



FORM 5G

Rule 5.02(2), 56.01(2)

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

Case: S ECI 2021 03415

Filed on: 20/09/2021 09:57 AM

No. 2021

B E T W E E N

Environment Victoria Inc

Plaintiff

and

AGL Loy Yang Pty Ltd and Others according to the schedule

Defendants

ORIGINATING MOTION FOR JUDICIAL REVIEW

Date of Document: 16 September 2021

Filed on behalf of: the Plaintiff

Solicitors Code: CR009995

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TO THE DEFENDANTS

TAKE NOTICE that this proceeding by originating motion has been commenced by the plaintiff for the relief or remedy set out below.

IF YOU INTEND TO DEFEND the proceeding, **YOU MUST GIVE NOTICE** of your intention by filing an appearance within the proper time for appearance stated below.

YOU OR YOUR SOLICITOR may file the appearance. An appearance is filed by:

- (a) filing a "Notice of Appearance" in the Prothonotary's office, 436 Lonsdale Street, Melbourne, or, where the originating motion has been filed in the office of a Deputy Prothonotary, in the office of that Deputy Prothonotary; and
- (b) on the day you file the Notice, serving a copy, sealed by the Court, at the plaintiff's address for service, which is set out at the end of this originating motion.

IF YOU FAIL to file an appearance within the proper time, the plaintiff **MAY OBTAIN JUDGMENT AGAINST YOU** without further notice.

IF YOU FILE an appearance within the proper time, the plaintiff cannot obtain judgment against you except by application to the Court after further notice to you. There will first be a directions hearing of which you will receive notice by summons or otherwise.

THE PROPER TIME TO FILE AN APPEARANCE is as follows:

- (a) where you are served with the originating motion in Victoria, within 10 days after service;
- (b) where you are served with the originating motion out of Victoria and in another part of Australia, within 21 days after service;
- (c) where you are served with the originating motion in Papua New Guinea, within 28 days after service;
- (d) where you are served with the originating motion in New Zealand under Part 2 of the Trans-Tasman Proceedings Act 2010 of the Commonwealth, within 30 working days (within the meaning of that Act) after service or, if a shorter or longer period has been fixed by the Court under section 13(1)(b) of that Act, the period so fixed;
- (e) in any other case, within 42 days after service of the originating motion.

FILED 16 September 2021

Prothonotary

THE PLAINTIFF CLAIMS:

1. A declaration that the decisions of the delegate of the Fourth Defendant made on 5 March 2021 to:
 - a. revoke certain conditions of licences 1149, 3987 and 10961 of the First, Second and Third Defendants respectively issued under the *Environment Protection Act 1970* (Vic) (**the 1970 EP Act**), in purported exercise of the power conferred by s 20(9)(b) of the 1970 EP Act,
 - b. to amend certain other conditions to which those licences are subject in purported exercise of the power conferred by s 20(9)(b) of the 1970 EP Act; and
 - c. to attach certain new conditions to those licences in purported exercise of the power conferred by s 20(9)(c) of the 1970 EP Act

(the **Decisions**) are invalid and of no effect because:

- d. the Decisions were not made in accordance with law; and/or
 - e. the Fourth Defendant did not exercise its power to make those decisions in accordance with the requirements of the 1970 EP Act and the **Climate Change Act** (2017) (Vic) (**the CC Act**).
2. An order in the nature of certiorari quashing the Decisions (or any one or more of the Decisions).
3. Alternatively, each form of relief identified above with the Decisions re-defined to exclude the decision identified above at 1c – that is, to only concern those decisions purportedly made under s 20(9)(b) of the EP Act 1970.

4. An:
 - a. order in the nature of mandamus directed to the Fourth Defendant, or
 - b. alternatively an injunction

requiring the Fourth Defendant, to exercise the power conferred under ss 20(9)(b) and 20(9)(c) of the 1970 EP Act or s 58 of the *Environment Protection Act 2017* (Vic) in accordance with law in respect of the licenses of the First, Second and Third Defendants.

5. Such orders as to the costs of this proceeding as the Court deems fit.

THE GROUNDS RELIED UPON ARE:

1. The Plaintiff is:
 - a. an incorporated association under the *Associations Incorporation Reform Act 2012* (Vic); and
 - b. a registered charity whose objects include the protection of the Victorian environment.
2. The Fourth Defendant is a statutory body established by s 5(1) of the 1970 EP Act and continued in existence by s 356(1) of the *Environment Protection Act 2017* (Vic) (**the 2017 EP Act**).
3. The First Defendant is the operator of a coal fired power station in the Latrobe Valley in Victoria commonly known as Loy Yang A power station (**LYA**).
4. The Second Defendant is the operator of a coal fired power station in the Latrobe Valley in Victoria commonly known as Yallourn W or the Yallourn power station (**Yallourn**).
5. The Third Defendant is the operator of a coal fired power station in the Latrobe Valley in Victoria commonly known as Loy Yang B power station (**LYB**).
6. Until 31 June 2021, the operation of each of Yallourn, LYA, and LYB was regulated by, among other things,
 - a. the 1970 EP Act;
 - b. statutory rules made under the 1970 EP Act, which included the *Environment Protection (Scheduled Premises) Regulations 2017* (Vic);
 - c. State environment protection polices made by the Governor-in-Council pursuant to s16 of the 1970 EP Act.
7. At all relevant times, each of Yallourn, LYA, and LYB was a scheduled premises within the meaning of the 1970 EP Act.

PARTICULARS

- a. Regulation 6 of the *Environment Protection (Scheduled Premises) Regulations* provides that premises of a class described in column 2 of the Table in Schedule 1 to those Regulations is a scheduled premises for the purposes of s 4(1)(b) of the 1970 EP Act.
- b. Premises type K01 (Power stations) in Schedule 1 to the *Environment Protection (Scheduled Premise) Regulations* describes a class of premises which generate electrical power from the consumption of a fuel at a rated capacity of at least 5 megawatts of electrical power.
- c. Each of Yallourn, LYA, and LYB are premises which generate electrical power from the consumption of coal at a rated capacity exceeding 5 megawatts of electrical power.

8. At all relevant times, s 20 of the 1970 EP Act provided that an occupier of a scheduled premises must not, relevantly, discharge, emit or deposit waste to the environment unless licenced to do so under the 1970 EP Act.
9. Each of Yallourn, LYA, and LYB discharges, emits and/or deposits waste to the environment pursuant to a licence granted under the 1970 EP Act.

PARTICULARS

- a. Yallourn operates under licence 10961 (**the Yallourn Licence**).
 - b. LYA operates under licence 11149 (**the LYA Licence**); and
 - c. LYB operates under licence 3987 (**the LYB Licence**).
10. On and from 1 August 2021, each of the Yallourn Licence, the LYA Licence, and the LYB Licence were continued in force by the combined operation of s 470 of the 2017 EP Act and r 219(1)(a) of the *Environment Protection Regulations 2021* (Vic) as operating licences within the meaning of the 2017 EP Act.
 11. In or around August 2017, the Fourth Defendant commenced a review of the Yallourn Licence, the LYA Licence, and the LYB Licence (**the Review**) in order to determine whether to revoke and/or amend certain conditions, and/or attach certain new conditions, to those licences under s 20(9)(b) and (c) of the 1970 EP Act.
 12. In conducting the Review:
 - (a) the delegate of the Fourth Defendant invited the Plaintiff to participate in two conferences, both held on 22 August 2018, under s 20B of the 1970 EP Act;
 - (b) the Plaintiff participated in the two conferences and made written submissions to the delegate for the purposes of the conferences and the Review (**the Plaintiff's submissions**);;
 - (c) the delegate of the Fourth Defendant was aware of, and was fully informed about, the discussions that occurred at the two conferences (**the conference discussions**);
 - (d) the delegate of the Fourth Defendant received submissions from other persons who participated in the conferences (**the other conference submissions**), including expert material relating to the ability of Yallourn, LYA, and LYB to achieve better environmental standards.
 13. On 5 March 2021, the Fourth Defendant purported to make the Decisions.
 14. On 10 March 2021, Environmental Justice Australia, on behalf of the Plaintiff and others, requested that the Fourth Defendant give reasons for the Decisions.
 15. On 3 August 2021, the Fourth Defendant provided Environmental Justice Australia with a copy of its reasons for the Decisions (**the Reasons**).
 16. In making the Decisions, the Fourth Defendant was required:
 - a. by s 1A of the 1970 EP Act to have regard to the principles of environmental protection set out in ss 1B – 1L of the 1970 EP Act;
 - b. by s 17(1) and Sch 1 of the CC Act to have regard to the matters set out in s 17(2), (3) and (4) of the CC Act;
 - c. by s 20C the 1970 EP Act, construed in light of s 33B and 37A of the 1970 EP Act, to ensure that the Decisions were consistent with and not contrary to any applicable or relevant State environment protection policy made under the 1970 EP Act; and
 - d. by s 20B(4) of the 1970 EP Act to take into consideration the Plaintiff's

submissions, the conference discussions, the other conference submissions and the recommendations of any person presiding at the conferences

(collectively referred to as **the mandatory requirements**).

17. The Fourth Defendant failed to comply with the mandatory requirements set out in paragraph 16(a), and thereby committed jurisdictional error in making the Decisions by not giving proper, genuine and realistic consideration to the principles of environmental protection set out in ss 1B – 1L of the 1970 EP Act.

PARTICULARS

- a. Section 1A of the 1970 EP Act required the Fourth Defendant to have regard to the principles of environmental protection set out in s 1B – 1L of the 1970 EP Act, including, relevantly:
- i. the principle of integration of economic, social and environmental considerations (s 1B);
 - ii. the precautionary principle (s 1C);
 - iii. the principle of intergenerational equity (s 1D); and
 - iv. the ‘polluter pays’ principles (s 1F(2)).
- b. Although paragraph 16.1 of the Fourth Defendant’s Reasons state that the Fourth Defendant had regard to the principles of environmental protection,
- i. The principle of intergenerational equity is not referred to at any point in the Reasons, despite the fact that carbon emissions from each of the power stations during the remaining lifetime will contribute to environmental impacts experienced by current and future generations, a matter which would be required to be integrated into the decision-making process under s 1B;
 - ii. The ‘polluter pays’ principle is not referred to at any point in the reasons, despite it being directly relevant to the evaluation of the economic, social and environmental considerations that the Fourth Defendant was required to consider under s 1B;
 - iii. The precautionary principle is only referred to in the context of new discharge limits for mercury and not in respect of any other element of the Fourth Defendant’s decision-making process; and
 - iv. The principle of integration of economic, social and environmental considerations:
 1. is referred to in relation to two elements of the decision-making process, but not otherwise; and
 2. where the principles are referred to, the reasons do not identify how the Fourth Defendant took the principle into account or what matters the Fourth Defendant took into account in applying that principle.

Further particulars will be provided after discovery.

18. The Fourth Defendant failed to comply with the mandatory requirements set out in paragraph 16(b) and thereby committed jurisdictional error in making the Decisions by failing to give proper, genuine and realistic consideration to the matters set out in s 17(2), (3) and (4) of the CC Act.

PARTICULARS

Although paragraph 16.3 of the Fourth Defendant’s Reasons states that the Fourth Defendant had regard to s 17,

- i. nothing in the Reasons identifies the potential impacts of climate change to which the Fourth Defendant had regard in making the decisions;
- ii. nothing in the Reasons identifies the potential contribution to the State's greenhouse gas emissions to which the Fourth Defendant had regard in making the decisions, including any increase or decrease in greenhouse gas emissions s 17(4)(c) which might occur depending on the conditions imposed;
- iii. nothing in the Reasons identifies how those matters were taken into account in the circumstances of the review to arrive at the conclusion at [60] that simply capping emissions at current levels was an appropriate response to those considerations.

Further particulars will be provided after discovery.

19. The Fourth Defendant failed to comply with the mandatory requirements set out in paragraph 16(c), and thereby committed jurisdictional error in making the Decisions by failing to give proper, genuine and realistic consideration to the relevant provisions read with the State environment protection policies made under the 1970 EP Act.

PARTICULARS

- a. Section 20C of the 1970 EP Act, properly construed in light of ss 33B and s 37A of the 1970 EP Act, require that the Decisions be consistent with, and not contrary to, State environment protection policies made under that Act.
- b. Clause 18 of State Environment Protection Policy (Air Quality Management) ('SEPP(AQM)') requires generators of emissions to:
 - i. manage their activities and emissions in accordance with the aims, principles and intent of the policy, which include relevant the principles of environmental protection referred to above; and
 - ii. apply best practice to the management of their emissions.
- c. 'Best practice' is defined in SEPP(AQM) as 'the best combination of eco-efficient techniques, methods, processes or technology used in an industry sector or activity that demonstrably minimises the environmental impact of a generator of emissions in that industry sector or activity.'
- d. Nothing in the Reasons considers the application of clause 18 of SEPP(AQM) to the power stations the subject of the licencing review and, in particular, nothing in the Reasons demonstrates any consideration of whether the conditions imposed as a result of the Review were consistent with the requirement that generators apply best practice to the management of their emissions.

Further particulars will be provided after discovery.

20. The Fourth Defendant committed jurisdictional error by failing to comply with the mandatory requirements set out in paragraph 16(d) by failing to give proper, genuine and realistic consideration to the Plaintiff's Submissions, the conference discussions, the other conference submissions and the recommendations of the person presiding at the conferences.

PARTICULARS

- a. The Reasons refer to recommendations 1, 2, 5, 6, 7 8, 9, 10, 14 and 17 of the s 20B conferences, but no consideration has been given to any of the other recommendations.
- b. Apart from a passing reference at [48], there is no consideration of the discussions

at the conferences.

- c. Further, insofar as persons, including the Plaintiff, made written submissions to the review process, nothing in the Reasons evinces any consideration of those submissions or the material accompanying them.
- d. In particular, nothing in the Reasons evinces any consideration of:
 - i. The reports prepared by Dr Ranajit Singh, Mr Bruce Buckheit, and Dr H. Andrew Gray which accompanied the submission by Environmental Justice Australia and which concluded that:
 1. Affordable technology existed to further reduce air emissions from LYA, LYB, and Yallourn and that applying that technology would produce health benefits and cost savings; and
 2. The air quality modelling prepared by GHD on behalf of the operators of LYA, LYB, and Yallourn was not reliable.
 - ii. Those submissions, including the submission of the Plaintiff, which contended that the Fourth Defendant should impose limits on permissible greenhouse gas emissions from LYA, LYB, and Yallourn.

Further particulars will be provided after discovery.

21. Further and alternatively:

- a. in making the Decisions the Fourth Defendant failed to actively and intellectually engage with the mandatory requirements and failed to determine how, to what extent and the manner in which those requirements informed, or were taken into account in making, the Decisions;
- b. in the Reasons the Fourth Defendant 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 in, and informed, the Decision.

PARTICULARS

The Plaintiff refers to and repeats the particulars set out in paragraphs [17] - [20]. Further particulars will be provided after discovery.

EXTENSION OF TIME:

The date when grounds for the grant of the relief or remedy claimed first arose was 3 August 2021, being the date on which the reasons for the decision were published by the Fourth Defendant. As such, no extension of time is needed.

If that is not accepted, there are 'special circumstances' justifying an extension of time under r 56.02. Those special circumstances include that:

1. the Plaintiff made a prompt request for written reasons five days after the Decisions were made, and the majority of the delay since that time is attributable to the time taken by the Fourth Defendant to produce its written reasons in response to that request;
2. before 3 August 2021, the plaintiff could not issue, and its lawyers could not advise concerning, a proceeding challenging the Decisions in a way that was consistent with their obligations under ss 18, 19, 22, 23 and 24 of the *Civil Procedure Act 2010* (Vic).

FURTHER PARTICULARS of the claim appear in the affidavit made in support of the claim. A copy of the affidavit and of any exhibit to the affidavit is served with this originating motion.

1. Place of trial— Melbourne.
2. This originating motion was filed for the plaintiff by Environmental Justice Australia, solicitor, of 60 Leicester Street, Carlton, Victoria 3053.
3. The address of the Plaintiff Level 2, 60 Leicester Street, Carlton, Victoria 3053.
4. The address for service of the plaintiff is c/o Environmental Justice Australia, solicitor, of Suite 301, Level 3, 60Leicester Street, Carlton, Victoria 3053.
5. The email address for service of the Plaintiff is nick.witherow@envirojustice.org.au and charley.brumby-rendell@envirojustice.org.au
6. The address of the First Defendant is: AGL Loy Yang Pty Ltd, Level 24, 200 George Street, Sydney, NSW 2000.
7. The address of the Second Defendant is: EnergyAustralia Yallourn Pty Ltd, 'Two Melbourne Quarter' Level 19, 697 Collins Street, Docklands, Victoria 3008.
8. The address of the Third Defendant is: Alinta Servco Pty Ltd, 'Grosvenor Place' Level 13, 225 George Street, Sydney, NSW, 2000.
9. The address of the Fourth Defendant is: Environment Protection Authority, 200 Victoria Street, Carlton, Victoria, 3053 DX210082.

SCHEDULE OF PARTIES

Environment Victoria

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