Book Reviews

Tim Bonyhady and Peter Christoff (eds), *Climate Law in Australia* (Federation Press, 2007, ISBN 978 186287 673 6, 315 pages)

REVIEWED BY DR TIM STEPHENS*

Only a few years ago use of the term 'climate law' to describe the body of statutory and common law relevant to the regulation of climate change in Australia would have raised eyebrows. However it is now very much part of the legal lexicon, as this remarkable and significant edited collection of chapters from Australia's preeminent commentators on climate law and policy makes clear.

The observed and projected physical changes being brought about by climatic change in Australia has prompted a suite of private and statutory actions in virtually all levels of the Australian court system. It seems inevitable that just as the United States Supreme Court has engaged with climate change[1] the High Court of Australia will likewise at some point be called upon to address a climate case. Parallel with climate litigation has come a developing body of regulation at State and Federal levels. Whereas such laws emerged slowly during the years of the Howard Government,[2] there is now a raft of State and Federal legislation in place,[3] or in the pipeline.[4] Also impossible to ignore is the developing international law of climate change, which seeks to build upon the foundations provided by the *1992 United Nations Framework Convention on Climate Change*[5] ('*UNFCCC*') and the *1997 Kyoto Protocol* ('*Kyoto Protocol*').[6]

Climate Law in Australia was published just a few weeks after the Rudd Labor government was elected to office, by which time the new Prime Minister had participated in the Bali summit on climate change, and taken the much acclaimed step of ratifying the *Kyoto Protocol*. This book is therefore situated at the juncture between the regressive policies of the Howard Government and the progressive policies of the Rudd Government. Nonetheless most of the 16 chapters have a high degree of currency given

---

* BA (Hons) LLB (Hons) *Syd* M.Phil *Cantab* PhD *Syd;* Senior Lecturer, Sydney University Law School..

1 *Massachusetts v Environmental Protection Agency* 549 US 497 (2007). See Rachel Baird, 'Arresting Climate Change Through Incremental Steps: Massachusetts v Environment Protection Agency' (2007) 24 *Environmental and Planning Law Journal* 245.

2 Tim Stephens, 'A Slow Burn: The Emergence of Climate Change Law in Australia' in Gavin Birch (ed), *Water, Wind, Art and Debate: How Environmental Concerns Impact on Disciplinary Research* (2007) at 1–22.

3 See for instance the *Climate Change and Greenhouse Emissions Reduction Act* 2007 (South Australia) and the *National Greenhouse and Energy and Reporting Act* 2007 (Commonwealth of Australia).

4 Minister for Climate Change and Water, Senator Penny Wong, has said that the government will release exposure draft legislation for the CPRS by December 2008: Senator Penny Wong, Media Release, 17 March 2008 <www.environment.gov.au/minister/wong/2008/pubs/mr20080317.pdf> accessed 1 August 2008.

5 Opened for signature 9 May 1992, 1771 UNTS 165 (entered into force 21 March 1994).

6 Opened for signature 11 December 1997, (1998) 37 ILM 22 (entered into force 16 February 2005).

their focus on changes to the landscape of climate law and policy promised by the Australian Labor Party in the 2007 Federal election campaign.

Following an introduction by the editors in which they trace the provenance of climate law in Australia to the 1980s, and to the pioneering work of Rob Fowler, Tim Bonyhady contributes an engaging chapter on the 'new Australian climate law' in which he introduces the burgeoning climate change case law through a characteristically historical and literary discussion of disputes that have flared across the Australian continent, from King Island to Mackay. Bonyhady makes the point that despite several false starts and sceptical reaction to mainstream scientific opinion Australian courts are now engaging with this existential threat and beginning to impact on governmental decision making as we wait expectantly for the Commonwealth to pass a comprehensive legislative package to implement the Carbon Pollution Reduction Scheme.

Our attention is then turned to the international law and policy of climate change in a chapter by Peter Christoff and Robyn Eckersley that examines the Asia Pacific Partnership on Clean Development and Climate ('APP'). First styled as the AP6, this non-binding arrangement among a small collection of major emitters around the Pacific Rim became known as the APP when Canada joined as the seventh member in late 2007. Christoff and Eckersley make a compelling argument that far from complementing the *UNFCCC* and the *Kyoto Protocol*, as was the stated premise of the APP, in fact it is pulling in an entirely opposite direction. They argue that by participating in APP, Australia and the other members are breaching their obligations under the *UNFCCC* because the APP does not mandate an absolute reduction in greenhouse gas emissions to prevent dangerous interference with the climate system, as required by article 2 of the *UNFCCC*. Nor does it address the differential obligations of developing and developed states in adopting mitigation policies, as required by article 3. With Australia's ratification of the *Kyoto Protocol* the future of the APP is uncertain, but Christoff and Eckersley note that there is nothing wrong in principle with regional climate change agreements, and that the APP could potentially be transformed into a constructive regional pact.

In his chapter Andrew Macintosh questions the comfortable consensus among some commentators that including a 'greenhouse trigger' in the *Environment Protection and Biodiversity Conservation Act* 1999 (Commonwealth of Australia) ('*EPBC Act*') would produce major dividends in terms of emissions abatement. The concept of the greenhouse trigger is that projects involving substantial greenhouse gas emissions would activate the Commonwealth's referral, assessment and approvals process. Macintosh traces the history of the plurality of greenhouse trigger proposals that have been made since 1999, and in so doing provides an illuminating account of the deep tensions within the Howard Government on climate policy. Macintosh argues that the greenhouse trigger is well-intentioned but an incomplete answer to the emissions reduction challenge because it cannot reduce pollution at the lowest cost. However he does suggest that a trigger could be adopted as a transitional measure in relation to large-scale projects that will be in place before the commencement of an emissions trading scheme.

Martijn Wilder and Monique Miller address the legal considerations that surround carbon trading markets, placing existing and promised Australian schemes within the context of growing international carbon markets which had a combined value of around

US$30 billion in 2006. They deal with the markets arising from the Clean Development Mechanism under the *Kyoto Protocol*, which Australian companies can now utilise. Wilder and Miller highlight the teething problems and lessons learnt in the European Union's Emissions Trading Scheme, and the world's first such scheme, the NSW Government's Greenhouse Gas Reduction Scheme introduced in 2003. From a practitioner's perspective they draw attention to several legal considerations that any enterprise participating in regulatory and voluntary carbon markets should be aware of, including the nature of carbon credits being purchased or sold, and the risks and warranties involved.

Juxtaposed against Wilder and Miller's upbeat account of the carbon market is the subsequent chapter by Peter Christoff which acknowledges the value of emissions trading as a potentially important policy tool, but deals with several hurdles that need to be overcome before emissions trading lives up to its promise. Inevitably aspects of Christoff's analysis has dated given his consideration of recommendations made by Prime Minister Howard's Ministerial Task Group of Emissions Trading, which have now gone by the wayside as the Rudd Government develops it own scheme. However, because Christoff highlights design features that need to be part of any emissions trading scheme if it is to be environmentally effective, his contribution continues to have currency as the detail of the Carbon Pollution Reduction Scheme is worked through.

Legislatures throughout the world have begun to step into the regulatory space of climate change in various ways, but an emerging statutory response has been legislation that imposes legally-binding targets and timetables. In his chapter Rob Fowler explores the way such headline legislation can sit above detailed regulation to facilitate measures such as an emissions reduction scheme, and can ensure that governments meet long-term emissions reduction goals. Legislation such as the *Climate Change Bill* 2007 (United Kingdom) give emissions reduction policy a high level of visibility and help to translate scientific opinion about optimal emissions stabilisation and reduction pathways into concrete form.

In her chapter on adaptation Jan McDonald addresses the reality that climate change impacts are already being felt throughout Australia, and that regardless of what mitigation action is taken these impacts will become more serious given the significant warming that is already built into the global climate system. She provides a fascinating study of the legal risks associated with adaptation policies at a local government level by examining the response of Byron Shire Council to the management of the world-famous Belongil Beach. This is but one example of the engagement by planning authorities with adaptation issues, which has begun to generate a body of jurisprudence in environmental courts and tribunals in several Australian states. McDonald notes that adaptation comes at a cost that must be allocated, and that development authorities are likely to be at the frontline in liability claims as climate impacts advance on fragile coastal and estuarine environments.

Australia is highly dependent on fossil fuels for base-load electricity generation and this infrastructure cannot be retired and replaced easily at low economic and social costs. As a result policy makers have been attracted to the possibility of capturing and storing

carbon emissions from power stations and other carbon intensive industrial processes. Alison Warburton, J A Grove, S Then and K M Geddes consider the legal framework that needs to be enacted to regulate geosequestration if this nascent and unproven technology is to help reduce Australia's growing emissions from the energy sector. As with laws relating to adaptation, the biggest issue here is liability – who will bear the risk should sequestered carbon leak from storage structures?

Virtually all of the remaining chapters in the book deal with specific case studies involving the developing Australian climate law. Charles Berger's piece is first, and discusses the Hazelwood case,[7] a landmark decision of the Victorian Civil and Administrative Tribunal that found downstream emissions from the expansion of a coal mine had to be considered in the environmental assessment process.

Kirsty Ruddock deals with a rather less successful instance of climate litigation in the Bowen Basin coal mines case[8] in which Justice Dowsett in the Federal Court expressed scepticism that emissions from coal sourced from proposed mines in Queensland would have any impact on the Great Barrier Reef or features of the Australian environment of national significance. Ruddock's analysis highlights the serious financial impediments faced by community organisations in bringing climate cases.

David Farrier addresses the Anvil Hill decision[9] in the NSW Land and Environment Court which has earned a rebuke, being described as 'loopy' by the editorial writers at *The Australian* newspaper which continues to be hostile to any measures to reduce emissions.[10] Justice Pain's decision was measured, considered and located clearly within a body of case law on environmental assessment procedures. As Farrier explains, the Anvil Hill decision ensured that downstream emissions were considered in the assessment process consistent with principles of ecological sustainable development enshrined in the relevant planning laws. However, as Farrier acknowledges the decision has improved the decision-making process but did not change the ultimate decision. The mine was ultimately approved by the NSW Government – a fact which indicates that the judicial supervision of decision-making can only ever take place within constraints set by the relevant legislation.

In his chapter Chris McGrath, a well-known Brisbane-based barrister who has acted in a range of important public interest environmental cases in various Australian jurisdictions, returns our gaze to a Queensland climate case – the Xstrata decision.[11] As with the Anvil Hill case this litigation concerned greenhouse gas emissions resulting from a proposed coalmine. In an important judgment the Queensland Court of Appeal overturned a peculiar decision of the Land and Resources Tribunal, in which the

7 *Australian Conservation Foundation v Minister for Planning* (2004) 140 LGERA 100; [2004] VCAT 2029.

8 *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.

9 *Gray v Minister for Planning* (2006) 152 LGERA 258; [2006] NSWLEC 720.

10 'Dangerous Decisions: Courts Should Steer Clear of the Carbon Debate', *The Australian* (17 February 2007), <www.theaustralian.news.com.au/story/0,20867,21238925-601,00.html> accessed 1 August 2008.

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

presiding member relied on evidence by fringe commentators who asserted that anthropogenic climate change was not occurring. However the decision of the Queensland Court of Appeal that the Tribunal failed to accord natural justice by considering this bizarre submission after hearings had concluded was a Pyrrhic victory for the Queensland Conservation Council because the Queensland Parliament moved quickly to pass special legislation to protect the mine.

Planning laws can be used to prompt governments to improve decision-making in relation to climate change matters, and even to change policy for the better. However environmental laws can be used as a shield to prevent climate-friendly development, as was made clear in the case of the Bald Hills wind farm analysed in great depth by James Prest in his lengthy chapter. The case illustrates how then Federal Minister for the Environment, Senator Ian Campbell, utilised the *EPBC Act* to stall a major wind farm development.

The reverse situation was encountered in the Taralga wind farm case[12] in the NSW Land and Environment Court in which Chief Judge Brian Preston handed down a significant decision that ratified and expanded a decision of the NSW Government to grant approval for a wind farm. In his merits decision Chief Judge Preston emphasised the greenhouse gas emissions reductions that would be achieved by the farm, and found them compelling in overriding local opposition to the farm on aesthetic grounds. Judith Jones considers this decision in her chapter and is critical of the reasoning in several respects, questioning whether the court is an appropriate place for sensitive issues of climate policy to be resolved.

The final chapter is by Ron Levy who looks to the legal framework that applies to the treatment and disposal of nuclear waste in Australia. Levy notes that the Howard Government did much to place nuclear power on the policy agenda, as seen most clearly in the 2007 Switkowski review of uranium mining, processing and nuclear energy. The Rudd Government has shown no enthusiasm for nuclear power, although it is likely that future Australian Governments will need to consider the nuclear option as climate change impacts are felt more severely. It bears repeating in this context that Australia not only holds the world's largest reserves of uranium but also has many highly stable geological sites suitable for safe long-term disposal of nuclear wastes from energy production.

In sum, *Climate Law in Australia* is an outstanding collection that offers the first sustained treatment of Australia's developing climate law. It provides a thorough legal analysis of climate case law and legislation at a time in which there is an urgent need to grapple with the legal consequences of anthropogenic climatic change in Australia. The book stands alongside and complements policy-focussed works such as Clive Hamilton's *Scorcher: The Dirty Politics of Climate Change* (2007) and provides many insights into the way in which climate mitigation and adaptation policies must be translated into law if we are to have any hope of addressing this overwhelming threat to human civilisation.

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