



THE LORD MONCKTON FOUNDATION
Α Γ Α Π Η Σ Ε Ι Σ

Originally published on Jo Nova's blog at <http://joannenova.com.au/2012/07/news-legal-action-against-agw/#more-22568>

NEWS: New legal approach — consumer protection laws may protect citizens against misleading BOM statements

We know there is something wrong when we pay public servants to serve us, and they provide us with temperature records that are not the same as the original data, but they won't explain why they adjusted them. We know the system is rotten when the inexplicable adjustments are used as an excuse to take even more money. We've tried FOI to get the information, but they ignore it. We've asked the National Audit Office to audit the records, but the people who adjusted the records are essentially the same ones who control them, so they just changed the records again, and said the audit request applied to a set they did not use now.

Today we announce a new approach – Anthony Cox and others are pursuing the legal option. It's a creative strategy — he's approaching this through consumer protection laws.

Is there a chance consumers *could be misled* by reports that don't include the uncertainties? We think so.
– Jo

Guest Post: Anthony Cox — Legal Action Against AGW

Lord Monckton Foundation Website Document:
Legal Action against AGW_Climate Science & Public Policy_JoNova Blog by Anthony
Cox_V1_20120707



Image: Wikimedia

In New Zealand there is an ongoing legal action against the government producer of the New Zealand temperature record, the National Institute of Water and Atmospheric research Limited [NIWA].

Researchers found the temperature record produced by NIWA had a warming bias which basically created a warming trend of 1C per century when the raw data showed no increase at all. After being stonewalled by NIWA the researchers issued a **Statement of Claim** seeking a Judicial Review of the temperature record.

The **Defence** issued by NIWA was novel in that it claimed there was no official New Zealand temperature record [clauses 6 & 7].

An **Amended Statement of Claim** was issued and the case is now at the Affidavit stage. Could a similar case be brought in Australia challenging the validity of the Australian temperature record which is prepared by the Bureau of Meteorology [BOM]? There are similarities between BOM and NIWA: both have adjusted their temperature record and both have created a warming trend through the adjustments. The BOM's has adjusted their temperature trend by approximately 40%. This appears not to be consistent with criteria for adjusting temperature laid down by **Torok and Nicholls** and **Della-Marta et al.**

However a complication with BOM is that they have replaced the former High quality network [HQ] with the new improved **ACORN adjusted temperature network**. In ACORN supposedly the problems with the HQ network which involved the creation of a warming trend have been corrected. In fact conceded errors with the HQ network which likely caused an increase in trend such as **metrication** have been left intact and it appears the temperature trend in ACORN is greater than in the HQ network.

Clearly the ACORN temperature network has not corrected the adjustment problem in the HQ network which produced the increase in temperature trend. But is it possible to litigate the ACORN temperature record and, as in New Zealand, seek a Judicial Review that the ACORN record is flawed and misleading?

Judicial reviews are sought under the **Administrative Decisions (Judicial Review) ACT 1977- section 5**.

The provisions of this Act should be read in conjunction with the **Competition and Consumer Act 2010, section 2C**. This establishes that the BOM is not exempt from the provisions of the Competition and Consumer Act 2010. BOM is not exempt because while it is a prescribed agency with staffing and financial autonomy **under various legislation** it does not satisfy any of the exemptions under Section 2C.

The BOM describes its activities as including:

” The Bureau contributes to national social, economic, cultural and environmental goals by providing observational, meteorological, hydrological and oceanographic services and by undertaking research into science and environment related issues in support of its operations and services. ” [**BOM**].“

The BOM holds itself out to having expertise in its specified activities and provides services based on this expertise to both governmental and private customers.

BOM, therefore, is covered by [Australian Consumer Law](#) and is not exempt from the consequences of contravention of that law.

The ACL says this:

“Businesses have an obligation not to engage in any conduct that is likely to mislead or deceive consumers. Note that the conduct only needs to be **likely to** mislead or deceive; it does not matter whether the conduct **actually** misled anyone, or whether the business **intended** to mislead—if the conduct was likely to mislead or deceive, the ACL is contravened”

If we apply this criteria to section 5 of the Administrative decision (Review) 1977 Act it is likely that subsection 2, parts (a) and (b) are relevant. In application to the ACORN temperature record, if, as it appears likely, that not only the defects of the HQ network have been remedied but exacerbated, then either irrelevant considerations were taken into account, or relevant considerations were not taken into account during the compilation of the ACORN data.

In addition section 5, subsection 2, part (h) may apply. If the temperature trend in ACORN is different from the trend of the unadjusted data, as appears to be the case, and the reasons for doing so are not justified, the uncertainty is created in respect of what the actual trend should be. This is especially the case since it is certain that some adjustments need to be done to the raw data for reasons outlined in [Table 2.2, pages 59-60 Torok and Nicholls](#).

A Judicial Review is a specialised area of law and any litigation seeking a Review would be expensive. Litigation would be based on expert testimony. A peer reviewed paper has already been prepared in response to the HQ defects. Another would have to be done in respect of the ACORN ‘improvements’; researchers have already started this process. Not with standing this a failed application for Review would be likely to involve the payment of the BOM’s costs and possibly the government’s if it sought and succeeded in obtaining standing in the proceedings.

On the other hand if the ACORN temperature record was successfully impugned the flow-on to challenging all policies, charges, imposts, levies and costs, applied by government and private interests would be feasible since those flow-on areas arguably all rely on the temperature record produced by the BOM being the dominant indice of AGW. If this dominant indice is not accurate and exaggerated then the certainty of the AGW justification for imposts on the community is much harder to sustain.

In respect of this certainty it should be noted that the “precautionary principle” has been incorporated in [legislation](#). However this may not be a bar to litigation. While the precautionary principle ostensibly provides a defence to the extent that the pro-AGW science is not settled and that any uncertainty with the ACORN temperature record should not prevent it being used to underpin policy, the statements of certainty from the BOM would seem to place any reliance on the precautionary principle as inherently contradictory; the BOM says this:

”Australia and the globe are experiencing rapid climate change. Since the middle of the 20th century, Australian temperatures have, on average, risen by about 1°C with an increase in the frequency of heatwaves and a decrease in the numbers of frosts and cold days.” [\[BOM\]](#)

This statement by BOM is not uncertain; the lack of uncertainty is sustained by the ACORN temperature record. If the ACORN record can be shown to be uncertain then the record is uncertain not because the science is unsettled so as to justify the support of the precautionary principle but due to the misrepresentation of the science in the ACORN temperature record; this uncertainty would not be salvageable by the precautionary principle. On this basis litigation would proceed.