

Crisp Law Newsletter

December 2021

Climate Change & Statutory Duties of Public Authorities

You may recall from our earlier newsletter this year which discussed cases of significant importance, namely, *Sharma, Bulga & Nerringillah*, and from our discussions that plaintiffs are increasingly resourcing to administrative law to enforce obligations of statutory bodies. In this newsletter, we are focusing on obligations of statutory bodies in relation to climate change with reference to *Bushfire Survivors*¹ case.

This Crisp Law Newsletter discusses the “Bushfire Survivors” case against the EPA. (A judgement of 26 August 2021). The Court found that the EPA was required to provide policy guidelines to manage climate change. The EPA’s policy “instruments” were wholly substandard. The case also demonstrates the effectiveness of “administrative law” remedies to control statutory authorities’ actions/inactions.

The *Bushfire Survivors* is a landmark decision in which the NSW Land and Environment Court has found that the NSW Environment Protection Authority (EPA) has failed in its statutory duty to develop guidelines and policies to protect the environment from climate change and ordered that the EPA develop such policies. The *Bushfire Survivors* decision follows the decision of the Australian Federal Court in *Sharma* where the Court declared that the Minister for the Environment owed a duty of care to avoid causing personal injury to Australian children arising ‘from emissions of carbon dioxide into the Earth’s atmosphere’² The *Bushfire Survivors* case was brought by Bushfire Survivors for Climate Action (BSCA), a climate action group who say they have experienced first-hand devastation caused by the Australian bushfires in 2019-20. The Court’s judgment in *Bushfire Survivors*³ found that the

¹ *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* [2021] NSWLEC 92.

² *Sharma v Minister for the Environment* (No 2) [2021] FCA 774, 1.

³ *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* [2021] NSWLEC 92.

EPA's statutory duty to 'develop environmental quality objectives, guidelines and policies to ensure protection from climate change remains unperformed'.⁴ The Court made an order compelling the EPA to perform its statutory duty, known as an order in mandamus, and ordered that the EPA pay BSCA's costs of the proceedings.

The Court considered the EPA's statutory duty under s9(1) of the *Protection of the Environment Administration Act 1991* (NSW) (POEA Act)⁵, which provides; "The Authority is required to – (a) develop environmental quality objectives, guidelines and policies to ensure environment protection... in defining the nature and scope of the duty contained in s9(1)(a), the Court had regard to the context and purpose of the duty.⁶ This necessitated reference to the objectives of the EPA, which are set out in s6(1) of the POEA Act. The first objective in s6(1) is "to protect, restore and enhance the quality of the environment in NSW, having regard to the need to maintain ecologically sustainable development".⁷

In *Bushfire Survivors* case, the Court illustrated the requirements of s6(2) for ecologically sustainable development through the adoption of the precautionary principle, intergenerational equity, biological diversity and ecological integrity.⁸

Also, worthy of mention is the court highlighted that to ensure environmental protection, the objectives, guidelines and policies will change over time given the ever changing threats to the environment.⁹

⁴ Ibid 17, 107, 142.

⁵ *Protection of the Environment Administration Act 1991* (NSW).

⁶ *Bushfire Survivors* at [20]-[21]; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362.

⁷ Ibid 41; *Protection of the Environment Administration Act 1991* (NSW), s 6(1)(a).

⁸ *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* [2021] NSWLEC 92, 43.

⁹ Ibid 66.