed to a straight levelling operation. You would have the transportation of the timber to a particular place. I'm just saying that it is different - - -

MS MORTIMER: It is very different, your Honour.

35

TAMBERLIN J: - - - from looking at it as a sort of felling operation on its own and when you're looking at something in conjunction with a large pulping operation you have got transport considerations are one thing that come to mind. There may be other things that - - -

40

MS MORTIMER: Well, you've got volume, your Honour.

TAMBERLIN J: - - - and they are more specific because if you're just felling, if that's the exercise, I don't know if that's what the regional – the forestry agreements relate to, just the felling and the clearing and the impact of that, but when you are
45 considering it as incidental to a specific operation as opposed to say simply cutting and sending it overseas in its basic form just in logs, you do have quite a different

approach and there may be something in what you are saying. That's all I'm suggesting.

5 MS MORTIMER: That's right, your Honour. There is no – another way to put it is that there is no derivative protection from section 38 for different kinds of actions that need timber harvesting and therefore the impacts of timber harvesting need to be considered. Section 38 is a protection given to those who are going into the forests and conducting RFA forestry operations and what section 42 subsection (c)
10 recognises is if you have another action whose primary purpose does not relate to forestry and the Minister in this appeal concedes the pulp mill is in that category, then if the forestry operation is incidental to that action it doesn't get the protection of division 4 and therefore 75(2B) doesn't operate. Now, there - - -

15 TAMBERLIN J: Just in - - -

MS MORTIMER: I'm sorry, your Honour.

TAMBERLIN J: No, sorry, go, finish off, I interrupted you.

20 MS MORTIMER: We accept there are at least two questions of fact involved in that – or three. Is there another action; is the primary purpose of that other action not related to forestry, and is the forestry operation incidental. When that is looked at in detail a number of different outcomes are possible. We do not have to go as far, on this appeal, as persuading your Honours about what the outcome of that deliberation
25 ought to be. The Minister didn't engage in it. The Minister misunderstood 75(2B) and thought it was a blanket exemption for all forestry, all RFA forestry operations, and therefore just shut it out.

30 He did not look and he needed to look at the operation of section 42. That is how the considerations argument is put. And because it's a very clear discounting by the Minister, in our submission, looking at the very plain language, the qualification in (2B) subsection (a) which is what's been ignored in the briefing note and ignored by the Minister, the exercise of looking at 42C and asking whether that's this situation
35 had to be undertaken before the Minister could discount the impacts of the forestry operations.

BRANSON J: Did you have a question?

40 MS MORTIMER: Sorry, your Honour.

BRANSON J: There is not a suggestion here is there of potentially two categories of forestry operations. It's obviously a debate about what forestry operations that are incidental to another action actually means, but you could understand for example if this mill were to be built in the middle of a forest such that a series of trees had to be
45 cleared to allow the footprint of the mill to be exposed for the building of a mill, that would be I think a forestry operation plainly incidental to another action, wouldn't it?

MS MORTIMER: No, your Honour. In our submission that would be part of the action. And that's exactly this situation, your Honour. The clearing of the site for the pulp mill involves in part cutting down trees. Now, that's not incidental to the action it's part of it.

5

BRANSON J: So you don't make a complaint that the Minister didn't give consideration to that.

MS MORTIMER: He did, your Honour. He did look at the impact of the cutting down of trees on the site in which the pulp mill is to be built and he only looked at the impact to threatened species that were found on the site. If he had looked – and this is what the briefing note – the submissions that are summarised in the briefing note point out – if he had looked at the impact of forestry operations that feed the mill, he would have had to look at the impact of threatened species in those forests and he didn't.

15

BRANSON J: You accept that there are two sorts of things that fall within the definition of forestry operations, or at least two. That is those that actually had to be undertaken to get the mill up and the wider considerations.

20

MS MORTIMER: Well, there might be nice question, your Honour, about whether the clearing of the site is an RFA forestry operation because it may not be harvesting for commercial purposes, it's really cutting trees down so you can put a pulp mill on it.

25

TAMBERLIN J: It depends how wide you interpret commercial purpose, I suppose the pulp mill is a commercial purpose.

MS MORTIMER: Well, it could be, your Honour, it could be and that's why I say it's a nice question, but there's no issue in this proceeding - - -

30

BRANSON J: About those ones.

MS MORTIMER: - - - about those ones. And that's why it really arises under – and it's really the second category.

35

BRANSON J: All right. So is it the argument being put by your client that the impact on forestry operations is not that trees that couldn't have been harvested for commercial purposes will be harvested, or that trees will be taken from different places than otherwise, they will be taken more quickly, is that right?

40

MS MORTIMER: Your Honour, the range of factual matters that would have been, in our submission, taken into account is large. You've got issues about volume. You've got issues about location. You've got issues about the kind of forest. What your Honours will see in the referral is that the proposal is that some be harvested from plantation, some be harvested from native forest. Now, obviously when one is looking at Part III protected matters of threatened species, harvesting from native forest is likely to have a different impact from harvesting from plantations.

45

BRANSON J: But they are native forests that were open to be harvested in any event; is that right?

MS MORTIMER: Yes.

5

BRANSON J: And plantations that were open to be harvested in any event.

MS MORTIMER: Yes, your Honour, that's right. So it's not – open to be harvested – there's a live issue and there would have been a live issue, in our submission, about volume and rate and choice. So that to follow through on our argument if 42C applied, one of the things that the Minister would have been entitled to look at was whether, for example, he ought to put a condition on the approval, if he got to that stage, about the amount of native forest that should be harvested versus the amount of plantation that should be harvested because he had ascertained that there was an impact on threatened species and that was a way to avoid it, or minimise it.

BRANSON J: What is troubling my mind is this possibility which you might well say is not this case at all, but if all of the forestry operations that could be envisaged to follow the establishment of this mill would have taken place, absent the mill, but the timber put to a different use: for example, planking or something of that kind. It would be hard to say that the forestry operations were incidental to the mill wouldn't it. Inasmuch as they were forestry operations that would have taken place in any event.

20
25

MS MORTIMER: That depends, your Honour, on the timing.

BRANSON J: That's why I am raising with you what - - -

MS MORTIMER: Assessing the notion of incidental, in our submission, in 42C presupposes that the other action is occurring.

BRANSON J: That is right. That's why I'm exploring with you - - -

MS MORTIMER: So it's not looking at what is happening now in the forest and whether that would have happened anyway, that's not the question 42C poses. 42C starts with the assumption that the other action is occurring and asks from that point in time are the forestry operations incidental to it. So then the question is are those forestry operations liable to happen in connection with or naturally appertaining to, that's the Macquarie Dictionary definition of "incidental to".

35
40

BRANSON J: Could I say for myself – just speaking for myself, that if it were the case and I don't suggest that it is, but if it were the case that the actual forestry operations would be completely unchanged because the mill had been built, simply that the end purchaser of the product of the forestry operations had changed, it will take a lot to persuade me that those forestry operations had suddenly become incidental to the action of building the mill.

45

MS MORTIMER: Well, your Honour, yes, that's a possible outcome on the merits looking at the application of incidental. What was being put to the Minister in the submissions was that there was going to be a substantial increase in harvesting. Now, that's a contentious fact. Gunns says that's not the case, but the Minister never
5 got to decide that and it might be, your Honour, that had he gone through that process he might have, after examining all the material, come to precisely the same conclusion that your Honour has come to, that it's not properly characterised as incidental because I'm satisfied on the material before me that there isn't going to be an increase in harvesting. That is a merits-based outcome if he had taken the proper
10 approach to 75(2B), but, in our submission, he didn't get anywhere near that. He simply saw 75(2B) as a blanket exemption for all RFA forestry operations. That's the jurisdictional error.

FINN J: Could I ask you two questions; the first one I know is a perfectly silly one, and that is there's obviously not any extrinsic material which would cast any light at all on what section 42 might mean?
15

MS MORTIMER: Section 42?

20 FINN J: Yes.

MS MORTIMER: I don't believe there is, your Honour, but we will check. We will check. I don't believe there is.

25 FINN J: I'm more interested – I have no doubt what the second reading speech will contain, if anything, but is there any series of governmental reports of any variety that inform this legislation?

30 MS MORTIMER: Your Honour, there were a mountain of reports that informed the conclusion of the regional forest agreements, I don't know that there were any particular reports that informed the drafting of these provisions.

35 TAMBERLIN J: It seems odd, doesn't it, because you would expect there would've been some discussion as to why the World Heritage List and the list of wetlands were given special treatment, why it was thought perhaps that it was inadequate by the regime?

40 MS MORTIMER: Your Honours, as I stand here, I'm not aware of any, but I think that's the second task we will take away with us.

FINN J: Can I ask you a second question; the forestry operations are incidental from other action whose primary purpose does not relate to forestry, not to forestry operations.

45 MS MORTIMER: Precisely, your Honour.

FINN J: Now, can it be said that the primary purpose of the pulp mill can properly be described as relating to forestry in that if you don't have a forest you don't have a

pulp mill, what is involved is the conversion of a tree – a series of – well, forests into pulp, absent one, you don't have the other?

5 MS MORTIMER: That so, your Honour, but the language of 42C is careful and it talks of a primary purpose.

FINN J: I fully appreciate that.

10 MS MORTIMER: And we submit the primary purpose of a pulp mill is the production of pulp and forestry does in its ordinary meaning, in our submission, mean something different to forestry operations. Forestry, again according to the Macquarie Dictionary – I will hand your Honours up in a moment the two definitions we have for incidental and forestry – means the science and practice of planting and taking care of forests. Now, is the primary purpose of a pulp mill the science and
15 practice of planting and taking care of forests? That was a question for the Minister. It may have met with more than one answer. It is not totally – it may have met with more than one answer and therefore it was something that he needed to consider, and we understand that that part of section 42 is the subject of a concession by the Minister.

20

TAMBERLIN J: Sorry, what, that it's incidental?

MS MORTIMER: No, not that it's incidental, that's not, but the construction and operation of the pulp mill is an action whose primary purpose does not relate to
25 forestry.

BRANSON J: Was he obliged to consider it or simply get the right answer?

30 MS MORTIMER: Pardon, your Honour?

BRANSON J: Was he obliged to consider it or simply get the right answer? This is not a factor he had to take into account for deciding something else, is it?

35 MS MORTIMER: Yes, your Honour, because the principal obligation is in section 75 subsection (2) to consider all adverse impacts of the action and carved it, that is, all adverse impacts of the construction - - -

BRANSON J: But what is a relevant adverse impact, it's a question of law, isn't it?

40 MS MORTIMER: What is an adverse impact is probably a mixed question, your Honour.

45 BRANSON J: In lots of things it doesn't matter if you don't think it through properly provided you get the right answer. I'm wondering if this isn't such a thing.

MS MORTIMER: Just like the water supply for the mill, in our submission, the wood supply for the mill was recognised, the harvesting of trees for wood supply to

the mill was recognised to be an impact and was shut out only because of section 75(2B). There was nothing - - -

5 BRANSON J: Because someone took a particular construction of the section. They are either right or wrong about that. If they got it wrong then there will be a problem, if they got it right will it matter that the Minister didn't think it was correct?

MS MORTIMER: If the construction is right – no, I withdraw that.

10 TAMBERLIN J: Are you saying he didn't address the problem?

MS MORTIMER: He didn't address the problem.

15 BRANSON J: Maybe it didn't have to be addressed as his supporting staff told him they were either right or they were wrong.

MS MORTIMER: Well, that's the whole issue, your Honour.

20 BRANSON J: It is.

MS MORTIMER: But the issue is what does (2B)(a) mean? How broad is that carving out?

25 BRANSON J: Well, that's a question of law, your Honour.

MS MORTIMER: Yes, your Honour.

30 BRANSON J: You are obligated to get the right answer not to think it through properly.

35 MS MORTIMER: No, your Honour, the Minister is obliged to apply the provision firstly to understand it correctly and then to apply it correctly and to take those steps required the Minister to look beyond section 38 whereas all the Minister did was to look at section 38. That's the argument. We are not submitting, and in our submission we do not have to reach the stage of persuading this court about whether 42(c) in fact inevitably applied. Our submission is that there are several not easy questions of fact involved in that, that the Minister had to go through in order to understand whether he needed to look at the impact of forestry operations or he didn't. And he did engage in that exercise. That's how the submission is put, if the Court pleases. And, your Honour, I have referred twice to a concession by the 40 Minister and it's in paragraph 21 of the Minister's submissions where the Minister says:

45 *It is true that the proposed pulp mill is an action, the primary purpose of which does not relate to forestry.*

MR UREN: I wonder if in this context I could indicate there is certainly no concession on the part of my client in respect to that issue. And while I am on my

feet, the bench referred to the question of an explanatory memorandum or something of that sort. His Honour has referred to one in paragraph 101 of his judgment which does contain a matter which is pertinent to section 75(2B).

5 BRANSON J: Thank you, Mr Uren. Yes, Ms Mortimer.

MS MORTIMER: If I could just hand up those two Macquarie - - -

FINN J: Section, para – which number?

10

MR UREN: 101 of page 1784 of the - - -

FINN J: Could you give me the paragraph number?

15 MR UREN: Paragraph 101.

FINN J: 101.

MR UREN: Yes, at page 1784 of volume 4 of the appeal book.

20

BRANSON J: Are you moving now to something entirely new, Ms Mortimer?

MS MORTIMER: No, your Honour, before I wrap up on this ground I need to take your Honours to the judge's reasons and identify the error, and I understood your Honour Justice Finn's question to be about material other than the explanatory memorandum.

25

FINN J: It was, it's - - -

30 MS MORTIMER: But in any event - - -

FINN J: - - - but this is very illuminating.

MS MORTIMER: Well, your Honour, it is our case if you look at the last sentence. If these sections, that is section 38, do not apply because of section 42 then the new 75(2B) inserted by this item does not apply. That's our case. And the error that the trial judge fell into, particularly in paragraph 104 of his Honour's reasons, was simply to dismiss section 42. It seems, with the greatest respect to his Honour, that he hadn't, in our submission, understood how section 42 operates. When his Honour says about four lines in paragraph 104:

35

40

The focus is on an action which is a forestry operation.

That is true at the start of section 42 and then his Honour says:

45

For current purposes the action is an action of a construction and operation of the pulp mill, consequently section 42 is not relevant.

That's just ignoring (c); it's ignoring the whole operation of (c). Now, I propose – your Honours, I was about to turn to the second ground, section 170C, would that be a convenient time?

5 BRANSON J: It probably is subject to this: I think it would be useful to explore how the appeal is going so far as time is concerned. How much longer do you expect your submissions to be, Ms Mortimer?

10 MS MORTIMER: Well, I have to deal with 170C and procedural fairness and it may be because of the interaction between myself and the bench that I don't need to say terribly much more about improper purpose, so I may in substance really have just the two grounds to go through and I will comfortably finish that in the morning, your Honour. Possibly before the luncheon adjournment.

15 BRANSON J: All right. Dr Perry, you have had the benefit of the introduction of Ms Mortimer, how long do you think your submissions will be?

DR PERRY: I would anticipate, your Honour, that they would be about two hours, possibly a little longer.

20 BRANSON J: Thank you. Mr Uren, you will have the benefit of two people going ahead of you?

MR UREN: Yes, possibly two hours or a little less.

25 BRANSON J: Yes. So it would seem likely that it would be unlikely to finish tomorrow, we would finish Friday morning?

MS MORTIMER: I think that's a fair assessment, your Honour.

30 BRANSON J: Very well. Thank you very much.

MS MORTIMER: If the court pleases.

35 BRANSON J: The hearing will resume at 10.15 tomorrow morning.

MATTER ADJOURNED at 4.14 pm UNTIL THURSDAY, 18 OCTOBER 2007