
TRANSCRIPT OF PROCEEDINGS

SUPREME COURT OF VICTORIA

COURT OF APPEAL

(Unrevised)

CIVIL DIVISION

No SAPCI 2012 0067

RED COURT

MELBOURNE

MONDAY 24 JUNE 2013

BEFORE THE HONOURABLE JUSTICES OF APPEAL

THE HONOURABLE CHIEF JUSTICE WARREN

TATE JA and GARDE AJA

B E T W E E N

MYENVIRONMENT INC

Appellant

- and -

VICFORESTS

Respondent

MR J.W.K. BURNSIDE AO QC with MR E.M. NEKVAPIL appeared on behalf of the Appellant.

MR I.G. WALLER SC with MR H.L. REDD appeared on behalf of the Respondent.

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1 MR BURNSIDE: May it please the court, I appear with my learned
2 friend Mr Nekvapil for the appellant.
3 WARREN CJ: Mr Burnside.
4 MR WALLER: May it please the court, I appear with my learned
5 friend Mr Redd for the respondent.
6 WARREN CJ: Mr Waller. Mr Burnside?
7 MR BURNSIDE: If the court please, can I start by saying this
8 case really resolves to a fairly simple point, but the
9 enormous size of the appeal book which I gather was
10 largely driven by the respondent because they have an
11 interest in pulp and paper wastage - - -
12 WARREN CJ: Well, Mr Burnside, that might be a little bit
13 unfair. The material was necessary for the court to
14 understand the complexity of this matter as it was
15 presented on your side for His Honour.
16 MR BURNSIDE: I accept that, Your Honour, it was a cheap shot,
17 I probably should have restrained myself. Your Honours,
18 we do not press Grounds 5 and 6, and that's because, so
19 far as (5) which is concerned with the logging of the
20 other two coupes, South Col and Fredo, we are content to
21 accept the undertaking which was given in the running,
22 that logging activities will not start on those without us
23 having appropriate warning, and we assume, from the way
24 the matter has been conducted, the logging would not take
25 place there, if we're correct, in what we contend is the
26 proper meaning of Zone 1A, but, having said that, we would
27 reserve our rights to seek to prevent logging there in the
28 event that we're right on Zone 1A and yet logging was
29 proposed for those two coupes, and Ground 6 concerns
30 simply the precautionary principle, and we say the
31 precautionary principle really informs the way you

1 approach the construction of the relevant instruments.

2 Having said that, we have put together a proposed
3 form of relief in the event that the court accepts our
4 submissions. Can I hand up four copies? As the court
5 will appreciate, the purpose of the action statement and
6 the purpose of the Forest Management Plan, is self
7 evidently, to protect Leadbeater's Possum from extinction.
8 It is put quite strongly in the action statement - I
9 should ask, has the court been provided with a folder that
10 contains the four crucial documents, the Action Statement,
11 the Code of Conduct, the Forest Management Plan? There
12 are four documents and if you have that single folder - -

13 -

14 WARREN CJ: Yes, we do have that, and for the most part we have
15 looked at the key aspects of those documents.

16 MR BURNSIDE: Yes. The key question, I guess, is whether those
17 documents still have the court book numbering. So taking
18 the Action Statement, for example, it should be numbered
19 in the bottom right hand corner as D0056.

20 WARREN CJ: Yes, in the folder the four documents are tabbed
21 and then they run with whatever was the relevant court
22 book allocation of number.

23 MR BURNSIDE: If I can take the court to the Action Statement
24 which should be Tab 3 and its first page is D56? At D57
25 in the right hand column you will see a heading "Major
26 Conservation Objectives" and we draw attention
27 particularly to the first bullet point, "Major
28 Conservation Objectives to guarantee that Leadbeater's
29 Possum can survive, flourish and retain their potential
30 for evolutionary development in the wild. In quantitative
31 terms, this may be described as to ensure the survival of

1 Leadbeater's Possum by managing its forest habitat towards
2 a target of no more than a one per cent probability of
3 extinction over 250 years throughout the forest within its
4 current range." It is important to identify that that is
5 the major objective. It's not just reducing the risk that
6 Leadbeater's Possum will become extinct but within a one
7 per cent probability over 250 years guaranteeing its
8 survival.

9 GARDE AJA: Is that based, Mr Burnside, on the prior scientific
10 studies which establish what the probabilities are of
11 extinction of the Leadbeater's Possum?

12 MR BURNSIDE: I don't think the precise figures are. I think
13 it is fair to say that writers, and in particular
14 Professor Lindenmayer who was a key witness have written
15 articles over the years which have said that this is a
16 species which is - well, it is certainly on the endangered
17 list. It was thought to be extinct. Examples of it were
18 found in the wild in 1961 and it is recognised as being
19 seriously at risk because future projections of the likely
20 conformation of relevant areas of forest demonstrate that
21 there will be a time - unless steps are taken there will
22 be a time when its required forest habitat will not be
23 sufficiently widespread to be confident about its
24 survival.

25 GARDE AJA: Accepting that - I mean this is a significantly
26 precise statement based on a one per cent probability over
27 a lengthy timeframe. Is there underlying finds that
28 supports such an objective?

29 MR BURNSIDE: Your Honour, I think that the only direct answer
30 I can give to that is that 95 per cent or five per cent
31 and 99 per cent or one per cent are two fairly standard

1 measures in epidemiology and other statistical assessments
2 of probability and I suspect that it is taking into
3 account the sort of things that would have to be measured
4 in order to see what are the probabilities associated with
5 any - given the future of the state of affairs, they have
6 chosen the one per cent rather than the five per cent
7 probability level. But beyond that, subject to the point
8 provided by Mr Nekvapil, I think the one per cent is a
9 reflection of the way statistics work rather than
10 particular evidence, but what is important about it is not
11 whether they said one per cent over 250 years or even five
12 per cent over 250 years, the objective is to guarantee its
13 survival. They are placing very high priority on it not
14 least perhaps because it is endangered, but perhaps also
15 as a nodding reference to the fact that it is Victoria's
16 emblem and it would be a rather dire thing for the emblem
17 to especially die out especially for people who are
18 superstitious.

19 It is plainly enough an endangered species and so
20 much is identified in the left column at p.D57 and D57
21 under the heading "Habitat" also identifies what is
22 necessary as habitat to help guarantee its survival.
23 Under the heading "Habitat" the Action Statement says,
24 "The most important components of Leadbeater's Possum
25 habitat are nest tree abundance, vegetation structure and
26 food availability. Large old hollow trees, either dead or
27 alive, for nesting and shelter are essential for the
28 survival of Leadbeater's Possum. Maximum population
29 densities occur in regrowth forests, 15 to 50 years, with
30 more than six potential nest trees per three hectares and
31 a biomass of Acacia between 20 and 50 per cent of stand

1 basal area." After the reference, "The term 'potential
2 nest tree' refers to existing hollow-bearing trees that
3 have the potential to be utilised by the species.
4 Leadbeater's Possum prefer short, fat trees with numerous
5 holes and a large quantity of dense surrounding
6 vegetation." And you will see, as you have noticed
7 already, there is references to Lindenmayer who appears to
8 be the principal authority on the species.

9 The Action Statement at p.58 identifies the
10 challenges for conservation of hollowed pendant fauna
11 generally and, of course, Leadbeater's Possum in
12 particular. If I can take you to D58 at about point 5 in
13 the left column - or point 4 perhaps, "Clear filling
14 effectively meets key silvicultural requirements and from
15 an operational viewpoint, the method is comparatively
16 simple, safe and easily supervised. However for the
17 conservation of hollow dependant forest fauna including
18 Leadbeater's Possum the current practice has two major
19 problems. Firstly retained trees within the coupe are
20 subject to a high intensity regeneration fire and then to
21 varying degrees of exposure so managers cannot guarantee
22 that these trees will remain standing through the
23 following rotation. Secondly, the current system is
24 planned to operate on a nominal 80 year rotation, which
25 leaves no allowance for any trees on logging coupes to
26 grow to ecological maturity and thus develop hollows for
27 future use. The major challenge for long term
28 conservation of the species is the protection and
29 continuing development of old trees with suitable hollows
30 for nesting and shelter in conjunction with suitable
31 habitat for foraging."

1 It is clear in that passage and also in various
2 other passages in the evidence received by His Honour that
3 there is a correlation between the age of a tree and the
4 likelihood of a tree containing hollows and the existence
5 of that correlation probably explains some of the
6 confusion that may have got into the matter when it came
7 to examining precisely what Zone 1A was. I say that
8 because it is one thing to say that there is a correlation
9 between the age of trees and their likelihood of
10 developing hollows. It is important not to lose sight of
11 the fact that what matters to the Leadbeater's Possum is
12 the existence of hollows rather than the age of the tree
13 in which the hollow develops.

14 WARREN CJ: Is that right? Because do not the trees have to be
15 old trees before the possums can find and utilise the
16 hollows?

17 MR BURNSIDE: It depends on what you mean by "old trees". It
18 seems pretty clear that - and I think Professor
19 Lindenmayer was clear on this, that saplings won't have
20 hollows and that the older the tree, the more likely it is
21 to contain hollows and perhaps even multiple hollows, but
22 what matters from the possum's point of view is the
23 hollows themselves, not the age of the tree in which the
24 hollows are found. To say that there is a correlation
25 between the age of the trees and the existence of hollows,
26 whilst it is accurate, it overlooks the point that unless
27 the correlation is a correlation of one, and there is no
28 suggestion of that, then hollows will occur in trees that
29 are less than 120 years old or less than 90 years old
30 even. They are still old trees at least by human
31 standards, but they are not old by the standards of trees

1 that might survive 500 years. A correlation between the
2 development of hollows and the age of the tree is
3 interesting and it explains a great deal, but it does not
4 overcome the fact that age is not - or at least extreme
5 age is not a necessary precondition for the existence of
6 hollows.

7 GARDE AJA: Was all this explored in evidence before the trial
8 judge?

9 MR BURNSIDE: Yes, it was. If the court could look at
10 Volume 6. Professor Lindenmayer gave evidence about this.
11 There are two passages I would like to take the court to.
12 The first is at transcript 239 and starting at line 17 on
13 239, Professor Lindenmayer was asked in-chief, "Under both
14 of those boxes you will see there's a statement and this
15 is written by Mr Ryan: "The important aspect outlined in
16 the above two diagrams is that trees in the regeneration,
17 regrowth, mature younger and mature older are not
18 considered suitable for Leadbeater's Possum habitat as
19 defined in the Action Statement. It is the large
20 senescing classes that are considered and identified in
21 Leadbeater Possum habitat surveys." Question: "Do you
22 agree with that summary of what the diagrams show?"
23 Answer: "No, I do not." Question: "Can you explain
24 why?" Answer: "The document in front of me states 'not
25 considered suitable for Leadbeater's Possum habitat as
26 defined in the Action Statement.' The definition of
27 suitable habitat, the knowledge of the suitable habitat,
28 Your Honour, is related to the abundance of hollow-bearing
29 trees, full stop. It relates to whether a tree has a
30 hollow."

31 He was cross-examined about that evidence later on,

1 starting at transcript 303 - or rather 302, I should say.
2 At line 23 on 302 he was asked, "If you go to p.239, you
3 were asked in examination-in-chief by Ms Walker whether
4 you agreed with a particular statement appearing under the
5 boxes on p.5 of Mr Ryan's report and you answered at
6 line 24 that you do not. You were then asked to explain
7 why and you said at line 26, 'The document in front of me
8 states 'not considered suitable for Leadbeater's Possum
9 habitat as defined in the Action Statement'. Then you
10 went on to say, 'The definition of suitable habitat, the
11 knowledge of the suitable habitat, Your Honour, is related
12 to the abundance of hollow-bearing trees, full stop. It
13 relates to whether a tree has a hollow.' Do you stand by
14 that evidence?" Answer, "In part." "Do you wish to
15 clarify the evidence?" "It also - the habitat
16 requirements of Leadbeater's Possum in addition to the
17 core component of habitat, which is the abundance of
18 hollow-bearing trees, presence and abundance of hollow-
19 bearing trees, in which the animal spends approximately
20 75 per cent of its life, is also influenced by the
21 occurrence of Acacia in the understorey of the forest."

22 Question, "To be clear, you don't consider there is
23 any age or size limitation on the nature of a hollow-
24 bearing tree?" and His Honour points out that he had
25 accepted saplings and seedlings and he answers then at
26 line 18, "Your Honour, the key issue here is whether a
27 tree has a cavity or not and whether or not there is a
28 careful assessment to determine whether there is a cavity
29 in a tree or not." Question, "Do you accept the very best
30 habitat, premium habitat for the Leadbeater's Possum
31 consists of large older trees containing hollows?" "Your

1 Honour, the concept of best and premium comes from value -
2 comes with value judgments. The way that we have
3 contemplated our -" sorry, "The way that we have completed
4 our analysis over many years is to look at the probability
5 of occurrence and the abundance of the species in relation
6 to those attributes of the forest. The number of hollow-
7 bearing trees, the amount of what would be understorey.
8 It is a probabilistic relationship for present or absence.
9 Or it's what we call poisson relationship for the
10 abundance of the abundance of the species."

11 Question: "In your report, you repeatedly refer, do
12 you not, to large trees containing hollows?" "In my
13 report I do discuss the issue of large trees but the
14 clarification is any tree with a hollow needs to be
15 measured as part of attempts to quantify the habitat
16 requirements of Leadbeater's Possum." Question: "Yes,
17 but you insert into your report on numerous occasions the
18 adjective 'large'. Why did you see the need to do that?"
19 Answer, "It's a term that - the term 'large trees with
20 hollows' has on occasions been used interchangeably with
21 hollow-bearing tree in the literature and that is in part
22 a response to different referees on different papers that
23 we've published over a prolonged period of time but it's
24 always defined in those papers as a tree with obvious
25 hollows."

26 Then if I may pass over to p.305, at line 8, "You
27 say after the expression 'figure 4', 'This sets back the
28 functional age of a forest for Leadbeater's Possum to zero
29 years and when it takes another 150 to 190 plus years
30 before suitable nesting and denning habitat in hollow-
31 bearing trees first begins to develop,' and you cite your

1 own work published in 2009. Does that suggest or does
2 that not suggest that we need a tree of at least that age
3 before suitable nesting and denning habitat is formed?"
4 Answer: "No, it does not." "What did you mean to convey
5 when you referred to the 150 to 190 plus years before
6 suitable habitat in hollow-bearing trees first begins to
7 develop?" Answer: "That's - there's a slight error in
8 that statement. It should be 120 years plus. The meaning
9 and intent of that statement in Question 26B is that
10 typically trees take 120 years to first begin to develop
11 hollows, that's following the work by Graeme Ambrose
12 published in his PhD in 1982. Typically trees would be
13 150 or 190 years plus before the typically develop
14 suitable nesting and denning habitat. But again, Your
15 Honour, this is a probabilistic relationship, as we
16 published in 1981 in the Journal of Forest Ecology and
17 Management, and then tested the performance of those
18 models in a paper published in Biological Conservation in
19 1994. There are times you will have smaller trees than
20 that, younger trees than that, which will have cavities in
21 those trees and those cavities may be occupied and used by
22 Leadbeater's Possum and there may be trees older than 190
23 years that may not have cavities and that is the
24 underlying reason why it is critically important to do a
25 careful assessment of the trees in a particular area to
26 confirm the presence of hollows, to then do an assessment
27 of the abundance of hollow-bearing trees in an area and
28 that has always been the methodology that we have applied
29 in all cases since 1983 and we have to, Your Honour, apply
30 the same methodology on a repeated basis to make sure that
31 our work is sound."

1 GARDE AJA: Does the evidence extend to the probability of
2 trees of age less than 120 years having hollows?

3 MR BURNSIDE: Not age, I think. There is material which shows
4 a correlation between the height of the tree, the diameter
5 of the tree and the number of hollows that it bears and to
6 the extent that there is a correlation between height,
7 diameter and age, then the answer is yes. But of course,
8 no one can say with any particularity how old a tree is.

9 GARDE AJA: Correlation is one thing and probability is
10 another.

11 MR BURNSIDE: That is true, although the level of correlation
12 gives you a reasonable guide to probability. But the
13 point is, first and last in our submission, he is making
14 it very clear in that evidence that what you are concerned
15 about is the existence of hollows, other things being
16 equal. It has got to have the Acacia understorey and so
17 on but the existence of hollows is what provides the
18 habitat. The age of the tree will be a useful marker of
19 the likelihood of the existence of hollows but in that
20 sense the age of the tree is a proxy for the existence of
21 hollows, which is what you're really interested in and
22 what the Possum is interested in.

23 GARDE AJA: Yes.

24 WARREN CJ: Before you leave Professor Lindenmayer's evidence,
25 was there any other expert evidence before His Honour that
26 took a different view to Professor Lindenmayer?

27 MR BURNSIDE: Well, the evidence of Mr Ryan was put against
28 Mr Lindenmayer, and I am open to correction on this, but
29 I do not believe that he said that you do not get hollows
30 in trees that are younger than his definition of mature.
31 What was clear was that neither mature nor senescent is a

1 term of art. They are both vague terms, which is another
2 objection and probably a good reason for rejecting those
3 as defining characteristics.

4 WARREN CJ: So as matters presently stand, unless you or your
5 junior locate some evidence we are not aware of, Professor
6 Lindenmayer's evidence in this respect was not rebutted?

7 MR BURNSIDE: Yes, I believe so.

8 WARREN CJ: Then there was also evidence from Mr Spencer, who
9 was the Director of Planning for VicForests. Did he say
10 anything on this topic?

11 MR BURNSIDE: He did not rebut it, if that is the real
12 question, Your Honour.

13 WARREN CJ: Yes, thank you.

14 MR BURNSIDE: May I say, that is not really surprising, because
15 if the key point is that the possums live in hollows,
16 then, what matters is whether there are hollows in the
17 trees. The age of the tree may be a useful indicator, but
18 as a matter of choice for the possums, probably
19 irrelevant.

20 WARREN CJ: I am sorry to interrupt you, Mr Burnside, but just
21 whilst we are on Professor Lindenmayer, my recollection
22 was that the plan and statement were to a large part
23 informed by the academic work that Professor Lindenmayer
24 had done.

25 MR BURNSIDE: That is certainly so, yes.

26 WARREN CJ: Yes.

27 MR BURNSIDE: Whilst you have got the transcript folders
28 available, I wonder if I might take the court to p.236 in
29 Professor Lindenmayer's evidence, in particular, from
30 about line 15 through to the foot of the page.

31 WARREN CJ: What page was that again, Mr Burnside?

1 MR BURNSIDE: Sorry, 236. At line 15 on p.236 he was asked in
2 chief, "Can you tell the court what, in your opinion, the
3 term 'hollow-bearing trees' means?" Answer: "The term
4 'hollow-bearing trees', the term 'hollow-bearing trees'
5 refers to any tree with a hollow, Your Honour." "On what
6 basis do you give that opinion?" "I give that opinion on
7 the basis of having measured hollow-bearing trees for more
8 than 28 years in the wet forests of Victoria, having
9 constructed habitat relationships for Leadbeater's Possum
10 during that time, and the measurement of a very large
11 number of trees in those forests." Question: "Can you
12 tell the court where the term 'hollow-bearing trees'
13 derives from?" "The term 'hollow-bearing tree', Your
14 Honour, arose during the latter parts of my PhD program
15 and the term was developed by myself and my then
16 supervisor Dr Mick Tantom in the Department of Forestry at
17 ANU. The term 'snag'" - and I think "stag" might be the
18 correct word there, "The term 'stag' had been used in the
19 USA and it referred to a soft dead tree, usually
20 associated with woodpeckers and clearly that terminology
21 was not appropriate in an Australian context, and
22 particularly in mountain ash forests because we deal with
23 both living and dead trees, so we needed to come up with a
24 new term, and it was decided that the best term was
25 hollow-bearing tree and that term had been stayed in the
26 lexicon for scientific research on cavities, on hollows
27 and on hollow-bearing trees in Australia and indeed
28 overseas." So, it is the person who originated the
29 expression, and you can probably say it can be expressed
30 with some confidence about what it means, and, more
31 particularly, why it is important.

1 Can I take the court to the definition of "Zone 1A"
2 contained in the Action Statement at p.61. At about Point
3 2 on the left column on p.D61, the paragraph which begins
4 with "The Objective, Definitions and Management of the
5 Zoning system will be as follows: Zone 1A Leadbeater's
6 Possum and other wildlife conservation as the major
7 priority". The first dot point: "Mature ash forests,
8 greater than 120 years old and mixed age ash forests where
9 the oldest age class is mature, greater than 120 years
10 old", the second dot point, "Regrowth ash forests with at
11 least 12 live hollow-bearing trees per three hectares",
12 and then the third dot point, "The minimum area for
13 assessment and establishment of Zone 1A type forests shall
14 be three hectares".

15 Now, there was a good deal of concentration on that
16 formulation in the argument and in the judgment. In our
17 submission it is clear that the third dot point is
18 intended to apply equally to both of the preceding dot
19 points, and in our submission it is equally clear, as a
20 matter of ordinary language, that the first and second dot
21 points talk of different things, either of which would be
22 regarded as answering the description for Zone 1A.

23 The court will see that the first dot point
24 describes the type of forest, without reference to hollow-
25 bearing trees, and on the material it's plain enough that
26 the type of forest described in the first dot point, has a
27 fairly high likelihood of containing a significant number
28 of hollow-bearing trees. The second dot point doesn't
29 talk about the age of trees, but concentrates on the
30 existence of a certain number of trees with hollows. It's
31 because if one looks at the, as it were, the proxy, and

1 the second looks at the phenomenon of real interest, that
2 in our submission you cannot, as His Honour did, run the
3 two together as if they are to be read as a single
4 definition.

5 "Old, mature aged forest" on all the evidence, is
6 likely to have hollow-bearing trees, and if you can
7 identify a forest that answers that description, you don't
8 need to go around counting hollows. On the other hand,
9 regrowth forest may have and on the evidence apparently
10 frequently does have, a number of hollow-bearing trees,
11 and so if you count up a certain number of hollow-bearing
12 trees, and the number is 12, then that will qualify it for
13 Zone 1A.

14 The reference to regrowth ash forests calls back to
15 mind what is found at p.57 in the left column, under the
16 heading "Habitat", where the point is made in the third
17 sentence, "Maximum population densities occur in regrowth
18 forests 15 to 50 years with more than six potential nest
19 trees per three hectares". Now, it is very clear from
20 that, that the authors of the Action Statement understood
21 that even if a forest can't be described as mature or
22 mixed age where the oldest age class is mature, even in
23 regrowth forest you will likely find, or at least you
24 might find, hollow-bearing trees.

25 WARREN CJ: Yes, but the sentence which precedes it, Mr
26 Burnside, is that there are "large old hollow trees which
27 are essential for the survival of the possum", and it then
28 speaks of maximum population densities, might that not
29 refer back to those large old hollow trees?

30 MR BURNSIDE: In regrowth areas it's likely that you'll find
31 some large old trees, because they're not talking about

1 areas that have been clear felled but regrowth after
2 fires, so of course, in the ordinary way of things, there
3 will be some large old hollow trees, but the fact that it
4 acknowledges that in regrowth forests you will find
5 maximum population densities, provided there is more than
6 a certain number of potential nest trees, that's crucial,
7 but it focuses on the existence of nest trees, that is to
8 say trees with hollows.

9 WARREN CJ: But Mr Burnside, might that not inform the second
10 dot point? So that, when it speaks of regrowth ash
11 forest, with at least 12 live hollow-bearing trees, as you
12 say, regrowth ash forests may well include old live
13 hollow-bearing trees?

14 MR BURNSIDE: Yes, and I agree with that, that's very likely
15 right, but it's a different - what's being identified is
16 an area of forest which is not the same as mature ash
17 forest greater than 120 years old, but rather an area of
18 regrowth forest that happens to have in it some instances
19 of hollow trees and which has at least a certain number of
20 live hollow-bearing trees.

21 I should say, the reference to 12 live hollow-
22 bearing trees is also a reference to one of Lindenmayer's
23 early findings, which is that the population of
24 Leadbeater's Possum in a particular area has a linear
25 relationship with the number of hollow-bearing trees, but
26 it plateaus at 12, or might be 11 and a half, but once it
27 reaches that level, the population tend not to increase so
28 12 appears to have been a chosen number because that
29 reflects the kind of population density which the possums
30 themselves are prepared to tolerate.

31 Now, Your Honour Tate J is quite right, in regrowth

1 forests of course you will have or you are very likely to
2 have some large old trees, but clearly enough, that's not
3 the same thing as the forest which is described in the
4 first dot point

5 TATE JA: In the first dot point, there are two categories,
6 aren't there? There is the first category which is mature
7 Ash forest.

8 MR BURNSIDE: Yes.

9 TATE JA: Put that to one side. And secondly, there is the
10 mixed aged Ash forest. Now, are you suggesting that
11 regrowth Ash forest doesn't fall under the description of
12 a mixed aged Ash forest as His Honour considered it would?

13 MR BURNSIDE: In our submission there is no evidence to suggest
14 that they are saying the same thing twice and the earlier
15 passage on p.57 does seem to identify regrowth forest as a
16 second category of forest. I guess VicForests can explain
17 the difference, but presumably they wouldn't use two
18 different expressions for the same phenomenon if they know
19 what they are talking about and they certainly wouldn't do
20 it in two places.

21 TATE JA: What do you mean by mixed aged Ash forest?

22 MR BURNSIDE: I don't mean anything by it. I suspect that the
23 document means that there is forests in which you have
24 trees of various ages, but there is at least a significant
25 class that can be described as mature.

26 TATE JA: And the understanding of regrowth Ash forest?

27 MR BURNSIDE: Regrowth as we understand it is forest which
28 regrows after a fire has gone through an area and
29 certainly there is evidence in the material to regrowth
30 after the 1939 fires.

31 TATE JA: Is it only after fire or is it also after logging or

1 other interventions?

2 MR BURNSIDE: Well, I can't answer that. I don't know if the
3 evidence covered that, but can I say if it is reference to
4 forest that springs up after clear felling, then on all
5 the material it is unlikely that you would find - well,
6 first of all, you probably wouldn't call it regrowth
7 forest, but if you did, it would be just the new forest
8 that's young and very unlikely to obtain hollow-bearing
9 trees, but if it did contain hollow-bearing trees in
10 sufficient numbers, then the evidence suggests that the
11 Leadbeater's Possum would be contempt to live there, at
12 least it would be able to live there.

13 Can I just check one thing that arises out of that
14 question, Your Honour? Yes, I am grateful to my learned
15 friend. Professor Lindenmayer gave evidence about
16 regrowth forests at p.237 of the transcript. I might
17 start at line 10 because he deals with mixed aged forests
18 as well, Question: "Can you explain to the court what the
19 term 'mixed aged forest means'?" Answer: "Your Honour
20 the termed 'mixed aged forest' to my understanding and
21 experience means a forest that has trees and more than one
22 age cohort on a site and those trees usually have an
23 origin from a different disturbance event such as a fire
24 so there may be trees, for example, that date from the
25 mid-1800s and the 1939 fires in the one area on the same
26 stand or same site". Question: "Can you explain to the
27 court what the term regrowth forest means?" Answer: "The
28 term regrowth forest to my understanding means a forest
29 that has regenerated after a particular disturbance event
30 and the forest is largely of one age".

31 Largely of one age course still allows the

1 possibility contemplated on p.D at 57 where there are more
2 than six potential nest trees per three hectares so that
3 would mean two trees per hectare that are old enough to be
4 potential nest trees so if there, for example, there were
5 fire - and after the 2009 fires presumably, there would
6 remain in some areas, when there is regrowth, there would
7 presumably remain in those parts of the forest some of the
8 old growth enough to constitute nest trees so potentially
9 at some future decade, parts of Victoria that were
10 affected by the 2009 fires may fall within that
11 description.

12 TATE JA: So would that not suggest given that a mixed aged
13 forest will include trees that have an origin from some
14 disturbance event that when you have enough of the trees
15 that have originated from that event, you might have a
16 regrowth forest as it were that is a part of a mixed aged
17 forest?

18 MR BURNSIDE: I expect that is right that if you then drew a
19 Venn diagram you would probably find there is a
20 significant area of overlap although there may be
21 distinguishing features so take, for example, a forest
22 which is completely destroyed bar a few giants, then
23 presumably that would be regrowth forest once it springs
24 up again. If you just had two surviving trees per
25 hectare, it would be an old use of language to call it a
26 mixed aged forest. Presumably the various identifiable
27 agents within a mixed aged forest would have to be
28 sufficiently numerous to say that they are a relevant
29 cohort.

30 TATE JA: But would that not suggest then that a regrowth Ash
31 forest is indeed a subset as you say you could have a Venn

1 diagram which displayed it? Isn't it a subset of mixed
2 aged Ash forest which is precisely how His Honour
3 construed the relationship between the two dot points?

4 MR BURNSIDE: I understand that, Your Honour, and to the extent
5 that there is an overlap, the answer to that is "Yes", but
6 to the extent that you accept that there need not be an
7 overlap, the answer is "No" because there is the remaining
8 area of the Venn diagram which is not overlapping which
9 has to be taken into account and there is in addition the
10 factor that even forests of that sort, you are concerned
11 to look for a number of hollow-bearing trees.

12 Now, if it is within the first dot point, you are
13 not interested in the numblock. You are interested
14 indirectly in the number of hollow-bearing trees, but it
15 is not the thing that you look for. You look for the
16 characteristics of the forest itself because you are
17 assuming that there will be hollow-bearing trees and to
18 the extent that there is not an overlap between the first
19 and second dots points, what you are concerned about is
20 the existence of hollow-bearing trees as a fact rather
21 than as something that's likely.

22 TATE JA: So is it your submission that in a sense the second
23 dot point would be redundant if one was permitted by
24 reason of the first dot point to look simply at the proxy
25 as you say if you have a mixed aged Ash forest, then you
26 know that that's an area that demands the conservation of
27 the Leadbeater's Possum as the major priority without
28 looking any further?

29 MR BURNSIDE: It would depend crucially on a very generous
30 understanding of the expression mixed aged forest. In
31 other words, it would include an area of one hectare of

1 forest that contains two old trees is a mixed aged forest.
2 That's a pretty extreme way of understanding it and it
3 does not seem to be the way Professor Lindenmayer
4 understood it, but in any event, in our submission, unless
5 you assume that there is a complete overlap between the
6 first and second dot points, only then can you reach the
7 conclusion that His Honour reached because, as I say, the
8 first dot point looks at the proxy measure, the second dot
9 point looks at the thing that you are concerned about. If
10 the two happen to intersect, well, that's interesting, but
11 probably doesn't matter very much.

12 I guess summarising that, our criticism of His
13 Honour's finding at paragraph 165 is simply that he didn't
14 pay sufficient attention to the fact that the first dot
15 point is concerned with age and therefore a proxy for the
16 likelihood of hollows, and the second is concerned with
17 the fact of the existence of hollows.

18 GARDE AJA: You say when we look at the concept of aged Ash
19 forest, that that connotes something in the nature of a
20 patchwork quilt of trees, of trees of different ages in
21 different classes or areas within the forest but when we
22 talk about a regrowth Ash forest, there is a sense of
23 greater uniformity of the regrowth areas. Is that an
24 appropriate - - -

25 MR BURNSIDE: That is probably right, Your Honour. If judgment
26 by Professor Lindenmayer's evidence - if there is a
27 devastation of everything that goes through an area, then
28 new trees that spring up or will spring up at roughly the
29 same time, you know, give or take a few years, so that the
30 age cohort of that portion of forest after a number of
31 years will be uniform, but for the survival of a few that

1 were not wiped out via whatever the event was, whereas a
2 mixed aged Ash forest does rather suggest that there are -
3 let's say - three identifiable age groups of trees within
4 the same area, but it would be a curious thing to say that
5 a mixed aged forest is one where you have got one really
6 old tree and everything else is new. That does not meet
7 ordinary language standards of mixed aged we would say.

8 GARDE AJA: Let me think about regrowth Ash forest, that if we
9 exclude intervention by clearing, that is not relevant to
10 the conversation, if that is the position, which I don't
11 know, but I will assume for the purposes of the question.
12 Then we have got 2009 which we can put to one side. We
13 have got 1939 and when we go, what in practical terms are
14 the regrowth areas we are talking about as a consequence
15 of major fires that might affect this area?

16 MR BURNSIDE: I think the evidence shows that there was a major
17 fire in about 1905 or '06 and there is another year in
18 late 1800s which - I'll try and find out - but given what
19 we know about this continent it is not too surprising that
20 there are major fires from time to time and certainly 1905
21 was the focus of some questions in the evidence and 1939
22 naturally was another. That may be the origin of what
23 could fairly be called mixed aged forest given you have
24 trees with a potential life of 400 years or so,
25 significant fire events every 50 years let it be supposed
26 would be sufficient to give you half-a-dozen aged cohorts
27 within an area if it was affected in each of those fire
28 events.

29 GARDE AJA: If you think about 1939, that would be
30 significantly less than the 120 year so we are really
31 starting to look back to 1905/1906, are we, to consider

1 trees that are likely to have subsequently grown and reach
2 the relevant level of maturity so that is one possible
3 class of trees under consideration, and the second trees
4 that cause remnant trees, they may be that have survived
5 the cataclysmic bushfire events.

6 MR BURNSIDE: It depends on what you assume about the
7 particular fire in the particular area. It is not
8 necessarily the case that even a cataclysmic fire like
9 1939 destroys every tree in the area and so if you imagine
10 trees that were 30 or 40 years old at the time of that
11 fire, seven years later they could very easily be hollow-
12 bearing trees and presumably would be regarded as regrowth
13 although if at that point you are talking about trees that
14 might be 90 or 100 years old, in which case it might
15 conceivably be called a mixed aged forest depending on the
16 numbers that survived.

17 If 99 per cent of them got wiped out, then what you
18 will get - some of which could be regrowth forest
19 presumably. If 20 per cent of them were wiped out, then
20 what you get subsequently is a mixed aged forest, on the
21 ordinary use of language and on the way Professor
22 Lindenmayer dealt with those questions.

23 If I may say this with respect; His Honour's
24 treatment of the definition of Zone 1A in the Action
25 Statement appears to make the second dot point redundant,
26 left it with no work to do because given that the first
27 dot point doesn't look to the existence of hollows as a
28 matter of fact, then simply to say, "First dot point,
29 trees more than 120 years old; second dot point, trees
30 more than 120 years old with hollows add nothing to it, if
31 you find the hollows as well as the required number of

1 120-year-old trees, that's interesting, but it doesn't add
2 to the score because they get on the list by being 120
3 years old plus", and with respect, it is clearly intended
4 that the second dot point should have some work to do and
5 the work it does in our submission is to say, "Okay, we
6 accept that trees younger than 120 can have hollows.
7 Hollows are what we are interested in. If you can find
8 enough of them, then that would appear to be a suitable
9 habitat and therefore should be protected."

10 TATE JA: Mr Burnside, your submission is as I understand it
11 that the first two dot points are to be treated as
12 independent criteria so in particular the second dot point
13 stands on its own.

14 MR BURNSIDE: Yes.

15 TATE JA: But if that's the case, doesn't that mean that the
16 first dot point has to stand on its own? I think you
17 agreed with me that the first dot point would allow for a
18 situation where, say, there was only two old trees within
19 that area and that that would be sufficient then to demand
20 that they be treated as having major priority, and you
21 said, I think, that that would be a very, very generous
22 way of understanding mixed age Ash forest.

23 MR BURNSIDE: It would be odd in our submission to say that in
24 an area of three hectares with - let us say - 300 trees,
25 to say that if there are two trees that are older than 120
26 years in that group, that is then a mixed aged forest with
27 the oldest cohort of greater than 120 years. That seems
28 to be straining the language in the common sense.

29 TATE JA: But if that's the case, doesn't that provide the
30 reason why there was a need for additional criteria or
31 additional indicia to show what really is Zone 1A habitat?

1 It is not sufficient that you satisfy the second category
2 in the first dot point. You have actually got to go on to
3 look to see whether there are a sufficient number of live
4 hollow bearing trees in that class.

5 MR BURNSIDE: I understand the point, but with respect, no,
6 because it all turns on what is meant by mixed aged Ash
7 forest. I mean if the whole forest area is 120 years or
8 older, then there is no problem and it would be obviously
9 very likely that you will get at least 12 hollow bearing
10 trees and that's the critical level for Leadbeater's
11 Possum. When I say "Critical level", that's the level
12 beyond which further hollow-bearing trees make no
13 difference to their survival. The question then is what's
14 mixed aged Ash forest.

15 If it is just a couple of trees in three hectares,
16 in our submission, that would be a strained and
17 unreasonable way of reading that dot point. It must be at
18 least a significant percentage. I wouldn't want to be
19 tied to a percentage, but let's say ten or 20 per cent of
20 the relevant area should be of an identifiably separate
21 age. That would make sense. That would probably mean you
22 are looking at, at least, 30 or 50 trees of that older age
23 cohort.

24 In addition, counting against what Your Honour says
25 is the fact that the second dot point refers to regrowth
26 Ash forest rather than mixed aged Ash forest. If it was
27 really a qualification of the first dot point, you would
28 expect to use the same language with a different
29 qualifier.

30 TATE JA: One would certainly expect that. I mean it is
31 clearly not drafted in an ideal fashion, but I think you

1 agreed before that on the evidence, regrowth Ash forest is
2 really a subclass of mixed aged Ash forest so it is as it
3 were suggesting that the first dot point which would allow
4 for a situation where there were only two or three trees
5 of the right type, that is to say a proxy for hollows
6 without inspecting them, wouldn't be sufficient so one
7 then has to go further and see by inspection or by survey
8 whether there are 12 hollow bearing trees of the right
9 type in that forest, that is, within a forest that has
10 over 120-year-old trees in it.

11 MR BURNSIDE: I'll try and answer the question. I hope I have
12 understood it correctly. Let it be accepted that mixed
13 aged Ash forest may include a relatively modest number of
14 the older Ash trees. Let it be assumed also that a
15 regrowth Ash forest might contain a similar number of
16 older trees. Regrowth forest is more likely to contain
17 fewer older surviving trees, but allow that they may have
18 the same. If that is so, then you qualify under the first
19 dot point and the second has no work to do in that that
20 instance.

21 However, that what we have just articulated is the
22 boundary where the Venn diagram tends to overlap and the
23 boundary where there isn't an overlap because a regrowth
24 forest may include only a small handful of surviving trees
25 of older age in which case you wouldn't sensibly describe
26 it as a mixed aged forest, but you would describe it as a
27 regrowth forest, but then if you are in that sub- - if the
28 numbers are such that you describe it as a regrowth forest
29 rather than mixed age, then you have to look for hollows.

30 Now, the existence of hollows may depend in parts on
31 what or will depend in part on when the relevant regrowth

1 began and how many instances survived the relevant event,
2 but the point is that provided there can be - even in
3 theory - a difference between a mixed aged forest and a
4 regrowth forest, then the second dot point has relevant
5 work to do. We would submit that the circumstances in
6 which it will have work to do is where the relevant event
7 has cleared out so much of the forest that after regrowth,
8 you couldn't sensibly say it is a mixed aged forest, but
9 it is a regrowth forest, even allowing that there are some
10 older trees surviving. So it does in principle and we
11 would say almost certainly as a matter of fact have real
12 work to do independently of the first dot point.

13 TATE JA: Yes, but doesn't it suggest that if as you say a
14 regrowth Ash forest is unlikely to have many old hollow-
15 bearing trees, that's precisely the reason why there has
16 been a density requirement so in effect the first dot
17 point says, "If there is a mature Ash forest or a mixed
18 aged Ash forest, that is, where the oldest tree is over
19 120 years old - " - - -

20 MR BURNSIDE: Not the oldest tree, the oldest class.

21 TATE JA: Or the oldest class, if within that class one has a
22 regrowth Ash forest, which you have accepted that there is
23 that relationship - can exist, then precisely because
24 regrowth Ash forest may have very few old hollow-bearing
25 trees, there is a need to satisfy the density requirement,
26 namely, there is a need to find that there are 12 of those
27 live old hollow-bearing trees.

28 MR BURNSIDE: I'm not sure if I have understood you properly,
29 but if - the first question is what can qualify as a mixed
30 aged forest? Can a regrowth forest qualify as a mixed
31 aged forest? Well, perhaps. Is it likely? Probably not,

1 but let's suppose it can. If it can, and you have a mixed
2 aged forest where the oldest age class is greater than 120
3 years, then I don't need to look to the second dot point
4 even though the reason for a mixed aged forest is the fact
5 that there's been an event leading for regrowth.

6 On the other hand, if the number of older trees that
7 have survived the relevant event before regrowth begins,
8 if that number is smaller than could sensibly be described
9 as mixed aged forest, then the second dot point operates
10 on its own, and not surprisingly given that that forest
11 will be characterised principally by regrowth. Your
12 concern will be to see whether as a matter of fact it
13 provides habitat that is suitable for Leadbeater's Possum
14 whereas the first bullet point assumes that given the
15 dominant age of the sufficient number of trees, that it
16 will provide a suitable habitat. I don't know if that has
17 dealt with the question.

18 TATE JA: Thank you.

19 MR BURNSIDE: We should say for completeness, the third dot
20 point plainly enough has to be understood as applying
21 equally to both of the two previous dot points and the
22 fact that it is a dot point is probably a function of
23 Microsoft Word more than anything else. Now, the Forest
24 Management Plan also emphasises the importance of trees
25 with hollows. The Forest Management Plan should be tab 2
26 in the volume of critical documents. Can I take the court
27 to pp.89 to 90 in that document. On p.89 at about point 7
28 on the page is the heading "Retention of hollow-bearing
29 trees". The paragraph reads, "Many Australian birds,
30 bats, arboreal mammals and reptiles are dependent on tree
31 hollows for nesting and roosting. For the majority of

1 eucalypts in the Central Highlands, hollows are thought to
2 form in trees from about 100 to 150 years of age. Trees
3 of mature and senescent growth stage generally contain
4 more hollows than regrowth trees. The loss of hollow-
5 bearing trees from Victorian native forest is listed as a
6 threatening process under the Flora and Fauna Guarantee
7 Act 1988.”

8 At the foot of the page, the last paragraph,
9 “Predictive modelling of the number of hollow-bearing Ash
10 eucalypts indicates that a steady decline will occur until
11 about 2065. After this the number of trees containing
12 hollows will increase. This forecast is based on research
13 into Leadbeater’s Possum that indicates that Ash eucalypt
14 trees with hollows are collapsing at a rate of 3.6 per
15 cent for the total population each year.” A reference to
16 Byrne and Meyer’s work. “This decline is largely
17 attributable to the natural deterioration and collapse of
18 the 1939 fire-killed stags. The protection of existing
19 live hollow-bearing trees and recruitment of trees to grow
20 onto maturity is therefore required to ensure the long
21 term availability of this component of wildlife habitat.”

22 Then can I skip a paragraph? “This plan provides a
23 precautionary approach to maintaining hollow dependent
24 wildlife populations on State forest. At the strategic
25 scale, large areas of forest containing mature and
26 senescent trees are protected within the special
27 protection zone. In total, about 64 per cent of the
28 forced public land is not available for saw log
29 harvesting. At the detailed scale, the guideline below
30 provides for hollow-bearing tree retention and recruitment
31 from timber harvesting coupes.”

1 Further on in the document, p.95, we will come to
2 the part that gave His Honour some understanding
3 difficulty. Page 95 at about point 2 on the page, after
4 some introductory observations about Leadbeater's Possum,
5 after the third bullet point, "Young regeneration or
6 uneven aged Ash eucalypt forests that contains Wattles and
7 an ample supply of hollow-bearing trees is ideally suited
8 for the species. The fire killed remnants of mature
9 forests and the resultant regrowth from the 1939 fires
10 have provided abundant feeding and nesting habitat during
11 the past 30 years. However, as the fire killed nest trees
12 decay and fall, the extent of this type of habitat is
13 diminishing. Loss of potential nest trees due to timber
14 harvesting is incremental to this."

15 In a heading "Habitat classification and
16 management", "Flora and Fauna Guarantee Actions Statement
17 which has been prepared for the species defines the three
18 zones of Leadbeater's Possum habitat. Zone 1A habitat
19 contains living older trees and is expected to be
20 important for the long term conservation of the species.
21 Zone 1A habitat is protected in either conservation
22 reserves or the special protection zone. Appendix L
23 indicates the extent of existing Leadbeater's Possum Zone
24 1A habitat and Ash eucalypt forest across its known
25 range."

26 If the court is interested, appendix L is at p.D195.
27 Further down after referring to Zone 1D and Zone 2, the
28 document crucially says this, "Table 3.2 defines Zone 1A,
29 Zone 1B and Zone 2 habitat; to promote the development of
30 Zone 1A habitat and mixed aged forest, NRE will continue
31 research into and operational trials of the retained

1 Overwood silvicultural system in regrowth stands adjacent
2 to stands of veteran trees."

3 Then table 3.2, "Leadbeater's Possum habitat Zone
4 1A, density of hollow-bearing trees 12 per three hectares,
5 in patches greater than three hectares, hollow-bearing
6 tree type, living trees containing hollows and management
7 is, it should be in the Special Protection Zone."

8 Now, you will notice a couple of things about this.
9 The first is that in paragraph numbered 1 further up the
10 page, there is a paraphrase of Zone 1A which is incomplete
11 in that it is referring back to the Action Statement
12 because it overlooks the second dot point. Table 3.2
13 focuses not on the proxy, but on the thing with which we
14 are concerned with, namely, the number of living trees
15 containing hollows. Table 3.2 is said to define Zone 1A
16 and in our submission on any view of things, this
17 document, the Forest Management Plan, is a binding
18 document and one which must govern the field.

19 Some confusion was introduced into the document on
20 p.D97. The confusion comes in the box which is labelled
21 "Management prescription". It is worth noticing what a
22 management prescription actually means. It is identified
23 at p.76 of the document. Page 76, there is a taxonomy of
24 management integers, management guidelines give directions
25 to forest managers to facilitate protection or careful
26 management of specific values or uses. Management
27 prescriptions details specific conditions or standards
28 which apply to forest operations in the vicinity of
29 certain threatened flora or fauna. More detailed
30 prescriptions are established at the local level and are
31 reflected in wood utilisation plans and management actions

1 commit NRE to implementing a number of actions which will
2 further enhance the management of State forest.

3 So the management prescription in the first bullet
4 point says, "Include Leadbeater's Possum Zone 1A habitat
5 in the Special Protection Zone." Now, I deliberately
6 skipped the words in parenthesis because His Honour in our
7 respectful submission gave those words far too much
8 significance plainly enough of the sentence is saying is
9 that Leadbeater's Possum Zone 1A habitat is to be included
10 in the special protection zone. The parenthetic reference
11 to living mature and senescing trees, see table 3.2, is at
12 best a poor paraphrase and in our submission is incapable
13 of governing the definition which table 3.2 implements.

14 Now, it has to be acknowledged this document
15 contains a number of observations which are perhaps more
16 careless than you would expect to find in the hand of
17 parliamentary draftsmen, but they are not prepared by
18 parliamentary draftsmen and that probably explains the
19 confusion which appears in the document.

20 WARREN CJ: How do you say we should deal with the words in
21 parenthesis? Do you say we should just ignore it?

22 MR BURNSIDE: Yes, we do. Because a parenthetic insertion in
23 an instruction to include Zone 1A in the special
24 protection zone is hardly apt to redefine the very thing
25 that you are discussing. Now, back at p.95, it is very
26 clear that in the reference beginning at the page to the
27 Action Statement reference to Zone 1A habitat is plainly
28 not accurate and not complete. It is clear further down
29 the page that table 3.2 is said to define each of the
30 relevant zones including Zone 1A. The definition of Zone
31 1A in our submission side steps the proxy and goes

1 directly to the heart of the matter. It is concerned that
2 there should be 12 living trees containing hollows per
3 three hectares. That's the one measure which is supported
4 by Lindenmayer's work as being relevant to Leadbeater's
5 possum and a sufficient number beyond which any further
6 trees with hollows will not add significantly to their
7 survival.

8 Now, of course the reality is given the matter we
9 discussed a few minutes ago, the reality is an area of
10 Mountain Ash which contains at least 12 living trees
11 containing hollows is likely to contain a number of older
12 trees containing hollows. It is much more likely that
13 older trees will have hollows than younger trees. To
14 define 12 tree in three hectares suggests the likelihood
15 that many of those trees will be older, but what the
16 definition did not do is to require that all 12 of the
17 trees with hollows should be older than any particular
18 age.

19 One of the curiosities in this case is that the Gun
20 Barrel coupe in the relevant parts identified on the maps
21 did contain 12 hollow-bearing trees within three hectare
22 areas and the evidence of Mr Ryan was that I think eight
23 of those trees, six or eight of those trees, in one of the
24 areas was material senescing, but because all 12 were
25 material senescing, he regarded that coupe as no longer
26 qualifying as Zone 1A and that with respect is a perverse
27 outcome given that on the clear evidence of Professor
28 Lindenmayer the presence of 12 hollow-bearing trees which
29 he himself observed, counted, and his colleagues
30 photographed, the existence of those trees was the very
31 thing which is required for Leadbeater's Possum habitat.

1 It is with respect a very strange thing that you
2 disqualify the entire coupe from Zone 1A by reference to
3 the fact that not all of the trees are of the age that
4 they regard as in some way significant.

5 GARDE AJA: But as a practical matter when you are looking at
6 forest assessment, how do you pick the difference between
7 a tree that is 120 years of age and a tree that is 100
8 years of age?

9 MR BURNSIDE: Well, that is a good question, Your Honour. I am
10 not sure that anyone ventured to say how that precise
11 measurement could be done. There is in the material
12 illustrations of seven stages of a tree from early
13 maturity through to senescence and you can see that there
14 are changes to the crown and there are changes to the
15 number of branches and so on, so in a broad sense, you
16 could say, "Well, even on an aerial view we can see there
17 is quite a lot of trees that have broken crowns and are
18 therefore likely to be approaching senescence and are
19 there are therefore likely to be say a couple of hundred
20 years old."

21 But of course what Professor Lindenmayer and his
22 colleagues did was they walked the ground and they counted
23 the number of trees with hollows, some of them old, for
24 sure, some of them less old. I don't think anyone said
25 you can say, "This one is 100 and that one is 105 or it is
26 95 or whatever it is" and it would be a strange exercise
27 to undertake because you are only interested in the age as
28 being an indicator of whether it is likely to have
29 hollows. If it has hollows, you probably don't care how
30 old it is.

31 GARDE AJA: One factor in considering that construction of the

1 Action Statement of the management plan is to consider how
2 in practical terms on the ground it is going to be
3 applied.

4 MR BURNSIDE: Well, on the ground as I say, it seems that from
5 the illustrations of the form of trees, you can say in a
6 general sense that it is extremely old or it is fairly old
7 or it is between, you know, it is sort of early mature or
8 late mature; very gross observations, but useful because
9 it speeds up the process of seeing whether this forest
10 falls within that zone or another zone. But it is
11 important not to lose sight of the fact when trying to
12 interpret the documents what is the objective of it all or
13 what's the point of the whole exercise.

14 The point of the whole exercise is to see whether
15 this is a habitat which is suitable for Leadbeater's
16 Possum. If it has got 12 hollow-bearing trees regardless
17 of their age, then it is suitable and to say, "We will
18 treat it as not being suitable because we think some of
19 the hollow-bearing trees aren't old enough" is with
20 respect to - well, is to misread what the definition
21 requires and to miss understand what the purpose of the
22 exercise is. In our submission, the definition in table
23 3.2 goes directly to the heart of what you are after.

24 Now, it may be of course that in seeking to make
25 observations for Zone 1A as defined in table 3.2 it may be
26 that experienced people would fly over the forest and just
27 get a general impression that there is really quite a lot
28 of degenerating crowns and therefore it is highly likely
29 that there is more than 12 hollow-bearing trees. At the
30 margins, that sort of examination probably wouldn't be
31 terribly helpful, but this definition has the great

1 advantage that not only is it put forward explicitly as
2 the definition, it has the advantage of being precise. It
3 doesn't involve any estimate of age. It looks to the
4 thing that you are interested in.

5 GARDE AJA: Does the evidence disclose how in the industry the
6 task of discerning whether there is or is not compliance
7 is typically approached? Is it straight off air
8 photographs? Is it done on the ground? How in practical
9 terms is it to be discerned whether there is compliance or
10 not?

11 MR BURNSIDE: Your Honour, I can't answer that. I don't know.
12 I was speculating when I said they might fly over it.
13 They might walk through it, but anyone who has walked
14 through a forest would appreciate immediately that there
15 would be some trees where you can say with real confidence
16 that it is pretty old. You can tell when - in fact
17 I think one of the documents - yes, the standards, yes.
18 There is a document that deals with this and in effect
19 tells people what they should do on the ground and what
20 they do on the ground is to find a tree that has the
21 characteristics and then they look around and in a forest
22 of this sort, their line of sight is something like -
23 I think it is 57 metres is - or that they need to look to
24 and that will give you approximately one hectare and they
25 should then make a visual observation to see whether they
26 identify trees of that sort. The document I had in mind
27 is - begins at p.D598.

28 WARREN CJ: Can you tell us which volume?

29 MR BURNSIDE: I'm so sorry, volume 7.

30 WARREN CJ: Thank you.

31 MR BURNSIDE: Now, this is a document called "Survey standards

1 contribute. Very large live trees, that is, mature or
2 senescent, with irregular crowns, broken limbs,
3 buttressing and durable hollows are easily identified as
4 hollow-bearing trees. While older trees are more likely
5 to contain hollows, hollows can also occur in younger
6 smaller trees, for example, during the examination of
7 2,300 living and dead Ash trees with hollows in the
8 Central Highlands, while the mean size of hollow-bearing
9 tree of 1.9 metres", and I think that is a reference to
10 diameter, "Some trees as small as half a metre in diameter
11 contain hollows.

12 Some parameters such as slow latitude and stand age
13 and tree attributes such as height, diameter and form all
14 influenced the likelihood of the tree containing hollows.
15 It is therefore difficult to use a single feature such as
16 diameter as a surrogate for the likelihood of containing
17 hollows. Instead, each tree needs to be inspected for a
18 range of features that indicate the likelihood of
19 hollows." They then go on to identify the various groups.
20 I'm pretty sure this is the document that says - yes,
21 there we go - maybe not - I'm pretty sure that in this
22 document where Mr Nekvapil will find it for me is a
23 reference to the idea that if you find one and if you look
24 at a 57 metre radius, you are looking at one hectare and
25 so you can do the count.

26 I should though explain that did not completely
27 answer Your Honour Justice Garde's question because this
28 is the procedure when it is proposed to log a particular
29 area and so you have got to determine whether or not it
30 falls within Zone 1A so that it is excluded. For more
31 general purposes, they may without any particular

1 intention to use an area as a coupe, they may think that
2 flying over it or a casual observation is enough to
3 satisfy them that it is plainly Zone 1A.

4 GARDE AJA: If we look at p.606 of the first dot point on that
5 particular page that it introduces a methodology about
6 discernment as to whether there are or are not 12 hollow-
7 bearing trees per three hectares, but if I go back to the
8 second last dot point on p.604, the definition contained
9 in this document of the hollow-bearing tree is unrelated
10 to age.

11 MR BURNSIDE: Yes.

12 GARDE AJA: It is related to dimension, but not age.

13 MR BURNSIDE: Yes. And of course dimension and age will be
14 roughly correlated in the ordinary way of things, but you
15 are quite right. That is why we say age is really just
16 passing for what you are interested in. Whilst we are on
17 this document, can I just refer to the last dot point on
18 p.605 which is the passage I had in mind and tells you
19 that a seven metre radius is approximately a hectare. You
20 will see that it says at the foot of that page, "Four or
21 more hollow-bearing trees observed within approximately 50
22 metres indicates that categorisation to zone 1 is likely -
23 it is of similar densities of hollow-bearing trees in
24 adjacent areas, that is, appropriate area of three
25 hectares."

26 WARREN CJ: Just still on that page 605, it would appear
27 further up with the references to identification, groups
28 one through to four, that there is an emphasis on
29 assessing the appearance of the tree and those indicators
30 are set out there rather than some other measure to
31 indicate just the straight age of the tree.

1 MR BURNSIDE: Yes, that is so. They are markers that enable
2 you on the ground to see that maybe you do need to look
3 for hollows except the first one of course where the
4 hollows are obvious.

5 GARDE AJA: Firstly, Mr Burnside, if you would identify the
6 provenance that this particular document, I see it has
7 three authors. Does it have any official status or is
8 this document in survey standards intended to be a
9 methodology that is designed by the authors who wanted to
10 give effect of their conception as to the proper effects
11 of the Action Statement and the management plan?

12 MR BURNSIDE: All I can tell you is that it was prepared within
13 the department. It's only a draft. I don't know if it is
14 been adopted either in this form or in some modified form,
15 but it reflects we would submit exactly the right sort of
16 way to think about the problem and in particular as we
17 have discussed, it does not concern itself with age of the
18 trees. It concerns itself with the existence of hollows.

19 WARREN CJ: Was the document before His Honour?

20 MR BURNSIDE: Pardon me.

21 WARREN CJ: Was the document before His Honour? I cannot
22 recall.

23 MR BURNSIDE: It must have been otherwise it would not be in
24 the appeal book.

25 WARREN CJ: I don't recall His Honour referring to it, but that
26 might be my oversight.

27 MR BURNSIDE: I think that's right. I don't think it is
28 referred to, but it certainly was before His Honour as
29 Mr Nekvapil assures me. In our submission, His Honour's
30 approach to the question of the meaning at table 3.2 was
31 unduly influenced by the parenthetical words in the

1 management prescription at p.D97 where there is reference
2 to living material senescing trees which is not only
3 inaccurate because those words do not appear in table 3.2
4 and for that matter, they do not appear either in the
5 Action Statement in its definition of Zone 1A nor in the
6 paraphrase of the Zone 1A definition in the Action
7 Statement at p.D95. What it appears to reflect with
8 respect is a view within the department that prepares this
9 document that mature and senescing trees are likely to
10 contain hollows which is unimpeachable.

11 It is true they are likely to, but that does not get
12 around the point that one is concerned with hollows as a
13 matter of fact and the definition in table 3.2 is
14 concerned with hollows as a matter of fact. I mentioned a
15 few minutes ago that the likelihood of Leadbeater's Possum
16 nesting in an area of forest is maximised where there are
17 12 hollow-bearing trees and that tends to plateau after
18 that after the numbers increase and that is reflected in
19 particular at paragraph 171 of the judgment which draws
20 directive from a document at p.E496. It is not necessary
21 to take you to those, but that is the source.

22 Just following from Justice Garde's observation a
23 moment ago, there was material before His Honour which
24 showed a relationship between the diameter of the tree and
25 the likelihood of hollows and I guess one can take
26 diameter as a rough proxy for age and that relationship is
27 illustrated by the document at E475 which is in volume 8.
28 I should explain something about the document. It should
29 be under tab E9. Tab E9 is what was Exhibit X at the
30 trial which was highlighted copies of extracts from
31 various articles which also exhibited as where - and

1 unfortunately the highlighting simply makes the documents
2 more difficult to read, but at E475 you will see an
3 illustration which found its way into His Honour's reasons
4 - what the table at the top does, table 4, does is to
5 identify the minimum, mean and maximum value of various
6 characteristics including height, diameter, number of
7 hollows, number of fissures, number of hollow branches and
8 total cavities.

9 The box plot below it illustrates broadly speaking a
10 correlation between diameter and the number of cavities.
11 Interesting though it seems to be that none of the
12 material - I think I'm safe in saying - none of the
13 material showed a correlation between the number of
14 cavities and the age of trees. In fact there is
15 correlation, we know that, but none of them shows the age
16 however estimated is a better substitute for predicting
17 the existence of hollows than, for example, diameter or
18 height. I only mention that because whilst in a broad
19 sense it is accurate to say that the older the tree, the
20 more likely it is to have hollows.

21 It would be wrong to think that age is a strongly
22 reliable predictor for the existence of hollows and it is
23 a good reason in our submission why age should not be
24 regarded as one of the characteristics associated with the
25 definition where the objective is to preserve areas of
26 forest that have at least 12 hollow-bearing trees to
27 enable the survival of the species. Because the presence
28 of hollow-bearing trees is the key to the survival of the
29 species, in our submission it should be understood - a
30 number of hollow-bearing trees should be understood as the
31 most significant characteristic, certainly more

1 significant than age to the extent that age and the
2 numbers of hollows do not overlap.

3 GARDE AJA: When you say the growth of the tree is dependent
4 upon a range of factors, sunlight, vocation, quality of
5 soil, surrounding vegetation and doubtless other things,
6 it is actually in the shape or the configuration of the
7 tree that's the important consideration here.

8 MR BURNSIDE: Well, even more precisely than that, the
9 existence of hollows in the tree is the key consideration
10 and you are right, all of those factors influences the way
11 the tree grows, but in addition Professor Lindenmayer made
12 the point that lightning strikes will affect the existence
13 of hollows in the tree. Termite activity will affect the
14 existence of hollows in the tree. Falling branches et
15 cetera affect the existence of hollows in the tree.

16 At the risk of repetition, Leadbeater's Possum don't
17 make an aesthetic judgment about living in old trees; they
18 want to live in hollows. The question is what's more
19 important; the age of the tree or the existence of a
20 hollow? Plainly enough it is the existence of a hollow
21 and that's clear on all of the evidence.

22 At paragraphs 194 to 195 of His Honour's reasons, in
23 our submission His Honour allowed age to dominate the
24 question rather than the existence of the hollows. Given
25 the stated purpose of the Action Statement and the stated
26 purpose of the Forest Management Plan is to ensure as far
27 as a human can do it, the survival of Leadbeater's Possum,
28 it is our submission that that purpose is better achieved
29 by the literal meaning in table 3.2 and the court should
30 adopt a purposive approach to interpreting table 3.2 of
31 the Forest Management Plan.

1 His Honour adopted a meaning which would allow the
2 logging of coupes which are likely to support Leadbeater's
3 Possum. The Gun Barrel coupe did have areas identified in
4 the map which contained at least 12 hollow-bearing trees
5 within three hectares. The competing evidence of Mr Ryan
6 was just taking one part of the coupe which is easily
7 enough identified, he said, "Well, no, only eight of those
8 hollow-bearing trees are more than 120 years old."

9 In our submission, it would be to lose sight
10 entirely of the objective of the Forest Management Plan to
11 allow the logging of an area which visibly has more than
12 12 or has 12 hollow-bearing trees in the required area
13 that allowed a logging of all of them because only six or
14 eight of them happened to be older than 120 years
15 according to his assessment.

16 WARREN CJ: Well, another way of approaching that is for you to
17 say, "What if there were 11 trees identified?" So it fell
18 short by one, therefore under this test, they all go.

19 MR BURNSIDE: That is how the definition works. We can debate
20 whether the definition is sensibly struck, but that is the
21 way it works. At least it is clear and in our submission
22 it would plainly be the case that if there were only 11
23 hollow-bearing trees in the relevant three hectare area,
24 then it would not be Zone 1A. Now, having said all of
25 that, in our submission the court can decide this appeal
26 on Ground 3 alone. If the court accepts our submission,
27 table 3.2 should be read literally in its definition of
28 Zone 1A without the intrusion of any age overlay, then in
29 our submission the declaration numbered 1 which we have
30 put forward should be made.

31 WARREN CJ: Is there any finding of fact that underlies that

1 declaration?

2 MR BURNSIDE: Well, the declaration is about the proper
3 construction.

4 WARREN CJ: Yes.

5 MR BURNSIDE: Now, the findings of fact are so - good question
6 - the findings of fact I think support this; that the
7 relevant parts of the Gun Barrel coupe which were the
8 subject of evidence didn't contain the required number of
9 hollow-bearing trees in the required areas. The evidence
10 against that from Mr Ryan was, "Sure, but not all of them
11 are more than 120 years old." So the case really fell to
12 be determined on that narrow question of construction.

13 GARDE AJA: What it comes down to is quite a detailed actual
14 exercise between you're counting trees, you are looking at
15 three hectares, polygonal shapes, it is an exercise that
16 under the particularly in the management plan will produce
17 actual outcomes on which experts can vary - opinions can
18 vary as to the reality of the 12 trees in three hectare
19 area.

20 MR BURNSIDE: That's true although this court doesn't have to
21 be worried about that. That was done first by the
22 department and of course by the appellant and it's been
23 determined by His Honour. The real question that divides
24 the party is what is the meaning, what is the definition
25 of Zone 1A because we assume that if the court is with us
26 and we correct in our approach to what Zone 1A is, then
27 the relevant parts of the relevant coupes will not be
28 logged. We accept that's the way in which the department
29 would proceed.

30 GARDE AJA: Which is you say the more significant document; the
31 Action Statement or the management plan?

1 MR BURNSIDE: The one which is plainly directly binding is the
2 Forest Management Plan. The Action Statement in our
3 submission is interesting because it comes first and
4 useful because of its discussion of the purpose of the
5 whole thing, but only if the court were against us on the
6 meaning of the Zone 1A, the definition of Zone 1A in the
7 Forest Management Plan. Only then would it be necessary
8 to consider separately the meaning of the definition of
9 Zone 1A in the Action Statement because the Action
10 Statement becomes indirectly enforceable through the Code
11 of Conduct we would submit, but in our submission, Your
12 Honour, it would be a startling thing for a court to find
13 the two documents produced by the same department had
14 different meanings when they are both aiming at the same
15 objective.

16 GARDE AJA: The Action Statements are the input into the Forest
17 Management Plan, but, is it the Forest Management Plan
18 that really counts in terms of binding the respondent?

19 MR BURNSIDE: Yes, yes it is. Whilst it nobs to the Action
20 Statement and paraphrases it wrongly, in our submission
21 all of that whilst it does provide interesting context -
22 the difficulty is His Honour used the Action Statement and
23 various other bits and pieces as the context within which
24 one had to understand the Forest Management Plan, and if
25 you are dealing with documents prepared by parliamentary
26 counsel, that might be a legitimate approach. However, in
27 our submission the overriding consideration in this case
28 should be taking the Forest Management Plan as the
29 document which determines the fate of relevant parcels of
30 land otherwise said to be logged. What understanding of
31 the words used will achieve the undeniable objective which

1 that document and the other document are both aiming at.
2 The undeniable objective is preservation of a species; the
3 preservation of the species in terms depends on survive of
4 its habitat.

5 Its habitat characteristics have been well-studied
6 by Professor Lindenmayer over a very long time and there
7 is no doubting the proposition that he says that you need
8 at least 12 hollow-bearing trees within a three hectare
9 area for Leadbeater's Possum to survive and flourish.

10 Now, that's precisely what table 3.20 provides. To
11 say that there is a qualification of that definition, a
12 qualification not recognised by Professor Lindenmayer as
13 relevant, in our submission, is to mistake altogether what
14 is the point of the document.

15 GARDE AJA: The Action Statement, if you look at its role under
16 the legislation, the Action Statement should be focused on
17 the preservation of the species. If you look at the
18 Forest Management Plan, that the Action Statement is an
19 input, but there are a range of other inputs too. The
20 management plan is essentially striking a balance for the
21 variety of interests, but indeed a number of liquidation
22 statements so it is possible for the Action Statement to
23 say one thing and the Forest Management Plan to say
24 something else.

25 MR BURNSIDE: Yes, except that the Forest Management Plan
26 defines Zone 1A for the purpose of employing any special
27 protection zone and that's what the management
28 prescription provides. There is nowhere in that document
29 in our submission is there anything which says, "Well, as
30 much as we think the survival of Leadbeater's Possum is
31 important. We think it is also important to have lots of

1 jobs in the logging industry and therefore we will balance
2 one thing against another."

3 In our submission, in its definition in table 3.2
4 and in the Zone 1A should be included in the special
5 protection zone, there is nothing there that distracts
6 attention or should distract attention from the overriding
7 objective to ensure the survival of the species.

8 GARDE AJA: So you say when you review and properly construe
9 the Forest Management Plan, you discern the intent that
10 faithfully gives fulfilment for the Action Statement.
11 That's what it's about in this respect.

12 MR BURNSIDE: Yes. In fact in our submission, the own real
13 difference between the two documents properly construed is
14 that the Action Statement provides an alternative way of
15 identifying areas of forest likely to have the required
16 number of hollow-bearing trees. It's the proxy in the
17 first dot point is really just an indirect way of seeing
18 whether you have got 12 live hollow-bearing trees in the
19 area. Now, as a practical proxy for the real question,
20 probably quite good. It is possible, it is possible
21 I suppose that there are some cases where you might find
22 the first dot point of the Action Statement not satisfied,
23 but the second dot point satisfy - there is likely to be
24 unusual cases.

25 The requirement of 12 hollow-bearing trees is
26 probably, if anything, a little more conservative, that is
27 to say more apt to protect the species than the first dot
28 point of the Action Statement because the impression one
29 gets from the evidence is if you have three hectares of
30 more than 120-year-old Ash forest, you are very likely to
31 find a substantial number of hollow-bearing trees. In

1 other circumstances you need to do a count, but what the
2 Forest Management Plan does and appropriately does in our
3 submission is to focus on the thing that actually matters
4 to achieve the objective which is being sought and in our
5 submission, this court should accept that the literal
6 words of table 3.2 mean what they say and they should be -
7 the document should be understood as introducing that
8 meaning without the distraction to reference of age which
9 is only indirectly relevant to the interests of the
10 Leadbeater's Possum.

11 WARREN CJ: Mr Burnside, you have gone to the first paragraph
12 of the proposed form of relief that your client seeks.
13 Looking at the amended Statement of Claim and the orders
14 sought there, I am having difficulty in making the two
15 connect. I'm looking now at appeal book volume 1 at A28.
16 You will see that as it was pleaded there was injunctive
17 relief declaration about identified operations and so on,
18 and I assume having looked at the plaintiff's written
19 submissions before His Honour that the case ran on the
20 basis of that was the relief sought. My question is if
21 that assumption is correct, is the relief that you seek ad
22 varus with the way the case was run before His Honour?

23 MR BURNSIDE: No, Your Honour, because paragraph 101C seeks a
24 declaration which is consistent with the declaration we
25 seek here.

26 WARREN CJ: I see.

27 MR BURNSIDE: It seemed to us on preparing for today that the
28 declaration in the form of paragraph 1 - or even the first
29 part of paragraph 1 - 1.1 that we have handed up - if that
30 declaration were made, that would then govern the result
31 for the coupes in question. Now, we could have sought

1 something more extensive, but that would involve the court
2 in going through all the minor detail of particular
3 coupes, particular numbers of trees and so on and because
4 we are opposed to a Government department, we assume that
5 the declaration of this sort would then carry the rest
6 with it given the findings of fact which His Honour made.

7 GARDE AJA: Just in your 1.1, you have referred to identity of
8 greater than four hollow-bearing trees per hectare, do
9 I assume that that's intended to - well, replicate or be
10 the same as greater than 12 per three hectares which is
11 the description in table 3.2?

12 MR BURNSIDE: Yes, it is, and - yes, it is. In fact - - -

13 GARDE AJA: In reality, you are thinking in term to replicate
14 what table 3.2 says.

15 MR BURNSIDE: Exactly so, and you are right, it - instead of
16 having the prefatory words of patch greater than three
17 hectares with greater than four per hectare, it would be
18 more accurate and a more faithful representation I would
19 say greater than 12 per three hectare patch.

20 GARDE AJA: So in essence you seek through this form of order
21 to make good your submission that table 3.2 should be
22 viewed as - I will call it - overriding the other text we
23 find in the Forest Management Plan on this topic?

24 MR BURNSIDE: Exactly so. In the hearing below at transcript
25 734, our learned friend said to His Honour, "To make it
26 clear, if Your Honour accepts the plaintiff's submission
27 that a hollow-bearing tree for the purposes of Zone 1A is
28 any living tree with a cavity or a hollow, then we don't
29 challenge the way in which these polygons are being drawn
30 in Gun Barrel." Certainly that seemed to be consistent
31 with the evidence of Mr Ryan whose point of dissension

1 was, "Some of them aren't old enough."

2 TATE JA: Mr Burnside, do you have a page number in the
3 transcript from Mr Ryan?

4 MR BURNSIDE: Yes. Mr Ryan's evidence began at transcript 532
5 and it goes through to 605.

6 TATE JA: Yes, but precisely the page where he says that that -
7 it was dependent upon the age of the tree.

8 MR BURNSIDE: I'm sorry, I misunderstood the question. It is
9 rather in the maps that he put forward as competing with
10 the maps that the present appellant had put forward. In
11 volume 1 at pp.244 and 245 - highlight the real points of
12 distinction. 244 is a map of the Gun Barrel coupe
13 prepared by Mr Stein who was a witness for the plaintiff
14 and you will see that - just taking the left-hand area,
15 there's an area of 4.488 and density of 4.010, there you
16 will see identified by number various trees. Those are
17 trees which were identified as live trees with hollows in
18 them. At p.245, there's the corresponding map produced by
19 Mr Ryan and you will see that the shape of that polygon is
20 the same. There is a smaller number of trees marked and
21 they are coloured blue or brown as either been mature and
22 senescing or mature and not senescing, but you will see
23 there is a smaller number of them because he is saying in
24 substance at 244 that neither of them are mature and
25 senescing.

26 The material supporting that is in the tables that
27 are immediately preceding it at 242 to 243 and that gives
28 details, specific details, and characteristics of each
29 tree identified by number on those maps. I think that the
30 simple answer to your question, Your Honour, is you can
31 see that what Mr Ryan has done is to remove those trees

1 matter would turn on the question of construction and that
2 if the construction advanced by MyEnvironment, the
3 appellant now, that it is correct that there were the
4 requisite number of trees in Gun Barrel coupe and it was
5 similarly conceded by MyEnvironment that if their
6 construction was not correct, then VicForests'
7 construction was correct and there were not the requisite
8 number of trees in Gun Barrel.

9 Your Honour, it appears that the primary focus of my
10 learned friend's submissions have been appeal Ground 3 as
11 dealing with the proper construction of the prescription
12 in the Central Highlands Forest Management Plan. Appeal
13 Ground 4 and appeal Ground 5 have been expressly
14 abandoned. That leaves appeal Ground 1 and 2 which appear
15 also to have been put to one side, appeal Ground 1 was a
16 ground which stated that His Honour erred in holding that
17 the Action Statement did not impose obligations
18 independently of the Forest Management Plan. Appeal
19 Ground 2 dealt with a ground that His Honour erred in the
20 proper construction of the prescription in the Action
21 Statement.

22 From what my learned friend has said, he seemed to
23 accept that it was the Forest Management Plan rather than
24 the Action Statement that cast binding obligations on
25 VicForests. To the extent that appeal Ground 1 is still
26 pressed, we would say that His Honour in his reasons at
27 paragraphs 206 to 215 of the judgment cogently reasoned to
28 the conclusion that the Action Statement of itself does
29 not impose obligations independent of the Forest
30 Management Plan. The Action Statement in its own terms
31 expressly contemplates that the relevant prescription will

1 crystallise in the Forest Management Plan and we would
2 say, Your Honour, that what His Honour did in relation to
3 the Action Statement was to have regard to it and utilise
4 it as a document relevant in the construction of the
5 Forest Management Plan, but having decided that it imposed
6 no independent obligations itself, he did not use it as
7 the appropriate standard to determine whether or not Zone
8 1A or any other zone existed within the relevant coupes.

9 GARDE AJA: Well, the Action Statement in terms of its legal
10 status appears to be a document which the secretary is
11 directed by the legislation to prepare in relation to an
12 endangered species, if I can summarise the requirement so
13 that the framework of the Guarantee Act is to direct such
14 a document to be prepared consequent upon a particular
15 species being viewed as an endangered species with the
16 object that that Action Statement will cascade into the
17 subsequent management documentation that is prepared.

18 MR WALLER: Certainly we say that is what occurred here, but as
19 the trial Judge found in the earlier case of Brown
20 Mountain, in that case dealing with another threatened
21 species, the Long-footed Potoroo, His Honour held that
22 certain mandatory actions that were set out in that Action
23 Statement were enforceable. So His Honour said that each
24 of the Action Statements need to be construed and
25 interpreted according to their own terms and here the
26 language of this Action Statement was not mandatory in
27 nature and specifically in terms referred to the Forest
28 Management Plan that would be developed in which the
29 prescriptions would be crystallised. So he drew a
30 distinction between his analysis in the Brown Mountain
31 case and the relevant Action Statement that was before him

1 in this case.

2 GARDE AJA: I think Mr Burnside referred to the Action
3 Statement being manifested in the Code of Conduct.

4 MR WALLER: Yes, it is certainly referred to, but it is only
5 where an Action Statement contains a measure specified to
6 take the language of the Code of Conduct that it can have
7 separate and independent force in its own terms and His
8 Honour reasoned that there were not measures specified,
9 but the Action Statement was more properly to be
10 characterised as directions and options rather than an
11 intended - rather than a measure specified. That said,
12 Your Honour, we would agree that the language of the
13 Action Statement is important because it provides
14 background and which informs the proper construction of
15 the Forest Management Plan and if I could go immediately
16 to the Action Statement and highlight parts of the Action
17 Statement that were not emphasised by my learned friend.
18 While it is true as Your Honour Justice Garde has
19 observed, the Action Statement being made under the Flora
20 and Fauna Guarantee Act is directed more obviously towards
21 the protection of threatened species.

22 Nonetheless one still sees the notion of balance
23 that permeates the legislative framework generally, that
24 is provided a balance between the protection of flora and
25 fauna on the one hand, but at the same time allowing to be
26 developed an industry that allows for the extraction and
27 production of wood products on an economic basis so if one
28 goes - if the court goes to p.57 - D0057 on p.2 of the
29 Action Statement, one sees under the heading "Major
30 conservation objectives", following the first objective to
31 which my learned friend took the court, one sees the

1 second objective is to, "Identify and take measures to
2 protect all areas of optimum and potentially optimum
3 habitat as defined in this Action Statement throughout the
4 known range of the species."

5 We would emphasise, Your Honours, the reference to
6 optimum habitat. In the fourth bullet point, Your Honours
7 see this notion of balance to which I referred, the
8 objective being to develop, modify an alternate
9 silviculture systems that result in the continuing
10 presence habitat and the still allow for the extraction
11 and production of wood product on an economic basis. So
12 even in this document which primarily focuses on the
13 protection of the species, one sees the balance; perhaps
14 it is a manifestation of the precautionary principle to
15 which reference has been made in His Honour's decision.

16 In the next paragraph, "Management issues", the
17 Action Statement records that the timber industry strategy
18 for deploying Government 1986 seeks directions with the
19 timber industry by outlining a balance between timber
20 production and environmental protection. It goes on to
21 talk about the code which requires the production of a
22 Forest Management Plan which include detailed
23 prescriptions for the conservation of native forest fauna.
24 "In State forest, FMP is the primary vehicle for the
25 implementation of Flora and Fauna Guarantee Action
26 Statements."

27 I come to the Forest Management Plan, Your Honours
28 will see that notion of balance appears even more
29 noticeably and that's not surprising because it is a
30 management plan that needs to take account of a range of
31 factors. Obviously matters of kind set out in the Flora

1 and Fauna Guarantee Action Statement, but other than that
2 as well. We say the relevant prescription dealing with
3 Leadbeater's Possum and in particular its habitat needs to
4 be construed with that overall purpose in mind.

5 That this is not a situation of finding every tree
6 that contains a hollow and protecting it, but identifying
7 premium or optimum habitat for the Leadbeater's Possum.
8 That's why we say that the notion of large old and
9 senescing trees is highly relevant and cannot be swept
10 aside because it is those trees that provide premium or
11 optimum habitat for the Leadbeater's Possum. The point is
12 emphasised again at p.4 of the Action Statement or D -
13 sorry, at p.5B60. When the notion of zoning, management
14 zoning, is introduced, the very first point made at the
15 bottom of p.5, the last bullet point on the page is, "The
16 current zoning system operating in State forest will be
17 revised to reflect the relative long term stability of
18 some good habitat with living old trees, Zone 1A." So,
19 again, focussing on wood habitat for the Leadbeater's
20 Possum.

21 GARDE AJA: There is a bit more than that in the Action
22 Statement, isn't there, Mr Waller? If I look at the third
23 dot point of the nature of conservation objective, we are
24 talking about amenities and address the development of
25 habitat for the future.

26 MR WALLER: That's so and we would say that that's encompassed
27 by the notion of optimum habitat or optimum or potentially
28 optimum habitat referred to in the second dot point, but
29 the point we wish to make is that it does not cover all
30 habitat. So, Your Honour, the Action Statement itself is
31 replete with references to large old trees. My learned

1 friend took Your Honours to Sun(?) so there is reference
2 to large old hollow trees in the left-hand column under
3 the heading "Habitat" on p.2 of the Action Statement.

4 There is reference in that very paragraph to
5 Leadbeater's Possum preferring or prefer short fat trees
6 with numerous hollows and Your Honours would know that the
7 age of a tree is related to its circumference so again we
8 are talking about old mature trees. Then on p.3 of the
9 Action Statement in the left-hand column, there is
10 reference again in the second paragraph, the paragraph
11 beginning, "In parks and reserves" to "Large dead and live
12 old trees" and that's in reference to clear felling so
13 what he is playing is that even where there is clear
14 felling of Ash forest, that involves as the Action
15 Statement says the removal of all merchantable trees
16 followed by seabed preparation by either burn or
17 mechanical disturbance and artificial sowing or planting.
18 Large dead and live old trees are left standing on the
19 coupe. Unless they present an unacceptable safety hazard
20 or are chosen for seed collection.

21 Now, what the evidence showed in this case was that
22 VicForests had agreed that the harvesting that it would
23 take in Gun Barrel coupe would not be clear felling, but
24 variable retention harvesting whereby islands of the
25 forest would be retained and that was a matter that His
26 Honour took into account in determining that there was no
27 breach of the precautionary principle or no engagement of
28 the principle, and it was also agreed by VicForests that
29 there would be no regeneration burn after harvesting was
30 undertaken.

31 Then in the paragraph in the left-hand side column

1 beginning "The major challenge" on p.3, "The major
2 challenge for the long term conservation of the species is
3 the protection and continuing development of old trees
4 with suitable hollows for nesting and shelter. In
5 conjunction with suitable habitat for foraging." That's a
6 relevant matter. The evidence showed that it was not just
7 hollow-bearing trees that were important, but the Acacia
8 understorey between trees for which the Leadbeater's
9 Possum would forage.

10 That's a relevant matter which we will contend
11 causes some difficulty in the way our learned friends wish
12 to construe the Forest Management Plan, but I will come to
13 that in due course. Then, Your Honours, in the right-hand
14 column on p.3 at the bottom, very bottom, it is said, "The
15 nominal rotation length of 80 years does not allow trees
16 to grow large enough on harvested areas for hollow
17 formation to begin let alone develop sufficiently for
18 Leadbeater's Possum to use" and reference is made to Smith
19 and Lindenmeyer 1988 work. It is said that Smith and
20 Lindenmeyer over the page have described in detail the
21 form of tree selected as nest sites and their data
22 emphasised the old age of trees selected. "It does appear
23 that to properly cater for Leadbeater's Possum, rotation
24 time should be well in excess of 200 years. However, by
25 that age trees would have senesced and be well beyond
26 optimum harvest age and forest structure may not be
27 suitable for Leadbeater's Possum feeding and breeding
28 requirements." Then there are - reference is made at the
29 bottom of p.4 to social and economic issues and the fact
30 that - - -

31 GARDE AJA: Before you leave that last reference, what does it

1 mean when the Action Statement says, "Therefore strategies
2 are needed to maintain adequate number and even
3 distribution of nest trees, inspected areas of regrowth
4 forest and so on." What's that?

5 MR WALLER: We would say that points to the need to retain
6 mature and we would say senescing trees which we say Smith
7 and Lindenmeyer describe as - in the words at the very top
8 of that page, they have selected as nest sites emphasised
9 the old age of trees selected - we would say that those
10 sorts of trees need to be maintained, they need to be
11 protected. We would say that the Zone 1A requirement is
12 directed to those sorts of trees, not any tree however
13 young which might contain a hollow of whatever depth or
14 size.

15 Your Honour, there was some discussion between my
16 learned friend and the Bench about how it is easier to
17 identify a hollow than it is to identify the age of a
18 tree. We would say that these are matters of degree as
19 well, but plainly even on my learned friend's submission,
20 when one looks to Zone 1A in the first bullet point, one
21 sees, "Mature Ash forest greater than 120 years." Now,
22 that is not to say that one goes through the forest and
23 determines precisely if every tree is more than 120 years
24 old. One takes an overall look at the forest and one can
25 tell by reference to various factors broadly what the age
26 of the forest is.

27 On my learned friend's submission there would be no
28 difficulty in identifying mature Ash forest so why then
29 would there be difficulty in identifying a single mature
30 tree? We say as part of our submission and this ties in
31 with the notice of contention before the court that the

1 better construction of the Forest Management Plan is not
2 that the trees need be mature or senescing, but that they
3 be mature and senescing because that would provide a
4 visual guide in addition to identifying the age of the
5 tree, one sees the breaking of the crown, the visual
6 identifying features of senescence, that is, the
7 conditional process of deterioration of a tree with age,
8 and that that's a far better guide which gives faithful
9 application to the requirement that there be these mature
10 old trees rather than the exercise of looking on a tree by
11 tree basis for a tree of any age which might contain a
12 hollow however that might be defined from something
13 approximating a very shallow scratch to the sorts of very
14 large hollows that are plainly visible in mature senescent
15 trees.

16 WARREN CJ: You say it is better. Do you make that statement
17 based on the opportunity for greater certainty?

18 MR WALLER: We say that in interpreting the Forest Management
19 Plan, which as His Honour indicated was directed to those
20 in the field, the foresters, there needs to be a practical
21 process that they can engage in to identify Zone 1A
22 habitat and Mr Ryan gave evidence about how that is done
23 and I will take Your Honours to that, and Mr Spencer in
24 his material before the court also exhibited a document, a
25 guide prepared by VicForests as to how that process is
26 undertaken.

27 By contrast, the document which my learned friend
28 made reference which was a draft document prepared by
29 certain people within the Department of Sustainability and
30 Environment was expressly referred to by His Honour in his
31 judgment at paragraph 329 being a proposal that had gone

1 through 13 drafts and His Honour noted that the draft
2 tendered reflected the primary dispute over Zone 1A
3 prescription contained in the Action Statement and the FMP
4 and His Honour summarised the view taken in that draft
5 document contrasting it with documents, other document,
6 which revealed that other people within the DSE including
7 Mr Lindenmayer as the Executive Director of DSE which
8 suggested that Zone 1A definition was more than 12 mature
9 and senescent hollow-bearing trees per three hectares in
10 patches greater than three hectares to be included and
11 predicted in the SPZ.

12 His Honour said at 332, "I do not accept that the
13 adoption of a survey methodology by DSE could be regarded
14 as resultative or resolute of the interpretation of
15 either the Action Statement or the FMP." There was of
16 course also a letter which post-dated the draft to which
17 my learned friend took Your Honours from the director of
18 the DSE which again suggested that it was mature and
19 senescing trees that are to be identified to meet the
20 description in the FMP.

21 His Honour again took that into account. He gave
22 that some weight although he said it was not again a
23 matter that would dispose of that issue. Ultimately His
24 Honour found that the issue of construction was an issue
25 for the court and His Honour construed the provision in
26 the way that he did having regard to the matters that His
27 Honour referred to in his judgment. I go back though to
28 the Action Statement because His Honour did spend quite
29 some time looking at the Action Statement.

30 GARDE AJA: Before we perhaps leave that subject, mature trees
31 and senescent trees are quite different categories and if

1 we look at Professor Lindenmayer's work, mature trees of
2 age greater than, what, 120 years may well contain or
3 likely to contain hollows of the type that would be
4 appropriate from the point of view of the preservation of
5 the species and senescent trees also have that
6 characteristic. Why should we take the view that a
7 category should be convinced to senescent trees rather
8 than mature trees when those mature trees might be
9 entirely suitable for the preservation of habitat?

10 MR WALLER: Well, we say firstly, Your Honour, that's to follow
11 the language in the description. It doesn't say "or", it
12 says "and". It described the living mature and senescing
13 or senescent trees. We say that each would qualify as the
14 word that comes before so we are not talking about all
15 living trees, we are talking about mature living trees.
16 We are not talking about all mature living trees, we are
17 talking about those which are also in the state of
18 senescence and we say that because the literature
19 emphasises that senescence, that is to say when the tree
20 begins to deteriorate with age, that is when the hollows
21 are yet to be formed and the hollows that are particularly
22 preferred by the Leadbeater's Possum are formed. That was
23 apparent in the scientific papers that in fact His Honour
24 referred to when he analysed the construction of the
25 Action Statement. The Action Statement itself refers to
26 various scientific papers. His Honour at paragraph 193 of
27 the judgment stated that the three scientific papers that
28 he referred to taken together demonstrated a number of
29 things. They demonstrated that the field survey work
30 undertaken by Professor Lindenmayer had adopted the same
31 standard for potential nest trees, hollow-bearing trees

1 and trees with cavities, but importantly we say the papers
2 clearly identify the critical role of large old trees as
3 habitat for Leadbeater's Possum. Also that the field
4 survey work directly utilised the criteria of senescence
5 and classifies the trees surveyed expressly by categories
6 of senescence and we say that critically goes to this
7 mature and senescing point.

8 Likewise in 193D, His Honour said there was a
9 sensitive basis in the work of the 1993 paper for adopting
10 conservation strategy which excludes areas from timber
11 production that contain numerous veteran trees with
12 cavities. And in the next point, again, one we emphasise,
13 His Honour said that the scientific papers demonstrate
14 that both the Action Statement and the FMP may be regarded
15 as responsive to research described in those papers. If
16 the zone management actions and management prescriptions
17 that they contain are read as relating to old, i.e. mature
18 and senescent Mountain Montane Ash trees.

19 WARREN CJ: Are you going on to a new point here? I don't want
20 to cut you off midstream.

21 MR WALLER: If now is a convenient time, we can - - -

22 WARREN CJ: Very well. The court will adjourn until 2.15.

23 LUNCHEON ADJOURNMENT

24

1
2 UPON RESUMING AT 2.16 P.M.:

3 TATE JA: Mr Waller.

4 MR WALLER: May it please the court, in dealing with the
5 construction of the Action Statement, His Honour commenced
6 with a detailed contextual analysis at paragraph 154 of
7 His Honour's judgment. Then from paragraph 170 until
8 paragraph 193, His Honour carefully analysed the three
9 scientific papers that had been tendered in evidence some
10 of which are referred to in the Action Statement itself.
11 Finally, His Honour also looked at the hollow-bearing tree
12 Action Statement, a separate Action Statement specifically
13 relating to hollow-bearing trees generally as an agent to
14 interpret the Leadbeater's Possum Action Statement. He
15 did that from 196 to 198 and he sets out his conclusions
16 at 199 to 200, concluding ultimately that when the Action
17 Statement is read as a whole and in context, the better
18 view is that the second dot point of the Zone 1A
19 management action relates to old living hollow-bearing
20 trees. I just wanted to go very briefly to one of those
21 scientific papers which can be found in volume 8,
22 commencing at p.468 of that volume. That is one of the
23 papers that had been tabled by Professor Lindenmayer
24 referred to at paragraph 176 of the judgment published in
25 1993, and at p.568 - sorry, 505 of the court book, PNT are
26 the preferred nest trees, preferences of Leadbeater's
27 Possum, so, "Potential nest trees, preferences of
28 Leadbeater's Possum, actual nest trees utilised by
29 Leadbeater's Possum were not selected at random, but could
30 be distinguished from a range of available potential nest
31 trees on the basis of formed high diameter and access to

1 surrounding vegetation. Preferred dead nest trees were
2 characterised by senescent formed", and then a little
3 later, "Preferred living trees were those with dead or
4 broken tops, form 2, figure 1", and we would emphasise the
5 reference to the preferred living trees of the
6 Leadbeater's Possum according to this study conducted by
7 Professor Lindenmayer were those trees with dead or broken
8 tops, in other words, those trees that were senescing.
9 And he refers to form 2, figure 1, which is to be found at
10 p.498 of that volume where - - -

11 WARREN CJ: Could I just ask you so I understand the
12 significance of what you are directing our attention to,
13 Mr Waller; the document you have just been taking us to,
14 you make the point that Professor Lindenmayer was a co-
15 author of that document. This was dated 1991. The
16 professor has obviously published other work, but then he
17 gives evidence in this trial. Are you highlighting among
18 other things that he has changed his position?

19 MR WALLER: No, not at all. What I am highlighting is the fact
20 that His Honour in construing the Action Statement had
21 regard to a number of scientific papers including those
22 referred to in the report - in the Action Statement
23 itself. The 1998 report, he summarises at 176, paragraph
24 176, of his judgment, and that is a document that is -
25 I might have said 1993, that was an error. It begins at -
26 evidently it's at p.505, but that begins at 496, that
27 particular 1998 report.

28 That's referred to expressly in the Action Statement
29 and what that says and what His Honour had regard to was
30 that the preferred trees for Leadbeater's Possum according
31 to this statement so far as they were living were those

1 that can be described as mature and senescing when regard
2 is had to the table form at 498.

3 In other words, Your Honour, in construing the
4 Action Statement and ultimately the FMP, His Honour had
5 regard to the text of the Action Statement and the FMP,
6 but also some scientific literature as was referred to in
7 those documents which indicated that it was not any living
8 tree that might contain a hollow that was to be regarded
9 as relevant habitat for Zone 1A purposes, but preferred
10 habitat otherwise described as optimum habitat which we
11 say points to the correctness of His Honour's ultimate
12 construction of those prescriptions as relating to mature
13 senescing trees.

14 Now, His Honour ultimately adopted the mature or
15 senescing construction. We would advance the mature and
16 senescing construction, but as between those two variants,
17 they are to be contrasted with our learned friend's
18 position which is that the age of the trees is
19 functionally irrelevant and that so far as FMP refers to
20 mature and senescing, those words are to be ignored and
21 excluded. Just to finish, Your Honour, the - - -

22 GARDE AJA: Whilst we are on that plateau, Mr Waller, I know
23 that we go a couple of pages further on, there is a
24 significant discussion of tree hollow management, but if
25 I look at 507, "Ten to 12 PNT needs to be retained in each
26 tree hectare patch of Ash forest." Is that where the
27 criteria originally stems from?

28 MR WALLER: I suggest so, yes. It is only when there is a
29 critical mass which is determined to be there 10 to 12 and
30 in the Action Statement, at least 12, and in the Forest
31 Management Plan, it has to be greater than 12 so we are

1 into 13. It appears that it is only when you have a
2 critical mass of a relevant tree that you have got the
3 optimum habitat required by the Leadbeater's Possum.

4 GARDE AJA: Later in that paragraph, the author refers to the
5 need for an equivalent number of younger trees in logged
6 forest that provide replacements and a little later begin,
7 replacement trees being needed to be maintained in spatial
8 isolation from existing living PNT and so on so that the
9 author appears to be embracing in this discussion both
10 mature trees, but also the need for renewal in future
11 years.

12 MR WALLER: Well, Your Honours will need to have also to the
13 fact that the Zone 1A category is not the totality of
14 protection afforded to the Leadbeater's Possum. In fact,
15 it is just one of a range of protections and indeed in
16 spatial terms Zone 1A when it is found to exist in general
17 management zone would be a small part of that protection.
18 The main part of the protection is of course offered by
19 the general conservation reserves that exist across the
20 State.

21 In addition to that, there are the specific
22 Leadbeater's Possum reserves that exist and again to some
23 extent they cover the same territory as the SPZ, the
24 special protection zone, and in some respects they extend
25 further. It is only when you get to the general
26 management zone that you need to consider the additional
27 protection of Zone 1A.

28 It may be relevant at this stage to take Your
29 Honours to the maps that His Honour had regard to. These
30 are found in the appeal book, volume 6, behind tab D, D1.
31 If Your Honours go to map 9 which is at p.D0013, Your

1 Honours see the various forest management zoning in the
2 area surrounding the three Toolangi coupes. The coupes
3 are indicated by the blue border and the coupe numbers.
4 The green area represents general management zone. The
5 pink and orange area that was in special protection zone
6 and of course no harvesting, no timber harvesting at all
7 is permitted in SPZ. Within general management zone, that
8 is where these particular prescriptions of the kind we
9 have been looking at would apply.

10 So there is that to consider and then if Your
11 Honours go to map 21 which is at p.D25, there Your Honours
12 will see indicated the special Leadbeater management units
13 and Leadbeater reserves. Now, in particular the
14 Leadbeater reserves are areas that to a large extent, they
15 over - they also overlap with the SPZ, but it's not a
16 complete overlap. One sees that in the area surrounding
17 the coupes in question, there are large areas that are
18 protected completely from harvesting and if Your Honours
19 go to map 41 which is at p.D45, Your Honours see that in
20 2008 some additional areas of special protection zone were
21 created in the area surrounding the coupes so that in
22 particular in relation to South Col coupe which is on the
23 far right of the page, a large area of special protection
24 zone was credited to the immediate north of that coupe.

25 His Honour dealt with the issue of reserves
26 generally in his judgment where at paragraph 285 of his
27 judgment, His Honour noted that the Forest Management Plan
28 Recorded that the total area of Ash eucalypt forest in the
29 Central Highlands was 181,000 hectares and on this,
30 approximately 85,000 hectares or 47 per cent was in
31 conservation reserves or the SPZ. That of course did not

1 take into account the additional area of SPZ that was
2 added in 2008.

3 His Honour notes in 286 that since the Forest
4 Management Plan was published, the research system has
5 been amplified. To put matters in perspective, His Honour
6 notes, "It is to be observed that the area of Gun Barrel
7 to be harvested was 13.7 hectares which was about .0075
8 per cent of the total area of Ash eucalypt forest in the
9 Central Highlands." His Honour also noted that the
10 reserves immediately in the vicinity of Gun Barrel were
11 not affected by the 2009 fires. His Honour notes that at
12 paragraph 295 of His Honour's judgment and it is indicated
13 also by one of the maps.

14 If Your Honours look at map 25 which is at p.D49,
15 one sees the Leadbeater's reserves in 2009 fire areas in
16 the Toolangi Forest district. Coupes are indicated with
17 an arrow that points to the coupes from the left-hand
18 corner of the page down to relevant area and the lighter
19 the degree of shading, the less severe the fire, so that
20 the lighter the area indicated by fire indicates for
21 instance no crown scorch, no understorey burnt woodlands,
22 and then on the next map at p.30, a closer view of the
23 coupes indicates that there is very little fire indicated
24 at all on this map and to the extent that there is any, it
25 is of the most or of the least severe level.

26 So we would say that in construing the relevant
27 prescriptions, one needs to have regard to the fact that
28 these measures of protection for the Leadbeater's Possum
29 are not by any means the sole protection afforded to the
30 threatened species. They are additional - an additional
31 layer of protection that applies as an overlay in general

1 management zone quite apart from the reserves or the
2 Leadbeater's Possum reserves that are built in as a
3 separate protective device in the Forest Management Plan.

4 If I could move immediately to the Action Statement
5 and then I will move from there to the Forest Management
6 Plan. Just to deal with some of the matter that my
7 learned friend dealt with, in particular the bullet points
8 at p.6 of the Action Statement, p.61 of - D61 - and we
9 contend that His Honour's analysis of the dot points is
10 correct and that the second dot point is an amplification
11 and relates to the second part of the first dot point.
12 That is to say mixed aged Ash forest where the oldest age
13 class is mature, that will be Zone 1A where there are at
14 least 12 live hollow-bearing trees per three hectares, and
15 in line with His Honour's construction of that
16 prescription that they be mature trees

17 TATE JA: Mr Waller, I think Mr Burnside relied on the fact
18 that there wasn't uniform language used in the first and
19 second dot point. Could you explain for us in a sense why
20 was it that the language isn't uniform or how we should
21 construe it in the light of that?

22 MR WALLER: Well, we would accept that the language is somewhat
23 inelegant and it is plain that the third dot point is not
24 to be read as an alternative to the first and second, but
25 as applicable to both. So when one comes to construe it,
26 one has to have a degree of perhaps flexibility of
27 approach just as one has to make some sense of the third
28 dot point, one has to make sense of the second dot point.
29 There is a reference in this very text under Zone 2 to
30 regrowth Ash forest of varying ages.

31 We would say that the reference to regrowth Ash

1 forest in the second bullet point under Zone 1A is
2 similarly - or perhaps one can draw some understanding of
3 what that means by reference to the description of
4 regrowth Ash forest of varying ages under Zone 2. We say
5 that mixed aged Ash forest wouldn't necessarily include
6 regrowth because it is one of the various mixed age of Ash
7 forest and unless there was some further criterion by
8 which to apply to the second part of the first dot point,
9 mixed aged Ash forest where the oldest age class is
10 mature, it could lead to large tracts of the forest being
11 classified as being Zone 1A.

12 If you don't have to actually identify a particular
13 number of trees, but all you have to do is identify a
14 mixed aged Ash forest where the oldest age class is
15 mature, even if that oldest age class comprises only a
16 couple of trees, then by force of the definition, if the
17 second dot point is ignored, one has created Zone 1A.
18 Now, we can understand that where mature Ash forest exist
19 in the first part of the first dot point, but that of
20 itself can be set aside as Zone 1A. That's the whole
21 forest is mature, but where the forest is of mixed age and
22 it is only the oldest age class that's mature, why would
23 that have the same category? If it did, then why would
24 you need the first part of the first dot point? Because
25 if it was a mixed aged Ash forest where the oldest age
26 class is mature and that of itself protected that entire
27 forest, well, that would also pick up mature age forest.
28 That would be a subset of the second part of the first dot
29 point.

30 So we say in order to give some meaning to the
31 second part of the first dot point, one has to have regard

1 to the second dot point. We say that as an aid to
2 construing that, we would point to what His Honour did
3 which was to look specifically at one of the scientific
4 papers that was referred to in the Action Statement, that
5 is, the paper of MacDonald and Seabach where - if Your
6 Honours pardon me for a moment. E75, thank you, I am
7 indebted to my learned friend.

8 WARREN CJ: Which volume was that?

9 MR WALLER: It is in seven. If one looks to p.101, E101, on
10 the right-hand column, the heading is "5.1.3.1 management
11 zoning"; "To facilitate the various strategies possible
12 for the conservation of Leadbeater's Possum, Smith and
13 Lindenmayer suggested that timber production forest be
14 categorised into three management zones as follows: Zone
15 1, Leadbeater's Possum and other wildlife conservation is
16 a priority consisting of all remaining areas of mature and
17 multi-age structure forest where the latter is forest with
18 greater than or equal to 12 living emerging potential nest
19 trees per three hectares", so there it is clear that the
20 reference to 12 - or at least 12 living trees applies to
21 multi-age structured forest in contradistinction to mature
22 forest.

23 That sits well with the analysis of His Honour in
24 applying the second bullet point in the Action Statement
25 to the second part of the first bullet point.

26 WARREN CJ: Just looking at that statement then, the Zone 1,
27 how do we approach that in light of Professor
28 Lindenmayer's evidence?

29 MR WALLER: Well, it is plain from Professor Lindenmayer's
30 evidence that he regarded - he read the prescription and
31 he approached the identification of hollow-bearing trees

1 without regard to the words of certain in the
2 prescriptions. It is clear from his evidence that when it
3 came to the Forest Management Plan he only looked at table
4 3.2. He did not look at the management prescription. So
5 while his evidence certainly informs the matter generally,
6 His Honour regarded it as necessary to construe that the
7 prescriptions whether in the Action Statement or in the
8 Forest Management Plan by reference to the words and the
9 context that appears in the document as a whole and the
10 scientific literature that is referred to in those
11 documents, rather than by reference to what a particular
12 witness regarded the position to be.

13 It is plain that throughout Professor Lindenmayer's
14 report, his expert report, and indeed even in the letter
15 that was in evidence that he wrote to the Minister just a
16 month before the trial commenced that he repeatedly used
17 the expression "large trees". Yet in his evidence, he
18 sought to distance himself from that usage and say that
19 that was a synonym effectively for a hollow-bearing tree
20 of whatever age, whatever size. We say that the approach
21 adopted by His Honour which was go back to the language
22 used in the prescription and the words generally in those
23 documents is a surer and safer guide than following the
24 evidence of Professor Lindenmayer.

25 Your Honours, if I can move to the Forest Management
26 Plan.

27 GARDE AJA: Before you do that, but just on that point, when
28 you look at this paper, it talks about a zone or
29 classification that, for example, does not include Zones
30 1A or 1B so there is a clear shift from this paper to the
31 Action Statement in terms of the actual content of the

1 suggested provisions. Then if we look at the Forest
2 Management Plan, there is a clear shift from the Action
3 Statement to the Forest Management Plan in terms of both
4 criteria and the use of language.

5 MR WALLER: Yes, we say there is a progression. We say that
6 the relevant binding obligation is found in the Forest
7 Management Plan and to the extent that there is any
8 disconformity between the Action Statement and the Forest
9 Management Plan, the Forest Management Plan must prevail,
10 but we do say that the earlier document can be used to
11 construe the substance of the obligation, but ultimately
12 it is the obligation contained in the Forest Management
13 Plan that has to apply and the most obvious example of the
14 deference is the 13 versus the 12. There has been a
15 deliberate shift in the minimum number and we say the
16 Forest Management Plan must prevail.

17 We say that is entirely consistent with the role of
18 the Forest Management Plan which is to conduct much more
19 of a balancing exercise than the Action Statement. That
20 will become apparent when I take Your Honours to the
21 Forest Management Plan itself which is one of the key
22 documents - it is behind tab 2 in the key document folder.
23 On p.67 of the court book, the appeal book, under the
24 heading "Forward", the secretary of the relevant
25 department at the time, the Department of Natural
26 Resources and Environment, in the third paragraph states,
27 "This plan provides for the balance, use and care of State
28 forest and a framework in which the areas timber industry
29 can continue to confidently invest while providing
30 protection for the natural and cultural values of the
31 forest."

1 the next full paragraph, "To achieve these aims, this
2 Forest Management Plan establishes strategies or
3 integrating the use of State forest for wood production
4 and other purposes with the conservation of natural,
5 aesthetic and cultural values."

6 My learned friend took Your Honours to the
7 definition of management prescription on the next page,
8 p.76, and then the relevant prescription is found within
9 chapter 3 that there was with biodiversity conservation
10 and in particular on p.89 of the appeal book there is
11 reference to old-growth forest. Under the heading
12 "Retention of hollow-bearing trees", and this is separate
13 and distinct from the Leadbeater's Possum prescription,
14 "It is noted in the plan that for the majority of
15 eucalypts in the Central Highlands, hollows are thought to
16 form in trees from about 100 to 150 years of age. Trees
17 in mature and senescent growth stage generally contain
18 more hollows than regrowth trees." That sentence, "Trees
19 in mature and senescent growth stage", which applies that
20 these are - it is there referring to a single stage, not
21 stages but "The mature and senescent growth stage
22 generally contain more hollows than regrowth trees."

23 Then over the page on p.90 in the third paragraph,
24 this plan provides a precautionary approach to maintaining
25 hollow-dependent wildlife populations on state forests.
26 At the strategic level - sorry, "At the strategic scale,
27 large areas of forest containing mature and senescent
28 trees are protected within the SPZ. In total, about 64
29 per cent of the forested public land is not available for
30 sawlog harvesting." And at the detailed scale, the
31 guideline below provides for "Hollow-bearing tree

1 retention and recoupment on timber harvesting coupes."

2 If I could move then specifically to the
3 Leadbeater's Possum which is dealt with from p.95 onward.
4 While my learned friend directed almost all attention to
5 the table 3.2, it is important to note the words that
6 precede and follow the table.

7 TATE JA: Mr Waller, I think that was accepted by Mr Burnside.
8 In fact, he took us to paragraph 1 under the heading
9 "Habitat classification and management."

10 MR WALLER: Yes.

11 TATE JA: What he submitted in relation to that was that one
12 could not - it would be unwise to rely upon the
13 expression, "Living older trees there" because that is
14 clearly not a faithful representation of what is in the
15 Action Statement because it ignores the second dot point
16 completely.

17 MR WALLER: Yes. Well, Your Honour, we would say that is
18 entirely consistent with the Action Statement as construed
19 by His Honour where the relevant trees are necessarily
20 living older trees. Not any tree containing a hollow, as
21 His Honour found, and that the words in paragraph 1 there,
22 where it specifically states, "Zone 1A habitat contains
23 living older trees" is critically important. Although
24 those words - the words "older" does not appear in the
25 table 3.2, it plainly appears within the prescription
26 itself. If one goes to - the point is made further under
27 - on p.96 where under the heading "System of retained
28 habitat for Leadbeater's Possum", the second last
29 paragraph reads as follows, "This plan, the FMP, retains
30 patches of ash-eucalypt forest totalling at least 600
31 hectares in 15 of the 21 Leadbeater management units.

1 Many of the retained patches include existing Zone 1A
2 habitat. Ash-eucalypt forest in the six remaining
3 Leadbeater management units is primarily 1939 regrowth.
4 This forest will not start to develop Zone 1A habitat
5 characteristics for another 50 to 100 years."

6 This plan was published in 1998. It is referring to
7 1939 regrowth. There is 59 years between 1939 and 1998.
8 If one adds the 50 to 100 years referred to, one gets to
9 trees aged between 110, roughly, and 160 years, which we
10 say are plainly mature trees.

11 What the plan is saying is, that this forest will
12 not start to develop Zone 1A habitat characteristics until
13 those trees are 110 to 160 years old. In other words,
14 mature.

15 TATE JA: I thought the definition of mature, and I may be
16 wrong on this, but I thought the definition of mature was
17 a tree that was equal to or in excess of 120 years old.

18 MR WALLER: That is so, although the evidence before the court
19 was that that definition was not entirely inflexible and
20 you could have a tree of 100 years that was nonetheless
21 mature. What we say that points to is that another 50 to
22 100 years would take you well within the period where the
23 trees become mature. Even if they were not mature for the
24 first few years of that period, they would certainly
25 become mature in the last five-sixth of that period.

26 Then, and we say this is important - - -

27 GARDE AJA: Perhaps before you do that, whilst we are looking
28 at this particular paragraph, correct me if I am wrong,
29 but as I understand what happens in Appendix L and what
30 happens in this paragraph is that there is an
31 identification of areas of Zone 1A habitat in terms of

1 what is described as the Leadbeater's Possum management
2 unit, and at p.195 there is a list of areas that have been
3 identified by habitat starting for that purpose. But as
4 I understand what the paragraph you are referring to says,
5 it says there are six LMUs which are 1939 regrowth. In
6 other words, there are six areas embraced in Appendix L
7 which are 1939 regrowth, but nonetheless earmarked as Zone
8 1A habitat.

9 MR WALLER: No. We read that as that they are included as part
10 of the LMU but they do not get - constitute Zone 1A
11 habitat.

12 GARDE AJA: The heading of Appendix L is "Zone 1A habitat" in
13 terms of what it says it is listing. I note the second
14 sentence in that paragraph is the one we are talking
15 about. So it says, "The ash-eucalypt forest in the six
16 remaining LMUs is primarily 1939 regrowth." Then follows
17 the passage that you were drawing our attention to. But
18 when I turn to Appendix L, it appears to solely list what
19 is described as Zone 1A habitat.

20 MR WALLER: What is said that many of the retained patches
21 include existing Zone 1A habitat, and ash-eucalypt forest
22 in the remaining - in the six remaining LMUs is primarily
23 1939 regrowth. And it may be, Your Honour, that although
24 there is a small part of Zone 1A habitat within even
25 those, that primarily those LMUs comprise regrowth in
26 which there is not yet Zone 1A habitat.

27 GARDE AJA: The issue is that if we are talking about 1939
28 regrowth, why would six LMUs be listed in Appendix L?

29 MR WALLER: It is not suggested that regrowth only contains
30 1939 and nothing else. Indeed, it was common ground that
31 Gun Barrel could be characterised as 1939 regrowth. But

1 within that regrowth there are older trees that either
2 survived fires, or if there was logging were not logged.
3 The majority though are 1939 and that is why the plan
4 states that they will not begin to develop Zone 1A
5 characteristics for another 50 to 100 years.

6 GARDE AJA: The other topic, whilst we are on Appendix L,
7 I wanted to ask you about was the note at the bottom, the
8 asterisk which describes the Leadbeater's Possums Zone 1A
9 habitat as having been assessed on the basis of aerial
10 photographs on the basis of stag density, or modelled
11 using growth stage mapping and ash-eucalypt forest
12 mapping.

13 MR WALLER: Yes.

14 GARDE AJA: What struck me at looking at that, and you can
15 correct me if this is wrong, but the one thing left out of
16 that was that discussion of the maturity of the tree.
17 This table has been prepared on a basis that doesn't on
18 the face of it involve an assessment of the maturity
19 rather the identity assessed in the way described.

20 MR WALLER: No, we would say using growth stage mapping refers
21 directly to maturity and what is left out, Your Honour, is
22 notably any reference to hollows. It would be impossible
23 from an aerial basis to be working out whether a
24 particular tree contained a local. What they are doing at
25 a high level is working out perhaps crown deterioration
26 and using growth stage mapping of the age of the forest,
27 both of which we would say are more consistent with mature
28 and senescing approach rather than any tree of any age
29 which might contain a hollow.

30 Your Honours, the prescription on p.97 was something
31 that our learned friends seek to effectively - if one

1 ignores certainly the tree as a secondary source - we say
2 that in its times describe as a management prescription,
3 putting a box highlighted in that fashion, it rather than
4 anything else should be the focus of attention and while
5 it refers to table 3.2 and therefore it incorporates by
6 reference to table 3.2, the reverse is not the case.
7 Mr Burnside would have it that table 3.2 should be the
8 source of the prescription without reference to any other
9 part relevantly of this part of the Forest Management
10 Plan. All the information one needs is in table 3.2, but
11 as will become apparent, that is not so.

12 My learned friend suggested that the words "living
13 mature and senescing trees" in parenthesis in the first
14 dot point should be excluded, should be severed from the
15 text. Now, if that were to happen, Your Honours, would he
16 do the same with the word in parenthesis in the second
17 bullet point? There in relation to Zone 1B habitat, it
18 said, "Exclude Zone 1B habitat from harvesting until
19 either of the Zone 1B attributes no longer exist." We
20 might ask what are those attributes and unless one has
21 regard to the words in parenthesis, one wouldn't know
22 because the two attributes are either the preference of
23 dead mature or senescent trees or Wattle understorey.

24 Now, there is no reference to Wattle understorey in
25 table 3.2 in relation to Zone 1B. There is reference
26 under "Management" on the far right, "General management
27 zone, but excluded from timber harvesting while Zone 1B
28 attributes remain." So we are not sure what my learned
29 friend does with the words in parenthesis there, but we
30 say that to simply ignore the word "living mature and
31 senescing" in the prescription is to effectively change

1 the whole nature and meaning of this prescription. All of
2 the language of the Action Statement that points to older
3 mature trees, senescing trees, likewise those expressions
4 as found in the scientific papers, would all be swept
5 aside and one would need necessarily at a coupe level to
6 examine each and every tree, tree by tree, to determine
7 whether or not there are hollow of any size or description
8 in any tree however old that tree might be.

9 What the evidence showed, and particularly the
10 evidence of Mr Ryan, was that at a practical level the way
11 in which the coupe is surveyed for Zone 1A involves
12 identifying a large tree with a senescing crown or obvious
13 hollows and then determine whether there is a requisite
14 number of such trees within the requisite area. That is
15 to be found in Mr Ryan's witness statement at paragraph
16 56, that's in volume 4 behind tab B8 at p.2329. So at
17 paragraph 56 Mr Ryan is talking about his own inspection
18 of the coupe.

19 Then he is talking about inspecting South Col coupe
20 and noticing that there was a concentration of large pre-
21 1900 hollow-bearing trees. "In identifying a hollow-
22 bearing tree, I look for a large tree with a senescing
23 crown for obvious hollows from previous damage to the tree
24 caused by selection harvesting or other natural damage
25 vectors."

26 Then at p.2346 at paragraph 90, he there refers to
27 some field notes of another inspection and he said, "The
28 features that my colleagues and I looked for in
29 determining which trees were likely to be pre-1900 are set
30 out on p.4 of the Gun Barrel report. Trees that might be
31 post-1900 hollow-bearing trees generally have a smaller

1 diameter than pre-1900 trees. In assessing which trees
2 might be post-1900 hollow-bearing trees, I also looked for
3 some form of observable damage or irregularity in the
4 crown of the tree."

5 Then in the next paragraph, "It is important to note
6 however that post-1900 hollow-bearing trees are not
7 necessarily Leadbeater's Possum habitat trees. In
8 assessing trees for the purposes of Zone 1A and Zone 1B
9 habitat, I look for trees that were in senescing stages or
10 late mature trees with hollows."

11 WARREN CJ: Was Mr Ryan cross-examined about that?

12 MR WALLER: He was certainly cross-examined, but whether he was
13 challenged in any way about that, we can look at. This
14 demonstrated plainly that the way Mr Ryan represented
15 VicForests went about the survey for hollow-bearing trees
16 in a way in which Professor Lindenmayer and his colleagues
17 went about it were fundamentally different. Each one
18 claim to be true to the prescription, but His Honour
19 ultimately found that it was the VicForests or Ryan
20 approach that was the appropriate one. That approach was
21 mirrored by the evidence given by Mr Spencer in volume 3,
22 B1804, and it was an exhibit to Mr Spencer's affidavit,
23 Exhibit LRS51 which was a VicForests field guide for the
24 identification of LBP habitat. On p.1805, it states at
25 the top, "This guideline outlines the process by which
26 VicForests staff identify Leadbeater's Possum habitat in
27 the field. It does not replace the existing prescriptions
28 in the Leadbeater's Possum Action Statement, but provides
29 a practical field guide for the identification and
30 protection of Zone 1A and Zone 1B of LBP habitat."

31 Incidentally it notes that, "To ensure that

1 VicForests takes a conservative approach to LBP habitat
2 protection, prescriptions for Zone 1A and Zone 1B are
3 applied when the number of hollow-bearing trees reaches
4 ten." So within VicForests' own practice there is a
5 conservative aspect built in and then the next paragraph
6 reads, "For the identification of LBP habitat, a hollow-
7 bearing tree is defined as a mature tree that is in
8 senescing form. The tree may have some crown limbs that
9 are dead or dying, but not fallen. Crown shape may be
10 distorted and there may be stag heads and numerous trunk
11 epiphytes containing holes or cavities and there may be
12 hollows evident."

13 So the approach for Zone 1A habitat is then set out.
14 "Step 1; the observation of any hollow-bearing trees
15 surrounding and within the coupe recording location of the
16 coupe maps, so that would be a hollow-bearing tree as
17 earlier defined. If identified, count the number of
18 hollow-bearing trees that can be seen in all directions in
19 walking across a ten to 20 metre distance to ensure you
20 can see a crossing area of three hectares. A three
21 hectare patch is the area visible in the circle
22 approximately 100 metres in any direction from any
23 particular point. Repeat across the coupe whenever a live
24 hollow-bearing tree is observed."

25 So what that provides is a practical guide to those
26 VicForests personnel in the field as to how to locate and
27 identify Zone 1A habitat. It does not involve examining
28 every tree whatever age. It involves identifying hollow-
29 bearing trees that are mature and senescing and then
30 having identified one, working out from that one to see
31 whether the requisite density of such trees is present.

1 Now, in construing the prescription, one has to have
2 regard not only to the context, obviously the words, but
3 the practicality of the method that has been asserted by
4 Alan Friends and if VicForests had to in essence in fact
5 examine each and every tree in the way that's suggested
6 that whatever their age to see whether there was a hollow
7 of whatever kind then it would make the task, we say,
8 impractical.

9 WARREN CJ: Was there evidence to that effect though,
10 Mr Waller, or is that something you put to us now on
11 instruction?

12 MR WALLER: We will check that. I recall that there was some
13 evidence of that and I also recall His Honour stating that
14 certainly that the construction of prescription had to
15 have regard to the practicality of the exercise as well.
16 I will come back to that if I may.

17 WARREN CJ: Yes.

18 GARDE AJA: What do you say having regard to that document you
19 have just taken us to and more widely but in essence
20 mature and senescing trees taken as a class is
21 substantially synonymous with hollow-bearing trees?

22 MR WALLER: Yes, we say that mature and senescing which are the
23 very words used in the prescription conforms with the
24 premium or optimum hollow-bearing trees. As His Honour
25 noted in his judgment, the purpose of the prescription is
26 not to protect every hollow-bearing tree, but to protect
27 optimum trees. His Honour expressly stated that in
28 paragraph 201, "I do not accept that the relevant
29 objectives of the Action Statement support MyEnvironment's
30 construction." What the objectives contemplate is the
31 identification and taking and measures to protect areas of

1 optimum and potentially optimum habitat.

2 The Zone 1A provisions do this if they are construed
3 in the context as relating to old living hollow-bearing
4 trees and in the context of the forest management plan -
5 at paragraph 240 or 239 when His Honour dealt with the
6 prescription, His Honour said, "The first dot point of the
7 management prescription makes clear that the hollow-
8 bearing tree with which Zone 1A are concerned are living
9 material senescing trees. The words 'living mature and
10 senescing' must be given effect." Reference is made to
11 certain authorities which require that in the construction
12 of subordinate instruments. "I do not accept that they
13 have been included in the prescription as simply
14 illustrating the type of trees which are commonly hollow-
15 bearing. I do not accept MyEnvironment's submission that
16 the words 'living mature and senescing' are to be
17 understood as a guide or indicator of the kinds of trees
18 that will often meet the definition. The FMP is intended
19 to be utilised by foresters. The inclusion of the words
20 'living mature and senescing' within the management
21 prescription would be grossly misleading if this were not
22 intended to indicate the ambit of the prescription."

23 So we say that nowhere was it shown in His Honour's
24 reasons in relation to the importance of those words. We
25 do of course take issue with His Honour's decision or
26 finding that - His Honour's construction of mature -
27 living mature and senescing as treating the "and" as a
28 disjunctive rather than a conjunctive. We say that the
29 word "and" in the description relating to Zone 1A may be
30 contrasted with a description of trees in Zone 1B which
31 speaks of the presence of then mature or senescent trees

1 or Wattle understorey. So we say that the drafter of the
2 prescription has turned his or her mind to the use of the
3 word "and" or "or" in the prescription and has
4 deliberately chosen not to make Zone 1A a prescription, a
5 reference to mature or senescing trees.

6 I refer to the 1988 report that was referenced in
7 the Action Statement. In the 1991 study which is also
8 referred to by His Honour in the same analysis of the
9 scientific literature at paragraph 180 and following in
10 His Honour's judgment, there is a further paper which can
11 be found in volume 8 of the appeal book.

12 TATE JA: Mr Waller, just before you take us to that report, is
13 it not His Honour reasoning in this really encapsulated in
14 paragraph 252 where His Honour, in effect, says that
15 "Because any senescing tree must already be a mature
16 tree," there would simply be no utility in including the
17 word "mature" unless that was a - as it were, distinct
18 category or a characteristic which, if the tree was
19 mature, that was a sufficient display of the
20 characteristic.

21 MR WALLER: That is so, but one might say the same is true of
22 the word, "living". Why have the word, "living"? Why not
23 simply say, "senescing". We say that the word, "living"
24 would likewise be otiose, but it is not because one looks
25 first at living trees as opposed to dead trees. One then
26 looks to mature living trees and then one looks further to
27 mature and senescing living trees which are easily
28 identifiable in the field, in the way that Mr Ryan and
29 Mr Spencer have indicated because the crown is often
30 distorted. It can be looked at practically from a
31 distance across a distance of, say, 100 metres to

1 determine whether Zone 1A exists.

2 If one is looking simply for mature but not mature
3 and senescing, then that may be a more difficult exercise.
4 To the extent that mature may be a class that straddles a
5 period which may begin before 120 years and may extend
6 beyond 120 years, senescence, as it were, is an objective
7 fact. There is either deterioration or there is not.
8 That allows the forester in the field to determine, yes,
9 that is a tree which will enable me to begin the process
10 of identifying a Zone 1A habitat. Whereas if he looks at
11 a tree and has to determine is it mature or is it not
12 mature, then there is perhaps a degree of uncertainty. We
13 say it is certainly not as amorphous a term as Professor
14 Lindenmayer would have it, but we say the additional word,
15 senescing gives a degree of sharpness and precision to the
16 definition that would not otherwise exist.

17 We say it is also entirely consistent with the
18 literature which speaks continuous on mature and senescing
19 trees. That is referred to at paragraph 193 of His
20 Honour's judgment when he summarises the scientific papers
21 and refers to mature and senescent trees. It is referred
22 to when His Honour exams the hollow-bearing tree Action
23 Statement itself at paragraph 196 of the judgment, and
24 quoting from that hollow-bearing tree Action Statement
25 says, "Large hollows, essential for some fauna, do not
26 develop until trees are well over 100 years old. The
27 development of large hollows being a characteristic
28 feature of tree senescence." Paragraph 196 of the
29 judgment that is quoted.

30 Likewise, Your Honour, His Honour quotes other parts
31 of the Forest Management Plan at paragraph 224 and 225 of

1 the judgment which again refer several times to the notion
2 of mature and senescent trees. "Trees in mature and
3 senescent growth stage generally contain more hollows than
4 regrowth trees." That is at paragraph 225.

5 Later in another segment quoted from the FMP on p.68
6 of the judgment, His Honour notes "This plan provides a
7 precautionary approach to maintaining hollow-dependent
8 wildlife populations on state forest. At the strategic
9 scale, large areas of forest containing mature and
10 senescent trees are protected within the SPZ." Again,
11 mature and senescent seem to be a phrase where those two
12 terms are not treated as alternatives but as a composite
13 phrase where both aspects, maturity and senescence, are
14 relevant.

15 GARDE AJA: That is not the position, is it Mr Waller, if we
16 look at the second dot point on p.97, if you look at D97
17 in the management plan where we see mature and senescent
18 used in the alternative.

19 MR WALLER: No, that is true, and there we say that one - a
20 tree becomes a Zone 1B tree if it is dead, or if one looks
21 to it - or if it is a living tree containing hollows.

22 GARDE AJA: Perhaps the reason for the word, "Living" whilst we
23 are on it.

24 MR WALLER: Indeed.

25 GARDE AJA: They have adopted it, distinguishes 1A from 1B.

26 MR WALLER: We would agree with that. But we would say that
27 the "or" in the second dot point is disjunctive because it
28 sets out two alternatives. It sets out living tree and
29 dead trees. So we are talking about dead mature on the
30 one hand or living senescent on the other. So the use of
31 the word "or" there as a disjunctive is entirely

1 appropriate. But we say to construe the "and" in the
2 first dot point, likewise in a disjunctive sense, would be
3 to not follow the plain meaning of the text, nor for
4 literature that supports the prescription, suggesting that
5 it is mature and senescing trees that are the preferred
6 habitat of the Leadbeater's Possum.

7 GARDE AJA: If we go back to the first dot point, does that not
8 suggest that that category is intended to include two
9 types of tree? Living mature being the first category and
10 senescing trees being the second category.

11 MR WALLER: His Honour explained that the word, "Senescing"
12 incorporates mature. That could be one reading we accept,
13 but we would say that having regard to the literature,
14 especially that suggests that it is the senescence of the
15 tree by which the hollows are developed. That is to say,
16 the deterioration of the tree, the breaking down of it
17 that produces the hollows, that to separate out living
18 mature from senescing in that way would be inconsistent
19 with the context and the literature that supports it.

20 We said at trial that either of those two
21 constructions were open. Our primary construction was
22 living mature and senescing trees. Our secondary
23 construction was living mature or senescing trees.
24 Whichever construction was adopted, there were
25 insufficient trees within Gum Barrel to meet the minimum
26 required for Zone 1A habitat. But for the purpose of
27 appeal, we do renew our primary position under the notice
28 of contention that, properly construed, the "and" should
29 be read literally as - - -

30 GARDE AJA: Can I just follow this discussion and ask you how
31 you put the first as a matter of construction, how you put

1 that first dot point together with table 3.2? How do you
2 link them together? Table 3.2, as Mr Burnside has pointed
3 out to us, talking about hollow-bearing trees which are
4 defined in a descriptive way in that one, and do you say
5 that the term, "Living and mature and senescing trees"
6 derived from that dot point is to be taken as having the
7 same meaning as hollow-bearing trees? Do you say the
8 quotas are cumulative, namely that you have to have
9 living, mature and senescing trees and, in addition,
10 hollow-bearing trees? How does all that work in your
11 submission?

12 MR WALLER: We say one does not need to identify actual
13 hollows. One identifies trees, tree type and - as is set
14 out in table 3.2. And that the general description, living
15 trees containing hollows, is amplified in the preparation
16 as requiring living mature and senescing trees. Now, they
17 are all living trees. They invariably contain hollows,
18 but one doesn't need to actually identify a particular
19 hollow in a particular tree. One looks to the tree type,
20 living mature and senescing trees. The prescription tells
21 you look at table 3.2. You need to do that because you
22 need to know how many, the number of trees required, the
23 density, that's all set out in table 3.2, and table 3.2 is
24 not ignored by the prescription. To that extent, it needs
25 to be said as well, there is a statement in the written
26 submission of our learned friends that suggests in
27 paragraph 20 of their submission that His Honour
28 disregarded table 3.2 as being otiose. We say that that
29 is not so.

30 His Honour considered table 3.2 and that on its
31 proper construction, reference to Zone 1A in that table,

1 is a reference to living older trees. So much is clear
2 from what His Honour said at paragraph 234 of the
3 judgment. So we say that the table and the prescription
4 can happily be read together on our submission, but on our
5 learned friend's submission they can't because words have
6 to be abandoned.

7 GARDE AJA: What do you do on your submission about note 1
8 which clearly extends to trees both living or dead? There
9 are two dot points of the prescription at least in part.

10 MR WALLER: That hollow-bearing tree type and the footnote 1
11 applies all the way down the line including 1B which may
12 be dead or living. Zone 1A must be living and only
13 living, and the management prescription, the first dot
14 point only refers to living trees and that might be why a
15 suggestion that that be read as living mature on the one
16 hand or senescing on the other. To the extent that that
17 might suggest that the senescing trees are no longer
18 living, we would say that's not so and we would point to
19 the fact that senescing is a present participle. It is
20 not senescent which applies in the second dot point where
21 the tree may well have passed its senescing stage. It is
22 continuing to senesce and therefore continues to be alive.

23 GARDE AJA: Just one final point. I note this at the bottom of
24 p.96 there is a reference to map 5 which shows the results
25 of the modelling referred to. As far as I'm aware, we
26 don't have map 5. If you could identify where it is at
27 some convenient point or later on send a copy of map 5 in,
28 that might be useful.

29 MR WALLER: To the extent that it is available, we will do
30 that. I have a recollection that map 5 was not in
31 evidence because it couldn't be located, but I will make

1 inquiries, Your Honours, and if there is a map 5, we will
2 produce it. Could I just deal with one matter that came
3 up, Your Honours, in relation to the impracticality of the
4 various field guides? This may not answer Your Honour
5 Chief Justice's question directly, but Mr Spencer was
6 cross-examined and it was put - the draft survey
7 methodology that my learned friend referred to earlier was
8 put to him and he said at p.461 of the transcript that he
9 regarded it as in many regards an impractical field guide
10 whereas he said at line 12 of that page, "Our field guide
11 - ", referring to VicForests field guide, " - was a
12 practical field guide for field foresters who were
13 experienced in this.

14 WARREN CJ: That is a useful segue-way into a question I have,
15 Mr Waller. Mr Burnside took us through part of the cross-
16 examination of Professor Lindenmayer where you will recall
17 it was the witness's evidence and I summarise it that the
18 key issue was whether there was a cavity or not. Do you
19 accept that Professor Lindenmayer's historical work
20 informed the Action Statement and the Forest Management
21 Plan?

22 MR WALLER: We accept it is it was taken into account, but
23 ultimately it was for those promulgated both the Action
24 Statement and the Forest Management Plan to draw the
25 necessary balance that was required to identify optimum
26 habitat for the Leadbeater's Possum. It is plain from the
27 cross-examination of Professor Lindenmayer that he did
28 take the approach that Your Honour has just mentioned. To
29 that extent, to the extent that it was put to him that's
30 not what the management prescription requires, the
31 management prescription refers to mature and senescing

1 trees, he dismissed those terms as being terms that were
2 impractical and difficult to apply.

3 Ultimately His Honour said that while the scientific
4 literature obviously has to be construed - has to be taken
5 into account in construing the Action Statement that
6 evolved from that literature, ultimately the words in the
7 Action Statement speak to a large extent for themselves
8 and more so for the Forest Management Plan. To the extent
9 that the evidence of Professor Lindenmayer was at odds
10 with what he previously published, and indeed what he had
11 said in his own report tendered as part of the expert
12 evidence in court which continued throughout the report
13 referred to large trees, and yet in evidence, he said that
14 large trees was not a relevant criteria.

15 I can go to the report, but the report is replete in
16 references to large trees being irrelevant and yet in
17 evidence, Professor Lindenmayer came back to the position
18 that we look for cavities, we look for hollows,
19 irrespective of the age or the size of the tree;
20 seedlings, saplings to one side. That in our submission
21 was at odds with his own expert report before the court.
22 It was at odds with the letter that he wrote in January
23 2012 to the Minister which was in evidence and which is
24 referred to in the judgment, and it was at odds with the
25 scientific literature, some of which he authored which
26 continued to refer to large old mature trees and senescing
27 trees as being the preferred habitat of the Leadbeater's
28 Possum.

29 His Honour dealt with the last of those points in
30 the judgment at paragraphs 304 and 305 where His Honour
31 noted, "Professor Lindenmayer has sought to promote a

1 fundamental change of strategy by way of correspondence
2 with the relevant Minister by letter dated 31 October 2011
3 - ", I apologise, it was October 2011 - " - to the
4 Honourable Peter Walsh, Minister for Agriculture and Food
5 Security. Professor Lindenmayer advised that as an urgent
6 measure, all areas of 1939 regrowth that supports some
7 large living trees be exempted from logging. In addition
8 he stated that if logging is to continue in stands of 1939
9 regrowth, there is an urgent need to adopt variable
10 retention harvesting systems that result in the retention
11 of islands of forest of approximately 1.5 hectares or more
12 within logged coupes."

13 Then in the next paragraph 305, His Honour said,
14 "I pause to observe that the criteria of 'large living
15 trees' is in substance the criterion which Professor
16 Lindenmayer contends should not be regarded as relevant in
17 the application of the FMP. Professor Lindenmayer said in
18 evidence, 'The protection of large living trees is
19 critical, in my mind, because of the very limited areas of
20 old-growth, unlogged, unburnt forest in the Central
21 Highlands of Victoria. It is less than 2000 hectares of a
22 possible 171,000 hectares.' "I should add" - His Honour
23 says at 306 - "that I do not accept that the reference to
24 large living trees in the letter to the Minister is to be
25 equated with hollow-bearing trees of all sizes."

26 His Honour was not prepared to accept Professor
27 Lindenmayer's evidence that when he used that expression
28 "large living trees" it did not mean what it plainly on
29 its face meant.

30 WARREN CJ: Just one other matter. Mr Burnside provided to us
31 a proposed form of relief in the event that we were

1 persuaded of the appellant's case. Is there anything you
2 wish to say about the form of declaratory relief that is
3 sought?

4 MR WALLER: It seemed from what my learned friend said that he
5 was not pressing 1.2 but really pressing 1.1 which relates
6 to the construction of the Forest Management Plan.
7 Plainly we would say that His Honour's construction of the
8 plan which focused of course on the words "living mature
9 and senescing", was correct, save that we would press
10 under your notice of contention for the word "and" to be
11 construed conjunctively.

12 If Your Honours were of the view that the trial
13 judge misconstrued the prescription in the Forest
14 Management Plan and Your Honours were to accept what it
15 means, what is set out in 1.1, then we would have nothing
16 really to say about the language of that declaration.

17 I didn't hear my friend press 1.2 with any vigour,
18 but in relation to the construction of the action
19 statement we would again submit that His Honour's
20 construction of the action statement, in particular the
21 first two bullet points of that prescription was entirely
22 correct for the reasons His Honour set out. Your Honour,
23 I just have two more matters to raise.

24 WARREN CJ: Yes.

25 MR WALLER: Your Honour, first in relation to the map, Map 5, I
26 am informed that it was never submitted in digital form
27 and it was not before His Honour Justice Osborn in any
28 form at all. It was not in evidence but VicForests may be
29 able to obtain a copy of the map in hardcopy, but it is
30 not part of the evidence. It was not part of the evidence
31 before His Honour.

1 Could I also clarify something I said earlier. In
2 relation to the Forest Management Plan, it is true that
3 Table 3.2 does refer to wattle density as a separate
4 heading. So to the extent that I suggested that it did
5 not, I withdraw that submission.

6 WARREN CJ: The court will not pursue the question of Map 5 so
7 we need not call upon you in that regard, Mr Waller.

8 Thank you.

9 MR WALLER: If Your Honour pleases.

10 WARREN CJ: Mr Burnside.

11 MR BURNSIDE: If the court pleases, I have five short matters
12 in reply. The first is our learned friend referred to the
13 need for balance and he took you to several passages in
14 the Forest Management Plan. It is to be noted that the
15 figure of 12 hollow-bearing trees per three hectares is
16 the figure chosen, but you will recall that the document
17 earlier refers to six or 10 hollow-bearing trees as being
18 available habitat for Leadbeater's Possum.

19 That suggests that what has been adopted is the
20 inverse of a conservative approach, and this really
21 relates to a question Justice Tate asked, if there are
22 only 11 trees in a relevant area that doesn't qualify as
23 Zone 1A.

24 That presumably is part of the process of striking a
25 balance between the forestry interests on the one hand and
26 the conservation interests on the other hand. If it were
27 otherwise you would say that any area which is capable of
28 supporting one or two Leadbeater's Possums would be
29 protected, but that is not the approach which is taken.

30 Twelve, as you will remember, is the number beyond
31 which you get no corresponding increase in Leadbeater's

1 Possum populations. I think the figure is 11 point
2 something, it's one of Professor Lindenmayer's studies.
3 There is a linear increase in the number of Leadbeater's
4 Possums supported in any given area as the number of
5 hollow-bearing trees rises to 12, but after 12 it plateaus
6 and doesn't continue to increase. So in that sense the
7 balance is being struck by the very choice of the number.

8 The second thing is, our learned friend to some
9 extent stressed the point that what is being protected is
10 optimum or preferred habitat. In our submission, that is
11 a much less significant consideration now, given that the
12 documents were written before the 2009 fires, and the 2009
13 fires are known to have destroyed substantial areas of
14 Leadbeater's Possum habitat.

15 What follows from that is two things which I suppose
16 are the inverse of the other. One is that as a matter of
17 practicality Leadbeater's Possums are much less likely to
18 be fussy about their habitat because their choices are
19 reduced, and the second is it is all the more important to
20 adopt an approach to the construction of the documents
21 which errs on the side of caution, and thus it has to be
22 said the approach which we urged to the interpretation of
23 the Forest Management Plan is more lenient than the
24 approach adopted by the respondent. Where there has been
25 such massive destruction of the habitat in recent times
26 since the document was created, so it's desirable to adopt
27 a more strongly purposive approach than might otherwise
28 have been needed.

29 The next thing is in response to some questions
30 about Professor Lindenmayer's evidence concerning - he
31 said you look for hollow-bearing trees full stop, that

1 passage from 239 and then 303 to 308. He was not giving
2 an interpretation of the Forest Management Plan. He was
3 making a statement about what was needed, the way in which
4 these things ought to be approached.

5 There was a submission made about Chapter 3 of the
6 Forest Management Plan, in particular at p.D85 where the
7 aid is identified. There was no submission made about
8 that but a submission was made about the various purposes
9 of the plan, and we draw attention to the aim which is
10 identified at p.D85. The aim involved is to ensure that
11 all indigenous plant and animal species and communities
12 survive and flourish throughout the Central Highlands.
13 Now, that's a much more emphatically stated aim for the
14 more generalised aim of encouraging a forestry industry
15 and the other matters that you were taken to. Next, at
16 page D96 in the Forest Management Plan, in discussion with
17 Garde J about the reference to the Leadbeater's management
18 units, and a reference out to appendix L, and you will
19 recall that there is said to be 21 Leadbeater's management
20 units and if you go to appendix L on D195, you see that
21 they are there listed under our 21 in the list. It would
22 seem that the point being made at p.96 in the middle and
23 right most columns in appendix L identify the areas image,
24 Leadbeater's management unit, and the amount of Zone 1A
25 territory within that part.

26 It would seem to be that the reference to - that
27 appear to extant the reference to appendix L and the
28 Leadbeater's management units. Next at p.D97 - can I just
29 say I have given you the wrong page before. When I said
30 D97 before, D96 refers to the 21 Leadbeater's management
31 units, and D97 is the management prescription. My learned

1 friend pointed to the fact that the reference to Zone 1B
2 also has a parenthetical insertion and he says in fact that
3 we can't ignore that parenthetical insertion because it
4 wouldn't make any sense.

5 I draw attention to the differences between the two
6 parenthetical insertions. In the first dot point, it
7 includes Leadbeater's Possum Zone 1A habitat given the
8 special protection zone. That's a sentence which is
9 entirely meaningful without the parenthetical insertion.
10 The reference in brackets, table 3.2, in our submission
11 cannot be understood as altering the explicit definition
12 in table 3.2. It would be truly a case of the tail
13 wagging the dog if a parenthetical reference which is not
14 necessary to the understanding of the dot point could
15 alter the thing to which it refers.

16 The second dot point referring to Zone 1B. The
17 parenthetical insertion is in one sense necessary for anyone
18 to understand the second dot point, but in a difference
19 sense it is not relevant because if you go to table 3.2,
20 the definition of Zone 1B under the heading "Management"
21 says, "General management zone, but excluded from timber
22 harvesting while Zone 1B attributes remain." If you want
23 Zone 1B attributes, you go up the page to paragraph
24 numbered 2 which is part of the paraphrase of the Action
25 Statement and in the third and fourth lines of that
26 discussion, it says, "Zone 1B habitat attributes (the
27 presence of dead, mature or senescing trees or Wattle
28 understorey)" faithfully reproduced in the parenthetical
29 insertion in the second dot point under management
30 prescription so there is no help in our submission to be
31 got from the fact that there is a parenthetical insertion in

1 the second dot point.

2 My learned friend referred to what His Honour said
3 at paragraphs 239 to 240 concerning the effect of the
4 management prescription in saying in effect it would be
5 grossly misleading if the inserted words had no effect,
6 and that it was a document to be used by foresters. Well,
7 with respect, that is not quite right because the
8 management prescription tells you to do one single thing
9 so far as relevant and that is to include Zone 1A habitat
10 in the special protection zone. Once land is in the
11 special protection zone, foresters do not need to pay any
12 more attention to the wording of the dot point that got it
13 there.

14 So in that sense, that kind of document is not
15 really a document which is going to have much continuing
16 relevance for people that their daily field work. The
17 next, there was some discussion about Mr Spencer said -
18 sorry, an exhibit of Mr Spencer, was Exhibit RJS51 - I'm
19 so sorry, LRS51, which was in volume 4 at p.B1805 and it
20 was to some extent a counterpart of the draft strategy
21 document which I took the court to before lunch. It is
22 important to recognise that that was identified by
23 Mr Spencer in paragraphs 212 and 213 of his statement.
24 That is in volume 3 and it is worth - I am sorry - volume
25 1. At paragraph 213 after he has just exhibited the
26 document.

27 WARREN CJ: Which page?

28 MR BURNSIDE: I am so sorry, it is p.B201.

29 WARREN CJ: Thank you.

30 MR BURNSIDE: The key to that document was of course that it

31 had a flow chart explaining how you go about the task of

1 identifying Zone 1A and Zone 1B, but it had built into it
2 when we talk about hollow-bearing trees, we are talking
3 about mature or senescing hollow-bearing trees. In
4 paragraph 213, he says that the field guide was produced
5 over a period of some months commencing in about June 2011
6 and being completed in August 2011, the current version
7 having been approved in November 2011.

8 Now, if I can just briefly overlay the chronology of
9 the litigation across that; logging at the Gun Barrel
10 coupe began in July 2011, paragraph 25 of Mr Spencer - I
11 am so sorry, from His Honour's reasons, you are quite
12 right - and on 13 July 2011, VicForests was contacted by
13 MyEnvironment concerned about it and the writ was filed on
14 24 August 2011 so it is the most self serving document
15 imaginable being put together to justify a position and of
16 course whilst it is interesting to see it, the court can
17 attach no particular importance to it because self-
18 evidently it is simply implementing the position which
19 they have adopted in the litigation, cannot possibly
20 operate to verify or to vindicate the position in the
21 litigation.

22 Finally, on the question of the notice of
23 contention, we dealt with our reason for saying that
24 mature and senescing should be understood as identifying
25 two categories. We rely on our written outline in how do
26 you apply submissions which deal with the notice of
27 contention, but in very short compass, it is our
28 submission that something which is senescing, that is to
29 say, growing older must necessarily be mature already and
30 some mature and senescing is a tautology. It must be
31 understood as referring to two different categories if

1 that question arises at all. We say of course the
2 question should not arise because the simple words in
3 table 3.2 should govern the question.

4 WARREN CJ: I have a couple of matters, Mr Burnside. When
5 revisiting the grounds of appeal, you are not persisting
6 with pursuing in grounds 5 and 6, but having reflected on
7 your submissions, it would seem that essentially the only
8 live ground is really Ground 3. I am just wondering if
9 you could clarify therefore the position as to Grounds 1,
10 2 and 4.

11 MR BURNSIDE: Yes. Your Honour, 4 stands or falls with the
12 proper meaning of the Forest Management Plan. If I may
13 say, 1 and 2 occupy a minor position because if we are
14 right on 3, then that answers the questions. That's not
15 to say the Action Statement is unimportant and
16 understanding the Action Statement remains important
17 because it necessarily informs the way the Forest
18 Management Plan is set up and we do say that the first and
19 second dot points in the Action Statement have a different
20 territory and should be given separate weight. Because of
21 the, I think, accepted fact that older trees are more
22 likely to contain hollows, then the definition adopted in
23 table 3.2 of the Forest Management Plan is apt to embrace
24 both of the dot points of the Action Statement. Your
25 Honour is right; the request that the appeal can be
26 decided is by reference to Ground 3.

27 WARREN CJ: The remaining matter I have, Mr Burnside, is the
28 proposed form of relief. Mr Waller took it that you were
29 not really pressing 1.2, but you did not say as much to
30 us.

31 MR BURNSIDE: Yes. Can I say one additional thing before I

1 deal with that?

2 MR WALLER: Yes.

3 MR BURNSIDE: That is the point Garde AJA raised, it really
4 should be referring to 12 in three hectares or greater
5 than 12 in three hectares because otherwise the arithmetic
6 I suspect may work wrongly. If the court is with us on
7 1.1, then in our submission 1.2 would follow although it
8 would have reduced relevance.

9 WARREN CJ: I must say I took it that way and you had not
10 abandoned it, but as Mr Waller seemed to understand you
11 not to be pursuing it, it was a matter to be clarified.

12 MR BURNSIDE: Is there a sort of neutral position between
13 abandoning and advancing vigorously?

14 WARREN CJ: We will reserve your position in case you need it.

15 MR BURNSIDE: Yes, exactly right. That is exactly right.

16 WARREN CJ: Thank you, Mr Burnside. Mr Waller, is there
17 anything in reply to the submissions with respect to
18 notice of contention.

19 MR WALLER: No, Your Honour.

20 WARREN CJ: The court will reserve its judgment in this matter.
21 We thank counsel for their assistance. The court will
22 adjourn sine die.

23 - - -