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Climate Change Litigation in Australia

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1. Introduction

Litigation in courts and tribunals is becoming more popular in Australia and internationally as a strategy to compel governmental action on climate change. A legal system should provide laws that reflect the current concerns, indeed existential challenges of a society and its courts and tribunals should enforce them appropriately. However, it is by no means self-evident that litigation is a resource-effective strategy to achieve that. This is particularly case when, on one hand it is primarily the role of government to provide leadership in response to challenges and crises, and on the other, there is not a strong history of successful outcomes for the environment in Australian courts and tribunals.

The need to develop a meaningful, effective way forward in response to climate change has never been more urgent. On 9th August 2021 the United Nations Intergovernmental Panel [IPCC] on Climate Chane released a preliminary edition of the Sixth Assessment Report of Working Group I,[2] prior to the 26th Conference of the Parties [CoP 26] to the *Climate Change Convention*,[3] scheduled to take place in Glasgow from 31 October to 12 November 2021, in which the IPCC has very strongly emphasised the need for global warming to be reined in, within a rapidly dwindling timeframe, which suggests yet again that there should be no new fossil fuel extraction projects. In the absence of convincing governmental responses to this climate crisis, already involving, among other effects, extreme wildfires in northern and southern hemisphere in their respective summers of 2019 and 2021, and the widespread perception that government is captive of powerful vested interests in respect of this issue, it is not surprising that concerned citizens and community groups make formal demands in

1 Murray acknowledges the crucial role of the research completed by Victoria McGinness for their earlier projects in the development of this paper: Victoria McGinniss and Murray Raff, 'Coal and Climate Change: A Study of Contemporary Climate Litigation in Australia' (2020) 37 *Environmental & Planning Law Journal* 87. Views expressed in this paper are however Murray's views and not necessarily Victoria's views.

2 UN IPCC, *AR6 Climate Change 2021: The Physical Science Basis*, available at https://www.ipcc.ch/report/ar6/wg1/ (accessed 10 August 2021). See Nick O'Malley and Peter Hannam, 'UN raises red flag on rapid global warming' *The Age* (Melbourne) 10 August 2021, 1; Mike Foley, Miki Perkins and Peter Hannam 'Australia's climate policies falling short of United Nations' global goals' *The Age* (Melbourne) 10 August 2021 available at https://www.theage.com.au/politics/federal/australia-s-climate-policies-falling-short-of-united-nations-global-goals-20210810-p58hf4.html (accessed 30 August 2021).

3 Below, n 11.

courts and tribunals for climate justice, where facts and risks can be reviewed without political distortion.[4]

There are two causes of action now underway. First, the Minister for the Environment, Ms Susan Leys, is appealing the decision against her in *Sharma v Minister for the Environment*[5] to the Full Federal Court.[6] Secondly, the Australasian Centre for Corporate Responsibility [ACCR] has commenced action in the Federal Court against the oil and gas giant Santos, alleging misleading and deceptive claims in its annual report about its environmental credentials, including that the company has a clear plan to achieve net zero emissions by 2040, and that natural gas is a 'clean fuel'.[7] A further case was completed, subject to the possibility of appeal, on 26th August 2021when Chief Justice Preston of the NSW Land and Environment Court delivered his judgment in *Bushfire Survivors for Climate Action Inc v Environment Protection Authority*,[8] delivering orders that compel the Environment Protection Authority [EPA] to perform its statutory duty to develop environmental quality objectives, guidelines and policies to ensure the protection of the environment from climate change.[9]

In this paper the history of climate litigation in the courts and tribunals of the Australian jurisdictions, New South Wales [NSW], Queensland [Qld] and the Commonwealth (national) levels, and reactions to it, will be reviewed.

4 A recent opinion poll, commissioned by the Australian Conservation Foundation and completed by YouGov, has found that 67% of voters in all 151 national electoral seats the government should be doing more to address climate change, to reach zero net emissions by or before 2050: see Nick O'Malley and Miki Perkins, 'Voters demand climate action' *The Age* (Melbourne) 30 August 2021, 1, 8, available at https://www.theage.com.au/environment/climate-change/australia-s-biggest-climate-poll-shows-support-for-action-in-every-seat-20210829-p58mwb.html (accessed 30 August 2021).

5 [2021] FCA 560 ('*Sharma*'). This decision is discussed in text below following n 30.

6 Anjali Sharma*,et al*, 'Sharma v Minister For The Environment - The Appeal' https://chuffed.org/project/sharma (accessed 20 August 2021).

7 Environmental Defenders Office, 'World-first Federal Court case over Santos' 'clean energy' & net zero claims' available at https://www.edo.org.au/2021/08/26/world-first-federal-court-case-over-santos-clean-energy-net-zero-claims/ (accessed 30 August 2021); Charlotte Grieve and Nick Toscano, 'Santos hit with climate lawsuit over 'net zero' claims' The Age (Melbourne) 26 August 2021, available at https://www.theage.com.au/business/companies/santos-hit-with-climate-lawsuit-over-net-zero-claims-20210826-p58m79.html (accessed 26 August 2021).

8 [2021] NSWLEC 92.

9 The duty is imposed on the EPA by s 9(1)(a) of the *Protection of the Environment Administration Act 1991* (NSW) ['POEA Act']. Bushfire Survivors for Climate Action Inc represents survivors of the extreme bushfire events that swept across south eastern Australia in the summer of 2019-20, firefighters and local government councillors, who link the inferno to global warming and climate change: https://www.bushfiresurvivors.org/ (accessed 31 August 2021).

2. Australian recognition of climate change issues

A visitor to Australia could be forgiven for imagining that information about enhanced greenhouse effect, global warming and climate change had reached us only recently, judging by the tone of political debate and media discussion. However, in 1988 the issues and risks involved were discussed fervently and very publicly at the *Greenhouse 88* conference. This was a national conference held by the Commission for the Future, an agency of the Commonwealth government intended to raise the profile of public debate about futures issues and concerns.[10] There were large public conference venues in each capital city, connected by video link. This was the time when climate change entered public consciousness in Australia and educators vowed to prepare future generations for the need to turn the issue around.

In 1992 the Australian Environment Minister, Ros Kelly, signed on to the *United Nations Framework Convention on Climate Change* (UNFCCC).[11] A conservative (Liberal – National Party coalition) government was elected in 1996 and retained power until 2007. Following election of a social democratic (Australian Labor Party) government, in 2007 Australia ratified the *Kyoto Protocol*, a move which was symbolic because it had already taken effect by its own terms in 2005.[12] The incoming government attempted a number of reforms, including preparation for a carbon trading scheme. The great wheel of governmental fortune again turned in 2013 and a conservative (Liberal – National Party coalition) government remains in power in 2021, although it has changed its leader, and thus Prime Minister, three times with three different levels of conviction about climate change as a question of science and appropriate responses to it.[13] Australia ratified the *Paris Agreement*[14] on 9 November 2016. The target adopted was to reduce emissions to 26%-28% of 2005 levels by 2030 but Australia has not yet committed to achieving zero net emissions by 2050, although world

10 Richard A Slaughter (2018) 'Lessons from the Australian Commission for the Future: 1986-1998' available at https://richardslaughter.com.au/wp-content/uploads/2018/03/Lessons_from_Australias_CFF.pdf (accessed 13 August 2021); Richard A Slaughter, 'Australia's Commission for the Future: the first six years' (1992) 24 *Futures* 268-276. My own paper was later published as: Murray Raff, 'Come Back King Canute! Greenhouse Effect and the Law' (1989) 6 *Environmental & Planning Law Journal* 271.

11 *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 107, 3 (entered into force 21 March 1994) ('Climate Change Convention').

12 *Kyoto Protocol* to the Climate Change Convention, opened for signature 16 March 1998, 37 ILM 22 (entered into force 16 February 2005 (when the Russian Federation signed on)).

13 A more detailed overview of the political history is provided in Victoria McGinniss and Murray Raff, 'Coal and Climate Change: A Study of Contemporary Climate Litigation in Australia' (2020) 37 *Environmental & Planning Law Journal* 87.

14 *Report of the Conference of the Parties on Its Twenty-First Session, Held in Paris from 30 November to 13 December 2015 – Addendum – Part Two: Action Taken by the Conference of the Parties at Its Twenty-First Session,* Dec 1/CP.21, UN Doc FCCC/CP/2015/10/Add.1 (29 January 2015). See generally Hari Osofsky *et al* 'The 2015 Paris Agreement on Climate Change: Significance and Implications for the Future' (2016) 46 *Environmental Law Reporter* 10267.

leaders have urged Australia to adopt more rigorous reduction targets.[15] In the absence of clear national leadership on the issue, across the period 1988 to 2021 state and local levels of government have been responsible for significant innovation,[16] as well as private and commercial actors pursuing more cost-effective solar energy production within a corporatised national electricity grid, over which the national government has limited administrative control. On Sunday, 22nd August 2021 renewable energy inputs to the grid exceeded coal generated inputs for the first time.[17]

Since 1988 there has been no significant new issue in climate change science – the measurement and modelling have become more accurate and reliable but essentially the message, the anticipated catastrophe, has not changed.

3. The Australian coal industry

Australia's second top export industry is mineral fuels, valued at $65.4 billion per annum or 25.7% of total exports.[18] In 2020 coal exports alone were valued at $54.2 billion.[19] When exports of fossil fuels are taken into account, Australia's global carbon footprint is lifted from 1.4% to approximately 5% of global carbon emissions (2017 figures). Australia's exports of thermal and metallurgical coal account for the largest share of CO_2 emissions generated from exports by far.[20] Most Australian coal is mined in New South Wales and Queensland.

15 For example, Boris Johnson, Conservative Prime Minister of the UK: Bevan Shields, '"Impressed with Australia's ambition": Johnson offers Morrison support on climate change' *The Age* (Melbourne) 15 June 2021: https://www.theage.com.au/world/europe/impressed-with-australia-s-ambition-johnson-offers-morrison-support-on-climate-change-20210615-p581c6.html (accessed 21 August 2021).

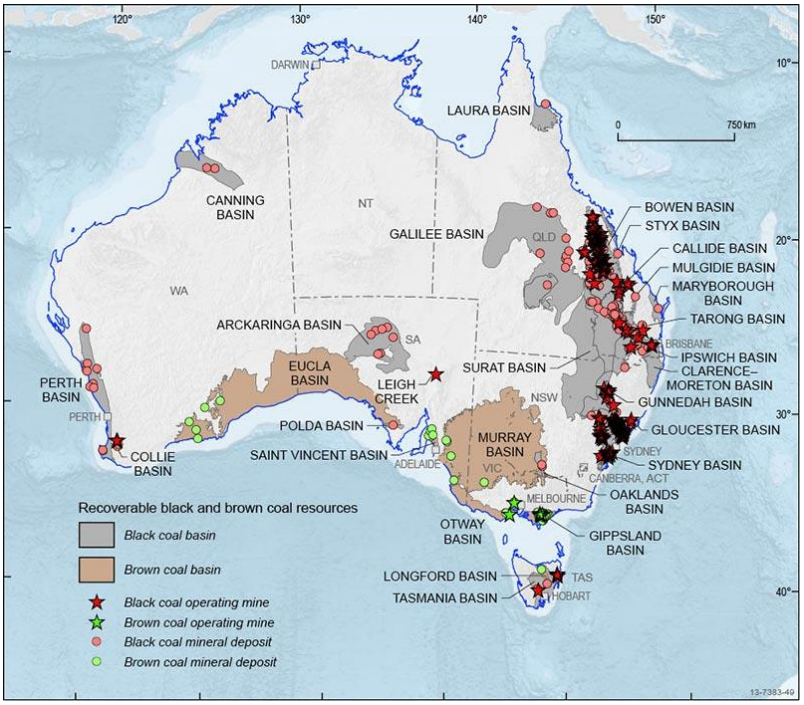
16 For example, in 2020 the Australian Capital Territory achieved sourcing of 100% of its electricity needs from renewable energy sources: ACT Government, 'Cleaner energy' https://www.environment.act.gov.au/energy/cleaner-energy (accessed 28 August 2021).

17 *Guardian Weekly* (Australia), 27 August 2021, 6.

18 Daniel Workman, 'Australia's Top 10 Exports': https://www.worldstopexports.com/australias-top-10-exports/ (accessed 23 August 2021).

19 Statistica, 'Value of coal exports from Australia from financial years 2011 to 2020': https://www.statista.com/statistics/1120570/australia-export-value-of-coal/ (accessed 23 August 2021). The annual value of education services that Australia provides internationally was estimated at $17 billion by the Productivity Commission for the year 2014 (Productivity Commission 2015, *International Education Services*, Commission Research Paper, Canberra, available at https://www.pc.gov.au/research/completed/international-education (accessed 23 August 2021)) but has also been estimated at $40 billion for the 2019 calendar year: Peter Hurley, '2021 is the year Australia's international student crisis really bites' *The Conversation*, 14 January 2021 (available at https://theconversation.com/2021-is-the-year-australias-international-student-crisis-really-bites-153180 - accessed 23 August 2021).

20 Paola Yanguas Parra, Bill Hare, Ursula Fuentes Hutfilter, Niklas Roming, *Evaluating the significance of Australia's global fossil fuel carbon footprint*, Report prepared by Climate Analytics for the Australian Conservation Foundation (ACF), July 2019, available at https://climateanalytics.org/media/australia_carbon_footprint_report_july2019.pdf (accessed 23 August 2021).



Map: Major Coal Mining Operations – Source, Geoscience Australia[21]

Consequently, so far as state legal jurisdiction is concerned, this paper focuses on the legal systems of the states of New South Wales (NSW) and Queensland.

The Australian Commonwealth government could draw on constitutional powers to regulate carbon pollution. For example, polluting activities of corporations could be regulated under the corporations power,[22] and a new post-carbon economy could be underpinned with laws made under the external affairs power,[23] drawing on the *Climate Change Convention* and *Paris Agreement*. The corporations and external affairs powers supported the ill-fated *Clean Energy Act 2011* (Cth), repealed in 2014 by the then recently elected conservative government. The *Environment Protection & Biodiversity Conservation Act 1999* (Cth) ('EPBC Act') is the main Commonwealth environment protection legislation. One of the main methods of regulation supported by this Act is Environmental Impact Assessment ('EIA') followed by a decision of the Commonwealth Minister for Environment on disapproval or approval, with or without conditions, of the project in question. This process is required ('triggered') when a proposed activity is likely to have a significant impact on a matter of 'national environmental significance'.[24] There has been much advocacy for the inclusion in the Act of a 'greenhouse trigger' as a matter of national environmental significance since the

21 'Applying geoscience to Australia's most important challenges – Coal': https://www.ga.gov.au/data-pubs/data-and-publications-search/publications/australian-minerals-resource-assessment/coal (accessed 23 August 2021).

22 s 51 (xx) Australian *Constitution*.

23 s 51 (xxix) Australian *Constitution*.

24 EPBC Act Part 3 (ss 12-25).

reforms embodied in the EPBC Act were first proposed[25] but this has been consistently rejected.[26] None of the listed matters of national environmental significance directly relate to climate change. Therefore, consideration of climate change under the EPBC Act can occur only where the effects of greenhouse gas emissions are likely to impact one of the listed matters of national environmental significance: recurrently the most litigated of these have been impacts on biodiversity or impacts on the Great Barrier Reef Marine Park.[27] Since 2013 ss 24D and 24E of the EPBC Act have provided a trigger in respect of significant impacts on water resources caused by coal seam gas development and large coal mining development;[28] clearly this does not directly hinge on GHG emissions in the way that a requirement for assessment of any project that will generate more than, say, 100,000 tonnes of GHG would.

4. Avenues for litigation

A network of community legal centres for environmental and planning law issues was established in the 1990s, led by legal practitioners concerned to see improvement of environmental law and enforcement in New South Wales and Victoria. The centres are generally called the Environment Defenders Office of the relevant jurisdiction and provide *pro bono* legal assistance to community members and NGOs. It was an ongoing question in this community legal sector how law and litigation could be used in support of climate change activism, along with other contemporary environmental issues, such as biodiversity conservation, heritage protection and mitigation of other forms of pollution. The significant interfaces that emerged were:

25 First proposed in the debate and inquiries concerning the EPBC Bill, the issue has been raised in political debate on several occasions since the enactment of the EPBC Act: see generally, Andrew Macintosh, 'The Greenhouse Trigger: Where Did It Go and What of Its Future' in Tim Bonyhady and Peter Christoff (eds), *Climate Law in Australia* (Federation Press, 2007) 46. See also Recommendation 10 of Allan Hawke, *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, 30 October 2009, ('the Hawke Review') available at <www.environment.gov.au/legislation/environment-protection-and-biodiversity-conservation-act/epbc-review-2008>.

26 Inclusion of a 'greenhouse trigger' was described as the 'anti-coal coal amendment' by Senator Ian Campbell, who was the Commonwealth Minister for Environment and Heritage at the time: Commonwealth, *Parliamentary Debates,* Senate, 28 November 2006, 29 (Ian Campbell); Commonwealth, *Parliamentary Debates,* Senate, 30 November 2006, 29 (Ian Campbell); Andrew Macintosh, above n 25, at 54. A greenhouse trigger could easily be added by making executive regulations made under s 25 EPBC Act.

27 See *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* (2006) 232 ALR 510, discussed in text below following n 54; and *Australian Conservation Foundation Incorporated v Minister for the Environment* [2016] FCA 1042, discussed in text below following n 58.

28 These provisions were inserted by the *Environment Protection and Biodiversity Conservation Amendment Act 2013* (Cth). Clearly, they do not provide a direct 'greenhouse trigger' although issues with water resources often occur in conjunction with risks from carbon emissions: see for example, Lisa Cox, 'Adani Coalmine: Minister Loses Legal Challenge on Water Pipeline Assessment' *Guardian* (on-line), 12 June 2019.

- Challenging inadequate Environmental Impact Assessment [EIA] of and substantive decision making about projects that would produce greenhouse gases ('GHGs') by means of judicial review in the courts, and
- Involvement in land use planning and environmental discharge approval processes, and in merits review of those processes by review tribunals, when alternative approaches would help to contain GHG production.

Both these approaches involve the public law sphere. Generally, they involve protection of procedural or regulatory rights and are not capable of compelling a particular environmental outcome. The question of how a civil law, or private law cause of action, could compel a protective approach or force internalisation of global warming externalities, for example through an order to pay compensation, was considered with scepticism because it was doubted that common law doctrines could operate at this scale and the inherent conservatism of common law systems constrained their capacity to reform themselves in a relevant timeframe.[29]

5. A civil law cause of action

Hope for a common law cause of action with respect to climate change was recently encouraged by the mixed private law – public law decision of the Federal Court in *Sharma v Minister for the Environment*.[30] Whitehaven Coal Pty Ltd ('the miner') obtained NSW development approval in 2014 to construct and operate a coal mine through a state fast-track process for state significant projects. The extraction of 135 million tonnes of coal was approved. In 2016, a subsidiary company, Vickery Coal Pty Ltd, sought approval to extend the capacity of the mine to 168 million tonnes. When combusted, the additional coal will produce about 100 million tonnes of CO_2.[31] The applicant was required to be refer the proposal to the Commonwealth government for approval under the *Environment Protection & Biodiversity Conservation Act 1999* (Cth) ('EPBC Act') in view of potential impacts on threatened species (ss 18 and 18A) and the use of water in a large coal mining project (ss 24D and 24E). Following EIA the Commonwealth Minister for Environment had authority to approve the project under s 133 of the EPBC Act.

Eight Australian children, Anjali Sharma, Isolde Shanti Raj-Seppings, Ambrose Hayes, Tomas Arbizu, Bella Burgemeister, Laura Kirwan, Ava Princi and Luca Saunders, with the aid of their litigation representative Sister Marie Brigid Arthur, a Sister of the Brigidine Order, applied to the Federal Court for a declaration that when deciding whether to approve the project the

29 For the optimistic view, see Jacqueline Peel, Hari Osofsky and Anita Foerster, 'Shaping the "Next Generation" of Climate Change Litigation in Australia' (2017) 41 *Melbourne University Law Review* 793. For the sceptical view see McGinniss and Raff, above n 13, 122-127.

30 [2021] FCA 560 ('*Sharma*'). This decision is being appealed by the Minister for the Environment to the Full Federal Court: see Anjali Sharma*,et al*, 'Sharma v Minister For The Environment - The Appeal' https://chuffed.org/project/sharma (accessed 20 August 2021).

31 Above n 30, § 7.

Minister for Environment owed the applicants, all children residing in Australia and all children residing anywhere in the world, a civil (private) law duty of care with respect to the harm that will be caused to them in the future by the contributions to global warming that the coal project will release and sought injunctions to prevent the Minister from failing to discharge her duty of care. Justice Bromberg made the declaration sought with respect to the applicant children and children residing in Australia but not for all children residing anywhere in the world.[32]

A remarkable aspect of the case is the extent of agreement between the parties about (i) Australia's great vulnerability to impacts of global warming and climate change, (ii) scientific predictions about those impacts endorsed in the *Paris Agreement* process, and (iii) the emissions from mining and burning the coal extracted in the course of the mining project.[33] This is remarkable because until 2015 the conservative Liberal – National Party government was a source of scepticism about climate change science, a stance which some members still maintain.[34] The point of disagreement between the parties was that the Commonwealth Minister for the Environment considered, and still considers, that she does not owe a duty of care to Australian children of the future when approving projects that will exacerbate global warming and climate change impacts. Justice Bromberg found it reasonably foreseeable that extension of the mining project will create a real risk that global average surface temperatures will increase beyond 2° C and thus global surface temperatures will be being propelled into an irreversible 4° C trajectory, leading to identifiable future risks for the children, including health impacts. The Minister has statutory authority to approve the project but statutory authority must not be exercised in breach of duty of care, or, negligently.[35]

However, Justice Bromberg declined to award an injunction that would constrain the Minister to decide the question of approval in a particular way. His Honour was not satisfied there was a reasonable apprehension that the Minister would breach her duty of care and refusal to approve the project in question under the EPBC Act was not the only way within her powers that she could satisfy her duty of care. It is understood that the Minister's

32 The terms of the declaration were finalised in a later proceeding: *Sharma v Minister for the Environment (No 2)* [2021] FCA 774.

33 For an overview see Justice Bromberg's 'Summary': *Sharma* [2021] FCA 560, 560-563. The *Paris Agreement* process is referenced above, n 14.

34 The present Deputy Prime Minister and leader of the National Party, Barnaby Joyce MHR, has been a long standing sceptic about action on climate change. The Prime Minister and leader of the Liberal Party, Scott Morrison MHR, when Treasurer once carried a lump of coal into the national Parliament claiming no one had anything to fear in coal: Katharine Murphy, 'Scott Morrison brings coal to question time: what fresh idiocy is this?' *The Guardian* (Australia) 9 February 2017 available at https://www.theguardian.com/australia-news/2017/feb/09/scott-morrison-brings-coal-to-question-time-what-fresh-idiocy-is-this (accessed 30 August 2021). See generally James Massola, 'Net zero by 2050: why Liberal Party moderates believe they've won' *The Age* (Melbourne) 15 August 2021 (accessed 30 August 2021).

35 *Sharma*, above n 30, §§ 490-491.

ground of appeal to the Full Federal Court[36] is essentially that she disputes existence of a duty of care to the children in their future lives.

Recognition of a civil duty of care in respect of damage that will be caused by climate change is at the leading edge internationally. In the *Peruvian Glacier Case*[37] the Appeal Court of North Rhine-Westphalia (the Oberlandesgericht [OLG] in Hamm) decided that in principle German energy producers are liable in tort, under § 906 of the *German Civil Code*,[38] to contribute to the cost of alleviating the risk that the applicant's property in Peru will be inundated by water from a glacier that is melting due to global warming, to which the defendant's carbon emissions have contributed. The case was adjourned for fact finding, which has not yet been completed, although it is reported that the parties remain "in discussion".[39] More recently, on 26 May 2021, the District Court of The Hague ordered Royal Dutch Shell to reduce the CO_2 emissions of the Shell group by net 45% by 2030, beside 2019 levels, on the basis of general law civil liability in tort under Article 6:162 of the *Netherlands Civil Code*.[40]

6. Legislative frameworks of coal mining approval

In New South Wales and Queensland two forms of approval are required in order to open a coal mine: (i) grant of a mining tenure, and (ii) environmental planning approval:

Issue	New South Wales	Queensland
Mining Tenements	*Mining Act 1992* (NSW) ('MA') Object: s 3A 'to encourage and facilitate the discovery and development of mineral resources in New South Wales, having regard to the need to encourage ecologically sustainable development.'	*Mineral Resources Act 1989* (Qld) ('MRA') Object: s 2(d) to 'encourage environmental responsibility' in mining activity' Open standing to object and pursue merits review

36 Above n 30.

37 OLG Hamm [Appeal Court of North Rhine-Westphalia] 30 November 2017, *Zeitschrift für Umweltrecht*, 2018, 118.

38 Equivalent to the common law doctrine of private nuisance: see Murray Raff, *Private Property and Environmental Responsibility: A Comparative Study of German Real Property Law*, Kluwer Law International, The Hague, 2003, 203-214.

39 *Westfälische Nachrichten*, 29 January 2020: https://www.wn.de/nrw/klage-zum-klimawandel-olg-hamm-pruft-ortstermin-in-peru-904515 (accessed 21 August 2021).

40 *Friends of the Earth v Shell*, District Court of The Hague, 26 May 2021, C/09/571932 / HA ZA 19-379. An English translation of the judgment is available at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339 (accessed 21 August 2021). The earlier famous Dutch climate change case, *Urgenda Foundation v The State of the Netherlands (Ministry of Infrastructure and the Environment)* (Case No C/09/456689/ HA ZA and 200.178.245/01, 9 October 2018), was based on Art 21 of the *Netherlands Constitution* which requires the authorities to keep the country habitable and to protect and improve the environment.

	Before making a determination, the Minister must take into account any submissions and the need to conserve and protect the environment: MA Sch 1b para 3. The Minister may approve or reject the application: MA s 63 Objections to coal mining projects may be made by any person.	
Environmental Planning Approval	*Environmental Planning and Assessment Act 1979* (NSW) (EPAA) Coal mining projects require development approval under the NSW planning system	*Environmental Protection Act 1994* (Qld) ('EPA') Object: s 3 to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends (*ecologically sustainable development*).
State Scale Projects	EPAA s 4.63 and *State Environmental Planning Policy (State and Regional Development) 2011* (NSW) sch 1 c1 5(1)(a) All proposed coal mining developments are State Significant Developments ('SSD'). Proponent must prepare and lodge an Environmental Impact Statement ('EIS') addressing all potential impacts. The EIS must also include justification of carrying out the development in the manner proposed having regard to biophysical, economic and social considerations, including the principles of ecologically sustainable development: *Environmental Planning and Assessment Regulation 2000* (NSW) sch 2 para 7(1)(f), (4) The application for development approval and the EIS must be publicly exhibited and any person may make a written submission. The Minister for Planning or the Independent Planning Commission (until 2018 the	*State Development and Public Works Organisation Act 1971* (Qld) Most major mining projects will also be declared 'coordinated projects' under this Act A project proponent may apply for such a declaration. If made, the Coordinator-General will have dual roles of facilitating and assessing the proposal. The project will undergo an assessment process, including production and public notification of an Environmental Impact Statement ('EIS').

	Planning Assessment Commission) is the consent authority for SSD projects. When assessing the project the consent authority must take into account: (i) likely impacts on the natural and built environments, social impacts and economic impacts; (ii) suitability of the site for the development; (iii) the public interest. The consent authority may refuse the application or approve the development, subject to legally binding conditions. *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (NSW) ('NSW Mining SEPP') the consent authority must consider an assessment of potential GHG emissions from the development, including downstream emissions, and must have regard to any applicable State or national policies, programs or guidelines concerning GHG emissions.	
Merits Review	Objectors may appeal to the NSW Land and Environment Court against grant of development approval. However, where the application was assessed by the Independent Planning Commission and a public hearing was held about the project merits appeal is not available to objectors: EPAA s 8.6. The assessment of coal mining projects usually occurs in this manner. Therefore opportunities for merits review of coal mining projects are very limited in New South Wales.	Application for a mining lease and objections to it must be referred to the Qld Land Court where an objection is made against an application for a mining lease and the mining lease application also relates to an application for an Environmental Approval. Parties to the proceedings include the applicant, the administering authority, and any objectors. The Court makes a recommendation that the Minister reject or grant the application subject to any necessary conditions: s 78

		Under the MRA relevant considerations (s 269) for the Land Court are: (i) whether any adverse environmental impact will be caused by the operations; (ii) prejudice to the public right and interest; and (iii) whether any good reason has been shown for refusal to grant the mining lease. Under the EPA the Court must consider (s 191): (i) the principles of environmental policy set out in the Intergovernmental Agreement on the Environment,[41] including the precautionary principle, intergenerational equity and conservation of biological diversity and ecological integrity; (ii) all submissions; and (iii) the public interest.

Table: Overview of Key Issues in Legislation of NSW and Qld Relevant to Approval of Coal Mines

State level regulation of mining activities in Queensland and New South Wales encompasses different and at times conflicting objectives. Clearly an inherent tension arises between, on one hand, the objective of mining legislation to facilitate the exploration and ultimately extraction of mineral resources and, on the other hand, the objective of planning and environmental legislative frameworks to conserve the environment. Although reference is made to Ecologically Sustainable Development [ESD], it is not generally invoked in these systems as an umbrella concept under which this tension is to be resolved. Rather, it is generally accorded the status of another consideration to be taken into account, along with economic, social and other factors which are thus posited as considerations that compete with ESD. Despite these conflicting objectives, the decision maker and, as will be discussed below, ultimately the courts must seek to balance competing and conflicting considerations under interconnected legislation and legislative instruments.

41 *National Environment Protection Council Act 1994* (Cth), Schedule. This legislation was replicated by 'mirror legislation' in each Australian jurisdiction in order to avoid constitutional validity issues.

Independent external merits review is not available to objectors with respect to decisions made under the EPBC Act discussed above.[42] Consequently, in the Commonwealth jurisdiction legal challenges to projects that will create carbon pollution must be pursued by means of judicial review.

7. Judicial review of coal mining approvals

In the course of judicial review of governmental decision making a court examines the lawfulness of a decision rather than reconsidering its substance or merits. Applications for judicial review involving climate change are most frequently framed as challenges to a failure of the decision maker to take into account 'relevant factors' when making a project approval decision. It is increasingly common to challenge a failure adequately to consider climate change when assessing coal mine issues within the statutory frameworks outlined above. Where a legislative instrument provides direct instructions to consider prospective GHG emissions, such as cl 14 of the NSW Mining SEPP, failure to consider such matters adequately will clearly justify judicial review of the decision. However, where there is no *express* reference in the legislation to climate change or the emission of GHGs as a consideration to be taken into account, it will be necessary to determine whether the statute *impliedly* requires consideration of these matters.[43] A requirement to take into account the principles of ecologically sustainable development, the 'public interest' or environmental impacts more generally may imply a requirement to take climate change issues into consideration.

In the course of judicial review of coal mining approvals courts in New South Wales and Queensland have grappled with the following issues:

- Scope 1 GHG emissions (those resulting directly from the proposed activity itself, the physical mining of the coal), Scope 2 GHG emissions (those resulting indirectly from the consumption of energy while undertaking the proposed activity, for example an electricity supplier burning fuel to produce electricity consumed by mine machinery in the course of producing coal), and Scope 3 GHG emissions (those generated in the wider economy by all activities related to the project, such as third parties burning coal extracted from the mine) were all considered relevant considerations by Justice Pain of the NSW Land and Environment Court in *Gray v Minister for Planning*,[44] which the objects of the EPAA, including pursuit of the principles of ecologically sustainable

42 In text above, following n 23. Independent *external* merits review of Commonwealth EIA decisions was recommended by the Administrative Review Council during design and drafting of the Environment Protection and Biodiversity Conservation Bill 1998 (Cth) but clearly rejected: *Environmental Decisions and the Administrative Appeals Tribunal*, Report No.36, 1994, available at <www.arc.ag.gov.au/Publications/Reports/Pages/Reportfiles/ReportNo36.aspx>. See also Recommendations 49 and 50 of the Hawke Review, above n 105. *Internal* reconsideration of the Minister's decision that a proposal is a controlled action may be sought under EPBC Act ss 78-79.

43 *Minister for Aboriginal Affairs v Peko-Wallsend Limited* [1986] HCA 40, especially per Mason J, §§ 11-15.

44 [2006] NSWLEC 720, § 100.

development, required the decision maker to consider when evaluating the adequacy of an environmental report. Success on this point however did not prevent the mine from going ahead.

- The question of whether a statutory requirement to consider the 'public interest' carries with it necessity to consider the impacts of climate change has been answered differently by different courts over the decades. It was answered affirmatively by Justice Biscoe in the NSW Land and Environment Court in *Walker v Minister for Planning*[45] but that was reversed on appeal by the NSW Court of Appeal, which however noted that this could change in the future.[46] In *Barrington-Gloucester Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure*[47] Justice Pepper in the NSW Land and Environment Court found '… the time [had] come that the principles of ESD can now be seen as so plainly an element of the public interest.'[48] This affirmative approach was adopted by Chief Justice Preston in the NSW Land and Environment Court, in his paradigm-shifting judgment of a merits review application, *Gloucester Resources Ltd v Minister for Planning*.[49]
- When a decision maker must 'have regard to' any 'applicable' State or national policies, programs or guidelines concerning GHG emissions[50] it is sufficient merely to consider them.[51]
- Evaluation of greenhouse gas emissions is a relevant issue to consider when the legislation under which the decision is made requires consideration of the principles of ecological sustainable development, however that is limited to the 'activities' that can be permitted under the relevant decision and does not include Scope 3 emissions, which are produced through the activities of other actors.[52]

In the Federal sphere, the Federal Court has not yet found a sufficient connection between the emission of GHGs from the mining and burning of coal that is implicit in a proposed project, on one side, and impacts of climate change on matters of national environmental significance protected by the EPBC Act, on the other side, to conclude that the latter results

45 (2007) 157 LGERA 124. For discussion of this case see McGinniss and Raff, above n 13, 100-101.

46 *Minister for Planning v Walker* [2008] NSWCA 224, § 56 per Hodgson JA, delivering judgment of the Court.

47 [2012] NSWLEC 197.

48 Above, Pepper J, at § 170.

49 [2019] NSWLEC 7. For further affirmative cases see McGinniss and Raff, above n 13, 101, n 151. Preston CJ emphasised interconnections between combatting climate change and achievement of ESD in *Bushfire Survivors for Climate Action Inc v Environment Protection Authority*, above n 8, § 61.

50 Cl 14(2) *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (NSW) ('Mining SEPP').

51 *Wollar Progress Association Incorporated v Wilpinjong Coal Pty Ltd* [2018] NSWLEC 92.

52 *Coast and Country Association of Queensland Inc v Smith; Coast and Country Association of Queensland Inc v Minister for Environment and Heritage Protection* [2015] QSC 260, at § 36.

from the former.[53] In *Wildlife Whitsunday*[54] Justice Dowsett could not find such climate change impacts would be 'impacts of the proposed coal project' when greenhouse gases are being produced all around the world – a conflation of issue of causation, relative proportions and difficulty dealing with cumulative impacts.[55] In *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources*[56] Justice Stone concluded that even if the proposed coal project would have an impact on biodiversity it would not be a 'significant' impact.[57] In *Australian Conservation Foundation v Minister for the Environment*[58] a finding that Scope 3 emissions of the proposed Adani Carmichael mine in Queensland would have no *direct impact* on the Great Barrier Reef led to a further finding that there was no 'threat of serious or irreversible environmental damage' and consequently the precautionary principle did not apply.

8. Merits review of coal mining approvals

In merits review of decisions to approve coal projects in New South Wales and Queensland the following issues have been prominent:

- Reluctance to regard Scope 2 and Scope 3 emissions of the mining operation and combustion of the mined coal[59] as emissions that will be created by the proposed project, rather than emissions created by the activities of other actors, and thus whether conditions imposed on approval could require offsetting of Scope 2 and Scope 3 emissions.[60] The NSW Land and Environment Court should be more willing to take account of Scope 3 emissions in light of the progressive *Gloucester Decision*.[61]
- Where jurisdiction of the tribunal conducting merits review of an environmental authorisation is restricted to the specific activities that have been authorised under that authority, for example 'mining activity', and consideration cannot be given to

53 Referred to in text above, following n 26.

54 *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* (2006) 232 ALR 510.

55 See for example, above, § 524.

56 *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* (2007) 243 ALR 784, upheld on appeal to the Full Federal Court in *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* (2008) 244 ALR 87.

57 Above, § 39.

58 *Australian Conservation Foundation Incorporated v Minister for the Environment* [2016] FCA 1042. This decision was affirmed on appeal to the Full Federal Court in *Australian Conservation Foundation Inc v Minister for the Environment and Energy* [2017] FCAFC 134.

59 The meaning of and distinctions between Scope 1, 2 and 3 emissions of a project were outlined in text above, following n 43.

60 NSW: *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221. QLD: *Xstrata Coal Qld Pty Ltd v Friends of the Earth, Brisbane Co-op Ltd* [2012] QLC 13.

61 Above, n 49, see especially §§ 499-503, discussed further in text below following n 77.

the impacts of other activities, such as those producing downstream Scope 3 emissions.[62]

- The relatively small volumes of Scope 1 and Scope 2 GHG emissions from coal mining are not sufficient to demonstrate an environmental impact that justifies the imposition of conditions or outright refusal of the coal mining proposal.[63]
- Climate change is a matter of general public interest, which may militate against approval of a coal mining project, however, it must be weighed against other issues when considering whether the public right and interest will be prejudiced by the project.[64] Perceived economic benefits of the project present a range of factors that are to be weighed against climate change, including potential financial returns, employment opportunities and regional economic development that could be facilitated by the mine.[65] Scope 3 emissions may be taken into account, along with Scope 1 and 2 emissions, as the potential contribution of the project to climate change when weighing public interest.
- There will be no net increase in the volume of GHGs in the atmosphere as a result of any one particular coal project because if the market demand for coal is not met by the proposed mine it will be met by supply of coal from elsewhere – the market substitution argument – thus there will be no increase in Scope 3 emissions.[66]

The superior analytical paradigm adopted by Chief Justice Preston in the recent merits review decision of the New South Wales Land and Environment Court in *Gloucester Resources Ltd v Minister for Planning*[67] has the potential to correct the paradoxes found in the approaches found above. The *Gloucester Case* was an application by Gloucester Resources Ltd for merits review of the decision of the NSW Planning and Assessment Commission, as delegate of the Minister for Planning, to reject development consent for its

62 QLD: *Xstrata Coal Qld Pty Ltd v Friends of the Earth, Brisbane Co-op Ltd* [2012] QLC 13, at § 598; *Hancock Coal Pty Ltd v Kelly and the Department of Environment and Heritage Protection (No. 4)* [2014] QLC 12; *Adani Mining Pty Ltd v Land Services of Coast and Country Inc* [2015] QLC 48; *New Acland Coal Pty Ltd v Ashman and Chief Executive, Department of Environment and Heritage Protection (No. 4)* [2017] QLC 24.

63 QLD: *Adani Mining Pty Ltd v Land Services of Coast and Country Inc* [2015] QLC 48; *New Acland Coal Pty Ltd v Ashman and Chief Executive, Department of Environment and Heritage Protection (No. 4)* [2017] QLC 24; *Hancock Coal Pty Ltd v Kelly and the Department of Environment and Heritage Protection (No. 4)* [2014] QLC 12.

64 President MacDonald in *Xstrata Coal Qld Pty Ltd v Friends of the Earth, Brisbane Co-op Ltd* [2012] QLC 13, at § 576.

65 Above, *Xstrata* at § 578.

66 QLD: *Xstrata Coal Qld Pty Ltd v Friends of the Earth, Brisbane Co-op Ltd* [2012] QLC 13, at § 598; *Hancock Coal Pty Ltd v Kelly and the Department of Environment and Heritage Protection (No. 4)* [2014] QLC 12, upheld on judicial review in the Qld Supreme Court in *Coast and Country Association of Queensland Inc v Smith* [2015] QSC 260; *Adani Mining Pty Ltd v Land Services of Coast and Country Inc* [2015] QLC 48; *New Acland Coal Pty Ltd v Ashman and Chief Executive, Department of Environment and Heritage Protection (No. 4)* [2017] QLC 24; *Hancock Galilee Pty Ltd v Currie* [2017] QLC 35.

67 Above, n 49. See also *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] 194 LGERA 347 [2013] NSWLEC 48.

Rocky Hill Coal Project. A community group, Gloucester Groundswell, was joined into the proceedings. Chief Justice Preston also rejected consent for the project after balancing a wide range of environmental impacts and planning considerations, most relevantly climate change impacts.[68]

Chief Justice Preston accepted that increased anthropogenic emissions of greenhouse gases are contributing to the following environmental impacts: rising global average surface temperature, basic circulation patterns of the atmosphere and the ocean, increasing intensity and frequency of many extreme weather events, increasing acidity of the oceans, rising sea levels and consequent increases in coastal flooding, and intensification of the hydrological cycle.[69] The NSW Mining SEPP requires a consent authority to consider potential greenhouse gas emissions from the development, including downstream emissions, and to have regard to any applicable State or national policies, programs or guidelines concerning greenhouse gas emissions.[70] Preston CJ noted that Australia is a party to the *Climate Change Convention* and the *Paris Agreement*.[71] His Honour accepted as a national policy on carbon emissions Australia's participation in the *Paris Agreement* and agreement to limit emissions to Nationally Determined Contributions ['NDCs'][72] and the nation's contribution to halting the global average temperature rise in the 1.5º - 2º C range, the key objective of the *Paris Agreement*. The NSW Government had endorsed the *Paris Agreement* and set a more ambitious objective to achieve net zero emissions by 2050.[73] Adopting the carbon budget approach, Preston CJ concluded that:

> … approval of the Project (which will be a new source of GHG emissions) is also likely to run counter to the actions that are required to achieve peaking of global GHG emissions as soon as possible and to undertake rapid reductions thereafter in order to achieve net zero emissions (a balance between anthropogenic emissions by sources and removals by sinks) in the second half of this century.[74]

In addition to the NSW Mining SEPP, a consent authority is obliged to consider likely direct and indirect impacts of a development, including environmental impacts on the natural and built environments.[75] Further, a consent authority must consider the public interest, which requires consideration of the principles of ESD, embracing with particular relevance the precautionary principle and principle of inter-generational equity.[76]

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68 For more detailed review of the other environmental impacts and planning considerations considered by Preston CJ in the Gloucester Decision, see McGinniss and Raff, above n 13, 105-108.

69 Above, n 49, at § 435.

70 Mining SEPP cl. 14, noted in text above at n 50.

71 Above, n 14.

72 Australia's NDC is to reduce GHG emissions by 26-28% below 2005 levels by 2030.

73 Above, n 49, at § 440.

74 Above, § 526.

75 Above, § 494; EPAA s 4.15(1)(b).

76 Above, § 498; EPAA s 4.15(1)(e).

Accordingly, Preston CJ concluded that refusal of the project would prevent a new source of GHG emissions, as well as the other negative outcomes, such as the unacceptable planning, visual and social impacts identified.[77]

In reaching this conclusion, Preston CJ also discussed a range of counter arguments and qualifications that had been advocated by the developer, Gloucester Resources. First, his Honour accepted that consideration of Scope 3 GHG emissions is an essential part of assessing emissions and their environmental impacts. The NSW Mining SEPP expressly requires consideration of downstream emissions, as noted above, nevertheless Preston CJ also adopted other Australian tribunal and judicial conclusions that Scope 3 emissions may and should be taken into account in the course of assessments.[78] His Honour also considered treatment of the issue in a range of US judgments, which describe in very critical terms the proposition that downstream emissions should not be assessed.[79] Secondly, Preston CJ considered necessary the assessment of cumulative impacts of myriad small emissions,[80] concluding:

> The Project's cumulative GHG emissions are therefore likely to contribute to the future changes to the climate system and the impacts of climate change. In this way, the Project is likely to have indirect impacts on the environment, including the climate system, the oceanic and terrestrial environment, and people.[81]

Thirdly, Preston CJ engaged with an assertion advocated for the developer that increases in GHG emissions associated with the project would not necessarily cause the carbon budget to be exceeded because reductions in GHG emissions from other sources, such as electricity generation, or increased removal of GHGs from the atmosphere by sinks, such as vegetation, could balance those increases. His Honour dismissed this as 'speculative and hypothetical' and not based in any evidence before the Court '… of any specific and certain action.'

> A consent authority cannot rationally approve a development that is likely to have some identified environmental impact on the theoretical possibility that the environmental impact will be mitigated or offset by some unspecified and uncertain action at some unspecified and uncertain time in the future.[82]

Fourthly, his Honour similarly dismissed as not rational an argument that greater emissions reductions could be achieved from other sources at lower cost by other persons or bodies

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77 Above, §§ 555-556.

78 Above, n 34, at §§ 499-503; *Australian Conservation Foundation v Latrobe CC* [2004] VCAT 2029; (2004) 22 VAR 82; (2004) 140 LGERA 100; *Gray v Minister for Planning*, above n 44; *Coast and Country Association Queensland Inc v Smith* [2016] QCA 242.

79 Above, n 49, at §§ 504-512,

80 Above, §§ 516-524, relying on Australian and international decisions, *ACF v Latrobe CC*, above n 78; *Gray v Minister for Planning*, above n 44; the US Supreme Court decision in *Massachusetts v Environmental Protection Agency* 549 US 497 (2007); and decisions of courts of the Netherlands in *Urgenda Foundation v The Netherlands*, above n 40.

81 Above, n 49, at § 525.

82 Above, at §§ 529-530.

and thus the project being considered by the consent authority could go ahead in view of likely abatement by them.[83]

Fifthly, Preston CJ dismissed an argument that coking coal would be purchased from other coal mines overseas where environmental standards are lower if the proposed Gloucester mine were not developed, leading to 'carbon leakage'. His Honour found that this risk was not substantiated in the evidence and there are other coking coal mines in Australia, existing or approved, that could provide appropriate coking coal.[84]

Sixthly, Preston CJ similarly found a 'market substitution' argument 'flawed'.[85] The market substitution argument is essentially that another supplier will provide the coal and the same emissions would be produced elsewhere even if the proposed project were not approved, so it might just as well be approved.[86] Should approval be refused for the proposed Gloucester mine, his Honour found, there was no certainty that new coking coal mines in any other country would supply the coal that would have been supplied by the proposed mine. Countries that import Australian coal, such as China, India, Japan and South Korea were all introducing emissions control regulations and expanding renewable energy capacity.[87] His Honour also referred to the US case of *WildEarth Guardians v US Bureau of Land Management*[88] in which the US Court of Appeals held that the US Bureau of Land Management had acted arbitrarily and capriciously, and without support in the administrative record,[89] when it concluded there was no real difference between issuing the coal leases and declining to issue them because third party sources would substitute any volume of coal lost on the open market should the relevant mining leases be refused.[90]

Finally, it had been argued that steel is an essential commodity in modern society, used to build wind turbines and hydro-electric dams.[91] Preston CJ found that current and likely future demand for coking coal for steel production could be met by other coking coal mines in Australia, existing and approved:

> On this basis, it is not necessary to approve the Project in order to maintain steel production worldwide. The GHG emissions of the Project cannot therefore be justified on the basis that the Project is needed in order to supply the demand for coking coal for steel production.[92]

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83 Above, § 533.

84 Above, § 536.

85 Above, § 538. Preston CJ also described it as the market substitution *assumption*.

86 See text above, at n 66.

87 Above, n 49, at § 538. Expert evidence had also been presented about new techniques in steel making, recycling and substitution that would reduce demand for coking coal: §§ 468-479.

88 870 F 3d 1222 (10th Cir, 2017).

89 Above, at 1233.

90 Above, n 49, §§ 542-543.

91 Above, § 461.

92 Above, §§ 548-549.

In brief, Preston CJ found that economic benefits of the mine were overstated and did not justify the environmental and social impacts that it would produce. The Court affirmed the refusal of the development consent by the NSW Planning and Assessment Commission (since 2018 the Independent Planning Commission), as delegate of the Minister for Planning.

9. Implications

Treatment of climate change issues by Australian courts and tribunals has been very limited, in terms of effectiveness in reduction of carbon emissions. It is clear that there are still significant barriers to effective climate litigation that seeks to enforce environmental aspects of the statutory frameworks for assessment and approval of coal mining proposals. Across all three jurisdictions, NSW, Queensland and the Commonwealth, there has been a general reluctance by the courts and tribunals to conclude that the contributions of coal mines to climate change are sufficient to require the refusal of a project. Central to this issue in Queensland, and in New South Wales until the recent *Gloucester Decision*,[93] has been the restricted relevance attributed by the courts to Scope 3 emissions.

Until the recent *Sharma Decision*,[94] the Federal Court has rejected any link between the greenhouse gas emissions that follow from a particular project and climate change and its wider environmental consequences.[95] With respect to assessment and approval decisions under the EPBC Act, there are two systemic areas of weakness in respect of greenhouse gas emissions and climate change: first, the emission of greenhouse gases in significant volumes is not yet a matter of national environmental significance requiring assessment and approval, despite potential constitutional power following from the *Climate Change Convention*[96] and the *Paris Agreement*.[97] Secondly, the absence of merits review of assessment and approval decisions under the EPBC Act means that the Minister's limited factual assessments of greenhouse gas emissions will be deemed lawful in judicial review, despite evidence that with respect to the merits a project will have significant environmental impacts.

10. Reactions to climate change litigation

We have seen that Australian courts and tribunals have with rare but very insightful exceptions developed a range of conservative approaches to climate change impacts of mining and burning coal. Even reforming legislation and legislative instruments requiring

93 Above, n 49. Reviewed in text above, following n 66.

94 Above n 30.

95 Laura Schuijers, 'Current Developments. In Carbon & Climate Law: Asia Pacific' (2017) *Carbon & Climate Law Review* 64, 72.

96 Above, n 11.

97 Above, n 14.

consideration of the public interest, downstream emissions and principles of ecologically sustainable development have been narrowed by processes of conservative interpretation in most cases. These conservative approaches have generally been upheld or even extended in appeal courts.

Balanced decisions in climate change litigation and environmental assessment have drawn conservative legislative and media responses.[98] These are some of them:

- The concept of an 'impact' is very important for the purposes of EIA under the EPBC Act, for example when determining whether there will be a *significant impact* – does this embrace indirect impacts as well as direct impacts? A Full Federal Court concluded in *Minister for the Environment and Heritage v Queensland Conservation Council Inc*[99] that the impacts that followed from building a dam included impacts on the Great Barrier Reef of pollution by fertilisers and pesticides used on farms developed because of the availability of irrigation water from the dam. Consequent amendment of the EPBC Act in 2006 sought to distinguish between the 'direct' and 'indirect' consequences of an event or circumstance which could amount to an 'impact' for the purposes of the Act. *Indirect* consequences will now be impacts under s 527E of the EPBC Act only if it can be demonstrated that the project is a 'substantial cause' and other criteria set out in s 527E(2) are met.[100] Therefore, the effects associated with climate change can be an impact for the purposes of the Act only if the coal mine in question is found by the Minister to be a substantial cause of those effects.[101] One could say that this conservative amendment preceded the climate change case.
- In the Federal sphere, following litigation concerning the Adani Carmichael coal mine, the conservative government led by former Prime Minister Tony Abbott sought to amend the EPBC Act in order to limit access to the courts by pro-environment parties with the political objective of limiting what rights to seek judicial review and injunctions to restrain breach of the Act.[102]
- A 'Greentape Reduction Bill'[103] was introduced into the Queensland Parliament soon after comments favourable to ecologically sustainable development and

98 See generally Jacqueline Peel and Hari M Osofsky *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015) 304ff.

99 [2004] FCAFC 190, also known as the *Nathan Dam Decision*. Although this case did not directly concern GHG emissions the amendment that followed had far reaching repercussions in the climate change case *Australian Conservation Foundation Incorporated v Minister for the Environment*, discussed in text above following n 57.

100 EPBC Act s 82.

101 *Australian Conservation Foundation Incorporated v Minister for the Environment*, above n 58, §§ 158-9.

102 See Bell-James and Ryan, above n 103, 535.

103 *Environmental Protection (Greentape Reduction) and Other Legislation Amendment Bill 2012* (Qld). See Justine Bell-James and Sean Ryan, 'Climate Change Litigation in Queensland: A Case Study in Incrementalism' (2016) 33 *Environmental and Planning Law Journal* 515, 535.

intergenerational equity were made by Member Smith in *Xstrata Coal Qld Pty Ltd v Friends of the Earth, Brisbane Co-op Ltd*.[104] The ensuing Act limited the need for the court to consider the principles of ecologically sustainable development. Member Smith of the Land Court, who made the comments, later resigned, coinciding with a critical report in the conservative press[105] that referred to appeal court findings of apprehended bias and unreasonableness in a decision in which he refused approval for expansion of a coal mine on grounds of intergenerational equity, among other grounds.[106]

- Following Land and Environment Court refusal of a coal mine expansion in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Ltd*[107] the project proponent lodged a new application, effectively seeking the same approval.[108] The application was dealt with in public hearings conducted by the Planning Assessment Commission, meaning that the rights of objectors to seek merits review in the Land and Environment Court were extinguished.[109] In 2015 the Planning Assessment Commission consented to the mine expansion.[110]
- Also following the *Bulga Milbrodale Progress Association Decision*,[111] and arguably in response to it, the NSW government amended the NSW Mining SEPP to allow priority to the economic advantages of a proposal above its environmental and social

104 [2012] QLC 13. For fuller discussion of Member Smith's comments see McGinniss and Raff, above n 13, 121-122.

105 Jamie Walker, 'Appeals court declares ex-judge 'irrational' in anti-coal ruling' *The Australian*, 23 October 2019. Available at https://www.theaustralian.com.au/nation/politics/appeals-court-declares-exjudge-irrational-in-anticoal-ruling/news-story/db3ad1c1ae4a211671d6129ca1a3c4d1 (accessed 28 October 2019). With potential prejudice to Member Smith, the journalist breaks off to discuss a case concerning sexual assault of a child in the middle of his report. Most of the conservative 'pro-mine' decisions of the Queensland Land Court discussed in this paper were the work of Member Smith: for more extensive review of them see McGinniss and Raff, above n 13. *The Australian* is a News Corporation (Murdoch) newspaper.

106 *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection (No. 4)* [2017] QLC 24.

107 [2013] 194 LGERA 347 [2013] NSWLEC 48.

108 NSW Government Planning Assessment Commission, *Determination Report Warkworth Continuation Project (SSD 6464)* (26 November 2015) https://www.ipcn.nsw.gov.au/projects/2015/05/warkworth-continuation-project--determination (accessed 29 August 2021).

109 cl 14 NSW Mining SEPP. In 2018 the NSW Planning Assessment Commission became the NSW Independent Planning Commission.

110 Above, n 108.

111 *Bulga*, above, §§ 48, 20, 500. The NSW Court of Appeal upheld the decision of Preston CJ on appeal: *Warkwork Mining Ltd v Bulga Milbrodale Progress Association Inc* (2014) 307 ALR 262.

impacts.[112] However, this amendment was short-lived following community disaffection.[113]

11. Conclusion

Australia is blessed with many potential sources of renewable energy; solar, wind, hydro-electric, tidal, ocean current, geothermal, to name a few. Domestically Australia has been a world leader in the domestic uptake of solar energy.[114] However, the Australian economy is heavily dependent on the export of GHG producing fossil fuels, and foremost coal, although it has been obvious since before 1988 that, on one side, this had to end, and on the other, that renewable energy production presents Australia with many opportunities. The fossil-fuel industries have had and continue to have great influence on Australia's political decision making systems. The length of the period over which conservative political, media and community spokespeople have disseminated denial of, or scepticism about climate science has been absurd. It is not surprising in this scenario that concerned members of the community and community organisations have sought to inject rationality and obtain more objective decision making by making legal applications to courts and tribunals.

The mixed success of consequent climate change litigation has revealed the limitations of common law judicial method when dealing with new or unprecedented situations, like climate change, and the conservatism of the Australian legal system. For example, the slow and still uncertain progress to recognition that Scope 3 and cumulative emissions are a product of a coal producing project, doubts about whether ESD and climate change are issues of 'public interest' in the evaluation of project approval, and ready acceptance of the 'market substitution argument' and consequent dismissal of the significance of impacts for the purposes of the precautionary principle demonstrate how deeply wedded the Australian legal system is to preservation of an industrial *status quo* that is actually in motion toward climate catastrophe, paradoxically. It is thus a legitimate question whether legal process is an effective use of scarce community resources in challenging projects with climate change repercussions.

On the other hand there have been bright highlights and many of them in recent months: the recent *Sharma Decision*[115] finding that the Minister for Environment has a civil (private) law duty of care to future Australian citizens when approving a new source of GHGs, the *Gloucester Decision*[116] setting out a textbook analysis of the environmental and climate

112 *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment (Resource Significance) 2013* (NSW).

113 Repealed by the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment (Significance of Resource) 2015* (NSW).

114 CSIRO, 'Australia installs record-breaking number of rooftop solar panels' 13 May 2021: https://www.csiro.au/en/news/news-releases/2021/australia-installs-record-breaking-number-of-rooftop-solar-panels (accessed 31 August 2021.

115 Explored in text above, following n 30.

116 Above, n 49. Reviewed in text above, following n 66.

change impacts of a proposed coal mine project, and the very recent *Bushfire Survivors Decision*[117] compelling the NSW EPA to develop environmental quality objectives, guidelines and policies to ensure the protection of the environment from climate change. In the past attempts have been made in the political sphere to overturn successes achieved in courts and tribunals.[118] Perhaps the successful decisions also inspire hope that legal process has a role to play in achieving climate justice, not least in signalling to political decision makers that their rhetoric in favour of powerful vested interests is not accepted in a forum where science, fact and objectivity should be fundamental.

117 Above n 8.

118 Many are recounted in text above, following n 98.

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Murray continues to research environmental law and property law, especially from an international comparative perspective. In his book, 'Private Property and Environmental Responsibility – A Comparative Study of German Real Property Law' (Kluwer, 2003) Murray studied the history and theory of the international model of land tenure administration, also used in Australia, to show how a principle of environmental stewardship could be recognised in present property law. Murray's present projects include legal protection of underwater cultural heritage and completion of Vol VI (Property and Trusts) of the International Encyclopedia of Comparative Law. Murray was elected to the International Academy of Comparative Law in 2012. He has visited the Max Planck Institute for Comparative & International Private Law in Hamburg [MPI] on many occasions since 1995. He is the editor of the Property Law volume of the 'International Encyclopedia of Comparative Law' – a project fostered by the MPI.

Murray's career in environmental law commenced in the 1980s. He helped to found the Environment Defenders Office in Victoria (now Environmental Justice Australia), a community legal service that assists in environmental law cases (pro bono), serving on its board for 16 years (1992-2006) and chairing the organisation for six years (1999-2006).

Murray taught International Comparative Law, Environmental & Planning Law, Property Law and Administrative Law at undergraduate and post-graduate levels. He has supervised many post-graduate and Honours research projects. Murray has also worked in the law schools of Monash University, Melbourne University and Victoria University, as well as at the Law Reform Commission of Victoria. Murray has worked in legal practice in all of the fields that he taught and is enrolled as a Barrister & Solicitor of the Supreme Court of Victoria.

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EU Climate Change Agenda in External Trade and Investment

This project seeks to investigate mechanisms for improving implementation of climate change policy responses in EU foreign trade and investment agreements. It bolsters shared knowledge between academic and policy experts in designing more efficient regulatory responses to climate change in global trade and investment contexts.