IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S ECI 2021 03415

ENVIRONMENT VICTORIA INC — Plaintiff

v

AGL LOY YANG PTY LTD & ORS — Defendants
(according to the attached schedule)

JUDGE:	Gorton J
WHERE HELD:	Melbourne
DATE OF HEARING:	18, 19 and 20 October 2022
DATE OF JUDGMENT:	21 December 2022
CASE MAY BE CITED AS:	Environment Victoria v AGL Loy Yang
MEDIUM NEUTRAL CITATION:	[2022] VSC 814

JUDICIAL REVIEW – Decision of Environment Protection Authority to amend defendants' licences – Identification of the power being exercised – Treatment of an anterior decision limiting the scope of any amendments – Whether there were mandatory considerations in relation to principles of environmental protection, climate change, environmental policies and s 20B reports – Whether there was a failure to have regard to a mandatory consideration – *Environment Protection Act 1970* ss 1B-1L, 20(9), 20B, 20C – *Climate Change Act 2017* s 17 – *Environment Protection Act 2017* – *Supreme Court (General Civil Procedure) Rules 2015* ord 56.

STATUTORY INTERPRETATION – The meaning of the word 'should' in ss 1B-1L of the *Environment Protection Act 1970* and whether it means 'must' or 'may' or neither – Comparison of consecutive statutory regimes – Application of s 20C of the *Environment Protection Act 1970* where the Environment Protection Authority exercised a power of its own motion.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr R Merkel KC, Mr R Watters, Mr M Albert and Mr	Environmental Justice Australia

	C Lum of counsel	
For the First Defendant	Mr B Lim of counsel	Herbert Smith Freehills
For the Second Defendant	Mr M Collins KC and Ms E Latif of counsel	Clayton Utz
For the Third Defendant	Mr J Gobbo KC and Ms C van Proctor of counsel	Allens
For the Fourth Defendant	Mr J Pizer KC and Ms E Smith of counsel	Victorian Government Solicitor's Office

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HIS HONOUR:

A. Background

1 AGL Loy Yang Pty Ltd ('**Loy Yang A**'), EnergyAustralia Yallourn Pty Ltd ('**Yallourn**') and LYB Operations & Maintenance Pty Ltd ('**Loy Yang B**'), the first to third defendants ('**the power companies**'), operate coal-burning power stations in Gippsland pursuant to licences that were issued to them on 19 June 1996 by the Environment Protection Authority, the fourth defendant, in accordance with the *Environment Protection Act 1970* ('**the 1970 Act**'). The licences permit[1] and regulate the disposal by the power companies of waste into the environment including the discharge of various particles and gases. Prior to the events of this proceeding, the licences did not place any direct restriction on the emission of greenhouse gases.

2 In November 2017, the Authority, of its own motion, indicated an intention to review the licences. A process was followed that included assessments of air quality and air emissions data, consultation with various organisations and experts, and a formal conference in accordance with s 20B of the 1970 Act. On 5 March 2021, the Authority, through its delegate, issued amended and new conditions to the licences. For convenience, I will refer to steps taken by the Authority's delegate as if they were taken by the Authority itself. The amendments, speaking broadly, reduced the concentration of pollutants that the power companies were able to discharge and required better monitoring and reporting, but, again, did not impose direct restrictions on the emission of greenhouse gases.[2] The Authority said, in its reasons, that it was satisfied that the changes were 'consistent with Policy, and protected human health and the environment to the extent practicable to do so.'[3]

3 Environment Victoria Inc, the plaintiff, has applied to this Court for declarations that

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1 Section 20(1) of the 1970 Act prohibits the occupier of a scheduled premises from discharging waste to the environment unless licensed to do so under that Act. The power companies occupy scheduled premises and thus are subject to that prohibition.

2 I am aware that greenhouse gases (including CO_2) are sometimes referred to as 'pollutants'. But for convenience, in these reasons I will use that word to refer to the particles and gases the discharge of which has been controlled for reasons other than their potential effect on climate change.

3 *Decision to Revoke and Amend Certain Conditions to which Certain Licences are Subject, and to Attach Certain New Conditions to those Licences, under section 20(9)(B) and (C) of the* Environment Protection Act 1970 (Environment Protection Authority, Mr Eaton, 3 August 2021) [49] ('**Statement of Reasons**').

the decisions to amend the licences, or some of those decisions, were invalid, orders in the nature of certiorari quashing those decisions, and an order in the nature of mandamus requiring the Authority to exercise the power to amend in accordance with law. The application is made under ord 56 of the *Supreme Court (General Civil Procedure) Rules 2015*. No defendant has challenged Environment Victoria Inc's standing to bring the proceeding. The Authority made submissions in relation to its 'powers and procedures' including on the matters of statutory construction that arose and what matters it was required to consider. Other than submitting that no inference should be drawn from the failure to lead evidence from the delegate of the Authority who made the decision,[4] it did not make submissions on what findings of fact should be made and otherwise adopted the *Hardiman* position.[5]

4 As Environment Victoria Inc accepted, the legislature has entrusted to the Authority the power and responsibility to decide what conditions to impose on the power companies' licences and so the proceeding is not, and cannot be, a challenge to the merits of the Authority's decisions.[6] Rather, to succeed, Environment Victoria Inc has to establish that the Authority did not exercise its power lawfully. Again speaking broadly, Environment Victoria Inc contended that the Authority failed to have regard to matters that the legislature required the Authority to consider as a condition of the valid exercise of its power to amend the licences. If that were established, there would be 'jurisdictional error' and the decisions would be unlawful.[7]

5 Environment Victoria Inc contended that the Authority was required to consider, but did not consider:

(a) The 'principles of environmental protection' contained in ss 1B to 1L of the 1970

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4 Cf *Jones v Dunkel* (1959) 101 CLR 298.

5 In accordance with *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13.

6 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40-41 (Mason J); *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 400 ALR 417, 426 [26] (Kiefel CJ, Keane, Gordon and Steward JJ).

7 *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24, 39 (Mason J); *Craig v The State of South Australia* (1995) 184 CLR 163, 179 (Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 400 ALR 417, 426-427 [27] (Kiefel CJ, Keane, Gordon and Steward JJ); see also *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431, 442 [31] (Kenny, Griffiths and Mortimer JJ).

Act;

(b) The climate change considerations identified in ss 17(2), (3) and (4) of the *Climate Change Act 2017*;

(c) State environment protection policy made under the 1970 Act, more particularly the *State Environment Protection Policy (Air Quality Management)*; and

(d) The discussions and resolutions of a conference convened under s 20B of the 1970 Act.

6 Environment Victoria Inc also included as a ground of appeal an allegation that the Authority 'did not apply an intelligible process of reasoning in relation to how, to what extent and the manner in which the mandatory requirements were taken into account, and informed' the decisions. It did not direct any oral submissions to this point.

7 The power companies[8] disputed that the exercise of power was unlawful. They also contended that the proceeding should be dismissed on the basis that, even if the exercise of power were unlawful, the Court has no power to make an order in the nature of mandamus, and that there would be no utility in quashing the Authority's decision or in making a declaration.

B. The extension of time

8 The Authority imposed the amendments to the licences on 5 March 2021. Rule 56.02(1) of the *Supreme Court (General Civil Procedure) Rules 2015* requires that a proceeding be commenced within 60 days after the date when the grounds for the grant of the relief or remedy claimed first arose. On 10 March 2021, and pursuant to s 8 of the *Administrative Law Act 1978*, Environment Victoria requested a statement of reasons. On 22 March 2021, the Authority, through its solicitors, asked Environment Victoria Inc to explain how it was a 'person affected' by the decision and thus entitled to a

[8] Each power company was separately represented, but they adopted each other's submissions.

statement of reasons. On 1 April 2021, Environment Victoria Inc responded. On 20 April 2021, the Authority confirmed that it would provide reasons for the decision as requested but said that it would take it some time to do so. The Statement of Reasons was provided on 3 August 2021. Shortly thereafter, Environment Victoria Inc briefed counsel to advise. It filed its originating motion and affidavit in support on 20 September 2021. This was more than 60 days after the 5 March 2021 amendments. Environment Victoria Inc therefore requires an extension of the time fixed by r 56.02(1). Rule 56.02(3) provides that the Court shall not extend the time fixed except in special circumstances.

9 The application for an extension of time was not opposed. The proceeding could not, practicably, have been commenced within 60 days due to the delay in obtaining the reasons for the decision. Environment Victoria Inc acted promptly in its request for reasons, and then again promptly, particularly given the complexity of the issues that arise, once the reasons were obtained. I accept that the circumstances are special, that the reasons for the delay have been explained, and that the delay has not caused any prejudice to the Authority or to the power companies. I will grant the extension of time sought.

C. The power, the process, the 5 March 2021 amendments and the reasons

10 It will be necessary to consider the legislative framework as it applies to each of the matters relied on by Environment Victoria Inc to see if they were mandatory considerations in the sense that, on a proper reading of the legislation, the exercise of power was unlawful if they were not first considered. Then, if it is established that the matters in question were mandatory considerations, it will be necessary to assess whether or not the Authority failed to have regard to them. If, of course, the Authority did have real regard to them, the weight that it gave to those considerations in reaching its decision was up to it and is not reviewable by this Court.[9]

11 But first, it is useful to consider in more detail the decision or decisions the Authority

[9] *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24, 41 (Mason J).

made and the power that it exercised.

12 The Authority exercised[10] the power given to it by ss 20(9)(b) and (c) of the 1970 Act, which provide as follows:

> **20 Licensing of certain premises**
>
> (9) During the currency of a licence the Authority may by notice in writing served upon the holder of a licence —
> …
>
> (b) revoke or amend any condition to which the licence is subject; or
>
> (c) attach new conditions to the licence.

13 A document generated by the Authority headed 'Periodic Licence Reviews – Power Stations' noted the Authority's view that it needed to ensure that licences were 'kept up to date with changing science, environmental conditions and community standards'. The same document stated the Authority:

> already intends that all the three brown coal fired power stations licences will have limits for oxides of nitrogen (NOx), sulphur dioxide (SO2), carbon monoxide (CO), Mercury (Hg) (*new*), coarse particles (PM 10) and fine particles (PM 2.5) (*currently just total particles*) to comply with the State Environment Protection Policy (Air Quality Management).[11]

and that the Authority:

> understands there is significant community interest in the licences of brown coal fired power stations and has decided to consult with key community groups as part of the periodic licence review of this sector. An indicative list of key issues will be updated after the community groups' feedback and given to the power stations to address.

14 Then, under the heading 'What does [the Authority] need from the power stations?', the Authority asked the power stations to provide information relating to their 'current performance and licence limits' for 'NOx, SO2, CO, Hg, PM10 and PM2.5'.

15 There was then community consultation, including a conference on 22 August 2018

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10 Or, as Environment Victoria Inc expressed it its submissions, purported to exercise.

11 Emphasis in original.

convened under s 20B of the 1970 Act. Section 20B of the 1970 Act provides that:

> (1) The Authority may if it is of the opinion that a conference of persons concerned in any matter under consideration by the Authority may assist in a just resolution of the matter, invite all or any of the interested parties to a conference.

16 The conference was convened by an 'independent chair'. The independent chair prepared a 'conference report'. The report indicated that the Authority had been provided with some 493 submissions and that the conference covered, among other things, 'potential options for licence conditions that could be considered in the licence review process.' At least some of those submissions sought 'the inclusion of CO_2 controls in the licence conditions' and the adoption of 'best practice' or the adoption of newer emissions-reduction technology in use overseas. The discussions and recommendations are considered in more detail later in these reasons.

17 On 5 March 2021, the Authority amended the licence conditions. There were six categories of amendment. The first was to attach a new condition requiring each power company to develop an improved risk management and monitoring program. The second was to attach a new condition requiring Yallourn and Loy Yang A to prepare an acceptable landfill and ash-pond rehabilitation plan. The third was to amend the air-discharge limits by adding limits for mercury and smaller particles, reducing some limits for carbon monoxide, chlorine compounds, fluorine compounds, oxides of nitrogen, sulfur dioxide and sulfur trioxide, and altering the methods by which limits were to be applied to take better account of operation during shut-downs and start-ups. The fourth was to attach new conditions requiring improved monitoring and the maintenance of publicly-accessible websites that publish discharge data. The fifth was to amend the water-discharge limits by reducing some limits and altering the method by which the discharge was measured. The sixth was to amend a condition on the licence to Loy Yang A that related to some land associated with groundwater to reflect a change in the state policy referred to in the condition.

18 The amendments to the air discharge limits operated to reduce the concentration of pollutants that the power companies were able to emit. This was done in the main by

amending tables that formed part of the licences and which set out maximum discharge rates, and on occasion by altering the process by which the discharges were to be measured. For example, with Yallourn:

(a) The maximum discharge rate for carbon monoxide was reduced from 139,000 g/min to 85,600 g/min for a 12-month rolling average, with 139,000 g/min permissible only during plant start-up or shut down or accidental failure and for a specified aggregate number of hours;

(b) The maximum discharge rate for chlorine compounds was reduced from 22,000 g/min to 21,000 g/min;

(c) The maximum discharge rate for fluorine compounds was reduced from 5,600 g/min to 1,300 g/min;

(d) The maximum discharge rate for nitrous oxide was reduced from 51,600 g/min to 49,100 g/min for a 12-month rolling average, with 51,600 g/min permissible only during plant start-up or shut down or accidental failure and for a specified aggregate number of hours;

(e) The maximum discharge rate for particles was reduced from 24,100 g/min to 14,500 g/min for a 12-month rolling average, with 24,100 g/min permissible only during plant start-up or shut down or accidental failure and for a specified aggregate number of hours;

(f) The maximum discharge rate for sulfur dioxide was reduced from 104,000 g/min to 73,100 g/min for a 12-month rolling average, with 104,000 g/min permissible only during plant start-up or shut down or accidental failure and for a specified aggregate number of hours;

(g) The maximum discharge rate for sulfur trioxide was reduced from 10,900 g/min to 8,200 grams per minute;

(h) A new limit of 21,800 g/min was introduced for 'PM10', or 'coarse particles',

and a new limit of 18,200 g/min was introduced for 'PM2.5', or 'fine particles'; and

(i) A new limit of 10.44 g/min was introduced for mercury.

19 The Authority did not impose conditions relating to the emission of carbon dioxide or other greenhouse gases (other than nitrous oxide, which was already the subject of the earlier licences and which is controlled, like carbon monoxide, for reasons other than its potential effect on climate).[12]

20 As noted above, on 10 March 2021, Environmental Justice Australia, on behalf of Environment Victoria Inc, asked the Authority pursuant to s 8 of the *Administrative Law Act 1978* to provide a statement of reasons in respect of each of the 'decisions dated 5 March 2021.' After taking some time, on 3 August 2021 the Authority provided a statement of reasons.

21 It will be necessary to look at the Statement of Reasons in more detail later. But for present purposes, the Authority, in the Statement of Reasons, asserted that it took the discussions and resolutions of the chair of the s 20B report into consideration, that it had regard to the principles of environmental protection, that it had regard to applicable policies, and that it had regard to the potential impacts of climate change and the potential contribution to the State's greenhouse gas emissions of the decision. The reasons stated that the increased risk management and monitoring requirements would 'potentially contribute to lowering the State's greenhouse gas emissions, by driving improvements in the efficiency of the operation of the Power Stations'.[13] They stated that the Authority considered the new discharge limits would protect 'human health and the environment to the extent practicable to do so'.[14] They also stated that the reductions to some of the existing maximum air discharge limits would remove

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12 I note that 'greenhouse gas emissions' is defined in s 3 of the *Climate Change Act 2017* to mean emissions of carbon dioxide, methane, nitrous oxide, sulfur hexafluoride, or a hydrofluorocarbon or perfluorocarbon that is specified in regulations made under the *National Greenhouse and Energy Reporting Act 2007* (Cth). Nitrous oxide, like carbon monoxide, can create problems for those who inhale it, beyond its role as a greenhouse gas.

13 Statement of Reasons [27].

14 Ibid [49].

'any opportunity of [the power companies] to increase production or to burn more coal', and in that way would effectively serve 'to cap greenhouse gas emissions'.[15] The reasons also stated, when considering whether limits should be imposed that would require upgrades to be made to Yallourn to reduce the frequency of its outages (which are associated with increased emissions during the subsequent start-ups), that 'the social and economic impacts of these upgrades would not be proportionate to the environmental gain'.[16]

22 It is necessary to bear in mind, when considering what inferences may be drawn from the content of the Statement of Reasons, that:

(a) The Statement of Reasons was prepared over time rather than in a rushed manner and by a person with access to an in-house lawyer; and

(b) The Statement of Reasons purports to explain why the Authority imposed the amendments to the licences that it imposed. It does not, for the most part, purport to explain why the Authority did not impose amendments to the licences that it did not impose.

D. Preliminary observations relating to the Authority's failure directly to regulate the emission of greenhouse gases

23 Environmental Justice Australia's request was for a statement of reasons 'with respect to each of the decisions to amend the Licences.' The request identified the decisions as decisions dated 5 March 2021. A subsequent request was for 'a complete statement of reasons for [the Authority's] decision to amend each of the power stations licences'.

24 The reasons provided do not reflect any engagement by the Authority in the process of balancing the extent of any increased risk of climate change globally associated with the ongoing discharge by the power companies of greenhouse gases, the consequences of any such increased risk, and how and to what extent that risk might be reduced if (new) limits were imposed on the emission of greenhouse gases or the ability to generate power were reduced or modified, against the benefits that come to the

15 Ibid [60].
16 Ibid [67.1].

community from the generation of power by the power companies. For example, the reasons do not record any consideration by the Authority of the extent to which these power companies contribute to global climate change or the extent to which any level of reduction in greenhouse gas emissions by these power companies would affect global climate change or contribute to the meeting of any domestic emissions reduction targets. Nor do they consider the extent to which or how any reduction would affect the supply or price of electricity and the consequences of any such changes for the Victorian community. Nor do they consider more generally the costs or benefits, financial, environmental or otherwise, of imposing direct limits on the emission of greenhouse gases. As is self-evident, evaluating and balancing these matters would be a complex process. Had the Authority engaged in that process, I would have expected there to be reference to it in the Statement of Reasons.

25 The conclusion is irresistible, then, that when the Authority was considering what restrictions to impose on the licences it limited its consideration to whether and if so how to alter the licence conditions to restrict the emission of pollutants.

26 One issue that arises in this proceeding is whether it was unlawful for the Authority to limit itself in this way. Was the Authority, as a condition of the lawful exercise of its power to amend the licences, obliged to engage in the process described in para 24 above relating to the emission of greenhouse gases? Environment Victoria Inc contends, in substance and among other things, that the Authority's failure to impose restrictions on greenhouse gases reflects legal error that justifies an order quashing the additional limitations on the emission of pollutants that the Authority did impose. The power companies contend that the Authority, which was exercising a power of its own motion and was not subject to any explicit legislative requirement to impose limits on the emission of greenhouse gases, was entitled to set for itself the parameters of its review and that the lawfulness of its decisions has to be assessed in that context.

27 An unusual aspect of the proceeding is that Environment Victoria Inc is seeking to have the strengthened restrictions on the emission of pollutants removed, and the power companies are seeking to have them maintained. Environment Victoria Inc is

seeking this relief even if I am not prepared to make an order requiring the Authority to redecide what amendments should be imposed.

28 I will deal with the grounds of appeal in the order in which they were presented.

E. The 'principles of environmental protection'

E.1 Were the 'principles of environmental protection' in ss 1B to 1L of the 1970 Act mandatory considerations?

29 The first matters said by Environment Victoria Inc to be mandatory were the principles of environmental protection set out in ss 1B to 1L of the 1970 Act. Environment Victoria Inc contended that the Authority, in making its decisions, was obliged to have regard to:

(a) the 'principle of integration of economic, social and environmental considerations' described in s 1B of the 1970 Act;

(b) the 'precautionary principle' described in s 1C of the 1970 Act;

(c) the 'principle of intergenerational equity' described in s 1D of the 1970 Act; and

(d) the 'principle of improved valuation, pricing and incentive mechanisms' described in s 1F of the 1970 Act.

E.1.1 The legislation in more detail

30 The language used in the legislation does not clearly state whether or not those matters are mandatory. The legislation repeatedly, at the key points, uses the word 'should', whereas in other parts of the Act it uses the words 'must' or 'shall' or the word 'may'.

31 More specifically, s 1A(3) of the 1970 Act provides that:[17]

> **1A Purpose of Act**
>
> (3) It is the intention of Parliament that in the administration of this Act regard should be given to the principles of environment protection.

[17] Underlining emphasis added.

32 Then, in each of the relevant principles, the Act again uses the word 'should':[18]

> **1B Principle of integration of economic, social and environmental considerations**
>
> (1) Sound environmental practices and procedures should be adopted as a basis for ecologically sustainable development for the benefit of all human beings and the environment.
>
> **…**
>
> (3) The measures adopted should be cost-effective and in proportion to the significance of the environmental problems being addressed.
>
> **1C The precautionary principle**
>
> (1) If there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.
>
> (2) Decision-making should be guided by —
>
> …
>
> **1D Principle of intergenerational equity**
>
> The present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.
>
> **1F Principle of improved valuation, pricing and incentive mechanisms**
>
> (1) Environmental factors should be included in the valuation of assets and services.
>
> (2) Persons to generate pollution and waste should bear the cost of containment, avoidance and abatement.
>
> …
>
> **1J Principle of integrated environmental management**
>
> If approaches to managing environmental impacts on one segment of the environment have potential impacts on another segment, the best practicable environmental outcome should be sought.

33 In 2017, the *Environment Protection Act 2017* ('**the 2017 Act**') was enacted. The 2017 Act added 'a new objective' of the Authority, and provided that:[19]

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18 Underlining emphasis added.

19 The extract provided is as at March 2021. It has since been amended.

6 Objective of the Authority

(1) The objective of the Authority is to protect human health and the environment by reducing the harmful effects of pollution and waste.

(2) The Authority must exercise its powers and perform its duties and functions under this act, the **Environment Protection Act 1970** or any other Act for the purposes of achieving the objectives set out in subsection (1) to the extent that it is practicable to do so having regard to the nature of the power being exercised or the duty or function being performed.

34 It also provided that it was to be read as if it formed part of the 1970 Act.[20]

35 By way of contrast, the occasions on which the 1970 Act uses the words 'may' or 'must' or 'shall' include the following (and this is not intended to be exhaustive):[21]

(a) Section 16(1):

16 State environment protection policy

(1) For the purposes of this Act the Governor in Council may, on the recommendation of the Authority, by Order published in the Government Gazette declare the environment protection policy to be observed with respect to the environment generally or any portion or portions of Victoria…

(b) Sections 19(2) and (3):

19 Review of policies

…

(2) The Authority must —

(a) consider the review; and

(b) determine whether the policy should be varied or revoked.

(3) The Authority must ensure that the Authority's determination is published in the report required under Part 7 of the **Financial Management Act 1994**.

(c) Sections 19AA and 19AB:

19AA Economic measures

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20 Section 4(1).

21 Underlining emphasis added.

(1) The Authority may develop economic measures for the purpose of providing an economic incentive to avoid or minimise harm to the environment…

…

(3) An economic measure must clearly identify —

…

19AB Tradeable emission scheme

(2) A tradable emission scheme may provide for –

…

(d) Section 19AC:

19AC Offence

(1) The holder of a tradeable emission permit must not discharge or emit waste into the environment of a volume, quantity or concentration which exceeds the entitlements held by that person.

(e) Section 19AF:

19AF Impetus for a directed proposal

(1) A protection agency, having powers or duties with respect to a segment of the environment, may request the Authority to —

…

(3) A request under this section must be made in the manner and form specified in guidelines issued by the Authority.

(4) In making a determination referred to in this section, the Authority must have regard to the applicable intervention criteria.

(f) Section 19AH:

19AH Endorsement of a directed or voluntary proposal

(1) The authority may endorse a directed or voluntary proposal to develop a neighbourhood environment improvement plan if the Authority is satisfied that…

(2) The Authority may impose any term, condition, limitation or restriction on that endorsement.

(3) The Authority must by notice in writing to the relevant protection agency specify the reasons for imposing any term,

condition, limitation or restriction on that endorsement.

(g) Section 19B:

19B Works approval

(1) An application for a works approval shall be —

(a) made in accordance with a form and in a manner approved by the Authority;

…

(2) The Authority shall not deal with an application which does not comply with subsection (1) and shall advise the applicant …

…

(5) The Authority shall—

(a) take into account any replies, reports, comments and information received …

…

(7) The Authority shall not later than 4 months after receiving an application for a works approval—

(a) refuse to issue a works approval; or

(B) issue a works approval subject to such conditions as the Authority considers appropriate…

…

(h) Section 19E:

19E Consideration of application

(1) The Authority must issue or refuse to issue a research, development and demonstration approval within 30 days of receiving an application…

(2) In determining whether the application relates to a research, development and demonstration project, the Authority must have regard to the scale, dimensions, purpose and duration and the potential environmental impact of the proposed works.

(i) Section 20:

20 Licensing of certain premises

(1) The occupier of a scheduled premises must not undertake at those premises—

(a) the discharge, omission or deposit of waste to the environment;

…

unless licensed to do so under this Act.

(4) An application for a license under this section shall be—

(a) made in accordance with a form and in a manner approved by the Authority;

…

(5) The Authority shall not deal with an application which —

(a) does not comply with subsection (4)…

(j) Section 20B:

20B Conferences

(1) The Authority may if it is of the opinion that a conference of persons concerned in any matter under consideration by the Authority may assist in a just resolution of the matter, invite all or any of the interested parties to a conference.

…

(4) The Authority shall take into consideration the discussions and resolutions of any conference under this section and the recommendations of the person presiding at that conference.

(k) Section 20C:

20C Consideration of policy

…

(2) In considering an application for the issue, transfer or amendment of an authorisation, the Authority must have regard to policy so that the authorisation and any condition in, or relating to, the authorisation is consistent with all applicable policies.

…

(4) Where a policy is declared or varied the Authority shall within such period of time as is reasonably practicable amend any licence which is in force so that the licence and any conditions to which the licence is subject are consistent with the policy.

(l) Section 37A:

37A Matters Tribunal must take into account

In determining an application for review or a declaration under this Part the Tribunal must —

(a) take into account any relevant planning scheme; and

…

(c) take account of, and give effect to, any relevant State environment protection policy or waste management policy;

…

(m) Section 49AE:

49AE Procedure to be followed before recommendation made

(1) Before recommending that the Governor in Council make or amend a declaration under section 49AD in respect of an industry, the Authority —

(a) must publish a statement … that it is intending to make a recommendation and

(b) must outline in that statement—

(i) the reasons for its intention; …

(n) Section 50BD:

50BD Further preparation of Regional Waste and Resource Recovery Implementation Plans

…

(3) Sustainability Victoria and each Waste and Resource Recovery Group must —

(a) take into account any comments made by the Authority under section 50B(4)…

(o) Section 51C:

51C Monitoring by the Authority

(1) The Authority must monitor industry waste reduction agreements.

(2) The monitoring must take into account the environmental, economic, commercial and social issues involved in the agreement and must seek to take into account, the views of the public generally, local government and industry.

(p) Section 53S:

53S Appointment of environmental auditor

…

(2A) The Authority in appointing an environmental auditor, or in suspending or revoking, or impose conditions on, such an appointment, must have regard to any relevant guidelines issued under subsection (6).

…

(6) An environmental auditor must have regard to any guidelines issued by the Authority for the purposes of this Act in carrying out his or her functions under this or any other Act.

(q) Section 53Y:

53Y Certificate of environmental audit

(1) In determining whether or not to issue a certificate of environmental audit, an environmental auditor must have regard to —

…

(b) any relevant State environment protection policy or waste management policy.

…

E.1.2 What does 'should' mean in ss 1B to 1L of the 1970 Act?

36 In *Mount Atkinson Holdings Pty Ltd v Landfill Operations Pty Ltd*, Garde J said that 'Parliament has stated in the clearest terms that decision making under the [1970 Act] shall take into account the wide range of matters set out in the principles', and that '[d]ecision-making requires careful and integrated consideration of the principles of environment protection'.[22] However, that case turned on an obligation placed on the Victorian Civil and Administrative Tribunal to take into account a State environment policy where the relevant section used the word 'must', and so the issue as to whether or not the principles of environment protection were mandatory considerations for the purpose of a judicial review proceeding of the Authority did not arise.[23] Accordingly, it is of little assistance in resolving the issue in dispute in this case.[24]

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22 [2020] VSC 345 [141].

23 The 1970 Act s 37A.

24 See, eg, *Coleman v Power* (2004) 220 CLR 1, 44 [79] (McHugh J).

37 The fact that the 1970 Act elsewhere uses 'may' when it intends to convey an option, and 'must' when it intends to convey an obligation, makes uncertain what is meant when it instead uses the word 'should'. The word 'should', as a modal verb, can convey an obligation, or it can convey an aspiration. The Macquarie Dictionary, in its definition of 'should', has as its first meaning that it indicates obligation and gives the example: 'I should visit my parents'. It has as its second meaning that it indicates advisability and gives the example: 'you should lock the car door when you get out'.[25]

38 In *Randren House Pty Ltd v Water Administration Ministerial Corporation,*[26] the Court considered the 'water management principles' set out in the *Water Management Act 2000* (NSW). Those principles used the word 'should'. Leeming JA, with whom Basten JA agreed, described that as 'language ... not expressed to be mandatory'.[27] In *Khabbaz v State Planning Commmission*,[28] the Court considered a 'Principle of Development Control' that provided that development 'should not exceed' a maximum building height. Parker J said 'the use of the word "should" ... makes clear that the principle is directory rather than mandatory'.[29] These cases confirm that the word 'should' does not necessarily convey a mandatory obligation. But beyond that, they are of little assistance as each case must turn on a proper construction of the particular legislation or instrument with which it is concerned.

39 In my view, the 1970 Act, when it uses the word 'should' in ss 1A(3) and 1B to 1L, is using it in the second meaning. It is indicating that these matters should be considered, but it is not mandating that they must be considered, in the sense that if they are not considered, an exercise of power is unlawful. In my view, this conclusion is inescapable given the repeated use of the word 'must' or 'shall' in the other parts of the Act, and in particular the use of the word 'must' or 'shall' by the legislature when it intended to require that identified matters be considered in the decision-making

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25 *Macquarie Dictionary* (online at 14 December 2022) 'should'; *Macquarie Dictionary* (Revised 3rd ed, 2001) 'should'.
26 (2020) 246 LGERA 1.
27 Ibid 23 [67].
28 [2022] SASC 11.
29 Ibid [445].

process, such as is seen in ss 19AF(4), 19E(2) and 20B(4), each of which is set out above.

E.1.3 The introduction in 2001 of the principles of environmental management

40 My view is confirmed by a consideration of how these principles were introduced. Sections 1A to 1L were introduced into the 1970 Act by the *Environment Protection (Liveable Neighbourhoods) Act 2001*. The expressed purpose of the *Environment Protection (Liveable Neighbourhoods) Act 2001* was (among other things) 'to include principles of environment protection', and 'to give the Authority the power to develop economic measures such as tradeable emissions schemes'.[30] No purpose was identified of imposing a constraint on the Authority's powers by requiring as a condition on their lawful exercise that the Authority consider the 'principles of environment protection'. Perhaps more significantly, the *Environment Protection (Liveable Neighbourhoods) Act 2001* also introduced a number of other provisions where both of the words 'may' and 'must' were used. For example, in s 19AF(4), which is set out in para 35(e) above, the identified matters were clearly stated to be mandatory in the relevant sense. The difference in the language used must have had some purpose. Further, in the second reading speech when the *Environment Protection (Liveable Neighbourhoods) Act 2001* was introduced, the Minister said:

> The government has a commitment to build sustainability principles into decision-making processes across government.
>
> The Environment Protection Act was written in 1970. In keeping with the legislative drafting style of the time, no principles or objectives were put into the original act. Nowadays, most pieces of modern legislation include principles or objectives as a way of articulating what an act is seeking to achieve. While principles are, by their nature, expressed in general terms, they can assist people to understand an act and provide some real guidance to decision-makers as to how it should be administered.
>
> This fact was recognised by the independent consultants who conducted the recent competition policy review of the act. They recommended that principles or objectives be included in the act to provide some guidance about its general purpose.
>
> Part 2 of the bill will introduce a purpose and principles into the principal act. The sustainability principles to be included in the act are drafted to be specific to environment protection aims. These principles are consistent with the community's general expectation of how we should continue to provide a safe

30 *Environment Protection (Liveable Neighbourhoods) Act 2001* (Vic) ss 1(a) and (b).

and healthy environment for Victoria.[31]

41 This speech supports a construction that the 'principles of environment protection' were intended to be aspirational in the sense of identifying what the legislation was trying to achieve, rather than intending to qualify the lawful exercise of powers by the Authority by requiring that the lawful exercise of power was conditional on those principles being considered.

E.1.4 Subsequent amendments and the use to which they may be put

42 The framing of these provisions was materially changed by the *Environment Protection Amendment Act 2018.* That Act introduced a new Chapter 2, headed 'Principles of environment protection', into the 2017 Act and repealed the 1970 Act.[32] The changes did not come into effect until 1 July 2021, which was after the decisions the subject of this proceeding.[33]

43 The second reading speech given when the *Environment Protection Amendment Bill 2018* was introduced included the following:

> The Bill I am introducing today completes the job of comprehensive reform of Victoria's environmental protection laws. It proposes to repeal the *Environment Protection Act 1970* and replace it with a new regulatory regime that focuses on preventing harm, rather than acting to clean up after a pollution incident has occurred. The Bill amends the Environmental Protection Act 2017 to create a comprehensive and modernised statutory scheme for the protection of human health and the environment.[34]

44 The new Chapter 2 of the 2017 Act has a Note under s 11 that:

> **Note**

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31 Victoria, *Parliamentary Debates,* Legislative Council, 2 November 2000, 1457-8 (Sherryl Garbutt, Minister for Environment and Conservation).

32 Section 7 of the *Environment Protection Amendment Act 2018* inserted the new Chapter 2 into the 2017 Act, and s 63 repealed the 1970 Act.

33 Although s 2 of the *Environment Protection Amendment Act 2018*, as enacted, indicated that the repeal of the 1970 Act and the introduction of Chapter 2 into the 2017 Act were to take effect when proclaimed or by 1 December 2020, s 54 of the *COVID-19 Omnibus (Emergency Measures) Act 2020* substituted a new s 2 in the *Environment Protection Amendment Act 2018*. The substituted s 2 provides that the changes would commence when proclaimed or by 1 December 2021. It also provided that the earlier proclamation, which had been made on 3 March 2020, was revoked and 'to be taken to have had no effect'. On 16 March 2021, the Governor proclaimed that the remaining provisions of the *Environment Protection Amendment Act 2018* would come into operation on 1 July 2021.

34 Victoria, *Parliamentary Debates,* Legislative Council, 20 June 2018, 2084 (Lily D'Ambrosio, Minister for Energy, Environment and Climate Change).

> In making certain decisions under this Act the Authority or the Minister must take into account the principles of environment protection.

45 The new Chapter 2 of the 2017 Act, instead of providing simply for 'licences', provides for 'registrations', 'permits', and 'licences'. The second reading speech given when the *Environment Protection Amendment Bill 2018* was introduced also included the following:

> **Permissions**
>
> Under the *Environment Protection Act 1970*, the only ongoing control EPA could impose on a high-risk activity is an EPA licence. Licences can be appropriate and effective, but in some cases a licence is a disproportionate and costly control and a more flexible solution is needed.
>
> The bill proposes a flexible range of regulatory controls that can be applied on a proportionate and cost-effective manner. The one-size-fits-all approach to EPA licensing will be replaced by three tiers of EPA permissions:
>
> > Registrations, which can be easily granted and are suited to low medium risk activities;
> >
> > Permits, which will have standardised assessment processes and are suited to medium-high risk activities with a complexity; and
> >
> > Licences, to apply a customised conditions to manage complex and high risk activities that need the highest level of regulatory control to manage their significant risks to human health and the environment.[35]

46 Section 74(3) of the 2017 Act now provides that:

> (3) When determining whether or not to issue an operating licence, the Authority must take into account —
>
> …
>
> (c) the principles of environment protection;
>
> …

47 Similar provisions now exist when the Authority is 'determining whether or not to issue' a development licence and when the Authority is 'determining whether or not to vary the conditions of' an operating licence.[36] But there is no equivalent requirement when the Authority is determining whether to issue or to renew a

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35 Ibid 2085.

36 The 2017 Act s 76(4)(c).

'permit',[37] or whether to grant or to renew a 'registration'.[38] By clear implication, the Authority is not required to have regard to the principles of environment protection when making those decisions. The current legislation, then, makes it clear that sometimes the principles of environment protection will be mandatory considerations for the Authority, and sometimes they will not be.

48 The power companies invited me to rely on the change in language, and the words 'certain decisions' in the note to s 11, as further reasons to interpret the earlier language in a way that did not make the principles of environment protection mandatory. They contended that 'the subsequent legislation was not merely clarifying legislation, but a new regime'. [39]

49 In many cases, little assistance can be obtained by comparing two consecutive statutory schemes. It may often just as easily be argued that any changes were directed at clarifying an uncertain meaning rather than effecting a change. The earlier legislation ought ordinarily to be construed having regard to its own terms and context. However, if Environment Victoria Inc's argument were correct that the principles of environment protection were mandatory in all licensing decisions under the 1970 Act, then the introduction of the 2017 Act, to the extent that it allows some decisions to be made by the Authority where the principles of environment protection are not mandatory, would have, in this respect, weakened the regulatory regime. This would be a surprising result and is further support for the view I have formed that the principles of environment protection are not mandatory considerations in all decisions made under the 1970 Act. However, I would have formed the same view having regard to the wording of the 1970 Act considered without reference to the wording of the 2017 Act. The principal relevance of the changes made by the *Environment Protection Amendment Act 2018*, other than establishing that the issues under consideration here may be essentially of historic interest only, is that it acts as an example of language that might have been used but was not used in the earlier

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37 Cf the 2017 Act ss 81(3) and 84(7).

38 Cf the 2017 Act ss 85 and 86.

39 See, eg, *Grain Elevators Board (Vic) v Dunmunkle Shire* (1946) 73 CLR 70, 86 (Dixon J).

scheme.

50 Of course, the construction I am placing on the 1970 Act, and anything else I say in these reasons, should not be taken to foreclose any arguments about how the 2017 Act should be interpreted.

E.2 Did the Authority have regard to the principles of environment protection?

51 In light of my conclusion that the principles of environment protection were not mandatory considerations, it is unnecessary to resolve the dispute as to whether the Authority considered them when making its decision.

52 However, I observe that the Authority in its Statement of Reasons referred to the principles of environment protection when it was explaining why it imposed the changes that it imposed. As examples:

(a) When explaining why it imposed a condition that the power companies develop an improved risk management and monitoring program, the Authority said it considered this was 'an appropriate condition to impose, including in light of the requirement in section 1B(2) of the Act for the effective integration of economic, social and environmental considerations in decision-making processes';[40]

(b) When explaining why it imposed a condition that limited the emission of mercury, the Authority said that it 'considered that the new limits ... was a conservative figure, and were consistent with the precautionary principle in section 1C of the Act';[41]

(c) Yallourn is older and less reliable than Loy Yang A and Loy Yang B. When explaining why the conditions it imposed on Yallourn did not limit the emissions permissible at start-ups and shut-downs to 88 hours within a 12 month period, which was the case with Loy Yang A and Loy Yang B the

40 Statement of Reasons [23].
41 Ibid [58].

Authority said that to do so:

> would require the extensive retrofit of its fundamental components to ensure its reliability. Given the scheduled closure of Yallourn, I considered that the social and economic impacts of these upgrades would not be proportionate to the environmental gain, and therefore not consistent with the principles of the Act, in particular section 1B [that is, the principle of integration of economic, social and environmental considerations].[42]

(d) When explaining why it imposed a condition that required continuous monitoring and publication, the Authority said it 'considered this would ... promote the principle in section 1L of the Act [that is, the principle of accountability], including that members of the public should be given access to reliable and relevant information in appropriate forms to facilitate a good understanding of environmental issues.'

53 In light of these references, I am also of the view that the Authority did have regard to the principles of environment protection when it imposed the conditions that it imposed. Its failure to refer on other occasions in its reasons to other principles of environment protection is no basis to infer that they were disregarded. It is more probable that they were considered, but were not given sufficient weight to require them to be referred to in the Statement of Reasons. As noted above, the weight given to them was a matter for the Authority and is not reviewable by this Court.

F. The climate change considerations in the *Climate Change Act 2017*

F.1 Were the climate change considerations identified in ss 17(2), (3) and (4) of the *Climate Change Act 2017* mandatory considerations?

54 Part 3 of the *Climate Change Act 2017* is headed 'Climate change considerations'. Section 17(1) provides that:

> **17 Decision makers must have regard to climate change**
>
> (1) This section applies to any decision made or action taken that is authorised by—
>
> (a) the provision of an Act specified in Schedule 1; or

42 Ibid [67.1].

…

55 The schedule includes the 1970 Act, and extends to a 'decision by [the Authority] relating to the licensing of scheduled premises under section 20'. As noted above, the amendments to the licences made by the Authority in this case were made pursuant to the power in s 20(9) of the 1970 Act. Accordingly, s 17 of the *Climate Change Act 2017* is engaged.

56 Section 17(2) of the *Climate Change Act 2017* provides that:

> (2) A person making a decision or taking an action … must have regard to—
>
> (a) the potential impacts of climate change relevant to the decision or action; and
>
> (b) the potential contribution to the State's greenhouse gas emissions of the decision or action; and
>
> (c) any guidelines issued by the Minister under section 18.

57 It was common ground that the Minister has not issued any guidelines under s 18 of the *Climate Change Act 2017*.

58 Sections 17(3) and (4) provide that:

> (3) In having regard to the potential impacts of climate change, the relevant considerations for a person making a decision or taking an action are—
>
> (a) potential biophysical impacts; and
>
> (b) potential long and short term economic, environmental, health and other social impacts; and
>
> (c) potential beneficial and detrimental impacts; and
>
> (d) potential direct and indirect impact; and
>
> (e) potential cumulative impacts.
>
> (4) In having regard to the potential contribution to the State's greenhouse gas emissions, the relevant considerations for a person making a decision or taking an action are—
>
> (a) potential short-term and long-term greenhouse gas emissions; and
>
> (b) potential direct and indirect greenhouse gas emissions; and
>
> (c) potential increases and decreases in greenhouse gas emissions;

and

(d) potential cumulative impacts of greenhouse gas emissions.

59 'Greenhouse gas emissions' is defined to be emissions of carbon dioxide, methane, nitrous oxide, sulphur hexafluoride, or a 'hydrofluorocarbon or a perfluorocarbon that is specified in regulations made under the National Greenhouse and Energy Reporting Act 2017 of the Commonwealth'.[43] That said, the obligations to 'ensure' that the State achieves the long term emissions reduction target of net zero greenhouse gas emissions by the year 2050 and to determine greenhouse gas emissions reduction targets are placed on the Premier and the Minister, who are of course responsible to Parliament, but not on the Authority.[44]

60 In light of the above, the climate change considerations identified in ss 17(2), (3) and (4) of the *Climate Change Act 2017* are clearly 'mandatory' in that they are considerations that, where they apply, the legislature requires them to be considered if the exercise of power is to be lawful.

F.2 Did the Authority have regard to the climate change considerations?

61 I will consider first the decision constituted by the amendments that were imposed, and will then consider the issue associated with the Authority's failure to impose conditions that directly restricted the emission of greenhouse gases.

F.2.1 The decision constituted by the amended conditions imposed on the licences

62 The imposition of the amended conditions on the existing licences was a 'decision made or action taken that [was] authorised by' the 1970 Act. Sections 20(9)(b) and (c) of the 1970 Act were the sources of the power to impose those amended conditions and thus the 'authority' by which that was done. Accordingly, when imposing the amended or new conditions that it did impose, the Authority was required by s 17(1) of the *Climate Change Act 2017* to have regard to the matters set out in s 17(2) of that Act as expanded upon in ss 17(3) and (4) of that Act.

63 It is apparent that the Authority did have regard to the climate change considerations

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43 *Climate Change Act 2017* (Vic) s 3.

44 Ibid s 8.

when it imposed the amended conditions on the existing licences. The Authority stated in its reasons that it had regard to the 'potential impacts of climate change relevant to the decision or action' and to 'the potential contribution to the State's greenhouse gas emissions of the decision or action.'[45] I accept that the mere recitation of this in a statement of reasons may be insufficient to establish that proper regard was in fact had to those matters.[46] On this occasion, however, the balance of the reasons give no reason to doubt the assertion. When explaining why it had imposed a condition that required the development of an improved risk management and monitoring program, the Authority said that it considered that the new condition 'would potentially contribute to lowering the State's greenhouse gas emissions, by driving improvements in the efficiency of the operation of the Power Stations.'[47] When explaining why it had reduced some of the existing 'maximum air-discharge limits', the Authority said that:

> In particular, in reaching that conclusion, I had regard to the potential impact of these Changes to the limits on greenhouse gas emissions. I considered that the removal of "headroom" effectively removed any opportunity of the Licensees to increase production or to burn more coal. This effectively served to cap greenhouse gas emissions.[48]

64 Environment Victoria Inc submitted that these paragraphs establish, at best, only that some of the climate change considerations were considered and that there was no proper engagement with all of the required considerations. It points out, for example, that there is no explanation of why 'simply capping greenhouse gas emissions at current levels' is an appropriate response to 'potential long and short term economic, environmental, health and other social impacts'. This submission, however, assumes that the Authority was exercising its power to impose limits on the emission of greenhouse gases. As noted in Part C above, and considered further below, I am satisfied that the Authority was not exercising its power to do so but instead was exercising its power only to limit the emission of pollutants. The obligation on the

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45 Statement of Reasons [16.3].

46 See, eg, *Dundar v Bas* [2019] VSCA 315, [53] (Beach, McLeish and Ashley JJA); *Minister v Immigration and Border Protection v Omar* (2019) 272 FCR 589, 608 [43] (Allsop CJ, Bromberg, Robertson, Griffiths and Perry JJ).

47 Statement of Reasons [27].

48 Ibid [60].

Authority was to consider the potential impacts of climate change 'relevant to' that decision.[49] This meant that it was required to consider the potential impacts of climate change of the increased restrictions it placed on the emission of pollutants, in circumstances where there was, and could be, no suggestion that the changes to the restrictions that the Authority made on the emission of pollutants would add to climate change.

65 Accordingly, and in light of the references in the Statement of Reasons to some of the matters referred to in s 17 of the *Climate Change Act 2017*, I am not satisfied that the Authority failed to have regard to the climate change considerations relevant to the decision it made. The fact that some particular considerations are not referred to does not satisfy me, in the circumstances, that the Authority failed to have regard to them when deciding what restrictions to impose on the emission of pollutants. I note that, of course, the weight given to such considerations was a matter for the Authority.

F.2.2 The failure to impose conditions that limited the emission of greenhouse gases

66 As noted in Part C above, I infer that when the Authority was determining what limitations to impose it did not engage with the question of whether or not, and if so to what extent, to limit the emission of greenhouse gases. It follows that at some anterior time the Authority either made a decision not directly to regulate the emission of greenhouse gases, or made a decision not to consider whether or not to do so.

67 This invites attention to the 'decision', or exercise of power, that is able to be challenged in this proceeding.

68 There was no clear attempt by Environment Victoria Inc to define the decision under challenge as some anterior decision by the Authority not to engage in the process of directly regulating the emission of greenhouse gases. No reasons for such an anterior decision were sought. The reasons sought were for the decisions made on 5 March 2021, at which time the restrictions that applied to the emission of pollutants were increased or otherwise varied. Environment Victoria Inc's originating motion defined

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49 *Climate Change Act 2017* (Vic) s 17(2)(a).

the decisions under challenge as the decisions made by the Authority on 5 March 2021.

69 Further, Environment Victoria Inc opened its case by saying that 'the impugned decisions, are recorded in the reasons' and that the 'reasons for the impugned decisions' are contained in paragraphs 43 to 67 of the written reasons for decision. Those paragraphs do not make any reference to a decision to exclude greenhouse gases from the gases that were to be subject to emission restriction. When asked in oral argument to identify precisely the decision that was the subject of challenge, so that the mandatory considerations relevant to that decision could be ascertained, Environment Victoria Inc did not embrace an argument that the Authority had, by implication or otherwise, made an anterior reviewable and unlawful decision not to engage in the process of determining whether or not to impose restrictions on the emission of greenhouse gases. When asked, towards the end of its submissions, whether it was seeking 'to expand the concept of the decision that's being impugned' from the way it had opened its case, referred to above, Environment Victoria Inc said that it was not qualifying or altering that contention. Rather, it contended, as I understood it, that the process of starting with the decision under review—the actual ultimate exercise of statutory power—in order to ascertain the relevant considerations was the wrong approach. Instead, it submitted that it was the 'scope of the review' that set the mandatory considerations; it was the 'pre-decision process which determines what considerations are relevant and must be considered', and the 'considerations are required to be determined by reference to the scope of the review undertaken by the Authority'. In substance, Environment Victoria Inc submitted that the s 20B conference was the 'ring' that set the ambit of the matters that had to be considered.

70 I disagree. I consider that, because I am reviewing the lawfulness of an exercise of a statutory power by a statutory authority, the starting point is to ascertain the statutory power that was exercised. The *Climate Change Act 2017* applies only to a 'decision made or action taken that [was] authorised by' the 1970 Act.[50] In my view, the

50 *Climate Change Act 2017* (Vic) s 17(1).

'decision made or action taken that was authorised by' the 1970 Act, to which the *Climate Change Act 2017* applies, was the imposition of the amended conditions on the licences. That was the exercise of statutory power. A decision by the Authority not to embark on the exercise of regulating greenhouse gases was not, in my view, an exercise of power under, or a decision or action that was authorised by, s 20(9) of the 1970 Act. Accordingly, the choice made not to engage in the exercise of regulating the emission of greenhouse gases, or the choice made not to consider whether or not to do so, is not reviewable on the grounds that the Authority failed to have regard to the matters set out in s 17 of the *Climate Change Act 2017*.

71 There may be cases where the legislature mandates that a power be exercised or exercised in a particular way, and in those circumstances other considerations may arise. But here the Authority decided, of its own motion and not pursuant to any legislative direction, to review the conditions that it had imposed on the existing licences. The existing conditions did not directly regulate the emission of greenhouse gases. If the legislature wished to require the Authority to take the step of commencing to regulate the emission of greenhouse gases (and not just the emission of pollutants), then it could have said so. I accept the power companies' submission that the Authority was not obliged to approach the exercise of its power as though 'everything is on the table'. Take, as an imagined analogy, a situation where the Authority wished to preclude the power companies from using lead-based paint.[51] Presumably, the Authority would have been able to utilise the power in s 20(9) of the 1970 Act to impose such a condition without its doing so requiring that it also regulate, or consider the regulation of, greenhouse gases. If a decision to restrict lead-based paint were to be seen to be also a decision not to impose limitations on the emission of greenhouse gases, the decision to restrict lead-based paint would be reviewable for a failure to take into account climate change considerations. The flaw in that approach is, as noted above, its failure to focus on the relevant exercise of statutory power.

72 I consider this issue of the nature of the 'decision' under review further in Part H.2

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51 I am assuming in this example, of course, that the emission of lead does not cause climate change.

below.

G. State environment protection policies

G.1 Does s 20C of the 1970 Act make State environment protection policies mandatory considerations?

73 Section 20C of the 1970 Act is headed 'Consideration of policy'. Section 20C(2) provides that:

> (2) In considering an application for the issue, transfer or amendment of an authorisation, the Authority must have regard to policy so that the authorisation and any condition in, or relating to, the authorisation is consistent with all applicable policies. [52]

74 The word 'authorisation' is defined to include a licence.[53] 'Policy' is defined to include a State environment policy.[54] In this case, Environment Victoria Inc contended that the Authority failed to have regard to cl 18 of the *State Environment Protection Policy (Air Quality Management)*. The power companies and the Authority contended that this provision did not apply to the exercise of power under s 20(9) because that power was not exercised in response to an application by a licensee.

75 Environment Victoria Inc submitted that to interpret s 20C(2) of the 1970 Act in a way that does not extend it to the exercise of a power under s 20(9) of that Act would be anomalous and capricious or lead to anomalous and capricious results. That submission has some attraction. Part of the attraction is the proposition that because the Authority is required to operate in accordance with policy on some occasions, there is no obvious reason why it ought not to be so required on this occasion. Also, the Act provides that if the Victorian Civil and Administrative Tribunal is reviewing a decision of the Authority, the Tribunal is required to take account of, and give effect to, relevant state policy.[55]

76 However, the question is not whether it would be desirable for the Authority to have regard to policy. The question is whether the statute has imposed a condition on the

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52 Emphasis added.
53 The 1970 Act s 20C(1).
54 Ibid s 4.
55 Ibid s 37A(c).

exercise of power so that a decision to impose an amendment is unlawful if the Authority does not have regard to policy.

77 The phrase 'an application for the' must apply to the words 'transfer' and 'amendment' as well as to the word 'issue'. That is the only natural reading of the subsection. Had the legislature intended the obligation to apply whenever any licence was issued, transferred or amended, it could have easily said so: instead of stating '*In considering an application for the issue, transfer or amendment of an authorisation, the Authority must have regard to policy ...*', the subsection could have stated '*In considering whether to issue, transfer or amend an authorisation, the Authority must have regard to policy ...*'.

78 It may be that a distinction was drawn between an application for an amendment by a licensee and an 'own motion' amendment initiated by the Authority in order to permit the Authority greater latitude to act swiftly and simply when it wished to impose a change on a licensee. The fact that the Authority in this case acted after a period of consultation and consideration should not obscure the question of statutory construction that arises. More fundamentally, however, to read s 20C(2) as applicable to circumstances where the Authority is imposing amendments of its own motion would be to deny meaning to words in the first clause of that subsection. That is not something lightly done.[56]

79 Here, the legislation deals at length and in some detail with how licences or amendments to licences are to be applied for and what the Authority may or may not do in response to such applications. Section 20C(3) provides that the Authority 'may refuse to issue, transfer or amend' an authorisation if, among other things, it would be contrary to, or inconsistent with, any applicable policy,[57] or if 'the person applying' has been found guilty of a relevant offence and is not a fit and proper person to hold the authorisation,[58] or if the 'person applying' is a corporation, a director or person

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56 See, eg, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 [71] (McHugh, Gummow, Kirby and Hayne JJ).

57 The 1970 Act s 20C(3)(a)(i).

58 Ibid s 20C(3)(b)(i).

who is concerned in the management of the corporation who has been found guilty of a relevant offence and is not a fit and proper person to be involved in a corporation holding the authorisation. Section 20(4) of the 1970 Act requires that 'an application for a licence' shall be made in accordance with a form and in a manner approved by the Authority, and is to be accompanied by certain information. Section 20(5) provides that the Authority 'shall not deal with an application' that does not comply with s 20(4). Sections 20(6), (7), (7A), (8), (8A), (8B) and (8C) all deal with the situation where a person has applied for a licence, and various parts of these sections then set out matters that the Authority or the applicant must or must not do in relation to that application.

80 By way of contrast, the legislature has not dealt in detail, or placed any explicit constraints on, the process that must be followed when the Authority is not responding to an application but is exercising a power of its own motion to impose an amendment on an existing licence. Section 20(9)(a) of the 1970 Act gives the Authority the power to revoke or suspend a licence, s 20(9)(b) gives the Authority the power to revoke or amend any condition to which a licence is subject, and s 20(9)(c) gives the Authority the power to attach new conditions to a licence. Subsections 9(b) and (c) are set out in para 12 above. None of these sections, on their face, are caught by the expressed terms of s 20C(2).

81 Statutes should be interpreted in accordance with their express meaning unless there is sufficient reason not to do so. Resolving an issue of statutory construction is ultimately a 'text based activity'.[59] There is, here, some uncertainty as to why parliament has chosen the words it has, but there is no ambiguity in the text: the power that the Authority was exercising on this occasion was not expressed to be subject to a requirement that it have regard to policy. The result is not 'absurd' and there is no reason to treat the choice of language as a mistake.[60] Accordingly, in my view, the

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59 *Northern Territory v Collins* (2008) 235 CLR 619, 623 [16] (Gummow A-CJ and Kirby J). See also *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46-47 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

60 Cf *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* (1981) 147 CLR 297, 304 (Gibbs CJ), 310-11 (Stephen J).

potentially anomalous result of not imposing a mandatory requirement on the Authority to have regard to policy when operating on its own motion is not a sufficient reason to depart from the clear terms of the statute. It follows that, in my view, s 20C does not make consideration of policy a condition of the lawful exercise by the Authority of its power to impose, of its own motion, an amendment to a licence.

82 The expressed obligation placed on the Victorian Civil and Administrative Tribunal to have regard to policy when reviewing a decision of the Authority does create a real difficulty, because that obligation would, it seems, apply also to a review of a decision made under s 20(9), and it would be contrary to sense if the Tribunal were required to have regard to policy when reviewing a decision when the original decision-maker was not so required. However, this difficultly may be resolved if the obligation on the Tribunal, which is expressed in general terms, were read down to accommodate the more specific manner in which the obligations on the Authority as original decision-maker are expressed. The presence of this difficulty is not sufficient reason for me to conclude that the intention of the legislature was other than that conveyed by the words used.

83 Environment Victoria Inc also relied, in oral submissions, on s 20C(4) of the 1970 Act, which provides that:

> (4) Where a policy is declared or varied the Authority shall within such period of time as is reasonably practicable amend any licence which is in force so that the licence and any conditions to which the licence is subject are consistent with the policy.

84 This section was not part of a separate ground of review. There was no exploration in the evidence of what would be a 'reasonably practicable' time. Rather, as I understood it, Environment Victoria Inc relied on s 20C(4) to support its argument that s 20C(2) of the 1970 Act should be interpreted as requiring the Authority to have regard to policy when imposing an amendment on a licence holder of its own motion under s 20(9) of the 1970 Act. I do not consider that this provision shifts the balance. I accept that it indicates a legislative requirement that licences will in due course be amended by the Authority to make them consistent with policy, but it also anticipates a potential time delay before that occurs. This is, presumably, a recognition that policy objectives can

be complex and demanding, and amendments imposed to make a licence consistent with policy may also be complex and demanding. In this way, this requirement is not inconsistent with the Authority retaining a power lawfully to impose amendments without having to have regard to policy, if that is what it wishes to do, in the meantime.

G.2 Did the Authority have regard to the *State Environment Protection Policy (Air Quality Management)*?

G.2.1 The context in which the policy arose for consideration

85 Notwithstanding my conclusion expressed above, I will consider whether the Authority did have regard to policy.

86 Environment Victoria Inc contended that the Authority had not had regard to the *State Environment Protection Policy (Air Quality Management)* and, in particular, to cls 18(1) and (3) of that policy. The *State Environment Protection Policy (Air Quality Management)* relevantly states, under the heading 'Management of Emissions':

> **18. General Requirements**
> (1) In this policy the management of emissions means:
> (a) avoiding and minimising emissions in accordance with the preference established in the principle of the wastes hierarchy;[61] and
> (b) the assessment, monitoring, control, reduction or prohibition of emissions for air quality management purposes.
> …
> (3) Generators of emissions must:
> (a) manage their activities and emissions in accordance with the aims, principles and intent of the policy;
> (b) pursue continuous improvement in their environmental management practices and environmental performance; and
> (c) apply best practice to the management of their emissions...

87 Environment Victoria Inc focused on the requirement in clause 18(3)(c) that generators of emissions must apply 'best practice' to their management of their emissions. 'Best practice' is defined in the policy to mean:

> the best combination of eco-efficient techniques, methods, processes or technology used in an industry sector or activity that demonstrably minimises

[61] The 'principle of the wastes hierarchy' means that wastes should be managed, in order of preference, by avoidance, re-use, re-cycling, recovery of energy, treatment, containment and then disposal.

the environmental impact of a generator of emissions in that industry sector or activity;

88 The question of 'best practice' had been raised in the submissions that were provided to the Authority. As examples of how the issue was raised:

(a) Environment Justice Australia provided to the Authority a written submission dated 8 February 2018. In that submission it sought, among other things, that the Authority should amend the licences to 'achieve international best practice emissions'. The submission attached a report from an expert Dr Sahu. In that report, Dr Sahu, among other things, contended additional technology should be retrofitted including 'wet Flue Gas Desulfurization' to reduce the SO_2 levels, 'Selective Catalytic Reduction' technology to reduce the NOx levels, a 'fabric filter/baghouse' to reduce particulate matter emissions, and activated carbon injection to reduce emissions of mercury. Environment Victoria Inc's essential submission on air quality was that the power companies should be required to spend the money required to upgrade their pollution reduction technology to accord with international best practice. In the course of its submission, it referred to the *State Environment Protection Policy (Air Quality Management)*.

(b) On 6 August 2018, Loy Yang B responded to some of the issues that had by then been raised. It contended that the air quality monitoring was reflective of best practice for the type of facility operating in Australia, and contended that it was not appropriate to make comparisons with overseas emissions criteria.

(c) Also on 6 August 2018, Loy Yang A responded, stating that its policy was to 'continuously improve its environmental performance'. Its response referred to cl 18 of the *State Environment Protection Policy (Air Quality Management)*. It considered that 'best practice raises different considerations for new coal plants ... than for existing operating plants, which are necessarily limited by the retrofitting options available', and that best practice did not have to be pursued 'at any cost'. It contended, as an example, that fabric filters would likely be impractical in brown coal fired power stations.

(d) Around the same time, Yallourn submitted that greater limits should only be imposed after a 'robust assessment' of the net environmental gains weighted against factors such as the cost and practicability of achieving the outcomes. It contended that Selective Catalytic Reactors for nitrogen oxide control and Flue Gas Desulfurisation were 'not practicable in the circumstances', and that Activated Carbon Injection was not necessary because of the low mercury content in Australian coal (when compared with overseas coal). It contended that replacing the current electrostatic precipitators with Fabric Filter Baghouses technologies would be 'prohibitive' and would deliver 'limited environmental benefit'.

(e) On 21 September 2018, Environment Justice Australia provided a further supplementary submission. It contended that the power companies had failed to comply with *State Environment Protection Policy (Air Quality Management)* and that they had failed to engage in 'continuous improvement' or to implement 'best practice'. It relied on further reports from Dr Sahu, Mr Buckheit and Dr Gray, and challenged many of the assertions made by the power companies, including that Flue-gas Desulphurisation and other technologies were not cost-effective or feasible.

89 These documents were before the Authority when it made its decision.

G.2.2 The Authority's Statement of Reasons

90 The Authority stated in its Statement of Reasons that:

> 11. The emissions intensity ... depends on some fixed and some variable components or factors. Fixed components or factors include furnace and boiler design, and turbine design .... Major reductions in the emissions of such pollutants would not be achieved without fundamental redesign or retrofit of the Power Stations, or forced reductions in their power output.
>
> ...
>
> 16. In making the Decisions, and in light of the information before me and otherwise known to me I:
>
> …
>
> 16.2 had regard to applicable policies so that the new and amended conditions were consistent with those policies, which I discuss below;

…

> 17. I did not consider that any of the Decisions or Changes would be: (a) contrary to or inconsistent with any applicable policy; (b) likely to cause, or to contribute to, pollution; (c) likely to cause an environmental hazard; or (d) likely to endanger public health.
>
> ...
>
> 24. In particular, I expected that the new condition ... would facilitate Licensees: (a) continually assessing emerging technologies concerning the reduction of emissions from their Power Stations; and (b) implementing those technologies where it was practicable to do so. I considered that ... conditions should be outcome-focussed and not prescriptive of the method employed to achieve that outcome.

91 In the course of setting out the reasons for which it made the changes that related to 'air quality in the Latrobe Valley', the Authority noted that monitoring data suggested that the 'ambient air quality in the Latrobe Valley is generally consistent with' the *State Environment Protection Policy (Ambient Air Quality)*, and that the data suggested that 'periodic exceedances' were 'generally attributable to other sources such as bush fires and fuel reduction burns'.[62] It then stated that:

> 49. In making these Changes, I was: (a) informed by my understanding as to the ambient air quality in the Latrobe Valley, and the contribution of Power Stations to the airshed; and (b) satisfied that the Changes were consistent with Policy, and protected human health and the environment to the extent practicable to do so.

92 The Authority referred again to the *State Environment Protection Policy (Ambient Air Quality)* when giving reasons for which it increased the air monitoring requirements and the sharing of data with the community.[63]

93 The Authority modified the licences so that they separately treated, at least to some extent, emissions during normal operations and emissions during 'start-ups and shut-downs', and to limit the number of hours for the latter. It treated Yallourn differently because of its age. The Authority, in that context, stated:

> 67.1 the Licence for Yallourn should not be restricted to the same 88 hour start up and shut down limits as I considered should apply to the Licences for Loy Yang A and Loy Yang B. I considered that, given the age and design of Yallourn, setting such a limit would require the extensive retrofit of its fundamental components to ensure its

62 Statement of Reasons [44].
63 Ibid [75].

> reliability. Given the scheduled closure of Yallourn, I considered that the social and economic impacts of these upgrades would not be proportionate to the environmental gain, and therefore not consistent with the principles of the Act, in particularly section 1B;

94 Finally, when imposing conditions that the power stations conduct continuous monitoring and publish their results on a publicly accessible website, the Authority justified this by saying that it considered it would:

> 75.1 promote the State Environment Protection Policy (Air Quality Management) … principle that "[m]embers of the public should ... be given (i) access to reliable and relevant information in appropriate forms to facilitate a good understanding of environmental issues';

95 When giving reasons for the amendments to the water discharge limits, the Authority also referred to the *State Environment Protection Policy (Waters)*.

96 The situation, then, is that the Authority, in its reasons:

(a) asserted that it had had regard to policy;

(b) included reference to several policies, including the *State Environment Protection Policy (Air Quality Management)*;

(c) concluded that, for practical purposes, the air quality required by the *State Environment Protection Policy (Ambient Air Quality)* was met; but

(d) did not specifically refer to the various ways in which emissions might be reduced by the introduction of technologies used elsewhere that Environment Victoria Inc and others had contended should be installed, but did observe that 'major reductions' would not be achieved without 'fundamental redesign or retrofit'.

G.2.3 Conclusion

97 In my view, it has not been shown that the Authority failed to have regard to policy, or in particular the policy requirement of 'best practice' or continuous improvement, when it decided on the amendments to the licences. The references by the Authority in its reasons to the fact that 'major reductions' might be achieved with 'retrofit' and

to 'implementing [emerging] technologies where it was practicable to do so' compel a conclusion, in my view, that the Authority did have regard to the fact that there were other technologies available that, if installed, would reduce emissions. The Authority did not impose a condition that those technologies be adopted, but that is no basis to infer that the matter was not properly considered. Again, I am not concerned with the merits of the Authority's decision, only its lawfulness. It is more likely that the Authority concluded that the amendments to the licences should not require the power companies to instal additional technologies than that the Authority failed to consider that issue. The issue is not whether the reasoning process leading to that conclusion has been fully exposed—it has not—but is whether the reasons, read in context, justify the inference that mandatory considerations have not been given genuine consideration. In my view the Statement of Reasons given do not justify that inference.

H. The s 20B Conference Report

H.1 The legislation

98 After it had received various submissions and engaged in community consultation, the Authority arranged for a conference in accordance with s 20B of the 1970 Act. Section 20B of the 1970 Act provides that:

> (1) The Authority may if it is of the opinion that a conference of persons concerned in any matter under consideration by the Authority may assist in a just resolution of the matter, invite all or any of the interested parties to a conference.
>
> ...
>
> (4) The Authority shall take into consideration the discussions and resolutions of any conference under this section and the recommendations of any person presiding at that conference.

99 The Authority appointed an 'independent chair' to preside over the conference.[64] The conference resulted in a '20B Conference Report' being prepared by that independent chair on 22 August 2018. The conference did not make any 'resolutions' but it did make 23 'recommendations'. The recommendations were not expressed in

[64] Section 20B(3) of the 1970 Act allows the Authority to nominate a person for that purpose.

prescriptive terms. The report also set out in appendices a 'summary of issues and concerns raised through the submission and consultation process', which referred to the process that the Authority had undergone prior to the conference, and the 'questions raised and addressed at the conference'. It also had an appendix that set out the 'questions raised at the conference but not addressed'.

100 I accept that the obligation in s 20B(4) of the 1970 Act is mandatory, in the sense that the legislative intention is that the lawful exercise of power by the Authority is conditional on the Authority complying with that obligation. The obligation is to take into consideration the discussions, resolutions and recommendations. There is no obligation to take into account the submissions.

101 Environment Victoria Inc's arguments focussed on the reference to greenhouse gas emissions and on the references to 'best practice', or alternative technologies, that could be retrofitted.

H.2 Greenhouse gas emissions

102 The questions raised and addressed and the report's recommendations extended to the issue of whether greenhouse gases should be regulated. A table attached to the s 20B report identified limits on CO_2 as being an 'option' for 'licence conditions that could be considered'. Three of the recommendations of the report, under the heading 'Climate change', were that:

> 21. The community expects [the Authority] to consider Climate Change in all decisions. [The Authority needs] to consider the request for more clarity on [the Authority's] scope of powers under the Climate Change Act 2017 and what GHG regulatory powers can apply to the licence review process.
>
> 22. Power station operators need to consider joining Victoria's Take2 climate change pledge program (to reduce emissions) to align with State government policy and community expectations of corporations operating in Victoria.
>
> 23 Further consideration needs to be given to licence conditions that require a Continuous Improvement Plan for GHG emissions with clear targets, and a clear implementation plan. Consideration needs to be given to including a staged/stepped reduction in emissions targets…

103 An appendix that summarised some questions raised and addressed at the conference

included the following:

Question	**[Authority] response**	**Licence holder response**
EPA Canada measure carbon pollution and the social cost of carbon emissions. Why isn't carbon measured?	We are wanting to understand what the options are through this conference process	The current licence doesn't include carbon.
…		
Scope of climate – will climate pollution limits be considered as part of the licence review process? I have 3,000 signature on a petition from people … who believe [the Authority] should play a more active role in reducing climate pollution, particularly from coal burning power stations.	Chair responded that the question of climate change considerations in the licence review process will be explored in the table discussion process.	

104 There was also an appendix that summarised some questions that were raised at the conference but were 'not addressed'. That appendix included the following:

climate change	• What if there isn't a national approach to greenhouse gas controls? Will [the Authority] take any responsibility for monitoring CO_2? … • Why is CO_2 not monitored? EPA Act should monitor CO_2 • Greenhouse gases not currently reviewed by [the Authority] bringing licensing up to community standards—point of licence review—Climate Change Act

105 These extracts show that the question of imposing limits on the emission of greenhouse gases was discussed at the conference. The discussions explored, among other things, the social cost of carbon emissions and climate pollution limits being considered as part of the licence review. The recommendations included that:

(a) the Authority consider the request for more clarity on the scope of its powers under the *Climate Change Act 2017* and what greenhouse gas regulatory powers can apply to the licence review process; and

(b) further consideration be given to licence conditions that require a continuous improvement plan for greenhouse gas emissions including reducing targets for those emissions.

106 For the same reasons set out in Part F.2.2 above, however, the obligation on the Authority to have regard to these matters must be seen in context and having regard to the power that was being exercised.

107 Once the Authority determined to amend the limit on the emission of, say, mercury to a particular level, the setting of the new limit was an exercise of power. If the new limit were ascertained and imposed without the Authority having regard to matters that it was required by the legislature to consider as a condition of the valid exercise of that power, that if considered might have led to a different limit, it would not matter whether the decision was treated as a decision to impose the limit or as a decision not to impose a higher limit. Either way, there would be a single exercise of power that is liable to be set aside.

108 If the Authority did not impose or change a limit on the emission of a particular pollutant, and it failed to have regard to suggested reasons for imposing or changing a limit on the emission of that particular pollutant, the issue becomes more complex. It could be argued that the exercise of power was the imposition of new limits on pollutants generally, and that the relevant decision was deciding what limits to impose or not to impose across all the different pollutants. On that basis, the exercise of power might be considered to be unlawful and not saved by a contention that the Authority was under no legal obligation to exercise its power in relation to that particular pollutant.

109 The situation, however, is different if the exercise of power can or should be treated in a more confined way. Here, the Authority had not previously limited the emission of greenhouse gases, and was under no statutory obligation to start do so. As I see it, the Authority chose to exercise its power to amend the limits on the emission of pollutants, but did not choose to exercise any power in relation to the emission of

greenhouse gases; it simply left that situation alone. As noted above, I conclude that it made an anterior decision to that effect, and that the Statement of Reasons did not advert to that decision because they were instead reasons for the amendments that were imposed.

110 Environment Victoria Inc's argument implicitly characterised the exercise of power under consideration at a higher level. It characterised it as the exercise of a general power to impose amendments to the licence conditions, or, in words closer to those used by Environment Victoria Inc, as the undertaking of a general review of licencing conditions. If that were the correct characterisation, then its argument would have some power, and the failure to impose restrictions on the emission of greenhouse gases could be seen as analogous to a failure to impose more onerous or different restrictions on the emission of a particular pollutant.

111 However, I do not consider that to be the correct way of looking at the matter. There is a clear conceptual distinction between amending or adding to restrictions that are already in place on the emission of pollutants, and introducing for the first time restrictions on the emission of greenhouse gases. Very different policy issues arise. The exercise of power under consideration in this case is more accurately seen as the imposition of amendments to the restrictions on the emission on pollutants. In determining whether this exercise of power was unlawful, it should be borne in mind that the Authority was <u>not</u> purporting to exercise its power to introduce restrictions on the emission of greenhouse gases, and that it was under no statutory obligation to do so.

112 Environment Victoria Inc also contended, as I understood it, that because the matters arising out of the s 20B conference called for the introduction of restrictions on the emission of greenhouse gases, the Authority thereafter became obliged to consider whether restrictions on the emission of greenhouse gases should be included and if so in what way, and to explain its reasoning process in the Statement of Reasons. Again, I do not consider that to be the correct way of analysing the matter. The obligation to have regard to 'relevant considerations' applies in the context of a particular exercise

of power; it is not a method by which an obligation emerges to exercise a power that did not otherwise have to be exercised. It should be recalled that the conceptual underpinning is that the legislature has granted a power but with a condition upon it that its lawful exercise depends on the 'relevant considerations' being considered. In exercising its power to regulate the emission of pollutants, the Authority was required to have regard to the discussions, resolutions and recommendations of the s 20B conference. But those discussions, resolutions and recommendations were not able to impose on the Authority an obligation that was not previously present to exercise a power to regulate the emission of greenhouse gases. The fact that the legislature required the Authority to take the discussions 'into consideration' did not have that effect. I accept the power companies' submission that the s 20B conference was not in this way entitled to 'set the Authority's agenda'.

113 A related way of looking at the matter might be, as discussed above, to infer that the Authority made an anterior decision at some time prior to 5 March 2021 not to regulate greenhouse gases, and to mount an argument that in making this decision the Authority was required to take the discussions at the 20B conference into consideration. This was not, as I understood it, the analysis put by Environment Victoria Inc. But even if it were, I would not have concluded that that anterior decision was unlawful. The Authority chose, of its own motion, to look at amending the restrictions on the emission of pollutants. It was free to decide to do this, and it was free to decide not to look at introducing other restrictions including on the emission of greenhouse gases. Those was matters for the Authority and there is no basis to treat those preliminary decisions as decisions that were made unlawfully, even if they could themselves be seen as exercises of statutory power that were potentially reviewable.

114 In any event, the Authority's delegate attended the s 20B conference[65] and was briefed with its report and other documents. The reasons for decision that were sought and provided relate to the decision made on 5 March 2021 to amend the licence conditions

65 Statement of Reasons [14].

that restrict the emission of pollutants and do not deal with that anterior decision. Accordingly, the absence from the Statement of Reasons of reference to the anterior decision not to impose restrictions on the emission of greenhouse gases would not provide a proper basis for inferring that this anterior decision was made without the Authority having had regard to the discussions, resolutions and recommendations in the s 20B report.

H.3 Best practice

H.3.1 Was it required to be considered?

115 The s 20B report establishes that one of the issues discussed at the conference was 'best practice site management', and that the representative of the power companies addressed the conference on the theme or issue of 'world's best practice'. Under the topic 'health impacts', the report records that the matters discussed included the contention that adopting best practice technology would involve adoption of 'wet scrubbers, fabric filters, selective catalytic converters' and wet flue gas desulfurization equipment'. Under the heading 'continuous improvement' the report records that the matters discussed included 'install fabric bag filters to replace electrostatic precipitators', 'reduce SO_2 through flue gas desulfurization', 'selective catalytic reduction to reduce NOx', and that the licence conditions could over time have a 'five year world's best practice target for emissions reduction', and that there could be a 'feasibility study of best-practice pollution reduction controls (comparative power stations/age/technology)' that would look at what could be feasibly be done. The report under the heading 'recommendations' confirms, were there any doubt, that the discussions extended to whether there should be 'alignment of licence limits with international best practice standards'. To some extent, these matters echo the considerations raised by the policy that are discussed in Part G above.

116 It follows, in my view, that the Authority, when it was deciding what limits to impose on the emissions of pollutants including particulate matter, sulfur and nitrogen oxides, was required by s 20B(4) of the 1970 Act to take into consideration the question of what was 'best practice'. To engage with this consideration required, for practical

purposes, considering whether there were available technologies that could or should be adopted that would limit the emission of the pollutants under consideration.

H.3.2 Was 'best practice' considered?

117 The Authority (or, its delegate) stated in its Statement of Reasons that:

> The Authority also invited certain persons to a conference under section 20B of the Act. The conference took place on 22 August 2018 in Traralgon, and was presided over by Cath Botta, from PCB consulting Pty Ltd. I attended that conference. Discussions and resolutions of the conference records were recorded in a report (**section 20B Report**). I took those discussions and resolutions, the recommendation of Ms Botta, and the section 20B Report more generally into consideration when making the Decisions.[66]

118 In the balance of its Statement of Reasons, the Authority stated that:

(a) 'major reductions' in the emission of some pollutants would not be achieved without 'fundamental redesign or retrofit of the Power Stations, or forced reductions in their power output';[67]

(b) the risk management and monitoring program it was implementing was expected to facilitate the power companies 'continually assessing emerging technologies' and implementing them 'where it was practicable to do so'. It specifically noted that this was consistent with the recommendations 1, 2, 8, 9 and 10 of the s 20B report;[68]

(c) when deciding to impose the conditions relating to continuous monitoring and reporting, it was 'informed by community consultation (including in particular recommendations 5 to 7 and 18 of the section 20B report)';[69] and

(d) it had regard to recommendation 14 when concluding that the discharge limits for water it was imposing were adequate and appropriate.[70]

119 The issue in this case is not whether the reasons set out the Authority's reasoning

66 Ibid [14] (emphasis in original).
67 Ibid [11].
68 Ibid [24]-[26].
69 Ibid [74].
70 Ibid [86].

process in detail. The issue is whether, when the reasons are read in their proper context, the probable inference is that the Authority did not have regard to the considerations to which it was required to have regard.

120 In my view, the repeated reference in the Statement of Reasons to various aspects of the s 20B report, coupled with the specific reference set out in para 118 above to the notion that 'major reductions' might be achievable with 'retrofit', preclude that inference from being drawn. It is difficult to see what those observations could indicate other than that the Authority took the issue of best practice, as referred to in the s 20B conference discussions and recommendations, into account. It is more likely, in my view, that the Authority did have regard to the question of whether that 'retrofit' ought to be required when it was deciding the conditions to impose, and decided against imposing conditions that would require that 'retrofit'.

121 More generally, the failure to refer to every discussion and every recommendation and to explain how it factored into the decision making process does not justify an inference that the discussions and recommendations were not considered. Reading the Statement of Reasons as a whole, it is in my view likely that the Authority did have regard to the discussions and recommendations arising out of the s 20B conference, and specifically referred to those that it chose to adopt or found to be of assistance.

I. Did the Authority provide an intelligible process of reasoning?

122 Environment Victoria Inc's argument under this ground was that the decision was legally unreasonable, in that there was no 'evident and intelligible justification' for the outcome. This is different from a contention that the Statement of Reasons do not meet a legal standard.[71] To succeed in its argument, Environment Victoria Inc must establish, by reference to material including the reasons, that the decision reached was irrational or otherwise outside the range of decisions that was open to the Authority.[72]

123 In my view, this has not been established. As noted above, the Authority did not

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71 In which case there may be an error of law on the face of the record – as to which see *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480, 493 [28] (French CJ, Crennan, Bell, Gageler and Keane JJ).

72 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 550 [10] (Kiefel CJ), 564 [51]-[53] (Gageler J), 573 [82] (Nettle and Gordon JJ), 585 [134] (Edelman J).

choose to regulate greenhouse gases. It was not legally obliged to do so, at least under the legislation in place at the time of its decisions, and whether or not to do so was a matter for it. The Statement of Reasons otherwise establish that the Authority took into account the matters that it was legally obliged to consider, and formed a view on the levels of emissions that it would permit. It reduced the level of permissible emissions. The weighing up of the various considerations in order to determine what would be permissible was a matter for it. It has not been shown that the decision it reached was without justification. Again, this Court, in reviewing the decision, is concerned only with the legality of the Authority's decision, not its merits.

J. Jones v Dunkel

124 The evidence before me included the material that was placed before the Authority's delegate who made the decision. Neither the Authority nor any of the power companies called the delegate to explain, or to expand upon, his written reasons. In its opening submissions, Environment Victoria Inc submitted that where a decision-maker has given reasons for their decision 'they are generally bound by those reasons' and that determination of whether a decision-maker has given the required level of consideration to a matter is an evaluative process 'based exclusively on what the decision-maker has said or written'.[73] It also submitted, though, relying on the principle associated with *Jones v Dunkel*,[74] that the failure of a decision-maker to give evidence 'may reinforce the drawing of adverse inferences'. In oral submissions, it clarified that it was only relying on the failure to call evidence from the delegate in support of a submission that I ought to reject any submission that a document not referred to was relied upon by the decision-maker simply because it was before him.

125 I have not drawn a conclusion that the delegate had regard to a document just because it was amongst the many placed before him. Accordingly, it is not necessary for me to attempt to resolve the complex issues that arise when a party asks the court to draw inferences from the failure of a decision-maker, who has provided a statement of

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73 Environment Victoria Inc quoted from *Anderson v Director General of the Department of Environment and Climate Change* 251 ALR 633, 651 [58] (Tobias JA).

74 (1959) 101 CLR 298.

reasons, to give oral evidence expanding upon or elucidating those reasons.[75]

K. Disposition

126 In light of my findings, it is not necessary to resolve the argument put by the power companies that even if I formed the view that the decision was unlawful, relief should be denied on the grounds that an order in the nature of mandamus would not be available and that there would be no utility in quashing the decision or making a declaration.

127 The proceeding should be dismissed, and I will hear the parties on the question of costs.

CERTIFICATE

I certify that this and the 50 preceding pages are a true copy of the reasons for judgment of the Honourable Justice Gorton of the Supreme Court of Victoria delivered on 21 December 2022.

DATED this twenty first day of December 2022.

SUPREME COURT OF VICTORIA
Associate of a Judge of the Court

.....
Associate

[75] See, eg, *East Melbourne Group Inc v Minister for Planning* (2008) 23 VR 605, 675-676 [308] (Ashley and Redlich JJA). Cf *ARM Constructions Pty Ltd v Deputy Commissioner of Taxation* (1986) 10 FCR 197; *The Lebanese Moslem Association v Minister for Immigration and Ethnic Affairs* (1986) 11 FCR 543; *Citibank Ltd v Federal Commissioner of Taxation* (1988) 83 ALR 144; *Minister for Aboriginal and Torres Strait Islander Affairs v Western Australia* (1996) 67 FCR 40; *Chetcuti v Minister for Immigration and Border Protection* (2019) 270 FCR 335.

SCHEDULE OF PARTIES

S ECI 2021 03415

ENVIRONMENT VICTORIA INC	Plaintiff
- and -	
AGL LOY YANG PTY LTD	First Defendant
ENERGYAUSTRALIA YALLOURN PTY LTD	Second Defendant
LYB OPERATIONS & MAINTENANCE PTY LTD	Third Defendant
ENVIRONMENT PROTECTION AUTHORITY	Fourth Defendant