

COURT ORDERS NSW EPA TO DEVELOP POLICIES TO PROTECT ENVIRONMENT FROM CLIMATE CHANGE

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Yesterday the Land and Environment Court of New South Wales ordered the New South Wales Environment Protection Authority (EPA) to develop environmental quality objectives, guidelines and policies "to ensure environment protection from climate change" in the landmark decision of *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* [2021] NSWLEC 92.

This case is the latest chapter in a string of climate change litigation - please refer to our earlier update on other recent developments [here](#).

This article outlines the decision and its likely implications.

WHAT WAS IT ABOUT?

'Bushfire Survivors for Climate Action' (BSCA), a public interest action group, commenced civil enforcement proceedings against the EPA asserting that the EPA had failed to comply with its statutory duty under section 9(1)(a) of the *Protection of the Environment Administration Act 1991* (NSW) (POEA Act). Section 9(1)(a) requires the EPA to "develop environmental quality objectives, guidelines and policies to ensure environment protection".

BSCA contended that this section imposes a duty on the EPA to develop environmental quality objectives, guidelines and policies to protect the environment of New South Wales from the threat of climate change and sought an order requiring the EPA to perform this duty. The EPA did not agree that the POEA Act required it to develop instruments specifically addressing climate change. The EPA also argued that, even if the BSCA's construction was correct, it had developed numerous instruments which ensure environmental protection in fulfilment of its statutory requirements.

WHAT DID THE COURT DECIDE?

Chief Judge Preston found in favour of BSCA and ordered the EPA to "develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change" and pay BSCA's legal costs. In reaching this decision, the Court held that:

- At a minimum, the duty requires the EPA to develop environmental quality objectives, guidelines and policies to ensure the protection of the environment from threats of greater magnitude and greater impact.

- At the current time and place in New South Wales, the threat to the environment of climate change is of sufficiently great magnitude and sufficiently great impact as to be one against which the environment needs to be protected.
- The duty imposed on the EPA by s 9(1)(a) of the POEA Act in the current circumstances therefore includes developing environmental quality objectives, guidelines and policies to ensure environment protection from climate change.

The Court found that the EPA retained a discretion as to the specific content of its climate change policies, and did not accept BSCA's argument that it was required to develop instruments which are "consistent with limiting global temperature rise to 1.5 degrees Celsius above pre-industrial levels". However, Chief Judge Preston's remarks suggest that the EPA's policies will be required to identify the:

- sources of greenhouse gas emissions within the EPA's regulatory control or the major industries that are sources of greenhouse gas emissions;
- current or future desired levels of greenhouse gases emitted by these sources and industries;
- timing for and rate of reduction of greenhouse gas emissions by these sources and industries;
- measures, approaches or tools to be used to achieve reduction of greenhouse gas emissions; and
- measures or approaches for adaptation to climate change so as to ensure environment protection from the impacts of climate change.

WHAT ARE THE IMPLICATIONS?

It is not yet known whether the EPA proposes to appeal the Court's decision or if the New South Wales Government proposes to introduce legislation to amend the POEA Act to overturn the decision. However, pending this, the EPA is required to:

- develop "environmental quality objectives, guidelines and policies to ensure the protection of the environment from climate change", although the Court did not impose any specific deadline by which this must occur; and
- "monitor the state of the environment for the purpose of assessing trends and the achievement of environmental quality objectives, guidelines, policies and standards" in respect of climate change.

While some early commentators have suggested that the EPA could now seek to impose a new State-based carbon price, this is an extremely unlikely result given the limits on the EPA's powers under the POEA Act and its approach to date. Rather:

- the EPA is likely to take a measured approach to developing new climate change policies in consultation with its stakeholders, building on its existing regulatory strategy and role; and
- businesses and licensees can expect to have the opportunity to provide submissions to the EPA on any proposed new climate change policy or initiative.

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