Summary of Judgment

Environment Victoria v AGL Loy Yang & Ors [2022] VSC 814

21 December 2022

Today, the Supreme Court of Victoria (Gorton J) dismissed an application for review of the Environment Protection Authority's (**Authority**) decision of 5 March 2021 to issue amended and new conditions to the mining licences held by AGL Loy Yang Pty Ltd, EnergyAustralia Yallourn Pty Ltd and LYB Operations & Maintenance Pty Ltd. The previous licence conditions restricted the emission of pollutants but did not otherwise directly restrict the emission of greenhouse gases. The amended licence conditions that the Authority imposed added to the restrictions on the discharge of certain pollutants, and made certain other changes, but did not introduce direct restrictions on the emission of greenhouse gases.[1]

Environment Victoria Inc sought to have the amended restrictions on the emission of pollutants set aside and an order that the Authority amend the licence conditions in accordance with law. The power companies contended that the amendments imposed were lawful and, also, that there would be no utility in setting them aside or, if they were set aside, no ability to order the Authority to impose other amended restrictions.

The Court was not concerned with the merits of the Authority's decision. Instead, the issue was whether the Authority had exercised its power under the *Environment Protection Act 1970* in accordance with the law.

The decision in large part concerned the provisions of the *Environment Protection Act 1970*, which has now been repealed and replaced by the *Environment Protection Act 2017*. Nothing in the decision affects the interpretation of the *Environment Protection Act 2017.*

The Court concluded that the Authority had made an anterior decision not to introduce direct restrictions on the emission of greenhouse gases, and that the relevant exercise of power for the purpose of the application was the imposition by the Authority of amended conditions that further restricted the emission of pollutants.

Environment Victoria Inc's grounds of review, and the Court's treatment of them, were as follows:

[1] The Court uses the word 'pollutants' to refer to the particles and gases the discharge of which has been controlled for reasons other than their potential effect on climate change.

Ground 1: the principles of environmental protection

Sections 1B to 1L of the *Environment Protection Act 1970* contained various 'principles of environment protection'. Section 1A of that Act stated that regard 'should' be given to those principles in the administration of that Act. The submission was that the word 'should' in the *Environment Protection Act 1970* meant 'must', such that the 'principles of environmental protection' in that Act were mandatory considerations with the consequence that if the principles of environment protection were not considered, an exercise of power was unlawful.

The Court held that the word 'should', when considered in the context of the *Environment Protection Act 1970*, had an aspirational rather than mandatory meaning, so that a failure to consider the principles would not result in the decision being unlawful. But even if the word 'should' did convey a mandatory obligation, the Court was satisfied that the Authority had considered the principles of environment protection in exercising its power to amend the restrictions on the emission of pollutants.

Ground 2: the *Climate Change Act 2017*

Section 17 of the *Climate Change Act 2017* obliges a person making certain decisions or taking certain actions to have regard to various climate change considerations. It applies to decisions made or actions taken that are authorised by provisions of certain Acts including the *Environmental Protection Act 1970*. The submission was that the Authority was obliged to have regard to those climate change considerations but failed to do so, with the result that its decision was unlawful.

The Court held that the climate change considerations in s 17 of the *Climate Change Act 2017* were mandatory where they apply, and that the Authority was obliged to consider them when it was exercising its power in s 20(9) of the *Environmental Protection Act 1970* to amend the restrictions on the emission of pollutants. However, the Court was satisfied that the Authority had had regard to the climate change considerations when it exercised that power.

The Court was not satisfied that the Authority's anterior decision not to introduce restrictions on the emission of greenhouse gases was a decision, or an exercise of power, to which s 17 of the *Climate Change Act 2017* applied.

Ground 3: the State environment protection policies

Section 20C of the *Environmental Protection Act 1970,* as expressed, required the Authority to have regard to policy (including the *State Environment Protection Policy (Air Quality Management)*) when it was considering an application for the issue, transfer or amendment of a licence. The Authority here was not considering an application, but was imposing amendments of its own motion. The submission was that the Act should be read such that the Authority was also required to have regard to policy when it was imposing an amendment of its own motion, and that it failed to do so.

The Court held that s 20C of the *Environment Protection Act 1970* did not apply where the Authority was not considering an application but was imposing amendments of its own motion. Also, the Court was not satisfied the Authority had failed to have regard to the relevant policy when it exercised its power to amend the restrictions on the emission of pollutants.

Ground 4: the s 20B conference

Section 20B of the *Environment Protection Act 1970* provided that the Authority shall take into consideration the discussions, resolutions and recommendations of any conference held under that section. A s 20B conference was held and discussed, among other things, the prospect of the Authority imposing restrictions on the emission of greenhouse gases and the adoption of 'world's best practice'.

As with ground 2, the Court assessed this ground in a context where the power that the Authority was exercising was the amendment to the restrictions on the emission of pollutants. The Court was satisfied that the Authority had regard to the matters arising out of the s 20B conference when it exercised that power. The Court considered that the discussions, resolutions and recommendations of the conference could not impose a positive obligation on the Authority to introduce restrictions on the emission of greenhouse gases, and was not satisfied that the Authority failed to have regard to those matters when it made its anterior decision not to introduce restrictions on the emission on greenhouse gases.

Accordingly, the proceeding should be dismissed.

NOTE: This summary is necessarily incomplete. The only authoritative pronouncement of the Court's reasons and conclusions is that contained in the published reasons for judgment.