



## **Climate Change at a local level**

Using the law to achieve change?



Photo- Greenpeace

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There is overwhelming evidence of the damage greenhouse gas emissions are doing to the Australian environment.<sup>i</sup> Climate change is predicted to cause a range of changes to the global climate, including an increase in carbon dioxide levels in the atmosphere, an increase in atmospheric and ocean temperatures, changes in rainfall patterns, changes in the frequency, intensity, and seasonality of extreme weather events, and a rise in sea level. Along with the growing awareness of climate change and the challenges it poses to society, there has been a simultaneous focus on how the law is responding to climate change.

Governments at all levels are responding more slowly to the need for law reform. While there is now some action towards establishing a carbon trading system at a national level, at present there are few federal laws that directly address climate change.<sup>ii</sup> Although some State Governments have developed State plans, emissions trading systems and renewable energy targets, there are significant gaps in planning and other areas.<sup>iii</sup>

In the face of the need for greater action on climate change, community groups have focused on the law and the need for law reform to ensure these issues are addressed. The paper will discuss a number of ways that communities are using the law to address climate change that will be discussed in this paper. Firstly, they are seeking to develop a greater understanding of planning and other processes that approve large greenhouse gas emitting developments. As a consequence, much of the litigation to date has focused on new coal mines. Secondly, they are seeking to improve laws that regulate greenhouse gases. Thirdly, communities are looking at whether the law will protect their communities in the future. The debate about who should be liable for the impacts of climate change is beginning to gather momentum. In particular, this debate is starting to focus on water shortages, liability for bushfires, cyclones and erosion impacts on our coasts.

## **Community groups using the Courts- Anvil Hill and Drake Brockman cases**

### **History of climate change litigation in Australia**

There have now been a significant number of cases which have sought to raise climate change issues. Australian cases have mainly focused on using existing planning and judicial review mechanisms.<sup>iv</sup> There have been a few notable victories including the

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<sup>i</sup> IPCC, 2007: *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson, Eds., Cambridge University Press, Cambridge, UK, 976pp.

<sup>ii</sup> The Commonwealth has recently passed the *National Greenhouse and Energy Reporting Act 2007*. Prior to this the Commonwealth has directly regulated greenhouse issues only through the *Renewable Energy (Electricity) Act 2000*, and *Energy Efficiency Opportunities Act 2006*. By contrast, South Australia has introduced a specific emissions target.

<sup>iii</sup> McDonald, J, "The Adaptation Imperative: Managing the Legal Risks of Climate Change in T Bonyhady & P Christoff (eds), *Climate Law in Australia* (MUP) (forthcoming) 2007, 8.

<sup>iv</sup> The first case to raise such issues was *Greenpeace Australia Ltd v Redbank Power Co Pty Ltd* (1994) 86 LGR 143 where the Court imposed conditions upon a coal fired power station in NSW requiring it to mitigate the effects of greenhouse gas emissions by planting sinks, limiting fuel sources for the station to tailings from particular mines, and monitoring and reporting on stack emissions. See note iv

*Hazelwood* and *Gray* decisions.<sup>v</sup> Other cases, such as the *Bowen Basin* decision, *Anvil Hill* case and *Drake-Brockman* litigation have been less successful in changing the law in the short term.<sup>vi</sup> Some commentators have suggested these cases show the problems with climate change litigation in relying on the judiciary to bring about environmental change.<sup>vii</sup> However in our experience these cases have been important steps in developing the law on climate change and have achieved positive results in other ways.<sup>viii</sup>

Internationally, climate change litigation has ranged from using similar judicial review mechanisms to bringing public nuisance and human rights cases.<sup>ix</sup> In the United States, there are more than a dozen lawsuits involving climate change issues currently before the Courts.<sup>x</sup>

### **What is the role of public interest litigation?**

Public interest litigation has always played a key role in ensuring that citizens are heard and their rights are protected. Litigation can focus public attention on a particular issue through media exposure. It can also encourage society to debate public values and the need to protect our environment.<sup>xi</sup> When climate change was receiving less media attention, cases such as the *Bowen Basin* decision received significant publicity and highlighted the Commonwealth Government's denial that climate change was occurring.<sup>xii</sup> Even unsuccessful cases can expose weaknesses in the law and highlight the need for law reform. Unsuccessful cases have often provided a vehicle for the development of the law, allowing subsequent cases to build on the legal arguments and scientific evidence presented.<sup>xiii</sup>

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and v below. In contrast, *Queensland Conservation Council Inc v Xstrata Coal Queensland Pty Ltd & Ors* [2007] QCA 338 (McMurdo P, Holmes JA, Mackenzie J) involved at first instance a merits review before the Land and Resources Tribunal- *Re Xstrata Coal Queensland Pty Ltd & Ors* [2007] QLRT 33.  
<sup>v</sup> *ACF v Minister for Planning* [2004] VCAT 2029; *Gray v Minister for Planning* [2006] NSWLEC 720.

<sup>vi</sup> *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage & Ors* (2006)232 ALR 510; *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* [2007] FCA 1480; *Drake-Brockman v Minister for Planning & Ors* [2007] NSW LEC 490.

<sup>vii</sup> Peel, 'The role of climate change litigation in Australia's response to global warming', (2007) EPLJ at 101.

<sup>viii</sup> See Ruddock, "Does Climate Change Litigation work?" paper for Public Interest Advocacy Centre conference, October 2007 found at [http://www.edo.org.au/edonsw/site/pdf/cc\\_litigation071019.pdf](http://www.edo.org.au/edonsw/site/pdf/cc_litigation071019.pdf)

<sup>ix</sup> Haag, A (2006), "Going to court over climate change", Bioed Online, at <http://www.bioedonline.org/news/news.cfm?art=2783> downloaded on 19 February 2007.

<sup>x</sup> Pidot, J, (2006), "Global Warming in the Courts-An Overview of Current Litigation and Common Legal Issues" *Georgetown Environmental Law and Policy Institute*, pg. 1. See article EDO (2006) "Climate Change First: Californian Attorney General Sues "Big Six" Automakers for Global Warming Damages, *Impact*, v. 83, September 2006, pg. 13 (13 (Connecticut et al. V Am. Elec. Power Co., No. 04-CV-05669; Massachusetts et al. V Environmental Protection Agency et al., No. 05-1120, from US)

<sup>xi</sup> Preston CJ, "The role of public interest environmental litigation" (2006) 23(5) *Environmental and Planning Law Journal* 337, 347.

<sup>xii</sup> Hodge, 'Canberra in denial over Greenhouse', *The Australian*, July 2005.

<sup>xiii</sup> Smith, J and Shearman, D, *Climate Change Litigation: Analysing the law, scientific evidence & impacts on the environment, health & property* (2006), p. 12.

### **The Anvil Hill case:**

The Anvil Hill Project is a proposed large open-cut coal mine near Wybong in the Hunter Valley region of NSW. The proposed mine site is situated on a valley floor, containing large remnant areas of woodland and grasslands that are of high conservation value.

According to the proponent, Centennial Coal Pty Ltd, the mine will have an output of on average 10.5 million tonnes of ROM coal per annum over the 21 year life of the mine. It is the largest new coal mine in NSW.<sup>xiv</sup>

About half the coal from the project is to be exported to power stations in Japan<sup>xv</sup>, while the rest will be sold to Macquarie Generation for the Bayswater and Liddell power stations, which supply 15% of the east coast of Australia's (and the equivalent of 40% of NSW's<sup>xvi</sup>) electricity.<sup>xvii</sup> The greenhouse gas emissions from the project are 12.7 million tones of carbon dioxide per year.<sup>xviii</sup>

The mine is opposed by the Anvil Hill Project Watch Association Inc ('AHPWA'), a local community association, drawing its membership mainly from the Wybong area. AHPWA aims to protect environmental and community interests and has been campaigning against the proposed mine since its incorporation in 2000.

This case sought review of the decision by the delegate of the Federal Minister for the Environment and Water Resources that the mine project was not a controlled action under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). The mine has been the subject of other legal proceedings. The *Gray* proceedings in the NSW Land and Environment Court challenged the State approval of assessment of the Project under Part 3A of the *Environmental Planning and Assessment Act 1979*. Further proceedings are currently underway challenging the final approval of the mine by the Minister for Planning on 7 June 2007.

This case involved several arguments, not all of which were related to climate change. The main argument relating to climate change turned on a statement of the delegate of the Minister for Environment and Water Resources.

The delegate had stated that:

A possible link between the additional greenhouse gases arising from the proposed action and a measurable or identifiable increase in global atmospheric temperature or other greenhouse gas impacts is not likely to be identifiable.

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<sup>xiv</sup> Anvil Hill Coal Mine will produce 150 million tonnes of coal over 21 years. Director-General's Environmental Assessment Report (June 2007), Table 1, pg. 2

<sup>xv</sup> *Gray* case, paragraph [4].

<sup>xvi</sup> <http://www.macgen.com.au>

<sup>xvii</sup> <http://www.macgen.com.au/>

<sup>xviii</sup> Director-General's Environmental Assessment Report (June 2007), Table 3, pg. 19.

It was submitted that the delegate should have considered whether the action was likely to have a significant impact on a protected matter that is important, notable or of consequence having regard to its context or intensity.

Effectively, the Applicant argued that the delegate should have taken a common sense approach to causation and sought to distinguish the case from the *Bowen Basin* decision.<sup>xix</sup>

The Applicant also argued that the delegate did not take into account the fact that the greenhouse gas emissions would contribute to “loss of climatic habitat caused by anthropogenic emissions of greenhouse gas” which is recognised as a key threatening process under the EPBC Act.<sup>xx</sup>

Another argument was that the issue of whether a project is a controlled action (that is, whether it is likely to have a significant impact on matters protected by part 3 of the EPBC Act) is a jurisdictional fact, and in fact the project was likely to have such an impact on:

- a) The Great Barrier Reef World Heritage Area (due to the impacts from the greenhouse gas emissions); and
- b) The Blue Mountains World Heritage Area (for the same reasons);

The Court, consisting of Justice Stone, handed down its decision on 20 September 2007. The Court dismissed the Applicant’s arguments on the greenhouse issues, stating that the Applicant’s submissions were not distinguishable from the decision in the *Bowen Basin* case.

In the *Bowen Basin* case, His Honour, Justice Dowsett rejected the arguments that the threats posed by the emission of greenhouse gases are cumulative and that a detailed assessment should be undertaken by comparing those projects with the mines or other proposals that would lead to emissions.<sup>xxi</sup>

He indicated that he maintained skepticism about the impacts of climate change, saying:

However I am far from satisfied that the burning of coal at some unidentified place in the world, the production of greenhouse gases from such combustion, its contribution towards global warming and the impact of global warming upon a protected matter can be so described ...There has been no suggestion that the mining, transportation or burning of coal from either proposed mine would directly affect any such protected matter, nor was there any attempt to identify the extent (if any) to which emissions from such mining, transportation and burning might aggravate the greenhouse gas problem. The applicant’s case is really based upon the assertion that greenhouse gas emission is bad, and that the Australian Government should do whatever it can to stop it including, one assumes, banning new coal mines in Australia. This

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<sup>xix</sup> *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for Environment and Heritage* (2006) 232 ALR 510 (Dowsett J).

<sup>xx</sup> *Environment Protection and Biodiversity Conservation Act 1999*, s 183.

<sup>xxi</sup> *Bowen Basin* case, paragraph [55].

case is far removed from the factual situation in *Minister for Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24.<sup>xxii</sup>

His Honour Justice Dowsett accepted that the mention of ‘indirect impacts’ on World Heritage values was enough to indicate that the delegate had considered that greenhouse gas emissions might cause climate change and impact on these values.<sup>xxiii</sup>

In the *Bowen Basin* case, His Honour also found that the international conventions relevant to the EPBC Act, including the *World Heritage Convention*, the *Biodiversity Convention* and the *Framework Convention on Climate Change*, offered little assistance in construing the EPBC Act, in contrast to the approach in *Brown v Forestry Tasmania*.<sup>xxiv</sup> He also found that the principle of Ecologically Sustainable Development (ESD) did not assist, stating:

It is not clear that this ‘principle’ can be applied to the decision-making process prescribed by s.75. In any event it has not been established that either project will cause serious or irreversible environmental damage.<sup>xxv</sup>

Similarly in the *Anvil Hill* decision, the Court held that the delegate’s conclusion was open to her based on the findings she had made. Justice Stone stated:

In the absence of such a link, however, the relatively small contribution of the proposed emissions to total global emissions could not be seen as having a significant impact.

Nor did the Court accept that the delegate needed to take into account the context of the impact of other potential actions that might reasonably be expected to be assessed under the EPBC Act.

With regard to the key threatening process, the Court noted that there was nothing in the EPBC Act that obliged the Minister to take a key threatening process into account when determining whether an action is a controlled action, and in any event the delegate had considered the substance of this threat in her reasons.

On 11 October 2007, the EDO filed an appeal against the decision in the Full Federal Court, on behalf of the Association. The appeal is limited to the grounds relating to jurisdictional fact and issues relating to Endangered Ecological Communities found on the site.

The *Anvil Hill* case, while unsuccessful, has continued to highlight the significant gap in our national laws in failing to regulate mining and its contribution to global warming. This is discussed further below.

### **Drake Brockman case:**

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<sup>xxii</sup> *Bowen Basin* case, paragraph [72].

<sup>xxiii</sup> *Ibid*, paragraph [42].

<sup>xxiv</sup> *Ibid*, paragraphs [46]-[47]. *Brown v Forestry Tasmania (No 4)* [2006] FCA

<sup>xxv</sup> *Ibid*, paragraphs [53]-[54].

One of the EDO's recent cases has highlighted not the use of coal but the contribution to climate change of how we build. Almost a quarter of Australia's total greenhouse gas emissions are a result of energy demand in the building sector.<sup>xxvi</sup>

The Applicant in this case, Matthew Drake-Brockman, challenged the validity of a concept plan approval granted by the Minister for Planning for the redevelopment of the Carlton United Brewery located on Broadway in Sydney. The current proposal for the site is for a mixed use urban precinct which includes:

- a) 88,809m<sup>2</sup> of commercial office uses and 12,093m<sup>2</sup> of retail uses which will accommodate 4,800 workers;
- b) 1690 apartments that will house 2,800 residents;
- c) 1634 car parking spaces for residents, 436 spaces for commercial and retail tenants and 250 public car park spaces.

The case is important not only for its arguments about climate change, but because it is one of the few cases that have considered the application of Part 3A of the *Environment Planning and Assessment Act 1979* (EP & A Act). Part 3A has given the Minister for Planning significant discretion when deciding to approve major projects of State significance, and in the formulation of the assessment requirements for such projects. The Applicant argued that the application of the principle of ESD required a detailed consideration of the climate change impacts of the development as well as water use on the site. Those arguments and a number of procedural arguments that related to the application of Part 3A of the EP & A Act were unsuccessful.

The Director-General Requirements for the project required the proponent to address the issue of ESD. The Applicant argued that this was not done. The Environmental Assessment consisted of a short report dealing with minimum energy, water and health targets for the project, referring to BASIX and 5-star Green Office requirements. The statement of commitments included compliance with SEPP (Building Sustainable Index: BASIX) 2004, ESD and water sensitive urban design.

The Applicant submitted that the *Gray* case held that the principles of ESD were mandatory considerations. The project would lead to an increase in greenhouse gas emissions of 0.45% of total emissions.<sup>xxvii</sup> The Applicant argued that the Minister did not have sufficient information before him to discharge his obligations with regard to ESD and didn't apply the Precautionary Principle. The Applicant also argued that the Minister did not consider all alternative options to the proposed concept plan, including those with fewer climate change impacts and less water usage. Trevor Lee's report indicated that there were significant ways to reduce greenhouse gas emissions and water use, through changes to ventilation of the buildings, consideration of the embodied energy in the building materials used, the use of solar energy hot water, rain water harvesting on site, and grey water treatment.<sup>xxviii</sup>

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<sup>xxvi</sup> Centre for International Economics, "Capitalising on the building sector's potential to lessen the costs of a broad based GHG emissions cut", September 2007, pg. 3

<sup>xxvii</sup> Report of Trevor Lee, Energy Partners that was filed in the proceedings.

<sup>xxviii</sup> Ibid

In the *Gray* case, the Director-General required the proponent to undertake an environmental assessment that included a detailed greenhouse gas assessment. The Applicant in that case argued that Scope 3 greenhouse gas emissions from the project – specifically, greenhouse gas emissions from the *combustion* of the coal bought from the project by third parties – should lawfully have been included in the detailed greenhouse gas assessment required by the Environmental Assessment Report. They succeeded on the argument that the Director General had failed to take into account ESD on the basis that the principles of intergenerational equity and the Precautionary Principle had not been considered. Taking into account ESD was necessary because the principles were included in the objects of the EP & A Act and were applicable to all decisions under it,<sup>xxix</sup> and numerous decisions of the Land & Environment Court have confirmed the importance of ESD principles for decision-makers.<sup>xxx</sup>

The Director-General had not taken the Precautionary Principle aspect of ESD into account firstly in not requiring cumulative impacts to be assessed<sup>xxxi</sup> (which would have included the impacts of coal burning<sup>xxxii</sup>), and secondly in not requiring that the impacts of coal burning be assessed even though there might be some scientific uncertainty about the extent of those impacts.<sup>xxxiii</sup> The failure to take into account cumulative impacts also constituted a failure to take into account the principle of intergenerational equity.<sup>xxxiv</sup>

Fundamental to this conclusion was the finding that climate change effects from coal burning were sufficiently proximate to the project itself as to be an environmental impact of the project.<sup>xxxv</sup> This was despite the submission that:

any later use of coal mined over time...can only occur as a result of independent and voluntary human action [which will be] subject to actual and potential regulation in that context [and result in impacts that are] completely separate from the [project].<sup>xxxvi</sup>

In contrast, her Honour Justice Jagot in *Drake-Brockman* found the cases on the Precautionary Principle were related to merits review in Class 1 proceedings rather than a judicial review context. She found no factual basis to suggest the Minister failed to give any consideration to ESD and greenhouse gas emissions. Her Honour found that *Gray* turned on the terms of the Director-General Requirements and was distinguishable from this case. She stated that *Gray* did not stand for the proposition that greenhouse gas assessment is required in each case. ESD does not subordinate other considerations, and is only one of the objects of the EP & A Act.

Her Honour concluded that the scheme of Part 3A was inconsistent with the Applicant's submissions because the Director-General can determine the content of the assessment report and the weight given to matters contained in it is a matter for the decision-maker. Her Honour rejected the argument that the report gave only lip service to the concept of ESD. She found that there were in fact indications that the

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<sup>xxix</sup> *Gray case*, paragraphs [41], [105].

<sup>xxx</sup> *Ibid*, paragraph [109].

<sup>xxxi</sup> *Ibid*, paragraph [122], [131].

<sup>xxxii</sup> *Ibid*, paragraph [126].

<sup>xxxiii</sup> *Ibid*, paragraph [131].

<sup>xxxiv</sup> *Ibid*, paragraph [134].

<sup>xxxv</sup> *Ibid*, paragraph [137].

<sup>xxxvi</sup> *Ibid*, paragraph [54].

Minister had considered it by rejecting the public car park on the site, and that the proponent had undertaken to comply with BASIX and Green Star Office.<sup>xxxvii</sup>

The decision has detracted from the strength of the Court's findings in the *Gray* case on ESD.

The *Drake-Brockman* case received considerable publicity in the *Daily Telegraph* as it featured Matthew Drake-Brockman as a student taking on the Minister for Planning, in a modern day David and Goliath court battle.<sup>xxxviii</sup> The *Drake-Brockman* case showed that more reforms to our planning laws are needed to deal with climate change. At present, BASIX does not go far enough towards reducing greenhouse gas emissions and water usage for new apartment developments, and there are no such standards for offices.<sup>xxxix</sup> Even the Department of Planning has criticised the Government's failure to introduce more stringent environmental rules for developers of major projects.<sup>xl</sup>

Since the case concluded, the developer has committed to more innovative solutions, including power co-generation to address the climate change impacts of the site. This voluntary commitment indicates that some developers are willing to take viable steps to reduce the climate impacts of their projects and that the NSW Government is lagging behind industry in failing to implement stronger BASIX requirements.

## Improving laws:

One of the key problems with climate change has been the absence of detailed laws to address the problem. As a result community groups campaigning for changes in policy have focused on improving laws.

The Coogee Climate Action Group is a local group formed in 2006 to address climate change issues in the Coogee region.<sup>xli</sup> As a result of their concern about climate change, some of their members have prepared a Climate Protection Bill.<sup>xlii</sup> It was based on a 2005 Bill created by communities and green groups in the UK.<sup>xliii</sup> It

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<sup>xxxvii</sup> *Drake-Brockman case*, paragraph [132-133]

<sup>xxxviii</sup> Lillian Saleh, '\$2bn Beer Battle: Sartor sued over brewery site approval,' *Daily Telegraph*, 9 March 2007

<sup>xxxix</sup> Nixon, S, "High-rise residents big energy guzzlers", *Sydney Morning Herald*, 30 May 2006. See also press releases of Nature Conservation Council, "Environment Groups propose Win-win for BASIX", 11 May 2006 found at <http://nccnsw.org.au>

<sup>xl</sup> Catherine Munro, 'Developer to go it alone on greenhouse gases,' *Sydney Morning Herald*, 28 September 2007.

<sup>xli</sup> See

[http://www.climatemovement.org.au/component/option,com\\_groupjive/task,showgroup/groupid,43/main,1/](http://www.climatemovement.org.au/component/option,com_groupjive/task,showgroup/groupid,43/main,1/)

<sup>xlii</sup> The complete bill at <http://climatemovement.org.au/images/docs/climate-protection-bill-complete.pdf>

<sup>xliii</sup> In the UK over 400 MPs voted for the Bill and when passed in Parliament, and the UK is now the first country to legislate binding limits on greenhouse pollution.

<http://news.bbc.co.uk/1/hi/sci/tech/6148416.stm> – "The Climate Change Bill sets a target for 60% reduction in carbon dioxide emissions by 2050. See

<http://www.defra.gov.uk/corporate/consult/climatechange-bill/>

includes a number of strategies including ratifying the Kyoto Protocol and setting emissions targets of reduction of emissions by 30% below the 1990 emission levels by 2020, and 80% below 1990 levels by 2050. The Bill sets out ways to achieve those reductions by:

- (i) adopting a national strategy for greenhouse gas emission reductions to meet the targets that addresses tax deductions and subsidies provided to greenhouse-intensive activities and industries;
- (ii) funding for research and development into demand side management, energy efficiency and renewable energy to achieve targets;
- (iii) implementing a national energy efficiency scheme;
- (iv) removing subsidies and tax breaks that encourage fossil fuel use and switching funding to renewable energy research and development, and improving public transport networks and services;
- (v) substantially increasing the percentage of Australia's energy being sourced from renewable energy sources;
- (vi) ensuring all Government agencies purchase electricity that is 100% renewable energy accredited under the National Green Power Accreditation Program;
- (vii) Reviewing the Green Power Accreditation Program;
- (viii) Implement a carbon accounting scheme;
- (ix) Prohibiting the development of new coal-fired power stations and new coal mines;
- (x) Prohibiting the construction or expansion of a nuclear power reactor; and
- (xi) Prohibiting logging in old growth forests.

The Bill has become the subject of a national campaign to improve laws and been vital in focusing attention on climate change in the lead up to the Federal election, with individuals lobbying their MPs about the Bill.<sup>xliv</sup> While obviously the Bill has some practical difficulties it does provide some important aspirations to focus the attention.

One way that community groups have highlighted the need for change as outlined above is through the use of litigation. Litigation can be a useful mechanism for highlighting problems with the law and the need for law reform even if a case is not successful. While both the *Bowen Basin* and *Anvil Hill* cases were unsuccessful, they were beneficial in terms of focusing attention on the need for law reform through a greenhouse trigger to the EPBC Act.

Climate change requires Federal leadership and action, as acknowledged in the 1997 Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment.<sup>xlv</sup> The Australian Network of Environmental Defender's Offices (ANEDO) has consistently appealed for the introduction of a greenhouse gas emission trigger into the EPBC Act. ANEDO has submitted that the greenhouse gas emission trigger should recognise any development that produces over 100,000 tonnes of CO<sub>2</sub> equivalent per year as a matter of national environmental significance. While such a trigger would not necessarily stop the development of new coal mines such as those at issue

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<sup>xliv</sup> See <http://climatemovement.org.au/content/view/159/431/>

<sup>xlv</sup> Council of Australian Governments, Attachment 1- Part II.

in the *Bowen Basin* and the *Anvil Hill* cases, the trigger would ensure the Minister has significant scope under the EPBC Act to impose extensive conditions on developments that contribute to greenhouse gas emissions. These conditions for example could ensure that new coal mines and other developments are responsible for offsetting all or most of their greenhouse gas emissions.

The debate on this issue since the cases has resulted in the ALP committing to the introduction of a greenhouse trigger.

## Who is liable for future impacts on communities?

While all Australian communities will be impacted by climate change, there are several communities that will be significantly affected. To name but a few:

- Communities living in coastal areas suffering from erosion issues, including well documented examples such as Belongil beach, and Collaroy/Narrabeen<sup>xlvi</sup>
- Areas prone to bushfires,<sup>xlvii</sup>
- Farmers suffering from prolonged droughts,<sup>xlviii</sup>
- Torres Strait Islanders and other low lying indigenous communities particularly in Northern Australia who are and will be affected by storm surge and sea level rises;<sup>xlix</sup> and
- Communities suffering from adverse health impacts.<sup>1</sup>

Litigation hasn't until recently been contemplated by any of these groups. However, residents of Belongil beach near Byron Bay have indicated that they are looking at their legal options in relation to climate change impacts.<sup>li</sup> This builds on actions by environmental groups and individuals in North Queensland who sought to review Council decisions that in their view failed to adequately respond to storm surge and cyclone risks. The Planning and Environment Court was unsympathetic to these claims. In the *Daikyo case*, the Court said it was not reasonable to expect development to be immune from cyclonic wave effects that were more onerous than the standard set out in the planning instruments.<sup>liii</sup> In the *East Point Mackay case*, the Court also rejected an objector appeal that sought to raise storm surge/cyclone risk as a basis for refusal of a development.<sup>liiii</sup> The Court rejected advice from the Department of Natural Resources and Mines to protect against 1 in 500 year inundation events on the basis that it was impractical. From a different perspective, the Land and

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<sup>xlvi</sup> McDonald, Ibid, pg. 15, Lipman & Stokes, Ibid, pg 418

<sup>xlvii</sup> Hennessy, Lucas, Nicholls, Bathols, Suppiah and Ricketts, Climate Change impacts on fire-weather in south-east Australia, CSIRO Marine and Atmospheric Research Bushfire CRC and Australian Bureau of Meteorology, 2005.

<sup>xlviii</sup> Karoly, D, Risbey, J and Reynolds, A (2003), "Global Warming Contributes to Australia's Worst Drought". Found at [http://wwf.org.au/publications/drought\\_report/](http://wwf.org.au/publications/drought_report/) as at 9/11/07

<sup>xlix</sup> Green, D "How Might Climate Change Affect Island Culture in the Torres Strait?" CSIRO Marine and Atmospheric Research Paper 011, November 2006.

<sup>1</sup> The impact of climate change on health is described in <http://www.cana.net.au/socialimpacts/australia/health.html>.

<sup>li</sup> Gilmore, H, "Byron Bay won't budge over rising sea liability", Sydney Morning Herald, 20 May 2007.

<sup>lii</sup> *Daikyo (North Queensland Pty Ltd) v Cairns City Council and Anor* [2003] QPEC 022.

<sup>liii</sup> *Mackay Conservation Group Inc v Mackay City Council & Anor* (2005) QPEC.

Environment Court has rejected development applications at Belongil beach to allow for rock walls and other protective measures to protect properties from erosion.<sup>liv</sup>

There is no doubt that the actions at Belongil are a sign of things to come. As the impacts become more marked on affected groups, legal actions to seek to hold both Governments and corporations responsible for the impacts of climate change are likely. Although to date there have been no Australian cases that have sought to address climate change in this way, there are a number of different legal vehicles they could use. The types of laws that could be used fall into two broad categories: laws that are directed at finding persons liable for damages to the environment, such as tort laws and specific environmental statutes; and laws that may be more general and aimed at protecting human rights.

In a recent paper, barrister Chris McGrath discussed the potential for the *Environmental Protection Act 1994* (Qld) (EP Act) to be used by third parties to hold accountable major greenhouse polluters for serious or material environmental harm.<sup>lv</sup> The notion of “environmental harm” is widely defined<sup>lvi</sup> under Queensland legislation and, although it has not been judicially tested, could encompass the emission of greenhouse gases and consequential climate change. Similar provisions do not exist in the equivalent NSW legislation.<sup>lvii</sup> One of the advantages of the EP Act is that it has wide standing provisions that provide significant opportunities for persons to bring proceedings in the Queensland Planning and Environment Court.<sup>lviii</sup> Usually they can do so without facing the risks of an adverse costs order.<sup>lix</sup>

The consensus amongst practitioners and academics seems to be that Local Councils will owe a duty of care to landowners in their consideration of individual development applications in coastal areas at most risk of climate change.<sup>lx</sup> However, outside this context it is much more difficult to establish a general duty of care on Governments of all levels.<sup>lxi</sup> Another significant obstacle to persons seeking to establish negligence is the issue of causation. Similarly, the *Civil Liability Act 2003* provides extensive protections against negligence actions. It provides that a Council or other authority will only be liable where its acts or omissions are “so unreasonable” that no authority having its functions could properly believe it to be a reasonable

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<sup>liv</sup> *Parkes v Byron Shire Council* [2003] NSWLEC 104, Lloyd J (Parkes No1), *Parkes v Byron Shire Council* [2004] NSWLEC 92 revised - 02/07/2004, Tuor C (Parkes No2), *Van Haandel v Byron Shire Council* [2006] NSWLEC 394, Brown C.

<sup>lv</sup> Chris McGrath, “Legal Liability for climate change in Queensland” (2007) 13 *Queensland Environmental Practice Reporter* 17.

<sup>lvi</sup> *Maroochy Shire Council v Barnes* [2001] QPELR 475, 478.

<sup>lvii</sup> *Protection of Environment Operations Act 1997* (NSW)

<sup>lviii</sup> *Environmental Protection Act 1994* (Qld) s 505.

<sup>lix</sup> *Integrated Planning Act 1997* (Qld) s 4.1.23.

<sup>lx</sup> Zada Lipman and Robert Stokes, “Shifting Sands-the Implications of Climate Change and a Changing coastline for Private Interests and Public Authorities in relation to Waterfront Land” (2003) 20 *EPLJ* 406, 420; Jan McDonald, “The Adaptation Imperative: Managing the Legal Risks of Climate Change in T Bonyhady & P Christoff (eds), *Climate Law in Australia* (MUP) (forthcoming) 2007, 20; Chris McGrath, “Legal Liability for climate change in Queensland” (2007) 13 *Queensland Environmental Practice Reporter* 17; Jan McDonald and Philippa England, “A Risky Climate for Decision-Making: The Legal Liability of Development Authorities for Climate Change Impacts” paper delivered to 2007 QELA Conference, Kingscliff, May 2007.

<sup>lxi</sup> See *Graham Barclay Oysters P/L v Ryan* [2002] HCA 54

exercise of its functions,<sup>lxii</sup> effectively limiting the situation where authorities could be found liable under negligence laws. Over time, as the impacts of climate change become more severe in some communities, failure to take preventative actions against climate change may come to be considered unreasonable.

Unlike negligence, the tort of nuisance does rely on the existence of a duty of care. Nuisance focuses on interference with the right to use and enjoy land. Public nuisance is defined as an unlawful act, the effect of which is to endanger the life, health, property, or comfort of the public.<sup>lxiii</sup> However two recent cases in the United States have found that the issue of climate change is not justiciable in the context of nuisance actions.<sup>lxiv</sup> If such an obstacle is overcome, it is likely this could provide a vehicle to bring climate change actions.<sup>lxv</sup>

In our view, there will be a significant increase in activity amongst individuals affected by climate change to seek to ensure that the law addresses their losses. While it is by no means clear that this will succeed in the short term, it nevertheless underlies the importance of all levels of Government addressing such issues to avoid litigation in the future. In particular, national leadership on coastal planning and vulnerable and disadvantaged communities is necessary to ensure that they do not bear the brunt of the costs of adaptation. In the case of Torres Strait Islander communities this is even more important because their own culture and existence is threatened by inundation events on their islands. These events may even make some low lying areas uninhabitable. While much attention has been given to climate refugees in our region, little attention has been paid to the human rights implications of climate change displacement within Australia. Torres Strait Islanders and other affected communities may also be able to use certain human rights instruments to address their concerns, either through international law or the provisions of the *Native Title Act 1993*.

## **Conclusions:**

Without decisive leadership at a National and State level on climate change, there will continue to be pressure from communities through the use of the law to achieve change. To avoid protracted and costly litigation, companies who are concerned about their greenhouse gas emissions need a concerted strategy to address the communities concerns. It is important that Governments at all levels also respond to this challenge.

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<sup>lxii</sup> *Civil Liability Act 2003* (Qld) s 36(2).

<sup>lxiii</sup> *R v Clifford* [1980] 1 NSWLR 314, 318.

<sup>lxiv</sup> *Connecticut et al v American Electric Power Company Inc et al* (2004) No. 04-CV-05669 (US District Court for Southern District of New York, 15 September 2005) and *People of the State of California v General Motors Corporation et al* No. C06-05755 MJJ.

<sup>lxv</sup> Although obviously causation and statutory defences may prove to be other barriers to such litigation.