

CLIMATE CHANGE LITIGATION

KIRSTY RUDDOCK
PRINCIPAL SOLICITOR,
ENVIRONMENTAL DEFENDER'S OFFICE
NSW



Presentation outline

- Why litigate? Barriers to litigation
- Judicial review cases
- Merits review
- Enforcement
- Health nuisance/negligence
- Trade Practices
- Criminal
- Human rights
- Conclusions

Introduction

- Climate litigation in Australia going for 16 years
- Started with *Greenpeace v Redbank Power Company*
- Significant expansion in last 5-6 years



Why litigate?

- To drive policy change in face of lack of national or international action
- Ensure Governments are accountable and responding to the issue
- To develop the law
- Overseas emphasis on obtaining damages to assist in adaptation particularly from large polluters

Who litigates?

- Small conservation groups or individuals
- Why? Costs risks associated with litigation
- NSW class 4 LEC jurisdiction costs follow the event, costs can be considerable
- More opportunity in merits jurisdiction where no costs risk



Other barriers to litigation

- Lack of law itself
- Causation issues with nuisance or negligence
- Requires flexibility with litigation strategies and use of non-environmental laws

Judicial Review- Key cases

- *Australian Conservation Foundation v La Trobe City Council (Hazelwood case)*
- VCAT Invalidated decision where failed to consider greenhouse gas emissions associated with new coal facility



Judicial review

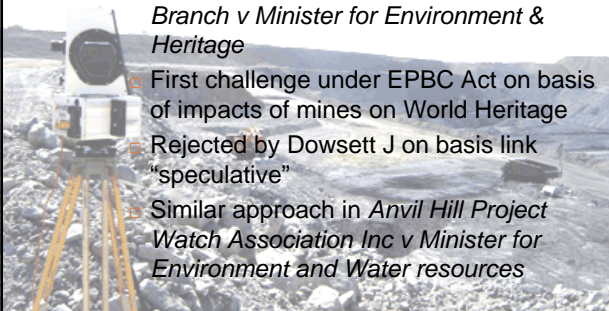
Gray v Minister for Planning

- Challenge to environmental assessment for Anvil Hill coal mine
- Argued failed to consider scope 3 emissions ie burning of coal sold to third parties by mine
- Pain J found required to consider ESD



Judicial review

- *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch v Minister for Environment & Heritage*
- First challenge under EPBC Act on basis of impacts of mines on World Heritage
- Rejected by Dowsett J on basis link "speculative"
- Similar approach in *Anvil Hill Project Watch Association Inc v Minister for Environment and Water resources*



Judicial Review

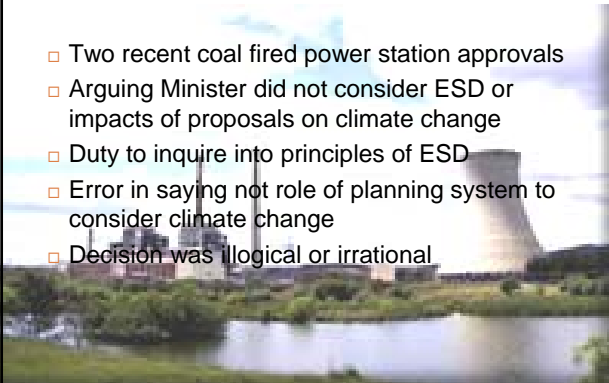
- *Walker v Minister for Planning*
- Biscoe J found decision of Minister invalid because failed to consider climate change flood risks
- Rejected by Court of Appeal failure to consider climate change did not invalidate
- Contrast with *Aldous v Taree Shire Council*

Administrative law challenges in NSW



Haughton v Minister for Planning

- Two recent coal fired power station approvals
- Arguing Minister did not consider ESD or impacts of proposals on climate change
- Duty to inquire into principles of ESD
- Error in saying not role of planning system to consider climate change
- Decision was illogical or irrational



Other coal related cases

- *Rivers SOS v Minister for Planning*
- Mining under water catchment for Sydney near Wollongong
- Argued denial of procedural fairness due to revised plan
- Preston CJ rejected arguments



Other coal related cases

- *Caroona Coal Action Group v Coal Mines Australia Pty Ltd & Ors*
- Challenge to exploration licence on Liverpool Plains
- Technical arguments about whether licence transferred properly
- Currently on appeal



Merits review

- *Greenpeace v Redbank Power Company*
- Must consider ESD but does not outweigh other considerations
- Imposed more conditions on development requiring mitigation, monitoring of emissions, and planting of sinks

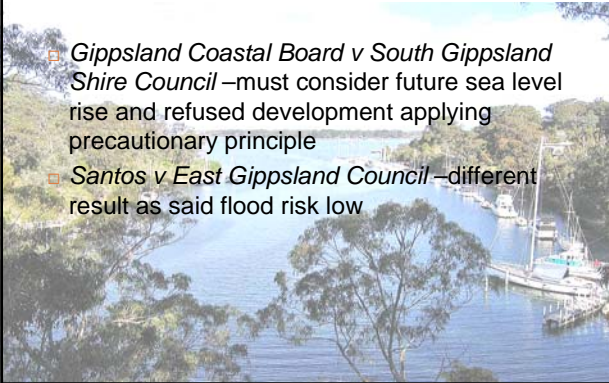
Merits review

- *Xstrata Coal Queensland v QCC*
- QCC challenged the licence for new coal mine
- Sought conditions to mitigate environmental impacts
- President of LRT dismissed and appeal against his decision upheld
- Special legislation removed appeal



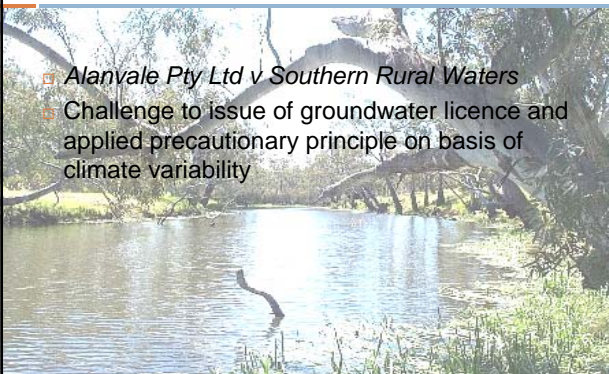
Merits Review-VCAT

- *Gippsland Coastal Board v South Gippsland Shire Council* – must consider future sea level rise and refused development applying precautionary principle
- *Santos v East Gippsland Council* – different result as said flood risk low



Merits review –VCAT

- *Alanvale Pty Ltd v Southern Rural Waters*
- Challenge to issue of groundwater licence and applied precautionary principle on basis of climate variability



Merits review- NSW

- Taralga Landscape Guardians v Minister for Planning
- Belongil cases about structures on foreshore



Merits Review –South Australia

- *Northcape Properties v District Council of Yorke Peninsula*
- Planning instrument required consideration of sea level in 100 years
- Refused development on basis of shift of shore line 35-40 metres inland

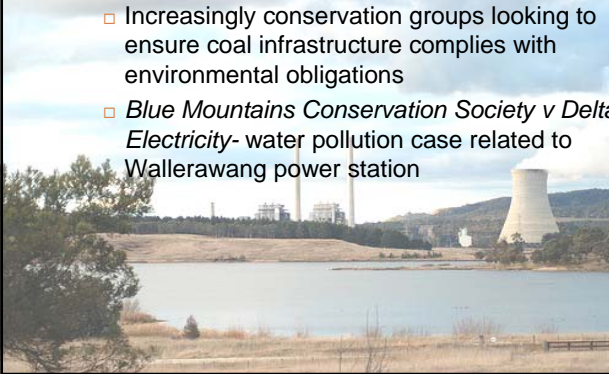


Enforcement?

- *Gray v Macquarie Generation*
- First pollution case –using Protection of the Environment and Operations Act to argue willfully or negligently disposing of waste
- Part of case struck out on basis that implied authority to pollute as power station
- Extent of pollution and whether reasonable is argument that remains

Enforcement?

- Increasingly conservation groups looking to ensure coal infrastructure complies with environmental obligations
- *Blue Mountains Conservation Society v Delta Electricity*- water pollution case related to Wallerawang power station



Nuisance/Negligence

- Causation difficult
- Health impacts are different as may be easier to show causation as science about coal pollution is linked to health problems
- Case study in Hunter



Trade Practices *Grrrrgreen.*

- Trade Practices Act
- makes it an offence to engage in misleading or deceptive conduct
- ACCC (regulatory authority in Australia) brought action against environmental claims
 - Goodyear said tyres reduced carbon dioxide
 - SAAB who claimed their cars were carbon neutral
 - Wipe out bills using solar
 - Soil Carbon Sequestration claims



Claims ACCC rejected

- Other complaints
 - "Ultra clean coal"
 - Forest industry wood carbon neutral
 - Other clean coal products



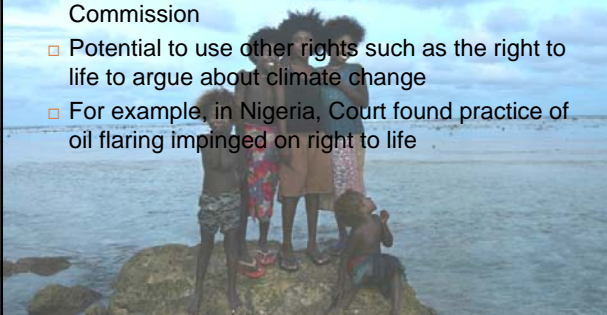
Criminal

- Ramification of Direct action?
 - Directions for compensation- Tomago
 - Climate emergency cases
 - Compare to Kingsnorth in UK



Human Rights

- Inuit complaint to Inter American Human Rights Commission
- Potential to use other rights such as the right to life to argue about climate change
- For example, in Nigeria, Court found practice of oil flaring impinged on right to life



Outcomes and Lessons

- Climate change litigation achieves some important outcomes
- Expert evidence is often important
- As new laws are introduced nature of climate litigation will change

