



ENVIRONMENT AND PLANNING LAW ASSOCIATION (NSW) INC.

Ms Sue Higginson MLC
Chair
Portfolio Committee No.7 – Planning and Environment

Dear Ms Higginson

Question on notice - Submission on the Climate Change (Net Zero Future) Bill 2023 by the Environment and Planning Law Association (NSW) Inc.

1. The question on notice identified at page 26 of the transcript is directed to the representative of the National Environmental Law Association (“NELA”) and to the President of the Environment and Planning Law Association (NSW) (“EPLA”).
2. The question is as follows:

“The Hon. SCOTT FARLOW: I'm going to pick up on Mr D'Adam's previous question with respect to the Victorian experience in particular in terms of litigation that has arisen out of the ministerial obligation there. Do you have any insight in terms of what litigation has arisen out of the Victorian obligation under the Climate Change Act 2017?

GRACE HUANG: That's something that I will probably take on notice.

The Hon. SCOTT FARLOW: Mr Crennan, have you got any insights there?

PAUL CRENNAN: No, I don't have any.

The Hon. SCOTT FARLOW: If you could take that on notice, I would appreciate it.”

3. EPLA research has identified that the decision of Environment Victoria Inc v ALG Loy Yang Pty Ltd [2022] VSC 814, Supreme Court of Victoria on 21 December 2022 makes reference to “ministerial obligation” which is found in section 8 Climate Change Act 2017 (Vic) (“the CC Act”).
4. The Court made the observation:
*“...the obligations to ‘ensure’ that the State achieves the long term emissions reduction target of net zero greenhouse gas emissions by the year 2050 and to determine greenhouse gas emissions reduction targets are **placed on the Premier and the Minister, who are of course responsible to Parliament, but not on the (Environment Protection)***

*Authority*¹. (emphasis added)

5. In that case the Court considered a number of aspects one of which was the Climate Change considerations in section 17 of the CC Act. The Court held that:
“... the climate change considerations identified in section 17(2), (3) and (4) of the Climate Change Act 2017 are clearly mandatory in that they are considerations that, where they apply, the legislature requires them to be considered if the exercise of power is to be lawful.”
(para 60)
6. The decision is the application of Administrative Law principles to a challenge to the exercise of statutory power by an administrative body. The case is helpful in the answer to the question on notice only in the observation made by the judge of the Supreme Court of Victoria (paragraph 4 above).
7. Our enquires do not reveal other cases in relation to section 8 CC Act.
8. The Academic Paper published by Michael Bennett entitled “The Role of National Framework Legislation in Implementing Australia’s Emission Reduction Commitments under the Paris Agreement”² cites the Climate Change Act 2017 (Vic) as an example of framework legislation which goes beyond political accountability requirements and imposes duties on public officials to ensure that mission reduction charges are achieved³. The author focuses primarily for the consideration on the Climate Change Act 2008 (UK).
9. The article observes that *“while the target duties in the Climate Change Act 2008 (UK) are yet to receive any detailed judicial consideration, they have been the subject of academic analysis that provides a useful starting point in considering”* the question of whether such an approach ought to be adopted in Australian National Framework Legislation.⁴
10. The paper draws from other commentary:
“Most commentary is doubted whether the section duties could be enforced by the Courts Judicial Review or other means.”

“Perhaps the most significant barrier is that the Courts are likely to refuse to entertain a Judicial Review Application because the Act provides for an alternative remedy”.

¹ Environment Victoria Inc v ALG Loy Yang Pty Ltd [2022] VSC 814 (para 59)

² (2018) 43(1) University of Western Australia Law Review 240

³ Ibid Section III Design Issues for Australian Framework Legislation Part C Political and Legal Accountability for Achieving Targets p261

⁴ Ibid p262

“...it could be argued that the Legislation explicitly envisages political accountability of government to Parliament rather than legal accountability to the Courts.”⁵

11. The article expresses the opinion that:

*“While apparently sweeping legal duties to achieve targets may give rise to few, if any, practical remedies, there are two good reasons to consider including them in Australian framework legislation. The first is for (the) signal they would send within the Commonwealth bureaucracy about the importance and priority of emission reduction goals....The second is the signal they would send to other nations about the seriousness with which Australia is taking its emission reduction commitments under the Paris Agreement”.*⁶

12. EPLA hopes that the response and the additional information set out above is of assistance to the Inquiry.

Paul Crennan
President
2 November 2023

⁵ Ibid p262

⁶ Ibid p263