

CASE NOTE

Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts [2011] FCA 113

Background

The Royal Botanic Gardens, located within the city of Sydney, is inhabited by a colony of Grey-headed Flying-foxes (GHFF). The Second Respondent, the Royal Botanic Gardens and Domain Trust (the BGT), became concerned that substantial damage is being caused to highly important species of trees located in the Gardens, particularly in the vicinity of an area known as the Palm Grove. In accordance with their concern, the BGT sought approval from the Minister for Environment Protection, Heritage and the Arts, the Hon Peter Garrett AM MP (the Minister) to disperse the colony of GHFF from the Royal Botanic Gardens. The Minister granted approval subject to conditions. The decision made in the exercise of the Minister's powers provided by ss 130 and 133 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the EPBC Act).

The Applicant, Bat Advocacy NSW is an incorporated association which advocates for, among other things, the protection, conservation and welfare of bats including the GHFF. The Applicant challenged the Minister's decision on the basis that the Minister failed to take into account relevant considerations when exercising his power of approval. The four principle challenges to the Minister's decision are as follows:

Did the Minister fail to consider a mandatory relevant consideration, namely any of the following:

1. the impact the removal of the GHFF from a 'critical habitat' would have on the species;
2. social matters associated with moving the GHFF to areas outside of the Botanic Gardens, in particular conflict with humans associated with the relocation;
3. the adverse impacts that the decision would have on the GHFF, being a matter protected by Part 3 of the EPBC Act, due to the duration of the approval; and
4. information in relation to previous attempts to disperse the GHFF from an area, in particular contained in public submissions responding to [BGT]'s Public Environment Report and in the independent expert report commissioned by the Department.

Issue

The issue before the Court was whether, as a matter of law, the Minister failed to take into account relevant information in arriving at his decision to grant an approval to disperse the GHFF.¹

Decision

Ground 1.

The Court held that the Applicant's first ground for challenge, namely, that the Minister failed to consider that the Gardens are a critical habitat for the GHFF, must fail. A Draft Recovery Plan which provides evidence that the Botanic Gardens are critical habitat for the GHFF was before the Minister when he made the approval. The fact that the Minister does not expressly refer to the Draft Recovery Plan in his Reasons, other than by inclusion in the list of documents on which he based his decision, does not prove that the Minister did not pay regard to the loss of the existing critical habitat of the GHFF in the Gardens.²

Ground 2

The Court rejected the Applicant's submission that the Minister failed to consider conflict with humans and other social conflict. The Minister expressly addresses 'Social and Economic Matters' in his Reasons.³ Further, the conditions attached to the approval are directed to dealing with any human conflicts and social conflicts that may arise as a result of the dispersal, for example Condition 13 envisions the need for re-dispersal.⁴

Ground 3

The Court rejected the Applicant's submission that the Minister failed to consider impacts resulting from the time period of approval. Based on the precise nature of the monitoring of the GHFF, which will continue throughout the life of the approval, and upon which the life of the approval is contingent, it could not be said that the Minister failed to consider how the approval would operate to the date of expiry.⁵

Ground 4

The Court rejected that Applicant's submission that the Minister failed to consider information relating to previously attempted GHFF dispersals. The Minister the Report of Dr Richards report and the Recommendation Report of the DEWHA before him when

¹ Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts [2011] FCA 113, [8].

² Ibid, [120].

³ Ibid, [129]

⁴ Ibid, [133]

⁵ Ibid, [149].

making his decision. Both of these reports contained information on the possibility that the dispersal would be unsuccessful including previous unsuccessful dispersal attempts.

Result

Since the Applicants were unsuccessful on all four grounds, their challenge was dismissed by the Court.