

## Case Note

### Newcastle & Hunter Valley Speleological Society Inc v Upper Hunter Shire Council and Stoneco Pty Limited

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#### Background

In 2009, development consent was granted by Upper Hunter Shire Council ('the Council') to Stoneco Pty Ltd to construct a limestone quarry north of Sydney. Newcastle & Hunter Valley Speleological Society Inc (NHVSS) appealed to the NSW Land and Environment Court to challenge the Council's decision to grant consent.

NHVSS asserted that White Box Yellow Box Blakely's Red Gum Woodland (White Box EEC), an endangered ecological community under the *Threatened Species Conservation Act 1995*, and the habitat of the squirrel glider, a listed vulnerable species under that Act, would be significantly affected by the project and hence a species impact statement was required under the *Environmental Planning and Assessment Act 1979* ('EPA Act'). The other key issue was the potential for the quarry to damage any limestone cave systems and any present biota within these systems.

The quarry stockpile and handling areas were redesigned during the Court proceedings to reduce the area of disturbance.

#### Decision

The entire project site was found to be comprised of the White Box EEC, however, the EEC was not considered to be significantly affected. Chief Justice Preston referred to the possibility of other relevant factors being taken into consideration in determining whether the EEC would be significantly affected. He concluded that the ameliorative measures of rehabilitation and management plans to enhance and maintain the EEC were practical, enforceable and effective enough that the EEC was not likely to be significantly affected by the proposal. He concluded that no species impact statement was required in respect of the EEC or the squirrel glider.

Despite a lack of scientific certainty the Court found that it was likely that there are caves and karst systems in the area to be quarried. It also concluded that it was beyond a mere possibility that biota existed within these systems, and that the threat of environmental damage to the biota from the proposed activity was scientifically likely. As a result of these two findings Chief Justice Preston found that the precautionary principle should apply and the lack of full scientific certainty regarding biota and the threat of environmental damage should not prevent measures being taken to prevent harm. The implementation of adaptive management programs were therefore considered necessary to the conditions of consent, applying the precautionary principle.

The creation of a pre-blasting assessment protocol was also considered necessary due to uncertainty as to the nature of cave systems.

The Court held that if appropriate conditions can be drafted to address the matters raised, the proposal is appropriate to be approved. The Court made further directions and a timetable for any evidence and submissions on the pre-blasting assessment protocol and amended conditions.

### **Implications**

Use of ameliorative measures to reduce the likelihood of threatened species being significantly affected may increase as a result of this case and other recent cases. Also, the broad application of the precautionary principle in this case and the conditions imposed to adequately address it, such as assessment prior to extraction activities and adaptive management processes, are likely to affect conditions attached to subsequent developments.