

## Case Note

### Hill Top Residents Action Group Inc v Minister for Planning [2009]

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#### BACKGROUND

This case involved a challenge by the Hill Top Residents Action Group Inc (HTRAG) to the approval by the Minister for Planning of an expansion of the existing Hill Top Rifle Range into a regional complex called the Southern Highlands Regional Shooting Complex. In 2008 the land zoning and development controls for the site were amended by the *State Environmental Planning Policy (Major Projects) 2005*. The project site was to be divided into two zones – Zone SP1 Special Activities was to be applied to the area designated for the shooting range while Zone E2 Environmental Conservation was to be applied to the remainder of the land and was to include a ‘range danger area’ for the purpose of catching stray bullets. The Minister appointed a panel of experts to consider and advise on the project impacts. She took their report into consideration and approved the project in 2009 under Part 3A of the *Environmental Planning and Assessment Act 1979*.

HTRAG claimed the approval was void on three grounds:

1. Clause 11 of Part 33 to Schedule 3 of the Major Projects SEPP as amended prohibits the project because the range danger area is not a purpose that is permitted within Zone E2.
2. The expert panel advising the Minister was not properly constituted because one of the three members, Ian Armstrong, was not an expert. Therefore, its report was invalid and anything that relied on the report, such as the Minister’s approval, must also be invalid.
3. The approval lacked finality for not including a ‘Statement of Commitments’, despite expressing that it was subject to certain conditions within the statement.

#### DECISION

The Court upheld the first ground on the basis that a shooting range would not be permitted in a Zone E2 so neither should a range danger area when it is actively used as a consequence of the shooting range. Justice Biscoe found that:

*“the range danger area is so essential to the shooting range that the Project as a whole could not be approved without it and, accordingly, is prohibited.”*

The second respondent (NSW Sport and Recreation) submitted that cl 11 of Part 33 to Schedule 3 of the Major Projects SEPP does not apply to the approval of the carrying out of the project, arguing that s75R of the *Environmental Planning and Assessment Act 1979* (EP&A Act) divides a project into three stages and s75(2) removes the application of the Major Projects SEPP at this stage. Justice Biscoe held that this would result in the legislature empowering the Minister to approve the carrying out of

a project that is unlawful under the Major Projects SEPP. It was held this interpretation “leads to absurdity that can hardly have been intended” and was rejected.

Justice Biscoe agreed that the panel of experts was not properly constituted. There was no statutory definition of ‘expert’ or ‘panel of experts’ in s75G of the EP&A Act so Biscoe J consulted the second reading speech of one of the Act’s amendment bills<sup>1</sup> and concluded “The second reading speech puts it beyond doubt that Parliament intended that only technical experts may be appointed, to resolve scientific issues.” As Ian Armstrong was not a technical expert the panel was found to be not properly constituted. However, the Court held the validity of the Minister’s approval was not affected by the absence of a report by a properly constituted panel as this was not a statutory requirement. Rather, the consequence was that a right of appeal would now be available under certain provisions removing the right in the presence of a panel of experts.

The Court dismissed the contention that the approval lacked finality as the Statement of Commitments was contained in the Preferred Project Report.

## **IMPLICATIONS**

The implications of this judgment are limited. The interpretation of Part 33 Schedule 3 of the Major Projects SEPP is exclusively relevant to the specific project site. After lengthy discussion of this case in *Rivers SOS Inc v Minister for Planning* [2009]<sup>2</sup> Preston CJ did not follow Biscoe J in his finding that the Minister could not approve the carrying out of a project if it was prohibited by the Major Projects SEPP, instead holding that “It cannot be absurd to do that which the statute allows”. The requirement that a panel of experts is to comprise technical experts only has been made largely irrelevant with the replacement of such panels with Planning and Assessment Commissions, unless the same definition of expertise is required of the commissions.

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<sup>1</sup> *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005.*

<sup>2</sup> NSWLEC 213 (16 December 2009)