IS THE JUDICIARY WARMING TO GLOBAL WARMING?

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> "The way forward to promoting the effective use of environmental laws as an instrument for translating sustainable development policies into action will require the balancing of environmental and developmental considerations in judicial decision-making"[1]

These words aptly capture the essence of a growing body of thought that the judiciary should continue the incremental expansion of legal authority regarding sustainable development. It echoes the sentiments of the Chief Judge of the New South Wales Land and Environment Court that the time has come for each member of the judiciary to participate in the evolution of these principles. [2]

Over the past year, global warming and climate change have been thrust into the spotlight and appear to have been elevated to mainstream concerns for the majority of Australians.[3] High profile environmentalists such as Australian of the Year, Tim Flannery,[4] and American politician, Al Gore,[5] have brought the issue to the forefront of public attention and it would appear that the courts too have been forced to weigh into the debate.

Whilst there is significant scientific debate as to the causes, extent and true impact of global warming and climate change, two recent cases, *Gray v The Minister for Planning & Ors*[6] and *Re Xstrata Coal Queensland Pty Ltd & Ors,*[7] illustrate that environmentalists are keen to bring to account coal miners whose product they blame for a considerable portion of the emissions linked to global warming.

Prior to the decision in *Gray,* it was accepted by the mining industry and government that proponents of significant resource projects, such as coal mines, were required to carry out environmental assessments of their proposed operations which included consideration of greenhouse gas emissions directly related to the proposed mine (including the flaring and venting of gas and the use of diesel burning trucks and machinery). However, it was thought that any

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1 Lal Kurukulasuriya and Jerry Velasquez, "Compliance and the Role of the Judiciary in Promoting Sustainable Development" (2003) 17 *Work in Progress* 18.

2 Honourable Brian Preston, "The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific" 9 *Asia Pacific Journal of Environmental Law* 109.

3 Peter Hartcher, "Canberra, take note: climate change is what terrifies us" *Sydney Morning Herald* 3 October, 2006.

4 Timothy Fridtjof Flannery is an Australian mammalogist, biologist, writer, humanist, paleontologist and 2007 Australian of the Year. He is noted for his best-selling books including *The Future Eaters* and *Throwim Way Leg*. His most recent book, *The Weather Makers: The History and Future Impact of Climate Change*, was published in September 2005. He is a frequent speaker on ecological issues, in particular global warming, and is a vigorous advocate of human population control.

5 Albert Arnold Gore, Jr is an American politician, teacher, businessman, and environmentalist. From 1993 to 2001 he was the 45th Vice President of the United States within the Clinton administration. He lectures widely on the topic of global warming, which he calls "the climate crisis". In 2006 he starred in the Academy Award-winning documentary, *An Inconvenient Truth*, discussing global warming and the environment.

6 *Gray v The Minister for Planning & Ors* [2006] NSWLEC 720.

7 *Re Xstrata Coal Queensland Pty Ltd & Ors* [2007] QLRT 33. See above under Queensland "Recent Developments".

greenhouse gas emissions which occurred after the mined product had been onsold and used by a third party did not require investigation or consideration.

Louise Baldwin, in her article "Mining in Greenhouses – A Precautionary Tale",[8] foresaw an increasing public and judicial scrutiny of environmental assessments and the possibility that proponents of large projects may need to consider the impact of greenhouse gases indirectly produced as a result of the project.

This paper will effectively continue Baldwin's narration of an ongoing saga whereby courts are incrementally forcing greater environmental accountability on participants in industries which contribute to environmental degradation. It will discuss the above cases and assess the implications of the decisions.

GRAY V THE MINISTER FOR PLANNING AND ORS

In this case, Justice Pain of the New South Wales Land and Environment Court was asked to decide whether a coal miner was required to assess the down-stream use of its mined product. Her Honour held that in assessing whether development was environmentally sustainable, consideration must be given to the impact of any greenhouse gases produced not only directly, but also indirectly, by the proposed development. Whilst this case has particular interest for proponents of significant mining projects in New South Wales, the decision also has wide-reaching implications for any projects assessed against the principles of environmentally sustainable development (ESD).

Background

The applicant in this case was an individual who brought the action in his own name against the Minister for Planning and Centennial Hunter Pty Ltd (Centennial), the proponent of a coal mine at Anvil Hill (Anvil Hill Project). Centennial's proposal was to mine up to 10.5 million tonnes of coal per annum over 21 years for use at power stations in New South Wales and overseas. The coal to be exported overseas was expected to be burned for electricity in Japan.

As a result of clause 6(1)(a) and Schedule 1 of the *State Environmental Planning Policy (Major Projects) 2005* (NSW), the proposed Anvil Hill Project was assessable against Part 3A of the *Environmental Planning and Assessment Act* 1979 (NSW) (EP&A Act) as the proposal included development for the purpose of a coal mine.

Environmental assessment of major projects

Part 3A of the EP&A Act titled 'Major Infrastructure and Other Projects' provides for the assessment of projects which are considered to be of state or regional significance. Under this Part, several steps are defined which ultimately lead to the Minister approving or rejecting major projects. The Director-General is required to set environmental assessment requirements. The project proponent must submit an assessment report in accordance with the requirements which, if initially judged adequate must be made available for at least 30 days for public comment. During and after public comment, the Director-General may require further information and amendment of the proponent's environmental assessment before it is then submitted, together with his or her own report, by the Director-General to the Minister for final decision.

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8 [2006] *AMPLA Yearbook* 533.

Environmental assessment for Anvil Hill Project

In the Anvil Hill case, the Director-General notified assessment requirements on 26 April 2006 which included a requirement that the project proponent address "Air Quality – including a detailed greenhouse gas assessment". The requirements also provided that any environmental assessment "must take into account relevant State government technical and policy guidelines…[including]...'Approved Methods for the Modelling and Assessments of Air Pollutants in NSW' ". However, the latter guideline did not refer to greenhouse gas emissions.

The environmental assessment lodged by Centennial was a significant and detailed report and contained a section titled "Energy and Greenhouse Assessment" which addressed greenhouse gas emissions from the proposed Anvil Hill Project in accordance with recognised assessment guidelines, calculated the energy consumption and greenhouse gas emissions for a variety of scenarios and assessed and identified relevant management controls. The report stated that the assessment was based upon the methodologies in:

- NSW Energy and Greenhouse Guidelines for Environmental Impact Assessment, Sustainable Energy Development Authority and Planning NSW, 2002 (Guidelines);
- World Business Council for Sustainable Development and World Resources Institute *Greenhouse Gas Protocol 2004* (GHG Protocol); and
- Australian Greenhouse Office *Factors and Methods Workbook December 2005* (Workbook).

The assessment of greenhouse gases by Centennial was principally in accordance with the GHG Protocol which creates three categories of greenhouse gas emissions:

> Scope 1 – Direct greenhouse gas emissions such as from owned or controlled boilers, vehicles and processing equipment.
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> Scope 2 – Indirect greenhouse gas emissions in the form of electricity consumption.
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> Scope 3 – All other indirect emissions which occur as a consequence of the activity of the company but from sources not owned or controlled by the company, such as the use of sold products and services.

The GHG Protocol specifies that Scope 3 is an optional reporting category.

The environmental assessment for the proposed Anvil Hill Project, which was accepted by the Director-General, assessed Scope 1 and 2 emissions but not Scope 3 emissions. A number of departmental minutes make the point that the approach used was "based on sound greenhouse accounting procedures, and is consistent with the current guidelines for calculating greenhouse emissions from coal mines".[9] Subsequently, the environmental assessment was, as required, publicly exhibited on 25 August 2006.

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9 *Gray v The Minister for Planning & Ors* [2006] NSWLEC 720 at [24].

Basis of Dispute

Justice Pain noted that there was no dispute regarding the proposition that the burning of the coal produced from the proposed Anvil Hill Project would "release substantial quantities of greenhouse gases into the atmosphere"[10] and subsequently distilled two issues to be decided:

1. Whether Centennial had complied with the assessment requirements and whether the Director-General's decision that it had done so was valid.
2. Whether the Director-General complied with the principles of ecologically sustainable development (ESD) in setting the assessment requirements and in deciding to accept the environmental assessment from Centennial.

The Decision

Relevance of the public interest and ESD

The first step in Justice Pain's reasoning was to decide whether the Director-General was required to consider the principles of ESD when firstly, deciding on the assessment requirements and secondly, deciding whether the environmental assessment adequately addressed the assessment requirements. Her Honour accepted the Applicant's argument that the Minister and the Director-General were both required to act in the public interest on the basis that:[11]

(a) the second reading speech for the legislation which inserted Part 3A into the EP&A Act states that Part 3A "provides better outcomes for the community and the environment without unreasonable cost to the proponent" and Part 3A applies to projects the Minister determines are major infrastructure or projects of State or regional planning significance;[12] and

(b) section 35CA of the *Constitution Act 1902* requires the Minister to act "for the good management of the public affairs of NSW" which in effect means the public interest.[13]

Referring to the decision in *Telstra v Hornsby Shire Council,*[14] Justice Pain confirmed that considerations in the public interest included a requirement to consider the principles of ESD.

Her Honour identified the two most relevant ESD principles in this case were the precautionary principle and intergenerational equity.

Validity of decision that the environmental assessment met the assessment requirements

Justice Pain held that environmental assessments under Part 3A are not optional and must be lodged in order for the Minister to approve any proposed project under Part 3A. Further, her Honour decided that the language of s 75H(3) of the EP&A Act indicated that the Director-General must give some consideration as to the adequacy of the environmental assessment prior to deciding whether first, it adequately addressed the assessment requirements and secondly, whether it could subsequently be made publicly available. Relying on *Buck v Bavone*[15] quoted in *Wu Shan*

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10 Ibid at [4].
11 Ibid at [115].
12 Ibid at [42]
13 Ibid at [44]
14 (2006) 146 LGERA 10.
15 (1976) 135 CLR 110.

Liang,[16] Pain J noted that Part 3A provided no guidance on the exercise of the Director-General's discretionary decision in determining the proper scope of the assessment and hence, the Director-General's decision was not easily reviewable by the court. The passage quoted in *Wu Shan Liang*[17] stated that unless the decision-maker has failed to act in good faith, acted arbitrarily or capriciously, been misdirected in law or failed to consider relevant matters, or the decision reached is so unreasonable that no reasonable authority could have reached it, "the authority will be left with a very wide discretion which cannot be effectively reviewed by the courts".[18]

Justice Pain observed that the factual evidence supported the conclusion that the Director-General did consider whether the environmental assessment complied with the assessment requirements. Her Honour held that the Director-General had a broad discretion to decide whether the environmental assessment adequately addressed the assessment requirements and that there was no legal "test" imposed on the Director-General in accepting the environmental assessment.

Compliance with principles of ESD in deciding assessment requirements and adequacy of environmental assessment

In reaching a conclusion regarding this issue, Justice Pain first addressed the issue of causation. Her Honour referred to two cases – *Bell*[19] and *Queensland Conservation Council Inc v Minister for Environment and Heritage*[20] – to support the propositions that an environmental impact statement could require assessment of off site impacts resulting from third parties not under the control of the proponent and that in assessing impacts, there must be wide consideration of the consequences which will follow if a proposed activity proceeds. Relying on *Minister for Environment and Heritage v Queensland Conservation Council Inc and Anor,*[21] Justice Pain, stated that the word "impacts" in its ordinary meaning can readily include the indirect consequences of an action and may include the result of acts by people other than the principal actor and furthermore, that relevant effects are those that it can be said, "without straining the language…would be the consequences of the action".[22]

Although the authorities upon which Her Honour relied were cases regarding the *Environmental Protection and Biodiversity Conservation Act 2001* (Cth), Justice Pain noted that the principles were "equally applicable to consider effects which may harm the environment in NSW, whether these be direct or indirect".[23]

Justice Pain then attempted to distinguish earlier decisions in which no causative link was found between the mining of coal and climate change. Quoting Dowsett J in *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and*

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16 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259.
17 Ibid.
18 *Buck v Bavone* (1976) 135 CLR 110 at 118-119.
19 *Bell v Minister for Urban Affairs and Planning and Port Waratah Coal Service Ltd* (1997) 95 LGERA 86.
20 [2003] FCA 1463.
21 (2004) 139 FCR 24.
22 Ibid at [53].
23 *Gray v The Minister for Planning & Ors* [2006] NSWLEC 720 at [91].

Heritage [24] who was "far from satisfied that the burning of coal at some unidentified place in the world…its contribution towards global warming and the impact of global warming upon a protected matter can be so described",[25] Justice Pain dismissed Dowsett J's decision stating that she did "not find it persuasive…that the impacts of [greenhouse gas] emissions produced from coal mined in NSW are beyond the scope of environmental assessment procedures in NSW"[26] reasoning that this case concerns "different circumstances".

In deciding whether the environmental assessment was invalid for failure to address Scope 3 emissions (that is greenhouse gas emissions from use of the mined product), Justice Pain relied on the Director-General's concession that the burning of coal mined from the proposed Anvil Hill Project would cause the release of substantial greenhouse gases in the environment and noted that in her opinion, these emissions would have impacts on the Australian and consequently the NSW environment, thereby meeting the test of causation based on a real and sufficient link.

Justice Pain stated that:

> "Climate change/global warming is widely recognised as a significant environmental impact to which there are many contributors worldwide but the extent of the change is not yet certain and is a matter of dispute. The fact there are many contributors globally does not mean the contribution from a single large source such as the Anvil Hill Project in the context of NSW should be ignored…I consider there is a sufficiently proximate link between the mining of a very substantial reserve of thermal coal in NSW, and the emission of [greenhouse gases] which contributes to climate change/global warming, which is impacting now and likely to continue to do so on the Australian and consequently NSW environment, to require assessment of that GHG contribution of the coal when burnt in an environmental assessment under Part 3A".[27]

In addressing the second limb of the issue, Justice Pain considered whether the Director-General had failed to take ESD principles into account. As authority that a court can determine the validity of a decision against the factors which a decision-maker is bound to consider in making a decision as set out in the statute conferring the discretion, Justice Pain referred to the decision in *Peko-Wallsend*[28] and noted its application in the decision in *Tugun,*[29] which concerned a challenge to the Minister's decision under a different section in Part 3A. In affirming the role that ESD principles must play in decisions under legislation which adopt ESD principles (which includes the EP&A Act), Justice Pain referred to *BT Goldsmith Planning Services v Blacktown City Council*[30] and *Telstra v Hornsby*[31] amongst others.

Justice Pain held that whilst Part 3A did not limit the Director-General's discretion in relation to the scope of the assessment requirements or in accepting the assessment, the exercise of that discretion had to be in accordance with the objects of the EP&A Act, one of which was to achieve ESD. Accordingly, the Director-General was required to take into account the ESD principles of

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24 [2006] FCA 736.
25 Ibid at [72].
26 *Gray v The Minister for Planning & Ors* [2006] NSWLEC 720 at [93].
27 *Gray v The Minister for Planning & Ors* [2006] NSWLEC 720 at [98].
28 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.
29 *Tugan Cobaki Alliance v Minister for Planning and RTA* [2006] NSWLEC 396 at [143].
30 [2005] NSWLEC 210.
31 (2006)146 LGERA 10.

intergenerational equity and the precautionary principle when deciding whether the Assessment should be accepted.

Intergenerational equity

Justice Pain acknowledged that there has been little judicial consideration of the principle of intergenerational equity and thus turned to a recent article by Preston J titled "The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific"[32] in which he outlined the following three fundamental principles of intergenerational equity:

(a) The conservation of options principle which requires each generation to conserve the natural and cultural diversity in order to ensure that development options are available to future generations;

(b) The conservation of quality principle that each generation must maintain the quality of the earth so that it is passed on in no worse condition than it was received;

(c) The conservation of access principle which is that each generation should have a reasonable and equitable right of access to the natural and cultural resources of the earth.

It was argued by the Director-General that raising climate change and global warming as an issue was enough to satisfy any requirement that intergenerational equity be taken into account because climate change and global warming were inherently concerned with impacts on future generations. Justice Pain rejected this argument on the basis that simply raising an issue does not necessarily satisfy a requirement that a principle has been considered where there has been no actual analysis of the impacts.

Justice Pain concluded on the issue of intergenerational equity that "it is apparent that there is a failure to take the principle of intergenerational equity into account by a requirement for a detailed GHG assessment if the major component of GHG which results from the use of the coal, namely Scope 3 emissions, is not required to be assessed".[33]

Precautionary principle

In relation to the precautionary principle, which has been the subject of considerable judicial comment, Justice Pain referred to the statement in *Telstra v Hornsby*[34] that the "function of the precautionary principle is to require the decision-maker to assume that there is, or will be, a serious or irreversible threat of environmental damage and to take this into account, notwithstanding that there is a degree of scientific uncertainty about whether the threat really exists or its extent".[35] If such is shown, then the proponent must "demonstrate that the threat does not exist or is negligible".[36] It was held that at the assessment stage of the Anvil Hill Project, the Director-General should have ensured there was sufficient information before the Minister to enable his consideration of all relevant matters.

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32 9 *Asia Pacific Journal of Environmental Law* 109.
33 *Gray v The Minister for Planning & Ors* [2006] NSWLEC 720 at [126].
34 (2006) 146 LGERA 10.
35 Ibid at [150].
36 *Gray v The Minister for Planning & Ors* [2006] NSWLEC 720 at [127].

Relevance of s 75X

The Minister and Centennial argued that s 75X of the EP&A Act rendered the Applicant's case untenable on the basis of *Tugan.*[37] Section 75X provides that the only mandatory requirement in Part 3A is that an environmental assessment be made publicly available.[38] The decision in *Tugan*[39] held that s 75X demonstrated "Parliament's intention that the only provision breach of which will necessarily lead to invalidity is s 75H(3)"[40] and that the consequences of breach of any other provision would need to be determined according to the principle of determining a statute's purpose as set down in *Project Blue Sky*.[41] Justice Pain rejected the arguments regarding s 75X on the basis that a failure by the Director-General to take into account ESD principles was adequate to give rise to invalidity of the decision.[42]

Untenable precedent

During the proceedings, the responding parties argued that if Justice Pain failed to accept the proposition that the chain of causation had been broken through voluntary, independent actions of third parties, unsatisfactory outcomes would result. In her judgement, Justice Pain referred to the example provided by the Director-General that the assessment of shipyards would require assessment of the greenhouse gas emissions of the ships built at the shipyard. Justice Pain, however, rejected such arguments on the basis that each decision would ultimately be an issue of fact and degree.[43]

Orders

Her Honour held that the Director-General had failed to comply with legal requirements to take into account ESD principles, in particular the principle of intergenerational equity and the precautionary principle, when he formed the view that Centennial's environmental assessment was adequate.

RE XSTRATA COAL QUEENSLAND PTY LTD & ORS[44]

On the same day that the decision in *Gray* was handed down, a Queensland conservation group lodged objections in the Queensland Land and Resources Tribunal (QLRT) to the grant of a mining lease to Xstrata Coal Queensland Pty Ltd for an expansion of the Newlands coal project in central Queensland. The group based its objections on similar arguments to that in *Gray*, specifically that the burning of the coal should be assessed as an impact of the proposed development. However, ultimately the Tribunal rejected the application and found in favour of Xstrata.

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37 *Tugan Cobaki Alliance Inc v Minister for Planning and RTA* [2006] NSWLEC 396.
38 Section 75H(3) EP&A Act
39 *Tugan Cobaki Alliance Inc v Minister for Planning and RTA* [2006] NSWLEC 396.
40 Ibid at [184].
41 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355.
42 *Gray v The Minister for Planning & Ors* [2006] NSWLEC 720 at [143].
43 *Gray v The Minister for Planning & Ors* [2006] NSWLEC 720 at [97].
44 Re *Xstrata Coal Queensland Pty Ltd & Ors* [2007] QLRT 33 (15 February 2007). See above "Recent Developments" p17.

Background

This case concerned an application under s 275 of the *Mineral Resources Act 1989* (Qld) (MRA) by Xstrata for the grant of an additional surface area of 722 hectares to Mining Lease No 4761. The purpose of the application for additional surface area for the tenement situated at Suttor Creek, 129km west of Mackay was to allow Xstrata to develop a new open cut coal mining operation to replace current production areas at Xstrata's Newlands Coal Project. It was proposed that the additional area would produce 1.9 million tonnes of coal over a 15-year lifespan. Xstrata had also applied for a relevant environmental authority (EA) under the *Environmental Protection Act 1994* (Qld) (EP Act).

Objections were lodged to the grant of the additional area by the Queensland Conservation Council Inc (QCC) and Mackay Conservation Group Inc (MCG) on the basis of greenhouse gas emissions. In essence, it was said that the proposed mine would contravene a number of factors to be assessed under the MRA and the EP Act unless conditions were imposed on the grant to "avoid, reduce or offset the emissions of greenhouse gases that are likely to result from the mining, transport and use of the coal from the mine".[45]

The QCC argued that Xstrata should avoid, reduce or offset a percentage of its greenhouse gas emissions on the basis that the proposed mine would contribute to global warming and climate change "which itself is imposing significant economic, social and environmental costs on Australia and the rest of the world".[46]

Provisions regarding the grant of additional surface area and EAs

Under s 269(4) of the MRA, the Tribunal is required to take into account a number of factors prior to making a recommendation to the Minister. In addition, ss 222 and 223 of the EP Act set out a number of provisions regarding decisions by the Tribunal in respect of EA applications where objections have been lodged.

Decision

Relevant factors

To begin, President Koppenol identified the relevant factors under the MRA and EP Act upon which the case turned including, adverse environmental impact, prejudice to the public right and interest, any good reason shown to refuse[47] and ESD principles (part of the "standard criteria").[48]

Evidence regarding global warming and climate change

President Koppenol was discerning and discriminating in accepting scientific and economic evidence regarding global warming and climate change. In particular, Koppenol P highlighted that Emeritus Professor Ian Lowe AO had incorrectly calculated the emissions from the proposed mine as a percentage of global annual emissions by using the emissions figure estimated for the life of the mine, instead of the annual figure.[49] In his judgment, Koppenol P also expressed the view that

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45 *Re Xstrata Coal Queensland Pty Ltd & Ors* [2007] QLRT 33 at [8].
46 *Re Xstrata Coal Queensland Pty Ltd & Ors* [2007] QLRT 33 at [11].
47 *Mineral Resources Act* 1989 (Qld) s 269(4)
48 *Environmental Protection Act* 1994 (Qld) s 223(c)
49 *Re Xstrata Coal Queensland Pty Ltd & Ors* [2007] QLRT 33 at [9].

regrettably a witness for the objectors had "grossly exaggerated references in the Stern Review to sea level rises".[50]

Xstrata did not dispute that greenhouse gas emissions contribute to global warming and climate change, however it did not concede as to the extent of that contribution or its consequences.[51]

President Koppenol made a detailed analysis of a number of reports and drew the parties' attention to critiques of the Stern Report by Professor Robert Carter *et al* and Professor Sir Ian Byatt *et al* which generally conclude that the Stern Report was scientifically flawed and a vehicle for speculative alarmism.[52]

Global warming, climate change and ESD principles

In concluding, Koppenol P answered QCC's submission that he should have regard to ESD principles "to mitigate the serious environmental degradation caused by global warming"[53] by deciding that he was not satisfied that the assumption concerning the cause and effect of global warming had been shown to be valid. Importantly, there was no demonstrated "causal link between this mine's [greenhouse gas emissions] and any discernible harm caused by global warming and climate change".[54]

President Koppenol held that "it would not be appropriate… to impose on the grant of this mining lease additional surface area application or environmental authority application, conditions as to the avoiding, reduction or offsetting of [greenhouse gases]. Apart from having no demonstrated impact on global warming or climate change, any such condition would have…the real potential to drive wealth and jobs overseas and to cause serious adverse economic and social impacts upon the State of Queensland".[55]

SIGNIFICANT IMPLICATIONS

These two cases, heard in different state tribunals under different legislation and indeed, with different outcomes, are none the less significant for they demonstrate the rapid expansion of proactive environmentalism and the evolving validity of global considerations under environmental protection legislation. In particular, project applicants would be well advised to give well-rounded consideration to downstream greenhouse gas emissions when preparing proposals or applications in any context where ESD principles apply.

The decision in *Gray* has significant implications for the mining industry in New South Wales. Any assessment of a major mining project should give consideration to the impact of its greenhouse gas emissions, both those directly associated with the project and those created later down stream by the end user of the product.[56] However, it is yet to be seen whether the courts, and in turn, the government will support the refusal of proposals on the basis of down stream, offshore carbon emissions and international climate change.

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50 Ibid at [13].
51 Ibid at [14].
52 Ibid at [16].
53 Ibid at [21].
54 Ibid.
55 Ibid at [23].
56 See above "NSW State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007" at p4.

While the decision in *Xstrata*, appears, at first glance, to be somewhat of a set back to having climate change arguments considered relevant to environmental impact assessment, the case is by no means to be dismissed this lightly.

Counsel for the environmentalist objectors in *Xstrata* failed to show a causal link between global warming and greenhouse gas emissions potentially associated with the project under scrutiny. Witnesses for the objectors exaggerated and misquoted references which most certainly did not assist their case. President Koppenol's response in the case is a timely reminder to objectors that solid, unbiased evidence will be needed before the judiciary is willing to make decisions that are potentially damaging to the economy and the community.

Given another set of facts, *Xstrata* is unlikely to present an insurmountable obstacle to environmental activists. It will not stem the tide of opinion that found judicial support in the *Gray* decision.

The significance of the *Gray* decision extends beyond the mining industry. Essentially, the decision in *Gray* demonstrated the judiciary's willingness to use broad-brush legislative objects to restrict the exercise of unlimited discretion by governments. The decision supports the proposition that greenhouse gas emissions contribute to climate change and as such, need to be considered under the ESD principles of intergenerational equity and the precautionary principle. The concept of ESD has been widely incorporated into both state and federal statutes.

CONCLUSION

The decision in *Gray* is very interesting as it demonstrates further consolidation of the trend to consider global consequences as relevant to local environmental impact assessment and further demonstrates that the judiciary have taken notice of the growing concern shared by many Australians regarding climate change and global warming. The decision in *Xstrata* however, is a warning that sound, solid and fairly presented evidence is needed in each case in order to succeed in actions regarding greenhouse gas emissions. The *Xstrata* decision also stresses the relevance of proportionality in these matters, a difficult consideration in the age of 30-second television grabs and trial by newspaper headline.