
Book review

CLIMATE LAW IN AUSTRALIA

Climate Law in Australia, edited by Tim Bonyhady and Peter Christoff, Federation Press, 2007, ISBN 9781862876736, 328pp, Paperback Australian RRP \$59.95, Direct price (from the publisher) \$55.00, International Price \$55.00.

There came a point in Australian legal consciousness that it was appropriate to coin the term “environmental law”.¹ For all the discussion of climate change and the policies required to mitigate the changes and adapt to the effect which cannot be avoided, it came as a surprise to see the title *Climate Change Law in Australia* cross my desk.

Tim Bonyhady,² Director of the Australian Centre for Environmental Law at ANU, recognises the way in which new areas of law have their origins in existing legal disciplines. In the early 1990s, Tim organised the most enjoyable seminar I have ever attended and, in turn, contributed to the development of those disciplines. The seminar focused on the way in which litigation directed at protecting the environment was impacting upon traditional areas of the law. His 1992 edited book, *Environmental Protection and Legal Change* came out of that seminar.³

In the “Introduction”, Tim Bonyhady points out that concern with climate change by lawyers in Australia is not new, noting that Sir Ninian Stephen eschewed a request to speak about federalism and, instead, addressed climate change at the 1991 annual conference of the Australian Mining and Petroleum Law Association. As one might expect with an emerging discipline, the climate change law discussed in the book has various origins and is in various stages of development. The discussion of emissions trading schemes draws upon existing legislation, domestically and internationally, but also looks at the likely legal shape of schemes in prospect.⁴ A body of case law has grown up under existing Commonwealth and State environmental protection legislation seeking to direct decision-makers towards climate change as a relevant factor to be considered in development and mining approval decision-making. Discussion of adaptation strategies looks at the way environmental planning legislation is being, and might be, directed at limiting future risk, but also draws upon existing tort law to discuss the way in which future losses from climate change may be distributed within the community under existing legal regimes.⁵ The discussion of geo-sequestration looks mainly at the inadequacies of existing legislative regimes and looks to legal reform needed to facilitate the adoption of the technology on an industrial scale.⁶ The chapter on emissions targets surveys

¹ See Fisher DE, *Environmental Law in Australia: An Introduction* (University of Queensland Press, St Lucia, 1980) and Bates G, *Environmental Law in Australia* (Butterworths, Sydney, 1983). *Environmental Law in Australia* is now in its sixth edition. In 1980 and still in 1983, environmental law represented a new categorisation. Despite a growing trend of legislation consciously directed at regulating the way humans interact with the environment, the content of environmental law contained many elements that had already been part of the law for along time and discussed under other rubrics such town and country planning, mining law, the law of water and anti-pollution law.

² Professor Bonyhady qualifies easily as polymath. As well as his many publications on environmental law; he is also an expert on art, art history and Australian history, having published prestigiously in each of these fields and has curated collections at the Australian Portrait Gallery and the Australian National Gallery. <http://www.humanities.org.au/Fellows/Searches/FellowsSearch.asp?Disc=3&KW=&Order=A&SN=&Sort=S&submit=Search&type=>.

Dr Christoff is coordinator of environmental studies in the School of Social and Environmental Enquiry at the University of Melbourne. He is a non-lawyer with an emphasis on policy development. His publication record on climate change policy is both extensive and impressive.

³ The seminar was enjoyable not only because the best legal minds in a host of specific disciplines took part. The format contributed greatly. The house rule was that everyone had to have read the paper before the particular session started. The person who wrote the paper did not get to deliver it. Instead, the session started with the commentator ripping into the paper. This was followed by everyone round the table being encouraged to add their criticisms. Finally, with 15 minutes left, the paper writer got to try to defend themselves and put the pieces back together again. An excellent blood sport, indeed and it worked.

⁴ The authors of the relevant chapter are Martijn Wilder and Monique Miller, both employees of Baker & McKenzie, Solicitors.

⁵ The author of the chapter on adaptation is Jan McDonald and John F Kearney Professor of Law at Griffith University.

⁶ By a quartet of authors from Minter Ellison: AM Warburton, JA Grove, S Then and KM Geddes.

international and domestic legislation on the topic as well as considering targets adopted only at the policy level.⁷ This collection of essays is a convincing piece of evidence suggesting that, despite its various origins and the amount of relabelling involved, there is sufficient substantive legislation and case law, in addition to rapid policy development, dealing with climate change issues to make “climate law” a useful concept for analytical and organisational purposes.

Environmental law, more generally, has developed through the process of judicial review forcing environmental considerations upon decision-makers. As community attitudes change or the society meets new social challenges, the matters required to be taken into account under legislation⁸ may change. Judicial review litigation allows such matters to be argued by members of the public.⁹

In the same way, the issue of climate change has been the subject of judicial consideration through the processes of judicial review. Therefore, Charles Berger’s¹⁰ chapter on the extension of the life of Australia’s most greenhouse gas-intensive power station at Hazelwood in Victoria discusses the successful action in the Victorian Civil and Administrative Tribunal forcing the Planning panel appointed by the Minister for Planning, Mary Delahunty, to consider greenhouse gas emissions as part of their expert report to the Minister.¹¹

Litigation about the opening of new coal mines is also a recurring theme. Kirsty Ruddock discusses an unsuccessful attempt to redirect the Commonwealth Minister for the Environment’s attention to greenhouse gas emissions of a new coal mine in the Bowen basin in Queensland. The case was brought before Dowsett J in the Federal Court and concerned decision-making under the omnibus Commonwealth environmental legislation the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (the EPBC Act).¹²

Judicial review of the decision making processes involving a new coal mine is also the subject of David Farrier’s chapter on the approval of the Anvil Hill coal mine in the Hunter Valley in New South Wales.¹³ This decision involved the actions of the Director-General of Planning under Pt 3A of the New South Wales development approval legislation, the *Environmental Planning and Assessment Act 1979* (NSW).¹⁴

James Prest’s excellent chapter on the misuse of Ministerial discretions under the EPBC Act by Commonwealth Minister for the Environment, Senator Ian Campbell,¹⁵ to stymie the development of wind energy as a clean alternative, shows the importance of judicial review as a possible means of

⁷ The chapter is written by Rob Fowler, Professor of Environmental Law in the School of Natural Sciences and Built Environment at the University of South Australia.

⁸ Applying the tests in *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 at 40; 66 ALR 299; 60 ALJR 560, per Mason J.

⁹ Assuming that the principles of locus standi do not prevent access to argument on the merits. See the long line of cases which, for modern purposes commences with *Australian Conservation Federation Inc v Commonwealth* (1980) 146 CLR 493; 45 LGRA 245; 28 ALR 257; 54 ALJR 176 and includes, in more recent times, *North Queensland Conservation Council Inc v Executive Director, Queensland Parks & Wildlife Service* [2000] QSC 172 and *Bateman’s Bay Local Aboriginal Land Council v Aboriginal Community Benefits Fund Pty Ltd* (1998) 194 CLR 247; 54 ALD 609; 98 LGERA 410; 155 ALR 684; 72 ALJR 1270 and *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; 60 ALD 342; 106 LGERA 419; 169 ALR 400; 74 ALJR 490; [2000] HCA 5.

¹⁰ Charles Berger is Director of Strategic Ideas at the Australian Conservation Federation.

¹¹ See *Australian Conservation Foundation v Minister for Planning* (2004) 140 LGERA 100; [2004] VCAT 2029, 29 October 2004.

¹² See *Wildlife Preservation society of Queensland Proserpine/Whitsunday Branch Inc v Minister for Environment and Heritage* (2006) 93 ALD 84; 232 ALR 510; [2006] FCA 736.

¹³ David Farrier is a professor of law and a member of the Institute for Conservation Biology and Law at the University of Wollongong.

¹⁴ The case is *Gray v Minister for Planning* (2006) 152 LGERA 258; [2006] NSWLEC 720.

¹⁵ Dr Prest is a member of the Australia National University’s College of Law.

forcing accountability upon politicians in the extreme case. Dr Prest's analysis has no reported decision to draw upon, since the Minister ultimately saw the hopelessness of his position, settled the case and eventually approved the wind farm.¹⁶

Merit consideration under development approval legislation also provides a source of principles for the new legal discipline. The approval of wind farms, the most "ready to go" of the low carbon energy generating options, has given rise to a significant amount of litigation. Judith Jones discusses the case law in this area with emphasis on the decision of Brian Preston CJ, in upholding and expanding a decision to approve the Taralga wind farm.¹⁷ Chief Justice Preston clearly articulated that the contribution of wind power to reducing global greenhouse emissions was a positive consideration in deciding whether a proposal should be approved.

The merit consideration of a mining lease extension in the Land and Resources Tribunal, and the resultant appeal to the Court of Appeal of Queensland, in the *Xstrata case*, shone light on the correct procedure to be undertaken by inquisitorial merits tribunals, with the Court of Appeal setting aside Koppenol P's decision for breach of natural justice.¹⁸ Chris McGrath's discussion of the case places emphasis on the "state of the science" evidence adduced by the Queensland Conservation Council in the case despite the fact that, at the merits review level, such evidence failed to draw an appreciative audience.¹⁹

Climate Law in Australia predates the election of a new federal government on 24 November 2007. The much anticipated Garnaut Report and resultant legislative action may make some of the essays date quickly. This will not matter.

Not only has the collection made the point, effectively, that "climate law" is an organising principle whose time has arrived; it also provides an excellent primer for practitioners, students and educators who wish to obtain a basic mastery of the new topic. Hopefully, further seminars and other fora will not only update the essays as further legal developments take place; they will build on the excellent analysis provided by this publication.

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¹⁶ However, see the argument on costs in *Bald Hills Wind Farm Pty Ltd v Hon Ian Campbell, Minister for the Environment* [2006] FCA 848.

¹⁷ See *Taralga Landscape Guardians Inc v Minister for Planning* [2007] NSWLEC 59.

¹⁸ See *Queensland Conservation Council Inc v Xstrata Coal Queensland Pty Ltd* (2007) 98 ALD 483; 155 LGERA 322; [2007] QCA 338.

¹⁹ Dr McGrath is at the Queensland Bar.