VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL (ADMINSTRATIVE)

Australian Conservation Foundation v Latrobe City Council

[2004] VCAT 2029

Morris J (President)

29 October 2004

Planning Schemes — Amendment — Submissions — Hearings by panel — Relevant and irrelevant considerations — Sufficient nexus between amendment and environmental effect — Consideration of environmental effects of greenhouse gases — Terms of reference to panel — Terms of reference having no legal effect — Act and content of amendment are effective terms of reference in considering submissions — Planning and Environment Act 1987 (Vic), ss 4, 6, 21, 24, 39.

Words and Phrases — "About an amendment" — Planning schemes — Amendment — Submissions — Hearings by panel — Relevant and irrelevant considerations — Sufficient nexus between amendment and environmental effect — Consideration of environmental effects of greenhouse gases — Terms of reference to panel — Terms of reference having no legal effect — Act and content of amendment are effective terms of reference in considering submissions — Planning and Environment Act 1987 (Vic), ss 4, 6, 21, 24, 39.

The applicants sought orders in relation to hearings by a panel concerning an amendment to the Latrobe Planning Scheme. The amendment related to particular matters that would facilitate mining coal fields to supply coal for a power station. The Minister for Planning approved terms of reference for a panel enquiry to be conducted under the *Environment Effects Act 1978* (Vic) and the *Planning and Environment Act 1987* (Vic) (the Act) in relation to the project. The terms of reference expressly stated that the panel was not to consider matters related to greenhouse emissions of the power station. The panel stated in a directions hearing that it would not consider matters outside the terms of reference given to it by the Minister.

Section 39 of the Act relevantly provided for persons to refer a matter in relation to an amendment to a planning scheme to the Victorian Civil and Administrative Tribunal for its determination.

Section 24 of the Act relevantly provided that a panel appointed to consider submissions about an amendment to a planning scheme must consider all submissions referred to it and give a reasonable opportunity to be heard to any person who has made a submission referred to it.

Section 21(1) of the Act permitted a person to make a submission "about an amendment".

Section 6(1) of the Act provided for general matters that a planning must or may address and s 4 of the provided the objectives of planning in Victoria.

Held: (1) The powers available to the Tribunal under s 39 of the Act were not powers in the nature of review on the merits. Rather the powers were in the nature of judicial review powers; that was, powers directed at considering the lawfulness of the conduct of the Minister, a planning authority or panel and then making orders to ensure that the law would be complied with.

(2) A panel could refuse to consider a submission referred to it (or part of a submission) if the submission (or the part of it) is irrelevant to the amendment. A panel could refuse to give a submittor an opportunity to be heard if the submittor sought to advance a submission which was irrelevant to the amendment.

(3) The panel intended to not consider submissions by the applicants concerning the environmental effects of greenhouse gases generated by the continued use of the power station.

(4) A submission concerning a planning scheme amendment would only be relevant if it raised planning issues, as ascertained by reference to the Act and it related to the amendment.

(5) Sections 6 and 4(1) of the Act set the potential scope of a planning scheme and also set the potential scope that might be addressed by a planning scheme amendment. Matters outside this scope were not relevant considerations in the preparation, consideration, adoption or approval of the amendment. A submission outside this scope must be disregarded.

(6) A submission would be "about an amendment" for the purpose of s 21(1) of the Act even if it related to an indirect effect of the amendment if there was a sufficient nexus between the amendment and the effect.

(7) There was a sufficient nexus between the approval of the amendment and the environmental effect of greenhouse gases that were likely to be produced by the use of the power station.

(8) Terms of reference could not be given to a panel and, if given, have no legal effect. The provisions of the Act and the content of the amendment were, in effect, the terms of reference in considering submissions about an amendment to a planning scheme.

Cases Cited

Environment and Heritage, Minister for v Queensland Conservation Council Inc (2004) 139 FCR 24; 134 LGERA 272.

Reference to Tribunal

M Dreyfus QC and *M Foley*, for the applicant.

T Heber (solicitor), for the planning authority.

C Wren, for International Power Hazelwood.

Cur adv vult

29 October 2004

Morris J (President).

1 This case raises the question of whether a planning panel, appointed to consider submissions to an amendment to a planning scheme under the *Planning and Environment Act 1987* (Vic) (the Act) to facilitate the continued operation of the Hazelwood Power Station, can refuse to consider the environmental effects of the emission of greenhouse gases resulting from that continued operation? I think the answer is to be found by examining the provisions of the Act and the terms of the amendment. But first it is necessary to put the matter in context.

Context

2 The Hazelwood Mine and Power Station occupies a site, south-west of Morwell in the Latrobe Valley, having an area of 3,435 ha. The power station, which has been operating for about 40 years, continues to be a significant power station. It contributes about 22% of Victoria's base load electricity; and has a nominal capacity of 1,600 megawatts.

3 The various brown coal mines which have served the power station are not expected to produce a reliable coal supply beyond the year 2009. Thus the owner of the power station, International Power Hazelwood (IPRH) wishes to develop an additional coal field, known as the West Field, to enable the power station to continue to operate until the year 2031.

4 Mining in the West Field after 2009 will require a diversion of the Morwell River and the deviation of the Strzelecki Highway. These changes, and other aspects of the West Field project, require the grant of various licences, permits and approvals. One of the approvals which is required is an amendment to the provisions of the Latrobe Planning Scheme ("the scheme").

5 By reason of the nature of the project and the nature and number of permissions required, the Victorian Government required IPRH to produce an environment effects statement (EES) in relation to the project. The EES described and assessed the direct implications of the mining of coal on the emission of greenhouse gases; but it did not describe nor address the production of greenhouse gases by the burning of coal, won from the West Field, and used to generate electricity after the year 2009. The reason for this is that IPRH was told by the Victorian Government, in August 2003, that the issue of greenhouse emissions of the power station was outside the scope of the EES; and that a separate government process would be adopted to address the issue of these emissions.

6 The Latrobe City Council prepared an amendment to the scheme required to give effect to the West Field project in early 2004. The amendment was titled Amendment C32. The council gave public notice of the amendment on 13 May 2004. It also published an explanatory report.

7 In the explanatory report the council stated that the amendment formed part of a joint planning scheme amendment and permit process under Div 5 of the Act. The explanatory report explained that the amendment included various matters to facilitate the West Field project. Specifically the amendment proposed to change the scheme by rezoning land to give effect to the relocation of the Strzelecki Highway and by introducing various overlay controls consequential upon the relocation of the Morwell River. The explanatory report stated that the environmental effects of the amendment, the applications for planning permit and the West Field project as a whole were detailed in the EES. It also stated that the amendment was consistent with the State and local policy frameworks.

8 On 1 June 2004 the Minister for Planning approved terms of reference for a panel enquiry to be conducted under the *Environment Effects Act 1978* (Vic) and the Act in relation to the project. In those terms of reference the Minister described the background to the enquiry and identified various approvals that would be required. These approvals included the approval of Amendment C32 and various planning permits pursuant to the scheme, approval under the

Mineral Resources Development Act 1990 (Vic), the *Environment Protection Act 1970* (Vic) and the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

9 The terms of reference described the task of the panel as follows:

> __To inquire into the potential environmental effects — including the physical, biological, social and economic aspects — of the proposal and the alternatives examined in the EES.
>
> __To consider the exhibited EES and relevant aspects of the EPA Works Approval Application WA 55174, Planning Scheme Amendment C32 and combined Planning Permit Applications (under the Latrobe Planning Scheme), all submissions received in response to the exhibited documents, as well as other relevant matters within the Victorian jurisdiction.
>
> __To advise whether potential adverse environmental effects of the project are capable of being effectively managed in the context of relevant legislation and policy, including in relation to the controlling provisions of the Environment Protection and Biodiversity Conservation Act — ie Sections 18 and 18A (Listed threatened species and communities).
>
> __To recommend whether the proposal should be approved either as generally described in the EES and other documents, or with modifications, including environmental management measures and monitoring programs.

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.

10 On 18 June 2004 various environmental groups, including the applicants, made a submission in respect of the amendment. The submissions made by the applicants canvassed the issue of the environmental impact of greenhouse gases generated by continuing to burn brown coal at the power station beyond the year 2009. The applicants argued that it was inappropriate to exclude the greenhouse implications of the proposal from the panel's deliberations.

11 The council referred all the submissions made to it to the panel to be appointed by the Minister for Planning pursuant to the Act.

12 On 12 July 2004 a panel conducted a directions hearing at Morwell. The applicants attended at the directions hearing and submitted that it was relevant and important to consider greenhouse issues as part of the EES process before the panel made its independent recommendation to the planning authority under the Act. At the hearing the panel told those present that it had not yet been appointed under the Act, although it intended to seek a reference under that Act. After considering submissions, the panel stated that it would not consider matters outside the terms of reference given to it by the Minister. Thus the panel effectively ruled that, in assessing the EES, it would not consider the greenhouse impacts of burning coal won as part of the West Field project.

13 On 15 July 2004 the panel issued a number of written directions. These directions purported to be in relation to the following aspects of the West Field project: the EES, Amendment C32, the planning permit applications and a works approval application under the *Environment Protection Act*. The directions related to procedural matters, such as the circulation of expert witness statements and the identification of certain matters which the panel was requesting be addressed by various parties.

14 On 21 July 2004 Kathy Mitchell, Chief Panel Member, Planning Panels

Victoria, under delegation from the Minister for Planning, appointed the panel to consider and hear submissions under the Act about Amendment C32.

15 The panel began to hear submissions about Amendment C32 and the EES on 26 July 2004.

16 On the following day the solicitor for the applicants contacted Planning Panels Victoria and learnt that the panel had now been appointed to hear and consider submissions concerning Amendment C32. The solicitor then sought clarification from Planning Panels Victoria as to whether the panel appointed to consider submissions in relation to Amendment C32 would be holding a separate directions hearing. On 30 July 2004 the Chief Panel Member replied stating:

> The Panel has advised me that there will be no further Directions Hearing in relation to this matter. They advised that submittors were informed of this position at Day 1 of the hearing (Monday 26 July), and further, that the directions issued as a result of the Directions Hearing held on 12 July would apply for the whole of the hearing, including the amendment component of it.

17 Another party which was interested in the EES and Amendment C32 was a company called HRL Ltd, which was interested in the development of a new 800 megawatt power station, using a new coal gasification technology, to be located nearby to the Hazelwood Power Station. At the directions hearing on 12 July 2004 it had also advanced the contention that the panel should not exclude consideration of greenhouse gas emissions arising from the operation of the Hazelwood Power Station for a further 25 years.

18 On 8 July 2004 HRL Limited wrote to the Minister for Planning expressing concern that the terms of reference for the panel inquiry excluded the issue of greenhouse gas emissions from the Hazelwood Power Station.

19 By letter dated 11 August 2004 the Minister replied, stating:

> As you are aware, the EES process for International Power Hazelwood's (IPRH) West Field Project (Phase 2) is limited to considering the effects of the project works, for which statutory approval is presently being sought. The project works include the diversion of the Morwell River, Eel Hole and Wilderness Creeks, deviation of the Strzelecki Highway and closure of Brodribb Road, in order to continue the mining of the West Field. The EES process is addressing greenhouse gas emissions associated with these works. IPRH previously obtained statutory approval for Phase 1 of the West Field Project.
>
> The Government is wholly committed to the general reduction of greenhouse gas emissions from coal-fired power generation. The Minister for Energy Industries and Resources is addressing greenhouse gas issues specifically associated with the operation of the Hazelwood Power Station using any coal outside the existing mining licence boundary. The full development of the West Field beyond the existing licence boundary will be subject to an agreement being reached between Government and IPHR. As is publicly known the Minister's intention is that greenhouse gas emissions from the Power Station associated with any coal outside the existing licence boundary should be substantially reduced.
>
> The two processes though which greenhouse gas issues are being addressed relate to the Hazelwood Mine and Power Station respectively. Both are necessary and practical in the context of their respective statutory requirements. Therefore the scope of the Panel Inquiry I appointed for this EES needs to align with the relevant statutory context and ensure due process is followed with respect to IPRH's proposed works (as listed above). There is no need for the Terms of Reference of this Panel Inquiry to change.

I take this statement by the Minister to mean that the panel was required to consider greenhouse gas issues in relation to the mining of coal from the West Field; but that the panel should not consider greenhouse gas issues in relation to the burning of coal from the West Field in the Hazelwood Power Station. I take the latter statement to be based upon the proposition that the statutory context, including the provisions of the Act in relation to Amendment C32, made it necessary and practical for the greenhouse gas issue in relation to the burning of coal to be assessed by a process separate to the planning scheme amendment process.

20 On 4 August 2004 the panel conducted a hearing and heard a submission from the applicants. The applicants called a witness, Dr Mark Diesendorf, whose presentation canvassed carbon related issues including greenhouse gases. However, based upon the ruling of 12 July 2004, the applicants' solicitor understood that the issues before the panel did not include the physical environmental impacts on the climate from the use of coal to make electricity in the Hazelwood Power Station. Consequently, the submission did not address any physical environmental impacts from using coal in the power station. Further the applicants stated in their written submission:

> Implicit in the panel's deliberations on the 12th July was the question of whether greenhouse issues could be considered. The panel clearly expressed it would not consider the effect of greenhouse emission, in accordance with the Minister's Terms of Reference.

During the presentation the panel did not interrupt the applicants' solicitor to suggest that, as it had now been appointed as a panel under the Act, it had formed a different view about the relevance of this issue.

The Tribunal's jurisdiction is in the nature of judicial review

21 The jurisdiction of the Tribunal arises under s 39 of the Act. Section 39(1) provides:

> A person who is substantially or materially affected by a failure of the Minister, a planning authority or a panel to comply with Division 1 or 2 or this Division or Part 8 in relation to an amendment which has not been approved may, not later than one month after becoming aware of the failure refer the matter to the Tribunal for its determination. Divisions 1, 2 and 3 of Part 3 of the Act are concerned with the amendment of planning schemes. Part 8 of the Act is concerned with panels.

22 Section 39(4) of the Act provides that the Tribunal may determine a matter referred to it under s 39 and may make various specific orders, such as make declarations or give directions to the planning authority or the Minister. The powers available to the Tribunal under s 39 are not powers in the nature of "review on the merits". Rather these powers are in the nature of judicial review powers; that is, powers directed at considering the lawfulness of the conduct of the Minister, a planning authority or panel and then making orders to ensure that the law will be complied with.

The alleged failure to comply with the Act

23 The applicants allege that the panel failed to comply with the following sections of the Act:

(a) Section 24, which provides that a panel appointed to consider submissions about an amendment to a planning scheme must consider all submissions referred to it and give a reasonable opportunity to be heard to any person who has made a submission referred to it.
(b) Section 161(1)(d)(i), which provides that in hearing submissions a panel is not bound by the rules or practice as to evidence but may inform itself on any matter as it thinks fit.
(c) Section 168, which provides that a panel may take into account any matter it thinks relevant in making its report and recommendations.

24 As will become clear, I regard it as sufficient to focus upon the alleged failure of the panel to comply with s 24 of the Act in relation to Amendment C32. Hence it is not necessary to consider the argument advanced on behalf of the applicants to the effect that, in confining its investigation of the greenhouse gas issue, the panel was unlawfully acting under the dictation of the Minister.

Section 24 requires the panel to consider relevant submissions

25 Counsel for the applicants submitted that the obligation of a panel under s 24 of the Act is to consider all submissions referred to it, whether relevant or not. I cannot accept this. Rather the panel's obligation is to consider all relevant submissions referred to it; and whether or not a submission is relevant must be ascertained by reference to the provisions of the Act and the content of the amendment in question.

26 During argument I suggested to counsel for the applicants that a panel could refuse to hear a submission to the effect that an amendment should be rejected because the proponent had red hair. Counsel respondent by contending that the panel would still need to consider such a submission, although it could subsequently reject it. In my opinion, this contention is an artificial construct which could give rise to absurd outcomes. I think the true position is that a panel can refuse to consider a submission referred to it (or part of a submission) if the submission (or the part of it) is irrelevant to the amendment. Further, the panel can refuse to give a submittor an opportunity to be heard if the submittor seeks to advance a submission which is irrelevant to the amendment. Section 21(1) of the Act permits a person to make a submission "about an amendment". To the extent that the submission is irrelevant, it will not satisfy that test. It would thus be illogical for the panel to be required to consider an irrelevant submission.

27 Hence, it is necessary to consider whether the submission sought to be advanced by the applicants concerning the environmental impacts of greenhouse gases generated by the continuation of the Hazelwood Power Station is relevant to Amendment C32.

28 But before considering this issue, it is necessary to consider another matter, raised by IPRH: namely whether the panel has in fact failed to consider such a submission.

Has the panel failed to consider greenhouse submissions?

29 Counsel for IPRH pointed out that the ruling made by the panel at the directions hearing on 12 July 2004 was distinct from the written directions which emanated on 15 July 2004. Counsel submitted that the subsequent letter from the Chief Panel Member, dated 30 July 2004, only related to the written directions and not to the ruling concerning greenhouse gases. It was pointed out that at the hearing on 4 August 2004 the applicants had led evidence which

covered the topic of greenhouse gas emissions from the power station. It was said that the applicants made a deliberate choice on that day not to clarify whether the "ruling" made on 12 July 2004 applied to the consideration of Amendment C32.

30 In my opinion, it is necessary to consider the whole context of Amendment C32 and the panel hearing in order to assess whether the panel has failed to consider submissions about the environmental impact of the emission of greenhouse gases from the power station.

31 Part of the relevant context is the advertisement inviting public comment about the EES and Amendment C32. The advertisement described the West Field project and Amendment C32; and invited persons to make a written submission on any of the EES, the environmental works approval application, Amendment C32 and the planning permit applications. It indicated that following the public exhibition phase and receipt of submissions a panel inquiry would be convened and submittors may be heard at the public hearings regarding their written submissions. The advertisement said that the panel would be appointed under the *Environment Effects Act* and the Act. Further it stated that the panel would hold a directions hearing on 12 July 2004 to establish the directions and time-table for the proponent and other submittors, as well as provide an opportunity for questions on the panel inquiry process.

32 Although the panel had not been formally appointed as a panel under the Act when it held the directions hearing on 12 July 2004, it clearly anticipated its appointment as such. Indeed I find that it conducted the directions hearing on the basis that rulings made, and directions given, at or following the hearing would apply to both the inquiry pursuant to the *Environment Effects Act* and the hearing of submissions pursuant to the Act. This is made clear by the fact that the written directions issued on 15 July 2004 purported to be directions concerning, inter alia, Amendment C32, even though the panel was not actually appointed under the Act until 21 July 2004.

33 The terms of reference were clearly addressed to the panel inquiry under the Act; the terms are not confined to the *Environment Effects Act*. These terms purport to limit the panel's inquiry under both Acts so as to exclude matters related to greenhouse gas emissions from the Hazelwood Power Station. In light of the panel ruling, it would be surprising if the panel could be taken to have kept open the option of considering such matters as part of its consideration of Amendment C32.

34 Further, when the matter was raised on 4 August 2004 the panel's silence can only be interpreted as indicating that the ruling made on 12 July 2004 was intended to apply to the whole of its inquiry, including the hearing of submissions pursuant to the Act.

35 Hence I am satisfied, having regard to the whole of the context, that the panel intends to not consider submissions by the applicants concerning the environmental effects of greenhouse gases generated by the continued use of the power station.

The scope of relevant considerations generally

36 I have already indicated that a submission concerning a planning scheme amendment will only be relevant if it raises planning issues, as ascertained by reference to the Act, and it relates to the amendment.

37 Section 6(1) of the Act provides:

A planning scheme for an area —

(a) must seek to further the objectives of planning in Victoria within the area covered by the scheme; and

(aa) must contain a municipal strategic statement, if the scheme applies to the whole or part of a municipal district; and

(b) may make any provision which relates to the use, development, protection or conservation of any land in the area.

These general provisions are supplemented by s 6(2) of the Act which sets out a number of specific matters that a planning scheme may address. For example, this section provides that a planning scheme may regulate or prohibit the use or development of any land.

38 The objectives of planning in Victoria are set forth in s 4(1) of the Act. This provides:

The objectives of planning in Victoria are —

(a) to provide for the fair, orderly, economic and sustainable use, and development of land;

(b) to provide for the protection of natural and man-made resources and the maintenance of ecological processes and genetic diversity;

(c) to secure a pleasant, efficient and safe working, living and recreational environment for all Victorians and visitors to Victoria;

(d) to conserve and enhance those buildings, areas or other places which are of scientific aesthetic, architectural or historical interest, or otherwise of special cultural value;

(e) to protect public utilities and other assets and enable the orderly provision and co-ordination of public utilities and other facilities for the benefit of the community;

(f) to facilitate development in accordance with the objectives set out in paragraphs (a), (b), (c), (d) and (e);

(g) to balance the present and future interests of all Victorians.

39 Sections 6 and 4(1) of the Act set the potential scope of a planning scheme. As an amendment to a planning scheme can change the content of the scheme, ss 6 and 4(1) also set the potential scope that may be addressed by a planning scheme amendment. Matters outside this scope are not relevant considerations in the preparation, consideration, adoption or approval of the amendment. Further a submission outside this scope must be disregarded.

40 The duties of a planning authority, which are set out in s 12 of the Act, reinforce my conclusions about the scope of relevant planning matters. These duties include implementing the objectives of planning in Victoria. Moreover, s 12(2) specifically provides that in preparing an amendment, a planning authority:

(b) must take into account any significant effects which it considers the scheme or amendment might have on the environment or which it considers the environment might have on any use or development envisaged in the scheme or amendment.

It may be that in some cases there will be argument about whether an environmental effect is "significant", and hence must be taken into account, but it is unnecessary to pursue this in the context of the facts of this case.

41 Section 21(1) of the Act requires a submission to be "about an amendment". This requirement imposes a second limitation which will bear upon the relevance of a submission. For example, if the amendment proposes a new

height control over residential buildings or seeks to impose an overlay to regulate the development of flood prone land, it is improbable that a submission about the generation of greenhouse gases would be relevant. This is so notwithstanding that the emission of greenhouse gases, associated with the use or development of land, may be within the potential scope of a planning scheme. However a submission will be "about an amendment", even if it relates to an indirect effect of the amendment, if there is a sufficient nexus between the amendment and the effect. One way of assessing whether the nexus is sufficient will be to ask whether the effect may flow from the approval of the amendment; and, if so, whether, having regard to the probability of the effect and the consequences of the effect (if it occurs), the effect is significant in the context of the amendment.

42 The test has some similarities with that arising under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*, where in certain circumstances regard must be paid to "all adverse impacts". The Federal Court of Australia recently considered this matter in *Minister for the Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24; 134 LGERA 272, where it observed that the effect may be direct or indirect; and is not confined to direct physical effects. Certainly in the context of the Act, both these propositions also apply.

Greenhouse gas issues are relevant to Amendment C32

43 It is to be observed that a planning scheme may be made to further the objective of "maintaining ecological processes"; and, further, "to balance the present and future interests of all Victorians". These are broad words. Ecological processes include processes within the atmosphere of the earth, including its chemistry and temperature. Many would accept that, in present circumstances, the use of energy that results in the generation of some greenhouse gases is in the present interest of Victorians; but at what cost to the future interest of Victorians? Further the generation of greenhouse gases from a brown coal power station clearly has the potential to give rise to "significant" environmental effects. Hence I think it follows that a planning scheme could contain a provision directed at reducing the emission of greenhouse gases from a coal burning power station — not only to maintain an ecological process, but to balance present and future interests.

44 Mr Wren of counsel, who appeared for IPRH, submitted that in the case of Amendment C32 this general statement was inapplicable. In essence the submission was that the bulk of the land the subject of the West Field project was already available for brown coal mining and for its use in generating electricity. It was said that the amendment simply facilitated a road closure and a road acquisition, and involved an administrative tidying up of a redundant inundation overlay. Consequently he submitted that the scope of the matters the panel was required to take into account in considering the submissions in relation to the amendment was limited to the specific matters the subject of the amendment; which, he said, did not extend to the issue of greenhouse gas emissions.

45 It is true Amendment C32 is limited in its direct application to matters of roads and the matter of a flooding overlay. But, as explained earlier, a submission will be "about an amendment" if it relates to an indirect effect of the amendment, provided there is a sufficient nexus between the amendment and the effect.

46 Using the test set out earlier, I find that there is a sufficient nexus between the approval of Amendment C32 and the environmental effect of greenhouse gases that are likely to be produced by the use of the Hazelwood Power Station beyond 2009. This is because Amendment C32 is a necessary approval to give effect to the West Field project, including the extension of the life of Hazelwood Power Station. This is illustrated by the explanatory report supporting the amendment, which states:

> The amendment includes various matters so as to facilitate the IPRH West Field Project.

The explanatory report also states:

> The amendment is required to facilitate various matters associated with the IPRH West Field Project.

47 Put another way, the approval of Amendment C32 will make it more probable that the Hazelwood Power Station will continue to operate beyond 2009; which, in turn, may make it more likely that the atmosphere will receive greater greenhouse gas emissions than would otherwise be the case; which may be an environmental effect of significance. It follows that the scope of the amendment is not limited, as Mr Wren submits, to issues related to road closures and openings and the removal of a flooding overlay.

Terms of reference and panels

48 It is common for the Minister for Planning to prepare terms of reference for an advisory committee appointed pursuant to s 151(1) of the Act. Having regard to s 151(1), this practice is clearly open. It is also common for the Minister to prepare terms of reference for persons appointed to conduct an inquiry under s 9 of the *Environment Effects Act*. However when an advisory committee, or a person conducting an environment effects inquiry, also performs the role of a panel considering submissions about an amendment to a planning scheme the question arises as to whether terms of reference can apply to the panel in its role under s 24 of the Act. The answer is that terms of reference cannot be given to a panel; and, if given, have no legal effect. The provisions of the Act and the content of the amendment are, in effect, the terms of reference in considering submissions about an amendment to a planning scheme. The terms of reference dated 1 June 2004 should not have referred to the consideration of submissions about Amendment C32. And the panel should not have felt bound by them in performing this role.

Conclusion

49 I find that the panel appointed to hear submissions concerning Amendment C32 has failed to comply with s 24 of the Act. In particular, the panel has failed to consider submissions to the effect that the continuation of the Hazelwood Power Station may have adverse environmental effects by reason of the generation of greenhouse gases. This is so notwithstanding that the Minister has issued terms of reference to the panel directing it not to consider matters related to greenhouse gas emissions from the Hazelwood Power Station, as these issues were being addressed through a separate process. There is no power for the Minister to issue terms of reference to a panel in relation to its duty to consider submissions about an amendment to a planning scheme. In effect, the provisions of the Act provide the terms of reference for such a task. In the circumstances,

it is necessary to make an order preventing the adoption and approval of the amendment until the processes required by law have been carried out by the panel.

Orders made

ANDREW EDGAR