



Climate change and environmental planning law

By Clifford Ireland¹

Introduction: The scientific and policy context of contemporary climate change litigation

In his well known book *We are the Weather Makers – The Story of Global Warming*², Dr Tim Flannery observed that:

Prior to 1800 and the start of the industrial revolution, there were about 280 parts per million of CO₂ in the atmosphere, which equates to around 586 gigatonnes of carbon...

Today the figures are 380 parts per million or around 790 gigatonnes in total. If we wish to stabilise CO₂ emissions below that threshold of dangerous change [450 to 550 parts per million of CO₂], we will have to limit all future human emissions to around 600 gigatonnes. Just over half of this will stay in the atmosphere, raising levels to around 1,100 gigatonnes, or 550 parts per million by 2100. This will be a tough budget for humanity to abide by. Over a century, it equates to around 6 gigatonnes per year. Compare that with the average of 13.3 gigatonnes that accumulated each year throughout the 1990s (half of this from burning fossil fuel). And remember that the human population is said to rise from six billion now to nine billion in 2050.

Flannery wrote of predictions (at page 160) that if global CO₂ were stabilised at 550 parts per million, this would probably result in an increase in global temperature of around 3°C. Such a global temperature increase is predicted to cause much – some use the term ‘catastrophic’ (and it may well be quite apt, though emotive) – environmental change and damage.

It can be freely acknowledged, without challenging any of these predictions, that there remains some residual uncertainty as to the precise extent which global increases in CO₂ will cause the global average temperature to rise. As Flannery noted at 151:

We must now turn to the key uncertainty that remains in all models: would doubling of CO₂, from pre-industrial levels of 280 to 560 parts per million, lead to a 2° Celsius or 5° Celsius increase in warming? After almost 30 years of hard work and profound technological advances we are still not sure about the answer to this question.

Some eminent scientists (often earth scientists³ familiar with the dramatic natural fluctuations of the planet’s climate over the millennia) have gone quite a bit further than such acknowledgement that there is uncertainty in predicting the precise extent of greenhouse induced temperature rise, and queried whether the greenhouse effect has in fact caused the surface warming already observed in measurements to date at all. Typical of these more robust critiques is perhaps that of Ian Plimer, professor of geology at the University of Melbourne who, in his book *A Short History of Planet Earth*⁴, wrote as follows (at 213):

Most weather stations are where they always have been. Buildings have sprung up around them and forests have been cut down. Local temperatures are driven up, making analysis of data misleading for the computer models that are the basis for many weather and global climate predictions. If the atmosphere heats up like a giant greenhouse, then the troposphere should also be warming. It isn’t. Furthermore, the effects of natural variability in orbit, solar activity, the lunar tides, ocean currents, ice sheet dynamics and volcanicity,

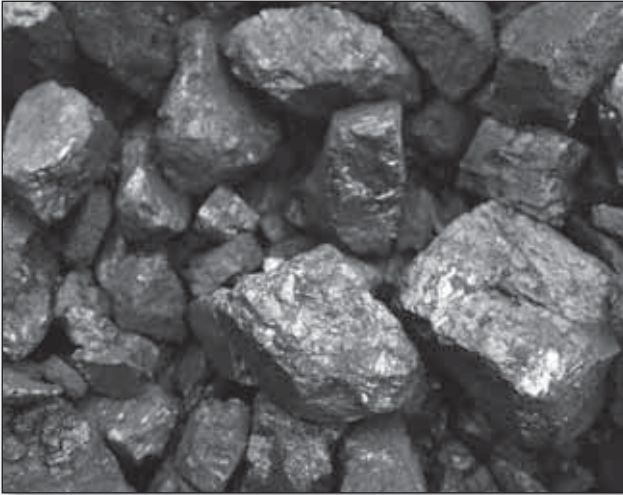


sedimentation, mountain building, subsidence and continental drift are far greater for temperature changes than those calculated for the worst human induced greenhouse scenario. There is an inescapable conclusion: observed slight surface warming in the 20th Century is related to factors other than the greenhouse effect.

It seems fair to say that such dissenting scientific opinion as that of Professor Plimer, while contributing to a lively public policy debate in the area, is decidedly in the minority amongst scientific experts.⁵ Most importantly for the discussion of climate change in recent Australian case law is the fact that such views are at odds with the conclusions of the Intergovernmental Panel on Climate Change (IPCC).

Other scientists who support views similar to that of Professor Plimer, for example Dr Robert Carter and Sir Ian Byatt, have produced a critique of the Stern review.⁶ This critique was in fact considered and relied upon by Queensland Land and Resources Tribunal in the recent case.⁷ The Queensland Court of Appeal⁸ held that the manner in which the tribunal chose to rely on this critique (involving a notification of the parties after the conclusion of the hearing that it had come to the tribunal’s attention) involved a process that did not give the Queensland Conservation Council ‘fair opportunity to test or refute the critique by other information or submissions’. This resulted in a denial of natural justice and led to the tribunal’s decision being overturned. This decision on appeal was not surprising considering that it was common ground at the hearing that anthropogenic climate change due to greenhouse gas (GHG) emissions was occurring⁹. Some environmentalist commentators have been particularly scathing of the decision of the tribunal and of its president, President Kopenol, in the *Xstrata* case.¹⁰

The reasoning in the *Xstrata* case (apart from exhibiting error of law for failure to accord procedural fairness) was unusual in its adoption of a robustly sceptical approach to climate change science. The scientific reference point for most other contemporary Australian climate change case law is the material published by the IPCC. In its *Fourth Assessment Report*, November 2007, the IPCC concluded as follows:



Warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global average sea level... (page 1, Summary for Policy Makers).

Rising sea level 'consistent with warming' has also been documented by the IPCC:

Rising sea level is consistent with warming. Global average sea level has risen since 1961 at an average rate of 1.8mm per year and since 1993 at 3.1mm per year, with contribution from thermal expansion, melting glaciers and ice caps, and the polar ice sheets. Whether the faster rate for 1993-2003 reflects decadal variation or an increase in the longer term trend is unclear. (page 1, Summary for Policy Makers)

The IPCC has confirmed that climate change is having an effect on natural systems:

Observational evidence from all continents and most oceans shows that many natural systems are being affected by regional climate changes, particularly temperature increases. (page 2, Summary for Policy Makers)

The IPCC noted that while there are multiple natural causes of climate change:

Global GHG emissions due to human activities have grown since pre-industrial times, with an increase of 70 per cent between 1970 and 2004. ...

Global atmospheric concentrations of CO₂, methane (CH₄) and nitrous oxide (N₂O) have increased markedly as a result of human activities since 1750 and now far exceed pre-industrial values determined from ice cores spanning many thousands of years.

Atmospheric concentrations of CO₂ (379 parts per million) and CH₄ (1,774 parts per million) in 2005 exceed by far the natural range over the last 650,000 years.

... Most of the observed increase in global average temperatures since the mid 20th Century is very likely to be due to the observed increase in anthropogenic GHG concentrations...

During the past 50 years the sum of solar and volcanic forcings would likely have produced cooling.

Observed patterns of warming and their changes are simulated only by models that include anthropogenic forcings... (page 4, Summary for Policy Makers).

The IPCC also commented on the likely effects of continued GHG emission at projected levels:

Continued GHG emissions at or above current rates would cause further warming and induce many changes in the global climate system during the 21st Century that would very likely be longer than those observed during the 20th Century.

For the next two decades warming of about 0.2°C per decade is projected... (page 6, Summary for Policy Makers)

The predicted implications for Australia and New Zealand are noted as follows:

- ◆ By 2020, significant loss of biodiversity is projected to occur in some ecologically rich sites including the Great Barrier Reef in Queensland Wet Tropics.
- ◆ By 2030, water security problems are projected to intensify in southern and eastern Australia and, in New Zealand, in northland and some eastern regions.
- ◆ By 2030 production from agriculture and forestry is projected to decline over much of southern and eastern Australia, and over parts of eastern New Zealand, due to increased drought and fire. However, in New Zealand, initial benefits are projected in some other regions.
- ◆ By 2050, ongoing coastal development and population growth in some areas of Australia and New Zealand are projected to exacerbate risks of sea level rise and increases in the severity and frequency of storms and coastal flooding.' (page 10 of the IPCC's Summary for Policy Makers)

Australia is not a major contributor (by reason of GHG emissions produced within its territory) to global GHG emissions in absolute terms (producing around 1.5 per cent of world emissions).¹¹ Australia does have one of the highest per capita emission rates. The practical significance of a per capita rate of emission for this global environmental problem constituted by the absolute amount of greenhouse gases in the planet's atmosphere has been the subject of much recent popular debate.

The IPCC report noted that a number of mitigation measures can be taken at a global level to address the problem:

A wide variety of policies and instruments are available to governments to create the incentives for mitigation action. Their applicability depends on national circumstances and sectoral contents ... They include integrating climate policies in wider

development policies, regulations and standards, taxes and charges, tradeable permits, financial incentives, voluntary agreements, information instruments and research, development and demonstration. (Summary for Policy Makers, at page 18)

It is apparent that such mitigation measures taken on a global level will have impacts, economically, on fossil fuel exporting nations such as Australia:

Fossil fuel exporting nations (in both Annex 1 and non-Annex 1 countries) may expect, as indicated in the TAR, lower demand and prices and lower GDP growth due to mitigation policies. The extent of this spill over depends strongly on assumptions related to policy decisions and oil market conditions. (Summary for Policy makers, at page 19)

The IPCC report regarded both international and national or local action as important in mitigating climate change:

Many options for reducing global GHG emission through international co-operation exist. There is high agreement and much evidence that notable achievements of the UNFCCC and its Kyoto Protocol are the establishment of a global response to climate change, stimulation of an array of national policies, and the creation of an international carbon market and new institutional mechanisms that may provide the foundation for future mitigation efforts. Progress has also been made in addressing adaption within the UNFCCC and additional international initiatives have been suggested.

Greater co-operative efforts and expansion of market mechanisms will help to reduce global costs for achieving a given level of mitigation, or improve environmental effectiveness. Efforts can include diverse elements such as emissions targets; sectoral, local, sub-national and regional action; R&D programs; adopting common policies; implementing development oriented actions; or expanding financing instruments.

Notwithstanding that Australia is only a relatively small contributor to global GHG emissions, contemporary planning and environmental law at the level of judicial and tribunal decision-making and increasingly at a regulatory and legislative level has now decisively moved towards acceptance that such local action by Australia is a matter of importance.

Further, several recent New South Wales Land and Environment Court decisions have accepted that the impacts of global climate change need to be factored into the environmental assessment process in relation to local development. In these and other ways, climate change science, and in particular the reasoning of the IPCC, are impacting on Australian environmental jurisprudence. Climate change is an issue that cannot be ignored by those practising in the environmental and planning area for this reason alone.

2. Historical overview: Redbank, Nicholls and Leatch

The application of the science of climate change in environmental law to the environmental assessment of proposed developments involves the application of science that, while accepted, necessarily

involves predictions with considerable margins of error about future consequences. This means that the principle of ecologically sustainable development (ESD) known as the 'precautionary principle' is of particular importance in decision-making in the area. ESD consists of a number of related principles including the precautionary principle (others are the principle of intergenerational equity and the polluter pays principle). The precautionary principle provides that the absence of complete scientific certainty should not be used as a reason for not taking or postponing protective environmental measures. For example, the 1992 Rio Declaration isolated the precautionary principle as its Principle 15 and defined it as follows:

In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

The first Australian judgment to meaningfully adopt and rely upon the precautionary principle in environmental assessment litigation was the merits appeal decision of Stein J in *Leatch v Shoalhaven City Council* (1993) 81 LGERA 270. At 282 Stein J held that the precautionary principle was not made an irrelevant or extraneous consideration by the object, scope and purposes of the *National Parks and Wildlife Act 1974* (NSW) and in particular, Part 7 concerning the issue of licences to harm threatened species. In so reasoning, Stein J relied on the analysis in *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24.¹²

Other decisions of the Land and Environment Court of this period were not so favourable to the application of the precautionary principle in New South Wales law and reference may be made to the decisions of Talbot J in *Nicholls v DG NPWS* (1994) 84 LGRA 397¹³ and Pearlman J in the *Redbank Power Station* case.¹⁴ The objector's appeal in *Redbank* based upon climate change and the adverse impact of greenhouse gas (GHG) emissions produced by the proposed power station was unsuccessful before Pearlman J. While her Honour held that the precautionary principle and the contribution to global warming of GHG emissions from the proposed power station should be taken into account in her merits appeal decision (applying *Leatch* in this respect) she went on to reason that while relevant, the precautionary principle applied to this greenhouse threat should not outweigh all other considerations.¹⁵ The case can therefore be properly regarded as a significant precursor for a series of climate change cases brought some years later under different applicable legislation and in a different public policy climate. These later challenges, as will be seen below, had significantly different results.

In most recent Australian litigation since 2005 concerning climate change it has not been at issue that climate change was occurring and will have substantial adverse environmental impact on Australia and the rest of the world. The issue generally has been whether that impact or likely impact has been taken into account insofar as a particular development project has been concerned and, if not, whether it was mandatory to take it into account. While the matter has been raised by applicants, by and large, defendants and respondents have conceded the fact of anthropogenic GHG induced climate change in their pleadings. This

is a sensible pragmatic approach to litigation in the area as the weight of scientific opinion is clearly in favour of the proposition that climate change is happening, and that GHG emissions are the primary cause, and the chances of persuading a court to rule to the contrary are quite low. The costs associated with calling relevant dissenting experts in the area would in most cases not be justified by any forensic advantage that would accrue from such an approach. Accordingly, it is questionable whether it is in fact correct to conclude that:¹⁶

A fundamental question remains whether or not our courts and tribunals are willing to rule that climate change is happening.

Applicants, and those NGOs supporting them, see climate change litigation as a vehicle for articulating their concern that the science of climate change (along the line of that promulgated by the IPCC) be publicly accepted and vindicated. A substantial purpose of bringing the cases is to raise the profile of this particular environmental issue. In this they have by and large been an outstanding success.¹⁷ For example, it is noted¹⁸ that while the applicant was unsuccessful in the Isaac Plains litigation (discussed below), the case was useful in assisting the progress of public debate about climate law and the EPBC Act.

3. The EPBC Act – Isaac Plains and Anvil Hill

In *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister of the Environment and Heritage and Ors* [2006] FCA 736 (the Isaac Plains case), Dowsett J considered a challenge under the *Administrative Decisions (Judicial Review) Act 1977* seeking review of two decisions by the federal minister for the environment pursuant to s75 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). The two decisions were that two proposed coal mine projects in Queensland were not controlled actions within the meaning of that term in s75 of the EPBC Act. Section 75(2) provided that the minister in considering whether the referred action was a controlled action was required to consider all adverse impacts of the action on a matter protected by Part 3 of the EPBC Act (matters of national environmental significance). In this case important matters of national environmental significance were the Great Barrier Reef world heritage area and the Wet Tropics heritage area. Further, it was argued that due to the GHG emissions that would be produced from the burning of the extracted coal, the projects would necessarily have an adverse impact on listed threatened species, listed threatened ecological communities, migratory species, and wetlands of international significance. The applicant's argument was that the ultimate purpose of the coal projects was to supply coal for combustion in power generation and that:

The production of greenhouse gases is almost certain to occur as a result of the action and can reasonably be imputed as within the contemplation of the proponent of the action.

In this case the minister's delegate, a Mr Flanigan, was called by the respondent and subject to cross-examination. His evidence was that he did consider 'indirect impacts' and that he considered indirect impacts to include the issue of GHG emission and climate change. The calling of the actual decision-maker in such litigation against environmental decision-making is unusual.¹⁹ The availability of the decision maker

for cross-examination in court exposed the impugned decision to an unusually elevated degree of scrutiny. Mr Flanigan was called despite there being written evidence that he had considered GHG (judgment [18]) in the form of a handwritten note made by Mr Flanigan on the departmental recommendation leading to the decision. What can be said is that in this case there was a particularly detailed forensic investigation during the proceedings into the decision-maker's state of mind and reasoning process. Some lines of cross-examination were disallowed ([36] and [37]). Ultimately the decision of Dowsett J turned on his acceptance of the truthfulness and reliability of Mr Flanigan as a witness ([38]). This fact may limit the significance of the Isaac Plains decision for subsequent litigation based on different evidence.

The judgment at [43] dealt with a line of argument commonly forming part of respondents' cases in this area of climate change litigation against coal projects:

[43] Understandably, the applicant sought to advance its case by pointing to the paucity of detail concerning these matters in the reasons. It may well have been better had Mr Flanigan said rather more than he did. However, as I have previously observed, the applicant raised the matter as one of general concern. Mr Flanigan concluded that the possibility of increased concentration of greenhouse gases in the atmosphere resulting from each project was speculative and merely 'theoretically possible'. There was no suggestion that the mining of coal pursuant to these proposals would increase the amount of coal burnt in any particular year, or cumulatively. It was not suggested that in the absence of coal from these sources, less coal would be burnt. Mr Flanigan also considered that if there were any such increased emissions, the additional impact on protected matters would be very small and therefore not significant.

The line of reasoning employed by Dowsett J (that Australia's relative contribution to global GHGs or the relative contribution of any particular project is so minimal as to be insignificant at a global level and hence in terms of environmental impact at a local level) is a matter of hot philosophical dispute and a theme running through much recent climate change litigation. The applicant's rejoinder to this line of reasoning is set out at [55] in Dowsett J's judgment:

[55] Finally, the applicant sought to make much of the fact that threats posed by the emission of greenhouse gases are cumulative. It was argued that it was inappropriate to seek to identify the actual effect attributed to the action in question, as opposed to the general threat posed by greenhouse gas emission and climate change.

Dowsett J rejected this rejoinder and accepted Mr Flanigan's reasoning that, while he considered the impact of the burning of coal produced by the project on global climate change, he concluded that the impact on Australian matters of national environmental significance was not significant (therefore meaning that the project was not a controlled action). In closing obiter remarks his Honour commented:

[72] I have proceeded on the basis that greenhouse gas emissions consequent upon the burning of coal mined in one of these projects might arguably cause an impact upon a protected matter, which impact could be said to be an impact of the proposed action. I have

adopted this approach because it appears to have been the approach adopted by Mr Flanigan. 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. The applicant's concern is the possibility that at some unspecified future time, protected matters in Australia will be adversely and significantly affected by climate change of unidentified magnitude, such climate change having been caused by levels of greenhouse gases (derived from all sources) in the atmosphere. 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 case is far removed from the factual situation in *Minister for Environment and Heritage v Queensland Conservation Council* [2004] FCAFC 190; (2004) 139 FCR 24. [*The Nathan Dams case*]

Dowsett J has been much criticised by some commentators for these obiter remarks.²⁰ Yet the comments were subsequently approved by another judge of the Federal Court.

The decision of Stone J in the Federal Court of Australia²¹ delivered on 20 September 2007 in the case of *Anvil Hill Project Watch Association Inc v Minister for Environment and Water Resources and Centennial Hunter Pty Ltd* involved a challenge to the decision of a delegate of the minister that the proposed Anvil Hill coal mine in the Hunter Valley of New South Wales was not a controlled action within the meaning of s67 of the EPBC Act. The reasoning of the minister's delegate as set out in the judgment of Stone J at [25]-[27] is more detailed than the reasoning of Mr Flanigan the minister's delegate in the Isaac Plains decision. The nub of the delegate's reasoning is set out at [25] as follows:

The delegate then considered whether the proposed action was likely to have 'indirect impacts' on matters protected under Part 3 of the Act 'as a result of any possible contribution to greenhouse gas emissions'. The delegate accepted that greenhouse gases in the earth's atmosphere are causing damage to that atmosphere and to weather patterns and that these changes might affect matters protected by Part 3 such as the Hunter Estuary Wetlands Ramsar Site. She found that if all the coal produced by the proposed mine were to be consumed by end users, the combustion of that coal would produce per annum the equivalent of 0.04 per cent of the current annual global greenhouse gas emissions. She found that 'such emissions are a small proportion of the total possible emissions from all other sources'.

Stone J found that the submission of the applicant in this regard was not distinguishable from that considered by Dowsett J in Isaac Plains and should be dismissed for the reasons his Honour gave. In particular, Stone J rejected the applicant's proposition that a 'common sense approach' to causation such as that applied to tort actions at common law (reference was made in argument and in the judgment to *Henville*

v Walker (2001) 206 CLR 459 at 490 per McHugh J) was applicable to the requirement in s75 of the EPBC Act that the decision-maker consider adverse environmental impacts of a proposed action. The evidence was that the emissions from the burning of coal produced by the mine would not be a substantial cause either of climate change or of any resulting impact on matters of national environmental significance protected by the EPBC Act. Stone J accordingly found that the conclusion that the relatively small contribution of the proposed emissions to total global emissions could not be seen as having a significant impact was a conclusion open to the minister's delegate to make (Judgment at [40]). Stone J rejected an argument that the significance of the proposed action was to be judged by reference to other proposed actions that may be assessed under the EPBC Act (an argument directed towards emphasising the relative significance, alleged by the applicant, of the burning of coal from the project and countering the respondent's argument that at a global level the relative impact was insignificant). Stone J rejected this argument at [44]. Her Honour reasoned as follows:

The delegate was entitled to assess the significance and substantiality of the impact of the proposal as a whole rather than merely in comparison with other potential actions. The applicant's assertion must be rejected.

The challenge brought by the applicant was dismissed with costs.

The decision of Stone J was upheld on appeal in *Anvil Hill Project Watch Association Inc v Minister for Environment and Water Resources* [2008] FCAFC 3, per Tamberlin, Finn & Mansfield JJ. The appeal was on grounds unrelated to GHG but it is notable that the full court chose to repeat the delegate's reasoning in relation to the GHG issue by way of background and without criticism at [8] – [11] of its judgment.

4. Recent Land and Environment Court decisions – Anvil Hill and Drake-Brockman

Perhaps the climate change decision which has received most prominence (in NSW) in recent years is the decision of Pain J in *Gray v Minister for Planning and Ors* (2006) 152 LGERA 258; [2006] NSWLEC 720.²² The decision has been largely misunderstood by those commenting on it, particularly in some media reports appearing immediately after the decision. The applicant in *Gray* challenged decisions made by the director-general under Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW) (EP & A Act) and, in particular, a decision to accept as adequate an environmental assessment lodged by the coal miner Centennial in support of its Anvil Hill project. The principal argument raised by the applicant was that the environmental assessment (EA) should not have been accepted as adequate because it did not adequately address the environmental assessment requirements (EARs) promulgated by the director-general under s75F of Part 3A.

As noted at [4] of the judgment, there was no dispute that the burning of coal produced by the project would release substantial quantities of greenhouse gases into the atmosphere, nor that the Anvil Hill project was for the mining of 10.5 million tonnes of coal per annum over a project life of 21 years mainly for power generation with 50 per cent

being intended for export for use in overseas power stations, generally in Japan: judgment at [4].

Section 75H(3) of Part 3A provided as follows:

(3) After the environmental assessment has been accepted by the director-general, the director-general must, in accordance with any guidelines published by the minister in the Gazette, make the environmental assessment publicly available for at least 30 days.

The EA lodged by Centennial in support of its project included an assessment of Scope 1 and 2 GHG emissions (that is, from the project itself) but not Scope 3 emissions (that is, from the downstream burning of coal produced by the project). The EARs required the following of the EA:

The EA includes a comprehensive air quality assessment that adequately assesses the potential air quality impacts of the project, including a detailed greenhouse gas assessment.

The applicant argued that the EA as lodged did not comply with the EARs. There was no detailed GHG assessment. The applicant further argued that the director-general was required to take into account the principles of ESD in determining whether the EA was adequate to comply with the EARs. The applicant relied on the decision of the Land and Environment Court in *Telstra v Hornsby Shire Council* (2006) 146 LGERA 10, a decision which decided that the principles of ESD were mandatory relevant considerations required by the consideration of the 'public interest' under s79C of the EP & A Act in relation to the processing of a development application under Part 4 (not Part 3A and the project approval process under Part 3A).

The respondents contended that ESD principles were not mandatory relevant considerations as determined in *Minister for Aboriginal Affairs v Peko- Walsend Ltd* (1986) 162 CLR 24. Further, it was argued that the evidence supported the proposition that the director-general did take ESD considerations into account given the large number of environmental matters considered in the 'adequacy checklist' in the EA itself. Pain J decided that the EA not including Scope 3 emissions did not comply with the director-general's EARs as the impact on the Australian and New South Wales environment due to any GHG emissions produced by coal from the Anvil Hill project had a sufficient proximate link with the mining of that coal. In applying this test of sufficient proximate link, Pain J was reasoning consistently with the earlier decision of Bignold J in *Bell v Minister for Urban Affairs and Planning and Port Waratah Coal Service Ltd* (1997) 95 LGRA 86. Pain J reasoned that she did not find the comments of Dowsett J at [72] of the Isaac Plains judgment as persuasive. At [100] Pain J expressed her conclusion on this point:

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 contributes 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 Part 3A.

Pain J also found that the director-general was in error in not considering the precautionary principle and the principle of intergenerational equity being components of the principle of ESD which was a mandatory relevant consideration given the director-general's adequacy decision and in formulating EARs which did not require the assessment of Scope 3 GHG emissions. Pain J found at [115] that the discretion to be exercised under s75F in formulating the EARs had to be exercised in accordance with the objects of the EP & A Act. As Pain J reasoned at [126]:

While the court has a limited role in judicial review proceedings in that it is not to intrude on the merits of the administrative decision on the challenge ... it is apparent that there is a failure to take the principle of intergenerational equity into account by a requirement for a detailed GHG assessment in the EAR if the major component of GHG which results from the use of coal, namely Scope 3 emissions, is not required to be assessed. That is a failure of a legal requirement to take into account the principle of intergenerational equity.

There was a similar finding in relation to the precautionary principle at [135]. Pain J therefore concluded at [143] that there was a failure to take into account any ESD principles in relation to the decision by the director-general that Centennial's EA was adequate and that this decision gave rise to invalidity. Pain J made a declaration to this effect but, due to a variety of circumstantial factors including the fact that Centennial had lodged a further submission expressly dealing with Scope 3 emissions, Pain J did not order re-exhibition as sought by the applicant. Accordingly, the approval process for the Anvil Hill project proceeded and the project was ultimately approved by the minister in mid-2007.

In terms of the relief sought by the applicant in the proceedings, the outcome of the case can fairly be considered to be evenly balanced. It was certainly not a complete victory for the applicant, although it may have been perceived as such by the applicant due to the case's important role in raising the profile of the issue of climate change in relation to an important proposed coal mining project. The case did have this effect.

It has been correctly noted²³ that there was nothing in Pain J's decision to prevent the director-general from framing EARs to exclude Scope 3 emissions, although he would be required to consider ESD principles in reaching that decision. Such documentation can be readily prepared and lodged by proponents. David Farrier²⁴ noted that this would be the preferable approach:

Far better, it would seem, from a political/public relations perspective, for both government and the proponent to get on the front foot and present the relevant data from the outset.

This is in fact exactly what was done by Centennial in the Anvil Hill proceedings and was the reason for Pain J's rejection of the applicant's claimed injunctive relief against the approval process for the Anvil Hill mine.

The EARs issued by the director-general for coal mines in the Hunter Valley now require the assessment of GHG emissions produced by the combustion of product coal (that is Scope 3 emissions). The recent

SEPP (Mining, Petroleum Production and Extractive Industries) 2007, gazetted on 16 February 2007 applying to assessment of development applications under Part 4, now expressly requires consent authorities to consider GHG emissions including any downstream emissions caused by the proposed mining, petroleum production or extractive industry development prior to granting development consent.

The Gray decision was distinguished by her Honour Jagot J in *Drake-Brockman v Minister for Planning* [2007] NSWLEC 490. *Drake-Brockman* involved a challenge to the approval by the minister for planning of a concept plan relating to the former CUB site at Chippendale under s75O of the EP & A Act. One of the grounds of challenge was that the minister failed to consider ESD when granting the approval. At [130] Jagot J correctly observed that the decision in *Gray* depended on the EARs for the Anvil Hill project issued by the director-general requiring a 'detailed greenhouse gas assessment' and that it was in this context that Pain J found that the director-general's adequacy decision failed to consider the precautionary principle and intergenerational equity. At [131], Jagot J observed that the case before her involved no complaint of any disjunction between the EARs and the EA that the director-general had accepted as adequate under s75H(3). Importantly, Jagot J noted that:

Gray does not stand for a general proposition that Part 3A of the EP & A Act requires any particular form of assessment of greenhouse gas emissions for each and every project to which that part applies. Any such understanding would be inconsistent with the statutory provisions and established principles of judicial review ... The decision in *Gray* therefore does not assist the applicant.

At paragraph [132], Jagot J rejected the proposition that the minister can only consider ESD by considering a quantity of analysis of greenhouse gas emissions. Such a proposition had no support in the statutory scheme enacted by parliament. In the case before her Honour it was conceded by the respondents that climate change generally induced by GHG emissions poses a risk of serious and irreversible harm to the environment in that the development would involve the production of greenhouse gases (at [132]). Jagot J observed that this was not decisive as the respondents did not go on to concede any net increase in greenhouse gases as a result of the approval of the concept plan and the evidence did not establish this. Because her Honour rejected the applicant's proposition that the minister had failed to consider ESD including the precautionary principle and intergenerational equity, she did not need to go on to consider the further argument put by the respondents that the minister had no obligation to do so, and her Honour did not do so.

While the future of climate change arguments as a limb of judicial review challenges to the approvals process for major projects in New South Wales appears assured, the viability of such arguments in relation to projects that do not involve mining and in particular coal mining must be questioned. Even in the case of challenges brought to coal mines, the prudent proponent will be able to adequately defuse the greenhouse issue by preparing comprehensive and detailed environmental assessment documentation. As long as the information concerning GHG emissions, including scope 3 emissions, is put before the relevant decision-maker and given proper consideration, the



approval of the project will not in itself give rise to any legal error on this ground. Put another way, it is difficult to conceive of an Australian coal mine approval being justifiably found to have been unreasonable in the *Wednesbury* sense where the decision-maker has had a properly documented appreciation of the *worst possible* impact that the mine may have by way of downstream (scope 3) GHG emissions on global climate change and consequently upon the global and local environment. Due to the sheer magnitude of global GHG emissions, it would appear highly likely that the issue of GHG emissions in relation to Australian mining projects, however large, will continue to represent only a procedural hurdle, not a substantive bar against the grant of any required approval.

5. Taralga and the amelioration of GHG emissions

The GHG issue and principles of ESD may be a positive factor for a proponent in the approvals process for projects that are designed to provide renewable energy and thereby facilitate the reduction of overall GHG emissions. In *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* [2007] NSWLEC 59, Preston CJ observed as follows:

[1] The insertion of wind turbines into a non-industrial landscape is perceived by many as a radical change which confronts their present reality. However, those perceptions come in differing views. To residents, such as the members of *Taralga Landscape Guardians Inc* (the guardians), the change is stark and negative. It would represent a blight and the confrontation is with their enjoyment of their rural setting.

[2] To others, however, the change is positive. It would represent an opportunity to shift from societal dependence on high emission fossil fuels to renewable energy sources. For them, the confrontation is beneficial – being one much needed step in policy settings confronting carbon emissions and global warming.

On balance, as Preston CJ noted at [3] in this Class 1 merits appeal, the balance was in favour of the broader public good in approving a positive development confronting global emissions and warming.

The case before Preston CJ was a merits appeal by an objector to a project constituting designated development under the EP & A Act. The proposed wind farm was proposed to be built upon ridge lines stretching about 11km north to south across rural property about 3km and 7km east of the village of Taralga. The problem posed by global climate change was summarised with particular cogency by his Honour at [70]:

Although natural and human ecosystems are adaptive in nature, the rate at which the global climate is changing outweighs the rate at which the systems can adjust. Available data indicates that regional climate changes have already affected a wide range of physical and biological systems across the world. Examples given by the IPCC of the effects of climate change include the shrinkage of glaciers, thawing of permafrost, later freezing and earlier break up of ice on rivers and lakes, lengthening of mid to high latitude growing seasons, poleward and altitudinal shifts of plant and animal ranges, declines of some plant and animal populations, and earlier flowering of trees, emergence of insects, and egg laying in birds, as well as the death of coral reefs, atolls and mangroves. Although some species may thrive under the new conditions, many of these systems will be irreversibly damaged.

At [75] Preston CJ noted that renewable energy sources were an important method of reducing GHG emissions and preserving traditional energy resources for future generations. In conclusion, Preston CJ concluded at [352] that the overall public benefits arising from the project outweighed any private disadvantages either to the Taralga community or specific landowners. The project was approved subject to 116 detailed conditions of consent.

6. The Walker decision – adaptation to climate change

The issue of climate change can also be a factor in challenges to development approvals not due to the project's likely emission of GHGs, but due to a project's failure to address the likely consequences of global climate change, such as insidious sea level rise. The case of *Walker v Minister for Planning* [2007] NSWLEC 741 is a case in point. In this decision the applicant challenged in Class 4 of the Land and Environment Court's jurisdiction the validity of a concept plan approval by the minister for planning under Part 3A of the EPA Act. The concept plan was for a residential subdivision and retirement development of 25 hectares at Sandon Point, an area of cleared coastal plain 14km north of Wollongong.

In this decision, Biscoe J analysed in great detail the historical evolution of international and local climate change law and policy. His Honour noted that in 1987 (and earlier) the World Commission on Environment and Development in its influential report 'Our Common Future/The Brundtland Report' highlighted the problems posed by the combustion of fossil fuels, being gradual global warming due to the greenhouse effect: at [51]. His Honour noted the clear articulation of the principle of ESD in the Rio Declaration of 1992: at [52]. His Honour noted that it was established law in the Land and Environment Court that in Class 1 development appeals the court would apply ESD unless there were cogent reasons to depart from it and referred in this regard to *BGP Properties v Lake Macquarie City Council*²⁵.

Biscoe J noted that as at November 2007 New South Wales had 55 Acts and Regulations which refer to ESD and the Commonwealth had 19: at [69]. His Honour analysed the history of climate change litigation from the Leatch, Nicholls and Redbank decisions (at [85], [88] and [89]).

Biscoe J analysed in detail the long history of reports from the IPCC and noted at [122] that that body considered the two trends, increases in global temperatures and in anthropogenic GHG concentrations, were related and that global warming presented climate change risks including sea level rises, increases in the severity and frequency of storms and coastal flooding. His Honour noted that 2001 and more recent 2007 IPCC reports set out in detail the likely consequences of climate change for Australia and New Zealand (at [125]).

Relevantly to the case, important likely impacts included increasing coastal vulnerability to storm surges and sea level rise. The following passage from the IPCC's third assessment report (TAR) is referred to by Biscoe J at [125]:

At Collaroy/Narrabeen Beach (NSW), a sea level rise of 0.2 metres by 2050 combined with a 50 year storm event leads to coastal recession exceeding 110 metres and causing losses of US\$184 million.

His Honour's judgment itself sets out in detail the history of climate change litigation both in Australia and elsewhere and refers to a range of relevant academic literature: at [126], [127].

Ultimately, Biscoe J upheld the challenge on the basis (at [164]-[167]) that there was an implied obligation arising from the subject matter, scope and purpose of the EP & A Act and EP & A Regulation 2000 that a decision to approve development under Part 3A was to be made on the basis of the most current material available to the minister which has a direct bearing on the justice of the decision. In so reasoning, Biscoe J relied upon *Minister for Aboriginal Affairs v Peko-Wallsend* at 44-45. The nub of Biscoe J's reasoning appears at [166]:

In my opinion, having regard to the subject matter, scope and purpose of the EP & A Act and the gravity of the well-known potential consequences of climate change, in circumstances where neither the director-general's report nor any other document before the minister appeared to have considered whether climate change flood risk was relevant to this flood constrained coastal plain project, the minister was under an implied obligation to consider whether it was relevant and, if so, to take into consideration when deciding whether to approve the concept plan. The minister did not discharge that function.

In the judgment Biscoe J, for example at [161], emphasised that climate change presented a risk to the survival of the human race and other species and was a 'deadly serious issue'. The problem with the decision-making process in this case arose substantially from the fact that the director-general's report prepared under clause 8B of the EP & A Regulation did not include any consideration of the flooding impacts of climate change: at [160]. Biscoe J reasoned that if the report had considered the matter (and rejected its relevance) the court would not have concluded that the minister was under an independent obligation to consider whether it was relevant. It was the omission to expressly consider the matter, and the absence of any other reference to it in the documentation associated with the minister's decision, that gave

rise to an inference that the minister had not considered its relevance: at [160].

The decision of Biscoe J is a significant development in the Land and Environment Court in the area of climate change litigation having regard to the earlier decisions of Anvil Hill and Drake-Brockman. One result of the decision is that, despite the confinement of the reasoning in Anvil Hill and Drake-Brockman to cases where ESD has not been considered or the EARs are inconsistent with the EA, it has now been found that in certain circumstances it will be a direct implication from the object, scope and purpose of the EP & A Act that not only ESD but the particular local *consequences* of climate change be in fact taken into account, by reference to the most recently published or available material, by a decision-maker under Part 3A. If these matters are not in the material before the minister he or she must obtain this material. This represents a significant development and arguably an expansion of pre-existing law in the area.

A notice of appeal with appointment against his Honour's decision was apparently filed on 20 December 2007.

7. Conclusions

The objective of those commencing climate change court proceedings has frequently been unashamedly to draw public attention to the climate change issue.²⁶ The decision in the Anvil Hill litigation before Pain J was thus regarded as somewhat of a victory by the applicant, despite the rejection of what was obviously Mr Gray's primary claim which was for injunctive relief against the approval process for the Anvil Hill mine.

More recent decisions and, in particular, the decision of Biscoe J in Walker indicate that increasingly the aim of environmentally-minded litigants in this area need not be so modest. The direct implication drawn from the object, scope and purposes of the EP & A Act that a particular practical consequence of climate change was a mandatory relevant consideration for a decision-maker under the EP & A Act, and one that he or she had a duty to inform himself or herself about, whether there was material before him or her concerning it or not, indicates that an extremely high level of judicial scrutiny tantamount to a review of the merits of a proposed development may take place in this area, even in the judicial review jurisdiction. As Biscoe J's judgment articulates, this is a direct consequence of the extreme seriousness with which the climate change issue is perceived, for sound reasons, by the Land and Environment Court.

Endnotes

1. Reader, Eighth Floor Selborne Chambers, Phillip St, Sydney.
2. The Text Publishing Company, Melbourne, 2006.
3. *Climate Law in Australia*, T.Bonyhady and P. Christoff (eds), 2007, The Federation Press, Sydney, at 16.
4. ABC Books, Sydney, 2001.
5. See the discussion in the Lavoisier Group's 'Submissions to the Garnaut Climate Review', 7 January 2008. The Lavoisier Group is apparently an organisation constituted as a forum for climate change scepticism.
6. *Stern Review on the Economics of Climate Change*, HM Treasury, 2006, Sir Nicholas Stern.
7. *Re Xstrata Coal Queensland Pty Limited* [2007] QLRT 33.
8. *Queensland Conservation Council Inc v Xstrata Coal Queensland Pty Limited* [2007] QCA 338.
9. As is, almost invariably, the case in contemporary climate change litigation in Australia.
10. *Climate Law in Australia*, op cit, at 15-16.
11. *Climate Law in Australia*, op cit, at 93 citing the 2004 Commonwealth Energy White Paper.
12. It has been commented (not critically, but apparently by way of approbation) that there was 'no clear statutory mandate' for Stein J to apply the precautionary principle in Leatch: *Climate Law in Australia*, op cit, at 11. However, while it is true that the express words of the National Parks and Wildlife Act did not make the principle a mandatory relevant consideration, Stein J's conclusion that the matter was not an irrelevant consideration did not, as a matter of law, require such express statutory words.
13. Expressly not followed in relation to its discussion of the precautionary principle in *BGP Properties v Lake Macquarie City Council* (2004) 138 LGERA 237.
14. *Greenpeace Australia v Redbank Power Company* (1994) 86 LGERA 143.
15. The case has been criticised as a 'profound discouragement to greenhouse litigation in Australia' and as a statement that Pearlman J was of the view that 'climate change was not for her': at 12 in *Climate Law in Australia*, op cit. The textual basis for this pejorative commentary on the case is questionable, and the judgment, of course, says no such thing.
16. As concluded in *Climate Law in Australia*, op cit, at 13.
17. See the comment on the Isaac Plains litigation (below) at 185, *Climate Law in Australia*, op cit.
18. *Climate Law in Australia*, op cit, at 185.
19. *Climate Law in Australia*, op cit, at 177.
20. *Climate Law in Australia*, op cit, at 180.
21. NSD 870 of 2007.
22. The author instructed senior counsel for the miner, Centennial, Mark Leeming SC, in this litigation.
23. *Climate Law in Australia*, op cit, at 205-6.
24. *Climate Law in Australia*, op cit, at 206.
25. (2004) 138 LGERA 237 at [93] per McClellan CJ; at [57].
26. DS White, 'Climate Change at a Local Level', paper delivered to EPLA annual conference, November 2007, at page 11.