

IN THE VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

No. /2004

BETWEEN

THE AUSTRALIAN CONSERVATION FOUNDATION ('ACF')

and

THE WORLD <sup>WIDE</sup> WILDLIFE FUND FOR NATURE AUSTRALIA ('WWF')

and

ENVIRONMENT VICTORIA ('EV'),

and

THE CLIMATE ACTION NETWORK AUSTRALIA ('CANAA')

Applicants

and

THE PANEL APPOINTED TO HEAR SUBMISSIONS IN RELATION TO  
PROPOSED PLANNING SCHEME AMENDMENT C32 TO THE LATROBE  
PLANNING SCHEME

The Panel

**APPLICATION FOR DETERMINATION UNDER S. 39 PLANNING &  
ENVIRONMENT ACT 1987 – DEFECT IN PROCEDURE**

**STATEMENT OF GROUNDS**

1. The Applicants seek a determination under s. 39 of the *Planning & Environment Act 1987* ('PEA') regarding defects in the procedure of the Panel appointed 21 July 2004 to consider submissions concerning proposed Amendment C32 to the La Trobe Planning Scheme.

**Background**

2. As part of its proposed West Field Project, International Power Hazelwood ('the Proponent') seeks an amendment (C32) to the La Trobe Planning Scheme to rezone land to Special Use Zone – 1 Brown Coal, to allow an expansion of mining into the West Field. The brown coal sought will be used to produce electricity in the Hazelwood Power Station. The Applicants take issue with the proposed expansion, on the basis that a substantial proportion of

Australia's greenhouse gas emissions come from the stationary energy sector. The Brown Coal industry provides 97% of Victoria's baseload electricity supply. The Applicants seek to ensure that appropriate consideration of greenhouse gas emissions is required in the assessment of proposed Amendment C32.

3. The Applicants responded to an advertisement that appeared in the Age newspaper inviting public comments in relation to the proposed Hazelwood Mine – West Field Project. The advertisement invited comments on the Environment Effects Statement, EPA Works Approval application No. WA 55174, Amendment C32 to the La Trobe Planning Scheme and combined planning permit applications 04189, 04190, 04191 and 04192. Comments were to be lodged by 18 June 2004.
4. The advertisement stated that a Panel would be appointed under the *Environment Effects Act 1978* ('**EE Act**') and the *Planning & Environment Act 1987*.
5. The Applicants lodged a submission dated 18 June 2004 relating to the proposed West Field Phase 2 development with Planning Panels Victoria. The Applicants also lodged a request to be heard with Planning Panels Victoria. The submission addressed relevant planning policy and the impact of greenhouse gas emissions from the use of coal in the Hazelwood Power Station, and the extent to which this would impact on the enhanced greenhouse effect.
6. On 1 July 2004 the Minister for Planning appointed a Panel consisting of Robin Saunders (Chairperson), Geoff Angus and Bob Evans to hold an inquiry into the environmental effects of the Hazelwood Coalmine EES Extension (the Westfield Phase 2 Project) under s. 9 of the EE Act.
7. On or about 7 July 2004 the Minister issued Terms of Reference which purported to be made under both the EE Act and the PEA. The terms of reference are headed:

**“PANEL INQUIRY UNDER ENVIRONMENT EFFECTS ACT 1978  
PLANNING AND ENVIRONMENT ACT 1987**

**WEST FIELD PROJECT**

## PHASE 2 OF THE HAZELWOOD MINE WEST FIELD DEVELOPMENT”

The Terms of Reference state at p. 2:

*“The Minister for Planning has appointed a Panel Inquiry under s. 9(1) of the Environment Effects Act 1978. The same Panel is likely to be appointed under the Planning & Environment Act to consider objections/submissions to the amendment if they are referred by the Planning Authority. The Panel is also to consider relevant aspects of submissions on the Works Approval application which was advertised in conjunction with the EES.*

*After the Panel Inquiry provides its report to the Minister for Planning, the Minister will make an assessment of the project under the Environment Effects Act to inform the relevant decision makers.”*

8. The Terms of Reference also state at p.2:

*“The Panel is not to consider matters related to greenhouse gas emissions from the Hazelwood Power Station – these issues are being addressed through a separate process.”*

9. The Terms of Reference are dated 1 June 2004. This is considered to be a typographical error as the Terms of Reference were issued after the Panel was appointed under the EE Act.
10. The Panel as appointed under the EE Act held a Directions Hearing in Morwell on Monday 12th July 2004. The Applicants attended and were represented by the Environment Defenders Office (**‘EDO’**). On the Applicant’s behalf submissions were made concerning the Minister’s Terms of Reference and the statutory requirement to consider environmental impacts including the emission of greenhouse gases from the Hazelwood Power Station. The Applicants made a submission that the Panel was not bound by the Minister’s Terms of Reference and that the PEA required the Panel to consider relevant matters and submissions referred to it.
11. The Applicants referred to previous assessments under the Environment Effects Act involving planning scheme amendments where Panels had considered the effects of greenhouse gas emissions and previous Ministerial

Assessments where greenhouse gas considerations had been central to the decision to proceed with the proposal.

12. The position expressed by the Applicants was supported by representatives of HRL Pty Ltd who enjoy the benefit of an Exploration Licence issued under the *Mineral Resources Development Act* 1990. HRL allege the proposal would adversely affect their expectation as it relates to exploitation of coal in the vicinity of the West Field deposit.
13. The Panel concluded that it would not consider matters outside the Terms of Reference given to it by the Minister. The Panel stated that it would be curious if a Panel could stray outside any Terms of Reference provided by a Minister. The Panel in effect ruled that it would not consider the greenhouse impacts from using the coal in the West Field mine in the Hazelwood Power Station.
14. The Panel issued directions dated 15 July. Direction 2 describes issues about which the Panel sought to gain a better understanding. The Panel did not seek further information about any increase in greenhouse gas emissions from the Hazelwood Power Station. The Panel did seek further information on a number of issues including:
  - (a) (a) The way in which the “more efficient use of brown coal” in the West Field / Driffield coal field can be achieved. In particular, further elaboration on issues concerning the rights to the coal resource conferred under exploration licences, mining leases and other agreements with government, consideration of more efficient power station technologies that may emerge, and the long term strategy to protect future options; and
  - (b) (d) Greenhouse gas emissions resulting from the mining method proposed by IPRH as compared with that proposed by Yallourn Energy. The Panel requested more detailed information on the costs and benefits of the two coal winning methods, covering capital, operational and maintenance costs, and further information on greenhouse gas emissions resulting from each.

15. The Panel proceeded to begin hearing submissions on Monday the 26<sup>th</sup> July 2004. However the Applicants were not made aware that a Panel had been appointed under the PEA until after this date.
16. On 27 July 2004, Mr. Barnaby McIlrath of the EDO, made telephone inquiries to Planning Panels Victoria, seeking clarification as to whether a Panel was to be appointed under the PEA. The EDO had received no written correspondence from the Panel indicating that a Panel had been appointed.
17. He was subsequently informed by facsimile from Mr. Adrian Williams that a Panel had been appointed on 21 July 2004. The Minister for Planning appointed a Panel under the PEA on 21 July 2004, consisting of Robin Saunders (Chairperson), Geoff Angus and Bob Evans - the same persons appointed under the EE Act.
18. On 28 July 2004, the EDO wrote to Kathryn Mitchell, Chief Panel Member at Planning Panels Victoria, by facsimile, to clarify whether any Directions Hearing would be held by the Panel appointed under the PEA. The EDO also made enquiries as to whether the Panel appointed under the PEA would apply any directions in particular in the event that no Directions Hearing was to be held.
19. Ms. Mitchell responded by fax dated 30 July 2004. The fax stated the Panel's advice that there would be no further Directions Hearing and that the directions issued on 12 July would apply for the whole hearing, including the amendment component of it.
20. On Wednesday 4<sup>th</sup> August 2004 the Environment Defenders Office made submissions on behalf of the Applicants to the Panel.
21. In accordance with the Panel's ruling that it would not consider matters outside the Minister's Terms of Reference and the directions issued 15 July, the Applicants' submission did not address the effects on the climate from burning coal in the Hazelwood Power Station. The Applicants' submission did address *economic* issues concerning the more efficient use of the West Field coal deposit, and economic risks associated with the transition to a carbon constrained economy. However, these were not submissions about the

*environmental* effects of the proposal on the climate arising from the emission of greenhouse gases.

### **Failures to comply**

22. As a result of the Panel's conduct described above, the Panel failed to comply with the relevant provisions of the PEA:
- (a) By deferring to the Terms of Reference issued by the Minister for Planning on 1 June 2004, insofar as they provide that "*The Panel is not to consider matters related to greenhouse gas emissions from the Hazelwood Power Station – these issues are being addressed through a separate process.*" the Panel failed to exercise its statutory obligations under Division 1 and 2 of Part 2 and Part 8 of the PEA.
  - (b) In deferring to the Minister's Terms of Reference, the Panel failed to exercise its discretion under s. 161(1)(d)(i) of the PEA to inform itself on any matter as it sees fit.
  - (c) The Panel failed to consider the Applicants' submissions insofar as they relate to the environmental impacts related to the emission of greenhouse gases from the use of coal in the Hazelwood Power Station. In doing so it failed to comply with s. 24 of the PEA (Part 2 Division 2), which requires that the Panel must consider all submissions referred to it and give a reasonable opportunity to be heard to (inter alia) - *any person who has made a submission referred to it;*
  - (d) In failing to consider the greenhouse impacts of using the coal sought in the Hazelwood Power Station, the Panel failed to consider a matter which could not be described as irrelevant. In failing to consider relevant matters, it failed to exercise its discretion under s. 168 of the PEA (Part 8) to consider any matter *it* considers relevant in making its report and recommendations, including:
    - (i) Impacts on the environment from the emission of greenhouse gases by the Hazelwood Power Station which will be facilitated by the proposed amendment;

- (ii) The General Practice Note – Strategic Assessment Guidelines for Planning Scheme Amendments, issued November 2001 by the Department of Infrastructure insofar as it requires a Panel to consider:
1. the requirements of s. 12 of the PEA relating to planning scheme amendments;
  2. whether the proposed amendment adequately addresses environmental effects;
  3. which aspects of the State Planning Policy Framework ('SPPF') are relevant, and the extent to which the proposed amendment or proposal supports or gives effect to the SPPF;
  4. the cumulative effect of the amendment on the strategic direction of the planning scheme.
- (iii) The objectives of clause 15.12 (Energy Efficiency) of the SPPF including the minimisation of greenhouse gases; and
- (iv) The objectives of Clause 15.14 of the Planning Scheme (Renewable Energy), including representations by Government within that clause indicating the Government is committed to contributing to national and international efforts to reduce greenhouse gas emissions by reducing the long-term dependency on energy from fossil fuels, and increasing the security and diversity of Victoria's energy supply by increasing the proportion supplied from renewable sources; and
- (v) Clause 15.09 of the Planning Scheme insofar as it requires planning and responsible authorities to address Potentially Threatening Processes listed under the Flora and Fauna Guarantee Act 1988 ('FFG Act'), particularly the listed Potentially Threatening Process - *loss of terrestrial climatic habitat caused by anthropogenic emissions of greenhouse gases*.

- (e) The past practice of considering greenhouse gas emissions in other environmental impact procedures and assessments informing decisions under the PEA;
- (f) A relevant government policy, the Victorian Greenhouse Strategy ('VGS') insofar as it is relevant to assessment of environmental impacts before the Minister approves a planning scheme amendment under the PEA;
- (g) In doing so, the Panel breached the rules of natural justice which bind its conduct under s. 161(b) of the PEA.

### **Relief sought**

23. The Applicants seek the following relief pursuant to s.39(4) of the *Planning & Environment Act 1987*:

- (a) A direction that the planning authority not adopt the amendment until the Panel takes the following actions:
  - (i) The Panel provides a reasonable opportunity for the parties to adduce evidence relating to the issue of greenhouse gas emissions from the Hazelwood Power station; and
  - (ii) After receiving submissions concerning the impact of greenhouse gas emissions, the Panel be required to
    1. reconvene; and
    2. provide a reasonable opportunity to be heard to any party who makes a submission in relation to the environmental impacts of greenhouse gas emissions from the Hazelwood Power Station; and
    3. considers those impacts in making its recommendations and report to the planning authority.



- (b) A declaration that the Panel failed to exercise its discretion under sections 168 and 161(1)(d)(i) of the *Planning & Environment Act 1987* to inform itself as it sees fit, in that it failed to turn its mind to the relevance of effects on the climate from the emission of greenhouse gases by the Hazelwood Power Station; and
- (c) A declaration that:
- (i) the Panel is not bound by the Ministerial Terms of Reference to the extent that they purport to divert the Panel from its responsibilities under Divisions 1 and 2 of Part 2 and Part 8 of the *Planning & Environment Act 1987*; and
  - (ii) The Panel is bound to exercise its discretion to consider relevant evidence and other duties arising under Part 2, Divisions 1 and 2 and Part 8 of the *Planning & Environment Act*;
- (d) A declaration that:
- (i) the Panel breached its duty under s. 24 of the *Planning & Environment Act 1987* by failing to consider the Applicant's submission insofar as it addressed environmental impacts of emissions of greenhouse gases resulting from the use of coal in the Hazelwood Power Station, and in doing so:
  - (ii) The Panel denied the Applicants natural justice; and therefore breached its duty under s. 161(1)(b) of the *Planning & Environment Act 1987*.



Barnaby McIlrath

Date: 20 August 2004

ENVIRONMENT DEFENDERS OFFICE (VIC) LTD