



Land and Environment Court New South Wales

Medium Neutral Citation:

**Bushfire Survivors for Climate Action Incorporated v
Environment Protection Authority [2021] NSWLEC 92**

Hearing dates:

9, 10 and 11 August 2021

Date of orders:

26 August 2021

Decision date:

26 agosto 2021

Jurisdiction:

Class 4

Before:

Preston CJ

Decision:

The Court orders:

- (1) The Environment Protection Authority, in accordance with s 9(1)(a) of the *Protection of the Environment Administration Act 1991* (NSW), is to develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change.
- (2) The respondent is to pay the applicant's costs of the proceedings.

Catchwords:

JUDICIAL REVIEW – public duty – failure to perform – duty to develop environmental quality objectives, guidelines and policies to ensure environment protection – meaning and content of duty – discretion in performing duty – controls on the exercise of discretion – duty requires the development of objectives, guidelines and policies to ensure environment protection from climate change – breach of duty - mandamus to compel performance of duty

Legislation Cited:

Protection of the Environment Administration Act 1991 (NSW) ss 3, 8, 9

Cases Cited:

ASIC v Cassimatis (No 8) (2016) 336 ALR 209
Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223
Buck v Bavone (1976) 135 CLR 110; [1976] HCA 24
Corporation of the City of Enfield v Development Assessment Commission (2000) 199 CLR 135; [2000] HCA 5

Cuming Campbell Investments Pty Ltd v Collector of Imposts (1938) 60 CLR 741
 Cunliffe v The Commonwealth (1994) 182 CLR 272; [1994] HCA 44
 Deputy Commissioner of Taxation v Clark (2003) 57 NSWLR 113; [2013] NSWCA 91
 Gloucester Resources Ltd v Minister for Planning (2019) 234 LGERA 257; [2019] NSWLEC 7
 Graham v Minister for Immigration and Border Protection (2017) 263 CLR 1; [2017] HCA 33
 Manglicmot v Commonwealth Bank Officers Superannuation Corporation Pty Ltd (2011) 282 ALR 167
 McCloy v State of New South Wales (2015) 257 CLR 178; [2015] HCA 34
 Minister for Immigration and Border Protection v SZMTA (2019) 264 CLR 421; [2019] HCA 3
 Minister for Immigration and Border Protection v SZVFW (2018) 264 CLR 541; [2018] HCA 30
 Minister for Immigration and Citizenship v Li (2013) 249 CLR 332; [2013] HCA 18
 Minister for Immigration v Bhardwaj (2002) 209 CLR 597; [2002] HCA 11
 Mount Isa Mines Ltd v Peachey [1998] QCA 400
 Nationwide News Pty Ltd v Wills (1992) 177 CLR 1; [1992] HCA 46
 Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd (2018) 264 CLR 1; [2018] HCA 4
 R v G and another [2004] 1 AC 1034; [2003] UKHL 50
 R v Gee (2003) 212 CLR 230; [2003] HCA 12
 Re Australian Bank Employees Union; Ex parte Citicorp Australia Ltd (1989) 167 CLR 513
 Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82; [2000] HCA 57
 SAS Trustee Corporation v Miles (2018) 265 CLR 137; [2018] HCA 55
 Smith v Papamihail (1998) 88 FCR 80
 SZTAL v Minister for Immigration and Border Protection (2017) 262 CLR 362; [2017] HCA 34
 Thomas v Mowbray (2007) 233 CLR 307; [2007] HCA 33
 Water Conservation and Irrigation Commission (NSW) v Browning (1947) 74 CLR 492

Texts Cited:

Climate Change 2021: The Physical Science Basis
 Contribution of Working Group 1 to the Sixth Assessment
 Report of the Intergovernmental Panel on Climate Change
 Paris Agreement, opened for signature 22 April 2016
 [2016] ATS 24 (entered into force 4 November 2016)

Category:

Principal judgment

Parties:	Bushfire Survivors for Climate Action Incorporated (Applicant) Environment Protection Authority (Respondent)
Representation:	Counsel: Mr R Beasley SC, with Mr D Hume (Applicant) Mr S Free SC, with Mr O Jones (Respondent) Solicitors: Environmental Defenders Office (Applicant) Environment Protection Authority (Respondent)
File Number(s):	2020/106678
Publication restriction:	Nil

JUDGMENT

The dispute in a nutshell

- 1 A climate action group, Bushfire Survivors for Climate Action (BSCA), seeks an order in the nature of mandamus to compel an environmental regulatory agency, the Environment Protection Authority (EPA), to perform a statutory duty to develop environmental quality objectives, guidelines and policies to ensure the protection of the environment from climate change. The duty on the EPA is imposed by s 9(1)(a) of the *Protection of the Environment Administration Act 1991* (NSW) (POEA Act). In its terms, the provision requires the EPA to “develop environmental quality objectives, guidelines and policies to ensure environment protection”.
- 2 BSCA’s primary argument is that the purpose of environment protection includes protection of the environment from significant threats. BSCA argues one of the most significant threats, BSCA referred to it as “existential” and “grave”, is climate change. The environmental quality objectives, guidelines and policies to ensure environment protection that the EPA is required by s 9(1)(a) to develop should therefore include instruments of this kind to protect the environment in New South Wales from this threat of climate change. BSCA contends for a specific content of the duty. The duty requires developing not only instruments to ensure protection of the environment from climate change as a general proposition but more particularly to do so in ways that are “consistent with limiting global temperature rise to 1.5 degrees Celsius above pre-industrial levels.”
- 3 BSCA contends that the EPA has failed to develop such instruments to protect the environment in New South Wales from climate change. Whatever instruments the EPA has developed to ensure environment protection do not in fact ensure, and were not developed for the purpose of ensuring, the protection of the environment in New South Wales from climate change. In this respect, the duty imposed on the EPA by s 9(1)(a) of POEA Act remains unperformed.

- 4 BSCA seeks an order of the Court compelling the EPA to perform its duty to develop environmental quality objectives, guidelines and policies to ensure the protection of the environment in New South Wales from climate change.
- 5 BSCA's primary argument raises three issues: What is the nature and content of the duty imposed on the EPA by s 9(1)(a) of POEA Act? Is the EPA in breach of the duty under s 9(1)(a)? If so, what order should be made to remedy the breach of duty?
- 6 The EPA defends its conduct and contests BSCA's claim. As to the first issue of the nature and content of the duty, the EPA contends that the duty under s 9(1)(a) is to develop environmental quality objectives, guidelines and policies to ensure environment protection generally and not any particular aspect of environment protection, such as the protection of the environment from climate change. As a consequence, the EPA is not under a duty to develop instruments of the kind described in s 9(1)(a) to ensure the protection of the environment from climate change.
- 7 As to the second issue of the breach of duty, the EPA contends that if the duty in s 9(1)(a) does require the EPA to develop instruments to ensure the protection of the environment from climate change, it has done so. The EPA has developed numerous instruments to ensure environment protection in many ways, some of which incidentally regulate greenhouse gas emissions, such as methane from landfill. More directly, the EPA has developed a regulatory strategy, which identifies climate change as one of the regulatory challenges for the EPA and outlines the role the EPA foreshadows it will play in the solution to the challenge. The EPA contends that the development of these instruments is sufficient to perform its duty under s 9(1)(a).
- 8 As to the third issue of what order should be made if the Court finds that the EPA is in breach of its duty, the EPA contests the specificity of the order sought by BSCA. A mandamus can only compel the EPA to perform its duty to develop instruments of the kind described in s 9(1)(a), not to prescribe the particular content of the instruments.
- 9 BSCA put two secondary arguments in the alternative to its primary argument. The first went to the duty; the second went to the discretion to perform the duty. The first alternative argument was that the duty under s 9(1)(a) is a purposive duty: the EPA's duty is to develop environmental quality objectives, guidelines and policies for the purpose of environment protection. In the context of public law, a common means for identifying whether an instrument has a particular purpose is to ask whether the instrument is appropriate and adapted (sometimes described by expressions such as proportionality, reasonable proportionality or reasonable necessity) to the relevant purpose: see, eg, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 93-94; [1992] HCA 46; *Thomas v Mowbray* (2007) 233 CLR 307; [2007] HCA 33 at [135]; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 356; [1994] HCA 44; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18 at [74]; and *McCloy v State of New South Wales* (2015) 257 CLR 178; [2015] HCA 34 at [3]. On this construction, the EPA's duty is to develop all such policies which are adapted to, in the sense of reasonably necessary for, achieving the purpose of environment protection.

BSCA argues that the duty is unperformed because an obvious policy, which is reasonably necessary for achieving that purpose, is a policy addressing and mitigating against greenhouse gas emissions and climate change.

- 10 The second alternative argument arises if the EPA is not under a duty to develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change but nevertheless has a discretion to do so. BSCA contends that this discretion is subject to the constraint of unreasonableness. BSCA submits that the EPA is required to develop such environmental quality objectives, guidelines and policies to ensure environment protection that a reasonable authority would develop if the authority were endeavouring to ensure environment protection. BSCA notes that statutory discretions are, at least subject to contrary intention, subject to the implied limit that they must be exercised in a legally reasonable way: *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1; [2018] HCA 4 at [71]; *Minister for Immigration and Citizenship v Li* at [24], [29], [63], [88]-[90]; *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1; [2017] HCA 33 at [100]; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421; [2019] HCA 3 at [11]. BSCA submits that there is no reason to think that Parliament here would have intended otherwise. The scope of the unreasonableness limit depends on the construction of the statute in issue: *Minister for Immigration and Citizenship v Li* at [67]. Here, the statute is one which was clearly intended to impose a firm duty on the EPA in respect of environment protection. Further, a decision will often be unreasonable if it lacks an “evident and intelligible justification”: *Minister for Immigration and Citizenship v Li* at [76].
- 11 BSCA contends that, having regard to the gravity of the threat posed by climate change, with the EPA being charged to ensure environment protection, there is no evident or intelligible justification for the EPA not having developed a policy addressing climate change and its causes and consequences.
- 12 The EPA contested these two alternative arguments. As to the first, the EPA submits that the principle that a law must be adapted to, or reasonably necessary for, a purpose derives from the Commonwealth’s constitutional powers. If the Commonwealth has a power that can only be exercised for a particular purpose, then the law in question must be reasonably adapted to or proportionate to that purpose. The principle places a limit on the Commonwealth’s legislative power. The principle cannot be readily applied to s 9(1)(a) of the POEA Act so as to require every environmental quality objective, guideline or policy to be adapted to, or reasonably necessary for, serving the specified purpose of environment protection for which it is made.
- 13 As to the second alternative argument, the EPA notes up front that BSCA does not challenge or seek to quash any decision of the EPA that is said to involve a legally unreasonable exercise of the discretion to perform the duty under s 9(1)(a). Rather,

BSCA seeks an order in the nature of mandamus requiring the EPA to perform the duty to develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change.

- 14 In any event, the EPA submits the threshold for challenging the exercise of a discretion on the grounds of unreasonableness is very high. As the High Court explained in *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541; [2018] HCA 30, where review is sought on unreasonableness grounds the Court must not stray into evaluating for itself how it might exercise the discretion entrusted by statute to the decision maker. For that reason, the test for unreasonableness may be described as “necessarily stringent” (at [11]), “extremely confined” (at [52]), in “the realm of the extraordinary” (at [70]) or as being expressed in “strong terms” (at [135]).
- 15 The EPA further contends that any assessment about what “any rational decision maker” in the position of the EPA would do needs to take account of the policy context in which the EPA exercises its functions under the POEA Act. The EPA is subject to the control and direction of the Minister, under s 13(1) of the POEA Act. As a consequence, the actions of the EPA should be considered in the context of the policies adopted by the New South Wales Government. Two such policies are the NSW Climate Change Policy Framework, adopted in 2016, and the Net Zero Plan Stage 1: 2020-2030, adopted in 2020. As a statutory authority subject to the control and direction of the Minister, the EPA is entitled to take into account New South Wales government policy when determining what actions it should take in the exercise of its functions under the POEA Act.

The Court’s findings in a nutshell

- 16 Dealing with BSCA’s primary argument, I find that the duty under s 9(1)(a) of the POEA Act to develop environmental quality objectives, guidelines and policies to ensure environment protection, in the current circumstances, includes a duty to develop instruments of the kind described to ensure the protection of the environment in New South Wales from climate change, although this does not demand that such instruments contain the level of specificity contended for by BSCA, such as regulating sources of greenhouse gas emissions in a way consistent with limiting global temperature rise to 1.5°C above pre-industrial levels. The EPA has a discretion as to the specific content of the instruments it develops under s 9(1)(a) to ensure the protection of the environment from climate change.
- 17 I find that the EPA has not fulfilled this duty under s 9(1)(a) to develop instruments of the kind described to ensure the protection of the environment from climate change. None of the documents on which the EPA sought to rely is an instrument for the purposes of s 9(1)(a) to ensure the protection of the environment from climate change.
- 18 An order in the nature of mandamus should therefore be made to compel the EPA to perform its duty. The terms of the order should reflect the content of the duty that I have found, so that the EPA should be ordered to develop environmental quality objectives,

guidelines and policies to ensure environment protection from climate change.

- 19 This resolution of BSCA's primary argument makes it unnecessary to decide BSCA's secondary arguments, which were put in the alternative to the primary argument. Nevertheless, aspects of the proper construction of s 9(1)(a) raised by BSCA's secondary arguments and the EPA's defence to these arguments are addressed in my determination of the primary argument.

The duty under s 9(1)(a) of the POEA Act

- 20 The nature and scope of the duty imposed by s 9(1)(a) of the POEA Act, and any discretion to perform the duty, are to be construed by reference to the text of s 9(1)(a), considered in light of its context and purpose: *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362; [2017] HCA 34 at [14]; *SAS Trustee Corporation v Miles* (2018) 265 CLR 137; [2018] HCA 55 at [20], [41], [64]. Where the Court is undertaking judicial review of administrative conduct, this task of statutory construction is "to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less": *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; [2000] HCA 5 at [56] and see *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; [2000] HCA 57 at [55].
- 21 In the present case, the administrative function the subject of judicial review is a duty not a power and the focus of the review is on the performance or non-performance of the duty. In question are the action that the duty requires to be taken and the legal effect that is given to that action by the statute. An administrative decision or action only has such force and effect as is given to it by the statute pursuant to which it was made or taken: *Minister for Immigration v Bhardwaj* (2002) 209 CLR 597; [2002] HCA 11 at [46]. Thus, action taken in accordance with a statutory provision imposing a duty will have the legal effect given to that action by the statute. But action taken otherwise than in accordance with the statutory provision imposing the duty will not have legal effect or consequence under the statute.
- 22 I will begin the task of statutory interpretation by construing the terms by which s 9(1)(a) imposes the duty: first, the duty "to develop"; second, "objectives, guidelines and policies"; third, with the character of "environmental quality"; and fourth, for the purpose "to ensure environment protection". I will next examine the nature and scope of the discretion to perform this duty, and the controls on the exercise of the discretion. I will finally examine the legal application of the meaning of the statutory provision imposing the duty and conferring the discretion to perform the duty, as interpreted, to the facts of this case to determine whether the duty requires the EPA to develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change.

The duty to develop

- 23 The POEA Act has three objects:
- “(a) to constitute the Environment Protection Authority,
 - (b) to provide integrated administration for environment protection,
 - (c) to require the Authority to perform particular tasks in relation to the quality of the environment, environmental audit and reports on the state of the environment” (s 4).
- 24 The particular tasks the EPA is required to perform, referred to in the third object, relate to three matters: the quality of the environment, environmental audit and reports on the state of the environment. The first task relating to environmental quality is required by s 9(1); the second task relating to environmental audit is required by s 9(2); and the third task relating to reports on the state of the environment is required by s 10. This case is concerned with the EPA’s performance of the first task relating to environmental quality, required by s 9(1).
- 25 Section 9(1) requires the EPA to perform two tasks in relation to the quality of the environment: first, to develop certain instruments to ensure environment protection and, secondly, to monitor the state of the environment for the purpose of assessing trends and the achievement of the instruments it has developed. Section 9(1) provides:
- “The Authority is required to—
 - (a) develop environmental quality objectives, guidelines and policies to ensure environment protection, and
 - (b) monitor the state of the environment for the purpose of assessing trends and the achievement of environmental quality objectives, guidelines, policies and standards.”
- 26 The subsection imposes a duty on the EPA – the EPA “is required” – to perform the particular tasks in paragraphs (a) and (b). The task in paragraph (a) is to “develop” objectives, guidelines and policies of a particular character, “environmental quality”, and for a particular purpose, “to ensure environment protection”. To “develop” such objectives, guidelines and policies is “to bring into being or activity; generate” (Macquarie Dictionary) these instruments.
- 27 The object of the action to develop is the particular objective, guideline or policy that is developed. The subject of the action to develop is the EPA who develops the objective, guideline or policy. The EPA cannot delegate the duty to develop objectives, guidelines and policies to any other person or body. This means that objectives, guidelines or policies developed by a person or body other than the EPA cannot be objectives, guidelines or policies for the purposes of s 9(1)(a) of the POEA Act.

The instruments of objectives, guidelines and policies

- 28 The instruments that the EPA is required to develop under paragraph (a) are threefold: objectives, guidelines and policies. I refer to these collectively as instruments as they need to be in writing. This flows not only from the nature of the class of “objectives, guidelines and policies” and the nature of each individual member of the class, but also from the power of the EPA under s 8(f) of the POEA Act to invite and consider public submissions when it develops objectives, guidelines and policies under s 9, as public notice and comment needs to be in relation to written instruments.

- 29 The instruments that the EPA is required to monitor under s 9(1)(b) include the three instruments that the EPA is required to develop under s 9(1)(a) together with another type of instrument, “standards”. Standards will also be in writing. The EPA is not required by s 9(1)(a) to develop standards, but one of the objectives of the EPA is to reduce the risks to human health and prevent the degradation of the environment by means such as “adopting minimum environmental standards prescribed by complementary Commonwealth and State legislation and advising the Government to prescribe more stringent standards where appropriate” (s 6(1)(b) of the POEA Act. Standards can be adopted by this process.
- 30 The nature and content of each of the instruments referred to in paragraphs (a) and (b) are not defined in the POEA Act. They will bear their ordinary meaning. An objective is “an end towards which efforts are directed; something aimed at” (Macquarie Dictionary). A guideline is “a statement which defines policy or the area in which a policy is operative” (Macquarie Dictionary). A policy is “1. a definite course of action adopted as expedient or from other considerations. 2. a course or line of action pursued by a government, ruler, political party, or the like” (Macquarie Dictionary). A content requirement common to all three instruments is the need for specification of some outcome, standard or course of action to achieve the instrument.
- 31 This content requirement is confirmed by the requirement of paragraph (b) for the EPA to monitor the achievement of the objectives, guidelines and policies developed under paragraph (a). The EPA can only monitor what it can measure, whether quantitatively or qualitatively. Outcomes, standards and courses of action are able to be measured and monitored, so as to enable an assessment of whether the objectives, guidelines, policies and standards are being achieved.
- 32 Returning to the instruments that the EPA is required by s 9(1)(a) to develop, although the instruments are joined by the word “and”, that word does not have a conjunctive or cumulative effect, so as to require the EPA to develop all three instruments in relation to an aspect of environment protection, but rather the word has a disjunctive or dispersive effect, so as to require the EPA to develop one or more of the instruments in relation to an aspect of environment protection. The word “and” can be read for “or” if the text, context and purpose of the statutory provision suggests such an interpretation: *Smith v Papamihail* (1998) 88 FCR 80 at 88–9.
- 33 This disjunctive effect is corroborated by how the instruments are referred to in s 8(f) of the POEA Act. That provision empowers the EPA to invite and consider public submissions “when it develops objectives, guidelines or policies under section 9.” The disjunctive word “or” conveys that the EPA may develop one or more of the objectives, guidelines or policies under s 9(1).
- 34 The instruments that can be developed by the EPA under s 9(1) are also not mutually exclusive, but may be combined. A guideline, by its ordinary meaning, can define the area in which a policy is operative. A policy may include an objective or a standard.

The character of environment quality

35 The objectives, guidelines and policies developed under s 9(1)(a) must be of a certain character, that of relating to “environmental quality”. As noted, s 9(1) is the source of the requirement on the EPA to perform the particular tasks stated in the subsection “in relation to the quality of the environment”, being the third object of the POEA Act stated in s 4. Although the expressions “environmental quality” or “the quality of the environment” are not defined in the POEA Act, the word “environment” is defined:

“**environment** means components of the earth, including—

- (a) land, air and water, and
- (b) any layer of the atmosphere, and
- (c) any organic or inorganic matter and any living organism, and
- (d) human-made or modified structures and areas,

and includes interacting natural ecosystems that include components referred to in paragraphs (a)–(c).” (s 3(1)).

36 Environmental quality or the quality of the environment refers, therefore, to the quality of these components of the earth, including interacting natural ecosystems that include the components referred to in paragraphs (a) to (c).

37 The adjectival phrase “environmental quality” in s 9(1)(a) and (b) qualifies each of the nouns that follow the phrase and not merely the first noun in the collocation. Hence, each of the objectives, guidelines and policies in paragraph (a) and each of the objectives, guidelines, policies and standards in paragraph (b) need to be in relation to “environmental quality” or “the quality of the environment”.

The purpose to ensure environment protection

38 The duty under s 9(1)(a) is to develop objectives, guidelines and policies not only of a particular character, being of “environmental quality”, but also for a particular purpose, “to ensure environment protection”. This phrase, “to ensure environment protection”, is normative, that is to say, it establishes an evaluative standard or norm for the objectives, guidelines and policies. There are two components: the action “to ensure” and the object of the action “environment protection”.

39 The verb “ensure” bears its ordinary meaning of “2. to make sure or certain to come, occur, etc 3. to make secure or safe, as from harm” (Macquarie Dictionary). BSCA referred to Muir J’s observation that the word “ensure” “has its normal everyday meaning of ‘make certain’ or ‘make sure’”: *Mount Isa Mines Ltd v Peachey* [1998] QCA 400 at [15]. BSCA relied on Edelman J’s statement that “a duty to ‘ensure’ compliance is a duty to strict liability”: *ASIC v Cassimatis (No 8)* (2016) 336 ALR 209; [2016] FCA 1023 at [529]. The EPA contested that the duty can be classified as one of strict liability, citing *Manglicmot v Commonwealth Bank Officers Superannuation Corporation Pty Ltd* (2011) 282 ALR 167; [2011] NSWCA 204 at [121].

The object of the action to ensure is “environment protection”. “Environment protection” is defined in s 3(1) of the POEA Act to include “anything which furthers the objectives of the Authority as set out in section 6.” Two points should be noted about this definition. First, it is an inclusive not an exhaustive definition. The ordinary meaning of the words “environment protection” is extended by the definition to include anything which furthers the objectives of the EPA, but the meaning of the words is not limited to doing those things. The ordinary meaning of “environment protection” is simply the protection of the environment. As I have earlier noted, “environment” is defined widely in s 3(1) of the POEA Act to include all the abiotic and biotic components of the earth. Importantly, for this case, the abiotic components include the “air” and “any layer of the atmosphere”. “Environment protection” is necessarily therefore a wide concept, referring to any action to protect the environment by such means as conserving the environment, preventing and remedying harm to the environment, and restoring the quality of the environment. Secondly, this extended definition refers to environment protection as being anything that “furthers” the objectives of the EPA, rather than being the objectives of the EPA as such.

- 41 The objectives of the EPA set out in s 6(1) are twofold. The first objective is “to protect, restore and enhance the quality of the environment in New South Wales, having regard to the need to maintain ecologically sustainable development” (s 6(1)(a)). The concept of “ecologically sustainable development” is defined in s 6(2):

“For the purposes of subsection (1) (a), ecologically sustainable development requires the effective integration of social, economic and environmental considerations in decision-making processes. Ecologically sustainable development can be achieved through the implementation of the following principles and programs—

(a) the precautionary principle—namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

In the application of the precautionary principle, public and private decisions should be guided by—

(i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and

(ii) an assessment of the risk-weighted consequences of various options,

(b) inter-generational equity—namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations,

(c) conservation of biological diversity and ecological integrity—namely, that conservation of biological diversity and ecological integrity should be a fundamental consideration,

(d) improved valuation, pricing and incentive mechanisms—namely, that environmental factors should be included in the valuation of assets and services, such as—

(i) polluter pays—that is, those who generate pollution and waste should bear the cost of containment, avoidance or abatement,

(ii) the users of goods and services should pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any waste,

(iii) environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, that enable those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems.”

There are three points to note about this first objective of the EPA in s 6(1), as expanded by s 6(2). The first is that the verbs “protect, restore and enhance” each require the EPA to take positive action. The second is that the object of such action is “the quality of the environment in New South Wales”. This is what needs to be protected, restored and enhanced.

43 The third is that the taking of such action for this purpose is to be done having regard to “the need to maintain ecologically sustainable development”. In order to “maintain” ecologically sustainable development, it must first be achieved. Section 6(2) explains that ecologically sustainable development can be achieved through the implementation of the principles and programs set out in s 6(2), being the precautionary principle, intergenerational equity, conservation of biological diversity and ecological integrity, and improved valuation, pricing and incentive mechanisms, including the polluter pays principle.

44 The first objective of the EPA, therefore, is for the EPA to take action to protect, restore and enhance the quality of the environment in New South Wales in ways that are consistent with achieving and maintaining ecologically sustainable development.

45 The second objective of the EPA in s 6(1) is “to reduce the risks to human health and prevent the degradation of the environment” by various means. The objective of the EPA in s 6(1)(b) is:

“to reduce the risks to human health and prevent the degradation of the environment, by means such as the following—

- promoting pollution prevention,
- adopting the principle of reducing to harmless levels the discharge into the air, water or land of substances likely to cause harm to the environment,
- minimising the creation of waste by the use of appropriate technology,
- regulating the transportation, collection, treatment, storage and disposal of waste,
- encouraging the reduction of the use of materials, encouraging the re-use and recycling of materials and encouraging material recovery,
- adopting minimum environmental standards prescribed by complementary Commonwealth and State legislation and advising the Government to prescribe more stringent standards where appropriate,
- setting mandatory targets for environmental improvement,
- promoting community involvement in decisions about environmental matters,
- ensuring the community has access to relevant information about hazardous substances arising from, or stored, used or sold by, any industry or public authority,
- conducting public education and awareness programs about environmental matters.”

46 Similar points can be noted about this second objective as I have noted for the first objective. First, the verbs “reduce” and “prevent” require the taking of positive action by the EPA. Secondly, the objects of these actions are, for the action to reduce, “the risks to human health”, and for the action to prevent, “the degradation of the environment”. Thirdly, the means by which these objects are to be achieved also require the taking of positive action by the EPA, such as “promoting pollution prevention” and “setting mandatory targets for environmental improvement”.

47

Together, the action “to ensure” and the object of the action “environment protection” establish the evaluative standard or norm in accordance with which environmental quality objectives, guidelines and policies need to be developed. The duty under s 9(1) (a) is not to ensure environment protection in itself, but rather to develop environmental quality objectives, guidelines and policies to ensure environment protection. That is to say, ensuring environment protection is the norm with which, and the end towards which, the EPA is required to develop environmental quality objectives, guidelines and policies.

The discretion in performing the duty

- 48 I have explained in the previous sections the nature and scope of the duty imposed by s 9(1)(a) of the PEOA Act. The performance of the duty involves discretion. I now will explore the nature and scope of this discretion. The discretion to perform the duty is limited by the terms in which the duty is imposed. There is no discretion as to whether or why the duty is to be performed. There is no discretion as to whether any environmental quality objectives, guidelines and policies to ensure environment protection need to be developed because there is a duty on the EPA to do so, and there is no discretion as to why environmental quality objectives, guidelines and policies need to be developed because the duty requires such instruments to be developed to ensure environment protection.
- 49 There is a limited discretion as to when, what and how the duty is to be performed. When do the circumstances demand that the EPA must develop particular environmental quality objectives, guidelines and policies to ensure environment protection? What type of instrument – an environmental quality objective, guideline or policy – should be developed? What should be the subject matter of environment protection in respect of which such an instrument should be developed? How should the selected instrument address the selected subject matter?
- 50 The answers to such questions are within the discretion of the body on whom the duty is imposed, the EPA. As the EPA submitted, “the number, content and nature of the particular objectives, guidelines and policies to be developed was intended to be a matter for the EPA to determine in the exercise of its discretion” (Respondent’s Written Submissions at [16]).

The controls on the exercise of the discretion

- 51 There are controls on the discretion afforded to the EPA in its performance of the duty. The primary controls on the discretion derive from the terms in which the duty is imposed, as I have earlier explained. These operate to ensure that any action taken in purported exercise of the duty will only have legal effect for the purposes of the statutory provision if the action is in accordance with the statutory provision imposing the duty. Thus, a document that does not answer the statutory description of being

“objectives, guidelines and policies”, with the character of “environmental quality” and for the purpose “to ensure environment protection” will have no legal effect or consequence under s 9(1)(a).

- 52 There is one further control that operates to prevent an abuse of the discretion to perform the duty under s 9(1)(a), which relates to administrative competence. Instruments of the nature, character and purpose required by s 9(1)(a) must be developed by the EPA, a specialist statutory body constituted with objectives and functions to protect the environment. I have earlier explained the objectives of the EPA. The EPA has the functions conferred or imposed by the POEA Act, the environment protection legislation and other legislation (s 7(1) POEA Act). The EPA has the general responsibility for the functions conferred by s 7(2), including “(a) ensuring that best practicable measures are taken for environment protection in accordance with the environment protection legislation and other legislation”. The powers of the EPA include the general powers conferred by s 8 of the POEA Act, such as to formulate and create plans for environment protection (s 8(a)). The EPA has the duties relating to environmental quality imposed by s 9(1), the duty for environmental audit imposed by s 9(2) and the duty to report on the state of the environment imposed by s 10 of the POEA Act. The EPA has the power to advise public authorities on performance targets relating to environment protection (s 11) and to direct authorities to do anything within the power of the public authority which will contribute to environment protection (s 12).
- 53 These objectives and functions of the EPA vest it with expert administrative competence in environment protection. Section 9(1) seeks to employ this expert administrative competence by imposing on the EPA the duty to develop environmental quality objectives, guidelines and policies to ensure environment protection. This requirement for expert administrative competence is a positive control on the discretion to perform the duty in s 9(1)(a). The discernible legislative intention is that the discretion to perform the duty is less likely to be abused if it is exercised by a public authority who has expertise in environment protection.
- 54 To these controls deriving from the statutory construction of the statutory provision imposing the duty may be added the usual implied limitations on the exercise of a statutory discretion. These include those identified by Gibbs J in *Buck v Bavone* (1976) 135 CLR 110 at 118; [1976] HCA 24:
- “In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it.”
- 55 The last mentioned constraint on the exercise of discretion is one of avoidance of unreasonableness, not only in the sense of *Wednesbury* unreasonableness (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB

223), that the decision is so unreasonable that no reasonable person could have arrived at it, but also in the sense used in *Minister for Immigration and Citizenship v Li* of a decision lacking an evident and intelligible justification.

- 56 This constraint of unreasonableness is derived from “the framework of rationality imposed by the statute...[and] it reflects a limitation imputed to the legislature on the basis of which courts can say that Parliament never intended to authorise that kind of decision”: *Minister for Immigration and Citizenship v Li* at [28] and see also at [88]. The legal standard of reasonableness that applies to constrain the exercise of its statutory discretion is the standard indicated by the proper construction of the statute. “It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused”: *Minister for Immigration and Citizenship v Li* at [67]. Implication of unreasonableness as a condition of the exercise of a statutory discretion “is a manifestation of the general and deeply rooted common law principle of construction that such decision-making authority as is conferred by statute must be exercised according to law and to *reason* within limits set by the subject matter, scope and purpose of the statute”: *Minister for Immigration and Citizenship v Li* at [90].
- 57 The implied condition of reasonableness is not confined to why a statutory decision is made, the outcome or result, but also extends to how the statutory decision was made, so that a decision may be unreasonable if it “lacks an evident and intelligible justification” or is “so devoid of plausible justification that no reasonable person could have taken that course”: *Minister for Immigration and Citizenship v Li* at [76], [91].
- 58 The controls on the exercise of the discretion to perform the duty under s 9(1)(a) are, therefore, much greater than only the control of unreasonableness for which the EPA contended. The EPA contended that the discretionary power to perform the duty is subject to the constraint only of unreasonableness, both in the sense of *Wednesbury* unreasonableness and in the sense explained in *Minister for Immigration and Citizenship v Li*. That contention is incorrect. There are the constraints on the exercise of the discretion to perform the duty, as well as the positive control of requiring the body performing the duty to have expert administrative competence, all deriving from the terms of the statutory provision imposing the duty. There are also the implied limitations on the exercise of the discretion, only one of which is unreasonableness. Common to all these controls is that they are to be derived by a proper construction of the statutory provision, s 9(1)(a) of the POEA Act, which imposes the duty and confers the discretion to perform the duty. The statutory provision defines and governs the exercise of the duty and the discretion.
- 59 In a case such as the present where the body on whom the duty is imposed contends that it has performed the duty, the focus of the Court, in judicially reviewing the purported performance of the duty, will be on whether the action taken by the body meets the description of the action to which the statutory provision attaches a legal consequence, which in this case is to develop environmental quality objectives,

guidelines and policies to ensure environment protection. If what has been done by the EPA does not have all the characteristics implicit in the statutory description of the action required by s 9(1)(a), the action taken by the EPA will be without legal consequence for the purpose of the statutory provision and the duty imposed by the statutory provision will remain unperformed. This inquiry goes beyond the limited inquiry for which the EPA contended, of merely checking whether the exercise of the EPA's discretion was unreasonable in any relevant sense.

Environment protection from climate change

- 60 BSCA contends that the duty under s 9(1)(a) to develop environmental quality objectives, guidelines and policies “to ensure environment protection” includes a duty to develop such instruments to ensure environment protection from climate change. BSCA refers to the evidence of Professor Penny Sackett, and the reports of the Intergovernmental Panel on Climate Change (IPCC), including the recently released Climate Change 2021: The Physical Science Basis. Contribution of Working Group 1 to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change. Professor Sackett described climate change as “the greatest threat to the environment and people of New South Wales”. BSCA submits that “environment protection” necessarily includes protection of the environment in New South Wales from climate change. This follows not only from the ordinary meaning of “environment protection” but also from the extended meaning of “environment protection” in s 3(1) of the POEA Act. Actions to protect the environment in New South Wales from climate change meet the description of being anything which furthers the objectives of the EPA set out in s 6(1).
- 61 Such actions further the first objective “to protect, restore and enhance the quality of the environment in New South Wales, having regard to the need to maintain ecologically sustainable development”. The environment is defined to include the “air” and “any layer of the atmosphere”, both of which are adversely affected by the cause of climate change of the anthropogenic emissions of greenhouse gases. Professor Sackett’s evidence, and the IPCC Reports and scientific articles to which she refers, establish that the emission of greenhouse gases is a grave threat to the atmosphere and climate systems. The atmosphere and climate systems interact with, support, and impact on other components of the earth and its natural ecosystems, including land, air and water; organic or inorganic matter and any living organism; and human-made or modified structures and areas. Protection of the environment against the threat of greenhouse gas emissions must entail mitigation of the sources of greenhouse gas emissions; adaptation to climate change is insufficient as it is not directed to protection of the atmosphere. Protection of the environment from climate change implements the principles of ecologically sustainable development, including the precautionary principle, intergenerational equity, conservation of biological diversity and ecological

integrity, and the polluter pays principle, thereby enabling the achievement and maintenance of ecologically sustainable development: *Gloucester Resources Ltd v Minister for Planning* (2019) 234 LGERA 257; [2019] NSWLEC 7 at [488], [498].

62 BSCA submits that actions to protect the environment from climate change also further the second objective of the EPA in s 6(1) “to reduce the risks to human health and prevent the degradation of the environment” by means such as those specified in s 6(1) (b). The first two means specified are broad enough to include the prevention and reduction of emissions of greenhouse gases, which are a pollutant, by sources, while the seventh means is broad enough to allow for setting mandatory targets for the amount and rate of reduction of greenhouse gas emissions by sources.

63 The EPA did not contest that the purpose in s 9(1)(a) “to ensure environment protection” was not sufficiently wide so as to enable the EPA to develop environmental quality objectives, guidelines and policies to protect the environment in New South Wales from climate change. Indeed, the EPA argued that it had developed instruments for that very purpose. The EPA’s argument was, however, that the duty in s 9(1)(a) did not demand that the EPA develop instruments to ensure the environment in New South Wales is protected from climate change. Whatever objectives, policies and guidelines the EPA might choose to develop is a matter within the EPA’s discretion.

64 I reject the EPA’s construction of s 9(1)(a) of the POEA Act. In the drafting of the duty in s 9(1)(a), the legislature has chosen to use words and phrases that are “of indeterminate scope and of a high level of generality”: *Deputy Commissioner of Taxation v Clark* (2003) 57 NSWLR 113; [2013] NSWCA 91 at [142]. The instruments that the EPA is required to develop are described broadly as “objectives, guidelines and policies”, which should have the character of “environmental quality” and be for the purpose “to ensure environment protection”. The use of such general language in the statutory provision reveals a legislative intention that the application of the language in the statutory provision should be regarded as ambulatory, capable of picking up changes in the subject matter as they occur from time to time: *R v Gee* (2003) 212 CLR 230; [2003] HCA 12 at [7]; *Deputy Commissioner of Taxation v Clark* at [139], [142].

65 This does not mean that the meanings of the words and phrases that make up the duty in s 9(1)(a) change, but only that the context or application of the meanings of those words and phrases to the facts and circumstances prevailing at the time and place changes. As Lord Bingham of Cornhill observed in *R v G and another* [2004] 1 AC 1034; [2003] UKHL 50 at [29]:

“Since a statute is always speaking, the context or application of a statutory expression may change over time, but the meaning of the expression itself cannot change.”

66 Having regard to its general and ambulatory language, s 9(1)(a) of the POEA Act should be construed as “always speaking”, allowing the duty to embrace changes in the threats to the environment in New South Wales. 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.

- 67 For instance, the pollutants of yesteryear, with their concomitant threats to the environment and risks to human health, may no longer be the pollutants of today, which pose different threats to the environment and different risks to human health. The environmental quality objectives, guidelines and policies that s 9(1)(a) would have required be developed to ensure environment protection from the pollutants of yesteryear may not be the environmental quality objectives, guidelines and policies that s 9(1)(a) now requires to be developed to ensure environment protection from the pollutants of today.
- 68 What is required to perform the duty in s 9(1)(a), therefore, will evolve over time and place in response to the changes in the threats to the environment. This may make it difficult to describe definitively what the duty requires at any particular time or place, because it requires identification of the current threats to the environment. Nevertheless, it should always be possible to identify the current threats that are of greater magnitude and greater impact. This means that, at a minimum, the duty under s 9(1)(a) will require the development of environmental quality objectives, guidelines and policies to ensure the protection of the environment from threats of greater magnitude and greater impact.
- 69 On the evidence, at the current time and in the place of 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. Indeed, this has been recognised by the EPA. One of the instruments on which the EPA relied was its Regulatory Strategy 2021-24, which identified climate change as one of the challenges facing the environment in New South Wales and the EPA. In these circumstances, the duty in s 9(1)(a) to develop environmental quality objectives, guidelines and policies to ensure environment protection requires the development of such instruments to ensure environment protection from climate change.

The specificity of the duty to ensure environment protection from climate change

- 70 BSCA argues that the environmental quality objectives, guidelines and policies that need to be developed must not only ensure environment protection from climate change generally, but more particularly such instruments must:

- “(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 preindustrial 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.” (paragraph 37 of the Points of Claim).

- 71 The foundation for BSCA’s argument that the environmental quality objectives, guidelines and policies to ensure environment protection, which the EPA is required to develop, must contain these specific matters lies in the evidence of Professor Sackett, and the IPCC reports and scientific articles to which she referred.
- 72 BSCA relies firstly on the evidence of the causes of climate change to establish the object of the actions that the environmental quality objectives, guidelines and policies require to be taken, in particular, to reduce the amount of greenhouse gas emissions by sources. Professor Sackett in her first report of 5 March 2021 summarised the causes of climate change in the executive summary as follows:

“7) Greenhouse gases (GHGs) trap some of the radiation from the Sun warming the surface of the Earth. Human activities are upsetting a long-standing balance in these gases, adding energy via global warming that fuels changes in the global climate.

8) The primary greenhouse gases driving current anthropogenic (human-caused) climate change are carbon dioxide (CO₂), methane (CH₄), and nitrous oxide (N₂O). Most of the carbon dioxide that is not absorbed quickly by ocean and land ‘sinks’ will remain in the atmosphere for thousands of years. This means that the full effect of past and present emissions is yet to be felt.

9) Current levels of CO₂, CH₄ and N₂O in the atmosphere are 146%, 257% and 122%, respectively, of their pre-industrial levels around 1850. Increased concentration of CO₂ in the atmosphere caused by human activity is the most important contributor to global warming and climate change. Carbon dioxide levels are higher now than any other time our species has inhabited the Earth. At present, 85-90% of the additional CO₂ emitted per year is from the burning of fossil fuels: coal, gas, and oil; all of these major sources of emissions continue to rise.

10) Nearly all of the warming experienced in past 160 years is due to human activities. Since 1970, the average global surface temperature has been changing at a rate 200times faster than anytime in the last 7,000 years.

11) Reducing net anthropogenic GHG emissions to zero and maintaining them at that level is the only way that humans can stabilize the climate. The primary determinant of future climate change, is the trajectory of world emissions, especially the path between now and 2030. Restrictions imposed in response to COVID-19 will have negligible impacts in terms of climate change.” (see for a fuller explanation section 3.1 and 3.2).

- 73 BSCA relies secondly on the evidence of the consequences of climate change to the environment and peoples of the world, Australia and New South Wales in particular. Professor Sackett explained the adverse effects that global warming has already caused, noting that the global average temperature for 2019 has increased by 1.1°C above pre-industrial levels for the world, Australia and New South Wales (in section 3.3.1, 3.3.2 and 3.3.3 of the Sackett First Report). Professor Sackett opined that many individual extreme events can be directly linked to climate change. She gave the examples of the devastating Australian 2019/2020 bushfires, which were at least 30% more likely because of climatic changes caused by humans, and the widespread coral bleaching of the Great Barrier Reef during 2016, which was made 175 times more likely by climate change (in section 3.3.4 and 3.3.5). Professor Sackett explained the likely future adverse effects for the world, Australia and New South Wales if the global average temperature continues to increase by 2°C, 3°C or 4°C above pre-industrial levels (section 5.1, 5.2 and 5.3).
- 74 Professor Sackett concluded her evidence and analysis of climate change and its consequences by saying that:

"[I]t is reasonable to state that unabated climate change is the greatest threat to the environment and people of New South Wales." (at [53] and [263] of Sackett First Report and [20] of the Sackett Fourth Report of 10 August 2021).

75 Professor Sackett's reason for this conclusion included, in summary, that:

"Unabated anthropogenic climate change is:

- a) Fundamental - affecting basic aspects of the physical Earth system, and the ecosystems that depend on it,
- b) Global - greenhouse gases emitted anywhere in the world affect the whole globe,
- c) Comprehensively Dangerous - with the potential to disrupt/destroy every ecosystem,
- d) Rapid - occurring at a speed that precludes many organisms and even whole ecosystems from adapting,
- e) Inertial - with a delayed response to emissions that "locks in" some measure of climate change that is greater than that currently experienced,
- f) Compounding - the effects of climate change can occur simultaneously, greatly increasing the negative consequences of extreme events,
- g) Irreversible - feedbacks in the Earth System have the potential to irreversibly change ecosystems and processes in the Earth system." (at [52] of the Sackett First Report and see further section 6).

76 Professor Sackett's evidence and analysis of the causes and consequences of climate change, and conclusion concerning the severity of the threat to the environment and people of New South Wales posed by climate change, were not contested by the EPA. The EPA and BSCA agreed a statement of facts regarding the causes and consequences of climate change:

"1 Emissions of carbon dioxide (**CO₂**) and other greenhouse gases from human activity (including power generation, industry, transport and agriculture) cause a build-up of greenhouse gases in the atmosphere.

2 The build-up of greenhouse gases in the atmosphere traps heat.

3 The build-up of greenhouse gases in the atmosphere leads to global warming, also known as climate change.

4 Anthropogenic greenhouse gas emissions contribute to anthropogenic climate change.

5 Once emitted, greenhouse gases disperse throughout the global atmosphere where they act cumulatively to contribute to anthropogenic climate change.

6 Anthropogenic climate change has the potential to adversely alter all aspects of the natural environment.

7 Anthropogenic climate change has the potential to irreversibly alter all aspects of the natural environment.

8 Direct and indirect greenhouse gas emissions from activities in New South Wales impact on the environment.

9 NSW and Queensland are the two main producing states for black coal in Australia.

10 Australia is one of the world's largest producers and exporters of coal.

11 Global average surface temperature is approximately 1 degree Celsius (°C) higher than pre-industrial levels as at June 2020.

12 Australia's climate has warmed by just over 1°C since 1910.

13 2019 was Australia's warmest and driest year on record.

14 Globally, 2019 was the warmest year on record without the influence of El Niño.

15 As of 2018, eight of Australia's top ten warmest years on record had occurred since 2005.

16 As of 2018, sea surface temperature in the Australian region has warmed by around 1°C since 1910.

17 Eight of the ten warmest years for sea surface temperature on record have occurred since 2010 as at June 2020.

18 Anthropogenic greenhouse gas emissions have caused changes in the basic circulation patterns of the atmosphere and the ocean.

19 Anthropogenic greenhouse gas emissions have caused increases in intensity and frequency of many extreme weather events.

20 Anthropogenic greenhouse gas emissions have caused increases in acidity of the oceans.

21 Anthropogenic greenhouse gas emissions have caused rise in sea levels and consequent increases in coastal flooding.

22 Anthropogenic greenhouse gas emissions have caused intensification of the hydrological cycle.

23 Anthropogenic greenhouse gas emissions have caused increases in the frequency and/or duration of heat waves.

24 Anthropogenic greenhouse gas emissions have caused increases in the intensity and/or duration of drought.

25 Anthropogenic greenhouse gas emissions have caused or contributed to an increase in the frequency of extreme heat events in Australia.

26 Anthropogenic greenhouse gas emissions have caused or contributed to a decrease in April to October rainfall of approximately 11 per cent since the late 1990s.

27 Anthropogenic greenhouse gas emissions have caused or contributed to sea levels rising around Australia.

28 Warming of the ocean around Australia has contributed to longer and more frequent marine heatwaves.

29 Anthropogenic greenhouse gas emissions have caused or contributed to marine heatwaves and mass bleaching events on the Great Barrier Reef in 2016 and 2017.

30 Oceans around Australia are acidifying.

31 Acidification of oceans has led to a reduction in coral calcification and growth rates on the Great Barrier Reef, which impacts recovery from coral bleaching.

32 The climate of New South Wales is changing due to global warming.

33 Anthropogenic greenhouse gas emissions have caused a 1°C increase in average temperature in New South Wales as between the period 1960–90 and 1990 to 2018.

34 Anthropogenic greenhouse gas emissions have caused the number of hot days across NSW to increase since the mid-20th century.

35 Anthropogenic greenhouse gas emissions have caused the number of cold nights (temperatures dropping to less than 2°C overnight) to decrease since the mid-20th century.

36 In the period 1911–2013, heatwaves in parts of NSW have become longer, hotter and more frequent.

37 Australia is a signatory to the Paris Agreement.

38 Climate change cannot meaningfully be addressed without multiple local actions to mitigate emissions by sources and remove greenhouse gas emissions by sinks.

39 Global greenhouse gas emissions are currently rising.

40 If there is a 1.5-2.0°C temperature rise (relative to the period 1850-1900), the risk of widespread impacts on the most vulnerable would rise from moderate towards high.

41 If there is a 1.5-2.0°C temperature rise (relative to the period 1850-1900), the aggregated impacts of climate change around the world will increase political tensions and instabilities.

42 If there were a 4°C temperature rise (relative to the period 1850-1900) above preindustrial levels, there is a high to very high risk that most of the world's ecosystems would be heavily damaged or destroyed.

43 If there were a 4°C temperature rise (relative to the period 1850-1900) above preindustrial levels, extreme weather events would be far more severe and frequent than today.

44 If there were a 4°C temperature rise (relative to the period 1850-1900) above preindustrial levels, the most vulnerable people would increase greatly in number and, as large areas of the world become uninhabitable, migration and conflict would escalate.

45 If there were a 4°C temperature rise (relative to the period 1850-1900) above preindustrial levels the aggregated impacts around the world would significantly damage the entire global economy.

46 If there were a 4°C temperature rise (relative to the period 1850-1900) above preindustrial levels, a cascade of intrinsic tipping points in the climate system could drive ongoing strong warming even if action was taken to reduce emissions.”

- 77 Based on this evidence, BSCA argues that the duty under s 9(1)(a) of the POEA Act to develop environmental quality objectives, guidelines and policies to ensure environment protection thereby includes a duty to develop such instruments to ensure the environment in New South Wales is protected from climate change.
- 78 BSCA relies thirdly on the evidence of the outcomes and objectives that need to be achieved to address these causes and consequences of climate change. Professor Sackett opines that neither Australia’s nor New South Wales’ current policy commitments are sufficiently ambitious or effective to reduce greenhouse gas emissions to the extent required to address the threats to the environment and people of Australia and New South Wales.
- 79 BSCA contends that a target consistent with a global average temperature rise of 1.5°C above pre-industrial levels is appropriate, based on the evidence, for four reasons. First, it is a target, a long-term temperature goal, in the Paris Agreement (Paris Agreement, opened for signature 22 April 2016 [2016] ATS 24 (entered into force 4 November 2016)). Article 2(1)(a) states that the Paris Agreement aims to strengthen the global response to the threat of climate change by “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” (section 4.1.1 of the Sackett First Report).
- 80 Secondly, the consequences of an increase in global average temperature by 1.5°C will be less than would be suffered if the global average temperature were to increase by a greater extent, such as to 2°C or 3°C. Put another way, limiting the increase in global average temperature to 1.5°C will ensure environment protection to a greater degree than would be possible if the increase in global average temperature were to be higher (section 5 of the Sackett First Report).
- 81 Thirdly, limiting the temperature increase to 1.5°C lessens the risk of crossing tipping points. Professor Sackett explained that tipping points in the Earth system refer to thresholds that, if crossed, lead to far reaching and in some cases abrupt or irreversible changes in the Earth’s subsystems. The most devastating risk of continued global warming is that some of the Earth’s subsystems, such as Arctic sea ice, ocean circulation, the Amazon rainforests and coral reefs, will become unstable and tip irreversibly into new states that accelerate the effects of climate change. “Continued warming increases the risk that crossing tipping points will cause subsystems of the Earth to collapse, one initiating another, to create a cascade of transformations that

result in what has been dubbed a “‘Hothouse Earth’”, Professor Sackett said that: “It is uncertain precisely where this ‘Hothouse’ threshold lies, but it could be as close as a few decades away, that is, at or just beyond 2°C of warming” (at [240]-[243] of the Sackett First Report).

82 BSCA argues that the risk of crossing tipping points increases with increases in global average temperatures. Thus, setting a target temperature increase of 1.5°C, rather than a greater temperature increase, lessens the risk of crossing tipping points. Professor Sackett said that her conclusions on tipping points has been fortified by the recent IPCC Sixth Assessment Report (at [10]-[15] of the Sackett Fourth Report of 10 August 2021).

83 Fourthly, setting a temperature increase of 1.5°C is still feasible, although only by taking increasingly ambitious and urgent action to reduce greenhouse gas emissions (T9/8/21 p 69).

84 BSCA contends that the current emissions reduction trajectories for both Australia and New South Wales are not consistent with limiting global average temperature rise to 1.5°C above pre-industrial levels.

85 As far as Australia’s Nationally Determined Contribution (NDC) under the Paris Agreement, Professor Sackett considered that:

“Australia’s NDC to reduce its emissions by 26%-28% (on 2005 levels) by 2030 is incompatible with holding global warming to below 2°C, let alone 1.5°C. If all governments were to adopt and fulfill targets like those [of] Australia, global warming would exceed 2.0°C and could climb as high as 3.0°C. Moreover, Australia is not on track to meet its 2030 Paris NDC commitment.” (at [30] of the Sackett First Report and see section 4.2).

86 As far as New South Wales is concerned, Professor Sackett considered that:

“Although New South Wales has set an aspirational goal of achieving net zero emissions by 2050, and set out plans to **reduce its greenhouse gas emissions by 35% on 2005 levels by 2030**, neither of these actions is sufficient separately or taken together to place NSW on an emissions reduction trajectory in line with limiting global temperate rise to no more than 1.5°C above pre-industrial levels.” (at [33] of the Sackett First Report and see sections 4.3 and 4.4).

87 Professor Sackett opined that the current emissions trajectory of New South Wales is incompatible with holding global warming to 1.5°C above pre-industrial levels for three reasons. First, Professor Sackett considered that New South Wales has not and will not meet the three parallel targets in the IPCC Special Report on the Impacts of Global Warming of 1.5°C. These targets are net zero emissions by 2050; a 45% emissions reduction of carbon dioxide emissions compared to 2010 levels by 2030; and a reduction of methane and black carbon of 35% compared with 2010 levels by 2050 (at [185]-[192] of the Sackett First Report).

88 Secondly, in assigning a regional ‘population share’ of the 1.5°C carbon budget, Professor Sackett found that New South Wales was outside its population share of the 1.5°C carbon budget (at [193] of the Sackett First Report).

89

Thirdly, Professor Sackett considered that New South Wales is a major contributor to the production gap, being the discrepancy between planned fossil fuel production and global production levels consistent with limiting warming to 1.5°C (at [194]-[199] of the Sackett First Report).

- 90 On this evidentiary foundation, BSCA contends that the environmental quality objectives, guidelines and policies to ensure environment protection, which the EPA is required to develop, need to regulate sources of direct and indirect greenhouse gas emissions consistent with limiting global temperature rise to 1.5°C above pre-industrial levels.
- 91 BSCA argues that this outcome or objective is supported by the general responsibility of the EPA of “ensuring that the best practicable measures are taken for environment protection in accordance with the environment protection legislation and other legislation” (s 7(2)(a) of the POEA Act). BSCA submits that the best practicable measures to protect the environment in New South Wales from climate change is to reduce direct and indirect sources of greenhouse gas emissions consistent with limiting global temperature rise to 1.5°C above pre-industrial levels.
- 92 The EPA contested that the duty under s 9(1)(a) is so specific as to require the development of environmental quality objectives, guidelines and policies that regulate and reduce direct and indirect sources of greenhouse gas emissions consistent with limiting global temperature rise to 1.5°C above pre-industrial levels, being the two matters claimed by BSCA in [37(c) and (d)] of the Points of Claim.
- 93 The EPA submits that there is nothing the EPA can do, in developing the environmental quality objectives, guidelines and policies required by s 9(1)(a), to “ensure” that the environment in New South Wales will be protected from climate change. The EPA accepted that climate change is a global problem and cannot be meaningfully addressed without multiple local actions to mitigate greenhouse gas emissions by sources and remove greenhouse gases by sinks. But no local action by the EPA alone in New South Wales can address the problem; its local action must be combined with multiple local actions elsewhere in order for climate change to be meaningfully addressed.
- 94 The EPA submits that, in performing the duty to develop environmental quality objectives, guidelines and policies to ensure environment protection, it has a discretion in formulating the local actions that ought to be taken to address climate change. The local actions chosen might well have as their goal reducing greenhouse gas emissions consistent with limiting the increase in global average temperature to 1.5°C above pre-industrial levels, but the EPA is not under a duty to set this as the goal. The EPA submits that, even if this were to be set as the goal, there are multiple pathways to achieving the goal, even on Professor Sackett’s evidence and the IPCC Reports to which she refers. There are different ways to calculate the global carbon budget for a global temperature rise of 1.5°C, including making different assumptions about the level of probabilities of the temperature rise and the carbon budget; there are different

assumptions about the behaviour of countries to regulate sources of greenhouse gas emissions in their jurisdiction; there are different ways to “downscale” from a global carbon budget to carbon budgets for Australia and for New South Wales; there are choices to be made as to whether to aim for a temperature target of 1.5°C with no overshoot or with a degree of overshoot; and there are different pathways or trajectories that can be pursued in order to achieve the selected temperature target. These are but some of the fact-rich and evaluative-rich choices that need to be made in formulating the local action that should be taken.

- 95 The EPA submits that there are also choices to be made as to the methods and modes of regulation. The diversity of regulatory approaches that are available is illustrated in the objectives, functions and powers of the EPA in ss 6, 7 and 8 of the POEA Act, including banning certain activities, licensing other activities, and using economic instruments or measures to incentivise or disincentivise still other activities. The EPA submits that the necessity to make these legitimate policy choices in formulating the local action that should be taken speaks against a construction of the duty in s 9(1)(a) of the POEA Act at the level of specificity contended for by BSCA.
- 96 I find that the duty under s 9(1)(a) of the POEA Act to develop environmental quality objectives, guidelines and policies to ensure environment protection does not require such instruments to address the topic of climate change at the level of specificity claimed by BSCA in [37(d) and (d)] of its Points of Claim. These paragraphs claim that the instruments must regulate and reduce direct and indirect greenhouse gas emissions consistent with limiting global temperature rise to 1.5°C above pre-industrial levels.
- 97 No doubt, the environmental quality objectives, guidelines and policies to ensure environment protection developed by the EPA could address these matters, and may be the better for doing so, but the EPA is not compelled by the terms of the duty to do so. As the EPA submitted, there are legitimate policy choices to be made in formulating the regulatory approaches and local actions that should be pursued to protect the environment from climate change. The controls on the EPA’s discretion in performing the duty are the negative and positive controls that I have earlier described, derived from a proper construction of the statutory provision imposing the duty. On a proper construction of s 9(1)(a), the statutory description of the instruments required to be developed under s 9(1)(a) does not demand that the instruments address the matters with the level of specificity claimed by BSCA in [37(c) and (d)] of the Points of Claim.
- 98 The other matters claimed by BSCA in [37] of the Points of Claim are expressed at a higher level of generality. There is a degree of overlap in the formulation of the matters that BSCA claims should be addressed in the instruments. They are threefold: first, the topics of greenhouse gas emissions and climate change and the environmental impacts of greenhouse gas emissions (paragraphs (a) and (b)); secondly, keeping greenhouse gases at a level which is appropriate, having regard to the best available science (paragraph (e)); and thirdly, ensuring environment protection (paragraphs (f) and (g)).

- 99 The third matter can be quickly dismissed: it merely recites the purpose “to ensure environment protection” for which environmental quality objectives, guidelines and policies must be developed under s 9(1)(a). The second matter, as expressed, is question begging. What level of greenhouse gases in the atmosphere is “appropriate”? The qualification that the appropriateness of the level of greenhouse gases be calculated having regard to the best available science does not provide the needed clarity and certainty for the formulation of the duty. The duty under s 9(1)(a) cannot be construed as demanding the development of instruments that are calculated to keep greenhouse gases at such an ambiguous and uncertain level.
- 100 The first matter does address the aspect of environment protection enlivened by the current and grave threat to the environment in New South Wales of climate change. The undisputed cause of climate change is anthropogenic greenhouse gas emissions. BSCA’s formulation of the matter in [37(a) and (b)] is imprecise. The environmental impact of greenhouse gas emissions is to cause climate change, while climate change causes the vast array of environmental impacts to which Professor Sackett and the IPCC reports refer, which are the consequences of climate change.
- 101 I would formulate the aspect of environment protection in respect of which environmental quality objectives, guidelines and policies need to be developed as being simply “climate change”, as this term is sufficiently wide to embrace the phenomenon itself, as well as its causes and consequences. The duty imposed on the EPA by s 9(1)(a) in the current circumstances would, therefore, include developing environmental quality objectives, guidelines and policies to ensure environment protection from climate change.

Breach of duty

- 102 BSCA contends that the EPA has failed to perform the duty under s 9(1)(a) of the POEA Act. Although the EPA has prepared hundreds of documents that might be said to relate to environment protection, BSCA contends that none of these documents meet the statutory description of being an instrument required to be developed by s 9(1)(a) to ensure environment protection from the environmental impacts of greenhouse gas emissions and climate change. The EPA contests this, submitting that a number of the documents do address the topics of greenhouse gas emissions and climate change, whether directly or indirectly.
- 103 Both BSCA and the EPA adduced evidence regarding the documents that might potentially be considered to be instruments of the kind described by s 9(1)(a) and engaged persons, being Professor Sackett for BSCA and Mr Fowler for the EPA, to assess whether, in their opinion, the documents did in fact meet the statutory description of instruments required to be developed by s 9(1)(a). Whilst the tender of the documents was helpful, the opinion evidence of the persons assessing the

documents was less helpful. The question of whether the documents meet the statutory description of the instruments required to be developed by s 9(1)(a) is not one on which the persons could give evidence. This is a question for the Court to decide.

- 104 Nevertheless, the persons' assessments of the documents did have the benefit of reducing the potential documents from a set of 426 documents, which were initially produced by the EPA, to 14 documents, on Professor Sackett's assessment, but then with refinement by the EPA in closing submissions, to seven documents that referred or were relevant in some way to greenhouse gas emissions or climate change. Five of the seven documents were prepared by the EPA: 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; and the EPA Regulatory Strategy 2021-24. Two of the seven documents were prepared by persons other than the EPA: NSW Climate Change Policy Framework for NSW, prepared by the Office of Environment and Heritage (2016) and Net Zero Plan Stage 1: 2020-2030, prepared by the Department of Planning, Industry and Environment (2020).
- 105 The EPA also referred to the direction given by the Minister for Energy and Environment under s 13(2)(b) of the POEA Act that the EPA include in the State of the Environment reports published between 2020 and 2030, including the next report due in late 2021, an assessment of the NSW Net Zero Plan Stage 1: 2020-2030 setting out:

"Statewide context

1. a description of the status of the policies set out in the Plan;
2. the State's projected annual emissions reductions on 2005 levels by 2030 expressed in percentage terms;

The Plan's impacts

3. the emissions reductions expected by 2030 on 2005 levels as a result of the totality of the Plan and other NSW Government policies;
4. the extent to which the Plan is setting the State up to achieve its aspiration to have net zero carbon emissions by 2050;
5. an analysis of the economic impacts of the Plan;
6. an analysis of the other environmental impacts of the Plan."

- 106 This direction refers to the reports on the state of the environment that the EPA is required by s 10(1) of the POEA Act to make every three years. The duty under s 10(1) to make these reports on the state of the environment is distinct from the duty under s 9(1)(a) to develop environmental quality objectives, guidelines and policies to ensure environment protection. Accordingly, such a report on the state of the environment does not meet the statutory description of an instrument required to be developed by s 9(1)(a).
- 107 On my assessment of the seven documents relied on by the EPA, none of them meet the statutory description of the instruments that the EPA is required to develop under s 9(1)(a) of being environmental quality objectives, guidelines and policies to ensure environment protection from climate change, this being the description that the current circumstances require.

108 I will start with the NSW Climate Change Framework for NSW (2016) and the Net Zero Plan Stage 1: 2020-2030 (2020). These documents were not developed by the EPA, but instead by the Office of Environment and Heritage for the first, and the Department of Planning, Industry and Environment for the second. Although Mr Fowler, who works for the EPA, said that the EPA was consulted on and had some input into the preparation of the documents, the EPA did not develop the documents, whether under s 9(1)(a) of the POEA Act or otherwise. In these circumstances, the documents do not meet the statutory description of the instruments required to be developed by the EPA under s 9(1)(a).

109 I turn to consider the five documents that were prepared by the EPA. The first is the NSW Changing Behaviour Together: Waste Less, Recycle More Education Strategy 2016-2021. The Changing Behaviour Together document is an education strategy, published in 2017, to implement the NSW Government's Waste Less, Recycle More initiative. This initiative aims to transform waste and recycling in New South Wales over 9 years (2012-2021). The EPA believed that education was crucial to meeting the goals of the Waste Less, Recycle More initiative. To this end, the EPA published the Changing Behaviour Together Education Strategy as:

"a framework for us, our partners and stakeholders to change community behaviour through targeted education. The strategy will deliver and support education to:

- help people use new resource recovery infrastructure
- encourage the adoption of positive waste behaviours
- build the capacity of the waste sector to deliver behaviour change programs.

Changing Behaviour Together is relevant for all organisations implementing programs under *Waste Less, Recycle More*." (p 1).

110 The EPA described what it wanted to achieve by the Changing Behaviour Together Education Strategy as:

"Our vision is to optimise the use and quality of education in all *Waste Less, Recycle More* programs so that they:

- increase knowledge and skills
- build positive attitudes
- promote positive behaviour change so the whole NSW community can improve the environment and community wellbeing." (p 2 and see further pp 4-6).

111 The EPA described what it would do to implement the education strategy as including developing "action plans that list current and planned education actions" (p 2 and see further pp 7-8). The topics of the education actions are "waste avoidance, resource recovery and safe disposal" (p 7). These topics embrace the targets in the NSW Government's Waste Avoidance and Resource Recovery Strategy 2014-2021 to avoid and reduce waste generation, increase recycling, divert more waste from landfill, manage problem wastes better and reduce illegal dumping (pp 4-5). The Changing Behaviour Together document does not refer at all to greenhouse gas emissions or climate change.

112

I find that the Changing Behaviour Together document does not meet the statutory description of an instrument required to be developed under s 9(1)(a) to ensure environment protection from climate change. As an education strategy, the document does not fall within the description of “environmental quality objectives, guidelines or policies to ensure environment protection”. The vision and the education actions to achieve the vision concern optimising the use and quality of education in the Waste Less, Recycle More programs. There is no concrete and direct objectives or standards to ensure environment protection as such. More particularly, the education strategy is not directed to ensure the protection of the environment from climate change or its consequences. That topic is simply not addressed.

- 113 The second document relied on by the EPA is the Environmental Guidelines: Solid waste landfills (2nd ed, 2018) (Landfill Guidelines). The structure and purpose of the Landfill Guidelines are described in Part A to include:

“These guidelines provide guidance for the environmental management of landfills in NSW by specifying a series of ‘Minimum Standards’. They involve a mix of design and construction techniques, effective site operations, monitoring and reporting protocols, and post-closure management.

The NSW Environment Protection Authority (EPA) will use these guidelines to assess applications for new or varied landfill licences under the *Protection of the Environment Operations Act 1997* and to assess issues that arise during the operational and post-closure periods of landfills.” (p 1).

- 114 The Landfill Guidelines note that landfills may produce the pollution streams of leachate, stormwater runoff, landfill gas, offensive odour, dust, noise and litter and these pollutants can degrade the quality of surrounding surface water bodies, groundwater, soil and air (p 1).
- 115 Part B of the Landfill Guidelines sets the minimum standards for landfills. One of the issues in respect of which minimum standards are set is “landfill gas management and monitoring”. The required outcomes include that:

“Landfill gas management practices must be adopted to:

- minimise emissions of untreated landfill gas to air and through sub-surface strata and services
- minimise greenhouse gas emissions (methane, the major bulk component of landfill gas, is 20 to 25 times more potent than carbon dioxide)
- minimise emissions of offensive odour
- minimise the explosive risk to humans from gas build-up in confined spaces
- ensure that, wherever feasible, landfill gas is sustainably utilised for energy recovery
- minimise emissions of air pollutants from the combustion of landfill gas in flaring or electricity-generating equipment.” (p 31).

- 116 Sections 5.1 to 5.7 set out the “acceptable measures to managing and monitoring landfill gas”.

- 117 I find that although the Landfill Guidelines might meet the description of being “environmental quality objectives, guidelines and policies to ensure environment protection”, they do not sufficiently address environment protection from climate change, either generally or specifically.

118

Generally, the Landfill Guidelines were not developed for the purpose of ensuring the protection of the environment from climate change. Instead, as the Landfill Guidelines expressly state, the purpose of the Landfill Guidelines was to provide guidance for the environmental management of landfills by specifying the minimum standards and to be used in assessing licence applications for landfills. The management of emissions of methane (the main component of landfill gas) from landfills is but an incidental benefit of the Landfill Guidelines.

- 119 Specifically, the management of landfill gas is necessary for many reasons, including protecting the land, air and water from pollution and humans from offensive odour and the explosive risk from gas build-up. Minimising the emissions of methane is but one of the reasons to manage landfill gas. The minimum standards for landfill gas management and monitoring set by the Landfill Guidelines might be of benefit in minimising methane emissions, but that is not the primary purpose of the minimum standards set by the Landfill Guidelines. Moreover, methane emissions from landfill is but a small percentage of total greenhouse gas emissions in New South Wales, such that minimising methane emissions from landfill will not be sufficient to protect the environment from climate change. It is a useful small step, but insufficient without other actions being taken.
- 120 Both generally and specifically, therefore, the Landfill Guidelines do not, in themselves, meet the description of instruments required by s 9(1)(a) of being environmental quality objectives, guidelines or policies to ensure environment protection from climate change. The Landfill Guidelines might be one instrument that addresses incidentally that topic but their preparation did not fulfill the duty on the EPA to develop instruments to ensure environment protection from climate change.
- 121 The third document relied on by the EPA is the NSW Energy from Waste Policy Statement. This Policy Statement outlines the policy framework and technical criteria that apply to facilities proposing to recover energy from waste in New South Wales (p 2). The EPA “recognises that the recovery of energy and resources from the thermal processing of waste has the potential, as part of an integrated waste management strategy, to deliver positive outcomes for the community and the environment” (p 1). The Policy Statement establishes a two-tiered framework separating the requirements for low-risk wastes proposed for thermal treatment (categorised as eligible waste fuels) from all other wastes (p 3 and see section 3). Facilities proposing to thermally treat any waste not listed as an eligible waste fuel must meet the requirements of an energy recovery facility (p 4 and see section 4).
- 122 I find that the NSW Energy from Waste Policy Statement does not meet the statutory description of an instrument required to be developed under s 9(1)(a) to ensure environment protection from climate change. The Policy Statement does not address at all greenhouse gas emissions or climate change. The purpose of the Policy Statement was not to ensure the protection of the environment from climate change or its consequences. Instead, as the Policy Statement expressly stated, the purpose was to

regulate the recovery of energy from waste. The Policy Statement recognised that the recovery of energy from waste poses risks of harm to human health and the environment. The requirements established by the Policy Statement are intended to minimise these risks to human health and the environment. The requirements are not directed to reducing greenhouse gas emissions to mitigate climate change.

- 123 The fourth document relied on by the EPA is the Methane fact sheet. The introduction to the fact sheet sets out its purpose:

“The NSW Environment Protection Authority (EPA) is the lead regulator for coal seam gas (CSG) activities in NSW. Along with legislative requirements, each CSG facility in NSW holds an Environment Protection Licence (EPL) issued by the EPA that sets out legally enforceable, site-specific conditions and controls, which holders must comply with in order to prevent and minimise pollution and safeguard the environment. This includes controls to protect air quality.

The main component of CSG is methane. Although methane is a naturally occurring gas present in the earth’s atmosphere, it is also a greenhouse gas and can be hazardous in high concentrations, so it is important that methane emitted from industry sources is minimised and monitored.

This fact sheet contains an introduction to methane and the EPA’s regulation of methane air emissions from CSG facilities.” (p 1).

- 124 As foreshadowed in the introduction, the fact sheet explains what is methane, how it is formed, where it is emitted, what it is used for, what are the methane concentrations in the air and whether it is hazardous (pp 1-3). The fact sheet then explains the requirements for methane monitoring in CSG operations, noting that the EPA requires EPL holders for gas activities to develop and implement a gas Leak Detection and Repair (LDAR) program for their operations (pp 3-4). The fact sheet finally notes Australia’s domestic and global methane emissions reporting framework (p 5).

- 125 I find that the Methane fact sheet does not meet the statutory description of an instrument required to be developed under s 9(1)(a) to ensure environment protection from climate change. The fact sheet neither meets the description of “environmental quality objectives, guidelines and policies” nor is for the required purpose “to ensure environment protection”. The fact sheet is purely factually descriptive, providing an introduction to methane as a gas and describing the EPA’s regulation of methane air emissions from CSG facilities by way of imposing conditions on licences for CSG operations. The fact sheet does not set any objectives or standards, impose any requirements, or prescribe the taking of any action to ensure the protection of the environment from methane air emissions.

- 126 The fifth document on which the EPA relied was the EPA Regulatory Strategy 2021-24. The Regulatory Strategy describes its scope as being to set out:

- “• our objectives and our commitments
- the principles that guide our work
- our regulatory challenges
- what we do and how we do it
- who we work with.” (p 8).

127

The Regulatory Strategy is stated to be “connected to the corporate EPA Strategic Plan and links to other important EPA policies, strategies and plans” (p 8). Figure 1 depicts graphically “How the Regulatory Strategy fits into the big picture”. Above the Regulatory Strategy is the “Strategic Plan 2021 – 2024”. This is a yet to be released new strategic plan proposed to be launched in the third quarter of 2021. Below the Regulatory Strategy are two categories of documents “Regulatory Policy” and “Prosecution Guidelines”. The Regulatory Policy is another yet to be released policy, proposed to be in force in the third quarter of 2021, which will replace the current Compliance Policy. The Regulatory Strategy describes the purpose of the proposed Regulatory Policy to be to explain “how we identify appropriate regulatory actions and apply a fit-for-purpose regulatory response to an environmental issue or non-compliance, based on relevant factors.” (p 8). The Prosecution Guidelines commenced in 2020 and inform decisions of the EPA to prosecute for offences against the environment protection legislation.

128 The Regulatory Strategy notes that: “We use a range of approaches from education and influence to enforcement and punitive actions to protect the environment and human health” (p 8).

129 The Regulatory Strategy identifies the challenges the EPA faces under six topics: protecting human health; degradation of our environment; ecologically sustainable development; resource recovery and reducing waste; climate change; and environmental crime (pp 11-15). Under each of these topics, the Regulatory Strategy identifies “the environmental issue” and the “regulatory challenge”.

130 For the topic of climate change, the Regulatory Strategy identifies the environmental issue as:

“Climate change is a global challenge. It is driving a change in global climate conditions, including extreme weather events and disasters such as heatwaves, dust storms, droughts, floods, bushfires and storms. We see the impacts of climate change in NSW and Australia on a regular basis, such as the devastating bushfires in NSW during the summer of 2019–2020. Globally, we need to reduce greenhouse gas emissions to reduce the negative impact of a changing climate on the environment and communities.” (p 14).

131 The regulatory challenge is identified as:

“The EPA doesn’t regulate all the factors that contribute to climate change. We are working collaboratively to achieve net zero emissions by 2050 and to make NSW more resilient to a changing climate under the NSW Climate Change Policy framework.

During crises like the bushfires and floods, the EPA plays an important role in emergency response by assisting in and regulating environmental factors during clean-up actions. There are often higher risks to human health and the environment due to these catastrophic events; for example, the need to clean up asbestos after the devastating 2019–2020 bushfires.

To make the most of the important part we play in the solution we will:

- aim to influence the NSW whole-of-government response to climate change
- encourage industry to plan and act to address climate change risks
- lead specific programs, including ensuring NSW achieves net zero emissions from organic waste by 2030
- report on progress through the NSW State of the Environment Report to ensure transparency to achieving net zero emissions by 2050
- partner with other government agencies, peak bodies and research organisations to find and progress solutions

- monitor and enforce measures to reduce greenhouse gas emissions that are within our regulatory control
- use the approaches and tools available to us to promote reduction of carbon and greenhouse gas emissions and climate change resilience
- encourage major industries to change their behaviour to help the NSW Government achieve net zero emissions by 2050, by proactively reducing their greenhouse gas emissions, and planning, adapting to and mitigating the risks of climate change.” (pp 14-15).

- 132 After addressing in general terms the challenges facing the EPA, the Regulatory Strategy describes its regulatory approach in the section “What we do and how we do it” (pp 17-21). The Regulatory Strategy notes that: “The EPA has a balanced regulatory approach with eight elements”. The eight elements are named: Listen, Educate, Enable, Act, Enforce, Monitor, Require and Influence (p 17). Each of these elements is explained in the following sections: We act to address issues and create solutions; Influence outcomes; What we require; How we monitor; We enforce the requirements; We listen to the community and our stakeholders; We enable others to protect the environment and human health; We educate the community to protect the environment and human health (pp 18-21). None of these explanations of what the EPA does or how it does it refers to developing environmental quality objectives, guidelines and policies to ensure environment protection under s 9(1)(a) of the POEA Act.
- 133 I find that the Regulatory Strategy does not meet the statutory description of an instrument required to be developed under s 9(1)(a) to ensure environment protection from climate change.
- 134 The Regulatory Strategy neither meets the description of being “environmental quality objectives, guidelines and policies” nor being such an instrument with the purpose “to ensure environment protection”. The Regulatory Strategy is descriptive of who the EPA is, what it does and how it does it. The Regulatory Strategy does not set any objectives or standards, impose any requirements, or prescribe any action to be taken to ensure the protection of the environment.
- 135 The Regulatory Strategy does identify six challenges facing the EPA, summarising each environmental issue involved and the regulatory challenge that the issue raises, but the discussion is simply descriptive and at a high level of generality. This is exemplified in the Regulatory Strategy’s discussion of climate change.
- 136 The description of the environmental issue of climate change is so general and trite that it fails to provide any foundation for the discussion of the regulatory challenge. The description of climate change does not describe what climate change is, or what are the causes of it. The description does note that: “Globally, we need to reduce greenhouse gas emissions to reduce the negative impact of a changing climate on the environment and communities.” The reader might imply from this statement that greenhouse gas emissions are a cause of the changing climate, but this is not expressly stated. The description of the environmental issue does summarise some of the consequences of

climate change, such as the devastating bushfires in New South Wales during the summer of 2019-2020, but the Regulatory Strategy does not address how to deal with the consequences.

- 137 In the regulatory challenge section, the EPA describes “the important part we play in the solution” to the environmental issue of climate change. At the outset, the EPA records that it is “working collaboratively” with others to achieve net zero emissions by 2050 and the policy outcomes set by the NSW Government in its NSW Climate Change Policy Framework. This collaborative role involves influencing, encouraging and partnering with others, and reporting on others’ progress. Thus, the EPA records that it aims to influence the New South Wales whole-of-government response to climate change; encourage industry to plan and act to address climate change risks and encourage major industries to change their behaviour to help the NSW Government achieve net zero emissions by 2050, by proactively reducing their greenhouse gas emissions and planning, adapting to and mitigating the risk of climate change; partner with other government agencies, peak bodies and research organisations to find and progress solutions; and report on progress through the NSW State of the Environment Report to ensure transparency to achieving net zero emissions by 2050.
- 138 The EPA records the limited action it will take by itself, one being to lead specific programs ensuring New South Wales achieves net zero emissions from organic waste by 2030, the second being to monitor and enforce measures to reduce greenhouse gas emissions that are within the EPA’s regulatory control and the third being to use the approaches and tools available to the EPA to promote the reduction of carbon and greenhouse gas emissions and climate change resilience.
- 139 The EPA does not identify, however, what approaches, tools or measures it will use to achieve any of the outcomes or objectives implicit in these actions described in the regulatory challenge, or identify any criteria against which achievement of the outcomes or objectives must be measured. Hence, although the Regulatory Strategy proclaims that the EPA plays “an important part” in the solution to climate change, and sketches in general terms what part the EPA could play, the Regulatory Strategy lacks any details as to what is involved in the EPA playing this part, how it will play the part, or how it will measure whether it has succeed in playing the part. The Regulatory Strategy is hortatory and aspirational, not action forcing.
- 140 This is exemplified in the aspirational statements that the EPA should monitor and enforce measures to reduce greenhouse gas emissions within the EPA’s regulatory control and encourage major industries to change their behaviour by proactively reducing their greenhouse gas emissions. The Regulatory Strategy fails to identify, so far as mitigation of greenhouse gas emissions to ensure environment protection from climate change: the sources of greenhouse gas emissions within the EPA’s regulatory control or the major industries that are sources of greenhouse gas emissions; the current or future desired levels of greenhouse gases emitted by these sources and industries; the timing for and rate of reduction of greenhouse gas emissions by these

sources and industries; or the measures, approaches or tools to be used to achieve reduction of greenhouse gas emissions. The Regulatory Strategy also fails to identify measures or approaches for adaptation to climate change so as to ensure environment protection from the impacts of climate change.

- 141 In these circumstances, the Regulatory Strategy is not itself an environmental quality objective, guideline or policy to ensure environment protection from climate change for the purposes of s 9(1)(a), although it could serve to inspire the EPA to develop such an instrument under s 9(1)(a) by taking one or more of the actions discussed in the Regulatory Strategy.
- 142 This completes my assessment of the documents relied on by the EPA. Two of the documents do not meet the statutory description of being the instruments required by s 9(1)(a) because they were not developed by the EPA. Five of the documents do not meet the statutory description of the instruments required by s 9(1)(a) to ensure environment protection from climate change. The result is that the duty on the EPA under s 9(1)(a) to develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change remains unperformed.
- 143 However, even if the five documents prepared by the EPA could be said to meet the statutory description of instruments required by s 9(1)(a), these documents are not sufficient to ensure protection of the environment in New South Wales from the threat of climate change. In order to discharge the duty, the EPA must at least develop environmental quality objectives, guidelines and policies to ensure the protection of the environment from threats of great magnitude and impact. Climate change is an exemplar of such a threat to the environment. The development of environmental quality objectives, guidelines and policies directed towards ancillary or insignificant causes or consequences of climate change is not sufficient to discharge the duty in s 9(1)(a) of the POEA Act.

Orders to be made

- 144 Although the EPA argued that it had developed instruments in ostensible performance of its duty, I have found that those instruments did not meet the statutory description of the instruments required by s 9(1)(a) of the POEA Act to ensure environment protection from climate change. In law, therefore, the duty on the EPA under s 9(1)(a) to develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change remains unperformed. In these circumstances, a mandamus should issue to compel the EPA to discharge its duty: *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 504; [1947] HCA 21.
- 145 The EPA did contest the appropriateness of issuing a mandamus, but this contest was limited to the terms in which BSCA had sought for the mandamus to issue. BSCA had claimed that the Court should order the EPA to develop the instruments required by s 9(1)(a) so as to address all of the specific matters claimed in [37] of the Points of Claim.

The EPA disputed that the duty imposed by s 9(1)(a) required any instrument developed to have that specific content. The EPA submitted that the Court would not, therefore, order the EPA to develop instruments under s 9(1)(a) with that specific content.

- 146 The EPA submitted that where a decision maker is afforded a discretion as to how to discharge a duty, the Court may not order that the discretion be discharged in any particular way. The EPA cited the statement of Latham CJ in *Cuming Campbell Investments Pty Ltd v Collector of Imposts* (1938) 60 CLR 741 at 749; [1938] HCA 53:

“When it is the duty of a public officer to exercise a discretion, the court may order the officer to perform his duty by exercising his discretion, but it will not control the exercise of the discretion by directing that it be exercised in a particular manner not expressly required by law. ‘A mandamus goes to set a party in motion to do a thing, but not to prescribe the way in which it shall be done.’”

- 147 BSCA responded that mandamus issues to “compel the performance of a public duty when there has been a refusal or failure to perform the duty”: *Re Australian Bank Employees Union; Ex parte Citicorp Australia Ltd* (1989) 167 CLR 513 at 515; [1989] HCA 41. Section 9(1)(a) of the POEA Act does impose a duty on the EPA, which the EPA has failed to perform. Mandamus can issue to compel performance of the duty. BSCA accepted that the terms in which the mandamus should issue will need to be consistent with the Court’s findings as to the content of the duty. A mandamus to perform the duty in the terms found by the Court is orthodox and does not constrain the discretion of the EPA as to how to discharge the duty.
- 148 BSCA’s submissions are correct. The Court can properly issue a mandamus to compel the EPA to perform the duty under s 9(1)(a) in the terms I have found apply in the current circumstances. The EPA should be ordered to develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change. This leaves the EPA a discretion as to how to discharge its duty to develop such instruments.
- 149 The Court orders:

- (1) The Environment Protection Authority, in accordance with s 9(1)(a) of the *Protection of the Environment Administration Act 1991* (NSW), is to develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change.
- (2) The respondent is to pay the applicant’s costs of the proceedings.

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Decision last updated: 26 agosto 2021