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Brian Preston

Chief Judge of the Land and Environment Court of New South Wales



Justice Brian J. Preston, Chief Judge of the Land and Environment Court of New South Wales, Australia, has had a distinguished career, having graduated from Macquarie University in 1982. Notably, he served as the Principal Solicitor at the NSW Environmental Defender's Office and was appointed as a Senior Counsel (SC) by the NSW Bar Association in 1999. His significant contributions in the field of environmental law were recognized when he received an

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award from the Asian Environmental Compliance and Enforcement Network (AECEN) in 2010. He has also been honored as a Fellow of the Royal Society of NSW (FRSN) and received honorary doctorates from Macquarie University and Western Sydney University. He is an adjunct professor at the University of Sydney, Southern Cross, and Western Sydney Universities. In 2023, he was awarded the Medal of Honor by the World Jurist Association, further highlighting his notable achievements in the legal arena.

Climate litigation: the role of the judiciary in keeping the government accountable

Tackling the existential crisis of climate change requires ambitious action by governments to reduce greenhouse gas (GHG) emissions from human activity. The goal is to achieve net zero emissions – a balance between anthropogenic emissions by sources and removals by sinks. Emissions reductions need to be deep and rapid to limit global warming to the agreed temperature target of well below 2°C above pre-industrial levels¹ by the time target of the second half of this century (2050).² The government of a polity needs to take the lead in setting and implementing the strategic, policy and legal frameworks needed for effective climate action. The executive needs to execute these laws and implement policies for climate action. The judiciary needs to hold the executive accountable for discharging these responsibilities. This article focuses on this important role of the judiciary.

The executive government may fail to adequately fulfill its responsibilities in at least four ways: failing to adopt a climate policy, implementing a climate policy in breach of the law, failing to adequately implement a climate policy or failing to take adequate climate action. Recently, there has also been an emergence of climate litigation claiming a breach of a duty of care in climate policymaking or a breach of a duty to take climate action, however, to date courts have been less persuaded to hold the executive accountable by enforcing a tortious duty of care.³

¹ *The Paris Agreement, opened for signature 12 December 2015, 3156 UNTS 79 (entered into force 4 November 2016) art 2(1)(a).*

² *Ibid art 4(1).*

³ See, for example, *Sharma v Minister for the Environment* (2021) 391 ALR 1; (2021) 248 LGERA 330; [2021] FCA 560 (Federal Court of Australia). Overturned on appeal: *Minister for the Environment v Sharma* (No 2) (2022) 401 ALR 108; [2022] FCAFC 65 (Full Federal Court of Australia).

1. Failing to adopt climate policy

Legislation may require the executive government to adopt policies to mitigate or adapt to climate change. In *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority*,⁴ a climate action group sought an order in the nature of mandamus to compel the NSW Environment Protection Authority (EPA) to perform its statutory duty to develop environmental quality objectives, guidelines and policies to ensure the protection of the environment from climate change. The Land and Environment Court of NSW held that the statutory duty in s 9(1)(a) of the Protection of the Environment Administration Act 1991 (NSW) to develop environmental quality objectives, guidelines and policies to ensure environment protection includes a duty to develop instruments to ensure the protection of the environment from climate change⁵. The EPA had failed to fulfill its duty to develop instruments of the kind described. The Court ordered the EPA to do so.⁶ In compliance with the Court's decision, the EPA released its Climate Change Policy and Action Plan 2023-26 in January 2023.⁷

2. Implementing a climate policy in breach of law

The executive might adopt a climate policy or take climate action, such as setting and implementing the extent and rate of GHG emissions reductions, that breaches the law. In *Urgenda Foundation v The Netherlands*,⁸ Urgenda Foundation challenged the sufficiency of the Dutch Government's climate change policy and action, arguing that the government's failure to require deeper and more rapid reductions in GHG emissions breached its duty of care under the Dutch Civil Code and its obligations under the European Convention on Human Rights (ECHR). The Hague District Court found that the

⁴ *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* (2021) 250 LGERA 1 (Land and Environment Court of NSW).

⁵ *Ibid* [16], [69].

⁶ *Ibid* [149].

⁷ EPA Climate Change Policy', NSW EPA (Online Report, January 2023)

<https://www.epa.nsw.gov.au/-/media/epa/corporate-site/resources/climate-change/23p4264-climate-change-policy.pdf?la=en&hash=157C0D56355E99CBCAE75A5118896A713307CC72>
and 'EPA Climate Change

Action Plan 2023–26', NSW EPA (Online Report, January 2023)

<https://www.epa.nsw.gov.au/-/media/epa/corporate-site/resources/climate-change/23p4265-climate-change-action-plan-2023-26.pdf?la=en&hash=9EC85B32AB55A627762F61FCDF67973AF30513CD>.

⁸ *Urgenda Foundation v the State of the Netherlands* (ECLI:NL:RBDHA:2015:7145) (The Hague District Court).

insufficient emissions reductions breached the government's duty of care and ordered the government to reduce GHG emissions by 25% below 1990 levels by 2020.⁹ This decision was upheld on appeal by The Hague Court of Appeal and the Supreme Court of the Netherlands, on the ground that the insufficient emissions reductions also infringed the plaintiffs' human rights under the ECHR.¹⁰

3. Failing to implement climate policy

The executive government might adopt climate policies according to law but fail to adequately implement them, thereby breaching the law. In *Leghari v Federation of Pakistan*,¹¹ the Pakistan government had adopted policies for adaptation to climate change, but the government had not implemented them. Leghari submitted that this inaction violated his fundamental rights, read with constitutional principles and international environmental principles. The Lahore High Court held that the executive government's inaction in implementing the climate policies had breached Leghari's fundamental rights.¹² The Court ordered the establishment of an ad hoc Climate Change Commission to provide advice as to how to implement effectively the government's climate policies.¹³

4. Failing to take adequate climate action

The executive government may fail to take adequate climate action in breach of the law. In *Notre Affaire à Tous et al v France*,¹⁴ four NGOs claimed that the French Government's failure to implement proper measures to address effectively climate change violated its legal duties. The government's legal

⁹ *Ibid* [4.83]-[4.86], [5.1]

¹⁰ *The State of the Netherlands v Urgenda Foundation* (ECLI:NL:GHDHA:2018:2610) (The Hague Court of Appeal) [67], [71]-[76]; *The State of the Netherlands v Urgenda Foundation* (ECLI:NL:HR:2019:2007) (Supreme Court of the Netherlands) [5.2.1]-[5.5.3], [9].

¹¹ *Asghar Leghari v Federation of Pakistan* (WP No 25501/2015) (Lahore High Court).

¹² *Ibid* [11]-[12].

¹³ *Ibid* [13].

¹⁴ *Notre Affaire à Tous et al v France*, No 1904967, 1904968, 1904972, 1904976/4-1, 14 October 2021, (Administrative Court of Paris).

duties to act on climate change stemmed from the French Charter for the Environment, the ECHR and the general principle of law that every person has a right to live in a preserved climate system. The Administrative Court of Paris held that France could be held responsible for failing to meet its own climate and carbon budget goals under European Union law and national law.¹⁵ The Court ordered the state to take immediate and concrete actions to comply with its commitments on cutting carbon emissions and repair the damage caused by its inaction by 31 December 2022.¹⁶

Conclusion

The executive holds significant responsibility for taking effective action to address the climate crisis. The judiciary plays an important role in holding the executive accountable for fulfilling this responsibility. This article has highlighted a few cases where courts have played this role.

¹⁵ *Ibid* [1].

¹⁶ *Ibid* [13].