Federal Court of Australia - Full Court

Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources [2008] FCAFC 3 (14 February 2008)

Last Updated: 25 February 2008

FEDERAL COURT OF AUSTRALIA

Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources [2008] FCAFC 3

ADMINISTRATIVE LAW – jurisdictional fact – whether finding that proposed action has, will have or is likely to have a significant impact is a condition precedent to Minister's exercise of discretion under s 75(1) of *Environmental Protection and Biodiversity Conservation Act 1990* (Cth).**ADMINISTRATIVE LAW** – irrelevant considerations – whether consulting descriptions of ecological communities in privately maintained classification is an irrelevant consideration when construing the term "listed threatened ecological community".*Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5*Environmental Planning and Assessment Act 1979* (NSW) s 77(3)*Environmental Protection and Biodiversity Conservation Act 1990* (Cth) ss 3(2), 12(2)(c), 15A(4)(c), 15B(8)(c), 15C(16)(c), 16(2)(c), 17B(4)(c), 18, 18A, 19(3)(b), 20, 20(2)(c), 20A 67, 72(2), 75(1), 75(1A), 75(3), 181*Law Enforcement (Controlled Operations) Act 1997* (NSW) ss 6(1), 7(1)*Local Government*

Act 1919 (NSW) s 99(11A)*Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* [2007] FCA 1480; (2007) 97 ALD 398 affirmed*Dowe v Commissioner of the New South Wales Crime Commission; Gedeon v Commissioner of the New South Wales Crime Commission* [2007] NSWCA 296 considered*Sutherland Shire Council v Finch* [1970] HCA 49; (1970) 123 CLR 657 considered*Timbarra Protection Coalition Inc v Ross Mining NL* [1999] NSWCA 8; (1999) 46 NSWLR 55 considered**ANVIL HILL PROJECT WATCH ASSOCIATION INC v MINISTER FOR THE ENVIRONMENT AND WATER RESOURCES AND ANDROS AUSTRALIA PTY LTDNSD 2031 OF 2007TAMBERLIN, FINN, MANSFIELD JJ14 FEBRUARY 2008SYDNEY**

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 2031 OF 2007**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**ANVIL HILL PROJECT WATCH ASSOCIATION INC** **Appellant**
AND:	**MINISTER FOR THE ENVIRONMENT AND WATER RESOURCES** **First Respondent** **ANDROS AUSTRALIA PTY LTD** **Second Respondent**

JUDGES:	**TAMBERLIN, FINN, MANSFIELD JJ**
DATE OF ORDER:	**14 FEBRUARY 2008**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

The appeal be dismissed with costsNote: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY NSD 2031 OF 2007

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**ANVIL HILL PROJECT WATCH ASSOCIATION INC** **Appellant**
AND:	**MINISTER FOR THE ENVIRONMENT AND WATER RESOURCES** **First Respondent** **ANDROS AUSTRALIA PTY LTD** **Second Respondent**

JUDGES:	**TAMBERLIN, FINN, MANSFIELD JJ**
DATE:	**14 FEBRUARY 2008**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

THE COURT:

BACKGROUND

1 This is an appeal from a judgment of a Judge of the Court dismissing an application by the Anvil Hill Project Watch Association Inc ("appellant") which challenged a determination by a delegate of the first respondent that an action comprising the construction and operation of an open cut coal mine and colliery facility ("the Anvil Hill project") by the second respondent ("Andros") was not a "controlled action" within the meaning of s 67 of the *Environmental Protection and Biodiversity Conservation Act 1990* (Cth) ("the Act").

2 The background to this matter can be briefly stated. Andros proposes to

perform the Anvil Hill project in the Hunter Valley district of New South Wales. On 11 January 2007, Andros referred the Anvil Hill project to the Minister to decide whether it was a controlled action. On 19 January 2007, a delegate of the first respondent decided that the Anvil Hill project was not a controlled action, with the consequence that it could proceed without further approval being required under the Act. On 17 May 2007, the appellant filed an application under s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) for review of the delegate's decision. Her Honour the primary judge dismissed the application: see *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* [2007] FCA 1480; (2007) 97 ALD 398.

REASONS FOR DECISION OF THE DELEGATE

3 On 18 April 2007, reasons were provided by the delegate of the first respondent for the decision that the Anvil Hill project was not a controlled action. They are summarised in her Honour's judgment at [21]-[27], which we substantially reiterate below.

4 In the statement of reasons, the delegate outlined the background to the referral of the Anvil Hill project, and gave a description of it. The delegate noted that the referral had been sent to the Minister for Industry, Tourism and Resources, the Minister for Defence and to the New South Wales Minister for Planning, but that no comments had been received from them. The delegate also said that 13 comments had been received from the public, including the appellant. The majority of these submissions contended that the Anvil Hill project should be a controlled action because it was likely to have "significant impacts" on matters of national environmental significance.

5 The delegate stated that she considered the information and advice provided by the appellant, and that she relied on a brief from the Department of Environment and Water Resources. The evidence and other material in that brief on which the delegate's findings were based included the referral itself, environment assessment documents, the public submissions, various correspondence, and policy statements and advice from the Department of the Environment and Heritage.

6 The delegate made extensive findings of fact about listed ecological communities, plant species, fauna species and migratory species protected under Part 3 of the Act and concluded that there was "no likelihood" that the proposed action would have a significant impact on any of them, other than, potentially, listed threatened species and communities (ss 18 and 18A of the Act) and listed migratory species (ss 20 and 20A of the Act). The delegate continued:

'In particular, I found that two listed ecological communities, two listed flora species and several listed fauna species are known to occur, or may occur, in the area of the proposed action.'

7 The delegate examined these communities and species separately and found that a significant impact on any of them by the proposed action was "not likely".

8 The delegate then considered whether the proposed action was likely to have "indirect impacts" on matters protected under Part 3 of the Act "as a result of any possible contribution to greenhouse gas emissions". The delegate accepted that greenhouse gases in the Earth's atmosphere are causing changes to that atmosphere and to weather patterns, and that these changes might affect matters protected by Part 3 of the Act. The delegate found that if all the coal produced by the proposed mine were to be consumed by end users, the combustion of that coal would produce per annum the equivalent of 0.04% of the current annual global greenhouse gas emissions. The delegate found that "such emissions are a small proportion of the total possible emissions from all other sources".

9 The delegate accepted that the contribution to Australia's greenhouse gas emissions from the mining and use of coal is important, but that it was only one of many contributions. The delegate observed that Australia's emissions, "though relatively large on a per capita basis", should be considered with the emissions of other industrialised countries, and that:

'... the amount and concentration of greenhouse gases in the atmosphere, and any resultant adverse impacts on matters protected by Part 3 of the EPBC Act, are the consequence of human activities on a global scale over a long period of time.

10 In the conclusion of the reasons, the delegate stated:

'I found that, while it is clear that, at a global level, there is a relationship between the amount of carbon dioxide in the atmosphere and warming of the atmosphere, the climate system is complex and the processes linking specific additional greenhouse gas emissions to potential impacts on matters protected by Part 3 of the EPBC Act are uncertain and conjectural. In light of this, and in light of the relatively small contribution of the proposed action to the amount and concentration of greenhouse gases in the atmosphere, I found 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 impacts is not likely to be identifiable.'

11 Finally, the delegate also concluded that the emissions of greenhouse gases that would result from the mining, shipping and transport of the coal were "likely to be negligible in the context of existing emissions".

LEGISLATION AND ISSUES ON APPEAL

12 Section 75(1) of the Act requires the Minister to decide whether the subject of a proposed action which is referred to the Minister is a "controlled action", and if so which of the "controlling provisions" in Part 3 of the Act apply to the action. The expression "controlled action" is defined in s 67 of the Act as being an action which, if undertaken without approval under Part 9 of the Act, would for the purposes of a provision of Part 3 be prohibited. The provisions of Part 3, which include ss 18, 18A, 20 and 20A, contain prohibitions on the taking of certain activities without ministerial approval due to the impact which those activities will have upon the environment. Part 7 of the Act, which includes s 67, contains the procedures by which the Minister must decide whether a proposed action referred to the Minister requires approval. Part 9 of the Act regulates the approval of otherwise prohibited actions and provides the machinery for the approval of proposals and the imposition of any necessary or appropriate conditions. Of special relevance to this case is s 181 of the Act, which requires the Minister to establish and publish a list of "threatened ecological communities" that are critically endangered, endangered or vulnerable.

13 Two issues arise on this appeal. The first is whether the primary judge erred in construing s 75(1) of the Act as not involving a jurisdictional fact to be objectively determined, namely, whether a proposed action has, will have, or is likely to have a significant impact on a matter protected by Part 3 of the Act. The second issue is whether it is correct to interpret the phrase "a listed threatened ecological community" in ss 18 and 18A of the Act by reference to descriptions of ecological communities which are not listed in s 181 of the Act but are contained in a separate, privately maintained classification system.

ISSUE ONE – JURISDICTIONAL FACT

14 The question as posed by the appellant is whether a precondition to the Minister's exercise of discretion under s 75(1) was that the proposed action has, will have or is likely to have a significant impact on a matter protected by Part 3 of the Act.

15 The primary judge answered this question in the negative, pointing to several matters which supported this conclusion.

16 First, her Honour explained the statutory context in which s 75(1) operates, and pointed out at [66] and [71] that the decision which the Minister must make under that section may be made on the basis of information and comment obtained under, for instance, ss 72(2) and 75(1A) of the Act. This is a matter which suggests that the decision is not contingent upon the existence of a fact which must be determined objectively on the basis of admissible evidence before a court.

17 Secondly, her Honour observed at [68] that exemptions from the Part 3 prohibitions apply where there is in force a decision of the Minister that the relevant provision is not a controlling provision: see, for instance, s 12(2)(c) of the Act. This again indicates that the Act treats the decision of the Minister as central to the operation of s 75(1), rather than any condition precedent on which that decision must be based.

18 Thirdly, her Honour noted at [67] that, according to the Act's regime, consequences flowed from the fact that the decision under s 75(1) is made, rather than from a determination of the objective fact that the proposed action is or is not a controlled action. An example of this is found in

s 75(3) of the Act, which states that the consequence of designating a person as the proponent of the action directly flows from the Minister making a decision under s 75 "that the action is a controlled action". Her Honour considered that the flow of such consequences from a decision which has already been made reinforced the conclusion that s 75(1) involved a decision of the Minister, rather than an objective determination of whether a "significant impact" under Part 3 was established. Her Honour concluded at [69]:

‘If the legislature intended these consequences to follow only from an objective determination that an action is or is not a controlled action, it would be surprising for the consequences to be expressed as following from the fact of the Minister having made the determination rather than to a statement of the fact. Even more telling, perhaps, is the fact that it would be unnecessary to provide exemptions from the controlling provisions in Part 3 in respect of an action that, objectively, is not a controlled action in respect of a provision. By definition such an action would not fall within the relevant prohibitions. The language is too pointed and the repetition of the exemptions too frequent for this simply to be a provision that is not strictly necessary but made in an abundance of caution. The exemption is repeated specifically and deliberately in every controlling provision; see for example, ss 12(2)(c), 15A(4)(c), 15B(8)(c), 15C(16)(c), 16(2)(c), 17B(4)(c), 19(3)(b), 20(2)(c) to mention just a few of the relevant subsections.’

19 Finally, her Honour addressed at [70] the submission that the "jurisdictional fact thesis" would best promote the objects of the Act in this case. The force of this submission was attenuated in her Honour’s view by the fact that s 3(2) of the Act also referred to adopting "an efficient and timely Commonwealth environmental assessment and approval process that will ensure activities that are likely to have significant impacts on the environment are properly assessed". Observing that the scheme of the Act creates "an initial clearing house" to ensure the actions which are not likely to have significant impacts on the environment are properly assessed and not further impeded by a cumbersome approval process, her Honour concluded that availability of merits review at this early stage would not assist the attainment of this purpose.

20 In our view, the primary judge was correct in making all of the above

observations about the operation and meaning of the Act, and her Honour's reasoning discloses no error of law. This finding is sufficient to dispose of this ground of appeal, although some further comment might be made on this point.
21 To constitute a condition precedent, the relevant fact or circumstance must exist independently of, and be objectively determined prior to, the exercise of the power or performance of the duty by the decision-maker. The starting point for ascertaining whether a fact or circumstance is a jurisdictional fact must be the words of the statute, read in their context. Although there is no strict verbal formula, the existence of a jurisdictional fact is frequently signalled by the use of expressions such as "**where** 'x' exists", or "**when** 'x' exists" or "**if** 'x' exists", then a person is empowered or obliged to act or refrain from action. The 'x' in this format is the relevant fact or circumstance which is a condition precedent to the exercise of a power or performance of a duty. In some instances, the fact or circumstance may be subjectively expressed. Examples of this include "**where** in the opinion of the Minister 'x' exists" or, "**if** in the opinion of the Minister 'x' exists" or "**when** the Minister is satisfied 'x' exists", then the Minister is to exercise the power or perform the duty. Such language often indicates that the Minister must form the necessary opinion as a condition precedent to the power or duty, although the correctness of this opinion, once formed, is not a matter for review by the Court.
22 The High Court considered the question of conditions precedent in *Sutherland Shire Council v Finch* [1970] HCA 49; (1970) 123 CLR 657. In that case, s 99(11A) of the *Local Government Act 1919* (NSW) provided that the Minister for Local Government could give a direction to a council to pay compensation to an employee whose services had been terminated if a report under the Act exists which is favourable to the employee. The provision read:
'In any case ***where*** *the council decides to terminate the services of the servant notwithstanding that* ***the report*** *of the person holding the inquiry* ***is substantially favourable*** *to the servant,* ***the Minister****, on the application of the servant ...,* ***may****, after such inquiry as he deems sufficient, direct the council to pay to the servant as from the date of termination of his services compensation ...'*

(Emphasis added.)

23 The relevant issue in *Sutherland Shire* [1970] HCA 49; 123 CLR 657 was whether it was for a court or the Minister to finally determine whether the report was "substantially favourable" to the employee. At 666, Gibbs J (with whom the other members of the Court agreed) said:

'Before the Minister gives a direction, he must satisfy himself that this condition has been fulfilled and it is therefore true to say that the Minister is required to form an opinion as to whether the report is substantially favourable. However it does not follow that his opinion when formed is conclusive. The Minister must also form the opinion that the council has decided to terminate the services of the servant, and that the servant has made application within fourteen days, but he cannot acquire the power to give a direction by forming an erroneous opinion on those matters. The subsection does ***not*** *state that the Minister may give a direction* ***if in the opinion of the Minister*** *the report is substantially favourable. No difficulty would have existed in framing the subsection to make the opinion of the Minister the governing consideration if that had been intended.'*

(Emphasis added.)

24 His Honour noted at 666-667 the discretion of the Minister to make appropriate inquiries, but considered that neither the existence of the power to inquire nor the breadth of the discretion supported the view that the condition precedent imposed by the section had been satisfied where it could be established in a court that the Minister erroneously considered that the report was substantially favourable to the servant.

25 In the present case, the language of s 75(1) of the Act and the related provisions referred to by the appellant does not require any objective factual determination as a condition precedent to the exercise of the power of the Minister to make a decision under s 75(1). There are no references to expressions such as "Where there is a significant impact, the Minister may ...", or "If there is likely to be a significant impact, the Minister may ..." or even "Where there are grounds on which the Minister can consider whether there is likely to be a significant impact, the Minister may ...", each of which may suggest the existence of a condition precedent to the exercise of the power by the Minister.

26 Section 75(1) of the Act imposes a duty on the Minister to decide whether a proposed action is a controlled action. In making this decision, the Minister must take into account the elements of a controlled action as

defined by s 67, which in turn involves a determination whether the proposed action would be prohibited by a provision of Part 3 of the Act, including those provisions which give rise to what the appellant asserts is the condition precedent of s 75(1). The determination of this latter question involves a duty to determine whether there would be a prohibition under Part 3 of the Act which applies to the proposed action because the action has, will have or is likely to have a significant impact on a relevant aspect of the environment. The duty to make this determination is assigned to the Minister. It is not given to a court or tribunal, and is not expressed as an objective matter. As a result, the performance of this duty is not properly to be regarded as a condition precedent to the exercise of the power in s 75(1).

27 On the hearing, reference was made to the two decisions of the New South Wales Court of Appeal. The first was to *Timbarra Protection Coalition Inc v Ross Mining NL* [1999] NSWCA 8; (1999) 46 NSWLR 55, where Spigelman CJ said at 64:

'Where the process of construction leads to the conclusion that parliament intended that the factual reference can only be satisfied by the actual existence (or non-existence) of the fact or facts, then the rule of law requires a court with a judicial review jurisdiction to give effect to that intention by inquiry into the existence of the fact or facts.'

28 His Honour also observed at 64 that where language is used which refers to the opinion, belief or satisfaction of the decision-maker, the general approach is to conclude against the existence of a jurisdictional fact, except for example where the simple existence of the opinion is itself a jurisdictional fact.

29 The decision in *Timbarra* 46 NSWLR 55 does not assist the appellant in this case. Section 77(3) of the *Environmental Planning and Assessment Act 1979* (NSW), which was under consideration in that case, provided that a development application must, if it is in respect of land which is part of a critical habitat, be accompanied by a species impact statement. The Court of Appeal decided that the question whether a species impact statement was required was a jurisdictional fact which the Land and Environment Court must determine objectively for itself where the validity of that application is challenged. This result is not surprising given the context of the requirement and language of the statute in that case. The language did not suggest that any subjective decision should be made,

such as, for example, by referring to an opinion, belief or conclusion of a decision-maker. The language in that case can be compared with the language in the present case where s 75(1) of the Act empowers the Minister to decide whether an action is a controlled action without any reference to an objective fact as a condition precedent to the exercise of that power.

30 The Court of Appeal subsequently considered the principles relating to jurisdictional fact in *Dowe v Commissioner of the New South Wales Crime Commission; Gedeon v Commissioner of the New South Wales Crime Commission* [2007] NSWCA 296. In that case, the relevant language of the *Law Enforcement (Controlled Operations) Act 1997* (NSW) was in these terms:

*'6(1) **After** considering an application for authority to conduct a controlled operation, and any additional information furnished under section 5(3), **the chief executive officer**:*

*(a) **may authorise a law enforcement officer** for the law enforcement agency concerned **to conduct the operation** ...*

...

*7(1) An authority to conduct a controlled operation must **not** be granted in relation to a proposed operation that involves any participant in the operation: ...*

(b) engaging in conduct that is likely to seriously endanger the health or safety of that or any other participant ...'

(Emphasis added.)

31 Spigelman CJ, with whom Basten JA and Handley AJA agreed, held at [32]-[33] that the question whether certain conduct is likely to seriously endanger health or safety was not an objective jurisdictional fact which must be determined on the basis of evidence adduced before a court, but was a subjective matter for the final determination by the chief executive officer. Although the prohibition in s 7(1) in that case did not refer to any decision, opinion or belief of the decision-maker, Spigelman CJ regarded it as "an emphatic instruction to the decision-maker" which did not amount to a jurisdictional fact.

32 There is even less indication of the existence of a jurisdictional fact in the language of s 75(1) of the Act in the present case. Section 75(1) requires the Minister to make a decision. The exercise of this power is not contingent upon a pre-existing, objectively determined fact. The language of the provision does not contemplate that a challenge may be brought against the Minister's decision on the basis of different or additional evidence which may be adduced before a court.
33 As a matter of practical consequence, if the question of significant impact was considered to be a jurisdictional fact, then, according to the scheme of the Act, a challenge could be made before a court as to whether there was actually and objectively a significant impact on the matters protected by Part 3 of the Act. Accordingly, the decision of the Minister on this point could be challenged immediately after it was made, and many months might elapse until a final resolution was reached. Such a legal challenge in many cases could involve very substantial delays to the approval process established by the Act, which would be inconsistent with its purpose of adopting an efficient and timely environmental assessment and approval process.
34 Finally, the appellant submits that the Act should be read down so as not to give the Minister power to circumvent the detailed approval process by deciding at an early stage that the proposed action is not a controlled action. Given that one objective of the Act is to protect the environment, the appellant says that a construction of s 75(1) which confers upon the Minister a power broad enough to be exercised contrary to the Act's objectives ought to be avoided. This submission is unacceptable because it relies on a proposition that the Minister, despite acting within the jurisdiction conferred by the Act, simply should not be given such a wide power. The decision regarding the breadth of the power is one for the legislature, and if a statute is clear in its provisions, it should not be read down by a court.

ISSUE TWO – IRRELEVANT CONSIDERATIONS

35 The second issue on appeal is whether it is correct to interpret the phrase "a listed threatened ecological community" in ss 18 and 18A of the Act by reference to descriptions of ecological communities which are not published pursuant to s 181 of the Act but are contained in a separate, privately maintained classification system. It is said that reliance on this private classification system involved taking into account irrelevant

considerations because the delegate went beyond the definition published under s 181 of the Act. The appellant submits that the listed ecological community should have been interpreted solely by reference to the relevant legislative instrument promulgated under s 181. It is not disputed that the ecological community relevant to this case is known as the *White Box-Yellow Box-Blakely's Red Gum grassy woodlands and derived native grasslands*, and that the community is listed as critically endangered pursuant to s 181.

36 After reviewing the evidentiary material, the primary judge did not accept the appellant's submission on this point. Her Honour concluded that, on the material before the delegate, which included the private classification system, the reasoning and conclusions were clearly correct, and therefore this submission failed.

37 Her Honour at [51] sets out the terms of a schedule to the relevant legislative instrument. The schedule requires that for an area to be included in the listed community there must be a "species-rich understorey" with the "dominance, or prior dominance of White Box-Yellow Box-Blakely's Red Gum trees". In light of this requirement, her Honour's reasoning, which we accept, was that to fall within the community the area must, where there is a canopy, have a dominance or co-dominance of those species of trees. On this point, the delegate found as a fact that "key diagnostic species, such as White Box, Yellow Box or Blakely's Red Gum, were absent or not present as the dominant canopy species sufficient to form the listed community", thereby leading to the conclusion that a significant impact on listed ecological communities was not likely.

38 It is important to note that counsel for the appellant submitted that it was not challenging any of the findings of fact made by the delegate. It is only the mode by which the delegate reached those findings, namely by reference to a private classification system, that is disputed. This acceptance of correctness is unsurprising, given that the reasoning of her Honour at [57] clearly demonstrates that the delegate's decision and reasoning was correct according to law, irrespective of any consideration given to the private classification system.

39 In our view, regardless of whether the findings of fact were correct,

there was no error of law disclosed in either the reasons of the delegate or the determination of this matter by her Honour, and this ground of appeal must be rejected.

CONCLUSION

40 For the above reasons, we do not accept the submissions of the appellant on either issue, and the appeal is dismissed with costs.

I certify that the preceding forty (40)
numbered paragraphs are a true copy
of the Reasons for Judgment herein
of the Honourable Justices
Tamberlin, Finn and Mansfield.
Associate:Dated: 14 February 2008

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Date of Hearing:	12 December 2007
Date of Judgment:	14 February 2008

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