



Judgment Summary
Supreme Court
New South Wales
Court of Appeal

KEPCO Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc [2021]
NSWCA 216

Basten JA, Payne JA, Preston CJ of LEC

The Court of Appeal has dismissed the appeal of KEPCO Bylong Australia Pty Ltd (KEPCO) which had sought development consent for a proposed thermal coal mine in the Bylong Valley, northeast of Mudgee. The mine was intended to supply coal for KEPCO's electricity generation plants in South Korea.

On 18 September 2019 the Independent Planning Commission (the Commission) refused consent. The Commission was not satisfied that the proposal included conditions that minimised Scope 3 greenhouse gas (GHG) emissions (that is, emissions created by burning the coal) and that minimised depletion of groundwater to the greatest extent practicable. It was also concerned about the effects on prime agricultural land in the Bylong Valley. KEPCO sought judicial review of the decision in the Land and Environment Court, alleging that legal errors had been made by the Commission. On 18 December 2020 the Court dismissed KEPCO's challenge.

KEPCO appealed the judgment of the Land and Environment Court, repeating its allegations that (i) the Commission had wrongly dealt with the minimisation of GHG emissions and effects on groundwater resources by itself assessing those effects rather than considering whether they could be adequately addressed by conditions; (ii) the judge erred in concluding that any such error was immaterial, because conditions only became relevant if consent were to be granted; (iii) the Commission had assessed GHG emissions, rather than considering assessments which had already been carried out; (iv) the Commission had erred in having regard to the NSW Climate Change Policy Framework, which was not relevant to the assessment of GHG emissions; and (v) the Commission had failed to consider the environmental impacts if KEPCO were forced to seek an alternative source of potentially inferior coal elsewhere.

The Court found that there had been no legal error in the Commission's reasoning. First, the Commission's finding that KEPCO had not minimised GHG emissions meant that it had proposed no conditions to ensure such minimisation took place. Secondly, although the judge incorrectly held that consideration of conditions only arose once the Commission decided to grant consent, that error was immaterial because the Commission had correctly considered the conditions proposed (and not proposed) by KEPCO. Thirdly, the Commission correctly undertook an assessment of studies of GHG emissions. Fourthly, the application of the State Climate Change Policy concerned GHG emissions and was therefore applicable.

This summary has been prepared for general information only. It is not intended to be a substitute for the judgment of the Court or to be used in any later consideration of the Court's judgment.

Finally, the Commission adequately addressed the claim that KEPCO might seek an alternative source of inferior coal. Accordingly, the appeal was dismissed.