

BETWEEN: **ANVIL HILL PROJECT WATCH ASSOCIATION INC**
Applicant

AND: **MINISTER FOR THE ENVIRONMENT AND WATER
RESOURCES**
First Respondent

AND: **CENTENNIAL HUNTER PTY LIMITED
ACN 101 509 111**
Second Respondent

AMENDED APPLICATION FOR AN ORDER OF REVIEW
(Order 54, Form 56)

Application for an order of review of a decision by a delegate of the first respondent, made under section 75 of the *Environment Protection and Biodiversity Conservation Act 1999* (“**EPBC Act**”) on 19 February 2007, that the proposed action by the second respondent to construct and operate an open cut coal mine and ancillary facilities, known as the Anvil Hill Project (EPBC Referral No. 2007/3228), is not a controlled action.

The applicant is a person who is aggrieved by the decision, pursuant to the widened standing provided by section 487 of the EPBC Act, because:

1. The applicant is incorporated in Australia.
2. During the 2 years immediately before the decision the applicant has engaged in a series of activities in Australia for protection or conservation of, or research into, the environment.
3. At the time of the decision the objects or purposes of the applicant included the protection or conservation of, or research into, the environment.

**AMENDED APPLICATION FOR
AN ORDER OF REVIEW**
Filed on behalf of the applicant
Order 54, Form 56

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The grounds of the application are –

1. Under section 5(1)(f) of the *Administrative Decisions (Judicial Review) Act 1977*, that the decision involved an error of law, namely, the delegate erred in construing the meaning of “all adverse impacts (if any) the action is likely to have on the matter protected by each provision of Part 3” in section 75(2) of the EPBC Act by requiring a measurable or identifiable impact ~~to~~ on the matters protected by Part 3 of the Act caused by the greenhouse gas emissions from the use of coal from the Anvil Hill Project beyond or additional to the contribution that the greenhouse gas emissions make to climate change, thereby impacting on the matters protected by Part 3 of the EPBC Act.
2. Under section 5(1)(f) of the *Administrative Decisions (Judicial Review) Act 1977*, that the decision involved an error of law in that the delegate applied the wrong test, namely, that in considering the likelihood of the proposed action having a significant impact on a matter protected by any provision of Part 3 of the EPBC Act, the delegate applied the test whether there was a link between the additional greenhouse gases arising from the proposed action and a measurable or identifiable increase in the global atmospheric temperature or other greenhouse gas impacts. The delegate should have applied the test whether the proposed action is likely to have an impact on a matter protected by Part 3 of the EPBC Act that is important, notable or of consequence having regard to its context or intensity.
3. ~~2.~~ Under sections 5(1)(e) and 5(2)(b) of the *Administrative Decisions (Judicial Review) Act 1977*, that the making of the decision was an improper exercise of the power conferred by section 75 of the EPBC Act because the delegate failed to take a relevant consideration into account in the exercise of the power when assessing “all adverse impacts (if any) the action is likely to have on the matter protected by each provision of Part 3” in section 75(2) of the EPBC Act, namely, the delegate failed to consider that the greenhouse gas emissions that will result from the action will contribute to “loss of climatic habitat caused by anthropogenic emissions of greenhouse gas”, which is a key threatening process included in the list established under section 183 of the EPBC Act.
4. ~~3.~~ Under sections 5(1)(e) and 5(2)(b) of the *Administrative Decisions (Judicial Review) Act 1977*, that the making of the decision was an improper exercise of the power conferred by section 75 of the EPBC Act because the delegate failed to take a relevant consideration into account in the exercise of the power when assessing whether the action “is likely to have a significant impact on a listed threatened species or a listed threatened ecological community” for the purposes of deciding whether sections 18 and 18A are controlling provisions for the action under section 75(1) of the EPBC Act, namely, the delegate failed to consider that the greenhouse gas emissions that will result from the action will contribute to “loss of climatic habitat caused by anthropogenic emissions of greenhouse gas”, which is a key threatening process included in the list established under section 183 of the EPBC Act.

5. Under section 5(1)(f) of the *Administrative Decisions (Judicial Review) Act 1977*, that the decision involved an error of law, namely, the delegate erred in construing the meaning of “a listed threatened ecological community” for the purposes of applying sections 18(5) and 18A(2) of the EPBC Act by interpreting the description of “White Box – Yellow Box – Blakely’s Red Gum Grassy Woodland and Derived Native Grassland”, as stated for its inclusion in the list established under section 181 of the EPBC Act as a critically endangered ecological community, by reference to descriptions of non-listed ecological communities known as “Upper Hunter White Box – Ironbark Grassy Woodland”, “Forest Red Gum Riparian Woodland”, and “Ironbark Woodland Complex”.
6. Under sections 5(1)(e) and 5(2)(a) of the *Administrative Decisions (Judicial Review) Act 1977*, that the making of the decision was an improper exercise of the power conferred by section 75 of the EPBC Act because the delegate took an irrelevant consideration into account in the exercise of the power, namely, the delegate considered descriptions of non-listed ecological communities, known as “Upper Hunter White Box – Ironbark Grassy Woodland”, “Forest Red Gum Riparian Woodland”, and “Ironbark Woodland Complex”, in determining the presence or absence of a listed threatened ecological community on the land proposed to be mined, namely “White Box – Yellow Box – Blakely’s Red Gum Grassy Woodland and Derived Native Grassland”, which is included in the list established under section 181 of the EPBC Act as a critically endangered ecological community.
7. Under sections 5(1)(c) and 5(1)(d) of the *Administrative Decisions (Judicial Review) Act 1977*, that the delegate did not have jurisdiction to make the decision and the decision was not authorized by the EPBC Act because, as a question of jurisdictional fact, the proposed action is likely to have a significant impact on matters protected by Part 3 of the EPBC Act.

Particulars

- (a) The proposed action is likely to have a significant impact on the world heritage values of a declared World Heritage property, namely the Great Barrier Reef World Heritage property, due to the emission of greenhouse gases contributing to climate change that will or are likely to result from the mining, transport and use of the coal from the proposed mine.
- (b) The proposed action is likely to have a significant impact on the world heritage values of a declared World Heritage property, namely the Greater Blue Mountains World Heritage Area, due to the emission of greenhouse gases contributing to climate change that will or are likely to result from the mining, transport and use of the coal from the proposed mine.
- (c) The proposed action is likely to have a significant impact on a listed threatened species, namely the Painted Diuris (*Diuris tricolor*), a native orchid listed as vulnerable under the EPBC Act, due to the destruction and disturbance of the species within the area proposed to be mined.

(d) The proposed action is likely to have a significant impact on a listed threatened ecological community, namely “White Box – Yellow Box – Blakely’s Red Gum Grassy Woodland and Derived Native Grassland”, which is included in the list established under section 181 of the EPBC Act as a critically endangered ecological community, due to the destruction and disturbance of the listed threatened ecological community within the area proposed to be mined.

The applicant claims –

1. An order setting aside the decision of the delegate of the first respondent on 19 February 2007 that the proposed action by the second respondent to construct and operate an open cut coal mine and ancillary facilities, known as the Anvil Hill Project (EPBC Referral No. 2007/3228), is not a controlled action.
2. An order remitting the decision referred to in order 1 to the first respondent (or a duly appointed delegate of the first respondent) for further consideration and decision.
3. An order that the respondents pay the applicant’s costs of the application.

This application was prepared by Lucy McCallum SC and Chris McGrath of counsel.

Date: 10 July 2007

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Environmental Defenders Office (NSW) Ltd
Solicitor for the applicant

NOTICE OF AMENDMENT

This application was amended on 10 July 2007 pursuant to leave under O 13, r 2 of the Rules, granted on 5 July 2007 by Her Honour Justice Stone.