The *Anvil Hill* Case

Case Summary
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***Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources and Centennial Hunter Pty Ltd* [2007] FCA 1480**

On 20 September 2007, the Federal Court dismissed an application for review of a decision by the delegate of the Federal Minister for the Environment and Water Resources that the Anvil Hill open-cut coal mine project was not a controlled action under the Environment Protection and Biodiversity Conservation Act 1999.

Background

Centennial Coal proposed to build a large open-cut coal mine near Wybong, in the Hunter Valley region of NSW. The proposed is to produce up to 10.5 million tones of coal per annum and operate for 21 years. It is to be one of the largest new coal mines in Australia. About half the coal will be exported to power stations in Japan and the rest will be used domestically.

The Anvil Hill Project Watch Association Inc ('AHPWA') is a local community association, drawing its membership mainly from the area in which the proposed mine will be located. AHPWA has been campaigning against the proposed mine since its incorporation in 2000.

The mine site is situated on a valley floor, containing large remnant areas of woodland and grasslands that are of high conservation value. The mine will almost entirely clear the valley floor (over 2000 hectares). Included on the site is the habitat of an endangered orchid, *diuris tricolor*, and possibly a critically endangered ecological community (EEC).

In these proceedings, AHPWA was represented by Lucy McCallum SC and Chris McGrath of Counsel, with EDO instructing.

The mine has received State approval under Part 3A of the *Environmental Planning and Assessment Act 1979.* The EDO is also acting for another client who has lodged proceedings against the State approval in the NSW Land and Environment Court.

The Appeal

The case involved several arguments:

1. The delegate had stated that:

> a possible link between the additional greenhouse gases arising from the proposed action and a measurable or identifiable increase in global atmospheric temperature or other greenhouse gas impacts is not likely to be identifiable.

It was argued that this was an error of law on 2 grounds:

a. It was an error in the construction of "all adverse impacts"; and

b. It was the wrong test - The delegate should have asked whether the proposed action was likely to have a significant impact on a protected matter that is important, notable or of consequence having regard to its context or intensity.

Effectively, the Applicant argued that the delegate should have taken a common sense approach to causation and sought to distinguish the case from the *Bowen Basin* decision.[1]

2. The delegate did not take into account the fact that the greenhouse gas emissions would contribute to "loss of climatic habitat caused by anthropogenic emissions of greenhouse gas" which is recognised as a key threatening process under the EPBC Act;

3. The Applicant argued that the delegate made errors in relation to the classification of an EEC known as White Box-Yellow Box-Blakely's Red Gum grassy woodlands and derived native grasslands. Those errors were, namely:

a. The delegate failed to construe the listed EEC by reference to the Legislative Instrument that included it in the list;
b. The delegate interpreted the description of the EEC by reference to various non-listed ecological communities; and
c. The delegate took into account the descriptions of those non-listed ecological communities when determining whether the EEC was present on site.

4. Importantly, it was argued that the issue of whether a project is a controlled action (that is, whether it is likely to have a significant impact on matters protected by part 3 of the EPBC Act) was a *jurisdictional fact,* and in fact the project was likely to have such an impact on:

a. The Great Barrier Reef World Heritage area (due to the impacts from the greenhouse gas emissions);
b. The Blue Mountains World Heritage Area (for the same reasons);
c. An endangered orchid (*diuris tricolour*) (because of the clearing of the site); and
d. A critically endangered ecological community (see above – for the same reasons as the orchid).

The Federal Court's decision

The greenhouse issues

Justice Stone dismissed the Applicant's arguments on the greenhouse issues, stating that the Applicant's submissions were not distinguishable from the decision in the *Bowen Basin* case. The Court held that the delegate's conclusion was open to her on the findings she had made, stating:

> In the absence of such a link, however, the relatively small contribution of the proposed emissions to total global emissions could not be seen as having a significant impact.

[1] *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for Environment and Heritage* (2006) 232 ALR 510 (Dowsett J).

Nor did the Court accept that the delegate needed to take into account the context of the impact of other potential actions that might reasonably be expected to be assessed under the EPBC Act.

With respect to the arguments about the key threatening process, the Court noted that there was nothing in the Act that obliged the Minister to take a key threatening process into account when determining whether an action is a controlled action, and in any event the delegate had considered the substance of this threat in her reasons.

The Endangered Ecological Community

In relation to the EEC, the Applicant argued that it was clear from the Statement of Reasons that the delegate had determined whether this was present or absent by reference to an EPBC Policy document, rather than the legislative instrument. However, the Court stated that it was not necessary for the delegate to list the Legislative Instrument as something which she had considered and inferred that the delegate was conscious of the description in the legislative instrument from the use of her words "the specific community listed under the EPBC Act".

With respect to the arguments relating to the use of other, non-listed ecological communities, the Court concluded factually that:

> As the written submissions for the second respondent express it, 'The presence of other woodlands excludes, *definitionally*, [the EEC]'

Justice Stone stated that:

> There is nothing in this reasoning that indicates that the delegate made the legal errors asserted by the Applicant.

Effectively, her Honour accepted that the delegate could determine whether the EEC was present by reference to the non-listed ecological communities.

Jurisdictional fact

The Applicant argued that the delegate's decision that the coal mine was not a controlled action was based on the supposed fact that the mine will not have a significant impact on matter protected under Part 3.

The applicant contended that, in the case of a decision under s 75 that an action is not a controlled action, the definition of "controlled action" in section 67 can only be satisfied by the actual non-existence of the facts referred to in the prohibition sections.

The Court preferred the submissions of the respondents and placed weight on the following matters:

- The Act distinguishes between a controlled action and the Minister's decision that an action may be characterised as that;
- The evidence before a Court would be different to that before the Minister;

- The Act provides for consequences to flow from the fact of the Minister's decision rather than whether the proposed action is or is not a controlled action;
- Focus on the object of "an efficient and timely Commonwealth environmental assessment and approval process" which would not be assisted by 'the availability of merits review at this stage'; and
- The fact that the Full Court in the Nathan Dam case stated that "*it is a question of fact for the Environment Minister whether a particular adverse effect is an 'impact' of a proposed action.*"

Further action

On 11 October 2007, the EDO filed an appeal against the decision in the Full Federal Court, on behalf of the Association. The appeal is limited to the grounds relating to jurisdictional fact and the issue of whether it was permissible to construe an EEC by reference to non-listed ecological communities, to determine whether an EEC is on the site.

No hearing date has yet been set, but Centennial is seeking expedition of the matter.