



Land and Environment Court New South Wales

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| Medium Neutral Citation: | Bushfire Survivors for Climate Action Inc v Environment Protection Authority [2020] NSWLEC 152 |
| Hearing dates: | 15, 20 and 23 October 2020 |
| Date of orders: | 26 October 2020 |
| Decision date: | 04 November 2020 |
| Jurisdiction: | Class 4 |
| Before: | Moore J |
| Decision: | See orders set out in Annexure B to this decision. |
| Catchwords: | EVIDENCE - Notice of Motion by the Applicant for leave to file and serve expert evidence in Class 4 proceedings - insufficiently precise identification of propositions/questions proposed to be subject of the expert evidence - refinement of areas of proposed expert evidence - need to ensure expert evidence had relevance to the alleged impacts on New South Wales - leave granted for filing and serving expert evidence from nominated expert on specified propositions/questions - position of Respondent to consider seeking leave for expert evidence in reply preserved |
| Cases Cited: | <i>Fullerton Cove Residents Action Group Inc v Dart Energy Ltd (No 2)</i> (2013) 195 LGERA 229; [2013] NSWLEC 38; <i>Help Save Mt Gilead Inc v Mount Gilead Pty Limited</i> [2018] NSWLEC 88 <i>Minister for Aboriginal Affairs v Peko-Wallsend</i> (1986) 162 CLR 24 |
| Texts Cited: | Land and Environment Court, 'COVID-19 Pandemic Arrangements Policy' (July 2020) |
| Category: | Procedural and other rulings |
| Parties: | Bushfire Survivors for Climate Action Inc (Applicant) Environment Protection Authority (Respondent) |
| Representation: | |

Counsel:

Mr G Kennett SC/Mr D Hume, barrister (Applicant)

Mr O Jones, barrister (Respondent)

Solicitors:

Environmental Defenders office Ltd (Applicant)

Environment Protection Authority (Respondent)

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JUDGMENT

Introduction

- 1 On 26 October 2020, I made orders granting leave for the Applicant in these Class 4 proceedings, Bushfire Survivors for Climate Action Inc (Bushfire Survivors), to file and serve expert evidence from Professor Penny Sackett, a climate scientist at the Australian National University in Canberra.
- 2 These reasons for decision explain why I was satisfied that such leave should be granted. They also set out the process by which the specific topics for which I have given leave were refined from the significantly broader, and much less focused, scope for which Bushfire Survivors had originally made application.

The substantive proceedings

- 3 On 8 April 2020, Bushfire Survivors commenced these proceedings against the Environment Protection Authority (the EPA) by filing a Summons effectively challenging the adequacy of the EPA's policy responses to climate change. The Summons and Bushfire Survivors' Points of Claim was served on the EPA by e-mail on 15 April 2020.
- 4 On 8 May 2020, Bushfire Survivors was granted leave to rely on an Amended Summons. The Amended Summons sought the same relief as in the original Summons. This relief was (and remains):

Pursuant to ss 65(1) and 69(1) of the *Supreme Court Act 1970* and ss 20(2)(a) and 20(3)(a) of the *Land and Environment Court Act 1979*, orders in the nature of mandamus requiring the Respondent to:

- (a) develop environmental quality objectives, guidelines and policies to ensure environment protection; and
 - (b) develop draft policies in accordance with Chapter 2 of the *Protection of the Environment Operations Act 1997* to ensure environment protection.
- 5 The effect of the amendment was to provide the grounds in support as being matters set out in the original Points of Claim, now annexed to the Amended Summons. This document contained 41 paragraphs and accompanying particularisation. It is 13 pages long (a copy of the Points of Claim is Annexure A to these reasons).

Subsequent procedural steps

- 6 On 5 June 2020, the EPA filed its Points of Defence. At par 9 of this document, the EPA asserted its reliance on a 24-page list of policy documents (containing 300 document titles) forming Annex A to its Points of Defence. The list was described as demonstrating that "the EPA has discharged the duty in s 9(1) (a) of the [*Protection of the Environment*] *Administration Act* by exercising its powers from time to time to develop environmental quality objectives, guidelines and policies to ensure environmental protection". The list was noted as being inclusive and not exhaustive.
- 7 On 11 June 2020, Bushfire Survivors served the EPA with a Notice to Admit Facts. This document contained 73 "facts" with which the EPA was asked to agree. As later discussed, some of the "facts" were expressed as opinions rather than being matters of fact to which the EPA's agreement could properly be sought using this admission-seeking process.
- 8 On 25 June 2020, the EPA provided a Notice Disputing Facts in response to Bushfire Survivors' Notice. The EPA's Notice was in the formal, laconic form required for such a document. However, by letter also dated 25 June, the EPA provided Bushfire Survivors with a more discursive response (of some six pages), fleshing out the reasons for the responses given in the formal reply Notice.

On 28 September 2020, Bushfire Survivors filed a Notice of Motion seeking leave to adduce expert evidence in these proceedings. The expert evidence proposed to traverse a somewhat lengthy list of enumerated elements contained in Bushfire Survivors' Points of Claim and in its Notice to Admit Facts. In this motion, the topics were not immediately set out in any discernibly coherent fashion.

The Notice of Motion hearings

- 10 Bushfire Survivors' Notice of Motion was heard by me on 15, 20 and 23 October 2020. The hearings were held, as a consequence of the COVID-19 pandemic, using Microsoft Teams software without the necessity for any physical attendance in the courtroom. They were conducted in accordance with the Court's COVID-19 Pandemic Arrangements Policy.
- 11 Bushfire Survivors were represented by Mr G Kennett SC and Mr D Hume, barrister. The EPA was represented by Mr O Jones, barrister, for the substantive elements of these hearings (the third occasion being, effectively, a formal process to finalise those matters arising from what had occurred on the two earlier occasions).

The approach to be taken here

- 12 Although, in proceedings such as these, caution will need to be exercised by a trial judge in approaching the exercise of functions by a body such as the EPA (*Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 at 40-41) and there have been differing approaches taken concerning the appropriateness of permitting reliance on expert evidence in some Class 4 proceedings (*Fullerton Cove Residents Action Group Inc v Dart Energy Ltd (No 2)* (2013) 195 LGERA 229; [2013] NSWLEC 38), I am nonetheless satisfied that, at least at these initial stages, leave is appropriate to be granted to Bushfire Survivors to file and serve expert evidence upon which it would seek to rely.
- 13 As Molesworth AJ observed in *Help Save Mt Gilead Inc v Mount Gilead Pty Limited* [2018] NSWLEC 88, at [42], when permitting the preparation and filing of such evidence, questions of admissibility of such evidence remain a matter for the trial judge.

When "facts" are not facts but are contestable opinions

- 14 An example of the problem arising from the Bushfire Survivors' Notice to Admit Facts can be seen from what was set out in it, at par 10, where the "fact" to which agreement was sought was a proposition in the following terms:

10 Unregulated release of greenhouse gases is the greatest threat to the environment of NSW.

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It was clear from the inclusion of the word “greatest” in the example above that this “fact” was, truly, an expression of an opinion - an opinion which was capable of being the subject of contest, given the nature of the proceedings which Bushfire Survivors has commenced against the EPA.

The position at the end of the interlocutory hearings

- 16 During the course of the Notice of Motion hearings, Bushfire Survivors proposed an Amended Notice of Motion. The scope of evidence in the proposed Amended Notice of Motion was somewhat better structured than had originally been proposed but was not, as I observed to the representatives of the parties, in a form that I could consider appropriate as providing sufficient clarity and direction for the scope of expert evidence capable of being given leave for potential reliance at trial.
- 17 As a consequence, in an iterative process, discussion took place concerning what might be the nature of propositions and/or questions which might provide an acceptable basis upon which I might consider the granting of leave to Bushfire Survivors to file and serve expert evidence upon which they could seek to rely at the substantive hearing. No objection to this iterative process was raised on behalf of the EPA.
- 18 After the conclusion of the first two hearings noted above at [10], a proposed Further Amended Notice of Motion was provided to me with attached draft propositions/questions to be addressed by Professor Sackett. It was proposed, on behalf of Bushfire Survivors, that I should give leave for the filing and serving of expert evidence from Professor Sackett on the following propositions/questions:

- 1 Unregulated release of greenhouse gases is the greatest threat to the environment and people of N.S.W. as anthropogenic climate change has the potential to adversely and irreversibly alter all aspects of the natural environment.
- 2 To what extent have anthropogenic greenhouse gas emissions caused a long-term increase in extreme fire and in the length or the fire season, across Australia.
- 3 Whether and why the world is or is not on target to achieve a global temperature rise of no more than 1.5 degrees Celsius above pre-industrial levels.
- 4 Whether and why the current emissions reduction trajectory for Australia is or is not in line with and appropriate to limiting global temperature rise to no more than 1.5 degrees Celsius above pre-industrial levels.
- 5 Whether and why the current emissions reduction trajectory for New South Wales is or is not in line with and appropriate to limiting global temperature rise to no more than 1.5 degrees Celsius above pre-industrial levels.
- 6 Whether or not (and why) the objectives, guidelines and policies identified by the Respondent:
 - (a) regulate or reduce direct and indirect sources of greenhouse gas emissions in a manner consistent with global temperature rise being limited to 1.5 degrees Celsius from preindustrial levels and
 - (b) are fit for purpose in protecting or mitigating against the threat posed by climate change to the quality of the environment and the people of New South Wales

The EPA's position on these questions, was, as I understood it, that it did not accept that expert evidence would necessarily assist in the proceedings, but that, if leave was to be given by me, the propositions/questions set out above were ones to which it did not express objections as to their formulation. In this context, it is to be observed that the EPA's position as to admissibility and relevance of such evidence as might arise from expert opinion concerning those propositions/questions was expressly reserved (a position with which Bushfire Survivors' representatives did not demur).

Consideration

- 20 My preliminary reaction to the matters set out in Bushfire Survivors' Points of Claim and Notice to Admit Facts, and in the formal and informal reply documents from the EPA, was twofold.
- 21 First, the nature of the matters set out in these documents contained, in their terms, likely scope for significant further pre-trial interlocutory disputation which was potentially able to be cured (or if not cured, at least limited) by giving Bushfire Survivors leave to seek to rely on expert evidence (if such expert evidence was prepared on the basis of a limited number of more specifically framed topics posed as specific propositions and/or questions).
- 22 In this context, of course, any leave being granted by me to permit the filing and serving of such more focused expert evidence would be a determination of a very preliminary nature - with questions of admissibility and relevance necessarily awaiting determination by the trial judge at the time when Bushfire Survivors sought to tender such evidence.
- 23 Second, as observed at [6], the EPA's Points of Defence had annexed to it a 24-page list of documents (containing the titles of 300 documents of a policy nature) advanced by the EPA as demonstrating the invalidity of the implicitly omnibus complaint levelled at the EPA by Bushfire Survivors concerning the broad area of policy responses to climate change.
- 24 To the extent that expert evidence had, at least inherently, some potential to provide a more focused (but nonetheless sufficiently broad) canvas for the consideration of the issues involved, I was of the view that permitting the filing and serving of such evidence had significant potential to provide assistance to the trial judge (leaving, of course, determination of admissibility to that trial judge when the substantive hearing eventually took place).
- 25 It has always been my view that, if a sporting analogy was ever appropriate to be adopted for litigation as is involved in these proceedings, such an analogy would be with a game of tennis - with the length and intensity of the (forensic) rallies being, in

part, dependent on the evidence advanced and the replies to it and, also in part, on the skill of the analysis and submission of the advocates on behalf the parties.

- 26 The nature of the opening skirmish demonstrated by Bushfire Survivors' Points of Claim and Notice to Admit Facts, and the formal and informal responses to them from the EPA, evidence that, at least at this preliminary stage, tennis was an inapt sporting analogy, and that golf might be a better one - with, at the present time, the parties playing different holes, with one being on the front nine of the course, with the other to be seen, figuratively, to be playing on the back nine of that course. Thus, there was not immediately apparent a coherent and appropriately defined "match" or contest between the parties.
- 27 It was my assessment that granting leave to Bushfire Survivors to file and serve expert evidence (with the EPA having the opportunity, after this had occurred, to consider whether or not it wished to engage its own expert in reply) provided at least the opportunity for the trial judge to be presented with a more coherent framework for addressing the underlying issues of complaint arising in these proceedings.
- 28 When the propositions/questions set out at [18] came before me on 26 October 2020 with the proposal that I grant leave for Bushfire Survivors to rely on a Further Amended Notice of Motion permitting it to file and serve evidence on the basis of them, I indicated to the parties that I was not satisfied with the broad (and apparently unconfined) scope of questions (2) to (5) as there set out.
- 29 I indicated that, in the terms formulated, each of those questions did not incorporate any qualification to ensure that they caused the expert witness to address, with sufficient specificity, matters within the statutory jurisdiction of this Court. I indicated that I was only prepared to grant leave if the words "and how that would impact on the environment of New South Wales" were added at the end of each of those four questions.
- 30 It was then indicated for Bushfire Survivors that there was no objection to the adding of that framing phrase as I proposed. A similar position was adopted on behalf of the EPA (but being a position subject to retention of the broad caveat, earlier discussed, for which the EPA's attitude was reserved).

The form of my orders

- 31 As a consequence, I made orders granting Bushfire Survivors leave to rely on the Further Amended Notice of Motion and, thus, granting leave to file and serve expert evidence:
- (1) From the specifically nominated expert (Professor Penny Sackett);
 - (2) On the six set out propositions/questions as amended by me;

- (3) Subject to the right of the EPA being permitted to seek leave to rely on expert evidence in reply from its own (to be nominated) expert if the EPA considered that this was an appropriate course for it to follow; and
- (4) Subject, also, to the general reservation of the EPA's rights to press matters of admissibility and relevance with respect to Bushfire Survivors' expert evidence when the matter proceeded to trial.

32 For completeness in understanding this decision, a copy of the orders as signed by me (together with the annexed propositions/questions in the form modified as discussed above) are reproduced as Annexure B to this decision.

Annexure A

ANNEXURE TO AMENDED SUMMONS

POINTS OF CLAIM

COURT DETAILS

| | |
|-------------|---|
| Court | The Land and Environment Court of New South Wales |
| Division | Class 4 |
| Registry | 225 Macquarie Street, Sydney |
| Case number | |

TITLE OF PROCEEDINGS

| | |
|------------|--|
| Applicant | Bushfire Survivors for Climate Action Incorporated (INC1901160) |
| Respondent | Environment Protection Authority (ABN 43 692 285 758) |

FILING DETAILS

| | |
|--------------------------------|--|
| Filed for | Bushfire Survivors for Climate Action Incorporated, Applicant |
| Legal representative | Elaine Johnson, Environmental Defenders Office Ltd |
| Legal representative reference | 1926923 |
| Contact name and telephone | Elaine Johnson; Matt Floro; (02) 9262 6989 |
| Contact email | elaine.johnson@edonsw.org.au; matthew.floro@edonsw.org.au |

POINTS OF CLAIM

Introduction

- 1 The Respondent is a statutory body representing the Crown constituted under s 5 of the *Protection of the Environment Administration Act 1991* (**POEA Act**).

Statutory context

- 2 Section 4(c) of the POEA Act states that one of the objects of the Act is to "require" the Respondent "to perform particular tasks in relation to the quality of the environment, environmental audit and reports on the state of the environment."
- 3 The general functions of the Respondent are set out in s 7 of the POEA Act. Section 7(2) provides that the Respondent has "general responsibility" for a number of functions including "ensuring that the best practicable measures are taken for environment protection in accordance with the environment protection legislation and other legislation."
- 4 Section 8 of the POEA Act is titled "General powers of Authority" and relevantly states that the Respondent "may" carry out several functions, for example "formulate and promote plans for environment protection" and "invite and consider

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public submissions...when it develops objectives, guidelines or policies under section 9...^h

- 5 The Respondent was "required" by s 9(1) of the POEA Act to "develop environmental quality objectives, guidelines and policies to ensure environment protection."
- 6 Pursuant to ss 6 and 55 of the *Protection of the Environment Operations Act 1997* (NSW) (POEO Act), the Respondent is the regulatory authority responsible for granting environment protection licences which authorise the carrying out of activities identified in Schedule 1 of the POEO Act.
- 7 Certain scheduled activities cause pollution and create waste, including as a result of the direct and indirect greenhouse gas emissions arising from the activity.

The risk of harm to environment arising from greenhouse gases

- 8 Emissions of carbon dioxide (CO₂) and other greenhouse gases from human activity (including power generation, industry, transport and agriculture) are leading to a build-up of these gases in the atmosphere, trapping heat and leading to global warming, also known as climate change.

Particulars

- i. State of NSW and the Environment Protection Authority: NSW State of the Environment 2018, December 2018, p.109.
<https://www.soe.epa.nsw.gov.au/sites/default/files/2019-05/18p1370-nsw-state-of-the-environment-2018-WEb_9-5-19.pdf> (accessed on 20 February 2020)
- 9 Anthropogenic greenhouse gas emissions contribute to anthropogenic climate change.
- 10 Once emitted, greenhouse gases disperse throughout the global atmosphere where they act cumulatively to contribute to anthropogenic climate change.
- 11 Greenhouse gases are a form of air pollution and waste.
- 12 Unregulated release of greenhouse gases is the greatest threat to the environment and people of NSW, as anthropogenic climate change has the potential to adversely and irreversibly alter all aspects of the natural environment.
- 13 Direct and indirect greenhouse gas emissions from activities in New South Wales impact on the environment.
- 14 In addition to domestic emissions, Australia exports two-thirds of its net energy production. This includes coal and natural gas, the combustion of which contributes

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to greenhouse gas emissions. Australia is one of the world's largest producers and exporters of coal and produced around 510 million tonnes (Mt) of coal in 2017/18. NSW and Queensland are the two main producing states for black coal in Australia.

Particulars

- i. Reserve Bank of Australia: The Changing Global Market for Coal, 19 September 2019.
<<https://www.rba.gov.au/publications/bulletin/2019/sep/the-changing-global-market-for-australian-coal.html>> (accessed 20 February 2020)
- ii. Australian Government, Department of Environment and Energy: Australian Energy Update 2019, 1 September 2019.
<<https://www.energy.gov.au/publications/australian-energy-update-2019>> (accessed 20 February 2020)
- 15 The Intergovernmental Panel on Climate Change (IPCC) is a United Nations body that assesses recent scientific research on climate change and its effects from around the world. The IPCC has published five comprehensive assessment reports to date, the most current being the Fifth Assessment Report in 2014. Key findings

to date, the most current being the 2018 assessment report in 2018. Key findings include the following:

- a. warming of the climate is unequivocal, and since the 1950s, many of the observed changes are unprecedented over decades to millennia;
- b. human influence is clear and is the dominant cause of global warming since 1950.

Particulars

- i. State of NSW and the Environment Protection Authority: NSW State of the Environment 2018, December 2018, p111.
<https://www.soe.epa.nsw.gov.au/sites/default/files/2019-05/18p1370-nsw-state-of-the-environment-2018-WEB_9-5-19.pdf> (accessed on 20 February 2020)

16 The effects of anthropogenic climate change are already being seen:

- a. global average surface temperature is approximately 1 degree Celsius (°C) higher than pre-industrial levels. Australia's climate has warmed by just over 1°C since 1910.
- b. 2019 was Australia's warmest and driest year on record. Globally, 2019 is likely to be the second-warmest year. It was the warmest year without the influence of El Niño.

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- c. as of 2018, eight of Australia's top ten warmest years on record had occurred since 2005.
- d. as of 2018, sea surface temperature in the Australian region has warmed by around 1°C since 1910, with eight of the ten warmest years on record occurring since 2010.

Particulars

- i. State of NSW and the Environment Protection Authority: NSW State of the Environment 2018, December 2018.
<https://www.soe.epa.nsw.gov.au/sites/default/files/2019-05/18p1370-nsw-state-of-the-environment-2018-WEB_9-5-19.pdf> (accessed on 20 February 2020)
- ii. CSIRO and Australian Government Bureau of Meteorology 2018: State of the Climate 2018.
<<https://www.csiro.au/en/Research/OandA/Areas/Assessing-our-climate/State-of-the-Climate-2018/Report-at-a-glance>> (accessed on 20 February 2020)
- iii. Australian Government Bureau of Meteorology: Hottest, driest year on record led to extreme bushfire season, 9 January 2020.
<<http://media.bom.gov.au/social/blog/2304/hottest-driest-year-on-record-led-to-extreme-bushfire-season/>> (accessed on 20 February 2020)

17 Greenhouse gas emissions have already had the following additional impacts:

- a. changes in the basic circulation patterns of the atmosphere and the ocean;
- b. increases in intensity and frequency of many extreme weather events;
- c. increases in acidity of the oceans;
- d. rise in sea levels and consequent increases in coastal flooding;
- e. intensification of the hydrological cycle;
- f. increases in the frequency and/or duration of heat waves;
- g. increases in the intensity and/or duration of drought.

18 In Australia, the existing impacts of anthropogenic climate change include:

- a. an increase in the frequency of extreme heat events;

- b. a long-term increase in extreme fire weather and in the length of the fire season, across large parts of Australia, especially in southern and eastern Australia;
- c. April to October rainfall in the southeast of Australia has decreased by approximately 11 percent since the late 1990s;
- d. sea levels are rising around Australia increasing the risk of inundation and damage to infrastructure;
- e. ocean warming has contributed to longer and more frequent marine heatwaves. Marine heatwaves and mass bleaching events on the Great Barrier Reef in 2016 and 2017 were likely due to warming oceans as a result of anthropogenic climate change;
- f. oceans around Australia are acidifying. Those changes have led to a reduction in coral calcification and growth rates on the Great Barrier Reef, which impacts recovery from coral bleaching.

Particulars

- i. CSIRO and Australian Government Bureau of Meteorology 2018: State of the Climate 2018.
<<https://www.csiro.au/en/Research/OandA/Areas/Assessing-our-climate/State-of-the-Climate-2018/Report-at-a-glance>> (accessed on 12 November 2019)

19 The climate of New South Wales is also changing due to global warming. Impacts that have already been seen include:

- a. 1°C increase in average temperature from the period 1960–90 to 2018;
- b. the number of hot days across NSW has been increasing since the mid-20th century, with a decrease in the number of cold nights (temperatures dropping to less than 2°C overnight);
- c. over the period 1911–2013, heatwaves in parts of NSW have become longer, hotter and more frequent. Since the late 1950s, these changes have accelerated in most regions;
- d. 3.2mm rise in sea level per year for the NSW coast since 1993.

Particulars

- i. State of NSW and the Environment Protection Authority: NSW State of the Environment 2018, December 2018.
<<https://www.soe.epa.nsw.gov.au/sites/default/files/2019-05/18p1370->

nsw-state-of-the-environment-2018-WEB_9-5-19.pdf> (accessed on 20 February 2020)

- 20 Australia is a signatory to the Paris Agreement, which aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by, *inter alia*:

Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.

Particulars

- i. Paris Agreement, Art. 2(1)(a)

- 21 The global problem of climate change cannot meaningfully be addressed without multiple local actions to mitigate emissions by sources and remove greenhouse gas emissions by sinks.
- 22 The document titled "NSW Climate Change Policy Framework" published by the State of NSW and the Office of Environment and Heritage in 2016 states that the NSW Government endorses the Paris Agreement, and contains an aspirational long-term objective to "achieve net zero emissions by 2050".
- 23 Global emissions are currently rising, and the world is not on target to reduce emissions in line with the international goal of limiting global temperature rise to 1.5°C above pre-industrial levels.

Particulars

- i. IPCC: Global warming of 1.5°C degrees – Summary for Policy Makers, October 2018, Figure SPM.1
<https://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf> (accessed 20 February 2020)

- 24 The current emissions reduction trajectory for Australia is not in line with the international goal of limiting global temperature rise to 1.5°C above pre-industrial levels.

Particulars

- i. Australian Government, Department of the Environment and Energy: Quarterly Update of Australia's National Greenhouse Gas Inventory: June 2019, June 2019. <<https://www.environment.gov.au/climate-change/climate-science-data/greenhouse-gas-measurement/publications/quarterly-update-australias-nggi-jun-2019>> (accessed 20 February 2020)

- ii. Australian Government, Department of the Environment and Energy: Australia's Emissions Projections, December 2019. <<https://www.environment.gov.au/climate-change/publications/emissions-projections-2019>> (accessed 20 February 2020)
- iii. IPCC: Global warming of 1.5°C degrees -- Summary for Policy Makers, October 2018. <https://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf> (accessed 20 February 2020)

25 The current emissions reduction trajectory for New South Wales is not in line with the international goal of limiting global temperature rise to 1.5°C above pre-industrial levels.

Particulars

- i. Australian Government, Department of the Environment and Energy: State and Territory Greenhouse Gas Inventories 2017, June 2019. <<https://www.environment.gov.au/climate-change/climate-science-data/greenhouse-gas-measurement/publications/state-and-territory-greenhouse-gas-inventories-2017>> (accessed 20 February 2020)

26 The effects of climate change on the people and the environment of NSW are expected to become more pronounced and increase in severity as warming continues over the next century.

Particulars

- i. State of NSW and the Environment Protection Authority: NSW State of the Environment 2018, December 2018, p109. <https://www.soe.epa.nsw.gov.au/sites/default/files/2019-05/18p1370-nsw-state-of-the-environment-2018-WEb_9-5-19.pdf> (accessed on 20 February 2020)

27 Anthropogenic climate change will continue to have adverse environmental, economic and social impacts of a serious and irreversible kind to the environment in New South Wales, Australia, and globally.

28 On current projections, the likely and/or potential consequences of climate change for New South Wales include the following:

- a. maximum temperatures increasing in the near future by 0.4 to 1.0°C;
- b. minimum temperatures increasing in the near future by 0.0 to 0.5°C;
- c. the number of hot days will increase in the near and far future;

- d. rainfall to decrease in spring and winter in the near and far future;
- e. average fire weather to increase in summer and spring in the near and far future;
- f. number of days with severe fire danger to increase in summer and spring in the near and far future;
- g. increase in the intensity of extreme rainfall events and associated flooding, although the magnitude of the increases cannot be confidently projected;
- h. soil organic carbon (a widely used indicator of soil health) is expected to decline throughout the state, resulting in losses up to 10t/ha. In the southern alpine region, losses greater than 20t/ha are likely;
- i. the effects of existing threats on biodiversity are expected to be exacerbated and additional pressures will be introduced;
- j. sea level rise is expected to increase resulting in greater exposure of coastal lakes and estuaries to inundation and erosion.

Particulars

- i. NSW Government, Office of Environment & Heritage: New South Wales Climate Change snapshot, November 2014.
<<https://climatechange.environment.nsw.gov.au/Climate-projections-for-NSW/Climate-projections-for-your-region/NSW-Climate-Change-Downloads>> (accessed on 25 November 2019)
- ii. State of NSW and the Environment Protection Authority: NSW State of the Environment 2018, December 2018.
<https://www.soe.epa.nsw.gov.au/sites/default/files/2019-05/18p1370-nsw-state-of-the-environment-2018-VWEB_9-5-19.pdf> (accessed on 20 February 2020)

29 If there is a 1.5-2.0°C temperature rise (relative to the period 1850-1900, as an approximation of preindustrial levels), the following further risks will arise:

- a. the risk of widespread impacts on the most vulnerable would rise from moderate towards high;
- b. the aggregated impacts of climate change around the world would increase political tensions and instabilities and take its toll on the global economy.

Particulars

- i. IPCC (2014) Assessment Box SPM.1, Figure 1 from IPCC (2014):
Climate Change 2014: Impacts, Adaptation, and Vulnerability –

Summary for Policymakers. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Field CB, Barros VR, Dokken DJ, Mach KJ, Mastrandrea MD, Bilir TE, Chatterjee M, Ebi KL, Estrada YO, Genova RC, Girma B, Kissel ES, Levy AN, MacCracken S, Mastrandrea PR, and White LL (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA.
 <https://www.ipcc.ch/site/assets/uploads/2018/02/ar5_wgII_spm_en.pdf> (accessed on 21 February 2020)

- 30 If there were a 4°C temperature rise (relative to the period 1850-1900, as an approximation of preindustrial levels) above preindustrial levels, there is a high to very high risk that:
- a. most of the world's ecosystems would be heavily damaged or destroyed;
 - b. extreme weather events would be far more severe and frequent than today;
 - c. the most vulnerable people would increase greatly in number and, as large areas of the world become uninhabitable, migration and conflict would escalate;
 - d. the aggregated impacts around the world would significantly damage the entire global economy;
 - e. a cascade of intrinsic tipping points in the climate system could drive ongoing strong warming even if action was taken to reduce emissions.

Particulars

- i. IPCC (2014) Assessment Box SPM.1, Figure 1 from IPCC (2014): Climate Change 2014: Impacts, Adaptation, and Vulnerability – Summary for Policymakers. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Field CB, Barros VR, Dokken DJ, Mach KJ, Mastrandrea MD, Bilir TE, Chatterjee M, Ebi KL, Estrada YO, Genova RC, Girma B, Kissel ES, Levy AN, MacCracken S, Mastrandrea PR, and White LL (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA.
 <https://www.ipcc.ch/site/assets/uploads/2018/02/ar5_wgII_spm_en.pdf> (accessed on 21 February 2020)

- 31 At all material times, the Respondent:

(a) has been aware of each of the matters alleged in paragraphs 8 to 30 above;
and

(b) has believed each of those matters to be true.

Respondent's duties

32 At all material times, the Respondent has been required to develop environmental quality objectives, guidelines and policies to ensure environment protection.

Particulars

POEA Act s 9(1)(a).

33 Further, at all material times, the Respondent has been obliged to develop environmental quality objectives, guidelines and policies:

(a) which are adapted to ensuring "environment protection" within the meaning of s 9(1)(a) of the POEA Act;

(b) which any reasonable authority would develop if the authority were endeavouring to ensure "environment protection" within the meaning of s 9(1)(a) of the POEA Act.

Particulars

These duties arise on the proper construction of s 9(1) of the POEA Act.

34 Further, at all material times, the Respondent has been:

(a) empowered to develop draft policies in accordance with Chapter 2 of the POEO Act; and

Particulars

POEO Act s 12(1).

(b) obliged to develop draft policies in accordance with Chapter 2 of the POEO Act to ensure environment protection;

Particulars

POEO Act s 12(1); POEA Act s 9(1)(a).

(c) obliged to develop draft policies in accordance with Chapter 2 of the POEO Act:

(i) which are adapted to ensuring "environment protection" within the meaning of s 9(1)(a) of the POEA Act; and/or

(ii) which any reasonable authority would develop if the authority were endeavouring to ensure "environment protection" within the meaning of s 9(1)(a) of the POEA Act.

Particulars

These duties arise on the proper construction of ss 12(1) of the POEO Act and s 9(1) of the POEA Act.

Correspondence between the Applicant and the Respondent

- 35 Between June and December 2019, the Applicant engaged in correspondence and discussions with the Respondent requesting that the Respondent identify the environmental quality objectives, guidelines and policies it has developed that address climate change and its impacts, to ensure the protection of the environment pursuant to s 9(1) of the POEA Act.

Particulars

- i. Letter from the solicitors for the Applicant, the Environmental Defenders Office (EDO), to the Environment Protection Authority (EPA) dated 4 June 2019
 - ii. Letter from the EPA to the EDO dated 18 June 2019
 - iii. Letter from the EDO to the EPA dated 22 July 2019
 - iv. Letter from the EPA to the EDO dated 9 August 2019
 - v. Letter from the EDO to the EPA dated 10 September 2019
 - vi. Meeting between the Applicant and the Respondent dated 24 October 2019
 - vii. Letter from the EDO to the EPA dated 11 November 2019
- 36 In response to those requests, the Respondent has provided the Applicant with copies of three documents prepared by the NSW Government, and dated November 2016, being the *NSW Climate Change Policy Framework*, and two fact sheets titled "Climate Change in NSW", and "Emissions in NSW".

Particulars

- i. Letter from EPA to EDO dated 13 December 2019

Breach of duties

- 37 In order to discharge the duties on the Respondent described in paragraphs 32 to 34, it is necessary for the Respondent to develop guidelines, policies and/or draft policies which:
- (a) address the topics of greenhouse gas emissions and climate change;
 - (b) address the environmental impacts of greenhouse gas emissions;

- (c) regulate sources of direct and indirect greenhouse gas emissions consistent with limiting global temperature rise to 1.5°C above pre-industrial levels;
 - (d) are adapted to reducing direct and indirect sources of greenhouse gas emissions consistent with limiting global temperature rise to 1.5°C above pre-industrial levels;
 - (e) are calculated to keep greenhouse gas levels at a level which is appropriate, having regard to the best available science;
 - (f) ensure environment protection;
 - (g) are adapted to ensuring environment protection.
- 38 At all material times, the Respondent has not developed environmental quality objectives, guidelines and policies which:
- (a) address the topics of greenhouse gas emissions and climate change;
 - (b) address the environmental impacts of greenhouse gas emissions;
 - (c) regulate sources of direct and indirect greenhouse gas emissions consistent with limiting global temperature rise to 1.5°C above pre-industrial levels;
 - (d) are adapted to reducing direct and indirect sources of greenhouse gas emissions consistent with limiting global temperature rise to 1.5°C above pre-industrial levels;
 - (e) are calculated to keep greenhouse gas levels at a level which is appropriate, having regard to the best available science;
 - (f) ensure environment protection;
 - (g) are adapted to ensuring environment protection.
- 39 Further, at all material times, any authority in the position of the Respondent which was endeavouring to ensure "environment protection" within the meaning of s 9(1)(a) of the POEA Act would have developed environmental quality objectives, guidelines, policies and/or draft policies which:
- (a) address the topics of greenhouse gas emissions and climate change;
 - (b) address the environmental impacts of greenhouse gas emissions;
 - (c) regulate sources of direct and indirect greenhouse gas emissions consistent with limiting global temperature rise to 1.5°C above pre-industrial levels;
 - (d) are adapted to reducing direct and indirect sources of greenhouse gas emissions consistent with limiting global temperature rise to 1.5°C above pre-industrial levels;

13

(e) are calculated to keep greenhouse gas levels at a level which is appropriate, having regard to the best available science;

(f) ensure environment protection;

(g) are adapted to ensuring environment protection.

40 In the premises, the Respondent has breached the duties set out in paragraphs 32 to 34.

Relief sought

41 Pursuant to ss 65(1) and 69(1) of the *Supreme Court Act 1970* and ss 20(2)(a) and 20(3)(a) of the *Land and Environment Court Act 1979*, orders in the nature of mandamus requiring the Respondent to:

(a) develop environmental quality objectives, guidelines and policies to ensure environment protection; and

(b) develop draft policies in accordance with Chapter 2 of the POEO Act to ensure environment protection.

SIGNATURE OF LEGAL REPRESENTATIVE

Signature

Capacity

Date of signature

Employed Solicitor for the Applicant

15/7/2020

Annexure B

In Loree
26/10/2020

SHORT MINUTES OF ORDER
23 OCTOBER 2020

COURT DETAILS

| | |
|-------------|---------------------------------------|
| Court | The Land and Environment Court of NSW |
| Division | Class 4 |
| Registry | 225 Macquarie Street, Sydney |
| Case number | 20/106678 |

TITLE OF PROCEEDINGS

| | |
|------------|--|
| Applicant | Bushfire Survivors for Climate Action Incorporated (INC1901160) |
| Respondent | Environment Protection Authority (ABN 43 692 285 758) |

PREPARATION DETAILS

| | |
|--------------------------------|---|
| Prepared for | Bushfire Survivors for Climate Action Incorporated, Applicant |
| Legal representative | Elaine Johnson, Environmental Defenders Office Ltd |
| Legal representative reference | 1926923 |
| Contact name and telephone | Elaine Johnson; Matt Floro; (02) 9262 6989 |
| Contact email | elaine.johnson@edo.org.au; matthew.floro@edo.org.au |

SHORT MINUTES OF ORDER

The Court orders that:

- 1 The Applicant is granted leave to rely on the Further Amended Notice of Motion on the proviso that Annex A to the Further Amended Notice of Motion is amended in the form annexed and marked "A1" (**Amended Areas of Expert Evidence**).
- 2 The Applicant is granted leave to file and serve the Further Amended Notice of Motion, including the Amended Areas of Expert Evidence, by 23 October 2020.
- 3 Pursuant to UPCR r 31.19, the Applicant is granted leave to adduce expert evidence at trial directed to the Amended Areas of Expert Evidence from Professor Penny Sackett.
- 4 The matter is listed for a directions hearing before the List Judge on 20 November 2020.
- 5 The costs of the hearing of this Notice of Motion, Amended Notice of Motion and Further Amended Notice of Motion are reserved to the final hearing of the Applicant's Amended Summons.

- 6 Order 4 will be vacated if, prior to 4.30pm on 18 November 2020, the Applicant advises the Associate to Moore J of the date when Prof Sackett's report is to be filed and served. If this occurs, the matter will be set down before the List Judge for further directions on the second Friday after the date nominated for the filing and serving of Prof Sackett's evidence.
- 7 Liberty to relist on three days' notice before the List Judge.

SIGNATURE

Signature of legal representative

Capacity

Solicitor for the Applicant

Date of signature

Signature of legal representative

Capacity

Solicitor for the Respondent

Date of signature

"A1"**ANNEX A TO THE FURTHER AMENDED NOTICE OF MOTION****Amended Areas of expert evidence**

1. Unregulated release of greenhouse gases is the greatest threat to the environment and people of NSW, as anthropogenic climate change has the potential to adversely and irreversibly alter all aspects of the natural environment.
2. To what extent have anthropogenic greenhouse gas emissions caused a long-term increase in extreme fire weather and in the length of the fire season, across Australia and how that would impact on the environment of New South Wales.
3. Whether and why the world is or is not on target to achieve a global temperature rise of no more than 1.5 degrees Celsius above pre-industrial levels and how that would impact on the environment of New South Wales.
4. Whether and why the current emissions reduction trajectory for Australia is or is not in line with and appropriate to limiting global temperature rise to no more than 1.5 degrees Celsius above pre-industrial levels and how that would impact on the environment of New South

Wales.

5. Whether and why the current emissions reduction trajectory for New South Wales is or is not in line with and appropriate to limiting global temperature rise to no more than 1.5 degrees Celsius above pre-industrial levels and how that would impact on the environment of New South Wales.
6. Whether or not (and why) the objectives, guidelines and policies identified by the Respondent:
 - (a) regulate or reduce direct and indirect sources of greenhouse gas emissions in a manner consistent with global temperature rise being limited to 1.5 degrees Celsius from pre-industrial levels; and
 - (b) are fit for purpose in protecting or mitigating against the threat posed by climate change to the quality of the environment and the people of New South Wales.

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated: 04 November 2020