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EPA MUST ACT ON CLIMATE CHANGE TEST CASE ALERT

The Environment Protection Authority (**EPA**) must address climate change!

Who would have thought a Court judgment was needed to settle that?

This morning, the NSW Minister for Energy and Environment announced that the NSW EPA would not appeal the landmark judgement delivered two weeks ago, on 26 August 2021, by Chief Judge Brian Preston of the NSW Land and Environment Court (**LEC**).

Black Summer bushfires.

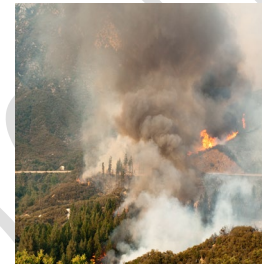


Image: Jamie Kidston

In New South Wales, the EPA has a statutory duty to:

'develop environmental quality objectives, guidelines and policies to ensure environment protection'.¹

A bushfire survivors group² claimed that this statute included a duty:

'to develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change.'

The group was called Bushfire Survivors for Climate Action (**BSCA**).

The Chief Judge agreed with them.

In this case, there was an important preliminary finding by another LEC Judge, before the case reached the Chief Judge. Justice Moore found that expert evidence of anthropogenic climate change could be presented. According to the NSW Environmental Defenders Office (**EDO**), which conducted the litigation for BSCA, this is:

'the first time an Australian court has ruled on whether evidence on climate change can be allowed to be heard in a case involving an alleged failure by a Government agency to perform a statutory duty.'³

Courts previously accepted expert evidence of climate change, but this case accepted that expert evidence was relevant to a breach of statutory duty claim.

¹ *Protection of the Environment Authority Act 1997* (NSW), s9(1)(a).

² Image https://www.emos.org.au/index.cfm?module=news&pagemode=indiv&page_id=1189894, accessed 10092021.

³ Environmental Defenders Office, 'Court Rules Bushfire Survivors Can Present Climate Evidence in Case Against NSW EPA' (5 November 2020) <<https://www.edo.org.au/2020/11/05/court-rules-bushfire-survivors-can-present-climate-evidence-in-case-against-nsw-epa/>>

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As a result, former Australian Chief Scientist, Professor Penny Sackett PhD, gave expert evidence, including her opinion that climate change is:

'the greatest threat to the environment and people of New South Wales'.⁴

From this evidence, BSCA argued that protecting the environment required limiting the global average temperature rise to no more than 1.5 degrees celsius above pre-industrial levels to avoid *'abrupt or irreversible changes in the Earth's subsystems'* and this required the EPA to regulate sources of direct and indirect greenhouse gas emissions.⁵

EPA argued that there was no compulsion on it as:

*'[w]hatever objectives, policies and guidelines the EPA might choose to develop is a matter within the EPA's discretion.'*⁶

Chief Judge Preston rejected the EPA's discretionary approach to its statutory duties, insofar as they concerned climate change. He found that the *'general and ambulatory language'* of the statutory duty imposed by s 9(1)(a), *Protection of the Environment Administration Act 1991 (NSW)* should be construed as *"always speaking"*,⁷ and found that:

*'The threats to the environment, against which environmental quality objectives, guidelines and policies need to be developed to protect the environment, will change over time and place and in magnitude and impact. The environmental quality objectives, guidelines and policies to ensure environment protection will need to change in response to the threats to the environment that prevail and are pressing at the time.'*⁸

His Honour examined seven documents relied upon by EPA as evidence of compliance with its statutory duty:⁹

- *Changing Behaviour Together, NSW Waste Less, Recycle More Education Strategy 2016-21;*
- *Environmental Guidelines Solid Waste Landfills (2nd ed, 2018);*
- *NSW Energy from Waste Policy Statement;*
- *Methane fact sheet;*
- *EPA Regulatory Strategy 2021-24;*
- *NSW Climate Change Policy Framework for NSW*, prepared by the Office of Environment and Heritage; and
- *Net Zero Plan Stage 1: 2020-2030*, prepared by the Department of Planning, Industry and Environment.

⁴ *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* [2021] NSWLEC 92 (*Bushfire Survivors*) at [60].

⁵ *Bushfire Survivors* at [90].

⁶ *Ibid*, at [63].

⁷ *Ibid*, at [66].

⁸ *Ibid*.

⁹ *Ibid*, at [104].

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The Chief Judge found that none of these documents was sufficient to meet the EPA's statutory duty in regard to climate change.

This landmark case followed the important decision of Justice Bromberg in the Federal Court in May 2021 finding that the Federal Environment Minister, Sussan Ley, had a duty of care to young people to consider climate change impacts while administering the legislation for which she is responsible.¹⁰ Ms Ley chose to appeal Justice Bromberg's decision.

VICTORIA

A statutory duty is imposed on the Victorian EPA by the Victorian *Environment Protection Act 2017* (Vic), requiring it to identify and respond to opportunities to:

- eliminate or reduce risks of harm to human health and the environment, and
- improve environmental quality.¹¹

The Victorian EPA appears to have no specific climate change policy or guidelines, but some of its existing policies potentially encompass climate change considerations.

That said, the Victorian *Climate Change Act 2017* empowers the Victorian government to take action on climate in many different ways, including by:

- a goal of net zero greenhouse gas emissions for Victoria by 2050;¹²
- interim goals of net emissions reduction at 5 year intervals until 2050;¹³
- emissions reductions pledges for various sectors and organisations;¹⁴
- a requirement for various decision makers to have regard to the impacts of climate change;¹⁵
- a Ministerial climate change strategy;¹⁶ and
- a strategy to adapt to the effects of climate change.¹⁷

CONCLUSION

The current era of emissions reduction policy in Australia retains a focus on developing market-based drivers with funding support for 'least cost' CO₂ emissions reduction projects, despite previous support for a nationwide and cross-border emissions permit trading scheme.

¹⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 130 and 133; *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560.

¹¹ *Environment Protection Act 2017* (Vic), s 358(d).

¹² *Climate Change Act 2017* (Vic), s6(1).

¹³ *Ibid*, s10(1).

¹⁴ *Ibid*, ss41-50.

¹⁵ *Ibid*, s17.

¹⁶ *Ibid*, ss29-33.

¹⁷ *Ibid*, ss34-40.

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By comparison, the German approach, codified in the 2019 Federal Climate Change Act (*Bundes-Klimaschutzgesetz*), establishes legally binding climate targets, and designates responsibility for verifiable and proportionately distributed sectoral emissions targets to the regulatory agency with responsibility for developing policies for that sector.

The precedent established by Chief Judge Preston's decision may signal the need, in the face of the threats posed by climate change, for whole of government approaches that redefine the ambit of the duty of statutory agencies to development and implement emissions reduction policy that satisfactorily responds to the scientific reality of climate change.

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10 September 2021

INTERNAL MEMO ONLY

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