



Does Climate Change Litigation Work?



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Those seeking to change Government policy on climate change have been confronted of late with overwhelming evidence of the damage greenhouse gas emissions are doing to the Australian environment.ⁱⁱ Yet with the Australian Government still refusing to sign the Kyoto Protocol and make significant changes in policy to combat climate change, many have been forced to take their campaign to the Courts.

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.ⁱⁱⁱ There have been a few notable victories including the *Hazelwood* and *Gray* decisions. Other cases have been less successful in changing the law. Some commentators have suggested these cases show the problems with climate change litigation in relying on the judiciary to bring about environmental change.^{iv} This paper will seek to outline some recent cases in the area of climate change litigation, to explain the Court's response to them and to explore the role of such public interest litigation in informing debate and change. It will focus on the *Bowen Basin* case, the *Anvil Hill* case, the *Gray* case and the *Drake-Brockman* litigation.^v

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.^{vi} 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.^{vii}

The Bowen Basin case:

The *Bowen Basin* case, as it has come to be known, was the first to challenge a decision of the delegate of the Minister for Environment and Heritage (the decision-maker) for failing to consider the greenhouse gas emissions from two proposed mines in deciding whether they should be assessed and approved under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

ⁱⁱ IPCC Working Group II 'Climate Change 2007: Impacts, Adaptation and Vulnerability'. Also see the extensive evidential sources cited by Wood, 'Nature's Trust: Reclaiming an Environmental Discourse', pp. 434-436

ⁱⁱⁱ The first case to raise such issues was *Greenpeace v Redbank Power*, where the Court imposed conditions upon a coal fired power station in NSW requiring it to mitigate the effects of greenhouse gas emissions by the planting of sinks, the limitation of fuel sources for the station to tailings from particular mines, and the monitoring and reporting on stack emissions. Also see: *ACF v Minister for Planning* [2004] VCAT 2029; *Gray v Minister for Planning* [2006] NSWLEC 720.

^{iv} Peel, 'The role of climate change litigation in Australia's response to global warming', at 101.

^v *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage & Ors* [2006] FCA 736; *Drake-Brockman v Minister for Planning & Ors* [2007] NSW LEC 490.

^{vi} Preston CJ, "The role of public interest environmental litigation" (2006) 23(5) *Environmental and Planning Law Journal* 337, 347.

^{vii} Joseph Smith and David Shearman, *Climate Change Litigation: Analysing the law, scientific evidence & impacts on the environment, health & property* (2006), p. 12.

Around 85% of Queensland's coal comes from the Bowen Basin where the two mines at issue are located.^{viii} The majority of mines in the Bowen Basin are open cut and directly employ around 13,000 people. The National Greenhouse Gas Inventory 2004 identified that coal mining released 21.3 million tonnes of CO₂ in 2004 or 4% of net national emissions. Those emissions associated with the combustion of coal contributed 185 million tonnes of CO₂ or 33% of emissions, excluding export coal.^{ix}

There were two new mines in issue in the *Bowen Basin* case: the Sonoma Coal Project (Sonoma) and the Isaac Plains Coal project (Isaac Plains).

The Sonoma Coal Project proposed by QCoal Pty Ltd was for a new open cut mining project near Collinsville. The mine is expected to produce approximately 30 million tonnes of coal, primarily export coking coal, with lesser amounts of thermal coal for both the export and domestic markets. The annual output is expected to be 2 million tonnes per annum, with an anticipated mine life of 15 years.^x

The Isaac Plains Coal Project proposed by Bowen Central Coal Management Pty Ltd is for an open cut coal mine located approximately 7 km north east of Moranbah. Mining of coal will be undertaken at a rate of approximately 1.9 million tonnes per annum with a lifespan of approximately 9 years. The coal is to be exported.^{xi}

The (third version) referral document lodged in respect of Isaac Plains discussed greenhouse gas emissions. It stated that the greenhouse gas emissions would be predominantly from electricity and diesel use from the operation of the mine and estimated to be 40,000-45,000 tonnes of CO₂ equivalent gas per year.^{xii} Sonoma's referral contained no such details.

Both proponents referred the mine proposals to the Department of Environment and Heritage for assessment under the EPBC Act. Both argued that the mines would not impact on matters of national environmental significance and therefore were not controlled actions under s.75 of the EPBC Act. In response, Wildlife Whitsunday wrote detailed submissions stating that: 'Global warming is already impacting on matters of national environmental significance and unless major changes are made to current greenhouse gas emissions, will severely impact on matters of national environmental significance in the future'.^{xiii} It went on to outline the strong scientific evidence of climate change impacts on the Great Barrier Reef World Heritage Area, possibly leading to the collapse of coral populations by 2100. The submission also

^{viii} Department of Natural Resources and Water, 'Mining, Exploration and Petroleum: Mining Operations and Developments', State of Queensland, 2007, <http://www.nrw.qld.gov.au/mines/coal/operations.html>

^{ix} Australian Greenhouse Office (AGO), *National Greenhouse Gas Inventory 2004: Accounting for the 108% Target*, Canberra, 2006, <http://www.greenhouse.gov.au/inventory/2004/pubs/inventory2004.pdf>

^x QCoal Pty Ltd, Sonoma Coal Project Commonwealth EPBC Act 1999 Referral, p. 2, title: "QCoal Pty Ltd/mining/near Collinsville/QLD/Sonoma Coal Project, comprising Sonoma-1, Sonoma-2 and Belmore-1", reference no. 2005/2080, April 2005, http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referral_detail&proposal_id=2080

^{xi} Isaac Plains Coal Project Commonwealth EPBC Referral, p. 2, title: "Bowen Central Coal Management Pty Ltd/Mining/Moranbah/QLD/Open cut coal mine 7km NE of Moranbah (Isaac Planins)", reference no. 2005/2070, April 2005, http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referral_detail&proposal_id=2070

^{xii} *Ibid.*, pp. 37-38

^{xiii} Wildlife Whitsunday submission p. 6

discussed evidence about the impacts of climate change on the Wet Tropics World Heritage Area that suggested even moderate levels of warming would pose serious threats to its biodiversity.^{xiv} The submission stated that emissions must be considered when assessing the likely impacts of the action under s.75 of the EPBC Act.^{xv}

Wildlife Whitsunday requested a statement of reasons from the decision-maker for declaring that the projects were not controlled actions. The decision-maker's reasons stated that he 'took into account ... the public comments received on the referral from the Proserpine/Whitsunday Branch of the Wildlife Preservation Society of Queensland'. However, there was no reference in the reasons for the decision to the submissions on climate change, indicating that the decision-maker regarded them as irrelevant or had failed to consider them.^{xvi} On this basis Wildlife Whitsunday commenced the Federal Court proceedings.

During the course of the proceedings a handwritten note written by the decision-maker was produced in relation to the Isaac Plains mine that stated: 'I regard the likelihood of significant impacts on NES arising from the marginal addition of greenhouse gases to be extremely small, in addition to speculative'.^{xvii} A similar comment was made in relation to the Sonoma mine. In October 2005, two weeks before the case was to be heard, the decision-maker's lawyers filed additional evidence to support the decisions, a 13-page affidavit from the decision-maker, Mark Flanigan.^{xviii} The affidavit sought to explain at length the reasoning behind his decision, concluding that because the contribution of the respective coal mines was small compared to, and not measurable or identifiable separately from, the collective contribution of all other contributors to the same climate change,^{xix} the mines did not have a *significant impact* on World Heritage values.

As a result of the additional evidence lodged by the decision-maker, Wildlife Whitsunday amended its application to challenge the reasoning of the decision-maker.^{xx} The Applicant argued the significance of the emissions should be addressed by examining the emissions in the context of significance at a national level in comparison with other actions in Australia contributing to global warming.^{xxi} Wildlife Whitsunday also argued that the question of 'significant impact' should be considered *cumulatively* with other contributors to global warming.^{xxii} It was also argued that the decision-maker had failed to consider that global warming is included as a key threatening process under section 183 of the EPBC Act.^{xxiii} The Applicant also argued

^{xiv} Krockenberger, AK, Kitching, RL, and Turton, SM, *Environmental Crisis: Climate Change and Terrestrial Biodiversity in Queensland*, Rainforest CRC, Cairns, 2003.

^{xv} Wildlife Whitsunday, 'Comments on QCoal Pty Ltd- Mining near Collinsville Queensland, Sonoma Coal Project, 14th April 2005, p. 7.

^{xvi} *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [5], [37], [69] and [216]; *Mees v Kemp* [2004] FCA 366.

^{xvii} These documents were annexed to the affidavit of Mark Flanigan.

^{xviii} Affidavit of Mark Flanigan can be found at <http://www.envlaw.com.au/greenhouse2.pdf> (without attachments).

^{xix} Affidavit of Mark Flanigan, paragraphs 17-25, 29 (b) & (e), 41.

^{xx} Amended Application for Order of Review (version 3), amended October 2005 pursuant to leave under) 13, r 2 of the Rules, granted by Dowsett J, (in respect of the *Bowen Basin* case)

<http://www.envlaw.com.au/greenhouse1.pdf>

^{xxi} *Ibid*, paragraph [6].

^{xxii} *Ibid*, paragraph [5].

^{xxiii} *Ibid*, paragraph [10].

that there was no evidence or other material to justify making the decision, or upon which the decision-maker could be reasonably satisfied that the greenhouse impacts were not likely to have a significant impact on the matters protected by Part 3 of the EPBC Act.^{xxiv} This was particularly important because had such material been before the decision-maker it would have shown that the impacts of the mines were significant- accounting for around 2% of emissions each year.^{xxv}

Wildlife Whitsunday filed extensive submissions in this matter, which provided detailed background on the EPBC Act and the role of environmental impact assessments in environmental law.^{xxvi} Wildlife Whitsunday's submissions also made detailed reference to the role of causation in the context of environmental law.^{xxvii}

Wildlife Whitsunday argued that the interpretation of the decision-maker meant that no matter how substantial an action's contribution to climate change, it would be excluded from assessment under the EPBC Act. Instead, it was argued, the fact that there were multiple causes of damage to World Heritage values does not mean the mines are insignificant as one of those causes. Wildlife Whitsunday posited that the relevant test should be the contribution of the proposal to impacts which climate change will bring to the matters of national environmental significance in the context of other Australian contributors to those impacts.

Unfortunately the arguments did not succeed. 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.^{xxviii}

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

^{xxiv} Ibid, paragraph [12].

^{xxv} Based on total greenhouse gas emissions being 550Mt CO₂ (as they were in 2003 according to AGEIS).

^{xxvi} *Project Blue Sky v ABA* (1998) 194 CLR 357; *Prineas v Forestry Commission of NSW* (1983) 49 LGRA 402 at 417 per Cripps J; *Tasmanian Conservation Trust Inc v minister for Resources & Gunns Ltd* (1995) 55 FCR 516 at 541 per Sackville J; *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No.4)* (1981) 1 NZLR 531 at 534.

^{xxvii} *Nathan Dam* case mentioned decisions on causation: *March v Sramare (E & MH) Pty Ltd* (1991) 171 CLR 506; *Royall v R* (1991) 172 CLR 378 at 387; *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 215 ALR 385; *Henville v Walker* (2001) 206 CLR 459 at 489-491.

^{xxviii} *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.^{xxix}

Justice Dowsett suggested that Wildlife Whitsunday in its submission should have identified in detail the protected matters that would be significantly impacted by the emissions from these mines and the increase in the amount of coal burned as a result of these mines.^{xxx} His Honour 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.^{xxxi}

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.^{xxxii} He also found that the principle of Ecologically Sustainable Development 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.^{xxxiii}

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 Hunter 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.

About half the coal from the project is to be exported to power stations in Japan^{xxxiv}, 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^{xxxv}) electricity.^{xxxvi}

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.

^{xxix} *Bowen Basin* case, paragraph [72].

^{xxx} *Ibid*, paragraph [40].

^{xxxi} *Ibid*, paragraph [42].

^{xxxii} *Ibid*, paragraphs [46]-[47].

^{xxxiii} *Ibid*, paragraphs [53]-[54].

^{xxxiv} *Gray* case, paragraph [4].

^{xxxv} <http://www.macgen.com.au>

^{xxxvi} <http://www.macgen.com.au/>

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 EPBC Act. Other proceedings in the NSW Land and Environment Court challenged the State approval of the Project under Part 3A of the *Environmental Planning and Assessment Act 1979*.

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.

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.^{xxxvii}

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.^{xxxviii}

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.

The Court held that the delegate’s conclusion was open to her based on the findings she had made. Justice Stone stated:

^{xxxvii} *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for Environment and Heritage* (2006) 232 ALR 510 (Dowsett J).

^{xxxviii} *Environment Protection and Biodiversity Conservation Act 1999*, s 183.

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 respect to the arguments about 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.

Gray Case

The *Gray* case also involved the Anvil Hill Project. This case involved a challenge by climate change activist Peter Gray in the NSW Land and Environment Court against the NSW Government's decision to approve the mine.

Under the *Environmental Planning and Assessment Act* (EP & A Act),^{xxxix} the Director-General of Planning is required to issue environmental assessment requirements (EARs) for projects to which Part 3A of the Act applies. The EARs must have regard to any relevant guidelines published by the Minister in the NSW Government^{xl} and set out the form of environmental assessment that is to be prepared by or on behalf of the proponent.^{xli}

The Director-General issued EARs for the project in April 2006. These included a requirement that the environmental assessment include a detailed greenhouse gas assessment. The assessment was to take into account relevant State government technical and policy guidelines^{xlii}, and a list of suggested relevant guidelines was attached to the EARs.

The subsequent environmental assessment was described by the Court as a “very large and detailed document”. It contained an “Energy and Greenhouse Assessment” based on, among other things,^{xliii} the *Greenhouse Gas Protocol 2004*.^{xliv}

Importantly, the Protocol provided for assessment of three types of emissions (emphasis added):

^{xxxix} *Environmental Planning and Assessment Act 1979*, s 75F(2).

^{xl} *Environmental Planning & Assessment Act 1979*, s 75F(1).

^{xli} *Environmental Planning & Assessment Act 1979*, s75F(5). That EARs by definition require an “environmental assessment” was a key aspect of the judgment: see further paragraph [70] of the judgment.

^{xlii} *Gray* case, paragraph [16].

^{xliii} That is, the draft *NSW Energy and Greenhouse Guidelines for Environmental Impact Assessment* (Sustainable Energy Development Authority and Planning NSW, 2002) and the Australian Greenhouse Office *Factors and Methods Workbook December 2005*.

^{xliv} *Gray* case, paragraph [18]-[19].

- **Scope 1 emissions** - Direct GHG emissions that *occur from sources that are owned or controlled by the company*, for example emissions from combustion in owned or controlled boilers, furnaces, vehicles, etc.; emissions from chemical production in owned or controlled process equipment;^{xlv}
- **Scope 2 emissions**^{xlvi} - Electricity indirect GHG emissions from the generation of *purchased electricity consumed by the company*;^{xlvii} and
- **Scope 3 emissions** - An optional reporting category that allows for the treatment of all other indirect emissions. Scope 3 emissions are a consequence of the activities of the company, but occur *from sources not owned or controlled by the company* (e.g.) extraction and production of purchased materials; transportation of purchased fuels; and *use of sold products and services*.^{xlviii}

The assessment addressed Scope 1 and 2 emissions, but did not assess Scope 3 emissions for the project

The Director-General wrote to the proponent stating his view that the assessment adequately addressed the EARs and that the assessment would be placed on public exhibition.^{xlix}

The Applicant 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 EARs. Further, it was argued that the fact that the Director-General released the assessment for public comment without requiring Scope 3 assessment to be included rendered the decision to release the assessment for public comment invalid.

The Applicant claimed the decision to release the assessment for public comment was invalid for two reasons. Firstly, the assessment could not have complied with the EARs because a detailed greenhouse gas assessment necessarily considered carbon dioxide emissions when the coal was burnt¹. This was because ‘environmental assessment’^{li} was an ‘assessment of the impact on the environment of the proposal’.^{lii}

Importantly, the premise of the Applicant’s argument was that by releasing the assessment for public comment, the Director-General necessarily had to have decided

^{xlv} Ibid, paragraph [19].

^{xlvi} Ibid.

^{xlvii} “Purchased electricity” is defined as “electricity that is purchased or otherwise brought into the organisational boundary of the company, (emissions that) physically occur at the facility where electricity is generated” – para 19.

^{xlviii} Gray case, paragraph [19].

^{xlix} Gray Case, paragraph [21].

¹ Ibid, paragraph [76].

^{li} Under section 75F(5) of the *Environmental Planning and Assessment Act 1979*

^{lii} The same meaning as in s75H of the *Environmental Planning and Assessment Act 197.*

that the assessment complied with the EARs, giving rise to a reviewable administrative decision.

The Director-General submitted that release for public comment of an assessment that did *not* comply with the (original) EARs impliedly amended those EARs (so that the assessment did then comply with them).^{liii} This submission was rejected by the Court.^{liv}

Consequently, the Applicant argued that the assessment necessarily had to be able to be characterised as an ‘environmental assessment’ if it was to be able to meet any EARs issued in relation to the project. Therefore the requirement for a detailed greenhouse gas assessment was by definition an environmental assessment. The broad definition of ‘environment’ in the Act (that it “includes all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings”^{lv}) meant that the assessment had to include impacts from coal *burning* given that global climate change was an impact on the (global) surroundings of humans. The Applicant did not succeed on this ground.^{lvi}

The Applicant’s second argument was that in deciding the assessment complied with the EARs (and so releasing the assessment for public comment), the Director-General failed to take into account the principles of Ecologically Sustainable Development (ESD). 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.^{lvii}

Her Honour found for the Applicant on the ground of failure to take into account ESD on the basis that the principles of intergenerational equity and the Precautionary Principle had not been considered. The Court also agreed that the decision to release the assessment for public comment was predicated on a decision that the assessment complied with the EARs,^{lviii} and that this was a justiciable decision.^{lix}

The Director-General was required to take the principles of ESD into account because of the numerous decisions of the Land & Environment Court that have confirmed the importance of ESD principles for decision-makers who make decisions under legislation which adopts ESD principles.^{lx}

The Director-General had had not taken the Precautionary Principle aspect of ESD into account firstly in not requiring cumulative impacts to be assessed^{lxi} (which would have included the impacts of coal burning^{lxii}), 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.^{lxiii}

^{liii} *Gray Case*, paragraph [73].

^{liv} *Ibid.*

^{lv} *Environmental Planning and Assessment Act 1979*, s 4.

^{lvi} *Gray case* paragraphs [80]-[81].

^{lvii} *Ibid.*, paragraphs [41], [105].

^{lviii} *Ibid.*, paragraph [72].

^{lix} *Ibid.*, paragraph [75].

^{lx} *Ibid.*, paragraph [109].

^{lxi} *Ibid.*, paragraph [122], [131].

^{lxii} *Ibid.*, paragraph [126].

^{lxiii} *Ibid.*, paragraph [131].

The failure to take into account cumulative impacts also constituted a failure to take into account the principle of intergenerational equity.^{lxiv}

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.^{lxv} 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].^{lxvi}

Her Honour held as follows:

Given the quite appropriate recognition by the Director-General that burning the thermal coal from the Anvil Hill Project will cause the release of substantial GHG in the environment which will contribute to climate change/global warming which, I surmise, is having and/or will have impacts on the Australian and consequently NSW environment, it would appear that Bignold J's test of causation [in Bell] based on a real and sufficient link is met.

[The fact that] the use of coal as fuel occurred only through voluntary, independent human action, that alone does not break the necessary link to impacts arising from this activity given that the impact is climate change/global warming to which this contributes...

"...The fact that there are many contributors globally does not mean the contribution from a single large source such as the Anvil Hill Project in the context of NSW should be ignored in the environmental assessment process. The coal intended to be mined is clearly a potential major single contributor to GHG emissions deriving from NSW given the large size of the proposed mine.

I consider there is a sufficiently proximate link between the mining of a very substantial reserve of thermal coal in NSW, the only purpose of which is for use as fuel in power stations, and the emission of GHG which contribute to climate change/global warming, which is impacting now and likely to continue to do so on the Australian and consequently NSW environment, to require assessment of that GHG contribution of the coal when burnt in an environmental assessment under Pt 3A.^{lxvii}

The decision to release that assessment for public comment under s75H(3) was declared to be void and without effect. Consequently the Director-General was

^{lxiv} Ibid, paragraph [134].

^{lxv} Ibid, paragraph [137].

^{lxvi} Ibid, paragraph [54].

^{lxvii} Ibid, paragraphs [97]-[100]. For the reasons set out in paragraphs [84], [86], [87] and [90 – 93].

required to consider this decision again before the process of approval under Part 3A could progress any further.

As Her Honour noted in the judgment, this wide interpretation of the environmental impact of a project is not radical in a planning law context. Many other cases have held that effects beyond the physical boundary of a project can be taken into account in assessing environmental impacts.

However two important effects can be expected to flow from *Gray*. Firstly, the climate change impacts of the *use* of a product were for the first time required to be taken into account in a detailed greenhouse gas assessment required for the project. This was though the project did not involve use of the product itself (other than through contracts with purchasers for the use of the product) and though that use would be by third parties not directly related to the project^{lxviii} (other than contractually). Having been included in the assessment, a decision-maker considering that assessment will now be specifically aware of all of the impacts in deciding whether to approve the project. Secondly, two important ESD principles, were given real teeth in determining how a development project was to be assessed.

Whilst this was a challenge to the release of the environmental assessment for public comment and not a challenge to any mine approval itself (which has subsequently been granted), the case stands to have considerable impact on the assessment of major infrastructure projects. The judgment will assist in ensuring that decision-makers consider the climate change impacts of the *use* of products and services in assessing the environmental impacts of a project. Assessments that fail to follow these requirements may be subject to challenge in the Land and Environment Court of NSW and be found to be unlawful.

Drake Brockman case:

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.^{lxix}

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 concept plan provided for extensive re-development of the site, including residential apartments, commercial offices and retail premises. The case is important because it is one of the few cases that have considered the application of Part 3A of the 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. Those arguments and a number of procedural

^{lxviii} Ibid, paragraphs [54].

^{lxix} 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

arguments that related to the application of the 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 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. 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.

Her Honour found the cases on the Precautionary Principle were related to merits review in Class 1 proceedings, in contrast to these judicial review proceedings. 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* does 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 lip service to the concept of ESD. She found that there were in fact indications that the Minister had considered it by rejecting the public car park on the site, and making it necessary for the proponent to comply with BASIX and Green Star Office.

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

Lessons learned from these cases

One of the key benefits of climate change cases is that they have received national attention and highlighted the Government's failure to use its own laws to address climate change. In particular, the *Bowen Basin* case occurred at a time when climate change was obtaining less coverage than it currently receives. When the litigation commenced, ABC's 'Lateline' ran a story about the case, including an interview with the Minister for the Environment. Similarly, *the Australian* ran two articles about the case, one criticising the Government's hypocrisy in denying that climate change was occurring in the context of the litigation.^{lxx} The position of the Government in

^{lxx} Hodge, 'Canberra in denial over Greenhouse'.

denying that climate change was occurring in response to a notice to admit facts early in the case also became the subject of a heated debate in the Senate.^{lxxi} The *Drake-Brockman* case received considerable publicity in the *Daily Telegraph* featuring the student who was taking on the Minister for Planning.^{lxxii}

Several major law firms have produced newsletters or commentary about climate change cases.^{lxxiii} They have sought to highlight to their mining clients the fact that environmentalists are using the law to challenge coal mining and other greenhouse gas emitting projects. Much of this has been to encourage their clients to obtain expert advice on climate change issues. In particular, there is now a plethora of seminars and conferences about climate change liabilities.

Need for law reform through amendments to the EPBC Act

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 the publicity they generated for law reform through adding a greenhouse trigger to the EPBC Act.

The *Bowen Basin* and *Anvil Hill* cases showed that until the Courts find otherwise, it will be possible for the Commonwealth Minister to consider greenhouse gas emissions from large mining and infrastructure projects - but find that their contribution to climate change is not enough to justify their assessment under the EPBC Act. The only way to conclusively deal with this problem is to amend the EPBC Act to include a specific greenhouse trigger.

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.^{lxxiv}

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 CO₂ 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 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.

^{lxxi} See speech of Senator Bob Brown, 11 August 2005.

^{lxxii} Lillian Saleh, '\$2bn Beer Battle: Sartor sued over brewery site approval,' *Daily Telegraph*, 9 March 2007

^{lxxiii} Deacons, 'Wildlife Preservation Society of Queensland'; Mallesons Stephen Jaques, 'Greenhouse Gas Emissions'; Allens Arthur Robinson, 'Greenhouse gas challenge to coal mines rejected by Federal Court'; Corrs Chambers Westgarth, 'Isaac Plains/Sonoma Coal Mines Greenhouse Gas Case'.

^{lxxiv} Council of Australian Governments, Attachment 1- Part II.

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. Even the Department of Planning has criticised the Government's failure to introduce more stringent environmental rules for developers of major projects.^{lxxv}

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.

Difficulties in bringing climate change litigation

There were a number of barriers to climate change litigation. Federal Court litigation is expensive. The filing fee alone is over \$1700. The costs risks are considerable, as the Court has been reluctant to exercise its discretion to not award costs against public interest litigants. The Courts have rarely discounted the costs amount.^{lxxvi} This means that most major conservation groups are unwilling to take the risk of litigation unless they are sure that the case is certain to succeed. Costs were awarded against Wildlife Whitsunday as a result of them losing the *Bowen Basin* case. As a result, Wildlife Whitsunday voluntarily agreed to wind up their organisation. Unsurprisingly they were unable to meet the estimate of the Minister's and two mining companies' costs which amounted to over \$300,000.^{lxxvii}

The *Bowen Basin* and *Anvil Hill* cases occurred because the client was prepared to risk their organisation to run the litigation. Without the fee waiver and pro bono assistance of solicitors and Counsel these cases would not have occurred.

In NSW, it is much easier for clients to bring climate change litigation as legal aid is available for public interest environmental law matters. Importantly, legal aid also provides an indemnity from a costs order.

Conclusions

Litigation still has a significant way to progress in dealing with climate change. There are however some useful decisions both in relation to interpreting the EPBC Act and climate change litigation in other jurisdictions that will assist in future arguments before the Court. There is significant scope under the EPBC Act to ensure mining is better regulated to address the overall impacts on emissions and the Australian environment through conditions on the approvals. Some of these cases, while unsuccessful, have assisted in starting the debates about climate law and the EPBC Act in particular. They have also highlighted the need for clear statutory reform at both the State and Federal level to address greenhouse gas emissions.

^{lxxv} Catherine Munro, 'Developer to go it alone on greenhouse gases,' Sydney Morning Herald, 28 September 2007.

^{lxxvi} See decisions such as *Margarula v Minister for Environment & Heritage* (2005) FCA 1219 at [2].

^{lxxvii} These were the costs estimates provided by the three Respondents on a party/party basis as opposed to taxed costs. The actual legal costs were higher.