

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 66231

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

9.31 AM, FRIDAY, 19 OCTOBER 2007

Continued from 18.10.07

DAY THREE

**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.

BRANSON J: Yes, Mr Uren?

MR UREN: If the court please, I wonder if my learned friend Dr Perry could inform the court of one or two small matters?

5

BRANSON J: Dr Perry.

DR PERRY: Thank you, your Honour. There were just two matters, one of which I said I would follow up for your Honours. First, at page 109 of the transcript I said I'd give the court the reference to the evidence of Mr Early on the way in which the department carries out the assessment process, and that's found at appeal book, volume 1, page 109, lines 20 to line 46. And the second point was that your Honour Justice Branson asked if I could identify where a restriction I mentioned was found, and that was that the Minister could only stop the clock where he believed that he needs further information. I must apologise to the court. I was incorrect and I just wanted to clarify that there was no such restriction.

BRANSON J: Thank you, Dr Perry.

DR PERRY: Thank you.

BRANSON J: Yes, Mr Uren?

MR UREN: If it suited the court's convenience, we would deal with the issues in the following order: firstly, the section 75(2)(b) point; secondly, the 170C(4) point; thirdly, the improper purpose point, and fourthly, under the natural justice point. Going to the first point, that's the 75(2)(b) point, the – I wonder if we could take the court to section 75 itself, and section 75, subsection (2) provides that :

If, when the Minister makes a decision, it's relevant for him to consider the impacts of an action.

And then there are subparagraphs (a) and (b), and subsection (2)(a) is subsidiary to subsection (2), and it provides that:

35

For the purposes of subsection (2) –

Sorry, (2)(b) I meant –

that without otherwise limiting any adverse impacts that the Minister must consider under paragraph (2)(a), the Minister must not consider any adverse impacts of any RFA forestry operations to which, under division 4 of Part IV, Part III does not apply.

Now, when one looks at the definition, or what is said to be the definition of impact in section 527E, which doesn't really define impact – what it does is define the extents – define the circumstances in which an impact will be a cause, or an action will be a cause of an impact. The word "impact" we understand to itself still bear of

the meaning which was given in the Nathan Dam case (2004) 139 FCR 24. That is the Minister for Environment v the Queensland Conservation Council.

5 On the question of causation, the law has changed since that case, and section 527E has been introduced, and we think that rather goes to the question of cause, if I may so describe it as such, rather than the question of what impact actually is. It's when something is the impact of an action which that deals with. Starting then, it does appear, when one looks at section 527E, that the adverse impact of an action, and thus also the adverse impact of an RFA forestry operation, may be what the action
10 itself does, which may be cutting down trees. That might be an action which has a direct impact on a threatened species, or it may be - - -

BRANSON J: You mean clearing the site for example?

15 MR UREN: Yes. I mean, you may have an argument about whether the impact is actually the lack of food which causes the species to die, or whether the impact is the cutting down of the tree which causes the food not to be there, or something of that sort. But in any event, one could say that the adverse impacts of an action are the direct consequences and are also the indirect consequences, providing the indirect
20 consequences satisfy the description in 527E(2), or satisfy the criteria in 527E(2).

So an action can have an adverse impact through a chain of events, and the chain of events can include an RFA forestry operation. So an RFA forestry operation itself can be an impact, and it can also be something in a chain of events from another
25 action which gives rise to an adverse impact. Now, in that case, in accepting that one event in a chain from another action may be an RFA forestry operation itself, the impact on the species will be, in effect, the impact of two actions, are not acting in parallel, but acting in a chain. One will be the non-RFA forestry operation. On the argument which is put by the appellant, we think, that would be in this case the pulp
30 mill; and the other would be the RFA forestry operation itself which would be said to form part of the cause or chain.

So you could have an impact on the species which is in fact an impact, according to the definition, of two actions: one being an RFA forestry operation. But if, however
35 it's the case that the impact is an impact of an RFA forestry operation, either directly or indirectly by virtue of its part in the chain under 527E, the impact is to be excluded from consideration under 75(2)(b). That's because it is in fact an impact of an RFA forestry operation. So it doesn't matter if it's also the impact of something else. And so even if, as is likely in many cases, that the impact is also the impact of
40 another action, through the operation of 527E, under 75(2)(b) it must be excluded if it falls within the description also of an adverse impact of an RFA forestry operation to which Part III does not apply because of division 4.

So you can have multiple causes, as it were, but providing that one of them is an
45 RFA forestry operation within the meaning of 75(2)(b), you must not consider that adverse impact, no matter that there are other causes of that impact, which constitute actions within the meaning of the Act. So it's only necessary for 75(2)(b) purposes to ask: is this alleged impact an adverse impact of an RFA forestry operation to

which under division 4 of Part IV, Part III doesn't apply. It doesn't matter if the RFA forestry operation is not the relevant action for the purposes of a referral or an approval. It only has to be an adverse impact on a RFA forestry operation itself.

5 BRANSON J: Mr Uren, I can understand your client's interest in having this section interpreted very widely, but does this submission address anything put to the court by Ms Mortimer?

10 MR UREN: Yes, it does. Ms Mortimer's view is that the two – well, sorry, I will go back a square. I think the grounds of appeal say that the Minister should have concluded, or he did not take into account the question of whether the RFA forestry operation was one to which Part III didn't apply.

15 BRANSON J: I thought that was because of something in Part IV, division 4 of chapter 2.

MR UREN: Yes, that's in section 42, but the road to section 42 and 42C and its application is in fact through 75(2)(b), which is why we go to it first, and why it is put that the Minister's decision was in fact perfectly correct on the findings which the trial judge made, and also on the evidence which was given, because the Minister – sorry, on the findings which the Minister made, because the findings which the Minister made, which appear at 1487 to 1488 of the appeal book, was that this was an RFA forestry operation conducted in accordance with the provisions of an RFA.

25 BRANSON J: I rather understood Ms Mortimer to say that whatever 75(2)(b) means didn't apply here because of section 42.

MR UREN: Yes, but once you – it's necessary to look at the true meaning of 75(2)(b) and its operation to see what 42(2)(c) applies to, and that's – so we're getting to 42(2)(c), but the doorway to it is 75(2)(b). Now then, if I could go on. If then 75(2)(b) operates to exclude the impact – I will go back a square. 75(2)(b) then operates to exclude that impact from consideration when considering the impacts which have to be considered under section 75 subsection (2).

35 Now, the RFA forestry operations which are identified, or which are referred to, are those which are identified in Part IV. Now, they are identified in Part IV for another reason, not – in other words what section 75(2)(b) does, it builds on the identification of particular forestry operations in Part IV. Part IV, however, doesn't exist for the purposes of section 75, 75 builds on what Part IV refers to. And what Part IV refers to, relevantly in section 38, is an RFA forestry operation that is undertaken in accordance with an RFA. And it says that Part III does not apply to RFA forestry operations undertaken in accordance with an RFA, and consequently there is no prohibition under Part III in the conducting of an RFA forestry operation which is undertaken in accordance with an RFA.

45 And the Minister's finding was, as we've mentioned, that these particular RFA forestry operations were in fact undertaken in accordance with an RFA, and that the sourcing of timber was from that operation. It is not suggested, as we understand it,

that the RFA forestry operation itself is in fact within Part III – sorry, is in fact not within Part III because it is excluded by Part IV. In other words, it seems to be conceded that the cutting down of the trees itself is in fact an RFA forestry operation that is undertaken in accordance with an RFA to which Part III does not apply. Now,
5 accordingly, from our – in our submission, once you accept that the RFA operations themselves, to say the cutting down of the trees, is not an action that Part III prohibits, then their impacts are not to be considered for the purposes of an impact assessment of any action under 75(2)(b).

10 So this is – I mean, those cutting down of those trees has not been argued not to be an RFA forestry operation to which under division of Part IV, Part III does not apply. Otherwise you could stop the cutting down of the trees. What seems to be put is that for some reason, because the cutting down is also a consequence of another action or part of the chain of events leading from another action for which approval is sought,
15 that for some reason things change, but they don't. All you have to do is ask yourself is the thing – is the adverse impact alleged, which is the effect of the species, an adverse impact of an RFA forestry operation to which under division 4 of Part IV, Part III doesn't apply.

20 And if it is the case, as it must in our submission be, that the cutting down of the trees itself is an RFA forestry operation that is undertaken in accordance with an RFA and no one seems to be asserting that it's not, and then it is excluded – sorry, it is something to which section 38 applies and thus is excluded from the operation of Part III. Being excluded from the operation of Part III the Minister is under
25 75(2)(ba) precluded from considering its adverse impact. So once you accept that the operations themselves are not illegal, if the RFA operations are not illegal, they cannot be considered as the adverse impacts of any other action.

30 FINN J: Just so that I can understand what you are saying, are you saying subdivision (c) of this division has no application whatever in the - - -

MR UREN: In this case, in this case.

35 FINN J: So even though subdivision (c) does tell you when the limits of Part III, i.e. when Part III does not apply, and when that same formula is used in (2)(b) you simply ignore it?

40 MR UREN: Yes, we do for these purposes, because once it's accepted that the RFA forestry operation itself is the – is what is in the causal chain leading to the impact, if it's not it must – it must be something that is excluded from Part III by section 38. Now, we don't understand it to be argued that the RFA forestry operation itself could be prevented by virtue of the fact that it is an infringement of the prohibitions in Part III. Once that – if that is accepted then if the impact is an impact of that action, it is excluded from operation. Now, we have an alternative - - -

45 FINN J: Now, can I ask you a follow up question. Assume you decided that you weren't going to have subdivision (c), you simply had 38(1) saying subject to section 42, Part III does not apply to, what?

MR UREN: Well, Part III doesn't apply to certain sorts of things. But if the RFA forestry operation itself is the – sorry, if an RFA forestry operation which is not itself attacked as being illegal is the cause of the impact, then in our submission (2)(b) excludes it, and that is the answer. Now, the – what - - -

5

FINN J: I am just trying to work out at the moment how you interpret - - -

MR UREN: Yes, what has to be – see what - - -

10 FINN J: - - - subdivision (a)?

MR UREN: Is what the – what the appellant would have to do would be to also argue that if the pulp mill uses wood from the RFA forestry operation, because of the operation of 42C, the RFA forestry operation itself also becomes illegal. Not only
15 the pulp mill is illegal but the operation is illegal as well because it would be said then the RFA forestry operation which before the pulp mill was perfectly legal, after the pulp mill became illegal. Because it would have to be then said that 42 operates to make the RFA forestry operation incidental to another action whose primary purpose does not relate to forestry, and that being the case the operation itself would
20 become unlawful because it would not be one to which section 38 applies.

FINN J: But is that saying no more than that where there are a composite of impacts for the purposes of a particular action, what is illegal is the composite of it and not just the parts of it?

25

MR UREN: Right.

FINN J: It doesn't mean the RFA timber can't be used for other purposes. You are assessing this action with this composite of impacts.

30

MR UREN: The – one looks at the RFA forestry operations themselves it is not a question of the – no, I will go back a square. You look at the RFA forestry operations themselves, if it is said that they are – (a) if it is proved that they are incidental or another action whose primary purpose doesn't relate to forestry, then
35 section 38 does not apply to those operations. And the argument – and the argument of the appellant leads to the proposition that not only the purpose for which you want the wood is an illegal impact, but also the operation itself, the RFA forestry operation itself must also be illegal.

40 Because it is an RFA forestry operation, it would then be said to be incidental to another action etcetera, it would then be a one which 38 doesn't apply to and Part III would then apply in all its force. So the point I'm making here is that the appellant – appellant's argument on one view would have the effect that if the pulp mill is erected, not only the pulp mill would be illegal but also the cutting down of the trees
45 would be illegal as well and be able to be prevented as a separate impact. In other words, you could have an injunction to restrain the cutting down of the trees, not just to restrain the pulp mill.

FINN J: Yes, but that must follow on the proper construction of the act?

MR UREN: Yes, that's right, but we don't understand it actually to be argued that the operations of the RFA – sorry, that the RFA forestry operations themselves are
5 by virtue of this argument declared to be illegal. And the – if - - -

BRANSON J: Well, not all of them, Mr Uren, but I think perhaps some increase in them. But what do you say section 42C does mean so far as RFA forestry operations is concerned?
10

MR UREN: Well, what it means is this. The first – there are some RFA forestry operations which are judged to not be ones which have the protection of section 38, and those are ones which are incidental to another action whose primary purpose etcetera - apart from - - -
15

BRANSON J: Well, that's what it says.

MR UREN: Yes.

BRANSON J: What does it mean?
20

MR UREN: Yes, apart from (a) and (b). Well, what it means in practical application is this. Now, you have to look first at the meaning of the word “incidental” and we could supplement the dictionaries which have already been
25 provided with two other references, one is from the New Shorter Oxford and the other one is from Garner's Dictionary of Modern Legal Usage. If I could just hand it to the court and to my learned friends.

TAMBERLIN J: What's the word, “incidental”?
30

MR UREN: Well, the word “incidental”, in our submission means, it means:

a subordinate, or peripheral –
35 to something.

TAMBERLIN J: It's got a number of meanings. It's got about six or seven.

MR UREN: Yes, it's got a number of meanings, yes. Yes, now, Garner – Garner
40 refers to the difference between - perhaps it might be more convenient if the court had the references while I talk.

TAMBERLIN J: Yes.

MR UREN: Yes, Garner refers to the difference between the meaning of the words “incident to” and “incidental to”, and to them both coming from, originally from the word “incident”, event or happening, but having undergone a bit of a change during the course of history.
45

The former, that's to say "incident to", in this author's view, means:

...closely related to, or naturally appearing with.

5 And the "incidental to" means:

...happening by chance and subordinate to some other thing, or peripheral.

10 And the author then goes on to give a number of examples one of which is, for instance, that "incidental" is used in – correctly used in the following sentence:

It is clear that the testator's plan of accumulation was merely incidental to his primary charitable intention to create a source of – provide continuous income over the 400-year term for the maintenance of Masonic Homes.

15

And the author also, in the next paragraph, refers to the common blunder of using "incidental" in stead of "incident" and at the very bottom of that paragraph provides an example where sometimes a slip-shot drafting of statutes is, in fact, caused "incidental to" be construed as being "incident to" when it shouldn't be. Now, you can see the same definitions appearing in the Oxford Dictionary excerpt. Looking at the left-hand column of the Oxford, the meaning of the word "incident" has allowed:

20

...something that occurs casually in connection with something of which it forms no essential part of subordinate or accessory event.

25

There are other meanings given, of course. Then "incident" - - -

TAMBERLIN J: Well, there's a meaning of naturally attaching to them?

30 MR UREN: There is too, but that is a - - -

TAMBERLIN J: "Liable to happen".

35 MR UREN: Yes. Now, that's seems to be what Garner attaches to the word "incident" rather than "incidental". In other words, one has the – and I think that also appears – those - - -

TAMBERLIN J: But the Oxford Dictionary puts it as:

40 *Incidental: liable to happen, or naturally attaching to.*

MR UREN: Yes. And also occurring as something – looking in the middle - of the middle column:

45 *Occurring as something casual, or of secondary importance not directly relevant to following upon a subordinate circumstance.*

And that, in our submission, is the meaning which was intended.

BRANSON J: The words most commonly struck by the courts, I think, in the Constitutional context do you say it's not used in that sense in this Act?

5 MR UREN: Well, I think it might be better to leave the Constitution in the sense because that has its own relevant considerations but - - -

BRANSON J: That is to say you say it is not used in the same sense as it's used in the Constitution?

10 MR UREN: Your Honour, I don't have the correctly in my mind the ins and outs of the incidental power in respect of the Constitution so I would rather not express a sort of definitive view on that.

15 TAMBERLIN J: If you're talking about "incidental to", let's look at the Constitution for a moment. An incidental power would be one to give effect to the main power so it's what is necessary to take – put into effect in that context. Maybe that's why perhaps you might think it's not appropriate here, but certainly that's the meaning of it. You have an Act and something incidental to it, something which is necessary to it, or necessary to implement it.

20 MR UREN: I think that concept may not do any harm to the argument we put.

TAMBERLIN J: I would have thought it might.

25 MR UREN: Well, the argument we put is - - -

TAMBERLIN J: It's necessary to cut down trees to operate your pulp mill.

30 MR UREN: It may be necessary to cut down trees to make a pulp mill but the – I wonder if I – the section – the subsection, rather, refers to something which was incidental in another action whose primary purpose does not relate to forestry and the exclusion would not apply if the action was not incidental to the other action and if the other action's primary purpose did relate to forestry. Now, the meaning that, or the application that we would give to the section is this: if, for instance, you were
35 constructing a road through a forest for the purposes of getting from one place to the other but not for forestry purposes then the primary purpose of that road would not relate to forestry.

40 TAMBERLIN J: Wouldn't that be a forestry operation, transport, operations?

MR UREN: Well, not – we're postulating that this is not a logging road.

TAMBERLIN J: I see, yes.

45 MR UREN: It's a road which just goes for, let's say, tourism purposes from one place to the other. Now, that primary purpose does not relate to forestry. The cutting down of the trees is, it may be necessary to be done for the purpose of building the road but, nonetheless, it's incidental to the building of the road. Now, laying-down

of road materials is not incidental to the building of the road because that is the very construction of the road itself, but you can build a road without cutting down trees. Cutting down the trees may be necessary for the purposes of building a road in a particular place but it may, nonetheless, be said that it's a subordinate, or accessory event to the concept of road building.

So the cutting down of the trees for the purpose of building a road to go from one place to another, not being a logging road, would be incidental to another action whose primary purpose does not relate to forestry. Now, that is the sort of thing, in our submission, which is covered by 42C. That's in accordance also with the explanatory memorandum as we would read it. Now, there is a little bit of a sleeper in here because a forestry operation either under the definition of forestry operations in section 40 of the statute, or in the Regional Forest Agreement Act and the agreements themselves, requires that the forestry operation be done for commercial purposes.

TAMBERLIN J: Yes, and it's not a commercial purpose in your example.

MR UREN: Well, the answer is, it would be, because the person cutting down the tree does the action. He's doing it for commercial purposes because he's engaged to do it. He might be a contractor, or something, but he's contracted to cut down the trees. He cuts down the trees, that is the action. It's done for - - -

FINN J: So if it's done by the State Forestry Department employees it's not a commercial purpose, it's a governmental purpose?

MR UREN: Well, it's - I'm trying - the thing is, I'm trying - the argument that - I'll go back a square. The purpose of this argument is to show what RFA forestry operations are covered by 2C. RFA forestry operations, by definition, are commercial ones so once - - -

TAMBERLIN J: Yes, but when you cut down trees for a commercial purpose is means for selling the trees, doesn't it?

MR UREN: Well - - -

TAMBERLIN J: Doesn't it - the contractor's purpose, it's broader than that. It must mean you're cutting it down to make paper to sell, to do something with it. You're not looking at the narrow - the person who cuts down the trees who says well, he's doing it to earn some money.

MR UREN: Yes, I think the - - -

TAMBERLIN J: It's broader than that.

MR UREN: Well, there's a difficulty with looking at it like that because I think that tends to deprive the two sections of any sensible meaning, where a concept of commercial - of commercial purposes may go beyond the mere buying and selling of

the trees and the tree products themselves, because it's a species of RFA forestry operations which 42C refers to. It's not any sort of other operations. So it's got to start off being an RFA forestry operation, and it's got to be an RFA forestry operation – to be an RFA forestry operation, the operation has to be done for a commercial purpose.

Now, you can't exclude all RFA forestry operations from the operation of section 38 because of 42C. The RFA forestry operations are prima facie allowable. So cutting down the trees for commercial purposes is prima facie allowable. If cutting down trees for commercial purposes – that is to say for selling them so they can be used by someone – is prima facie allowable, you can't interpret the section so that the user is guilty of an offence of causing the adverse impact, because then you would be saying you could never do an RFA forestry operation for commercial purposes because no one could use the product. The consumer would then be said to be guilty of an offence by virtue of using the RFA forestry operation trees when the very thing that made the RFA forestry operation would be the commercial purpose for which the work was done. That's the other side's argument, but it cannot be true, because you would then say that if the RFA forestry operation is done for commercial purposes, then the user is guilty of the - - -

FINN J: Could I ask you – sorry to interrupt you again, but just so I can understand your argument – are you saying that the operation of the pulp mill here has or has not a primary purpose that relates to forestry?

MR UREN: Yes, we're saying it does, which is another reason why - - -

FINN J: But isn't that – if I understand that to be your argument, because it is your argument, 42C doesn't apply.

MR UREN: Yes.

FINN J: But you're holding up the spectre of 42C applying to any commercial exploitation of a forestry.

MR UREN: Yes, because that's the other side's argument.

FINN J: I hadn't quite understood the other side to be putting that argument, but if you're going to set up a straw person to knock down, I'm quite happy to listen to you, but I don't understand that is what is being put.

MR UREN: But it must be their argument because if the - - -

FINN J: Well - - -

MR UREN: Because if the appellant is saying, as we understand them to be saying, that the RFA forestry operations themselves are incidental to another action whose primary purpose does not relate to forestry, that means they're saying that the RFA forestry operations themselves – that is to say the cutting down of the trees – is

incidental to the operations of the pulp mill, it being – those operations being operations whose primary purpose does not relate to forestry. Now, there's no distinction between the pulp mill as a consumer and any other consumer. Any consumer of the forest products consumes them in the way in which they want them for their commercial purposes, whether it's burning in the fire; whether it's converting to pulp; whether it's making into code DH or something and building a house.

The consumer's requirements for the product may be multiple and multifarious, but nonetheless there's no distinction to be drawn between the pulp mill as a consumer and anybody else as a consumer, and if that's the case you must ignore, for the purposes of looking at the application of 42, the fact that this is a pulp mill, except for the purpose of working out whether its primary purpose doesn't relate to forestry or not, but there's no reason why the pulp mill's primary purpose doesn't relate to forestry – sorry, there's no distinction to be drawn between the pulp mill and any other user of the product for that purpose.

So we're not setting up a straw argument. What we're pointing out is the actual effect of the other side's argument. Now, it may be that what the appellant has done is to really ignore the concept that we have referred to in looking at section 75(2)(b) and the meaning of impact, and they have gone straight to the pulp mill and not looked at the fact that the – what causes the impact is the RFA forestry operation. It may be that they have not travelled the road we have, but the argument which they put, if it operates to exclude from the protections of section 38, an RFA forestry operation that supplies a consumer, then this is an argument which relates to all consumers and which therefore deprives in fact the RFA forestry operation itself of protections, because you don't have an RFA forestry operation without consumers, without commercial consumers, because the very definition of RFA forestry operation requires that the operations be done for commercial purposes.

So the argument we put is not a straw argument. It is in fact the logical effect of the argument which is put for the appellant, and we're saying it can't be true because it would then have the effect that no RFA forestry operation would, by definition, be able to be subject to the protections of section 38, the commercial purpose of the operation - - -

FINN J: Can I give you an example? There's forests, the wood of which can be used to build wooden boats. That's the only forest I'm interested in. But my activity is building boats. And the question arises whether my little ship-building operation on the lakes of the water – on the side of a river or something has some adverse impact, and the question arises whether cutting down trees in a forestry operation under an RFA is incidental to my ship-building activity – would you say my ship-building activity has a primary purpose that does or does not relate to forestry?

MR UREN: No, in our submission it does relate to forestry because it uses the forest product. In our submission, the purpose of the – it's a question of what's meant – or the width that the words relate to in this context, but the primary purpose - - -

TAMBERLIN J: The word “primary purpose” is not unimportant.

MR UREN: It doesn't have to consist of forestry, that's the point we make. It has to relate to forestry, and the primary purpose of the boat-building exercise, if it's the use of forest products – that's to say it supplies the commercial rationale for the forest operation itself, is something which – the primary purpose of which does relate to forestry. And also, the RFA forestry operation is, we would say, the primary purpose of that - - -

10 BRANSON J: Would that mean, Mr Uren, if Justice Finn's boat-building business built mainly fibreglass boats, but one or two timber boats, it would not come within the section, but if it built 51 per cent of timber boats it would?

MR UREN: Well, no. It's a matter of looking at what the section means. If I could give another example. The Law Book Company supplies books. It's a supplier of a product. I'm a consumer of the books, in other words I get the books. But the Law Book Company's operations are not incidental to my operations, and a supplier is not – a supplier who produces a product is not incidental, or its actions are not incidental to those of the consumer. They are actions which have their own commercial purpose.

My actions as a consumer are coincidental with the suppliers, in the sense that we're both in the same market of supply and demand, and I suppose in a broad sense, if there are no demanders there are no suppliers. But also, if there are no suppliers, there are no demanders. The supplier, in our submission, such as – whether it be the Law Book Company, David Jones or Myers or anything, is not incidental to the consumer. It's got its own independent operation, and although in a broad economic sense the consumers bring suppliers into the market place, nonetheless they don't make the suppliers.

Now, it seems that the argument for the appellant would have it that the supplier of the product, who produces them for commercial purposes, is incidental to the consumer, and the consumer may have a lot of reasons relating to forestry or not for the purposes of – for why it wants the product, but nonetheless it's not, in our submission, the use – proper use of the English language to say that the supplier is incidental to the user and then look at the users, or the consumer's actions and say does the primary purpose of that action relate to forestry? They're not talking about the same things.

40 BRANSON J: It may not matter as a matter of statutory construction, but on the facts of this case, Gunns is itself the principal supplier of timber to the proposed mill, isn't it?

MR UREN: I don't know the commercial arrangements for that. It may be that they're done through different companies. It's not clear. It's not been – I'm not too sure whether it's Forestry Tasmania which supplies the timber or what. Gunns has got - - -

BRANSON J: I seem to remember reading in the - - -

FINN J: But the proposal itself says - - -

5 BRANSON J: The proposal itself says that Gunns is supplying the timber, or the bulk of it.

MR UREN: Yes, but whether that's through another company or not, I don't know, but nonetheless the fact that you - yes, I am not too sure whether that is by Gunns
10 itself or by an associated company or by some other method. But nonetheless is that was the case it would tend to sought of support the proposition that the primary purpose of the pulp mill does relate to forestry because something is done - - -

BRANSON J: I think we understand the point you're making, Mr Uren.
15

MR UREN: Yes, something is done particularly for that purpose. But in our submission it is not possible for the consumer of the product in the sense that the pulp mill is, or the consumption of the product rather, to be another action whose primary purpose does not relate to forestry if the primary purpose of the action is in
20 fact to use the forest product and if its purpose of being there is in fact to use that particular product. And I think if one interpreted the section in the way which the appellant would have the court do it, then it is difficult to see what RFA forestry operation undertaken for a commercial purpose would not be excluded by 42C.

25 So 42C in our submission has the effect, which we've submitted, that it does have, that's to say if things which are incidental or subordinate to things which have got in their essence nothing to do with forestry, one might be road building, another might be the construction of a tourist resort, or something of that sort.

30 BRANSON J: I don't think we should dwell too much longer on this, but your submission would mean wouldn't it that if you didn't sell the trees you cut down to build the road you wouldn't fall within it, and if you did sell them you would?

MR UREN: If you weren't going to sell them you wouldn't be an RFA forestry
35 operation.

BRANSON J: Yes.

MR UREN: And if you weren't going to – in other words, if it is not done for
40 forestry – for commercial purposes it's not an RFA forestry operation. So that's the – that's what we say about section 75(2)(b). The RFA forestry operation is in fact a separate commercial activity which exists without the pulp mill. I mean it provides woodchips to go to Japan, instead of going to Japan they are going to stay in
45 Tasmania and – so it's only the source of the product which the pulp mill uses and in our submission the source of the product is not something which is excluded by, or intended to be excluded by, 42C. So that's what we wanted to say about that.

Now, I may say we are not repeating, I think, what we put in our written submissions and we are just addressing something which was separate to those. If we go to the section 170C(4) point – if we go to section 170C, subsection (4), now that subsection has been used by our learned friends by omitting portion of its verbiage. The
5 subsection reads:

If the referral is withdrawn the provisions of this chapter that would, apart from this subsection, have applied to the action cease to apply to the action.

10 The way they read it, it reads as follows:

If the referral is withdrawn, the provisions of this chapter cease to apply to the action.

15 That's what they've said, but that's not what the section says. They say all of the provisions cease to apply, but it's not all of the provisions that cease to apply, it's the ones that would, apart from the subsection, have applied to the action. Now, the –
now, this in effect repeats I think something that is in a written submission, but
nonetheless it may bear some repetition. You have to identify, in our submission, the
20 provisions of the chapter that would have applied to the action if the referral was not withdrawn in order to identify the relevant ones that don't apply. It's not all of them because it doesn't say all, it limits them. And in our submission the ones which have already had effect, such as section 68, are no longer ones which apply to the action, and therefore there is no prohibition on making a further application because – or
25 further referral because that comes under section 68.

So it's only those which are – the effect which it really has is that the processes of the statute no longer have to be continued in the event of a withdrawal. The –
everyone tries to frighten the court with examples of horrible things which would
30 happen if the other side's argument was right, so we are going to do that now. I would say there is a person who thinks his action does not need approval because it's so harmless to the environment, but the Minister on the other hand has thought that it did and so he has said it's a controlled action. But the person is so positive in their views that they've decided not to bother about the Minister who is being particularly
35 difficult and wanting all sorts of things to happen, and so they withdraw their referral and they go and do – decide to do the thing anyhow.

This may or may not cause harm to the environment but they are prepared to take the risk. But the Minister doesn't want to take the risk because he knows they're a shelf
40 company and everybody else lives overseas, so he can't get hold of them if they do irreparable harm to the endangered species. If all of the sections ceased to apply and this action goes ahead, it would seem that the Minister under section 70 would not be entitled to call the action in as it were and subject it to the provisions of the Act. Section 70 provides that if the Minister believes a person proposes to take an action
45 that may be a controlled action, he can require them to refer it to him, and if he does and they don't then he can determine in writing under section (3) of section 70 that the Act has effect as if they have.

And then the protective provisions of the Act take place included section 67A which prohibits the taking of a controlled action without approval. But the other side's argument, of course, would mean that all these things go, and if once you withdraw the application for approval it is open slather, there are no protections and no rights.

5 Well, in our respectful submission, that doesn't seem a very sensible thing. Now, another reason is given for the applicant's interpretation of the provisions and they are really based on their own construction of why the legislature might have wanted someone to only be able to apply once which itself is a scarcely likely scenario but - because no practical reason could really be advanced as to why that should be so.

10 But the reasons which are given seem to us to relate only to the question of whether if there was a withdrawal and you can start again you might be withdrawing for a reason which is really an abuse of process of some sort or an abuse of power, or leads to an abuse of power, or is done for an improper reason. Now, if it was the

15 case that there was a withdrawal of a referral and a later action which was able to be said to be an abuse of the processes or improper for some administrative law reason, then no doubt that could be dealt with in the appropriate way. But the appropriate way is not saying you can never do it whether you've got a good reason or not, and that would be an irrational intention in our submission to give the legislative.

20 In other words, the purpose of the Act is to control development, not to frustrate it, and it would be a significant frustration of development if you were only entitled to one go as it were, and on withdrawal for very good reasons the whole thing could never be done again, despite the fact as we think if you went on and got refused you

25 can start again. We don't see any impediment in the Act to starting another referral if your action is refused. And it may be refused for reasons which are germane to starting again.

30 It may be a threatened species is no longer present in the place in which you were going to build, it may be that the action you were proposing was relatively short term and the migratory species has gone off to Siberia or something and won't be coming back till you're finished, or there may be a whole lot of reasons why an action might be not approved by the Minister but nonetheless circumstances as they change later might make it an action which can be approved. And in our respectful submission if

35 the legislature had meant to say something as unlikely as you can - if you refer you can't start again two things would happen; firstly, people would know where they were and they would never withdraw anything, they would wait for a refusal; and secondly, that's the sort of thing that parliament should say expressly if that's what they mean.

40 Now, if we have given, in our respectful submission, a sensible interpretation to section 170C(4) and that's the area, in my submission, should be taken of it. Now, if we could then pass to the improper purpose. Now, we understand that the improper purpose allegation doesn't necessarily mean that there has been impropriety in the

45 strict sense but, nonetheless, it carries a taint of some sort and - - -

FINN J: It carries a what, sorry?

MR UREN: A taint of some sort, that you have done something for a purpose for which you hadn't, and one might have thought that the argument against us would have started off with maybe the judge's findings in this respect to show why they were wrong. Now, the judge heard Mr Early and he also read the Minister's reasons and the judge's findings were that the purpose of which the assessment process was chosen was not one which was adopted to suit Gunns timetable. And his Honour found that, especially at page 1797 to 8, and if we could refer the court just generally to his Honour's reasons at 1795 to 1798 and also to his recitation of Mr Early's evidence at page 1772 to 1777.

10 Mr Early expressly denied working to Gunns timetable and he did so at pages 66 and 85 of the appeal book and also, I think, at page 67. He explained in detail the nature of the processes and the burden of his evidence was that the process which was chosen was one which was thought to be appropriate in the circumstances. The 15 Minister gave his reasons – or the Minister's reasons were evidence at pages 1490 to 1493 of the appeal book and he said, and this was accepted by the judge, and he gave his reasons, that's to say the Minister did, why he was satisfied that the process of assessment by preliminary documentation was preferable to the other choice.

20 Mr Early gave his evidence of why the 20-day time limit was fixed, which was not – which was basically that it was thought that in the circumstances of the case it was adequate for the purposes of public comment, bearing in mind a number of things including the long history of the matter and the fact that the department itself had its own experts who were able to go through things and look at them, and various other 25 matters of that nature. But Mr Early gave a lot of evidence about why the time limit was fixed and he did expressly deny, and it was accepted by the judge, that he was working to Gunns timetable.

30 Now, it's not sufficient then to just throw to the court a number of emails and say, this is what people in the department had been saying, or to point to a number of points on the page of the submission. What has to be actually attacked is the judge's acceptance of the evidence which was given. And there's no reason to look closely at – no reasons advanced why the judge was not able to accept, although he should not have accepted the evidence of Mr Early. I don't think it was ever put that Mr 35 Mr Early, expressly, that he was lying and the judge certainly didn't find that he was, or that the Minister was lying. Now, of course, the improper purpose must be that of the Minister. It's not necessarily that it be that of – it's not that it would be that of Mr Early but insofar as Mr Early was the relevant departmental senior person there his evidence, as given, was accepted.

40 So for the purpose of the improper person allegation it must be shown that the judge's ruling was, in fact, wrong, and it's not enough just to show a few documents to the court and say, "Well, this shows why". We say that there was an improper purpose and I think also the – if my memory serves me right, the submission as put 45 in the summary of argument is merely that, if I can just go to it, that on page – paragraph 40 that:

The evidence supports the finding that the Minister chose an assessment process under section 87 and determined a period of consultation which would satisfy, not further disrupt Gunns asserted commercial imperatives.

5 Now, there are a couple of sleepers in the way that's expressed. Firstly, to say that
the evidence supports a finding is not a matter which allows an appellate court to say
the judge was wrong. A lot of evidence can support any finding but the question is,
what was wrong with what the judge found. The second thing is, the period of
consultation did, in fact, support Gunns commercial imperatives but you have to
10 actually show that that was the reason why it was done.

Now, the submission was that it goes on to refer to the purpose having to be the
dominant, or substantial one and I think our learned friends laid emphasis on the
word "substantial" in the submissions but the emphasis is actually to be put on the
15 word "dominant" because it does appear clearly from a number of cases, including
importantly, the case of *Samurai v Metropolitan Water, Sewerage and Drainage*
Board which was a decision of the High Court reported in volume 41 of the
Australian Law Reports at page 467 that the word – that the important word is
"dominant" and that the word "substantial" is used, or "substantial purpose" is used
20 in the sense that no attempt would have been made in this case to acquire the land if
it had not been desired to achieve the unauthorised purpose.

So for the purposes of showing a substantial purpose in the present case it has to be
shown that the time would not have been fixed if it had not been desired to achieve
25 Gunns commercial purposes. That's a very difficult task and it's made more difficult
by the judge's findings but it's – the fact that you take into account somebody's
commercial purposes doesn't mean that that was the case, which I think has really
been denied, in any event, but if it was the case it doesn't mean that that is the
substantial purpose of your action in that sense because the Minister has said, and Mr
30 Early said, and the judge also accepted the proposition, the reason why the
assessment and also the time were chosen was because it was thought that that was
appropriate both as to method and time in the circumstances of this case.

Now, those being the case it's really impossible, in our submission, to maintain an
35 argument which has to be maintained that the judge was wrong in coming to the
conclusion that there was an improper purpose in the – making the section 87
decision. An improper purpose is what actuated the actual persons and the actual
persons have produced material, in the case of Mr Early orally and in the case of the
Minister by his reasons, and they do not support the fact, or the allegation that the
40 purpose of fixing the assessment method if it was to satisfy Gunns commercial
imperatives as a matter of dominance.

The other point that we would like to mention in this context too, is that the section
87, subsection (5) provides a ground for the minister acting, which is both necessary
45 and sufficient for him to act. He may decide on an assessment on preliminary
documentation only if he is satisfied that that approach will allow the Minister to
make an informed decision whether or not to approve under Part IX the taking of the
action. Well, the Minister was satisfied of that. Having been satisfied what's he

supposed to do? He was satisfied that the objects of the Act could be met by the method which he chose.

5 Now, having come to that conclusion would it be proper, or improper to adopt the process which might make the commercial objects of the process less valuable by increasing the time-frame in which it would be done, or making them more expensive by having unnecessary processes undergone. In our submission, it could be improper for him to adopt a process which for reasons extraneous to the protective purposes of the Act meant that he ignored the fact that he was satisfied of what he had and said, “Go up and do other things because the public wants to know”, or something of that sort.

15 The purpose of the Act is the protection of the environment and the protection of the environment is done through an assessment process, which is based on information which the Minister gathers for the purposes of his task. And having been satisfied and then, in our submission, he’s entitled to act, and being entitled to act is all that’s necessary to provide a reason for him to do so. And if that’s the case what is there in the improper purpose argument? In our respectful submission, there’s nothing. He’s met all the requirements which assessed in the attainment of the object of the statute, and even if it was the case that he took into account the fact that there was a time table which the proponent wanted satisfied, there are many reasons in which those sort of things can be taken into account without any impropriety. One might be you might give more departmental resources to the assessment process, and various things.

25 BRANSON J: Mr Uren, I don’t want to cut you off entirely, but we have your written submissions on this, and your substantial submissions. It’s really for Dr Perry, I think, to protect the Minister, despite your client’s interests in doing so. I doubt that the point needs a lot more time.

30 MR UREN: If the Court pleases. I think also, in that context though, we have a – if I could go on to the natural justice point – we have a greater interest in protecting the Minister than the applicant does, in the natural justice matters which they’ve asserted. Anyhow, if we can go to the natural justice submission, and deal with the outline as it’s put in paragraph 31 and following of the appellant’s submissions, and the difficulty with the submission, both as it’s put orally and in the outline, and also in the notice of appeal, is what’s the authority for it? That is the difficulty. The difficulty is this, what is asserted is that the members of the public have a right to be heard on decisions made under the Act, as to approval, or disapproval of a controlled action, on the ground that those decisions are matters which affect matters of national economic significance, and environmental significance, and are matters in which the Australian community has a vital and legitimate interest.

45 Now, this of course is a political statement, in the small ‘p’ sense, and it is also in one sense a manifesto, but it’s not a legal proposition. There is no case which says that. I think we can confidently say there is no case which says that. And it’s – the proposition has been maintained before this Court with no authority in its favour, which is a matter which I think we are entitled to draw particular attention to. Now,

if we could just take the submissions as they're made sentence by sentence without dwelling too long on them, but looking at the first sentence in paragraph 31, now, that seems to be a – possibly a conclusion, rather than a proposition of law, but nonetheless there is no proposition – there is no case supported – sorry, cited in support of a proposition of that width.

And secondly the cases which have been referred to in our written submission are with respect to the entitlement to natural justice. They are against there being entitlements to natural justice in the public, or a section of the public itself. Now, the cases which I'll give the names of, which support the proposition I've just advanced, are the Botany Bay case at page 551 to 555, there's the Brisbane Airport case at page 165, which, although it's about standing, nonetheless makes observations on the side to natural justice itself. There's Ferguson v Cole at 419 to 420, and Transport Action Group v Motorways case at 622 and following in the judgment of the President of the Court of Appeal, who was agreed with by Sheller J at page 648.

Now, all of those cases relate the entitlement to natural justice to the affection of particular individuals in respect of their rights, interests, or legitimate expectations, and passages are taken in those cases from various authorities in the High Court, from Kioa's case going through Annette's case, and so forth. But there is no case which supports the proposition that the right to natural justice adheres in the public itself, or a section of the public, and the cases are in fact against that proposition.

BRANSON J: Mr Uren, I know that Ms Mortimer didn't draw our attention to them specifically, but do the provisions of section 475, subsection 6 and 7, have any relevance here, in suggesting that this is an Act of a special kind, so far as interests are concerned?

MR UREN: No, no, they're not. That's the standing section?

BRANSON J: Mm.

MR UREN: No, I think in Botany Bay it was said that standing was separate from – and that although people did sometimes address one as they would go the other, it doesn't. The reason for that section is because there is no right. You can't – if there is no right to natural justice the section gives you – in fact there's possibly also no relevant interest, so the – for AD(JR) Act purposes – so the section gives people who wouldn't otherwise be entitled to complain a standing to complain, but you can't say that if the section is enacted because people didn't otherwise have a right to complain, that the action – that the – because – sorry, I'll go back a square. It can't be said that because people don't have standing because of a substantive right, but have to be given standing extraneous to it, that the giving of the standing then gives rise to the right which the section was there made necessary for, because there wasn't one in the first place, if that makes sense. In other words, it's a bit of a boot straps argument. The standing - - -

BRANSON J: It does recognise however, doesn't it, the very broad range of people who are interested in the matters with which this Act is concerned?

MR UREN: Yes, yes. Well, the answer is – well, yes and no, but the – there’s a question of what’s meant by interest in that context, but also it may be presumed or thought that for various reasons the legislature considered that it would be a good thing if decisions under the Act were able to be challenged by qualified people, in other words, qualified in the statutory sense, who would not otherwise be able to do so. And also to avoid long and convoluted arguments about whether people do or do not have standing, which takes up time and effort, and therefore there were some watch dog system which the statute gave rise to, allowing certain organisations to be, in effect, a public watch dog. But the public question – but if you’re – you can be a public watch dog over the actions of government without having the sort of interest, or expectation which gives rise to rights of natural justice.

And indeed if those rights were there they wouldn’t need that section for standing. So the – and also the Botany Bay case drew a distinct distinction between the other standing issue and the entitlement to natural justice issue, and said that the fact that there is standing doesn’t give you an entitlement to natural justice, as a member of the public, or a section of the public. So that’s what we wanted to say about that particular part of the submission. Now, going on to the question of the – there are a lot of practical difficulties in giving somebody a right to be heard if you’re a member of the public. They’re sought to be dealt with by the appellant by limiting the right that they assert to what actually turns out to be an application of the section relating to the entitlement to comment, and, in our submission, that’s all it is, it’s a matter of what the content of the statutory right is.

But they’re putting it for reasons which are not entirely clear under the rubric of natural justice, and assert, in leaving the right to comment, the entitlement to comment provisions of the statute, and going instead to the concept of entitlement to be heard. But entitlement to be heard goes a long way further than entitlement to comment. If a person’s entitled to be heard, they are people who actually have a part to play in the decision making process itself. They’re entitled to be given lots of information. Now, taking the present case, if the members of the public have got a right to be heard, and that’s every member of the public, now, the Minister in this case has got a limited time frame within which to make his decision, he’s got, I think, 20 days to make his assessment approach decision, and also at the same time his time fixation decision. I think that’s what the Act provides for.

But he’s then got to think while he’s doing that, who in the entire continent of Australia will want to be heard about this issue, what sort of notice do I have to give everybody of this? Now, he’s got – they’ve got their departmental processes. The members of the department engage scientists, and the scientists look at things. Does the right to be heard include the right to know everything which the department’s got, to see what their scientists are saying, things of that sort, to be privy to every communication between the department and the proponent? And the provisions of documents, and things of that sort. It’s not possible in the context of members of the public, members of the community, to give a right to be heard in the true sense.

Now, it’s all very well to say that no doubt the content of the right can be tailored to suit the exigencies of the circumstance, but the difficulty here is that the decision

maker has to know what to do, otherwise the Act will be invalid, and there are severe practical reasons against the proposition that our decision makers are subject to obligations of natural justice in respect of the entire public when they have to make decisions as to whether our projects, quite large projects, are able to go ahead or not.

5

And bearing in time the timeliness which is required of the process, it's not practically possible to graft onto this process a right to natural justice in the whole public. But in any event, that's a practical issue which in one sense militates against there being such a right, but the real reason why there isn't such a right is that the cases which state the circumstances in which the right to natural justice exists do not encompass this sort of matter.

10

Now, going on to the second sentence in paragraph 31, that's a reference to section 131AA(7). Now, I think we have dealt with that in our written submissions. It is said in the third sentence that, for example:

15

The section doesn't touch upon the procedural fairness obligation that may arise in favour of a proponent in the assessment process itself.

Now, it's perfectly clear that at the very least the section does touch upon the procedural fairness obligation that relates to the proponent, because if it doesn't relate to the proponent and it doesn't relate to the opponents, it relates to nobody. So presumably what this sentence refers to is – at least the guiding part of this sentence is the words “in the assessment process itself”. But section 131AA(7) uses the words “in relation to”, and it's the entitlement to natural justice in relation to the making of the decision which is what the section deals with, and that must mean all forms of natural justice to anyone.

20

25

And could we reiterate one matter which seemed to us to be of some significance in respect of the interpretation of 131AA(7)? It's almost impossible, or is in fact impossible to conceive that the rational legislature, in governing the entitlement to natural justice of the proponent, while leaving the entitlements to natural justice, if there are any, of the entire public of Australia untouched – that's not a concept which bears any resemblance, in our respectful submission, to reality.

30

35

Then going to paragraph 32, the first sentence of – subparagraph (a) of 32 ignores the fact that section 87 subsection (5) makes the Minister's satisfaction a sufficient condition of the – for him to select the process for assessment under that section. If he is satisfied of a particular matter, he's entitled to make the decision which he did in that respect. And it also ignores the fact that the trial judge found that the Minister was entitled to select the approach which he did. In other words, there was an attack on that decision at first instance on the ground that it was reached unreasonably. That attack failed, and his Honour found that it failed at 1799 to 1800 of his reasons, and he found also that it was the least supportable of all the propositions which had been advanced in this case.

40

45

Now, looking at the time decision, which was referred to in 32B. Firstly, that has not been attacked in this case on the ground of unreasonableness at all. So it stands as a

5 decision which it was not – sorry, it stands as a decision which the Minister was validly entitled to make, for the reasons which Mr Early gave in his evidence at pages 45 to 46, page 50 and page 69 to 71. So we’ve got the situation where his approach has been found to have been one which he was entitled to decide on under the provisions of the Act and the time period within which he – which he allowed for comment, has not been attacked under an administrative law ground, save under this heading of Natural Justice.

10 So it’s very difficult, in our respectful submission, to take these administrative decisions, which are either held to be valid or not found to be invalid, and so that nonetheless there is, on top of these to be built, a reasonable opportunity to members of the community to be heard, which was a factor which was not made a condition of the exercise of the Minister’s powers by statute, and we lay emphasis here on the fact that what is referred to is “to be heard”. Now, it’s all very well to say – as the
15 appellant seems to do – well, what we mean by that is just the right to comment, but that’s not what the argument appears to be as it’s written down.

20 Now, it’s then said that the provisions of the Act do not replace or codify procedural fairness and the nature and extent of the obligation must be considered in the relevant statutory context. But the relevant statutory context is the Act does provide for rights of the public, and it provides those rights by way of the two provisions for comment which it allows, and as we mentioned yesterday, section 3, subsection (2)(a) of the Act in fact recognises that what the Act provides for is the mode by which the
25 objects of the Act are to be achieved, not by something which is outside the Act.

And if we could refer the court to Harris at page 67 to 68 and at the Motorways case at page 622 and following, again, for the proposition that where the statute does provide for rights of public comment, that that is, in essence, all that the public is
30 entitled to and there’s no right of natural justice standing on top of that. Of course, if there was a free-standing right of natural justice standing on top of it, there would be no need for the comment provision in the first place. Now, if we can take the next sentence, which states that:

35 *Procedural fairness applies because decisions made under this Act are matters of national environmental significance and matters in which the Australian community has a vital and legitimate interest.*

40 Now, this is basically a manifesto statement, but could we test it by replacing the word “environmental” with something else? Now, if we replaced it with, for instance, “economic”, so it read:

...and decisions which affect matters of national economic significance –

45 or if we replaced it with “defence” to another important matter; or something dear to one’s own heart, “taxation”, or if we replaced it with “health”. Now, you could replace the word “environmental”, which is no doubt a matter of importance, with any other matter of importance to the Australian public, but do I have a right to be heard on the federal budget, or on the tax scales, or anything else? No, the word

“environmental” is here because the applicants are interested in environmental matters. But what if they were small business and were interested in WorkChoices or something? Do they have a right to be heard on whether the statute contains something or doesn’t, or on decisions made under the statute? Well, of course not.

5

Those examples, in our submission, just illustrate the unlikeliness of this ever being a statement of law, and it’s just, in our submission, a manifesto of some sort which is the reason why the appellant is applying, but it’s not a reason why the Minister should give them any rights other than those which every other member of the public has, and which he gave to every member of the public without favour to anybody.

10

Now, going to the balance of paragraph 32, again it uses the word “heard”, but it also refers to section 95C, which it says is a statutory obligation to give persons a right to be heard. But is that what section 95C says? Well, the answer is no. It doesn’t say that at all. What it says is, there’s an entitlement – or infers that there’s an entitlement to comment.

15

And when it says – when the argument goes on to say its breadth is a feature of the relevant subject matter for decision, in truth its narrowness is the feature, not its breadth, but its narrowness. Its narrowness is the right only to comment, and the authorities do not treat the right to comment as in - given in the statute as stemming from our entitlement to natural justice, and that was stated in Harris’ case at 67-8 and at 71-4, and also in the RG Capital Radio case at page 585. And the balance of the submission can be dealt with merely by saying that it’s predicated upon an insertion of entitlements which are basically false and a false premise that the applicant, and indeed any member of the public, is in fact entitled to contest the granting of the approval.

20

25

That’s what they want, they want to contest the granting of the approval as though they were a party to litigation, and that’s a right which they are – where they are in this proceeding asserting. But in our submission that is not the role which was given to the role of the public under the statute. The role is only to make comments within the timeframe that the Minister believes to be reasonable. Now, the Minister’s belief in reasonableness depends on the Minister’s need for comment and he has, in this respect, his own experts and experts who can be engaged, and therefore he doesn’t need six months or one year or whatever the period of time would be which the applicant asserts it would seem that they are entitled to in order to investigate everything which the Minister is going to investigate himself.

30

35

And the last thing I would like to mention in this context is this; nobody has said what the practical content of the alleged right to be heard is. Now, do they want three months, three weeks, six months, twelve months; what is it that they actually want? Now, bearing in mind that the issue is not what they want, because they are just a member of the public, they are not a person who has a particular right apart from that of anybody else, the issue is not what they want, it is what everybody else might want as well. But what was the Minister to do? They’ve never said what he was to do, there have been a lot of adjectives in this case and very few nouns, what was he actually to do?

40

45

Was he to write a letter to everybody and say, please tell me what your timetable is, so that I can fix the time? And bearing in mind he's got a short time to do all this, some practical content has to be given to this argument. And the court's been engaged with concepts which are floating around in the air, but where is the on-the-ground thing the Minister should have done? Should he have written to the Wilderness Society and said, I am going to prefer you over everybody else, I am going to ask you what you need, I don't know what you've done but I would like you to tell me whether you need six weeks, six months or six years to engage experts; are you supposed to do that? And, if so, why isn't he supposed to do it to Joe Blow up in Cape York, why isn't he supposed to go through the telephone book and send every member of the public a flyer what time they want?

When you look at the practical result of the arguments for the other side all that can be seen, in our respectful submission, is a lot of flummery floating around, a lot of airy fairy concepts with no practical content given to them. Yet the Minister, who is supposed to be engaged in the practical exercise, is supposed to take into account all these things without them actually saying what they are – sorry, what was the Minister supposed to do. If somebody would actually say that the Minister was supposed to do (a), (b) and (c), and the (a) is not give me a fair hearing, the (a) is write me a letter telling me the following things and asking me to do this and telling me to do that and so forth. But has there been any definition of those things, well, the answer is no. And the reason why there isn't is that there can't be, and if the court pleases that is all we wish to say.

BRANSON J: Thank you, Mr Uren. Mr Uren, that covers your – those of contention as well as your response to the appeal, doesn't it?

MR UREN: Yes, it does, yes, yes.

FINN J: Dr Perry, I am wondering if you could do me a favour, and I suspect might do the other members of the court a favour? We've been wanting to get the regulations, and you have very helpfully provided us with what purports to be schedule 2 of the regulations. Unfortunately, we've got pages 205 and 207, and I am wondering if those who instruct you could provide the court with page 206 of the regulations? They are not without significance.

DR PERRY: No, my apologies that the set was incomplete, and we'll attend to that.

ADJOURNED [11.06 am]

RESUMED [11.16 am]

BRANSON J: Ms Mortimer?

MS MORTIMER: If the court pleases. The reply on behalf of the appellant will focus on section 75(2)(b), I will deal shortly with 170C and even more shortly with procedural fairness, and that is all I'll touch. It did appear to us, and for this I accept full responsibility if the court pleases, that on the 75(2)(b) argument we have been
5 derelict in supplying the court with material. And we propose to correct that as much as we can now by handing up a folder, and I've given my learned friends copies, that simply really does this; that traces from the start of the EPBC Act what sections – what division 4 looked like, and the changes that have been made to it including how - some of changes which came in through the Regional Forest Agreements Act. So
10 it's – the exercise is confined to the statutes, the legislative history, and we have not been able to find anything that specifically relates to section 42C I regret to inform the court, or 42 in general.

BRANSON J: Well, are we not surprised?
15

MS MORTIMER: So if I might hand to the court some folders. Now, what we've done - - -

FINN J: I told you it was a silly question I was going to ask you.
20

MS MORTIMER: What we've done if the court pleases is to leave room in this with the index for the material that we handed up yesterday. So the Regional Forest – the Tasmanian Regional Forest Agreement and the supplements can be fed into this, so your Honours will have in that sense a self-contained folder. The – there are
25 two propositions for which we understand the respondents' submissions really contend, and we will be submitting that the legislative history bears out neither of them. Now, I did tell my learned friend, Dr Perry, and I didn't have a chance to tell my learned friend, Mr Uren, that we understand that if – we accept, your Honours, if I stray into something that the respondents feel they should answer we've got no
30 difficulty with them putting a note in at the conclusion of the appeal about that whatsoever, if the court pleases.

We understand the respondents to contend that the introduction of 75(2B) brought about some change or broadening from the situation before that, and our submission
35 is that contention is wrong. Secondly, that either with or without 75(2B), that some reading down or downplaying exercise ought to be engaged in of section 42 generally, and we resist that contention as well. We submit that it means what it says and it has the operation it has without any necessary reading down to be done of it, and of course I will come to the reply about what we say it actually means. Now,
40 these – I will take your Honours through these folders and through the legislative history, it doesn't take that long. What your Honours will find behind the first tab is a creature called the Regional Forest Agreements Bill 1998, and from the date your Honours will see this predates the EPBC Act, but, again from the date, your Honours can see for example it postdates the Tasmanian RFA, and this bill was never enacted.
45

TAMBERLIN J: Sorry, what are you getting from taking us through this, what is the proposition?

MS MORTIMER: It is to demonstrate, your Honour, that section 33 – section 38 of the EPBC Act has always had a precise operation which is directly related to Part III. And the operation that it has is on the person who is taking the action, and what it does is to relieve a person who is taking a forestry operation from the prohibitions in Part III in some – in all circumstances except what is in section 42; that is the effect of it. That effect has never changed, and the requirements for people who are undertaking forestry operations to turn their minds to whether they are contravening Part III and they need an approval, has never changed and section 75B does not alter that. So that the questions of fact that arise in this case arose in 1999 and have not been affected by any of the amendments.

There has been some change to the language of section 38, and I will take your Honours to that, and our contention is that that effects no change to its meaning. Its meaning has stayed the same, the scope of section 42 has stayed the same, and what that raises inevitably, in our submission, is a question of fact to be determined by the decision maker and by the person undertaking the forestry operation at some stage. And what I wish to - - -

TAMBERLIN J: That question of fact is precisely what, how do you formulate the question of fact?

MS MORTIMER: Well, there are three depending on which part of section 42 one is dealing with. The questions of fact for (a) and (b) are relatively straight forward; does the person propose to undertake a forestry operation in a particular geographic location that has a particular quality? The question of fact in (c) involves several steps; does the person propose to undertake a forestry operation that is incidental to another action, so that's the first question of fact.

TAMBERLIN J: So you say there are some outstanding questions of fact that were never looked into and were not averted to?

MS MORTIMER: Absolutely.

TAMBERLIN J: That's the point, that your bottom line?

MS MORTIMER: Absolutely, your Honour. And I want to make, by way of reply, that point crystal clear by taking your Honours to – sorry, I have just lost the page number – appeal book page 1208.

BRANSON J: Volume 3?

MS MORTIMER: Yes, your Honour. This is The Wilderness Society's submission to the Minister. No, I am sorry, I withdraw that.

TAMBERLIN J: No, it's not.

MS MORTIMER: 1410. I completely apologise. I was looking at another reference, 1410. So this is before the section 75 decision, paragraph 42.

TAMBERLIN J: Yes.

MS MORTIMER: That was the question of fact that we, in my submission,
5 indisputably – if somebody needed to do it it was done to the Minister and that was
the question of fact that was never dealt with.

TAMBERLIN J: Sorry, what is the question of fact in 42?

MS MORTIMER: Whether the action – whether there are forestry operations which
10 are incidental to the construction and operation of the pulp mill. The pulp mill being
an action whose primary purpose does not relate to forestry; whether section 42
applies.

TAMBERLIN J: I am sorry, you were referring to 1410 (42), is that right?
15

MS MORTIMER: Yes, your Honour.

TAMBERLIN J: Paragraph 42?

MS MORTIMER: That's right.
20

TAMBERLIN J: Yes.

MS MORTIMER: And of course because this is a submission put on behalf of my
25 client, it is put in the positive but it is said that the proposed – the forestry operations
proposed by Gunns are incidental to and part of another action, the production of
pulp wood.

TAMBERLIN J: And that's an assertion of fact which should have been
30 investigated?

MS MORTIMER: Yes, your Honour, because without that investigation of fact it
could not – at 75(2)(b) – the task under 75(2)(b) can't be fulfilled.

TAMBERLIN J: Couldn't be performed.
35

MS MORTIMER: That's right, your Honour.

TAMBERLIN J: Yes.
40

MS MORTIMER: That's the simple reasoning of it.

TAMBERLIN J: Right.

MS MORTIMER: Now, there are some competing constructions around what
45 subsection © means, what does incidental mean, what does primary purpose mean.

TAMBERLIN J: What does forestry mean?

MS MORTIMER: What does forestry mean?

TAMBERLIN J: Yes.

5 MS MORTIMER: That is so, your Honour, they are all, apart from the word
“forestry operations,” they are all to be construed in their – by their usual meaning
and in our submission it likely to be – almost to be – are likely to be questions of
fact. The Minister needed to look at that and make up his own mind about that and
what we have seen in this appeal, in my submission, at least as to one of those
10 questions is a difference of opinion reasonably between the two respondents about
the Minister in his written submissions says the primary purpose of the pulp mill is
not related to forestry. Gunns says in its written submissions the primary purpose of
the pulp mill is related to forestry. Two - - -

15 TAMBERLIN J: What do you say forestry is?

MS MORTIMER: Forestry is to be given its ordinary meaning.

20 TAMBERLIN J: Which is what?

MS MORTIMER: Which is the science of taking care of forests. Now, as I said in
answer to - - -

25 TAMBERLIN J: So husbandry, is that the - - -

MS MORTIMER: Husbandry, yes, your Honour, but also the science behind it. So
that somebody that is sitting in the offices of Forestry Tasmania in this state who is a
research scientist on some aspect of forestry will say that they are involved in
something to do with forestry.

30 TAMBERLIN J: So if you use certain fertiliser or recommend certain fertiliser for
plantations, that is forestry, that is a forestry - that’s forestry as opposed to forestry
operation?

35 MS MORTIMER: It may be – that’s forestry. There is a big science associated
with how you sustainably manage and propagate – propagate, manage and harvest
trees and that is what forestry is, in our submission. So it’s a very broad concept,
broader than forestry operations.

40 TAMBERLIN J: That includes forestry operations you say, do you?

45 MS MORTIMER: Yes, your Honour, that’s right, that’s right. So the purpose of
this material is simply to demonstrate or to make good our proposition that section
38 and 42 have really always meant what we say they mean and section 38 does not
confer any blanket exemption to anything, including a derivative action, that involves
forestry operations. It does not have that character at all, it has a very targeted
objective for a policy reason that was developed over a long period of time that
people who were undertaking these operations in the forest on a day-to-day basis

should not have to go through the process in this Act, should not have to turn their mind every time they are just doing that operation to whether they need an approval that there was a better way to manage that through a state based prescription and reserve system and if that system functions properly and they act in accordance with it, they are all right.

And that is what section 38 has always been intended to do and still does, in our submission. It does not touch the circumstance where there is another action that may have a significant impact on a Part III matter. That – the taking of that action has never been touched by section 38. The question has always been in that circumstance, what are the impacts of that other action, including if forestry operations are undertaken as an incident of that action, what are the impacts of the forestry operations. That is what section 42 means and it has never been a matter that has been outside the purview of the approvals process and our submission is that all 75(2)(b), does as the explanatory memorandum makes clear, is to clarify that to ensure that the protection that section 38 affords is mirrored. Now, there are a number of – if it is not convenient, I don't need to take your Honours through this but we did want to emphasise a couple of points. I am sure I am still going to finish by 12.45 and so - - -

BRANSON J: That's all right. Present your case as you think best, Ms Mortimer.

MS MORTIMER: If the court pleases. This Bill, which predated the EPBC Act, nevertheless contemplated the Commonwealth legislative imprimatur being given to the inter-Governmental agreements; that's what it did and it had a definition of RFA and it had a definition of RFA forestry operations, which was different, as your Honours will see, to what ended up being the definition. Section 5 of this proposed bill, your Honours will see – clause 5 of this proposed bill had a very different expression of how RFA forestry operations were to be treated for other bits of Commonwealth legislation, because it talked in the language of effect, which is a much broader concept; didn't look at the undertaking of the action, it looked at the effect of it.

That Bill, as we said, never came to fruition and I do no more than speculate here, but it would seem from the chronology, if the court pleases, that is because the EPBC Act overtook it and your Honours will see that section 5, subsection (3) refers to one of the EPBC Act predecessors, the EPEP Act. When the EPBC Act was enacted and this is the materials under tab 2 in the folder, these were the forms which section 38 – which division 4 took and there are some dictionary definitions that are also relevant.

Your Honours will see that section 38(1) had – pardon me, a different form but a form that very closely reflected the language in Part III of the EPBC Act. It was focusing on the language in the Part III of the EPBC Act as a person must not undertake an action – or must not take an action and here a person may undertake. So very closely reflecting that language. And your Honours will see that section 42 simply says, say for some changes which I will come to which reflect the enactment of the Regional Forest Agreement Act, in substance did the same thing as it does now and the language of (a), (b) and (c) has not changed.

So when the Parliament enacted the EPBC Act it never contemplated that forestry operations, which were incidental to another action whose primary purpose did not relate to forestry, would get an exemption. And your Honours will see that – just to go back to section 38 and point this out, the definition of RFA forestry operations
5 there, firstly refers – refers to a non-existent Act, so – and your Honours will see that that subsequently gets corrected. Although there is a cross reference to a non-existent Act, in the dictionary of the EPBC Act at this stage there was a definition of forestry operations and it was a cross reference to section 40 – no, it is all the same hopeless cross reference, your Honours, it all cross references back to the
10 non-existent Act. But I just wanted to point out to your Honours that at some stage some things appear in the dictionary and then they go out of the dictionary.

The next stage in development is really to understand how the – your Honours have as the next tab the Australian Heritage Council Act, but in sequence the next tab is –
15 the next event is actually the enactment of the Regional Forest Agreement Act, which is behind tab 4. And when this Act was passed, what happened to the exemption for RFA forestry operations – pardon me, your Honour – yes, sorry, section 6 of the Act, 6(3) and 6(4) your Honours will see that different language has been chosen. The language of effects has been chosen for the Australian Heritage
20 Commission Act, but different and narrower language has been chosen for the EPBC Act, and it’s language that, in our submission, still reflects Part III, the taking of an action, the taking of a forestry operation.

What then happened – and the only reason that the legislation under tab 3 is included
25 is that in 2003 that provision in relation to the Australian Heritage Commission Act was repealed by schedule 1 of the Australian Heritage Commission Act. By schedule 1 of this Act – I’m sorry, on page 3 of the print of this document, and on page 4 of the print of this document, item 7, your Honours will see the repeal of subsection 6(3) of the Regional Forest Agreement Act. So that goes with the
30 Heritage Commission Act.

And it was then, just to continue on tab 4 for a moment, the Regional Forest Agreement Act, it was in this Act – so the form of words in the EPBC Act under tab
35 2 continued until the enactment of the Regional Forest Agreement Act, and then in the Regional Forest Agreement Act, schedule 1 on page 11 of the 3 print, there were some changes effected to the language, and your Honours will see there the language that still appears in section 38, and your Honours will see in relation to section 42 the omitting of the old introductory language and the replacement of it with the language that your Honours now see in the introduction to section 42, and your Honours will
40 also see, at this point, in item 2 of schedule 1, the introduction of what is now the definition of forestry operations.

Our submission is that this change in language, taking into account the preservation of that language of “is undertaken” does not effect a change to the meaning, and it is
45 still talking about a protection that is given to the persons who are undertaking the forestry operations. Now, that being the case, in our submission, when one looks at the plain language of section 75B, it is obvious that it does no more than clarify the

situation that existed before section 75(2)(b) was enacted, and it does not extend any blanket protection to RFA forestry operations.

5 Now, the scope of section 42, if I might just make a couple of reply submissions on that. As we understand our learned friend Dr Perry, what has been said by Dr Perry – I withdraw that – by the Minister, is that the word “incidental” means subordinate. It could also mean – and in our submission, in this context, where there is no necessary reason to narrow it, the better meaning is the one in the dictionary that my learned friend Mr Uren handed up, which is “liable to happen or naturally attaching to”. There’s no reason to limit the word “incidental” in this context, in the context of
10 an Act that is designed – that has as protective function.

This is the whole point. The whole point of this Act at this stage is to ensure that without proper assessment, that no action is taken which will have a significant
15 impact on matters protected by Part III. Taking that object into account – notwithstanding, of course, that once it’s been assessed everybody might decide it’s all right, but at this stage, at the entry point, it’s the protective function of the Act that governs the construction, in our submission, and what is put on behalf of the Minister as an example, both in submissions and orally, is the felling of trees on a
20 site – the clearing of land – and in this case that example is developed by reference to the harvesting operations that it is asserted will be necessary to construct the pulp mill on that hundred hectares or so that is the footprint of the site. We accept, as a question of fact, it is perfectly open to conclude that the felling of trees on the site of something that you plan to construct is incidental to the action which is the
25 construction

TAMBERLIN J: Is it a forestry operation?

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

TAMBERLIN J: Is it for a commercial purpose, or is it to get rid of – to make land available?

35 MS MORTIMER: That is also a question of fact, your Honour. It may not be a forestry operation, and our submission is that fairly read, the Minister did not treat it as such. If one reads the Minister’s reasons, there’s no reference to RFA forestry operations or to that concept at all. It was treated as a land-clearing exercise and assessed for that reason, perhaps assuming that that was necessary because of 42C, but 42C is not referred to in the reasons. But your Honour is perfectly correct; there
40 may be some circumstances where it’s not an RFA forestry operation at all, in which case one doesn’t even have to go back – doesn’t get into the prohibition in 75(2)(b), you’re just in the ordinary land of 75(2) looking at the impacts of the action.

45 TAMBERLIN J: If you wanted to put up a housing development, say a substantial housing development or a holiday resort on forestry land, and you cleared the land for the purpose of putting up the housing, would that be – what category would that come under? Would that be a forestry operation, or not?

MS MORTIMER: Well, your Honour, it could well be if, as part of that you sold the timber.

TAMBERLIN J: Sold the timber for profit.

5

MS MORTIMER: And the question is whether that is for a commercial purpose. The plural is used, and there is an issue that may arise about whether forestry operations really mean a one-off event.

10 TAMBERLIN J: I guess the housing operation would be a – for a commercial – the housing operation would be a commercial purpose, but you couldn't characterise the felling by reference to the fact that you were developing.

MS MORTIMER: No, your Honour.

15

TAMBERLIN J: That wouldn't be a forestry operation.

MS MORTIMER: No, your Honour, that's right. But the commercial purpose must attach to the planting, management or harvesting of the trees, or the transport operations incidental to them.

20

BRANSON J: On the other hand, if a forestry operator clear-felled a large area, and having got it cleared decided to put a housing development on it, you might have a more complex situation, mightn't you?

25

MS MORTIMER: That's right, your Honour. That's right. And that's why "incidental" has to have some work to do. You have to be able to contemplate the relationship. The timing is important, and I'm about to come to this point, if the court pleases. So just to recap: so we don't differ from the Minister's example in that sense, but the example does not assist the problem, because the example is limited to the construction of the mill. Now, there are two things happening in this action. There's the construction of the mill, and there's the operation of it, and there may be some RFA forestry operations which are incidental to the construction, like the land clearing, and there may be some forestry operations which are incidental to the operation of the mill.

30

35

TAMBERLIN J: Which are the servicing the forests, or the forests from which the timber comes?

40 MS MORTIMER: Which is the harvesting of the timber?

TAMBERLIN J: Yes.

MS MORTIMER: That is used in - - -

45

TAMBERLIN J: It's pulped.

MS MORTIMER: - - - the operation of the mill. And the problem, in our submission, with great respect, with the Minister's example, is that it ignores the fact that in the action with which we are concerned there are two very different things. If this was a referral only for the construction of the mill then the way 42C would
5 operate would be only the way that the Minister has proposed. If this were a referral for the operation of the mill then the Minister's example has no relevance, and a different question has to be asked. It's the question that has not been asked, and has not been answered. Are there forestry operations that are incidental to the operation of this mill, and does this mill have as its primary purpose forestry?

10 TAMBERLIN J: Sorry, this referral is for the operation of the mill - - -

MS MORTIMER: Construction and operation.

15 TAMBERLIN J: - - - or for the construction and operation?

MS MORTIMER: Yes, your Honour.

20 TAMBERLIN J: Both?

MS MORTIMER: That's right.

TAMBERLIN J: Yes.

25 BRANSON J: Operation for approximately 50 years, I think.

MS MORTIMER: That's right, your Honours. That's right. The process therefore that had to be gone through was to apply an ordinary meaning of incidental, and, in our submission, when one asks that questions the natural answer is that the
30 harvesting of trees is incidental to the – in the sense that it's liable to happen, or it naturally attaches to, bearing in mind, your Honours, that the question is asked on the assumption that the mill is operating. So some of my learned friend, Mr Uren's hypotheticals, in my submission, don't work.

35 If you don't look at an RFA forestry operation carried out today, and ask whether it's going incidental to the mill, you ask, when the mill is operating, when the action is being undertaken, are there forestry operations – are the forestry operations – are there forestry operations which are incidental to it. So you're looking forward in time to a time when the action is being undertaken, and it's at that point in time that
40 the question must be asked, whether there are forestry operations that are incidental. And that may be a question that requires some careful inquiry of fact.

We accept that. If that is right, the second point that seems to be put against us in relation to 42C is that that somehow frustrates or impugns the policy behind the
45 Regional Forest Agreements, because once the mill is up and running people who are harvesting the trees will be exposed to the Act. Now, that is a straw person, in my submission, because by that time this action must firstly have been approved for that factual situation to occur, and in those circumstances there will be an approval that

deals with, if the Minister has found there will be significant impact, that deal with by way of conditions any impacts that have been apprehended. And if that is right then the people who are actually undertaking the forestry operations are not going to contravene Part III. They're not going to have a problem with Part III, because when
5 they are undertaking those harvesting operations, they have those harvesting operations, their nature and their intensity, their location have been assessed.

FINN J: So could I just, to understand this translated into a practical example - - -

10 MS MORTIMER: Yes, your Honour.

FINN J: - - - I don't grow timber, or fell it, but I want to set up a factory which will turn logs into wood use for commercial purposes. You're saying that when - that would have to be assessed, the setting up of the factory, both its construction and
15 its - - -

MS MORTIMER: Operation.

FINN J: - - - operation.
20

MS MORTIMER: Yes, your Honour.

FINN J: And it's in the process of considering that, the question of whether the supply of wood to it would be a relevant impact that has to be taken into account?
25

MS MORTIMER: Yes, your Honour. Yes. We see no - - -

FINN J: And - - -

30 MS MORTIMER: I'm sorry.

FINN J: - - - but that operates as no impediment otherwise to the conduct of forestry operations on the land in which the trees are harvested and grown and all the rest of
35 it?

MS MORTIMER: Before the factory is up and running, your Honour?

FINN J: Yes.

40 MS MORTIMER: No, none at all. None at all. And while we're on factories, your Honour, in our submission your Honour's example of boat building is no different to this pulp mill if one looks at the second factual question, which is primary purpose. The submission we want to make about that, by way of reply, is really that the word
45 "Primary" is in there for a reason. One must assume that as an exercise in statutory construction, and it has to be given some work to do, so it's if a purpose of an action relates to forestry that's not the issue. The question is whether the primary purpose of the action relates to forestry, and, in our submission, that cannot be said of a factory, which is what a pulp mill is, which takes not trees, but wood chips, things

that have already been to another factory and chipped, and then are brought – so turned into one product somewhere else, brought to the pulp mill, and by a chemical process turned into another product.

5 TAMBERLIN J: Sorry, is that happening here?

MS MORTIMER: Pardon? Yes, your Honour.

10 TAMBERLIN J: I see. There's a wood chip plant somewhere?

MS MORTIMER: Yes, your Honour, that's in the referral.

TAMBERLIN J: Where is that? Where is the wood chip plant?

15 BRANSON J: Is it part of the action, the construction of the wood chip plant?

MS MORTIMER: The wood chip plant already exists, your Honour.

20 FINN J: Is that at – where is this?

MS MORTIMER: I'll find the reference in the referral, your Honour. Pardon me.

25 FINN J: I see. I had assumed – maybe I hadn't read it enough – but I had assumed it was coming straight from the forest into the pulp mill, but it's not, it's chipped first.

MS MORTIMER: Well, we'll find the reference in the referral, your Honour. That's, as I understand it, the only evidence that will be before the Court on that.

30 TAMBERLIN J: Is that relevant in any way at all, the fact that it's being double processed, or double manufactured?

MS MORTIMER: Well, your Honour, in our submission it makes - - -

35 TAMBERLIN J: Can the impact on the environment - - -

40 MS MORTIMER: - - - it makes plainer that there is a real question of facts about how it can possibly be said that the primary purpose of the pulp mill relates to forestry, when there's already an intermediate - - -

TAMBERLIN J: It's a second manufacturing stage. You've got a primary manufacturer, as it were, an adaptation or treatment, and then you've got a pulping. Is that the way it works? I would just be very interested to know - - -

45 MS MORTIMER: Yes, your Honour, there's a primary - - -

TAMBERLIN J: - - - what's going where from where, and how much.

MS MORTIMER: Well, there's a primary approach, there's a wood chipping.

TAMBERLIN J: Yes.

5 MS MORTIMER: And then what the proponent says – this is at appeal book volume 1, page 350 up the top - - -

TAMBERLIN J: So has the wood chip plant been in existence for some time, has it?

10

MS MORTIMER: Yes, your Honour.

TAMBERLIN J: Where is it at? Could you tell me?

15 MS MORTIMER: Yes. Well, it says it's at Tamar - - -

TAMBERLIN J: Right. Tamar.

MS MORTIMER: - - - the existing Tamar wood chip export facility.

20

FINN J: Can I ask you a question in relation to those first two sentences, is the upgrade to accommodate increased volume of log processing, would that be an action that's likely to have an environmental impact on the sort of argument you're putting? I mean, presumably the wood chip factory had to be assessed?

25

MS MORTIMER: Not as part of this referral, is not my understanding, your Honour.

FINN J: All right.

30

BRANSON J: Not even the upgrading?

MS MORTIMER: Well, your Honour, I'm unable to assist your Honours with that.

35 BRANSON J: We're not concerned with that anyway.

FINN J: Not concerned with that, it's just my curiosity.

MS MORTIMER: Yes, I don't know, your Honours, as I stand here.

40

TAMBERLIN J: Sorry, is that – so what's happening? The timber – the forest from which the timber is coming, or the coupes, or whatever it is, that's all being sent to a Tamar chip mill, is it? It must be a pretty big one, I guess, and then that's all taken from there across to the pulp mill; is that the way it works?

45

MS MORTIMER: Well, that is how the referral - - -

TAMBERLIN J: Because usually chipping – I thought chipping was just used for paper, or went off on its own, it was a product in itself, and was sold overseas as such.

5 MS MORTIMER: The wood chips?

TAMBERLIN J: Wood chips, yes.

10 MS MORTIMER: That's so, your Honour. That is what has been happening.

TAMBERLIN J: Yes. But this is a double processing in different places?

15 MS MORTIMER: Well, it's a different processing for a different product in a different place.

BRANSON J: The intention is to add greater value to the timber presumably - - -

MS MORTIMER: Yes, your Honour, absolutely.

20 BRANSON J: - - - by processing it in Australia?

MS MORTIMER: Absolutely, instead of exporting it to Japan and pulping it in Japan, yes, your Honour, that's right.

25 TAMBERLIN J: 350 is the page, is it?

MS MORTIMER: Yes, your Honour, up the top.

30 TAMBERLIN J: Well, these forests are being used, aren't they, for the woodchipping process?

MS MORTIMER: That's right, your Honour.

35 TAMBERLIN J: What's the pulping doing? What additional impact on the environment is there from the pulping?

MS MORTIMER: Well, as that portion actually says, that there will be an increased volume of processing - - -

40 TAMBERLIN J: So that's volume, is it?

MS MORTIMER: Well, that's one of the contentious issues of fact, if the court pleases.

45 TAMBERLIN J: Yes, and then you have got the treatment, of course, in the chemical treatment and so forth.

MS MORTIMER: That's right, your Honour.

TAMBERLIN J: But that's not related to forestry - - -

MS MORTIMER: And the – yes, and I think – I'm reminded that's the, in terms of
the contentiousness of it, that was the portion in the briefing note that I took your
5 Honours to very early in the opening at appeal book page 1216 where it - - -

TAMBERLIN J: 1216.

MS MORTIMER: - - - it's put that there will be forestry, volumes, methods,
10 harvesting regimes and locations will change.

TAMBERLIN J: I see, yes.

MS MORTIMER: But the detail on the forestry operations and where and when and
15 how, of course is light on because the Minister decided he didn't have to look at it.

FINN J: So if we could go back to my ship-building example just to, again, satisfy
my curiosity, while the question would be asked whether the primary purpose was
forestry the resounding answer on your submission would be, no, would it?
20

MS MORTIMER: It would be, your Honour, but we accept that it's a matter of fact
and degree, and looking at one of the important is that it's a purpose, not necessarily
looking at activities undertaken to achieve the purpose, you're looking at the purpose
of the thing that you're proposing to do. And in that example the purpose is to build
25 boats, in our submission, but it may admit of a different answer in depending on all
the facts, and we accept that.

BRANSON J: We're in this complex area, aren't we, where the ordinary meaning
of the English word is a question of fact, but whether a particular circumstance is
30 capable of meeting - - -

MS MORTIMER: Yes. Yes, your Honour.

BRANSON J: - - - the word of the statutes as a question of law.
35

MS MORTIMER: Yes, accept that, your Honour.

BRANSON J: If this wasn't capable of being – falling within the section on a
proper understanding of the section it would be material what the Minister did.
40

MS MORTIMER: Then your Honour's point that was put to me probably two days
ago - - -

BRANSON J: Days ago - - -
45

MS MORTIMER: - - - now, would be correct.

BRANSON J: Would revascularize [sic] itself.

MS MORTIMER: That's right, your Honour.

BRANSON J: Yes.

5 MS MORTIMER: Pardon me, your Honour. I'll leave that for the moment, your Honour. Now, I'll just check that that's all I want to say by way of reply on 75(2)(b). Yes, if the court pleases I'll turn to 170C.

10 FINN J: Yes. Could I just ask you one more question on 75(2)(b)?

MS MORTIMER: I am sorry; yes, your Honour.

15 FINN J: The essence of your argument is that the Minister simply didn't ask the right question.

MS MORTIMER: That's right, your Honour. He misconstrued the effect of it.

20 FINN J: Now, the only – assuming we accept that, the only basis upon which we would be justified in refusing relief is, because even if he had asked the question there is only one answer and that is that it – the section does not apply, the subsection does not apply?

25 MS MORTIMER: Perhaps not, your Honour, with respect. But the question in terms of discretion to refuse relief in our submission, would really fall to be decided from the principles in relation to a finding of jurisdictional error and the need to prove for the refusal of relief that would equally be futile.

FINN J: Futile; yes.

30 MS MORTIMER: That would be the correct approach, in our submission.

FINN J: Yes.

35 MS MORTIMER: And to that extent if there is an absence of fact-finding, in our submission, it would be very difficult to demonstrate that relief for a finding of jurisdictional error would be futile. May I turn to 170C, if the court pleases? The proposition that's put, in our submission, by both respondents is that our construction of subsection (4) is wrong because, and there's a slight difference between them, in my submission, and I understand that to be – my learned friend for the Minister suggests that there are words that can be inserted and, as I understand her
40 submission, the words that can be inserted are the words that the learned trial judge inserted and, in our submission, they don't produce a different outcome.

45 My learned friend, Mr Uren, put emphasis on the conditional in that paragraph – that subsection and said that a lot of work has to be given to the words “would have applied” and, as I understand his submission, it is that you look – pardon me, I'll just make sure I get it right:

Have to identify the provision of chapter 4 which would have applied if the referral had not been withdrawn –

5 the ones that would have had some effect on the action. It must be on the – one
cannot substitute “action” for any other word in that section. It says “action”, in our
submission, so what the Commonwealth said, in our submission, you put words in
and our response to that is that it has no alteration on the meaning. If the second
respondent’s submission is right then there has to be a precise identification of which
10 are the provisions of chapter 4 that would have applied if the referral had not been
withdrawn? Now, when one asks that question the best example is section 133, the
approval section.

That is a section which would have applied if the referral had not been withdrawn,
and on our learned friend’s construction, ceases to apply to the action. All that
15 produces is the same outcome for which we contend, the Minister can’t make an
approval decision. It doesn’t advance the purpose that our learned friends contend
for at all. And this is the difficulty, if the court pleases, with both the respondents’
arguments really not giving enough weight to the kind of statutory construction
principles that Dawson J identified in *Mills v Meeking*. And just to remind your
20 Honours, I’ll just read it out because it’s only one line; *Mills v Meeking* is on our
list of authorities and it’s report in (1990) volume 169 CLR 214, the relevant passage
in his Honour’s judgment is at page 235, about two-thirds of the way down:

25 *However, if the literal meaning of a provision is to be modified by reference to
the purposes of the Act, the modification must be precisely identifiable as that
which is necessary to effectuate those purposes and it must be consistent with
the wording otherwise adopted by the draftsman. Section 35 –*

30 That’s the Acts Interpretation Act, obviously –

requires a court to construe an Act, not to rewrite it in light of its purposes.

35 So in our submission the proper construction of the section is as we contend and the
real debate is around the respondent’s assertions that it produces some awful
consequence. But when you pin them down to how it ought to be rewritten, there are
all sorts of difficulties.

BRANSON J: Ms Mortimer - - -

40 MS MORTIMER: Yes, your Honour?

BRANSON J: There might be at least one of us who would be anxious to know
what you say about the extent to which those remarks survived authoritatively past
Project Blue Sky.

45 MS MORTIMER: Still – absolutely, your Honour, there is still no authority in a
court to rewrite a section, and if words are to be – of course words can be read in,
and of course - if that’s necessary to achieve the purpose of the legislation, but one

must identify what the words are, and then one must identify that they produce the consequence that is different from the words that are there, and that is the one that is said to promote the objects of the Act, and that is – when one drills down to the detail, in our submission, on either approach, it’s an impossible exercise for this section.

This section – and we accept what your Honour Justice Finn put to our learned friends yesterday, that it is a result attended with a great deal of finality. We accept that. It is not the only section that does that – and this is really the second point that I want to reply to on this issue. There are two other sections in the Act that have that operation, and I took your Honours to them, but there’s been a distinction made by my learned friend for the Minister between them and I need to address that. The two other sections are 75C, subsection (3), paragraph (a), that’s one; and the other one is section 155, subsection (3).

Now, just to deal with each of them – and I’ll start with 155(3), because that’s the one that we contend is the Minister-driven, bringing to an end the application of chapter 4, and to answer again in a different way the submission made by my learned friend Mr Uren about the importance of the conditional, we submit there isn’t. We submit the conditional is used only in 170C because it contemplates an election being made that the draftsman isn’t sure will be made, but if it is made, this is what happens. But subsection (3), in our submission, is designed to have the same kind of final effect. So if 170C(4) is to be rewritten, because it has an undesirable final effect, 155 subsection (3) must also be rewritten because it has the same undesirable effect.

74C is put by my learned friend for the Minister in a different category from 170C. What I understood my learned friend’s submission to be is that the words of 74C(3)(a) – those extra words “and take no further action in relation to the proposed action” assume some significance from their presence here and their absence in 170C; and the conclusion that follows from that, if the court pleases, is sterilisation under this section.

So my learned friend for the Minister, at least, appears to accept that there is a sterile – that this legislative scheme does contemplate sterilisation, to use your Honour Justice Finn’s word. It’s not out of the contemplation of the Act; it’s in the contemplation of the Act; the question is, where is it in there? And our submission about this construction is that those words are, I think again as your Honour Justice Branson put to me, otiose. They’re unnecessary. They, in different language, tell you what section 170C, subsection (4) does. So that’s the second principal issue in reply on 170C.

Now, that really leaves on 170C, one significant issue in reply, and that is to address what we accept as the real problem with this ground whenever one brings one’s mind to look at it for the first time, and that is that it seems to work, in the case of this particular proponent, an enormous – some people would describe it as an injustice; others would describe it as something for which the proponent bears responsibility because it elected to do it, but nevertheless we accept it is an extremely significant

consequence. But that is, as I said in my principal submissions, really to start at the wrong end of the exercise. It is to start with the predicament that a person has got into because of a misconstruction of a piece of legislation.

5 BRANSON J: I think you were going to tell me what your client said they should have done.

MS MORTIMER: Well, your Honour, I did in principal submissions. I put the proposition that if one looked there were a number of options. One was that if there was co-operation from the state, which there obviously was, and there was a great
10 desire on the part of the Commonwealth to see this project assessed and all the legal minds of the Commonwealth couldn't find a properly construed solution in the Act, the Commonwealth can amend the Act in a very short period of time. Hindmarsh Island Bridge Act, your Honour, was brought in precisely to do that sort of thing. So
15 there is – if the political will is there, then there is always a solution.

BRANSON J: No. Why couldn't the Commonwealth Minister have invoked section 33 of the Acts Interpretation Act and simply selected another process?

20 MS MORTIMER: Yes, your Honour and that was really the textual point that I put in argument – in principal argument that there is a requirement only for state accredited assessment processors to specify an assessment process by an instrument. That is going to be a straightforward application of the Acts Interpretation Act to specify a different process and to specify a Commonwealth process over which the
25 Commonwealth has control to conduct the assessment. So there is a textual answer within the Act as well.

There is no – and this is really the very important point about how one uses consequential arguments in statutory construction, if the court pleases. This is not a
30 case where every time somebody looks at this section it is going to have a terrible – or uses this section it is going to have a terrible outcome. Out construction does not produce that at all. If we are right and this court declares what the proper construction we contend for – I withdraw that - this court agrees with our construction and says so then no proponent who wants to proceed with an action that
35 has come under a state assessment process and that state assessment process has somehow been frustrated, will dive into section 170C. They will - as we suggest the scheme contemplates in a state/federal co-operative situation, they will go to the Minister and say, “What are you going to do about this? How are we going to fix it.”

40 And so this is not a construction that ad infinitum produces terrible consequences and that's the only situation, in our submission, which the court would really be justified in re-writing the section to avoid that. Now, I want to turn briefly to procedural fairness and ask your Honours to go to page 1208 of the appeal book. This is a convenient way to make good the proposition which has been – our proposition
45 which has been attacked by the respondents that there is such a gap between 95(2)© and the assessment decision that it has to be reviewed as a separate decision. Your Honours will see, this is the briefing note from Mr Early to the Minister. Your Honours will see in the - - -

BRANSON J: If they are separate decisions we will find that out by reference to the Act - - -

MS MORTIMER: Of course, your Honour.

5

BRANSON J: - - - not by reference to any matter of evidence, won't we?

MS MORTIMER: No, no, I accept that, but the point is this that the obligation – or this is our argument, the obligation in section 95 conditions the section 87 power; that's what it does and it is no different to stray with some trepidation into the Migration Act, if the court pleases, with 424A. When the RRT makes a decision under 424A to give a notice, a person doesn't challenge that decision, that's because that is a statutory obligation that conditions a different decision making power and you challenge the decision making power that it conditions.

15

And that is our proposition here, that the statutory obligation conditions a decision – conditions this decision making power, section 87(1). It is as simple as that. There is no doubt in 424A of the Migration Act that the Tribunal has to make a decision, it has to issue a notice, which is not dissimilar to 95(2)©, but you don't attack that, you attack the power that it conditions and that is our argument in a nutshell.

20

The second aspect of it that was attacked is that it's somehow affected by 131AA and I think I have probably said – no I withdraw that, what I want to say by way of reply about that proposition is that 131AA comes into the scheme after all these other statutory obligations exist, and it would require very clear words, in my submission, for it to be read as changing those other obligations, reducing them, minimising them. Let me give your Honours a good example, in my submission, that doesn't have the features that my learned friends object to about our argument, and that's section 131.

25

30

Can I ask your Honours to look at that? That is a section that imposes a statutory obligation on the Minister to inform other ministers, and invite comments, and if I can just digress there to make this submission, my learned friend for the Minister made some – no, I'll withdraw that. Both my learned friends placed some emphasis on the use of the word "comment." Your Honours will find that word used regularly and without exception for every statutory obligation in this part, whether it's related to the proponent, State ministers or Federal ministers. So if it's tiny it's tiny for everybody, and that, in our submission, is not an attractive construction.

35

FINN J: I have to say – I didn't say it to Ms Perry, but often I've been invited to comment on, in a past life, on a PhD thesis. Sometimes the comment is as long as the thesis.

40

MS MORTIMER: And, your Honour, sometimes those of us at the bar table say that all we're doing is commenting, and we can take a long time, and go into a lot of detail in doing that. So suppose – so the question that we pose, rhetorically, if the Court pleases, is what is it said that subsection (7) of 131AA does to that statutory obligation to invite ministers to comment? Obliterate it, make it unenforceable,

45

make a decision that – well, where there’s no opportunity at all given valid, when prior to 131AA(7) it would have been invalid, or might have been invalid? In our submission, the reliance on 131AA is misplaced, and it has a confined operation in relation to a proponent, which is precisely the kind of operation is has in the
5 Migration Act.

FINN J: But do you have to go that far? If you’re saying all the 95 conditions, the ‘87 decision, that’s not the decision taken by the Minister to which 131AA is directed.
10

MS MORTIMER: Well, your Honour, that’s another way to look at it.

FINN J: It’s a completely different - - -

15 MS MORTIMER: It is, that’s right.

FINN J: - - - different decision.

MS MORTIMER: It’s another way to look at it, yes, your Honour.
20

FINN J: I mean, in Bonton’s this could properly be said to be an intermediate decision?

MS MORTIMER: Yes, your Honour, but with real effect.
25

FINN J: Yes.

MS MORTIMER: Yes. Yes. Now, my learned friend, Mr Uren, relied – no, I withdraw that. Both my learned friends relied on the Botany Bay decision, and there is a fundamental distinction between the circumstance in that case and this case, and it is important that that is understood, in our submission, and it’s this. In that case the environmental legislation with which the Court was concerned imposed no statutory obligations to consult the public, none. And so the applicants in that case were thrown back on the common law, and they had to try and run an argument that, because they lived under the flight path, their interests were affected and at common law they had some trouble with that. And that is what the Court found. That’s not this case, and it’s not this case, for the simple reason, in our submission, that the Parliament has expressly recognised the rights and interests of the Australian community, through the provisions to which I have taken the Court. So whatever was said in Botany Bay, in our submission, is easily distinguishable.
30
35
40

And another case on our list which is the NH and MRC case and the Tobacco Institute, it is a decision of your Honours’, is a contrast to that because that was a circumstance where there was a statutory provision, that’s this kind of circumstance. But the common law you can’t imply natural justice to the public is just not in the universe of discourse for this statute. And finally on that if the court pleases, to take up something my learned friend, Mr Uren, said that our proposition in paragraph 32 of our outline is without authority, of course it is because this is the first case that has
45

raised it for this legislation. But we say that proposition is fundamentally grounded in what this Act is about, including if your Honour Branson J pleases the public interest injunction provisions and the public interest standing provisions. Now, if the court pleases that's the matters in reply.

5

BRANSON J: Thank you, Miss Mortimer. Dr Perry, do you want to respond to the new material or invoke any right of reply on your notice of contention?

DR PERRY: I am sorry, your Honour, I missed the last part of what you said?

10

BRANSON J: Or will reply on your notice of contention?

DR PERRY: Your Honour, I think that we've – perhaps there is only one point I would like to make in relation to the notice of contention point. And that is that it's said that the – or suggested that the decision in relation to section 87 is a distinct and separate decision from the final approval decision. In that regard, we would say that the two are inextricably linked because the section 87 decision is one which provides for the process which is to be followed in relation to the final approval decision. Otherwise, your Honour, if it were convenient to the court we would prefer to the have the opportunity to consider the written material which has been provided to your Honour and if we do feel it necessary to respond to any matters raised in that, to do that perhaps at the same time and in the same short submission which responds to the hand up given to your Honours yesterday dealing with or identifying - - -

15

20

25

BRANSON J: The evidence.

DR PERRY: - - - the evidence that's relied on; would that be convenient to the court?

30

BRANSON J: What timeframe do you suggest, Dr Perry?

DR PERRY: Would perhaps Wednesday next week be convenient for the court?

BRANSON J: Yes, that's fine.

35

DR PERRY: Thank you.

BRANSON J: Mr Uren?

40

MR UREN: Yes, I wonder if we could do the same, your Honour? There is also another matter which has arisen this morning as well which is the question of the woodchip issue in the context of 75(2)(b) which does raise some interesting considerations which we would also like to address.

45

BRANSON J: Would you like to put those in your written material as well?

MR UREN: If we could, yes.

BRANSON J: You may require the right to reply to those perhaps, Ms Mortimer?

50

MS MORTIMER: We'll try and resist the temptation, your Honour, unless it is absolutely necessary.

5 BRANSON J: All right. If you do need to could you try and get them in by the Friday of the same week?

MS MORTIMER: Of course, your Honour.

10 BRANSON J: Very well, thank you. So that completes everything?

MS MORTIMER: It does, your Honour, thank you.

15 BRANSON J: The court thanks counsel for their considerable assistance in this both complex and interesting matter. The court will take time to consider its judgment.

MATTER ADJOURNED at 12.25 pm INDEFINITELY