

Gray v Minister for Planning: The Rising Tide, of Climate Change Litigation in Australia

ANNA ROSE*

Abstract

This paper explores the recent decision in *Gray v Minister for Planning* and situates it in the context of the developing climate change jurisprudence in Australia. The paper examines the role the case played in the climate movement, especially the organisations campaigning to stop Anvil Hill mine. The *Gray* decision sets a valuable precedent for the Australian judiciary to become more willing to impose rigorous environmental assessment standards on projects with significant climate change impacts.

1. Introduction

Anvil Hill is a quiet, unusually shaped hill west of Muswellbrook in the NSW Upper Hunter Valley. Unbeknownst to the 178 animal species that call it home, Anvil Hill is also the site of a David-and-Goliath battle in the worldwide effort to stop dangerous climate change. This battle has not yet left scars on the serene landscape; the first round took place 300 km away in the NSW Land and Environment Court.

This paper explores the recent decision in *Gray v Minister for Planning*¹ (*Anvil Hill* case) and argues that a climate change jurisprudence is developing in Australia, reflecting similar progress internationally. The *Anvil Hill* case was an important step forward in developing this jurisprudence. Justice Pain's comments on the principles of ecologically sustainable development ('ESD'), and on the causal link between individual greenhouse gas ('GHG') emitting developments and climate change, were valuable to both legal and political conversations on the topic.

* Final year law student, University of Sydney, & Founder, Australian Youth Climate Coalition. I am grateful to Tim Stephens for his encouragement, and to Rising Tide Newcastle for their brave and inspiring work.

1 *Gray v The Minister for Planning, Director-General of the Department of Planning and Centennial Hunter Pty Ltd* [2006] NSWLEC 720 (*Anvil Hill Case*).

The law has long been used as a tool to achieve environmental justice,² and in this case NSW planning law was utilised as part of a broader campaign. Whilst the *Anvil Hill* decision generated significant momentum for the campaign to stop the mine, questions arise about the limited ability for the law to deliver results in a campaign context. The case did, however, generate other non-greenhouse outcomes regarding environmental assessment ('EA') under the controversial Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW) ('the Act'). I argue that the case was a worthwhile use of scarce activist time and resources due to the long-term implications resulting from the development of a more sophisticated body of law on GHG and climate change. The legal strategy adopted the 'power model' of environmental advocacy described by Cole.³ This model recognises that no amount of participation in the environmental impact assessment process *by itself*, including the legal challenge, will change the power relations that lie behind climate change and this specific mine.

2. *Submissions*

The applicant, Peter Gray,⁴ challenged the validity of the decision by the NSW Director General of Planning ('DG') to accept for public display the EA prepared by Centennial Coal Company Limited ('Centennial') regarding the Anvil Hill mine ('the Project'). He argued firstly that since Centennial did not include an assessment of the impacts of *burning* the coal (Scope 3 emissions)⁵ on the environment, the EA failed to comply with the direction from the DG in the EA requirements ('EARs') to include a 'detailed greenhouse gas assessment'. His second argument was that in deciding that the assessment complied with the EARs, the DG failed to take into account the ESD principles, and that this was not allowed under the Act because ESD principles were included in the objects of the Act.

Mr Gray argued that because the DG made the decision to accept the EA despite the lack of information about Scope 3 impacts, he failed to take into account the public interest.⁶ Mr Gray made the case that, in the context of the Act, the public interest includes taking into account ESD principles.⁷

2 See, for example, Luke W Cole, 'Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy' (1995) 14 *Virginia Environmental Law Journal* 687. See also Sheila Foster, 'Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement' (1998) 86 *California Law Review* 775.

3 Cole, above n1.

4 Twenty six year old member of the community climate change organisation Rising Tide Newcastle. For more information see <www.risingtide.org.au>.

5 The World Business Council for Sustainable Development and World Resources Institute ('WRI') GHG Protocol 2004 ('WBCSP GHG Protocol') refers to the assessment of Scope 1, 2 and 3 emissions. Scope 1 are *direct* GHG emissions from sources owned or controlled by the company, Scope 2 are *electricity indirect* GHG emissions; Scope 3 are *other indirect* GHG emissions such as downstream emissions from use of sold products: *Anvil Hill Case* [2006] NSWLEC 720 at 19.

6 *Id* at 42–5.

7 *Id* at 41.

The First Respondent, the DG, raised some controversial points. He argued that Part 3A projects do not require an EA because the word ‘may’⁸ implies that the preparation of such an assessment by the proponent is at the DG’s discretion. He argued that there are no specified requirements for the EA in Part 3A or elsewhere in the Act,⁹ and that ESD principles did not require information regarding Scope 3 emissions to be provided.

The DG also argued a ‘causation defence’, claiming that since any later use of coal mined over time from the Project can only occur as a product of other activities, undertakings and developments in Australia and overseas, these impacts are completely separate from the Anvil Hill Project.¹⁰

Centennial, the second respondent, argued that environmental assessment of Scope 3 emissions is not required for activities of third parties, and that this requirement is foreign to planning law.¹¹ Centennial also argued that ESD principles are not mandatory relevant considerations for any decision under Part 3A,¹² relying on the decision in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*.¹³

3. *The Decision*

On 27 November 2006, Justice Nicola Pain handed down her decision in favour of the applicant, on the ground that the DG had failed to take ESD principles into account in his decision to accept the EA. She held that environmental assessment by the proponent is required under Part 3A, contrary to the arguments of the Director-General.¹⁴ Pain J agreed with the DG that the content of an environmental assessment is subject to his discretion in establishing the EARs.¹⁵ However, she disagreed that the DG could accept an environmental assessment for public exhibition without it adequately addressing the EARs.¹⁶ She also decided that the DG’s discretion must be exercised ‘in accordance with the objects of the Act which includes the encouragement of ESD principles’.¹⁷

8 *Environment Planning and Assessment Act 1979* (NSW) (*‘EPA Act’*) s 75F(5).

9 *Anvil Hill Case* [2006] NSWLEC 720 at 47.

10 *Id* at 54.

11 *Id* at 61.

12 *Id* at 65.

13 (1986) 162 CLR 24.

14 This is clear from the nature of the projects which are likely to come under Pt 3A as described by s 75B(2), the wording of s 75H(1) and s 75I(2)(a) which requires a proponent’s environmental assessment be sent to the Minister: *Anvil Hill Case* [2006] NSWLEC 720 at 70. The inclusion of ‘may’ in s 75F(5) does not mean that the assessment is optional, just that the DG may specify a form for the environmental assessment if he or she so chooses: *Gray* [2006] NSWLEC 720 at 70.

15 *Id* at 71.

16 *Id* at 72.

17 *Id* at 115.

This meant that in light of the principle of intergenerational equity¹⁸ and the precautionary principle,¹⁹ ESD considerations required downstream GHG emissions to be taken into account for the Anvil Hill project.²⁰ In particular, the precautionary principle required that the mine's cumulative effects (including downstream emissions) be assessed,²¹ and that the impacts of burning be assessed despite any scientific uncertainty about the extent of the impact.²² Therefore, the decision to accept the EA for public display was declared void and without effect.

The decision was not set aside — the court did not force Centennial to re-submit a new EA for public exhibition — because the practical effect of doing so was questionable. This was due to the fact that, since proceedings were initiated, (a) Centennial had calculated its Scope 3 emissions and placed them on public display, and (b) the Minister had appointed a Panel of Experts who would assess the impact of Scope 3 emissions in their report.

4. Implications

It can hardly be said the NSW government or coal companies are reeling from the *Anvil Hill* decision. The court essentially allowed business to continue as usual, albeit with the proviso that governments must take into account the downstream greenhouse consequences of major projects under Part 3A of the Act. We can divide the implications of the decision into four categories set out below.

A. Legal Implications for Anvil Hill Approval Process

In a statement on the outcome of the *Anvil Hill* case, the CEO of Centennial stated, 'the Anvil Hill assessment process remains absolutely on track. [The case] has no practical implications for it whatsoever.'²³ This is true. The decision did not prevent or halt the mine's approval.²⁴ It did make the Director General, and by extension, the Minister, consider Scope 3 greenhouse emissions from the mine. However, as Pain J stated, 'ESD principles do not require that the GHG issue, including downstream emissions, override all other considerations.'²⁵ Planning Minister Frank Sartor has already made it clear that it will not affect his decision: 'it will have very little practical effect ... unless I interpret the law very extremely, and end up refusing a whole lot of coal mines.'²⁶

18 Id at 118–123.

19 Id at 127–135.

20 Id at 125.

21 Id at 122, 131, 126.

22 Id at 131.

23 Robert Cameron, interviewed on ABC Television, 'Coal To Burn', *Stateline*, 1 December 2006 <<http://www.abc.net.au/stateline/nsw/content/2006/s1802963.htm>> accessed 16 April 2007.

24 The Anvil Hill mine was approved on 7 June 2007. See *Stateline*, <<http://www.abc.net.au/stateline/nsw/content/2006/s1948727.htm>> for more information.

25 *Anvil Hill Case* [2006] NSWLEC 720 at 136.

26 NSW Planning Minister Frank Sartor, interviewed on ABC Television, 'Coal To Burn', *Stateline*, 1 December 2006 <<http://www.abc.net.au/stateline/nsw/content/2006/s1802963.htm>> accessed 16 April 2007.

B. Political Implications for the Anvil Hill Campaign

It is important to situate the law in its political context by acknowledging that the *Anvil Hill* case took place as part of an ongoing campaign to stop the mine.²⁷ The campaign aims to stop the mine as part of effecting a transition from fossil fuels to renewable energy in NSW. Questions about the value of diverting scarce activist time and resources into a court challenge were very real issues facing the applicant and other Anvil Hill activists.

The legal system is limited as an arena to win environmental campaigns, especially under Part 3A of the Act, which contains no right of merit review. Kirsty Ruddock²⁸ acknowledges these drawbacks, pointing out that even where a decision maker is forced by a court to examine the impact of climate change they can consider it but proceed regardless: '[i]t's merely about the process and whether the correct processes were followed ... that does obviously limit some of the outcomes that you can seek in relation to large projects.'²⁹

Even considering these limitations, Mr Gray thought that it was 'worth every minute' of his time, in part due to the current political context.³⁰ The legal challenge generated significant momentum for the campaign, a large amount of media attention, and placed pressure on decision-makers just four months before the NSW state election. The media attention and awareness generated by the case will likely pay dividends in terms of attracting people to take action as the campaign builds.³¹ Indeed, the case was undertaken in the broad tradition of public interest lawyering, the goals of which have been described by Aron as: 'to make government more accountable to the public; to increase the power of citizens' groups; to insist on a place at the bargaining table; and to ensure that the development of public policy be open to public scrutiny.'³² These goals appear to have been met in the *Anvil Hill* case.

Furthermore, the decision has implications for the political discourse on climate change in NSW beyond just the Anvil Hill mine. The fact that decision-

27 The campaign is largely organised by the 'Anvil Hill Alliance'. Rising Tide Newcastle and the Hunter Community Environment Centre, of which Peter Gray is an active member, are key participants in this coalition.

28 Principal solicitor, Environment Defenders Office NSW.

29 Interview with Kirsty Ruddock, ABC Radio National, 'Climate Change and Planning Law', *The Law Report*, 31 October 2006 <<http://www.abc.net.au/rn/lawreport/stories/2006/1776334.htm>> accessed 15 April 2007.

30 The political context was an important consideration for the applicant in deciding whether to run the case: '*Perhaps if there had been a greener or more marginal govt at the time, one that was more amenable to change then it might have been worth skipping the court action and concentrating on lobbying politicians for broad legislative change instead of piecemeal case by case challenges*'. Email from Peter Gray (the applicant) to Anna Rose, 21 April 2007.

31 For example, attracting people to large-scale public blockades to physically prevent construction of the mine. The Anvil Hill campaign is already being described by activists as 'The Climate Change Jabiluka' in reference to the long-standing blockade of the Jabiluka Uranium Mine in the Northern Territory that stopped the mine.

32 Nan Aron, *Liberty and Justice for All: Public Interest Law in the 1980s and Beyond* (1989) at 7–10 cited in Mahoney, Calmore & Wildman, *Social Justice: Professionals, Communities and Law: Cases and Materials*, (2003) at 4.

makers will now receive information about Scope 3 emissions means that they can no longer rely on ignorance as a defence when they are politically challenged about the climate change implications of their decisions. The *Sydney Morning Herald* argued that in making proponents provide information about the long-term environmental effects of their proposed activities, such effects will be ‘much more difficult to ignore. No longer out of sight and out of mind.’³³

Indeed, an interesting development recently occurred that could indicate the legal challenge, as part of the broader campaign, may have had more impact on Centennial than it previously admitted. On 17 September 2007, Centennial announced it was selling the Anvil Hill mine to a much larger mining company, Xstrata, which according to Centennial CEO Bob Cameron, is ‘better positioned to absorb the risks involved in the development of [the Anvil Hill Project.]’³⁴ Climate activists throughout the Hunter and NSW are now planning a direct action campaign to stop the mine’s construction.

C. Implications for Environmental Law in NSW

The *Anvil Hill* case generated some important qualifications to Part 3A of the Act. Pain J’s ruling against the DG’s argument that no environmental assessment is even required is certainly a relief for environmental lawyers, as is the ruling that ESD principles need to be considered for Part 3A projects. Svenson argues that two important effects will flow from the case: firstly, ‘the climate change impacts of the use of a product were for the first time taken into account’ and secondly, ‘the application of two important ESD principles were ... given real teeth in determining how a project was to be assessed’.³⁵ (Emphasis added.) Furthermore, Pain J’s use of the Hansard in interpreting the legislation³⁶ sets a good precedent in terms of holding politicians to their word. That is, when politicians attempt to paint changes to legislation as having environmental benefits, they will be held to their promise.

In addition, the NSW government has taken on board the *Anvil Hill* decision in its *State Environmental Planning Policy* (‘SEPP’) (*Mining, Petroleum Production and Extractive Industries*) 2007 made on 16 February 2007. This SEPP requires consent authorities to consider GHG assessment (including downstream emissions) for development regulated under Part 4 of the Act. Furthermore, since the decision, new coal mines in the Hunter have been asked to provide information on the environmental impacts of burning the coal they produce.³⁷

Whilst this is certainly no guarantee that the current Minister will reject a coal mine on the basis of its GHG emissions, we do not know what implications this decision will have in the future, as climate change effects on NSW intensify, political pressure around coal increases, and new representatives are elected.

33 ‘Counting the full cost of pollution’ *Sydney Morning Herald* (30 Nov 2006) at 14.

34 Barry FitzGerald, ‘Xstrata digs deeper in coal with \$1bn Centennial deal’ *The Age* (18 September 2007) Business at 3.

35 Jacque Svenson, Environmental Defender’s Office NSW, Speech delivered at Sydney University Law Students Society (SULS) ‘Climate Law’ forum, 23 April 2007.

36 Pain J refers to the Bill’s second reading speech: *Gray* [2006] NSWLEC 720 at 42

D. Development of Climate Change Jurisprudence

The *Anvil Hill* case is an important development in the rapidly growing area of 'climate change law'. Jeff Smith states it 'draws together a number of cases on related issues but takes them to the next step ... in requiring that any environmental assessment and ... decision on ... coal mines would need to consider climate change'.³⁸ Through comparing the *Anvil Hill* judgment with other GHG cases, we see it contributes to an important legal discourse on several issues that have arisen thus far.

(i) Causation

The issue of causation has been one of the most difficult hurdles for climate change litigants in Australia (and especially Queensland) to overcome. Pain J's comments, regarding the level of causation required in order to establish that GHG impacts will cause damage, will help future environmental litigants.

Pain J found that 'environmental assessment' under Part 3A extends to consider impacts which have a 'real and sufficient link' to the proposed project,³⁹ including indirect impacts. She found a sufficiently proximate link between the coal mining and GHG emissions, which contribute to climate change, and a consequent impact on the environment.⁴⁰

Whilst this finding sounds straightforward, it is a huge leap forward in judicial reasoning from the decision of Dorsett J in *Wildlife Whitsundays v Minister for Environment*,⁴¹ where His Honour demonstrated scepticism about the impact of burning coal on climate change and, consequently, the idea that climate change will impact areas such as the Great Barrier Reef:

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

37 See Director-General's Requirements under s 75W of the *Environmental Planning and Assessment Act 1979* (NSW) for: Mannering Continuation of Mining Project (06_0311), 12/02/07; Hunter Valley Operations South Coal Project (06_0261), 25/01/07; Glennies Creek Coal Mine Underground Extension (06_0213), 25/01/07; Drayton Coal Mine Extension (06_0202), 25/01/07; Glennies Creek Open Cut Coal Mine (06_0073), 25/01/07. Available at <<http://www.planning.nsw.gov.au/asp/register2006.asp#hunt>>.

38 Quentin Dempster, Interview with Jeff Smith, CEO Environment Defenders Office NSW, ABC Television, 'Coal to Burn', *Stateline*, 1 December 2006 <<http://www.abc.net.au/stateline/nsw/content/2006/s1802963.htm>> accessed 16 April 2007.

39 *Anvil Hill Case* [2006] NSWLEC 720 at 97.

40 *Id* at 100.

41 *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment & Heritage & Ors* [2006] FCA 736 ('Wildlife Whitsundays Case'): Wildlife Whitsunday sought judicial review of two decisions by a delegate of the Federal Environment Minister over the consideration of greenhouse gas emissions from the mining, transport and use of the coal from two large coal mines in Queensland. Wildlife argued that the Minister's delegate had failed to consider the direct and indirect impacts of greenhouse gas emissions from the mines on declared World Heritage Property, under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

towards global warming and the impact of global warming upon a protected matter, can be so described [as having an impact on a protected matter.]⁴²

Similarly, in the Bowen Basin case,⁴³ the presiding Tribunal Member Koppin P, rejected QCC's submissions on the basis that they failed to demonstrate a causal link between the mine's greenhouse gas emissions and any discernable harm — let alone any serious environmental degradation — caused by global warming.⁴⁴ He criticised the Stern Review and the IPCC 3rd Assessment report on the basis of material he had found himself, an article⁴⁵ co-written by well-known climate sceptic Bob Carter.

In this context, Pain J's comments on the causal link between coal mines, climate change, and environmental damage, were important in developing a body of case law that *does* accept climate change is happening and having real environmental impacts. The majority of the U.S. Supreme Court expressed similar reasoning to Pain J in *Massachusetts v EPA*.⁴⁶ The court held 5:4 that carbon dioxide from vehicular emissions does contribute to climate change, and that climate change *is* causing damage: 'the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. The risk of catastrophic harm, though remote, is nevertheless real.'⁴⁷

(ii) '*Impacts are Insignificant on Global Scale*' Excuse

The *Anvil Hill* case, and the similar reasoning used in *Massachusetts v EPA*, also contained comments about the importance of courts not ignoring the impact of *one* GHG emitting source merely because it is small in the global context of *all* GHG sources.⁴⁸

Pain J stated that decision makers and courts should not use the excuse that climate change is a global problem to refuse to examine the impacts of local developments. She said, '[t]he fact there are many contributors globally does not mean the contribution from a single large source ... should be ignored in the environmental assessment process'.⁴⁹ The *Massachusetts v EPA* judgment articulated the same view, noting: '[n]or is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century'.⁵⁰

42 *Wildlife Whitsundays Case* [2006] FCA 736 at 72.

43 *Re Xstrata Coal Queensland Pty Ltd & Ors v Queensland Conservation Council Inc & Ors* [2007] QLRT 33 ('Bowen Basin Case').

44 *Id* at 21.

45 Robert Carter, C de Freitas, Indur Goklany, David Holland & Richard Lindzen, 'The Stern Review: A Dual Critique – Part I: The Science' (2006) 7(4) *World Economics* at 165.

46 *Massachusetts Et Al v Environment Protection Agency Et Al* No. 05–1120 US (2007) ('*Massachusetts v EPA*') at 29.

47 *Id* at 29.

48 Incidentally, the Howard government often gives this excuse for not ratifying Kyoto – the fact that Australia's net emissions are small compared with India and China's rapidly growing emissions. This ignores the issue of per capita emissions.

49 *Anvil Hill Case* [2006] NSWLEC 720 at 98.

50 *Massachusetts v EPA* (2007) at 22–23.

This reasoning is important to counter judicial comments such as those made in the Xstrata case suggested that litigation over individual GHG sources are irrelevant. Koppenol P stated that he accepted the evidence from Xstrata that ‘such a very small figure would make *no difference* to the rate of global warming’.⁵¹ He found that ‘[a]bsent universally applied policies for GHG reduction, requiring this mine (and no others) to limit or reduce its GHG emissions would be arbitrary and unfair.’⁵²

(iii) *ESD Principles*

A key outcome of the *Anvil Hill* case is the fact that the NSW Planning Minister must now have regard to the impact of climate change on intergenerational equity as part of broader ESD considerations in the EA process. This reasoning has now been extended into thinking about the *positive* GHG impacts of renewable energy projects for intergenerational equity in reducing greenhouse emissions. In *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd*,⁵³ the Land and Environment Court weighed up local and global impact of a proposed wind farm near Taralga, NSW. Preston CJ decided that the public benefits of the project outweighed local detriment to the Taralga community or individual landowners,⁵⁴ and permitted the full original scope of the wind farm, citing intergenerational equity as a key consideration:

The principles of sustainable development are central to any decision-making process concerning the development of new energy resources. One of the key principles underlying the notion of sustainable development is the concept of intergenerational equity.⁵⁵

5. Conclusion

The *Anvil Hill* decision sets a valuable precedent for the Australian judiciary to become more willing to impose rigorous environmental assessment standards on projects with significant climate change impacts. The judgement in *Anvil Hill* was met with a barrage of media commentary, some of it verging on hysterical. *The Australian* called it a ‘[n]arrow ideological decision ... aimed at closing down the coal industry mine by mine, pit by pit’ and considered it ‘devastating for the state’s coal and many other industries’.⁵⁶ Perhaps this reaction was to be expected considering that what Peter Gray dared to question was our state’s historically unchallenged economic dependence on fossil fuels. In the *Sydney Morning Herald*, Richard Ackland stated, ‘[l]itigation frequently is advanced as a way of solving the entire gamut of mankind’s problems. Oddly enough it doesn’t’.⁵⁷ To a

51 *Bowen Basin Case* [2007] QLRT 33 at 12.

52 *Id* at 23.

53 [2007] NSWLEC 59 (‘Taralga’).

54 *Id* at 352.

55 *Id* at 73.

56 ‘Pie-in-the-Sky on Coal’ *The Australian* (30 November 2006) at 11.

57 Richard Ackland, ‘Lawyers Have Been Leaders in Seeing Green’ *Sydney Morning Herald* (20 April 2007) at 11.

large extent, he was right — and the applicant in this case agrees with him. Here, as in other ‘social justice’ cases, the law was used as *one* tool in a diverse array of tactics designed to meet a broader campaign objective. The legal challenge played an educational role for the public about the mine and its link to climate change, highlighting the issue and publicising the campaign. As Minami states, ‘[b]ecause the role of law in social change is limited, legal challenges and legal work must complement the efforts of progressive organisations . . . it is crucial that attorneys do not labour under the illusion that their work in isolation will produce the massive material changes needed in this society’.⁵⁸ Developing a climate change jurisprudence is an important step in the struggle to prevent dangerous climate change. Litigation like the *Anvil Hill* case certainly helps in the legal and political debates and campaigns needed to save our climate for generations to come.

58 Dale Minami, ‘Asian Law Caucus: Experiment in an Alternative’ (1975) 3 *Amerasia Journal* 28 at 39.