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TRANSCRIPT OF PROCEEDINGS

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S ECI 2020 00373

COUNTY COURT OF VICTORIA

CIVIL JURISDICTION

PRACTICE COURT

MELBOURNE

FRIDAY 10 JULY 2020

BEFORE THE HONOURABLE JUSTICE KEOGH

WILDLIFE OF THE CENTRAL HIGHLANDS INC v VICFORESTS

MS K. FOLEY with MS C. MINTZ appeared on behalf of the Applicant.

MR D. COLLINS QC with MS F. HUDGSON appeared on behalf of the Respondent.

1 HIS HONOUR: Ms Foley, you appear for the applicant?

2 MS FOLEY: I do, Your Honour. Together with Ms Mintz.

3 HIS HONOUR: Thanks very much. And Mr Collins?

4 MR COLLINS: Yes, Your Honour. I appear with Ms Hudgson for  
5 the defendant.

6 HIS HONOUR: So Ms Foley, where are we up to and what are we  
7 dealing with today?

8 MS FOLEY: Your Honour, today we're dealing with an interim  
9 injunction application. The plaintiff as you know has  
10 filed a summons seeking urgent interlocutory relief. I  
11 understand from the defendant's perspective that it's the  
12 preference to have today's hearing devoted to the interim  
13 application rather than the full interlocutory  
14 application. The plaintiff is content with that and I'm  
15 sure Your Honour will have seen from the volume of  
16 material that it is a more reasonable approach in my  
17 submission to have the full interlocutory application  
18 heard at another time so that the material can be fully  
19 developed and addressed in argument.

20 HIS HONOUR: All right. So you understand - you agree with  
21 that being the approach today, Mr Collins?

22 MS FOLEY: Yes, Your Honour. We oppose the interim orders and  
23 would say it is appropriate for the matter then to be  
24 adjourned to the interlocutory hearing, whatever the  
25 outcome of the application for interim relief or hearing  
26 - we'll discuss the dates perhaps later. I don't know  
27 whether they have been exchanged - those dates were  
28 exchanged with further material or any further  
29 submissions and the date by which that will be  
30 conveniently completed. And it's likely that we'll bring  
31 an application to be heard at the same time for the

1 discharge of the existing interlocutory injunction on the  
2 basis that a precautionary principal analysis has now  
3 been completed.

4 HIS HONOUR: Yes, all right. Thanks Mr Collins. Yes,  
5 Ms Foley?

6 MS FOLEY: Thank you, Your Honour. If I can just check that  
7 Your Honour has received all of the material, I must just  
8 run through it. Your Honour, in addition to the  
9 summons - - -

10 HIS HONOUR: Can I indicate - - -

11 MS FOLEY: Sorry.

12 HIS HONOUR: Can I indicate what I've written down and what  
13 I've got?

14 MS FOLEY: Yes. Thank you.

15 HIS HONOUR: I've got the summons, your outline of submissions,  
16 affidavits of Ms Jacobs sworn 7 July and 8 July,  
17 affidavits of Mr Marshall 6 July, Ms Bert 6 July,  
18 McKenzie 6 July, Foster 7 July. And I have from the  
19 defendant an outline of submissions and affidavits of  
20 Mr Gunn sworn 9 July and a further affidavit this morning  
21 which I think is probably sworn or affirmed 10 July. Is  
22 that (indistinct)?

23 MS FOLEY: Yes, so I think Your Honour might be missing just  
24 one affidavit. There was a second affidavit of  
25 Mr Nesbitt that was filed by the plaintiff this morning.  
26 It's a very short - - -

27 HIS HONOUR: Yes, yes. No, I've read that. yes.

28 MS FOLEY: Yes. Thank you, Your Honour. So Your Honour has  
29 all the material. Your Honour, the - - -

30 HIS HONOUR: And so that second affidavit is - do you know if  
31 it's dated today or yesterday?

1 MS FOLEY: I believe it's today. Let me just check, Your  
2 Honour. It's today, Your Honour.

3 HIS HONOUR: All right. Thanks very much.

4 MS FOLEY: Your Honour, the proceeding in this matter is set  
5 down for trial on 7 October on an estimate of seven to  
6 10 days. Your Honour would have seen from the material  
7 that the proceeding concerns whether the defendant is  
8 acting unlawfully in conducting its timber harvesting  
9 operations in certain areas of Victorian native forests.  
10 Put briefly, the areas that are at issue in the  
11 proceeding are those that are known to the Department or  
12 to VicForests to contain or be likely to contain what we  
13 refer to as bushfire-affected threatened species or  
14 habitat of the same. So to sit through, the species at  
15 issues are species that are listed as threatened pursuant  
16 to the Flora and Fauna Guarantee Act which is a Victorian  
17 statute. I should say, Your Honour, and this is relevant  
18 if Your Honour is looking at the earlier decisions made  
19 by Justice McMillan that there has been an amendment made  
20 to that Act. It came into effect on 30 June 2020. So if  
21 Your Honour goes to look at some of the provisions  
22 referred to Justice McMillan, there is now a new Act so I  
23 just want to bring that to Your Honour's attention.  
24 Amendments rather.

25 It means that the listing process for threatened  
26 species now aligns more closely with the Commonwealth  
27 Act. But I want to advise Your Honour that there is no  
28 new list that is yet published. So the existing list  
29 remains in force under a transitional provision which is  
30 s.75. And under that regime, eligibility is tied to risk  
31 of extinction and that's relevant for Your Honour's

1 consideration.

2 So the threatened species are so identified because  
3 they're listed under that Act and they are also affected  
4 by the bushfires occurring over the last summer. So  
5 that's the subset of species that we're talking about in  
6 this proceeding. The plaintiff says that it is unlawful  
7 for the defendant to harvest timber in coupes known to  
8 contain or be likely to contain those species or their  
9 habitat at the present time because there are  
10 Commonwealth and State governmental responses on foot  
11 which concern the bushfire impact on those threatened  
12 species and other species and we say that the expert  
13 advice and recommendations and findings resulting from  
14 those responses will need to be taken into account by  
15 VicForests before logging can occur in coupes containing  
16 or likely to contain these species.

17 The results of those responses for example might  
18 mean that there can't be logging in coupes that contain -  
19 to use one example - the greater glider because numbers  
20 are now known to be too low or it might be that there are  
21 recommendations or actions coming out of those responses  
22 to say that the logging can be done but only with certain  
23 protections and those protections might be different to  
24 the protections that are currently in place.

25 The legal framework for the argument is set out in  
26 our submissions, Your Honour, at paragraphs 16 to 21, and  
27 it can be described very simply as this. As Your Honour  
28 is aware from other proceedings, there is an obligation  
29 on VicForests under the Sustainable Forests Timber Act,  
30 s.46, to comply with codes of practice. The relevant  
31 code here is the Code of Practice for Timber Production,

1 and there are two parts of the Code that we rely upon.  
2 The first is the precautionary principle provision,  
3 s.2.2.2.2, and a related provision concerning expert  
4 advice and research that is s.2.2.2.3.

5 HIS HONOUR: M'hmm.

6 MS FOLEY: So very simply described, that is the case. We say  
7 that VicForests is obliged by statute to comply with the  
8 Code; the Code then requires compliance with those two  
9 provisions, and we say the effect of them is that  
10 VicForests must wait until the governmental responses  
11 have concluded, so it can take into account research,  
12 recommendations or findings coming out of those  
13 governmental responses before it continues to harvest in  
14 coupes that are known to contain or be likely to contain  
15 the bushfire-affected threatened species. So that is the  
16 case.

17 HIS HONOUR: Your outline of submission and the previous  
18 rulings are predicated on the assumption that there  
19 hasn't been a further analysis of the precautionary  
20 approach by VicForests after the 2019-2020 bushfires.

21 MS FOLEY: Yes. I'll be addressing that, Your Honour, when I  
22 get to VicForests' material, but that is indeed a  
23 relevant change, and that is a step that's been taken by  
24 VicForests subsequent to argument before Justice McMillan  
25 and her decisions. So that is indeed part of the killing  
26 ground for today.

27 Now our summons, Your Honour, seeks to prevent  
28 logging in 23 coupes where there is evidence before the  
29 court of the presence of bushfire-affected threatened  
30 species, and we seek interim injunctive relief to hold  
31 the position until the interlocutory injunction

1 application can be heard.

2 As Your Honour is aware, and I just want to deal  
3 with some of the background to explain how we got here,  
4 that there have been two earlier injunction applications  
5 which do form part of the context. The proceeding  
6 commenced on 28 January. At that time we sought an  
7 urgent interim injunction to prevent harvesting in  
8 10 coupes, and that was granted. We then had the full  
9 argument before Justice McMillan on the interlocutory  
10 application. It was a full day of evidence and argument,  
11 and Her Honour reserved her decision and gave judgment on  
12 5 March. The injunction was granted, and that was in  
13 relation to 13 coupes, and Your Honour would have seen  
14 references to the decisions that Her Honour has given in  
15 relation to those applications.

16 Two further applications were made, and they were  
17 heard together, and they were heard on 27 March before  
18 Her Honour. Decision was given on 29 April, and the  
19 injunction was granted over 13 additional coupes. Those  
20 further injunctions were brought because new information  
21 came to light about further activities being taken by  
22 VicForests, and those steps were taken to prevent the  
23 imminent harvesting.

24 It has always been foreshadowed to the defendant  
25 that instead of progressive applications leading towards  
26 trial, we would want to bring one final application in  
27 order to protect the coupes that might be logged before  
28 the trial. So we didn't want to be in a position where  
29 every couple of weeks or every month we needed to come  
30 back to the court. These are very time intensive  
31 applications, as Your Honour will have gathered from the

1 volume of the evidence.

2 And so that is this application, and Her Honour  
3 Justice McMillan set up a process to enable that to  
4 occur, which enabled us to request information from  
5 VicForests and for them to provide us with information  
6 about its plans going forward. So what we've attempted  
7 to do in this application is capture the coupes that are  
8 not just currently being logged, but will be logged also  
9 prior to trial.

10 The injunction application covered 23 coupes.  
11 VicForests filed evidence from Mr Gunn yesterday, which  
12 has given us some more information about the current  
13 state of play. From our perspective that changes things  
14 only in one respect, and that is that one of those  
15 coupes, known as Blue Streak, VicForests has told us now  
16 has been completely logged. So it's no longer active  
17 because it's been logged, so we do not seek our relief in  
18 relation to that coupe.

19 Mr Gunn's evidence also gave a little more detail  
20 about the planning for some of the other coupes, but it  
21 seems to us that although some of them are no longer  
22 scheduled for July, they will be resuming before the  
23 trial starts, so we don't see any other change to the  
24 numbers that are in issue, other than Blue Streak coming  
25 out.

26 HIS HONOUR: But are they all in issue on this interim  
27 application, or are only some of them in issue on this  
28 interim application, and the other 22 on the  
29 interlocutory application?

30 MS FOLEY: That will depend on the timing. There are five that  
31 are currently, on VicForests advice, currently being



1 logged. So if we were to go to the court next week, for  
2 example, on the interlocutory application, it would be  
3 acceptable, subject to instructions, to limit it to  
4 simply those five coupes. However, if there was going to  
5 be more time taken up, we would need some more  
6 information from VicForests to make sure that we weren't  
7 going to be travelling into that territory, but I'm sure  
8 we can deal with that by way of undertakings, Your  
9 Honour. But yes, the full interlocutory application  
10 would cover the 22.

11 HIS HONOUR: M'hmm.

12 MS FOLEY: Your Honour if I can then, having given Your Honour  
13 that background, address the evidence that has been filed  
14 by the plaintiff? I'm very conscious of the volume and  
15 the limited time we have today, so what I'm proposing to  
16 do is simply outline for Your Honour by reference to each  
17 of the affidavits, what the purpose of them, and the type  
18 of material that they cover.

19 If I can start Your Honour with the four affidavits  
20 that are directed to the evidence of identification of  
21 the species in the coupes, and they are the affidavits of  
22 Mr McKenzie, Mr Nesbitt, Mr Marshall and Ms Forster, so  
23 I'll just walk through those, starting with Mr McKenzie,  
24 if I may.

25 Mr McKenzie's affidavit, like the other three,  
26 gives direct evidence of detections of threatened species  
27 in coupes the subject of the application, and that's  
28 dealt with in that affidavit at paragraphs 9 to 79. He  
29 gives evidence of conducting surveys in the relevant  
30 coupes, direct evidence; recording the animals in  
31 question by way of video and photographs. His detections

1 are of the greater glider and the sooty owl.

2 He also gives evidence of recording the locations,  
3 and at paragraphs 4 to 6, he gives evidence of providing  
4 some of that information to the Department by way of  
5 detection reports. That of course is relevant to this  
6 question of knowledge. The plaintiff's case isn't framed  
7 by reference simply to whether or not there are  
8 threatened species in the coupes full stop; we recognise  
9 that a knowledge requirement is involved, so it's  
10 important that the Department or VicForests knows that  
11 these species have been identified.

12 Your Honour, can I take that affidavit as read, or  
13 is Your Honour proposing to deal with - - -

14 HIS HONOUR: Yes.

15 MS FOLEY: Thank you. The second affidavit, Your Honour, is  
16 that of Mr Nesbitt. He also gives evidence of a direct  
17 kind in relation to detections of the greater glider in  
18 paragraphs 31 to 106, and also of sending that  
19 information to the Department and to VicForests.

20 He gives evidence of his survey methodology, that's  
21 at paragraphs 13 to 17, and he also gives evidence of the  
22 Department of Forests - withdraw, the Department's forest  
23 protection survey program. You'll see that referred to  
24 as the FPSP. They record detections as well, and we rely  
25 upon those records. He gives evidence of those results  
26 at paragraphs 133 to 136 of the affidavit, and they are  
27 in relation to the greater glider and the powerful owl.

28 Can I take that affidavit as read, Your Honour?

29 HIS HONOUR: Yes.

30 MS FOLEY: Thank you. Turning them to the Marshall affidavit,  
31 he also gives evidence of a direct kind of detections of

1 the greater glider and the sooty owl. That's at  
2 paragraphs 29 to 83. He gives evidence of his survey  
3 method at paragraphs 18 to 23, evidence of preparation of  
4 maps and tables, which we rely upon, and that's at  
5 paragraphs 24 to 26. Can I take that affidavit as read,  
6 Your Honour?

7 HIS HONOUR: Yes.

8 MS FOLEY: Thank you. The final affidavit of this kind is that  
9 of Ms Forster. She gives direct evidence of detections  
10 of the greater glider, that's at paragraphs 6 to 43. She  
11 also gives evidence of the reports that are provided to  
12 the Department in relation to those detections, and the  
13 creation of maps which we rely upon. Can I take that  
14 affidavit as read, Your Honour?

15 HIS HONOUR: Yes.

16 MS FOLEY: So Your Honour, those affidavits are the material  
17 that we rely upon to support our contention that there  
18 are bushfire-affected threatened species in the coupes  
19 that are subject of this application. It is voluminous,  
20 but it is necessary, because we need to establish that  
21 the species are there in order to bring them into the  
22 fold of this application. It is the same kind of  
23 evidence that Justice McMillan relied upon in the earlier  
24 injunction applications.

25 There are then two solicitor affidavits of  
26 Ms Jacobs, the eighth affidavit and the ninth affidavit,  
27 if I can just describe for Your Honour what they deal  
28 with and why they're important. The eighth affidavit  
29 really sets up the background to this application being  
30 made. It demonstrates how we reached a landing on where  
31 logging will occur prior to trial, and based on that

1 information we've identified the coupes the subject of  
2 the application.

3 Your Honour will have seen from the Gunn affidavit  
4 that there is substantial agreement, to put it that way,  
5 between the parties about what's happening in the coupes,  
6 and there are 22 coupes that will be logged before trial,  
7 and as I understand it five that are in the presently  
8 active basket.

9 The second purpose of that affidavit was to provide  
10 the court with information about our request for  
11 undertakings, and that they weren't given.

12 The ninth Jacobs affidavit puts into evidence the  
13 latest report of the Commonwealth government's bushfire  
14 response. It's described as a rapid analysis of impacts  
15 of the 2019 to 2020 fires on animal species, and  
16 prioritisation of species for management response. We  
17 put that in, Your Honour, because it is an up to date  
18 copy of a report that has been relied upon previously and  
19 was before Justice McMillan. It supersedes the earlier  
20 version that was in evidence. That's DJ165.

21 We also put into evidence other material recently  
22 published that is relevant to the work of the  
23 Commonwealth response, and that is the purpose of that  
24 ninth affidavit of Ms Jacobs. Can I take those two  
25 solicitor affidavits as read, Your Honour?

26 HIS HONOUR: Yes.

27 MS FOLEY: This morning we filed the second Nesbitt affidavit.

28 I will address that in the course of my address in  
29 relation to VicForests' position, because it is  
30 responsive to material that was put in by VicForests last  
31 night.

1 HIS HONOUR: Yes.

2 MS FOLEY: But that is the plaintiff's evidence. I'll now turn  
3 to my argument on the injunction, Your Honour, in  
4 relation to both the serious question to be tried and the  
5 balance of convenience.

6 The court has the parties' written submissions on  
7 those issues, and the benefit, of course, of Justice  
8 McMillan's analysis on the earlier injunction  
9 applications. So what I propose to do is to focus on  
10 responding to VicForests' arguments and evidence that we  
11 received yesterday, including the point that Your Honour  
12 has raised about the precautionary principle analysis  
13 that's been conducted. So I'll turn to that now.

14 Turning to the serious question to be tried, the  
15 first point that VicForests makes in its submissions is,  
16 and this is in part A of its submissions, it is said  
17 VicForests logs in accordance with the regulatory scheme.  
18 The regulatory framework is set out at paragraphs 9 to  
19 11, and it is noted by VicForests and given particular  
20 emphasis that they apply existing prescriptions for  
21 protection of sooty owls and the greater glider.

22 Now, this argument has been made previously by  
23 VicForests before Justice McMillan at the first  
24 interlocutory injunction application. VicForests relied  
25 on the evidence of a Mr Paul that existing prescriptions  
26 were being applied and that these would operate to  
27 protect the threatened species.

28 The plaintiff argued then and we do so again that  
29 the prescriptions were based upon pre-bushfire knowledge,  
30 pre-bushfire information. So we say they can't be relied  
31 upon in the post-bushfire universe to say, 'Well, look

1 prescriptions provide adequate protection and that's what  
2 we're applying.' Her Honour Justice McMillan addressed  
3 this in the decision WOTCH v VicForests (No.2) which is  
4 [2020] VSC 99 at paragraph 97. Her Honour said of the  
5 Mr Paul evidence that it fails to address the thrust of  
6 the plaintiff's case which is that the current  
7 prescriptions were made pre-fires and therefore the  
8 foundations on which those prescriptions were made have  
9 now changed fundamentally.

10 The plaintiff also makes the point, as we did  
11 before Justice McMillan, that the - we call them the POMA  
12 and the SOMA prescriptions, Your Honour. They're for the  
13 powerful owl and the sooty owl. They don't simply require  
14 establishment of good quality or suitable habitat but  
15 maintenance of it which incorporates an ongoing  
16 obligation. Therefore, we say that it's a logical and  
17 probable consequence of the Commonwealth and the State  
18 responses that further habitat will be needed to be set  
19 aside in order to meet the existing prescriptions. So  
20 there might be changes to the prescriptions but there  
21 also might be changes made on the ground to meet the  
22 existing prescriptions. Two different points.

23 Her Honour Justice McMillan notes that argument at  
24 paragraph 129 in her reasons in the decision. Now, we  
25 say that Mr Gunn in his affidavit has not addressed those  
26 issues at all. It is the same approach we saw last time  
27 which is 'But there are prescriptions and we are applying  
28 them and therefore we're complying with the scheme' -  
29 this we say doesn't address the heart of our case which  
30 is yes, the scheme was set up, the prescriptions were  
31 made but the landscape has changed since then and the

1 prescriptions can no longer be safely relied upon as  
2 affording protection.

3 A good deal of research and expert consideration  
4 about what has occurred during and post the bushfires is  
5 being undertaken and that will need to be taken into  
6 account, we say, by VicForests and inform its actions  
7 going forward. And so that is why we say the  
8 precautionary approach requires VicForests to await the  
9 outcome of those responses. So we say reliance on the  
10 existing prescriptions that were pre-bushfires simply  
11 doesn't meet the plaintiff's case.

12 The second point that VicForests has raised - and  
13 it's the open that Your Honour has raised with me - is  
14 the contention 'Well, we have now complied. We have  
15 undertaken our own precautionary principle analysis.'  
16 And this is a new argument as I've said. It wasn't  
17 raised before Justice McMillan because the position there  
18 was that really, on the evidence, no one else's had been  
19 taken out at that time. The work that has been done by  
20 VicForests has been done since Justice McMillan's  
21 decisions.

22 The Gunn affidavit and the material that's  
23 exhibited to that affidavit provide the evidentiary  
24 foundation for that submission made by VicForests. The  
25 plaintiff has four principal responses to that  
26 contention. Some of those will need to be addressed in  
27 detail at the interlocutory application. They're quite  
28 detailed arguments but I will run through our four  
29 arguments now.

30 The first is this. The fact that VicForests has  
31 undertaken its own precautionary principal analysis at

1 the present time, we say, doesn't answer the question of  
2 whether clause 2.2.2.2 or 2.2.2.3 nevertheless require  
3 VicForests to wait for the outcome of the Commonwealth  
4 and State responses.

5 HIS HONOUR: Sorry - - -

6 MS FOLEY: If the Commonwealth - - -

7 HIS HONOUR: Sorry.

8 MS FOLEY: Yes.

9 HIS HONOUR: What is it about 2.2.2.2 or .3 which would require  
10 VicForests to wait, having undertaken their own analysis?

11 MS FOLEY: Because their own analysis is done on information  
12 that cannot yet take into account the ongoing work that's  
13 been done by the Commonwealth and the State responses.  
14 So those - - -

15 HIS HONOUR: Yes. Hang on. That doesn't meet the proposition.  
16 Sure, it doesn't take that into account because it  
17 doesn't yet have it.

18 MS FOLEY: That's right.

19 HIS HONOUR: But how is that - why does that mean that the  
20 analysis they've undertaken doesn't satisfy 2.2.2.2 or  
21 .3?

22 MS FOLEY: Well, one of the things that 2.2.2.3 does is ask  
23 VicForests to take into account relevant expert advice  
24 and research.

25 HIS HONOUR: Yes.

26 MS FOLEY: And we say that there is currently a process  
27 underway at the Commonwealth and the State level which is  
28 undertaking expert inquiry and will be providing advice  
29 to those who are working on the ground when the responses  
30 are concluded. Therefore, to take the step of harvesting  
31 now, ahead of having that expert advice, we say is not



1 compliant with a precautionary approach or what's  
2 required under 2.2.2.3. We say that - - -

3 HIS HONOUR: But there could be a number of sources or relevant  
4 expert advice and research.

5 MS FOLEY: Indeed but the Commonwealth - - -

6 HIS HONOUR: So if - - -

7 MS FOLEY: Sorry, Your Honour

8 HIS HONOUR: - - - VicForests has taken into account currently  
9 available and relevant expert advice and research, why is  
10 it not acting in compliance with 2.2.2.3?

11 MS FOLEY: Well, we say it hasn't and I'll get to that. But  
12 the first point that we make is when there are ongoing  
13 responses that are not yet concluded which are going to  
14 occur at both a Commonwealth and a State level which is  
15 bringing together the kind of expert analysis that will  
16 be not currently available to VicForests but will be  
17 directly relevant to their harvesting operations, the  
18 precautionary approach requires you to wait so that you  
19 can consider it.

20 The quality of information VicForests has now will  
21 not be and is not of the kind that will be coming out of  
22 the Commonwealth and the state responses. It is an  
23 unprecedented response to what happened to the bushfires.  
24 It's not an ordinary government inquiry. They are very  
25 detailed, intensive, coordinated responses, and I'll be  
26 taking Your Honour to some of the detail that makes that  
27 good. So it's not just waiting for any old government  
28 report, but they are serious pieces of work that are  
29 being undertaken at a Commonwealth and state and  
30 coordinated level, that will be directly relevant to the  
31 work that VicForests will need to do in these coupes.

1           So we say it is a very different kind of thing,  
2           we're in a different world here with this response  
3           because of the impact of the fires.

4 HIS HONOUR: So compliance with the precautionary principle and  
5           the mandatory action is an ongoing requirement.

6 MS FOLEY: Not just a point in time requirement. Here, we say  
7           yes. And that might be - in the past, Your Honour, with  
8           a fire of a different kind of impact, a court might find  
9           in those particular circumstances that of course, the  
10          fact that there might be a government report being  
11          written is not relevant, but what we say here is, the  
12          government responses, their scale, the kind of material  
13          they're looking at, the kind of experts they're bringing  
14          together, and the fact that the Commonwealth and state  
15          responses will be working together, is unprecedented.

16 HIS HONOUR: All right.

17 MS FOLEY: So we don't say that this is a standard proposition  
18          that applies any time a government report is being  
19          prepared, but in this context, given the severity of the  
20          fires and the nature of the responses at Commonwealth and  
21          state level, yes, that's what we say.

22 HIS HONOUR: So just summarise point A, the first point for me  
23          again, of your four responses.

24 MS FOLEY: Yes. The first point is this, that if the  
25          Commonwealth and the state responses are going to provide  
26          relevant expert advice and recommendations, then  
27          undertaking an analysis now is well and good, but it  
28          doesn't address why it is not unlawful to decide to  
29          harvest ahead of the responses being finalised.

30                 If VicForests harvests and it turns out that the  
31          responses provide new information that would have meant

1           that no logging could occur in these coupes, or that the  
2           logging needed to be of a different kind, then the  
3           habitat and the species in those coupes will be gone  
4           forever, and that impact will be irreversible impact. So  
5           on a precautionary approach we say given what is expected  
6           from these enquiries, yes, they need to wait. It's  
7           wonderful that they've done their own analysis and they  
8           should have been doing that analysis, but it won't be  
9           akin to what will be coming out of the Commonwealth and  
10          the state responses. It simply can't be.

11   HIS HONOUR: All right.

12   MS FOLEY: The second point we make in relation to that same  
13          issue, because if one asks, 'Well, why does VicForests  
14          say it doesn't need to wait?' What VicForests says is,  
15          well, the Commonwealth and the state responses aren't  
16          going to be focused on areas that are largely unaffected  
17          by the bushfires. That's in paragraphs 47 and 51 of  
18          their submissions. So they say the bushfire responses  
19          will focus on bushfire-impacted land. The coupes here in  
20          the central highlands, it's not bushfire-affected, so  
21          that's why we don't need to wait.

22                 The difficulty with that response is that it  
23          ignores the fact that analysis of bushfire impact on  
24          threatened species in bushfire-affected areas will  
25          inevitably lead to recommendations and governmental  
26          action to protect the species that are left, and likely  
27          candidates for such protection will be in unburnt area.  
28          And the material that we have put before the court bears  
29          that out.

30                 I'd like to take Your Honour to two of the  
31          Commonwealth reports, just to make good that proposition.

1           They're both in the - - -

2   HIS HONOUR:   So where do I find them?

3   MS FOLEY:    The ninth Jacobs affidavit, Your Honour.

4   HIS HONOUR:   I think I'm drowning in the volume here.   That's  
5           not currently (indistinct) to - - -

6   MS FOLEY:    Apologies, Your Honour.   The ninth Jacobs affidavit  
7           was filed on - I believe it was the 6th, let me just  
8           check.

9   HIS HONOUR:   Yes, all right.

10   MS FOLEY:    That was filed on 8 July, Your Honour.   My  
11           apologies.

12   HIS HONOUR:   Yes.   So am I going to the affidavit or the  
13           exhibits?

14   MS FOLEY:    The exhibits.   I'll take Your Honour to two of the  
15           exhibits.   The first is the DJ165, which is the updated  
16           report of the Commonwealth expert panel.

17   HIS HONOUR:   Yes.

18   MS FOLEY:    And if I could start, Your Honour, at p.21.   So this  
19           is the report I describe for Your Honour, which is the  
20           update of the panel superseding the version that was  
21           before Justice McMillan.   Page 21, if Your Honour is  
22           there.

23   HIS HONOUR:   Yes.

24   MS FOLEY:    You can just see, just to point out, table 3 is the  
25           list of priority mammals for urgent management action in  
26           the next 12 months.   And I'll just point out to Your  
27           Honour, in that table we can see two of the species that  
28           are at issue in this proceeding.

29   HIS HONOUR:   Hang on, sorry.   Are you referring me to the page  
30           of the document itself, or - these pages aren't numbered?

31   MS FOLEY:    My version is paginated on the bottom right.   If

1           Your Honour's looking on the PDF, it will be p.18 of the  
2           PDF.

3   HIS HONOUR:   H.

4   MS FOLEY:   Does Your Honour have pagination on the bottom  
5           right?

6   HIS HONOUR:   Yes, p.21.

7   MS FOLEY:   Page 21, thank you.

8   HIS HONOUR:   All right, take me through, yes.

9   MS FOLEY:   Table 3.  So this is the list that the expert report  
10           has identified as being priority mammals for urgent  
11           management action, and if Your Honour looks down the list  
12           on the left-hand side, you can see the smoky mouse and  
13           then the greater glider are identified there, and they're  
14           both mammals at issue in these proceedings.

15   HIS HONOUR:   Yes.

16   MS FOLEY:   If I can then take Your Honour through to p.32,  
17           looking at the numbering on the bottom right.

18   HIS HONOUR:   Yes.

19   MS FOLEY:   It talks about, in s.9 of the document, which  
20           actions, and this is the part of the document talking  
21           about, well, what are the interventions that we're going  
22           to recommend, and what will we be doing?  It says in the  
23           first part of that paragraph, 'The specific interventions  
24           required for each species are best informed by species  
25           experts, and a detailed suite of actions at local and  
26           regional scales should be and in many cases is being  
27           developed by state agencies and other relevant land  
28           managers'.  So that makes good the point that there's  
29           going to be a Commonwealth approach that's taking into  
30           account what's happening at the state level.

31           It then says, 'Figure 3, this is in the next

1 paragraph, summarises a pathway for considering which  
2 actions are likely to benefit a particular species'. And  
3 we point out in dot point 1, it talks about protecting  
4 unburnt habitats, especially unburnt habitat patches  
5 within or adjacent to burnt areas is a high priority.

6 HIS HONOUR: So Mr Collins might say that makes out the  
7 defendant's point, that the concentration is really of  
8 the response directed towards unburnt habitat patches  
9 within or adjacent to burnt areas.

10 MS FOLEY: So it talks about protecting unburnt habitats. It  
11 does say, 'Especially unburnt habitat patches'. I'm  
12 going to take Your Honour to the next document, which  
13 develops that a bit further.

14 HIS HONOUR: Sure.

15 MS FOLEY: But it is clear looking at the Commonwealth and the  
16 state material that in looking at what is left, the  
17 unburnt areas are part of that picture, and it makes  
18 perfect sense that that would be the case.

19 I'll take Your Honour to the next document to make  
20 that good, and that is Exhibit DG167.

21 HIS HONOUR: Yes.

22 MS FOLEY: Now Your Honour, this is another document emanating  
23 from the Commonwealth response concerning the provisional  
24 list of animals requiring urgent management intervention.  
25 If I can just start to give Your Honour some context on  
26 p.42, looking at the pagination there. You've got the  
27 blue paragraph, and then two paragraphs down it talks  
28 about, 'To support protection and recovery of these  
29 species, conservation action will be needed for many  
30 species at many sites. Such informed management will  
31 need to be supported by a wide range of government

1 agencies', et cetera.

2 It then talks about, 'Some species are in need of  
3 more urgent help than others, and the identification of  
4 119 species identified as urgent priorities'.

5 So if I can then go through to the part I wish to  
6 take Your Honour to, which is on p.44?

7 HIS HONOUR: Yes.

8 MS FOLEY: And that is at the bottom of that page, what actions  
9 are needed for high priority species.

10 HIS HONOUR: Yes.

11 MS FOLEY: It says, 'Two priority actions should be taken out.  
12 The first is rapid on-ground surveys'. And the second,  
13 which we highlight, it says, 'Protecting unburnt areas  
14 within or adjacent to recently burnt ground that provide  
15 refuge, as well as unburnt areas that are not adjacent to  
16 burnt areas.

17 HIS HONOUR: Yes.

18 MS FOLEY: So no doubt the responses are looking at everything  
19 that they can to protect the species that are left, and  
20 in some cases that will of course involve consideration  
21 of what they call refuge areas in patches of unburnt  
22 forest. The position at the state level is no different.  
23 I'm going to take Your Honour to some material a little  
24 later that bears upon that.

25 So that point is made in response to the VicForests  
26 contention that, well, we don't need to wait for the  
27 Commonwealth and state responses, because they'll only be  
28 concerned with the bushfire impact in bushfire areas.

29 So can I turn then to our second point in response  
30 to the precautionary principle analysis, and that is  
31 this? We say that the court cannot have any comfort in

1 VicForests precautionary principle analysis because it  
2 proceeds on a misunderstanding of the way that the  
3 principle operates. There are a number of elements to  
4 that.

5 The defendant's submissions at paragraph 29 say  
6 that the precautionary principle is triggered by two  
7 preconditions. Firstly, the threat of serious or  
8 irreversible damage, and secondly - - -

9 HIS HONOUR: Hang on, sorry, you're going - sorry, you're going  
10 too quickly.

11 MS FOLEY: My apologies, Your Honour. My apologies.

12 HIS HONOUR: So which paragraph of the defendant's submissions?

13 MS FOLEY: Paragraph 29.

14 HIS HONOUR: M'hmm.

15 MS FOLEY: This is setting out how they see the precautionary  
16 principle operating.

17 HIS HONOUR: Yes.

18 MS FOLEY: It says it's triggered by two preconditions.

19 Firstly, the threat of irreversible damage; secondly a  
20 substantial degree of scientific uncertainty.

21 HIS HONOUR: Yes.

22 MS FOLEY: This argument was made by VicForests before Justice  
23 Mortimer in her decision in the case Friends of  
24 Leadbeater's Possum.

25 Your Honour will be aware that Her Honour gave  
26 judgment recently in that case. It is Friends of  
27 Leadbeater's Possum Inc v VicForests No.4 [2020] FCA 704.  
28 Her Honour gave a very detailed consideration to the way  
29 that VicForests understands the precautionary principle,  
30 including that particular argument, and the argument was  
31 rejected by Her Honour. I'll just refer Your Honour to



1 the paragraphs. It's paragraphs 841 to 845 of Her  
2 Honour's reasons.

3 At 842 Her Honour said, 'This obligation arises  
4 whenever VicForests is contemplating decisions in respect  
5 of its timber harvesting operations and planning for them  
6 that will affect the environment'.

7 Now, we rely upon Justice Mortimer's analysis, but  
8 we also say it's plainly consistent with the language of  
9 the precautionary principle itself, which speaks about  
10 when contemplating decisions that will affect the  
11 environment. That's the language of the provision.

12 So that's the first point. The second is, in their  
13 submissions at paragraphs 37 to 38, VicForests advance a  
14 position that the precautionary principle is a matter  
15 really of process rather than outcome. They say what's  
16 important is that we have adopted a process, and it's not  
17 the outcome that matters; different outcomes might be  
18 reached. The process is the focus.

19 Again, we say that's wrong, and it is inconsistent  
20 with Justice Mortimer's decision, and I'll again refer  
21 Your Honour to the key paragraphs. They are  
22 paragraphs 955, 993, 988, and paragraph 1006 of the  
23 judgment. I'll just emphasise two things coming out of  
24 those paragraphs.

25 At 955 Her Honour says that, 'Careful evaluation of  
26 management options [which is of course the language of  
27 the precautionary principle] requires addressing what is  
28 happening on the ground'. And at 988 she says,  
29 'Clause 2.2.2.2 embodies an outcome or objective to be  
30 achieved in the forest on the ground'.

31 So it clear, looking both at the language of the

1 precautionary principle itself, but also Justice  
2 Mortimer's decision, that the precautionary principle is  
3 not just about process, it is also about outcomes.  
4 Whereas VicForests' approach is to say, 'You don't need  
5 to be concerned about the outcome and what is actually  
6 being achieved here, we just need to show you that we've  
7 adopted a process'.

8 And we say that that is a flawed approach. It's  
9 reflected not only in the Possums decision, where Justice  
10 Mortimer very clearly sets out that VicForests'  
11 understanding of the precautionary principle and the way  
12 that it's applied by VicForests is flawed. We say that  
13 same flawed approach is evident not only in VicForests'  
14 submissions, but also in the Gunn affidavit. They don't,  
15 we say, apply or understand the precautionary principle  
16 in a way that's consistent with law.

17 The third point that we wish to make in relation to  
18 the analysis undertaken by VicForests is this. We say  
19 the court can't draw very much comfort at all from  
20 VicForests' assertions that it has taken into account  
21 advice of relevant experts or considered the most up to  
22 date information as it says it has, when its own evidence  
23 reveals that it is acting against the advice of the  
24 conservation regulator.

25 I'd like to take Your Honour to that relevant  
26 document. The Gunn affidavit at Exhibit JMG9, I'll take  
27 Your Honour to that, that's the Office of Conservation  
28 Regulator position statement.

29 HIS HONOUR: So do you want me to go to the exhibit?

30 MS FOLEY: Yes please, Your Honour. So it's Exhibit JMG9 to  
31 the Gunn affidavit.

1 HIS HONOUR: Not very (indistinct) to get there. That's fine.

2 MS FOLEY: A lot of material, Your Honour.

3 HIS HONOUR: (Indistinct words.) Got it.

4 MS FOLEY: Thank you.

5 HIS HONOUR: Yes.

6 MS FOLEY: So this, Your Honour, is a document provided by  
7 VicForests. It's the document of the Office of the  
8 Conservation Regulator, published in May 2020. If I can  
9 start at s.1.1. I'm just wondering whether Your Honour's  
10 document has paginated numbers or not. But it's on the  
11 second page of the report itself.

12 HIS HONOUR: Yes, I've got it. Yes.

13 MS FOLEY: Yes, 1.1. Just to give you the context. It says  
14 the purpose of this position statement is to provide  
15 practical guidance to VicForests on how the conservation  
16 regulator interprets clause 2.2.2.2 and its application  
17 to the conservation of biodiversity values following the  
18 bushfires.

19 It then says that the regulator puts forward a  
20 proposition for a package of measures for VicForests'  
21 consideration. It expects VicForests to take into  
22 account the advice et cetera. So that's the background  
23 to it. If I can then take Your Honour to s.3.2 of the  
24 document. And this is on p.6 of the report itself.

25 HIS HONOUR: Yes.

26 MS FOLEY: In 3.2, you can see there 'identified species of  
27 concern'. So it says, 'The biodiversity analysis has  
28 identified 34 priority species whose range, habitat and  
29 potential viability are likely to have been significantly  
30 impacted by the bushfires. And they are also known to be  
31 vulnerable to adverse impacts from timber harvesting.'

1           So they are set out in the table and there are a  
2 number of species at issue in the proceedings that are in  
3 the table under 'Animals'. The glossy black cockatoo,  
4 the greater glider, the powerful owl, the smoky owl, and  
5 the sooty owl.

6           If we then turn the page to 3.3, and there is  
7 Figure 1 which is a map that will become relevant. It  
8 says, 'The biodiversity division has conducted analysis  
9 to identify the distribution of the highest value  
10 habitat, i.e. the most valuable 20 per cent of the  
11 habitat across the 34 identified priority species.' So  
12 taking what they described as the bucket of those 34  
13 species, this is what they say is the highest value  
14 habitat. 'It has the potential to provide refuge and to  
15 allow recovery.'

16           And that goes to the point I was making earlier  
17 which is if you are looking at how these species who are  
18 bushfire-affected might recover, you might be looking to  
19 refuge areas which are the unburnt areas. So there's the  
20 map and it's in blue.

21 HIS HONOUR: Yes.

22 MS FOLEY: If I can then take Your Honour to p.9 of the  
23 document and you'll see the blue map has been overlaid  
24 with pink and it says 'Figure 2 - distribution of the top  
25 20 per cent highest value habitat for the basket of  
26 bushfire-impacted priority species.' That's the map we  
27 saw before in blue. And then the pink is the top 20 per  
28 cent highest value habitat for individual identified  
29 priority species. Shown in pink. So you've got both of  
30 those listed there on the map or shown on the map rather.

31           Now, what the regulator then proposes in relation

1 to those areas is very significant in the context of this  
2 application and in looking at VicForests' so called  
3 analysis of its precautionary response. If I can take  
4 Your Honour to 4.1 of the document which is on p.11.

5 HIS HONOUR: Yes.

6 MS FOLEY: And this is the conservation regulator's advice to  
7 VicForests. It's described as its package of integrated  
8 precautionary measures and it has three components,  
9 you'll see there under 4.1. (1) is continued  
10 postponement of harvesting in East Gippsland FMA. (2)  
11 and (3) are relevant here because they're not about East  
12 Gippsland. (2), postpone harvesting in areas of highest  
13 value habitat for the basket. That's the blue area.  
14 (3), survey and mitigate if harvesting is in the best  
15 habitat for identified priority species. When we go to  
16 the detail of (3), that's the pink, it says in the second  
17 paragraph under component 3 - that's on the same page -  
18 'As component 3 of the package' - - -

19 HIS HONOUR: Sorry, slow down.

20 MS FOLEY: Yes. Apologies, Your Honour. I'm going too  
21 quickly. Before I get to (3), let me just pause and show  
22 Your Honour (2). So component 2, you'll see under the  
23 heading 'Postpone harvesting'.

24 HIS HONOUR: Yes.

25 MS FOLEY: The second paragraph under that heading, it says, as  
26 component 2 of the package, the conservation regulator a  
27 postponement of timber harvesting in these areas of  
28 highest value habitat. That's the blue.

29 HIS HONOUR: Yes.

30 MS FOLEY: And then component 3, again the second paragraph  
31 under the heading, it says, 'As component 3 of the

1 package, the conservation regulator advises to avoid  
2 timber harvesting in these locations where possible.'  
3 That's the pink.

4 So we have here the regulator giving advice to  
5 VicForests about the precautionary approach and they've  
6 recommended postponing the blue and avoid where possible  
7 in the pink. All of our coupes subject to this  
8 application are in either the blue or the pink. And that  
9 is the purpose of the map that we have put into evidence  
10 this morning. And it's the second Nesbitt affidavit,  
11 Your Honour.

12 HIS HONOUR: Yes.

13 MS FOLEY: I'm not sure whether Your Honour wants to look at  
14 that now but I can tell you that what it shows is that  
15 we've taken that map that has been provided this OCR  
16 report and overnight, we've simply overlaid where our  
17 coupes are and Your Honour will see, looking at the map,  
18 that they are entirely within either blue or pink.

19 HIS HONOUR: Yes.

20 MS FOLEY: So we say that this is incredibly significant  
21 evidence and one needs to then ask, 'Well, how has  
22 VicForests addressed this advice from the conservation  
23 regulator? What have they told the court about their  
24 response to this?'

25 Now, Mr Gunn deals with the OCR engagement at  
26 paragraphs 36 to 41 of his affidavit.

27 HIS HONOUR: Yes.

28 MS FOLEY: At paragraph 38 he says, 'It's not the OCR's role to  
29 dictate conclusions reached', and we say, well that might  
30 be right, of course; the OCR can't require VicForests to  
31 do anything, but it has given advice in s.4 of this

1 document. It's put forward a proposition for a package  
2 of measures that's based on the current best information  
3 it has available, and that advice includes postponement  
4 of harvesting in areas of highest value habitat and  
5 avoiding, where possible, in the pink.

6 So we say you would expect Mr Gunn to then address  
7 that advice, explain what the package of measures was and  
8 why VicForests has decided not to adopt it, because they  
9 haven't. There is no attempt by Mr Gunn to address that.  
10 He addresses component 3 in paragraphs 40 to 41 in a  
11 limited way, and doesn't address the balance. So Your  
12 Honour will really see no engagement by Mr Gunn with what  
13 we say is the critical part of the OCR advice and  
14 recommendations to VicForests, the parts that have direct  
15 impact on the coupes the subject of this application.

16 So we say in light of this material, the content of  
17 the OCR report, its advice to VicForests, the fact that  
18 VicForests is not following that advice and has not seen  
19 fit to explain that decision-making to the court in the  
20 Gunn affidavit, we say that the court can have little  
21 comfort from a serious question to be tried perspective  
22 that VicForests has complied with its obligations under  
23 2.2.2.2 or 2.2.2.3 in this analysis that it has  
24 conducted.

25 The fourth point, and I can make this very briefly,  
26 Your Honour, is this, and it goes to kind of the heart of  
27 actually what VicForests has done, and when we have the  
28 interlocutory application we'll address this in more  
29 detail, because it's quite detail-intensive.

30 For all of the work VicForests has said that it has  
31 done, and all of the pages that they've put in to the

1 affidavit before the court yesterday, in reality the plan  
2 going forward bears - well, it shows, rather, very little  
3 changes have actually been made to what they're doing on  
4 the ground. It is essentially the same approach, which  
5 is apply existing prescriptions and management that was  
6 in place pre-fires.

7 So they may have engaged in a process, which of  
8 course is how they describe it, it's our process is a  
9 precautionary process, but in terms of real change and  
10 outcomes, it is hard to see any real difference in what  
11 they're doing on the ground. That of course is  
12 surprising to say the least, given the impact of the  
13 bushfires that we already know of on these threatened  
14 species, but in particular in light of what the OCR has  
15 recommended.

16 Those are my points in relation to serious question  
17 to be tried. Before I move on to balance of convenience,  
18 which I can do in quite short form, Your Honour, I just  
19 want to say, the numbers I gave Your Honour about the  
20 number of coupes wasn't right. I'm instructed that there  
21 were 28 in the application. We now know that one of  
22 those has been logged, so there are 27 coupes left in the  
23 application, and five of them we know are presently  
24 active.

25 HIS HONOUR: Yes.

26 MS FOLEY: So can I turn then to the balance of convenience,  
27 and as I say I'll deal with this briefly? We rely on our  
28 written submissions at paragraphs 38 to 43.

29 VicForests' evidence directed to this is in the  
30 Gunn affidavit at paragraphs 70 to 72. That was  
31 yesterday's Gunn affidavit. And there's been some



1 additional evidence given in the affidavit received just  
2 before court began this morning.

3 HIS HONOUR: Yes.

4 MS FOLEY: It is thin evidence. In the affidavit from  
5 yesterday in paragraphs 70 to 72, Mr Gunn asserts - well,  
6 he says that the central highlands is a valuable source  
7 of timber. He says the five acting coupes supply timber  
8 to mills which are financially impacted by the fires but  
9 also by COVID.

10 He puts in no supporting material in relation to  
11 that matter. He has not given any figures in relation to  
12 financial impact, whether for VicForests or for the  
13 mills. There's also no identification of even the source  
14 of that information, so it's very thin in relation to how  
15 we might assess the impact of any - either the injunction  
16 over the whole lot or the five. There's simply not  
17 enough information there to make an assessment in any  
18 real way.

19 Most importantly we say, though, it doesn't address  
20 the fact that the coupes the subject of the present  
21 application, and the other coupes already subject to  
22 injunctive relief, comprise only 3 per cent of the total  
23 number of harvestable coupes. We have given that  
24 evidence through Mr Nesbitt's affidavit at paragraphs 24  
25 to 26, and that is unchallenged either in the evidence  
26 Mr Gunn swore yesterday or today.

27 This morning's affidavit refers back - - -

28 HIS HONOUR: Sorry, which (indistinct) affidavit is that? Is  
29 that the last one, or the one before?

30 MS FOLEY: The one before, Your Honour.

31 HIS HONOUR: Yes.

1 MS FOLEY: This morning's affidavit in relation to balance of  
2 convenience refers back to evidence that was given before  
3 Justice McMillan about financial impact. That evidence  
4 at that stage was also very general and wasn't sufficient  
5 for Her Honour to think that the balance of convenience  
6 outweighed the other matters in issue.

7 The new paragraph, it's paragraph 9 of this latest  
8 affidavit, again says nothing about financial impact in  
9 any specific detail. It also doesn't address the Nesbitt  
10 affidavit. So that evidence we say is critical. The  
11 total number of harvestable coupes when you look at that,  
12 we're only dealing with 3 per cent. It simply hasn't  
13 been addressed, and we've got no figures on which we can  
14 reliably base a balance of convenience analysis looking  
15 at financial impact.

16 Those are my submissions, Your Honour.

17 HIS HONOUR: Thanks very much, Ms Foley. Yes, Mr Collins.

18 MR COLLINS: I'm sorry, Your Honour, I'm just unmuting. Your  
19 Honour, in our submission, Ms Foley's submissions don't  
20 address two key propositions.

21 The first is addressing why it's unlawful to  
22 proceed in these particular coupes, given the adaptive  
23 management measures adopted which are designed,  
24 irrespective of the bushfires, to protect the  
25 preservation of these species in the areas of the coupes.  
26 So the adaptive management measures that are being  
27 applied have that - - -

28 HIS HONOUR: The adaptive management measures are reflected in,  
29 you say, the updated analysis in relation to the  
30 precautionary principle, which doesn't require in its  
31 terms that reference be made to material not currently in

1 existence, but which when it comes into existence may or  
2 may not be relevant material for the purposes of 2.2.2.3.

3 MR COLLINS: That's true, but we would accept, to the extent  
4 that there was uncertainty, a cautious approach is  
5 adopted, so as to, in a proportionate way, protect  
6 against that risk. So we accept the principle applies,  
7 but we say given that it doesn't dictate inaction, what  
8 it dictates is a proportionate response involving  
9 adaptive management measures, there are adaptive  
10 management measures.

11 The purpose of those adaptive management measures  
12 is to ensure steps are taken to retain hollow-bearing  
13 trees and sufficient basal area within the coupe,  
14 including areas to ensure connectivity with other  
15 habitat, and there's nothing in the material to suggest  
16 that those adaptive management measures aren't effective,  
17 and the material suggests - well, is evidence that they  
18 are. So that's the specific coupes.

19 Now, the second proposition really relates to the  
20 possibility that there are prospects of additional  
21 protected reserves, and the answer to that is that the  
22 area of these coupes, given the total area of suitable  
23 habitat to further preservation makes any such risk  
24 negligible, and that's a proposition, if I could go  
25 directly to it, if you go to paragraph 32 of Mr Gunn's  
26 affidavit sworn 9 July 2020.

27 HIS HONOUR: Yes.

28 MR COLLINS: What he deposes there is, good quality habitat  
29 outside of East Gippsland, either in reserves or areas of  
30 state forest which could be used by DELWP to declare  
31 additional IPA's POMAs or SOMAs if it thought that was an

1 appropriate step to take. And we don't dispute that that  
2 might ultimately be a step that's taken.

3 VicForests is proposing to harvest around 35,000  
4 hectares of forest over the next 10 years. That's over  
5 the next 10 years, and then harvesting will stop. If  
6 this was all within the area identified by DELWP as the  
7 top 20 per cent of habitated species of concern, that's  
8 the 20 per cent that Ms Foley took you to in the ACR  
9 response, this would represent only 2.9 per cent of the  
10 total 1,129,000 hectares identified habitat, and that's  
11 for the whole of the 10 year period. This would  
12 represent, over the next six months, and that's not even  
13 during the period of the interim injunction, but over the  
14 next six months, the total area of timber harvesting is  
15 estimated to be 0.1 per cent of the habitat area. That's  
16 of the 20 per cent.

17 HIS HONOUR: But that's really a very high-level analysis or  
18 set of propositions, isn't it, that because it's so  
19 small, really the risk is negligible. There might be all  
20 sorts of reasons why there are continuing threats to the  
21 relevant species. Evidence of that is of course the  
22 bushfires that occurred over the last summer. And so  
23 that the existence of other threats might require the  
24 focus of attention on the impact of even what is on the  
25 figures, a relatively minor reduction in available  
26 habitat. It's just not - it's not answered by that  
27 simple proposition in figures, is it?

28 MR COLLINS: Well it is, if the proposition is that we're  
29 diminishing the available habitat to the extent that  
30 there won't be areas available, additional suitable areas  
31 of habitat if the IPA SOMA, these are the areas reserved

1 for complete exclusion of logging within this top 20 per  
2 cent of habitat. None of this is directed to these  
3 particular coupes. So these particular coupes represent  
4 a very small and negligible proportion of the areas that  
5 would be available for designation as protected areas it  
6 was ultimately decided to introduce regulations to do so.

7 And there's nothing in the material which indicates  
8 these coupes or that harvesting, in accordance with the  
9 adaptive management measures that are adopted - - -

10 HIS HONOUR: But the response might not, of course, just be  
11 limited to designating further IPAs POMAs or SOMAs; the  
12 response recommended or required might extend to methods  
13 of harvesting and restrictions that go significantly  
14 beyond the adaptive management measures currently in  
15 place by VicForests.

16 MR COLLINS: Well, there's nothing in the material to suggest  
17 that, and we have in fact conducted a review concerning  
18 the management measures, and are presently adopting  
19 measures that go beyond the mandatory requirements  
20 embodied in the Code, and that's what the material  
21 establishes. So in theory what Your Honour's - - -

22 HIS HONOUR: Ms Foley puts two propositions in respect to that,  
23 as I understand it. It is hard to get your head around  
24 so much material, but as I understand it, two  
25 propositions. One is that the steps you put in place  
26 were for all practical purposes in place prior to the  
27 2019-2020 bushfires, and so really take no account of  
28 something that on any view requires that it can't be  
29 shaken. And second, that your response isn't in  
30 accordance with the recommendations of the OCR in the  
31 relevant ways. No doubt you'll come to that.

1 MR COLLINS: Yes. Well, can I direct to both of those  
2 propositions immediately? It's true that there's no  
3 substantial change in the appropriate management  
4 measures, but they already exceeded, and they already had  
5 the objective of ensuring the preservation of these  
6 species. That's the whole purpose of them.

7 HIS HONOUR: Of course, that's the purpose, yes.

8 MR COLLINS: Yes. There's nothing to suggest, and no material  
9 or argument to advance why those measures are inadequate  
10 and don't continue to be adequate to achieve that  
11 objective, and if they are, and the logging is occurring  
12 in areas remote from the affected burnt areas, there's no  
13 reason to presume that they would cease to be adequate  
14 for that purpose. These are all species that required  
15 protection before the fires.

16 HIS HONOUR: Yes, I understand that.

17 MR COLLINS: So it's not as though we're reviewing to make it  
18 safe to conduct logging in this way without proportionate  
19 measures to avoid the risk of extinction of the species.  
20 That's the risk, the risk of extinction of a species, of  
21 species already at risk of extinction. So all of these  
22 pre-existing measures adopt the very same risk.

23 Now, the aggravation of the risk results from the  
24 loss of populations of the species potentially, or at  
25 least large numbers of them, and of habitat in a  
26 different area, and the question what response does that  
27 call for in areas that are remote from the affected  
28 areas.

29 HIS HONOUR: Yes.

30 MR COLLINS: And the analysis has addressed that, and it  
31 addresses it critically in these two respects, by

1 reviewing the adaptive management measures, and there's  
2 no material at all to suggest that the review hasn't been  
3 properly conducted, and that the steps don't have the  
4 result.

5 Now, the second is the fact that's correct, that  
6 some logging has continued, representing a very  
7 negligible area within the top 20 per cent habitat  
8 identified in the subject of the recommendation for  
9 consideration by the OCR.

10 Now, the evidence establishes that it was  
11 considered, and I'll take you to the exhibits Foley went  
12 to. It doesn't follow that you had to accept it, and if  
13 you didn't properly engage in the process.

14 HIS HONOUR: Yes, well, I didn't think that was the point that  
15 Ms Foley made. I didn't think she made the point that  
16 you had to accept it. I thought the point she made was,  
17 there was no evidence as to how it was taken into  
18 account, if at all.

19 MR COLLINS: Well, paragraph 32 declares that, deals with that,  
20 because it looks at what percentage of the habitat that's  
21 to be preserved is represented by these coupes where  
22 adaptive measures have been reviewed and are being  
23 applied, and I'll take you to the passage of the OCR  
24 report that contemplates that that could be an  
25 appropriate response and is to be considered.

26 Thirty-three addresses it. Even if areas have been  
27 recently harvested using variable retention harvesting or  
28 other selective harvesting methods, the threes which  
29 remain will provide suitable habitat for either greater  
30 gliders, powerful owls or sooty owls, so harvesting using  
31 these methods is not an impediment to DELWP subsequently

1 identifying further IPAs, POMAs or SOMAs in these areas.  
2 That's even within this 0.1 per cent, if it thought that  
3 was desirable, over 4,600 hectares of the current IPAs  
4 were made up of areas harvested since 2011.

5 In paragraph 38 Mr Gunn deposes that a part of  
6 VicForests discussions with DELWP and the OCR - but this  
7 is one voice amongst many voices to be taken into account  
8 in the synthesis of all the information in making the  
9 decisions about responsible harvesting in accordance with  
10 the precautionary principle, and he deposes that they  
11 made it clear that it was not their role to approve  
12 VicForests precautionary principle analysis, but rather  
13 to assist VicForests to undertake a careful analysis, but  
14 not dictate the conclusions reached by VicForests. And  
15 if I then take you to the report that Ms Foley took you  
16 to, JNG 8, paragraphs - at pp.11 to 12.

17 HIS HONOUR: Yes.

18 MR COLLINS: The first thing I want to note is that it's not as  
19 though this was ignored. Continued postponement of  
20 harvesting in East Gippsland forest management area and  
21 the response isn't a response that just focuses on these  
22 coupes. It focuses on the total response to the impact  
23 of the fires and it's very misleading if all you do is  
24 address these particular coupes rather than the overall  
25 review and response. And there's been significant  
26 responses which is the most critical response which is in  
27 the fire affected areas.

28 The other thing to note is that within the 20 per  
29 cent habitat there's significant areas in the vicinity of  
30 the fire-affected areas which is the areas where it's  
31 going to be noted as significant because that's - - -



1 HIS HONOUR: Can you say that again?

2 MR COLLINS: Yes. It's the areas that are affected by the  
3 fires that it's going to be most important to address in  
4 terms of the restoration and preservation of the  
5 population of these species.

6 HIS HONOUR: Where's the evidence that establishes that  
7 proposition?

8 MR COLLINS: Well, that's the recommendations and that's in the  
9 report - - -

10 HIS HONOUR: The OCR recommendations?

11 MR COLLINS: The OCR recommendations focuses on that and the  
12 other reports that make it clear. They're exhibited to  
13 the most recent Jacobs affidavit. Some of the passages  
14 that my learned friend took you to and Your Honour made  
15 observations about which I will go to.

16 HIS HONOUR: Yes.

17 MR COLLINS: But I mean, Ms Foley focuses - as can be  
18 understood - on the fact that we haven't adopted every  
19 single recommendation or suggestion in the most extreme  
20 extent of it as a result of the precautionary principal  
21 analysis. That's true. We didn't adopt and preclude all  
22 logging in this 20 per cent habitable. There's a very  
23 small area subject to the adaptive measures.

24 Now, at pp.11 and 12, you'll see 'where timber  
25 harvesting' at the bottom of the page. It follows on  
26 from what Ms Foley took you to. 'Where timber harvesting  
27 is proposed in these locations VicForests' - - -

28 HIS HONOUR: Sorry, can you just tell me which sections you're  
29 reading from?

30 MR COLLINS: It's in this section - - -

31 HIS HONOUR: On p.11 or 12?

1 MR COLLINS: At the bottom of p.11.

2 HIS HONOUR: Yes, right, I've got it. Yes, thank you.

3 MR COLLINS: In the section that my learned friend took you to  
4 under component 3 which is the component she focuses on,  
5 ignoring that we have adopted the other recommendations  
6 and that we haven't ignored this in that what we're doing  
7 is consistent with the passage I'm about to take you to.

8 HIS HONOUR: Yes.

9 MR COLLINS: Where timber harvesting is proposed in these  
10 locations, VicForests should (1), ensure that each  
11 proposed timber harvesting coupe is surveyed to assess  
12 the presence of the identified priority species for that  
13 FMA.' Now, we accept that these species are present or  
14 likely to be present in these coupes and that the  
15 adaptive management measures necessary for the  
16 preservation of the species in the vicinity of the coupes  
17 is preserved which involves the retention of  
18 hollow-bearing trees and a minimum requirement of 40 per  
19 cent of the basal area and you'll see that we mostly  
20 exceed that. And certainly where there's a particular  
21 intensity of hollow-bearing trees, that area containing  
22 them and we exceed the mandatory requirements as we did  
23 before but it addresses these suggestions.

24 (2), modify any timber harvesting activity at that  
25 site to avoid or mitigate adverse impacts on the  
26 identified priority species and, where appropriate, the  
27 habitat requirements. So we've reviewed that and  
28 determined that the timber harvesting activities are  
29 being conducted in a way which does mitigate the impact  
30 on those species. And there's nothing in the material to  
31 suggest that that is not adequate and it's simply

1           asserted where there's no basis for it, despite a careful  
2           analysis being conducted, the fact that we've always been  
3           subject to the supervision or review of the OCR.

4           And if the OCR felt strongly that we were acting  
5           contrary to the recommendations in a way which seriously  
6           threatened the extinction of the species even adopting  
7           the admittedly appropriate cautious approach, then  
8           there'd be authority for the OCR to give a direction  
9           under s.70 of the Sustainable Forest (Timber) Act. And  
10          it's aware of what's being done and it hasn't considered  
11          it necessary or appropriate to take that step.

12 HIS HONOUR: Yes.

13 MR COLLINS: So it's not too correct that because we haven't,  
14          after considering the recommendation, adopted it in its  
15          entirety that we are acting unlawfully. And that's how  
16          high our learned friends have to put their argument.

17          So that, with respect, addresses directly the  
18          proposition our learned friends put on the serious  
19          question. I'll go to them regrettably in some detail as  
20          to the relevant principles. But that's a direct  
21          response, because there are only two ways it's put.

22          The particular coupes, and there's no evidence  
23          relating to the particular coupes, creating concern about  
24          what's being done, and that appropriate adaptive measures  
25          aren't in place following the precautionary principle  
26          review, and the second is that we're not following or  
27          haven't adopted a recommendation made by the OCR for our  
28          consideration, which wasn't in terms absolute. There was  
29          consideration of how you'd mitigate the risk by  
30          appropriate adaptive management measures if they were  
31          harvested, and the area is such that it can't materially

1 limit the ability to identify suitable habitat or  
2 additional reserves, if that's what is concluded ought to  
3 be done, particularly in this area, and it's likely  
4 additional areas of reserves are required that will be in  
5 the burnt areas, because that's where the species has  
6 been impacted.

7 HIS HONOUR: Yes, I'm not sure. I'm just not sure that's  
8 right. I mean, those are the areas that were impacted  
9 last summer.

10 MR COLLINS: That's true. That is true. And if the numbers  
11 meant - - -

12 HIS HONOUR: If all we do is chase our tail, then perhaps it  
13 will only end up in one place.

14 MR COLLINS: That's true. I'm not saying it doesn't have to be  
15 preserved elsewhere, but all the measures necessary to  
16 preserve the central highlands population were in place.  
17 Now it may be that because of - - -

18 HIS HONOUR: Well, isn't the question that - I know you say  
19 that, but might not part of a review be, well, if there's  
20 the risk of that sort of fire, do we in fact need other  
21 protective measures in place in somewhere that wasn't  
22 impacted by the fire during the last summer, but could  
23 be, so as to - - -

24 MR COLLINS: Well, for example, that's true, the sort of things  
25 they do suggest. Preservation and reduction of risk of  
26 fire impact.

27 HIS HONOUR: Or setting aside further areas, or - - -

28 ]MR COLLINS: That's true.

29 HIS HONOUR: - - - taking a different approach to timber  
30 harvesting in areas that are to be harvested.

31 MR COLLINS: All that's true, and all that could have been and

1 has been considered. But our learned friends would have  
2 to say, having considered it, 'We were obliged to reach a  
3 different conclusion', and only a different conclusion  
4 could be reached, or given the nature of the Commonwealth  
5 and state reviews, and notwithstanding they're not  
6 addressing directly this point, and there's nothing to  
7 indicate in the material they're about to, our option is  
8 then to cease entirely coupes in which these species are  
9 present or the habitat is present until that is  
10 concluded. And there's no support for that proposition,  
11 either in the material or in the legal principles. And  
12 that's how far our learned friends would have to go.

13 And then if I could then move before going through  
14 it in more detail, I'm really addressing directly the  
15 fundamental points our learned friends made in oral  
16 submissions, balance of convenience.

17 If you go to paragraph 9 of Mr Gunn's affidavit  
18 from this morning, it just demonstrates how unrealistic  
19 it is to say there's a lot of available logging area that  
20 you could divert to. It's not as though you just take  
21 your logging trucks and chainsaws and go to a different  
22 coupe. There's a lot of preparation and planning  
23 required. Amongst other reasons, to protect threatened  
24 species, ensuring that you're preserving the area that's  
25 got to be preserved; you identify the hollow-bearing  
26 trees, obtaining safe access and the like.

27 In paragraph 9 Mr Gunn refers to paragraph 70 and  
28 following of my first affidavit in relation to the impact  
29 of these injunctions on VicForests' ability to harvest.  
30 All contingency coupes in the central highlands, which  
31 are coupes which would otherwise be moved up the schedule

1 for harvest and have detailed planning and mapping, are  
2 already enjoined save for one coupe.

3 So there are no other coupes that can be harvested  
4 immediately or within the very near future, because those  
5 in which the planning and mapping had been done, and  
6 therefore were ready to go for any reason the plan  
7 couldn't be followed, are enjoined. There are no other  
8 contingency coupes to harvest over the winter period,  
9 including no coupes with the requisite harvest type, for  
10 example ash.

11 There are also two of the five active coupes in  
12 which this is the contractor's last coupe harvest for the  
13 season, and they are also not scheduled to resume until  
14 after winter.

15 So it's a significant thing to stop logging, which  
16 will impact the available supply of timber to sawmills.  
17 It impacts - and the purpose, the statutory purpose that  
18 VicForests performs isn't to make money, but that's not  
19 its objective, its objective in its establishment is to  
20 manage sustainable harvesting of logging in a way that  
21 takes account and protects the environment, but over the  
22 10 years over which logging is to continue in Victoria,  
23 it's done in a sustainable way that supports the  
24 industry, including the sawmills and the industries that  
25 rely upon the provision of the timber.

26 So to stop this logging that's being conducting in  
27 a carefully regulated manner, where there are lots of  
28 protections embodied in the legislative scheme, is a big  
29 step to take and has very serious adverse consequences.  
30 It prohibits VicForests from performing its function,  
31 which is an important function. Part of it is the

1 protection of the environment, which it must and does  
2 perform by - and has, including by the precautionary  
3 principle assessment. But it also has an equal function  
4 in responsible logging, enabling sawmills to continue to  
5 operate, and to provide an ongoing supply of timber.  
6 That's required.

7 And that's the adverse consequence to see where's  
8 the balance of injustice, what will cause the least  
9 injustice. And that's particularly so in circumstances  
10 which, for the reason we've advanced - I've advanced  
11 orally so far this morning, and in our written  
12 submissions, and was acknowledged that the highest you  
13 could put the plaintiff's case is, it seems a weak case,  
14 but we'd say there is no serious question to be tried for  
15 the reasons we've advanced.

16 And we accept that before the precautionary  
17 principle analysis had been performed, and because it has  
18 to be a decision based on the current circumstances, not  
19 at the time - a prior time when planning was done, that  
20 there was a basis at the times the previous injunctions  
21 were granted, but that was at least an arguable case.  
22 It's a very different circumstance now, when the  
23 precautionary principle analysis has been performed and  
24 completed.

25 Now Your Honour, that's the broad overview of how  
26 we put our case opposing the interim injunction.

27 HIS HONOUR: Yes.

28 MR COLLINS: Can I start off by saying, the principles to be  
29 applied aren't in dispute, save to the extent perhaps to  
30 a minor extent, that the submissions that Ms Foley made  
31 concerning is required by the precautionary principle.

1           We don't see that being a significant difference in  
2 point of principle. Of course what has to be looked at,  
3 what will be achieved on the ground by the measures  
4 adopted, but that's not to say that the court itself has  
5 to step into the shoes of regulator as if it was  
6 performing the regulator's role - I'm sorry, Forests  
7 Victoria's role in assessing the logging that should be  
8 performed, and the way in which it should be performed.

9           The court of course will find it is unlawful if we  
10 have not applied the precautionary principle, and in  
11 doing so have regard to what the consequences will be on  
12 the ground, but that's just to say that it's no point  
13 having protections that can't be implemented. There's no  
14 suggestion that the adaptive management measures that are  
15 in place aren't being or can't be implemented, so that  
16 point of difference goes nowhere.

17           But the principles are set out in our submission in  
18 MyEnvironment. In our submissions we refer to passages  
19 in the decision that's referred to, Brown Mountain, but  
20 Your Honour can be informed as to the relevant statutory  
21 framework and the principles by Justice Osborn's decision  
22 in MyEnvironment, which is [2012] VSC 91. And there's  
23 nothing inconsistent in what His Honour says in that  
24 decision, and the principles he identifies in his  
25 previous decision in Brown Mountain.

26           If Your Honour goes to paragraphs 7 to 16, you'll  
27 see His Honour sets out that the background to the  
28 dispute in that case, which was a case which had great  
29 similarities, because it concerned the extent to which  
30 logging in a coupe could proceed, given the significance  
31 of the impact of the 2009 Black Saturday bushfires.



1           And at paragraph 16, 'MyEnvironment's case is  
2           founded on two propositions, which in themselves are  
3           broken into alternatives. The first is, the logging of  
4           the Toolangi coupes is unlawful, because they comprise or  
5           contain zone 1A forests as defined in the LBP action  
6           statement for the relevant forestry management plan'.  
7           And we ignore that. 'There's no suggestion that the  
8           prescriptive mandatory requirements that exist to protect  
9           these species are not being complied with', and it's  
10          important that this is in the context of the carefully  
11          planned regime for the protection of the environment,  
12          including these threatened species.

13           The second proposition was that, 'The logging at  
14          the Toolangi coupes is unlawful because it would breach  
15          the precautionary principle having regard to underlying  
16          considerations and ecological sustainable development,  
17          and the need to complete a series of alternative adaptive  
18          procedures as a precondition to any further logging'.  
19          And it has that similarity.

20           But what our learned friends submit is, the  
21          adaptive procedure is to stop all logging in any area in  
22          which there's habitat or the presence of an endangered  
23          species, which is a very big step, to say it goes that  
24          far.

25           Importantly for present purposes, His Honour sets  
26          out the statutory framework in great detail, in  
27          paragraphs 48 through to 107, which I won't take Your  
28          Honour through, but it's important to note that our own  
29          consideration of the risk to the environment is not the  
30          only protection. For example, there's the protection of  
31          the ability to make directions that I referred you to

1 before.

2 HIS HONOUR: The OCRs, s.70 of the - yes.

3 MR COLLINS: Yes. So it's not as though it's just up to us.

4 That doesn't mean, and we accept of course that we have  
5 an important role, and we have an obligation in  
6 performing the logging to have regard to the  
7 precautionary principle when there are changed  
8 circumstances, and we accept that there is a relevant  
9 changed circumstances, and therefore as was very quickly  
10 a cessation of logging in the areas affected, and a  
11 broader consideration that has been conducted.

12 His Honour deals with the precautionary principle,  
13 which I won't go through all of that, but for example at  
14 paragraph 95 of his decision - I'm sorry, management  
15 procedures. He's simply noting there that are approved  
16 action statements and forestry management procedures in  
17 relation to threatened species. Now we go further than  
18 any of those requirements and of course, they are  
19 designed to ensure that where threatened species are  
20 present, those procedures and the action statement  
21 protect the species from extinction. But they're  
22 appropriate steps in terms of adaptive measurement  
23 procedures, some of them are mandatory and we go beyond  
24 those.

25 At paragraph 260, His Honour commences a  
26 consideration of the preliminary - the proportionally  
27 principle and make statements that aren't in dispute.  
28 There are two quotations of previous authorities. In  
29 261, His Honour refers to the underlying notion of  
30 precautionary principles stated by Justice Stone in  
31 Leatch v National Parks Wildlife Service and the

1 citation's in the footnote.

2 'The precautionary principle is a statement of  
3 common sense and has already been applied by the decision  
4 makers in appropriate circumstances prior to the  
5 principle being spelt out. It is directed towards the  
6 prevention of serious or irreversible harm to the  
7 environment, in situations of scientific uncertainty.  
8 Its premise is that where uncertainty or ignorance  
9 exists, concerning the nature and scope of the  
10 environmental harm, whether this follows from policies,  
11 decisions or activities, decision makers should be  
12 cautious'.

13 So cautious is approach where there's a risk of  
14 extinction of a species and when it's - there's  
15 uncertainty, you have to address that uncertainty and  
16 adopt a cautious approach. There's no suggestion that  
17 that hasn't been the approach adopted. Then in 262, 'The  
18 notion of cautiousness was discussed by Justice Wheeler  
19 in Bridgewater Greenbushes Friends of the Forest Inc  
20 Incorporated v Executive Director of Conservation and  
21 Land Management. In that case, the plaintiff sought a  
22 declaration that proposed logging operations where it had  
23 breached a precautionary approach and sought an  
24 injunction restraining the defendant (indistinct) in and  
25 out. In the course of her judgment, Her Honour observed  
26 - and there's a passage from the judgment, I won't read  
27 it all, but it finishes with these sentences. 'Although  
28 there has been very little judicial consideration,  
29 precautionary approach or precautionary principle, a  
30 similar or perhaps identical concept which appears in a  
31 number of intergovernmental agreements, the clear thread

1 which emerges from what consideration has been given to  
2 the approach, is that it does dictate caution, but it  
3 does not dictate inaction and it will not generally  
4 dictate one specific course of action to the exclusion of  
5 others'.

6 And in the beginning of the quoted passage begins,  
7 'Adopting for the moment, a very broad characterisation  
8 that the precautionary approach, a requirement the  
9 decision maker be cautious, says something about the way  
10 in which the decision must be made. There must be some  
11 research or reference to available research, some  
12 consideration of risks and a more pessimistic rather than  
13 optimistic view of the risks should be taken. However,  
14 such a requirement does not in any particular case  
15 specify precisely how much research are to be carried out  
16 or when a risk should be considered to be so negligible,  
17 but it may be safe to disregard it. Still least as such,  
18 an approach dictated what precautions of action must be  
19 taken after the possibilities have been cautiously  
20 weighed'.

21 Now Your Honour there's nothing in the material to  
22 make good a proposition, that is not what has occurred,  
23 that there has not been a cautious weighing of the  
24 possibilities and the assessment, and that's what's  
25 required to make good the unlawfulness that is alleged.  
26 And consistent with this approach is the passage quoted  
27 from *Telstra Corporation v Hornsby Shire Council* at  
28 paragraph 272 of my list.

29 The quoted passage from the judgment of Chief  
30 Justice Preston is 'The application of precautionary  
31 principle and the comments that need to take

1 precautionary measures is triggered by the satisfaction  
2 of two conditions, reasonable thresholds, a threat of  
3 serious or irreversible environmental damage and  
4 scientific uncertainties environmental damage. These  
5 conditions or thresholds accumulative, once both of these  
6 conditions or thresholds are satisfied, a precautionary  
7 measure may be taken to avert the anticipated threat to  
8 environmental damage, but it should be precaution'.

9 Now it doesn't mean that as soon as there's a risk  
10 and as soon as there's uncertainty, it dictates inaction  
11 until the greater scientific certainty is ascertained.  
12 It means a tortious approach must be adopted, to mitigate  
13 against the risk, in a proportionate way. In that  
14 decision at paragraph 275, His Honour made the  
15 observation. 'VicForests concedes that it is not in  
16 dispute LBD', that's Leadbeater's possum, 'is endangered  
17 to threaten species. What is disputed is that logging in  
18 the subject coupes, will of itself constitute or will  
19 create serious or irreversible damage to the Leadbeater's  
20 possum or Leadbeater's possum habitat'.

21 And it has to be to the extent that it is a serious  
22 or irreversible risk of extinction of species. That's  
23 the risk that's being preserved. That's what it's  
24 directed to and in the specific coupes, there is nothing  
25 in the materials to suggest that the logging in those  
26 coupes, in accordance with the adaptive management  
27 measures which significant extent are dictated by the  
28 forestry management plan and by the code, and which are  
29 exceeded by the adaptive management measure adopted are  
30 inadequate, consistent with the cautious approach to  
31 ensure the preservation of the species in those

1 locations.

2 And for the reason submitted, nor is the extent to  
3 which those coupes within total - top 20 of habitable for  
4 the 34 species to be given most urgent consideration,  
5 that the logging in accordance with those management  
6 measures of these particular coupes and isn't consistent  
7 with the cautious approach.

8 At paragraph 295, after further consideration, what  
9 His Honour concluded in relation to the particular coupe  
10 under consideration was that it is not possible to  
11 conclude that the variable retention harvesting of  
12 Gunbarrel is likely to cause loss of habitat which would  
13 materially affect the overall provision of areas which  
14 provide habitat and potential habitat for the Leadbeater  
15 possum.

16 And the same can be said here although there are 26  
17 coupes to the - over the total period to be logged but in  
18 accordance with the adaptive management measures. Is  
19 that going to materially affect the overall provision of  
20 areas which would provide habitat, potential habitat for  
21 these species? Particularly having regard to the  
22 dispersal of suitable habitat in the material in the OCR  
23 report. There's a wide range of suitable material -  
24 habitat for them. And this is not a material or  
25 significant part of that habitat. And it's not as though  
26 the logging is being conducted without regard or suitable  
27 adaptive measures to enable the species to survive in  
28 those areas despite the logging that's to occur.

29 Then at 298 and following, His Honour considers the  
30 significance that there was ought to be and would be  
31 ongoing review of the current reserve exclusion zone.

1 That's in 298. Evidence of the overall strategic review  
2 of the current reserve or exclusion zone system as a  
3 result of the 2009 fires. And he considers that evidence  
4 from paragraph 295 through to 307. He then notes that  
5 VicForests has accepted the application for variable  
6 retention harvesting of Gunbarrel in accordance with the  
7 second strategy reported in the letter. So it was  
8 acknowledging the significance that there were protective  
9 measures in the way in which the harvesting would be  
10 performed. And then he concludes that none of the  
11 material established, that there was a prospect of  
12 material that would be produced directed to the logging  
13 in the specific coupes at any short time which meant that  
14 the appropriate action was inaction. To simply suspend  
15 until those reports were completed.

16 Now, in Browns Mountain of course, there was a  
17 finding that it would be suspended but that was a  
18 specific report which would directly impact on the  
19 logging in the particular coupe to be completed shortly.  
20 And when you go to the material that the plaintiffs rely  
21 upon, it is clear that it is not focused in that way,  
22 directed either very directly to the Central Highlands  
23 region at all. Certainly not in a way that would  
24 directly impact these particular coupes or that the  
25 logging (indistinct) these conducted coupes would  
26 materially restrict the implementation of possible  
27 recommendations in a way that's likely to be prejudicial  
28 to the appropriate measures to ensure the survival of  
29 these species (indistinct) soon to occur.

30 So if the plaintiff's position were accepted as the  
31 appropriate response, it would say stop logging anywhere

1 in any part of the habitat or potential habitat of these  
2 species which would be inconsistent with adopting of a  
3 proportionate and balanced approach, accepting that a  
4 cautious approach is required.

5 Your Honour, if I could then go to Mr Gunn's  
6 affidavit.

7 HIS HONOUR: Yes.

8 MR COLLINS: The introductory paragraphs are his background and  
9 the correspondence which I need to take Your Honour to  
10 are the first seven paragraphs. Paragraphs 8 to 10 are -  
11 really, 8 through to 12 - are relevant to identifying the  
12 coupes that would be affected and we'd accept that all of  
13 those coupes other than (indistinct) if we get to it we  
14 can identify the relevant coupes. But there's five  
15 coupes referred to in paragraphs 8 or 9 where there's  
16 harvesting or logging being conducted. The Blue Streak  
17 coupe our learned friend doesn't press.

18 HIS HONOUR: Is completed. Yes.

19 MR COLLINS: The Myrrh and Frankincense coupes - there'll be no  
20 return of contractors until October. So there's no  
21 interim injunction required in respect of those. In  
22 paragraphs 11 to 12, there are a further 20 coupes  
23 listed. Only seven of those coupes are scheduled for  
24 harvest in July. And we will be proposing a date for the  
25 interlocutory hearing in early August. I'll just check  
26 if that's correct. So that it would be those that may  
27 otherwise be logged in (indistinct). So that deals with  
28 the scope of any interim injunction if one should be  
29 provided - - -

30 HIS HONOUR: Just let me clarify that. So if there were the  
31 interlocutory injunction hearing in early August, then



1 the scope of the interim relief here would be limited to  
2 those coupes identified in paragraph 8.

3 MR COLLINS: Yes.

4 HIS HONOUR: And then the other seven coupes identified in  
5 paragraph 11 as being schedule for harvesting in July.

6 MR COLLINS: Yes.

7 HIS HONOUR: So a total of 12 coupes. Is that right?

8 MR COLLINS: Yes.

9 HIS HONOUR: Yes, I see.

10 MR COLLINS: Then in paragraph 13 and following, he sets out  
11 the precautionary principle analysis, and there's been no  
12 challenge that that analysis is consistent with the  
13 principles relating to the precautionary principle, other  
14 than directing that consideration didn't result in the  
15 acceptance of a matter raised for consideration, in  
16 circumstances where there's no reason why all  
17 recommendations from one of the persons contributing to  
18 the matters to be weighed in making a decision was not  
19 entirely accepted.

20 HIS HONOUR: Well, I think there were two criticisms, weren't  
21 there? The other one was that it's an empty analysis  
22 which doesn't result in any change to the situation that  
23 existed prior to the 2019-20 fires.

24 MR COLLINS: No, in relation to these coupes that's true, but  
25 it's not true, because there are a range of measures in  
26 the fire-affected areas. It's not as though there's no  
27 change - there are a whole series of steps that are quite  
28 significant steps in the fire-affected areas and areas  
29 adjacent to them, and of course the logging that is  
30 continuing in areas that aren't close to the  
31 fire-affected areas is already subject to all the

1 controls for the preservation of all threatened species  
2 that exist, and consideration given to the extent to  
3 which any additional (indistinct) might be required or  
4 recommended or imposed, but the ability to do so would be  
5 impacted by the extent of the logging that is to occur.

6 But it's not true that it was simply no change.

7 That would be quite misleading.

8 HIS HONOUR: Yes.

9 MR COLLINS: And then it's set out in some detail, the people  
10 who are involved, and the precautionary principle as set  
11 out in the following documents. So there is a disclosure  
12 of how it was done. For example, if Your Honour wanted  
13 to, we could go to Exhibit JMGI, which is the detail of  
14 the report. But our learned friends have done that, and  
15 they've made no challenge to the fact that it has been  
16 conducted, and it did involve the consideration of the  
17 material available.

18 And then the results are all set out in the Excel  
19 spreadsheets entitled 'Adaptive management prescriptions  
20 fire-impacted species of concern', which are  
21 prescriptions developed in accordance with the  
22 precautionary principle for the protection of species of  
23 concern when harvesting of timber in fire-affected and  
24 non-fire-affected areas. So it involved both, and most  
25 of the significant steps, which isn't surprising, relate  
26 to the fire-affected areas or areas adjacent to them.

27 VicForests' method for undertaking the  
28 precautionary principle analysis is then dealt with, and  
29 there's no challenge to the approach that is adopted and  
30 the method. He refers to the code and the principle, and  
31 I needn't take you to the detail because it's set out

1 there and there's no challenge that that is a process  
2 that complies with the precautionary principle.

3 And then the content of the precautionary principle  
4 analysis set out, and a summary is given of the effect of  
5 it, is set out in the appendix. Now, to go through the  
6 appendix, Your Honour, takes a long time. It  
7 considerations of each of the 34 species and indicates  
8 what should be done in response both in fire-affected and  
9 non-fire-affected areas. And that is consistent with the  
10 responses of the state and the Commonwealth, which  
11 focuses on both, doesn't disregard that there may be  
12 steps in other area, but the focus is on those most  
13 directly affected or adjacent to the affected areas, and  
14 that's made good in paragraph 34.

15 The risk assessment was conducted on 34 species of  
16 concern identified by the Department of Environment, Land  
17 and Water and Planning Biodiversity Division as  
18 bushfire-impacted, which could also potentially be  
19 impacted by timber harvesting. These are set out in  
20 column A.

21 The first step was to assess the fire impacts on  
22 each of the species of concern by reference to the impact  
23 on their habitat, both in reserves which were not  
24 available for the timber harvesting, and areas of state  
25 forest which were available for timber harvesting.

26 Then the second step in the risk assessment was to  
27 evaluate the vulnerability of the species to timber  
28 harvesting, both at a state-wide and FMA level, including  
29 the harvesting in these coupes, and including taking into  
30 account the adaptive management measures in place.

31 In 24, if there is a non-negligible threat of

1 serious or irreversible damage to the environment which  
2 is attended by mature scientific uncertainty, s.6.1 of  
3 the VicForests forests management plan required timber  
4 harvesting to be put on hold unless the following  
5 circumstances apply: (1) the threat of serious  
6 irreversible harm to the environment is low; (2) the  
7 threat of serious irreversible damage to the environment  
8 can be addressed by adaptive management; and (3) the  
9 measures to be implemented is proportionate to the  
10 threat. And that's the approach that's been adopted and  
11 essentially it's that even before it was accepted that  
12 there was a serious irreversible damage to the  
13 environment in areas of habitat for these species which  
14 required adaptive management. That was required, and  
15 it's been reviewed.

16 As to the second matter which VicForests must be  
17 satisfied about, the precautionary principle assessment  
18 concluded that any threat or serious or irreversible  
19 damage to the environment could be addressed by effective  
20 management.

21 And there's nothing that precludes that conclusion  
22 being properly made in accordance with the legal  
23 obligations, including the application of the  
24 precautionary principle.

25 HIS HONOUR: Yes.

26 MR COLLINS: And then he sets out, 'The evaluation which  
27 underpin the conclusions in column A was based largely on  
28 whether the various prescriptions were sufficient to  
29 provide the habitat requirements for the particular  
30 species identified in column G'. That's really critical.  
31 That was the objective before and after, and it's been

1 reviewed.

2 At 27, 'For example by surveying the coupe for  
3 hollow-bearing trees, the harvesting plan can be  
4 developed that affords the protection of additional  
5 hollow-bearing trees at a level significantly beyond that  
6 prescribed in the management standards, which benefits a  
7 range of hollow (indistinct) fauna, including owls,  
8 possums and gliders. The management standards prescribe  
9 the retention of at least 40 hollow-bearing trees per  
10 hectare, effectively four hollow-bearing trees per  
11 hectare.

12 In the central highlands, table 12 in appendix 3 on  
13 p.75 of the management standards, but under forest  
14 variable retention methods of harvesting implemented  
15 since July 2019, 'Either 10 habitat trees per habitat,  
16 variable retention system 1, or 20 habitat trees per  
17 hectare, variable retention system 2, are retained. The  
18 increased retention of hollow-bearing trees, and the use  
19 of corridors to provide connectivity between patches of  
20 retained trees, another adaptive management prescription  
21 have been found to provide ongoing habitat for owls,  
22 gliders and possums.

23 'Preliminary post-harvest surveys on a direct  
24 number of coupes have found arboreal mammals and owls to  
25 persist in these areas. The team undertaking the  
26 precautionary principle assessment took these matters  
27 into account in evaluating whether any risk of serious or  
28 irreversible harm to these species from timber harvesting  
29 could be addressed by effective management'.

30 Now, that in short terms means, whether the species  
31 will continue to survive by preservation of the

1 hollow-bearing trees they require, and sufficient area to  
2 support the species, and the retention of connectivity  
3 corridors so that there's connectivity with other  
4 suitable habitat.

5 And that is consistent, for example, if you go to  
6 the exhibits to the most recent affidavit of Ms Jacobs,  
7 the species-specific report on the greater glider, that's  
8 Exhibit BJ169 to the affidavit of Dayna Jacobs sworn on  
9 8 July. That's a document that was published based on -  
10 it's effective from 5 May 2016, the delegate of the  
11 Minister approved this conservation advice on  
12 25 May 2016. But what it addresses, importantly, is  
13 what's necessary to preserve in an area so as to not  
14 impede the ability, or to properly adopt measures to  
15 ensure that the greater glider can survive in the area,  
16 notwithstanding some logging occurring.

17 And you'll see at pp.60 and following, the  
18 recommendations, for example, timber production. Prime  
19 habitat coincides largely with areas suitable for  
20 logging. The species is highly dependent on forest  
21 connectivity and large, mature trees. Glider populations  
22 could be maintained post-logging if 40 per cent of the  
23 original tree basal area is left. Logging (indistinct  
24 words) above this threshold.

25 So those sorts of recommendations, that's what  
26 informs the adaptive management measures, and there's no  
27 suggestion that there hasn't been proper regard to this  
28 sort of scientific material and research in ensuring what  
29 adaptive measures are appropriate to enable the  
30 populations to be maintained despite some logging  
31 occurring.

1           And to the extent reserves are required, they're an  
2 additional, and they are prescribed and mandated  
3 elsewhere, and there's no suggestion in the reviews that  
4 there's a need to ban logging that's progressing in  
5 accordance with the timber plan in order that there is  
6 sufficient suitable habitat for additional reserves if  
7 they are required.

8           And then it is specifically addressed, the impact  
9 of the fire on APAs, POMAs and SOMAs in paragraphs 30 and  
10 following, which I took Your Honour to previously.

11 HIS HONOUR: Yes.

12 MR COLLINS: And then he sets out the relevant research and  
13 expert advice, and then the review of the precautionary  
14 principle analysis by VicForests DELWP working group,  
15 which has been ongoing, involving weekly meetings. So it  
16 is taking it into account, considering it, making  
17 informed decisions involving a matter of weighting  
18 various considerations and judgments consistent with the  
19 observations of Justice Osborn concerning the nature of  
20 the process in MyEnvironment.

21           And then, Your Honour, the affidavit was prepared  
22 in anticipation that the issue would only involve the  
23 five presently active coupes where logging is prepared,  
24 and a description of what's being done in those to  
25 protect the species, but they can be referred to as  
26 examples of what Ms Foley refers to, what's happening on  
27 the ground, and there's no reason to believe that these  
28 measures won't similarly be implemented on the ground in  
29 other coupes.

30           For example, the couple planning for the five  
31 active coupes included consideration, and where

1 appropriate, application of the adaptive management  
2 prescriptions considered in the defendant's precautionary  
3 principle analysis. As part of the defendant's  
4 pre-harvest planning, field processes for all coupes, it  
5 commissions a pre-harvest biodiversity survey from DELWP  
6 for 80 per cent of its coupes, or conducts the survey  
7 itself for 20 per cent of the coupes. So there is  
8 surveying of the threatened species.

9 It also conducts a specific habitat plan serving  
10 within each group. So that's to identify the  
11 hollow-bearing trees to be preserved, and the nature of  
12 the habitat, to identify what needs to be preserved. So  
13 that's very much addressing this on the ground principle.

14 And then in Joker, as an example, 'The defendant  
15 has applied its greater glider conservation strategy  
16 prescriptions to this coupe. This requires it to retain  
17 at least 40 per cent of the basal areas of the eucalypts  
18 across each timber harvesting coupes'. And it goes on,  
19 for example in paragraph 50, a minimum retention of 44  
20 per cent pre-harvest basal area in the Joker coupe has  
21 been implemented, and final retention is likely to be  
22 higher.

23 The last sentence of paragraph 50, 'This area  
24 contains a high proportion of hollow-bearing trees and  
25 provides connectivity to the adjacent linear protection  
26 zone. In addition there is a retained corridor which is  
27 60 metres wide separating previous harvesting in the  
28 adjacent coupe from Joke's coupe. The retained corridor  
29 will ensure that species inhabiting the SPZ [that's the  
30 special protection zone] will have connectivity with the  
31 broader landscape. The corridor is 3.14 hectares in



1 size. Seed trains will also be retained in 35 metre  
2 intervals across the entire harvest area'.

3 And similar observations giving examples of the  
4 implementation of the adaptive management measures that  
5 have been adopted in accordance with the precautionary  
6 principle in the logging occurring in the particular  
7 coupes, which achieves the objective of, in a  
8 proportionate way, taking steps to avoid the uncertain  
9 but identified serious and irreversible risk of  
10 extinction of these species.

11 And it's true, then, that when he deals with the  
12 balance of convenience in paragraphs 70 and following,  
13 it's very short, that no doubt is because material is  
14 being prepared for the interlocutory injunction that  
15 addresses that more extensively, but he does make the  
16 point, which is then developed why it's so significant in  
17 the further affidavit, but it's not this, this is  
18 (indistinct) the impact, and they can just pick up their  
19 tools and go elsewhere.

20 As is made clear in paragraph 9 of the second  
21 affidavit, that simply isn't an option. If effectively  
22 stops logging for the period that the injunctions apply  
23 so that there won't be a supply of timber. It will mean  
24 that people who are working and can work, notwithstanding  
25 the current circumstances, but the sawmills that depend  
26 upon the supply of timber continue working. It's not the  
27 in the balancing exercise, putting all the weights on one  
28 sides of scales, rather than the dual objectives and  
29 what's the greater risk? The risk of the continuation of  
30 the proper and responsible harvesting for the supply of  
31 timber to mills and industry as opposed to the risks of

1           irreversible damage to the environment during the period  
2           of the interim injunction.

3                     In our submission, it weighs very much in the  
4           favour of not granting the interim order, extent of any  
5           logging given the adaptive management measures being  
6           adopted. It's just in our submission not maintainable  
7           that that represents any risk of causing extinction of  
8           these species. Or risk of loss of essential habitat for  
9           the preservation of these species.

10                    Would Your Honour just excuse me for a moment while  
11           I go on mute?

12   HIS HONOUR:    Yes.

13   MR COLLINS:    See what other matters either my instructing  
14           solicitor or junior think I need to address. Your  
15           Honour, we probably should go through what's available  
16           about the nature of these State and Commonwealth  
17           responses that our learned friends rely upon. That's  
18           really the basis of their case, to demonstrate there's  
19           nothing in those indicating that they'd sought a review,  
20           is addressing outcomes that would affect - would be  
21           affected - the implementation of them in an effective way  
22           would be affected by the logging that's likely to occur  
23           between now and the trial. Or even beyond the trial if  
24           logging in accordance with the principles continue after  
25           the trial.

26                    And rather than go to what our learned friend says  
27           about them, what Your Honour should do is go to the  
28           documents themselves. I've been to some of them briefly.  
29           They're the exhibits to the most recent affidavit of  
30           Danya Jacobs, sworn 8 July, the ninth affidavit. The  
31           first is DJ165 which is the rapid analysis of impacts of

1 the 2019/20 fires on animal species and prioritisations  
2 of species for management response.

3 In the summary, and in the summary (indistinct) 'to  
4 support recovery of these species, conservation acts will  
5 be needed for many species at many sites and much  
6 informed management will be carried out by a wide range  
7 of government agencies, non-government conservation  
8 organisations, university researchers, community groups  
9 and the public. However, some species are in need of  
10 more urgent help than others.

11 'Now, there's nothing to suggest that would be  
12 impacted in any material way by the logging that's about  
13 to occur in these coupes, particularly because logging is  
14 occurring in a way that already acknowledges and was  
15 based on the importance of preservation of these species.  
16 This paper presents a draft framework to rapidly evaluate  
17 which animal species are in most urgent need and they  
18 have been identified. Over the coming weeks and months,  
19 viewed at a national scale. Using this framework we  
20 assessed all reptiles, frogs, bird and mammal animal  
21 species. So that has been achieved.

22 The background and the priority activities. My  
23 learned friend took you to the first dot point -  
24 providing unburnt areas within or adjacent to recently  
25 burned ground that provides refuges.

26 HIS HONOUR: What page is this, sorry?

27 MR COLLINS: This is p.8. Sorry, Your Honour. And Your Honour  
28 made the observation and I'm doing what Your Honour  
29 anticipated I'd do. I'm relying on the fact that what  
30 it's directed to, protecting unburnt areas within or  
31 adjacent to recently burnt ground that provides refuges.

1 Now, it's going to obviously go beyond that to consider  
2 additional areas, but most significantly in areas within  
3 or adjacent to directly affected areas.

4 And there was nothing that my learned friend took  
5 you to, to identify anything that was likely to impact or  
6 be impacted by the anticipated logging or the planned  
7 logging in these coupes. The aims, at p.10, 'The list of  
8 animal species has been identified. Breach of the five  
9 affected species collate and attribute physical,  
10 behavioural, ecological and life history traits, so that  
11 likely fire impacts and requirement management responses  
12 can be better resolved.

13 'And three, develop a framework that identifies  
14 priority species for action in the next zero to  
15 12 months, and the actions that may be considered for  
16 these species based on the degree of the pre-fire  
17 imperilment, and the extent of overlap, and the species  
18 traits that make them more or less vulnerable to fire  
19 impacts. Use of the collation of species traits to  
20 indicate the broad range of actions required to support  
21 the priority species over the next 12 months'.

22 Now, none of that mandates or requires, in our  
23 submission, a (indistinct) to do no logging in areas even  
24 remote from the fire-affected areas to any extent,  
25 notwithstanding adaptive management measures during that  
26 period.

27 And there's a whole lot of detail, and anything  
28 that supported our learned submission would have been  
29 gone - Your Honour taken to, but there is nothing  
30 indicating a response that is going to the - effectively  
31 frustrated by what's occurring in these coupes.

1           In paragraph 32, which our learned friend took you  
2 to, 'The specific intervention is required for each  
3 species are best informed by species experts and a  
4 detailed suite of actions at local and regional scales  
5 should be, and in many cases is being, developed by state  
6 agencies and other relevant land managers', which would  
7 include our agency, with the input from the DWELP.

8           And then figure 3 summarises a pathway for  
9 considering which actions are likely to benefit a  
10 particular species. Note that in all cases it is highly  
11 likely that protecting unburnt habitats, especially  
12 unburnt habitat patches within or adjacent to burnt  
13 areas, is a high priority.

14           To the extent that there were unburnt habitats  
15 within the central highlands region that couldn't be -  
16 ought not be dealt with at all, that has been assessed.  
17 And in doing that, you have to have regard to the  
18 adaptive management measures. And it's acknowledged that  
19 actions required in burnt areas and unburnt remnant  
20 patches may differ.

21           Exhibit DJ166 is a document my learned friend  
22 didn't take you, and sets out details which don't address  
23 the issue our learned friend raises.

24           DJ167 is the update on the list of animals  
25 requiring urgent management intervention, and that's not  
26 in dispute, and urgent management intervention has been  
27 implemented.

28           And then what actions are needed for high priority  
29 species on p.44 or p.3 of the document, 'Two priority  
30 actions should be carried out for all high priority  
31 species'. The second was protecting unburnt areas within

1 or adjacent to recently burnt ground that provide refuge,  
2 as well as unburnt areas that are not adjacent to burnt  
3 areas, especially from extensive intense fire.

4 And then DJ 168, Wildlife and threatened species,  
5 bushfire recovery expert panel communicate 11 March.  
6 There was nothing in that my learned friend took you to  
7 or which indicates that it's likely to - or there's any  
8 prospect of an imminent conclusion justifying suspension  
9 of all logging, pending what might emerge from it. At  
10 p.55, 'The government has announced', in the third last  
11 paragraph, 'An additional \$2m was scientific research  
12 through the threatened species recovery covered national  
13 environmental science program to help with wildlife  
14 recovery efforts and habitat rehabilitation. Following  
15 the bushfires, the expert panel were provided by some  
16 research needs and project proposals and to this end,  
17 endorsed by the priority research areas, assessment of  
18 the impacts on species and echo systems, prioritisation  
19 of actions for those species. Priorities in bushfire  
20 recovery for indigenous Australians, monitoring in  
21 investigation and lessons for the future'.

22 Again, nothing to show an imminent report or series  
23 of recommendations, justifying total inaction in any  
24 areas of logging where there are threatened species. And  
25 I've taken Your Honour to the last document which was the  
26 threatened species scientific committee report for the  
27 greater glider. Does Your Honour have any questions that  
28 I've not addressed?

29 HIS HONOUR: No, no I don't.

30 MR COLLINS: As Your Honour pleases.

31 HIS HONOUR: All right.

1 MR COLLINS: And if appropriate, I'll address you later about  
2 directions for the interlocutory hearing.

3 HIS HONOUR: Well that's going to be appropriate either way  
4 isn't it?

5 MR COLLINS: That's true.

6 HIS HONOUR: So you might say something about that.

7 MR COLLINS: It was handed to me and I've misplaced it, the  
8 directions we propose. I don't think they - these have  
9 been provided to my learned friend and if necessary, we  
10 could arrange to have them emailed. It would be the  
11 plaintiff file any further lay affidavits.

12 HIS HONOUR: Perhaps without going through them, they set out a  
13 time zone and do they - to a date for the interlocutory  
14 hearing in what, something around the first week of  
15 August?

16 MR COLLINS: Yes, Your Honour, the week commencing 3 August.

17 HIS HONOUR: All right. Well I perhaps don't need to know any  
18 more than that do I?

19 MR COLLINS: No, Your Honour.

20 HIS HONOUR: All right. Nothing else Mr Collins?

21 MR COLLINS: No, Your Honour.

22 HIS HONOUR: Thank you very much. Ms Foley?

23 MS FOLEY: Thank you, Your Honour. Just a few points in reply  
24 if I may?

25 HIS HONOUR: Yes.

26 MS FOLEY: The first point, for the purposes of the reply, I'll  
27 put aside the question of any information that might be  
28 coming from the Commonwealth estate responses and simply  
29 say let's look at the information that VicForests has now  
30 from the OCR. The precautionary principle requires  
31 careful evaluation of management options, be undertaken

1 to wherever practical, avoid serious or irreversible  
2 damage to the environment. It also requires a proper  
3 assessment of the risk weighted consequences of various  
4 options.

5 We know that VicForests is not complying with the  
6 OCR's advice or not following those recommendations, in  
7 relation to postpone and avoid in the blue and the pink  
8 areas. They're components two and three of the  
9 recommendations and it hasn't explained to the court how  
10 it has evaluated or considered or taken into account that  
11 advice. So the court can't be satisfied that VicForests  
12 is complying with the precautionary principle at present,  
13 in its review, because we can't be satisfied on the  
14 evidence that there has been careful evaluation or a  
15 proper assessment to use the language of precautionary  
16 principle of the OCR's recommendations and obviously  
17 based on the information before the OCR from the  
18 department.

19 Therefore, there's a real question also about  
20 whether VicForests is avoiding serious or irreversible  
21 damage by not complying or acting consistently with those  
22 recommendations. Looking at 2.2.2.3, which shouldn't be  
23 forgotten, it requires consideration of the advice of  
24 relevant experts. There is no evidence before the court  
25 of VicForests consideration in any meaningful sense of  
26 the OCR's advice, in particular the recommendations that  
27 we've relied upon.

28 Mr Collins, my learned friend said the OCR report  
29 was considered, but the particular aspects which are of  
30 relevance here that you should postpone harvesting in the  
31 blue and avoid in the pink, there is no evidence of the



1 consideration or the careful evaluation of that.

2 We don't say VicForests was obliged to follow it,  
3 but there needed to be vehicle of how it has been  
4 evaluated or considered, and why they haven't adopted  
5 those recommendations, and it's simply not before the  
6 court. So that's looking at the matter, putting aside  
7 the Commonwealth and state responses, just looking at the  
8 OCR.

9 The second point I make is this, and it goes to the  
10 adequacy of the adaptive management measures. The  
11 VicForests measures focus on the retention of  
12 hollow-bearing trees. It's a key plank of the adaptive  
13 measures. Those measures are already required under the  
14 existing prescriptions. The plaintiff has put in direct  
15 evidence of on the ground observations that  
16 hollow-bearing trees are nevertheless being impacted,  
17 felled or pushed over by VicForests operations. We have  
18 put in evidence of that. It is summarised in annexure to  
19 our submissions at paragraphs 4.3, 5.1, 7.1, 9.2 and 9.3.

20 That evidence is unchallenged. I'm not going to  
21 take Your Honour to it, but the photograph at JRM74 of  
22 the third McKenzie affidavit speaks volumes about what is  
23 happening on the grounds. Now, in the Possums  
24 decision - - -

25 HIS HONOUR: Sorry, which exhibit was that, did you say?

26 MS FOLEY: JRM74 of the third McKenzie affidavit.

27 HIS HONOUR: M'hmm.

28 MS FOLEY: In the Possums decision, Justice Mortimer has given  
29 very clear guidance about the fact that the precautionary  
30 principle is concerned with not just process but also  
31 outcomes, and so VicForests needed to address not just

1 the process that it has put forward in these measures,  
2 but what it the outcome on the ground, and they have not  
3 sought to respond in any substantial way to the evidence  
4 that we've put in, direct evidence of what's being played  
5 out in the coupes on the ground.

6 There's also no evidence from VicForests that the  
7 measures have actually achieved or are achieving  
8 avoidance of serious and irreversible damage where  
9 possible, which is what is required consistently with  
10 Possums at 988 of the judgment.

11 The third point that I make is this. Mr Collins  
12 referred to the fact that there's no real difference in  
13 principle between the parties, and he identified that I  
14 had made some criticisms of the way that VicForests had  
15 outlined its understanding of the precautionary  
16 principle, but said it effectively wasn't a large issue.  
17 In my submission that's incorrect.

18 If VicForests is approaching the precautionary  
19 principle in its evidence, in its approach to the  
20 analysis, and in its submissions in a way which we say is  
21 not consistent with the law, in particular inconsistent  
22 with Justice Mortimer's decisions in Possums, then that  
23 is a matter of real significance, because it will bear  
24 upon what VicForests has done in its analysis and how  
25 it's approached the task.

26 If its understanding is misconceived or wrong, then  
27 the court can't have and shouldn't have any comfort in  
28 that analysis and the outcomes, and we say that's  
29 entirely what was identified as the problem by Justice  
30 Mortimer in Possums, where Her Honour has laid out in a  
31 very detailed way that the approach taken by VicForests

1 to the precautionary principle is not right in a number  
2 of ways, and that that is leading to these adverse  
3 impacts on the ground.

4 And so we are challenging the approach to the  
5 precautionary principle not just in terms of process, but  
6 also in terms of outcome, and it may be that the reason  
7 why there were those problems is because we say  
8 VicForests has actually approached the precautionary  
9 principle analysis in the wrong way.

10 Now, in addressing that, I should say Mr Collins  
11 made a number of concessions which we say are important.  
12 He conceded that VicForests adaptive measures have not  
13 changed in any substantial way subsequent to this  
14 analysis. He said that early - - -

15 HIS HONOUR: Well, I think Mr Collins said there had been  
16 changes.

17 MS FOLEY: Clarified.

18 HIS HONOUR: But perhaps no material changes that would impact  
19 the particular activity which is the subject of this  
20 application.

21 MS FOLEY: Yes, in the beginning, in the early part of his  
22 submission - - -

23 HIS HONOUR: But that shouldn't - - -

24 MS FOLEY: - - - our note was that he said, 'Not in any  
25 substantial way', and it wasn't limited to the coupes in  
26 the proceeding. When Your Honour asked some more  
27 questions about that, he did limit that proposition to  
28 the coupes in the proceeding, but nevertheless we say  
29 that's a significant concession that's consistent with  
30 our read of the evidence, which is, they've done a whole  
31 lot of analysis, it's not changing matters on the ground

1 for these coupes.

2 But he also conceded that the adaptive measures  
3 have been designed, he said, irrespective of the  
4 bushfires, and that is significant, because of course our  
5 case is, you need to take into account what's happened  
6 with the bushfires. You can't ignore that they've  
7 happened. They are having an impact on the species as a  
8 whole, and that needs to play out in what you do next.

9 The final point that I make is this. Mr Collins  
10 has said that the Commonwealth and state responses simply  
11 aren't going to bear upon non-bushfire-affected forests  
12 in a substantial way, and he took Your Honour to parts of  
13 the Commonwealth material.

14 We say of course, Your Honour just needs to look at  
15 the OCR report which comes out of the state's ongoing  
16 review and research, and relies upon the Department's  
17 analysis of up to date information, to see that that is  
18 exactly what has happened. The analysis of the bushfire  
19 impact is bearing upon what should be happening in  
20 non-bushfire-affected areas, because those are the  
21 recommendations that are being made.

22 And we say it's a very short step, it's not  
23 surprising that that step has been made, because what  
24 we're looking at is species that are on the path to  
25 extinction. The animals that are in the burnt areas have  
26 perished, their habitat has perished. There's a  
27 recognition that because these species are on the path to  
28 extinction, what's left needs to be protected. Naturally  
29 where you would start looking is to areas where the  
30 animals remain alive, and those are going to be  
31 substantially in unburnt areas. Those areas then become

1 areas of high value. That is exactly what we've seen in  
2 the OCR report.

3 So for my learned friend to be saying, 'Well, we  
4 don't think the state or Commonwealth responses are going  
5 to bear upon the non-bushfire-affected areas' simply  
6 doesn't stand up when one looks at what the OCR has  
7 recommended base on the up to date information that the  
8 Department has provided. They are precisely focusing now  
9 on what should be happening differently in these high  
10 value areas that have not been burnt.

11 And as Your Honour is aware from the evidence we've  
12 put on, the coupes at issue in this application fall  
13 within those areas that the OCR has recommended be  
14 treated differently now.

15 Those are my submissions, Your Honour.

16 HIS HONOUR: All right. Now, what about the hearing of the  
17 interlocutory injunction application?

18 MS FOLEY: We're content with that indicated date. I have in  
19 that week that Mr Collins - I'm just bringing up my  
20 diary.

21 HIS HONOUR: I won't sort out a date with you. All I want is  
22 an indication. The parties can have some discussion now  
23 about the timetable between now and then.

24 MS FOLEY: Yes, Your Honour.

25 HIS HONOUR: And hopefully - well, not hopefully, send  
26 something to my chambers, hopefully setting out  
27 agreement, but insofar as there's not agreement, what the  
28 disagreement is, and that can be sorted out.

29 MS FOLEY: Thank you, Your Honour. I hope we'll be able to do  
30 that. We are keen to have this determined quickly.

31 HIS HONOUR: Well, it seems there is at least one thing you can

1 agree on.

2 MR COLLINS: Your Honour, could I just mention in response  
3 because of some of the matters my learned friends weren't  
4 strictly in reply.

5 HIS HONOUR: Yes.

6 MR COLLINS: Just direct you to paragraph 8 of Mr Gunn's  
7 10 July affidavit, where he does depose about the  
8 preliminary results from the surveys indicate the  
9 measures are proving effective, and populations are being  
10 maintained.

11 And the point about the measures are measures to be  
12 taken into account and applied irrespective of the effect  
13 of bushfires, that's because the measures are designed  
14 and directed towards ensuring the preservation of the  
15 species and the maintenance of the species - - -

16 HIS HONOUR: Your point is that measures will be required  
17 notwithstanding bushfires, or that the - - -

18 MR COLLINS: Yes.

19 HIS HONOUR: - - - 2019-20 bushfires measures were already  
20 required.

21 MR COLLINS: And they don't - what measures will preserve the  
22 species and maintain it in an area won't alter as a  
23 result of a bushfire elsewhere.

24 HIS HONOUR: I'm not sure that's so, but in any event, I  
25 understand the submission you make. Well, thank you very  
26 much for your submissions. You've given me a reasonable  
27 amount to think about. Can't imagine that I'm going to  
28 be able to give you a result today. So I'll reserve and  
29 the parties will be advised when I'll be in a position to  
30 deliver a ruling.

31 MR COLLINS: Yes, Your Honour.

1 HIS HONOUR: And in the meantime, you'll provide my chambers  
2 with the directions orders leading to the interlocutory  
3 hearing.

4 MR COLLINS: As Your Honour pleases.

5 HIS HONOUR: Is it intended or hoped that it's Justice McMillan  
6 that's going to deal with that? Ms Foley, you might  
7 know. Has Justice McMillan indicated an intention that  
8 she be the trial judge in October or is that still  
9 uncertain?

10 MS FOLEY: I think it's still uncertain.

11 HIS HONOUR: Yes.

12 MS FOLEY: The last hearing that we had before Justice McMillan  
13 - I believe a comment was made that indicated to us she  
14 may not be. But nothing has been set in stone.

15 HIS HONOUR: Yes, that's fine. Anyway, I'll make some  
16 enquiries and we'll sort something out at least for the  
17 interlocutory hearing.

18 MS FOLEY: Thank you, Your Honour.

19 HIS HONOUR: Thanks very much. We'll adjourn sine die.

20 - - -