SUBMISSION IN RESPECT OF PROPOSED EPA CLIMATE CHANGE POLICY

11 October 2022

INTRODUCTION:

The EPA postulates as a basis for its authority to adopt regulations under the NSW Protection of the Environment Administration Act 1991, that an existential threat to the NSW environment and to human health and wellbeing of the NSW population can be averted under EPA's Climate Change Policy by 'adaptation' to and 'regulation' of CO2 emissions and that this is authorised under Sections 6 and 9 of the POEA Act 1991.

In support EPA offers the following:

- *"The future effects of climate change will be extensive, including more extreme weather events, increasing coastal erosion and inundation and greater impacts on infrastructure, human health and wellbeing."*
- *"We've considered the actual and potential impacts of climate change on human health and the environment of NSW, and the seriousness of the issue. We recognise that without substantial concerted action, climate change poses a major threat to humanity and most living systems on Earth. While impacts are being observed now, they will become more pronounced over time. Extreme events such as extreme heat, dangerous fire weather and heatwaves are projected to increase in duration, magnitude and frequency with impacts on communities and infrastructure (EPA2021d)."*

Comment:

These statements and assumed legal basis are not factually based.

There exists no social contract that would automatically allow the imposition by EPA of 'adaptation' and 'regulatory' policies to prevent or ameliorate the assumed Climate Change (aka Global Warming) 'threat' to the NSW 'environment' and/or to 'human health and wellbeing' of the residents of NSW.

To validate the Climate Change Policy EPA must, at the very least, be required to provide explicit proof that:

1. Global Warming is real, that it is in fact an existential 'threat' to the NSW 'environment' and to 'human health and wellbeing' of the NSW population.
2. In a studied analysis, how much global temperatures would be reduced by the 'adaptation' and 'regulation' of CO2 emissions proposed by the EPA Climate Change Policy and that such a temperature reduction would provide a measurable benefit to the NSW 'environment' and to the 'health and 'wellbeing' of the residents of NSW particularly on a cost/benefit basis.
3. There is a clear pathway, which would give legal authority for EPA to adopt the proposed Climate Change Policy under the NSW Protection of the Environment Administration Act 1991 such as would enable EPA to implement the proposed 'adaptation' and 'regulatory' measures.
4. Notwithstanding, items 1, 2 and 3 above, it must be a requirement that EPA show:
    i. Precisely what the 'threat' to the NSW **environment** is; and
    ii. unambiguously, demonstrate how 'adaptation' to and 'regulation' of anthropogenic CO2 emissions, proposed by the EPA Climate Change Policy, will either rectify or ameliorate that 'threat' to the NSW **environment**.
5. Notwithstanding, items 1, 2 and 3 above, it must be a requirement that EPA show:
    i. Precisely what the threat to **human health and wellbeing** is; and

ii. unambiguously, demonstrate how 'adaptation' to and 'regulation' of anthropogenic CO2 emissions, proposed by the EPA Climate Change Policy, will either rectify or ameliorate that 'threat' to **human health and wellbeing** of NSW residents.

6. A further issue of consideration, which would need to be addressed is the proposal by the now Labor Federal Government to activate the 2016 Safeguard Mechanism to capture the 215 largest Australian CO2 emitting companies under a levy or tax on those emissions.

It is noted that the addition of 'human wellbeing' is not included in the POEA Act 1991, this is an additional issue added by EPA, which is not supported by the provisions and rightly so.

Unless EPA can substantiate these issues then both the authority for and need for the proposed EPA Climate Change Policy falls away.

1. CLIMATE CHANGE POLICY EPA 2022 - BASICS:

The foreword to the EPA Climate Change Policy by CEO Tony Chappel sets out, the intent of the Policy and Action Plan as follows *"The EPA is committed to taking action to protect the environment and community from the threat of climate change ……".*

COMMENT:

For it to be necessary to implement policies and to 'take action' against Climate Change aka Global Warming, it must first be established as a basic fact, that a climate problem does exist. EPA seems to rely on IPCC reports, which in turn rely on discredited land-based temperature recordings and discredited modelling.

The World Climate Declaration 2022 States that there is *"no Climate Emergency".* This advice is backed by sound empirical measurement of Global Temperatures as follows:

- In the 40 years since NASA global satellite temperature data collection commenced the Global Temperature has increased +0.77°C.
- In the last 13 years since Dr. Roy Spencer has been producing monthly graphs of the NASA satellite global temperature data the global temperature has increased +0.11°C.
- In the last 10 years, from September 2012 to September 2022 the global temperature has decreased by -0.01°C.

While these global temperatures oscillate the trend line, does not support a 'belief' that there is a global warming emergency. Moreover, there is no proven evidence that global temperatures are driven by emissions of the trace gas CO2, to the contrary, in the last 10 years when record emissions of CO2 have been evidenced and when CO2 is accumulating there should have been a significant and consistent, uptrend in temperature outcomes but there was no such trend; in fact, there was a minor temperature decrease.

Accordingly, if there is no global warming emergency then there is hardly a need for EPA to be 'taking action" to counter what would amount to an imagined rather than real 'threat' and the EPA Climate Change Policy then begins to be more like a solution looking for a problem.

2. CLIMATE CHANGE POLICY EPA 2022 – GLOBAL TEMPERATURE OUTCOME AND BENEFITS:

Apart from seeming to be a good idea at the time, the proposed EPA Climate Change Policy must be able to establish a tangible benefit for the **environment** of NSW and the **health ~~and wellbeing~~** of residents of NSW. Moreover, the **cost** and the **implications** for any established benefit must be assessed and known at the outset.

The issues which must be addressed and precisely determined include as follows:

- What temperature reduction in deg. C will arise, in any one year due to the adoption and application of EPA's Climate Change Policy?
- Is this reduction significant enough to avert or mitigate the 'threat' to the NSW environment and health ~~and wellbeing~~ of NSW residents?
- What is the cost of these measures to industry and to the residents of NSW and what are the short term, medium-term and long-term implications?

3. CLIMATE CHANGE POLICY EPA 2022 - LEGAL BASIS:

EPA states that the environment can be 'saved' by **adaptation** and **regulation** of CO2 emissions and as noted above EPA considers that **"***The future effects of climate change will be extensive, including more extreme weather events, increasing coastal erosion and inundation and greater impacts on infrastructure".* In a supplementary note, EPA states that *"These objectives extend to protecting the environment and human health from climate change".*

In the second foreword to the EPA Climate Change Policy Acting Board Chair Carolyn Walsh, states that *"The EPA has a legal duty to protect the community and the environment from harm including that caused by climate change"*.

The mechanism proposed in the EPA's Climate Change Policy relies on an extended interpretation of Sections 6 and 9 of the Protection of the Environment Administration Act 1991.

Section 6 of the Act establishes the EPA's statutory **objectives** to protect the environment and human health. The EPA Climate Change Policy states that the key element of this provision are:

- *"To protect, restore and enhance the quality of the environment in NSW, having regard to the need to maintain ecological sustainable development (see Glossary)."*
- *"To reduce the risks to human health and prevent the degradation of the environment."*

In a supplementary note, EPA states that *"These objectives extend to protecting the environment and human health from climate change".*

Section 9 of the Act imposes on EPA a **statutory duty** to *"develop environmental quality objectives, guidelines and policies to ensure environmental protection".*

COMMENT:
It is a clear principle of law that that legislation of an Act of parliament specifies in and of itself the principles and the law. Law can only be made by Parliament not by unelected bodies and not by regulation. Regulation can only particularise the law as it exists and to the extent it is specifically enabled by the originating law.

The attempt by NSWEPA to bring about, by **regulation,** new law under the proposed Climate Change Policy seems eerily like the USEPA's attempt to include regulation of CO2 emissions under the US Clean Air Act. That overreach was unsuccessful before the US Supreme Court for the very reason that it is ultra vires to claim legal authority for a regulation not specifically permitted by the originating Act.

"Writing for the majority Chief Justice John Roberts said that under what the court has recently called the "major questions doctrine", neither the EPA nor any agency may adopt rules that are "transformational" to the economy – unless Congress has specifically authorized such a transformative rule to address a specific problem like climate change. In certain extraordinary cases,

both separation of powers principles and a practical understanding of legislative intent makes us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there, Roberts writes 'To convince us otherwise, something more than merely plausible textual basis for the agency action is necessary'. The agency must point to, 'clear congressional authorisation' for the power it claims."

In respect of the NSW **Protection of the Environment Administration Act 1991** there was not nor could there have ever been a legislative intent to include Climate Change and CO2 emissions or any other climate issue within that Act for reason that, while some climate change pontifications commenced in 1972:

- The Kyoto protocol was not adopted until 1997.
- The Paris agreement was not adopted until December 2015.
- Australia did not sign up to the United Nations Framework Convention on Climate Change [UNFCCC] until 1992 which provided states and territories with mechanisms to adhere to UNFCCC emissions guidelines.
- It was not until 2007 that Part 6A of the Energy & Administration Act 1987 was amended to provide a fund to *'encourage energy and water savings'*.

4. CLIMATE CHANGE POLICY EPA 2022 - ENVIRONMENT:

Section 6 Objectives of the Environment Protection Authority Act 1991

"6(1) The objectives of the Authority are—

(a) to protect, restore and enhance the quality of the environment in New South Wales, having regard to the need to maintain ecologically sustainable development, and

(b) to reduce the risks to human health and prevent the degradation of the environment, by means such as the following—

- *promoting pollution prevention,* Comment: CO2 is not a pollutant.
- *adopting the principle of reducing to harmless levels the discharge into the air, water or land of substances likely to cause harm to the environment,* Comment: EPA would need to establish that the trace gas CO2 is harmful in the air, in the waters and in the land and that there is legal authority to enable the implementation of the proposed Climate Change Policies.
- *minimising the creation of waste by the use of appropriate technology,* Comment: N/A
- *regulating the transportation, collection, treatment, storage and disposal of waste,* Comment: N/A
- *encouraging the reduction of the use of materials, encouraging the re-use and recycling of materials and encouraging material recovery,* Comment: N/A
- *adopting minimum environmental standards prescribed by complementary Commonwealth and State legislation and advising the Government to prescribe more stringent standards where appropriate,* Comment: There is no legal authority to include Climate Change issues under this provision of the Act.
- *setting mandatory targets for environmental improvement,* Comment: There is no legal authority to include Climate Change issues under this provision of the Act.
- *promoting community involvement in decisions about environmental matters,* Comment: There is no legal authority for application of this provision to Climate Change issues.

COMMENT:
Section 6 of POEA Act 1991 sets out the objectives to which the NSW EPA must respond under Section 9 viz. issues relating to the protection of the environment and issues in respect of human health.
The clear intention of Section 6(1)(a) and 6(1)(b) of POEA Act 1991 is to prevent environmental damage, degradation or even species extinction. The provision includes inorganic matter, living organisms and ecosystems.

To sustain a claim that EPA's proposed Climate Change Policy of 'adaptation' to change and 'regulation' of anthropogenic CO2 emissions in NSW will, prevent environmental damage; prevent environmental degradation or prevent species extinction axiomatically requires that:

- It is clearly identified what and how an environmental issue is under 'threat" due to CO2 emissions.
- Precisely how the proposed 'adaptation' and 'regulatory' measures will prevent or ameliorate that 'threat'.
- The cost of the proposed environmental 'adaptation' and 'regulatory' measures.

The World Climate Declaration 2022 states that *"**Global warming has not increased natural disasters.** There is no statistical evidence, there is ample evidence that CO2-mitigation measures are as damaging as they are costly".*

The declaration further states that "***CO2 is plant food, the basis of all life on Earth.***
CO2 is not a pollutant. It is essential to all life on Earth. More CO2 is favourable for nature, greening our planet. Additional CO2 in the air has promoted growth in global plant biomass. It is also profitable for agriculture, increasing the yields of crops worldwide."

In the further words of the World Climate Declaration 2022 *"Climate science should be less political and climate policies should be more scientific. Scientists should openly address uncertainties and exaggerations in their predictions of global warming, while politicians should dispassionately count the real costs as well as the imagined benefits of policy measures."*

A clear link between these 'threatened', environmental systems and the actual (rather than imagined) rise in global temperature must be established. EPA does not establish that causal link beyond some references to IPCC reports which rely on discredited land temperature data and equally discredited modelling.

EPA has not offered any proof that any 'adaptation' measures or 'regulations' it may care to impose on CO2 emitting industries would be demonstrably beneficial to the **environment**.

5. CLIMATE CHANGE POLICY EPA 2022 – HUMAN HEALTH~~/WELLBEING~~:
In Sec 6.1 of POEA Act 1991 the objectives of the Authority are—

(a) to protect, restore and enhance the quality of the environment in New South Wales, having regard to the need to maintain ecologically sustainable development, and
(b) to reduce the risks to human health and prevent the degradation of the environment, by means such as the following—

- *promoting pollution prevention,* Comment: CO2 is not a pollutant.
- *adopting the principle of reducing to harmless levels the discharge into the air, water or land of substances likely to cause harm to the environment,* Comment: EPA would need to establish that the trace gas CO2 is harmful in the air, in the waters and in the land.

- *minimising the creation of waste by the use of appropriate technology,* Comment: N/A
- *regulating the transportation, collection, treatment, storage and disposal of waste,* Comment: N/A
- *encouraging the reduction of the use of materials, encouraging the re-use and recycling of materials and encouraging material recovery,* Comment: N/A
- *adopting minimum environmental standards prescribed by complementary Commonwealth and State legislation and advising the Government to prescribe more stringent standards where appropriate,* Comment: No legal authority for application of this provision to Climate Change exists in POEA Act 1991.
- *setting mandatory targets for environmental improvement,* Comment: No legal authority for application of this provision.
- *promoting community involvement in decisions about environmental matters,* Comment: No legal authority for application of this provision to Climate Change issues.
- *ensuring the community has access to relevant information about hazardous substances arising from, or stored, used or sold by, any industry or public authority,* Comment: N/A
- *conducting public education and awareness programs about environmental matters*. Comment: There is no legal authority for application of this provision to Climate Change issues."

COMMENT:
The EPA postulates, as a basis for its authority to adopt regulations under POEA Act 1991, that an existential threat to **human health** ~~and wellbeing~~ can be averted under EPA's Climate Change Policy by 'adaptation to and 'regulation' of CO2 emissions and that this is authorised under Sections 6 and 9 of the POEA Act 1991. EPA states that "*The future effects of climate change will be extensive, including more extreme weather events, increasing coastal erosion and inundation and greater impacts on infrastructure, human health and wellbeing."*

To sustain a claim that EPA's proposed Climate Change Policy of 'adaptation' to change and 'regulation' of anthropogenic CO2 emissions in NSW will, protect human health ~~and wellbeing~~ requires that:

- It is clearly identified what human health issue or issues in NSW is or are under 'threat" due to CO2 emissions.
- Precisely how adaptation and 'regulatory' measures will resolve or ameliorate that 'threat'.

A clear link between this 'threat', to human health of the NSW population and the actual (rather than imagined) rise in global temperature must be established. EPA does not establish that causal link beyond some references to IPCC reports which rely on discredited land temperature data and equally discredited modelling.

EPA has not offered any proof that any 'adaptation' measures or 'regulations' it may care to impose on CO2 emitting industries would be demonstrably beneficial to the health ~~and wellbeing~~ of the NSW population.

6. CLIMATE CHANGE POLICY EPA 2022 – CONFLICT BETWEEN AUSTRALIAN FEDERAL LAW AND NSW STATE LAW

The Federal Government, under the National Greenhouse and Energy Reporting Act 2007 (and Regulations), has announced, under the Safeguard Mechanism 2016, that it will be bringing forward

measures to control and minimise CO2 emissions from 215 of Australia's largest CO2 emitting enterprises.

Under section 109 of the **Australian** Constitution, if a state parliament and the federal parliament pass **conflicting** laws on the same subject, then the federal law overrides the state law. Section 122 of the Constitution allows the federal Parliament to override a territory law at any time.

Without delving too deeply into Australian constitutional law this would seem to nullify the application of the EPAs Climate Change Policy, so far as it may have an application to the NSW enterprises captured by the Federal Safeguard Mechanism, even if the EPA Climate Change Policy was lawful.

END OF SUBMISSION

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