From Vermont’s Maples to Wybong’s Olives: Cross-Cultural Lessons From Climate Change Litigation in the United States and Australia

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I. INTRODUCTION

In 2002, Arthur and Anne Berndt began to notice widespread deterioration among the 16,000 trees on their sugar maple farm in Sharon, Vermont. As they watched their saplings die in unprecedented numbers from the heat, their first thought was not that they could now successfully

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launched a lawsuit for injuries caused by climate change. Instead, they worried how the 530-acre farm they had owned and operated for twenty years—and the livelihood they built around an ecosystem unique to Vermont—was going to survive the coming season.

Half way around the world, very different people had very similar concerns about the effects of climate change on their lives and career. Olive farmer Christine Phelps moved to the Wybong community in the Hunter Valley of New South Wales more than twenty years ago. Although the valley was Australia’s first “coal capital” with the industry dating back over 200 years, Phelps and other residents began to worry what additional emissions from new mines would mean for a country already experiencing the effects of climate change. One proposed mine in particular, an open-cut mine at Anvil Hill, spawned a motley crew of local opponents including dairy farmers, miners, Greenpeace members, vigneron, and horse breeders. Mining company Centennial Coal wanted to develop the operation a mere kilometer and a half from Phelps’ property, leaving her to wonder “what kind of world” she would be leaving her grandchildren if she did not join the fight.

Like their American counterparts in Vermont, the people of Wybong knew they had to act, but also like their American counterparts, had limited options to address their situation. The United States and Australia, two of the worst per capita polluters in the industrialized world, have refused to enact national mandatory reductions of global warming emissions and have done little else to protect their citizens from what those like Anne Berndt and Christine Phelps perceive as the dire consequences of unregulated greenhouse gases (GHG).

2 The Berndts are members of Greenpeace and Friends of the Earth, the plaintiffs in *Friends of the Earth v. Watson*, 2005 U.S. Dist. LEXIS 42335 (2005).

3 Declaration, supra note 1.


6 Id.

7 Id.

8 See Climate Analysis Indicators Tool (CAIT) Version 4.0 (Washington, D.C: World Resources Inst., 2007) (discussing the world’s highest polluters). “The earlier Bush, Clinton, and current Bush Administrations have largely relied on voluntary initiatives to reduce the growth of greenhouse gas emissions.” Of the more than fifty
federal action, individual states, non-governmental organizations, and private citizens have come forward in an effort to protect their homes and land from the impending calamities of climate change.  

In both countries, litigation has played an increasingly significant role in the non-legislative response to climate change. While these actions have met with a measure of success, such a case-by-case strategy provides only a piecemeal approach to a complex global issue. Sierra Club senior attorney David Bookbinder, who has represented several climate change plaintiffs, admitted, “I’m the first person to say this is not a very effective means of addressing the problem . . . But it’s the only one we’ve got.”

Not only is litigation one of the few paths available for those who want to fight unregulated greenhouse gas emissions, but, even more limiting, only certain types of climate change plaintiffs have been successful. As this paper explains, the most successful climate change cases in each country have been procedural injury cases, rather than, for example, “on the merits” common law nuisance cases. More specifically, environmental impact assessment procedural injury cases have come to the fore.

Of course, “successful” is a relative term. Motivations for bringing a lawsuit are myriad and can include encouraging legislation, gaining publicity, appeasing a donor base, garnering support for a movement, and delaying industrial action. That being said, however, most plaintiffs

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programs summarized in the 2002 Climate Action Report, submitted under the provisions of the UNFCC, only six are described as “regulatory.” Even this small subset was “established and implemented in response to concerns other than climate change, such as energy efficiency and air quality.” See Brent Yacobucci & Larry Parker, Climate Change: Federal Laws and Policies Related to Greenhouse Gas Reductions, CRS Report for Congress, Order Code RL 31931, Summary (updated Feb. 22, 2006).

Although the connection between human pollution and atmospheric warming cannot ever be indisputably proven, only inferred, a compelling case has been made by researchers that industrial carbon emissions are an important factor driving the rise in temperature. This does not exclude the possibility of a natural component to climate change, but the most likely scenario is one that includes human production of greenhouse gases. In this discussion it is assumed that global warming is real, that it is driven, at least in part, by human contributions to atmospheric greenhouse gases, and that the surface environment in many places has begun to react to changes resulting from warming.


Procedural injury is when a statute mandates that certain procedures be followed and the acting agency fails to comply.

See discussion infra Section IV.

bring suit in order to prevent future harm or obtain a remedy from harm already caused, and in that sense, environmental impact assessment challenges have been by far the most successful. Perhaps because of their success, they have also been the most numerous.\textsuperscript{14}

This paper is a cross-cultural comparison of exemplar procedural injury environmental impact assessment climate change cases in the U.S. and Australia. It evaluates the impact of litigation as a strategy to force polluters to curb emissions, with an eye toward predicting procedural injury cases’ continued relevance in the fight against global warming. Section II describes the various ways in which each country has attempted to address climate change legislatively. Section III analyzes each country’s environmental assessment process and discusses one case from each. Section IV then identifies major differences and similarities in climate change cases in the U.S. and Australia. Finally, in Section V, the paper discusses the role and impact of climate change litigation in the battle against unregulated emissions. The citizens of Vermont and Wybong found a voice and a small measure of victory in their climate change cases and, if the current trend is any indication, they will not be the last.

II. Soft “Climate Law”\textsuperscript{15} Spurred Climate Change Litigation

Although the problem of climate change has been discussed for decades both nationally and internationally, the only legislation with teeth has come about in the last year. With only voluntary measures in place and no mechanism of enforcement, there has been no way to force the hand of polluting corporations to lower emissions or to correct the behavior of government agencies that fail to regulate. Advocates, therefore, have looked to existing environmental protection statutes to help fight climate change.

A. United States

As a signatory to the United Nations Framework Convention on Climate Change (UNFCCC) in 1992, the U.S. has a responsibility to “adopt national policies . . . consistent with the objective of the Convention,” which is the stabilization of greenhouse gases at a level that


prevents dangerous interferences in the climate system.\textsuperscript{16} During the past decade, the U.S. has undertaken or proposed a variety of voluntary regulatory actions in order to fulfill its obligation under the treaty.\textsuperscript{17}

At present, Congress has introduced sixty-seven bills that would address climate change issues and emissions control.\textsuperscript{18} Thus far, however, only two bills have passed both chambers: H.R. 1585, requiring the Department of Defense to assess the risks of projected climate change to the department’s facilities, capabilities, and missions; and H.R. 2082, authorizing appropriations for fiscal year 2008 for intelligence and intelligence-related activities, which, under the House version, would require the Director of National Intelligence to submit to Congress a National Intelligence Estimate on the potential geopolitical effects of climate change and the implications for U.S. national security.\textsuperscript{19} Both bills were vetoed by President Bush.\textsuperscript{20} Even if they had passed, neither of these bills is the kind of robust legislation that would be needed to address adaptation to or mitigation of climate change. Instead—ironically—they are information-forcing, agency-procedure bills, not unlike the statute plaintiffs have been so successful utilizing in recent climate change lawsuits.

Thus far, the Climate Security Act of 2007 is the strongest and most direct legislative response by Congress to the threat of climate change.\textsuperscript{21} As introduced, the bill sets a cap on greenhouse gases that would reduce emissions by as much as sixty-six percent by 2050.\textsuperscript{22} Companies would need permits to emit pollutants that cause global warming. The government would allocate some permits to utilities and industrial companies, and auction others to generate revenues.\textsuperscript{23} The question of how to distribute permits and what to do with the money divides even supporters of the regulation.\textsuperscript{24}

\textsuperscript{16} United Nations Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 848 [hereinafter UNFCCC].


\textsuperscript{19} H.R. 2082, 110th Cong. (2007), \textit{available at} http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR02082:@@@D&summ2=m&.

\textsuperscript{20} Id.


\textsuperscript{22} Id.

\textsuperscript{23} Id.

\textsuperscript{24} Marc Gunther, \textit{Chances Dim for Climate-Change Legislation}, FORTUNE
The bill did not get passed this last legislative session, which did not come as a surprise to many. David Doniger, director of the Climate Center at the Natural Resources Defense Council and supporter of the bill, stated, “This [debate of the bill] will put us in a position to have action next year.” Industrial opposition to the bill against a backdrop of rising gasoline prices and a sluggish economy makes winning votes for a regulatory scheme that will raise the prices of electricity and gas difficult. Nevertheless, the fact that there is debate about details suggests that agreement is growing over the broader idea that national regulation is needed. For now, though, “both God and the devil are in the details.”

In reaction to the lackluster federal response, three states—California, Hawai‘i, and New Jersey—have passed laws establishing mandatory statewide GHG emission limits. The critical elements of these programs, however, are still being developed. A number of states have also completed or are in the process of completing climate change “action plans,” GHG emissions tracking systems and inventories, and mandatory GHG reporting. Though ambitious and laudatory in their intent, the most recent data from many states suggest that emissions are not decreasing but are at best leveling off.

26 Id.
27 Most visibly, Duke Energy opposed the bill. See id (discussing more on the bill’s opposition).
28 CA Exec. Order No. S-3-05 (June 1, 2005) set the 2010 and 2020 targets, AB 32 made the 2020 target mandatory; Hawaii Governor Lingle signed the Global Warming Solutions Act of 2007 (Act 234) into law June 30, 2007. The act mandates statewide GHG emission reductions; New Jersey Governor Corzine signed into law the Global Warming Response Act (A3301) July 6, 2007, which requires mandatory emission reductions.
31 At least forty-two states have developed GHG inventories. CRS Report RL 33812, supra note 29.
32 Id.
33 World Resources Institute, Climate Analysis Indicators Tool,
There have also been regional agreements among states to reduce emissions. The Western Climate Initiative was formed in 2007 by the governors of seven western states—Arizona, California, Montana, Oregon, New Mexico, Utah, and Washington—to reduce GHG emissions in their region.\textsuperscript{34} Another multi-state agreement, the Regional Greenhouse Gas Initiative (RGGI), is comprised of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont.\textsuperscript{35} The RGGI is a market-oriented effort aimed at reducing carbon dioxide emissions from power plants through a mandatory cap-and-trade program.\textsuperscript{36} Some observers consider RGGI to be a possible test case for a federal cap-and-trade program, and thus several of its elements are generating interest.\textsuperscript{37}

B. \textit{Australia}  

Australia also ratified the UNFCCC in 1992 and, as such, has an obligation to pass laws furthering the goals of the treaty. In recognition of this duty, the Council of Australian Governments approved the National Greenhouse Response Strategy (National Strategy) as a framework for dealing with GHG issues.\textsuperscript{38} In 1996, however, when the conservative John Howard was elected Prime Minister of Australia, a new understanding of the National Strategy came with him. He submitted a revised National Strategy that eschewed mandatory emissions reductions and instead focused on research, technological development, and voluntary programs.\textsuperscript{39}

Like the U.S., the strongest direct federal attempt to reduce GHG emissions has been the introduction of a cap-and-trade system for carbon trading. The Carbon Reduction Pollution Scheme (Scheme) places a cap on the amount of carbon an industry can emit, forcing businesses to buy a

\begin{footnotesize}
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\item\textsuperscript{34} See Western Regional Climate Initiative, Feb. 26, 2007, available at http://www.westernclimateinitiative.org/ewebeditpro/items/O104F12775.pdf (providing text of the original governors’ agreement).
\item\textsuperscript{37} Id.
\item\textsuperscript{39} Paul Kay, \textit{Australia and Greenhouse Policy: A Chronology}, Science, TECHNOLOGY, ENVIRONMENT, AND RESOURCES GROUP, Background Paper 4, (Sept. 1997).
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“pollution permit” for every ton of carbon they release.\textsuperscript{40} The Scheme focuses on Australia’s biggest polluters, which means that only 1,000 companies—less than one percent of Australian businesses—will have obligations.\textsuperscript{41} All of the proceeds of the permits will be used to invest in clean technologies.\textsuperscript{42} The emissions goal of the Scheme is to reduce Australia’s carbon pollution by sixty percent below 2000 levels by the year 2050.\textsuperscript{43} The Commonwealth will spend the rest of 2008 consulting with stakeholders, with the intention of releasing a final “white paper” draft for legislation by the end of the year.\textsuperscript{44}

In the heretofore absence of meaningful mandatory national action, there has been a dizzying array of voluntary programs implemented by the Australian Greenhouse Office aimed at encouraging individuals, local governments, and industry leaders to reduce their GHG impacts.\textsuperscript{45} Although such programs have met with a measure of success, they, like their American counter-parts, have generally been criticized as essentially “business as usual” and simply inadequate to effect substantial behavioral change on the part of industry.\textsuperscript{46}

Many Australian states have enacted climate change measures, ranging from a multi-jurisdictional emissions trading scheme to introducing a framework for carbon rights.\textsuperscript{47} The first piece of climate change legislation in Australia—and one of the first mandatory GHG emissions trading schemes in the world—was the New South Wales Greenhouse Gas Abatement Scheme (GGAS).\textsuperscript{48} Established in 2003 under the Electricity Supply Act 1995 (NSW), GGAS establishes annual statewide greenhouse gas reduction targets, and then requires individual electricity retailers in New South Wales to meet mandatory benchmarks based on the size of their share of the electricity market.\textsuperscript{49} If these parties,


\textsuperscript{41} Id.

\textsuperscript{42} Id.

\textsuperscript{43} Id.

\textsuperscript{44} Id.


\textsuperscript{47} Jacqueline Peel, \textit{The Role of Climate Change Litigation in Australia’s Response to Global Warming}, 24 ENVTL. & PLAN. L.J. 90, 95 (2007).

\textsuperscript{48} Electricity Supply Act 1995 (NSW Austl.).

\textsuperscript{49} Id.
known as benchmark participants, fail to meet their benchmarks, then a penalty is assigned.\textsuperscript{50} If—or when—a national emissions trading program is established in Australia, the GGAS is likely to be subsumed into the national scheme.

The introduction of different policies and legislation in each jurisdiction has tended to fragment the overall regulatory response to the greenhouse issue. Resource-rich states like Queensland and Western Australia have shown little interest in joining multi-jurisdictional efforts to regulate GHG emissions and so have left the usefulness of such programs in doubt.\textsuperscript{51} Additionally, a disjointed response weakens the potential for integrated environmental management, which is expected to be a necessary component of a successful policy for dealing with the predicted wide-scale cumulative effects of climate change.\textsuperscript{52}

The ineffectiveness of “soft” federal voluntary programs and the seemingly impracticable state regulations led to considerable frustration among environmental groups and others concerned with climate change in Australia. There was a growing sense that courts, “with their independence from government and capacity to develop legal principles of broad application, can offer an attractive mechanism for spurring legal change where political processes are deadlocked.”\textsuperscript{53} Activists began to wonder if judges could succeed where politicians had failed.

III. ENVIRONMENTAL IMPACT ASSESSMENT IN THE U.S. AND AUSTRALIA: THE SUCCESS OF PROCEDURAL INJURY CLIMATE CHANGE CASES

Climate change cases in the United States, both decided and pending, have arisen in four basic contexts: Clean Air Act litigation;\textsuperscript{54} nuisance litigation;\textsuperscript{55} preemption litigation;\textsuperscript{56} and National Environmental

\textsuperscript{50} Id.

\textsuperscript{51} Peel, supra note 47, at 95.

\textsuperscript{52} Id.

\textsuperscript{53} Id. at 96.


\textsuperscript{56} Central Valley Chrysler Jeep, Inc. v. Witherspoon, 456 F. Supp. 2d 1160 (E.D.
Policy Act (NEPA) litigation. The last category of cases is the oldest and most numerous in climate change litigation, and the category on which this paper focuses. Claims under NEPA center on the failure of government agencies to adequately analyze or disclose information regarding the possible consequences of their projects on global warming. Even more than in the U.S., successful climate change cases in Australia have been environmental assessment procedural injury claims. Indeed, the only climate change cases to succeed in Australian courtrooms have been challenges to development plans that fail to take climate change into account.

Besides being the most successful and most frequent, procedural challenges are also the most likely to continue regardless of possible national legislative action in the future. This is because the purposes of environmental impact assessment are informed public policy decision-making and public disclosure of information. These twin purposes—and their need to be guarded and reinforced by judicial review—will not go away in the face of further regulation. Second, environmental disputes often involve questions of community values regarding the appropriate balance between economic development and the conservation and preservation of our environment, a balance environmental assessment was designed to help achieve. The importance of public participation in the


A few GHG-related suits also have been filed under state “little NEPAs” – state laws requiring state, and sometimes local, agencies to consider the environmental impacts of their proposed actions, just as the federal NEPA does for federal agencies. See, e.g., General Motors Corp. v. California Air Resources Bd., No. 05-02787 (Cal. Sup. Ct. filed Sep. 2, 2005); State of California v. County of San Bernardino, No. CIV-SS07-00329 (Cal. Super. Ct. filed Apr. 12, 2007).

CLIMATE ACTION NETWORK AUSTRALIA: AUSTRALIAN CLIMATE JUSTICE PROGRAM, supra note 14.

debate about the appropriate balance of priorities in a community suggests there will be a continued importance of agency oversight in environmental information gathering and dissemination.

The third reason procedural injury cases are likely to continue is that other climate change cases face an increasingly uphill battle with challenges that procedural claims are more able to overcome. Nuisance claims and other categories of climate change cases struggle with a more rigorous standard of standing and other prudential concerns of the court. Environmental assessment challenges more easily surmount these hurdles. As a result, although Australia has experienced a change in federal leadership with a concomitant shift in its climate environmental policy—a change the United States is increasingly likely to also experience—environmental assessment litigation will nevertheless continue to be a vital aspect of the fight against anthropogenic climate change.

A. United States

The environmental law under which most successful climate change plaintiffs have fought is the National Environmental Policy Act (NEPA). Signed into law on January 1, 1970, NEPA became the first major piece of legislation to be passed in what came to be known as “the environmental decade” of the 1970s. NEPA’s mission “to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man,” is effectuated, not by some complex regulatory scheme, but rather by a mandate on the decision-making procedures of federal agencies. As the U.S. Supreme Court has said, “NEPA . . . prohibits uninformed—rather than unwise—agency action.”

The statute states that an Environmental Impact Statement (EIS) must be prepared for “proposals for legislation and other major federal

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64 National Environmental Policy Act of 1969, supra note 60.

actions significantly affecting the quality of the human environment.\textsuperscript{66} Under the act, agencies must develop a reviewable environmental record, called an environmental assessment (EA), to support any determination of whether their actions significantly affect the environment.\textsuperscript{67} The EA is used as a preliminary tool to determine if there is a “finding of no significant impact” (FONSI), which allows the project to go forward without further mitigation, or a finding of significant impact, which triggers the need for an EIS.\textsuperscript{68} Given the deference to agency expertise, a FONSI will only be overturned by a court if the decision was arbitrary, capricious, or an abuse of discretion.\textsuperscript{69} This level of discretion for agency action has been criticized as reducing NEPA to “one part information disclosure, one part public participation, and eight parts administrative discretion.”\textsuperscript{70} At the same time, however, the agency must prove that it took a “hard look” at the environmental consequences for its decision to withstand judicial review.\textsuperscript{71}

Preparing an EIS is often a massive undertaking, requiring a detailed assessment of the environmental consequences of the proposed action and reasonable alternatives.\textsuperscript{72} An assessment must include a discussion of direct and indirect effects, possible conflicts with federal, regional, State, or local policies, alternatives, historic and cultural resources, and means to mitigate damage.\textsuperscript{73} The scope of the alternatives to be considered must include a) no action, b) other reasonable courses of action, and c) mitigation measures not already included in the proposed action.\textsuperscript{74}

The requirement to assess alternatives is arguably the most important part of NEPA. It forces agencies not only to think outside the


\textsuperscript{68} See 40 C.F.R. § 1508.9 (2008) (providing the Council on Environmental Quality regulations) [hereinafter Council on Environmental Quality Regulations].


\textsuperscript{71} Kleppe v. Sierra Club, 427 U.S. 390 (1976) (finding that where an agency fails to take the requisite “hard look,” a court may enjoin it from pursuing the project until an appropriate EIS is prepared).

\textsuperscript{72} Council on Environmental Quality Regulations, supra note 68.

\textsuperscript{73} Id. at § 1502.16.

\textsuperscript{74} Id. at § 1508.25.
proverbial polluting box, but also enables the traditionally internal cost-benefit analysis of an agency considering a course of action to be subject to public scrutiny. Furthermore, researching alternatives provides the basis for informed decision-making, which, after all, is “the heart of the environmental impact statement.”

B. Australia

In January 1972, New South Wales was the first state in Australia to import the National Environmental Policy Act of the United States by adopting a rudimentary environmental impact policy.76 The Federal Commonwealth followed, enacting the Environment Protection (Impact of Proposals) Act 1974 to implement an environmental impact assessment procedure.77 Other states followed in a staggered fashion to formalize impact assessment in a statutory scheme so that all states now have procedures for assessing the environmental impact of development.78 The Environment Protection (Impact of Proposals) Act 1974, was replaced by the Environment Protection and Biodiversity Conservation Act 1999 (EPBC). The EPBC is touted as Australia’s “premier environmental legislation,” encompassing in one statute environmental assessment, endangered species protection, and national heritage preservation.79

The EPBC Act effectively embodies all of Australia’s international obligations of environment protection and biodiversity and, when enacted, replaced six previous Commonwealth statutes.80 It incorporates a number of international and national agreements, including the need to promote ecologically sustainable development (ESD) through the conservation and sustainable use of natural resources.81 It also requires the Environment

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75 Id. at § 1502.14.
78 BRIAN J. PRESTON, ENVIRONMENTAL LITIGATION (1989).
81 Environment Protection and Biodiversity Conservation Act, supra note 60, § 3(1). ESD was accepted as the central goal of national environmental policy by all Australian governments in 1992, pursuant to the National Strategy on Ecologically Sustainable Development (NSES). The NSES defines ESD as “using, conserving and enhancing the community’s resources so that ecological processes, on which life depends,
Minister (the Minister) to consider the precautionary principle when making decisions under the act.  

Like NEPA, the EPBC focuses Australian Government interests on the protection of matters of national environmental significance, leaving the states and territories with the responsibility for matters of local significance. Commonly, environmental impact assessment procedures apply to any “controlled action,” that is, an action that is likely to have a “significant impact on matters of national environmental significance.” There are eight categories of national environmental significance under the statute, including world and national heritage properties, declared Ramsar wetlands, threatened or endangered species, migratory species, nuclear actions, Commonwealth marine areas, and actions prescribed by other regulations. Crucial areas, such as global warming, are not currently delineated as matters of national significance and attempts to introduce a “greenhouse trigger” have so far proved unsuccessful.

Whether a proposal is likely to have an impact on a matter of national environmental significance is determined by the Minister. Administrative guidelines outline the breadth of issues that must be considered, such as the sensitivity of the receiving environment, direct and indirect impacts, and the degree of knowledge and understanding about the possible environmental consequences. Although this gives a large

are maintained, and the total quality of life, now and in the future, can be increased.” There are three underlying principles of ESD: 1) intergenerational equity, 2) the precautionary approach, and 3) biodiversity conservation. See Australian Department of the Environment, Water, Heritage and the Arts, Ecologically Sustainable Development, http://www.environment.gov.au/esd/ (last visited Nov. 17, 2008).

82 Environment Protection and Biodiversity Conservation Act, supra note 60, § 391.

83 Australian Department of the Environment, Water, Heritage and the Arts, supra note 79, at 4.

84 Environment Protection and Biodiversity Conservation Act, supra note 60, § 523.

85 Id. at §13; §15B; §17; §18; §20; §22; §24; and §25A(1), respectively.

86 In 2000, then Federal Environment Minister, Senator Robert Hill, released draft regulations designed to introduce a “greenhouse trigger” into the EPBC, which would have subjected significant developments to a federal requirement of an EIA where a project was likely to result in GHG emissions of more than 0.5 million tones of carbon dioxide equivalent in any twelve month period. See Australian Department of the Environment, Water, Heritage and the Arts, Greenhouse Trigger, http://www.environment.gov.au/epbc/publications/operation-act-2000-01/ongoing.html#greenhouse (last visited Nov. 26, 2008).

87 Environment Protection and Biodiversity Conservation Act, supra note 60, § 11.

88 Australian Department of the Environment, Water, Heritage and the Arts,
measure of discretion to the Minister, like the U.S. impact assessment, the exercise of this discretion is open to judicial review.\textsuperscript{89}

Judicial review tests the legality of decisions and may be available at various stages in the EIA process. Decisions as to whether a proposal is likely to have a significant environmental impact, decisions not to require an EIA, and the adequacy of the content of environmental impact statements may be legally challenged.\textsuperscript{90} A court undertaking judicial review may not substitute its own opinion for that of the Minister and is restricted to determining whether the EIA procedures and decisions based on them have met legislative requirements. If the decision was reasonable given the objective evidence before the Minister, then the court will not interfere.\textsuperscript{91}

Judicial interpretation of the statutory requirements governing the content of an environmental impact assessment concentrates upon the ability of the assessment to adequately inform decision making. The EIS must be sufficiently specific to direct a “reasonably intelligent and informed person” to the potential environmental consequences of carrying out or not carrying out the activity, must be written in “understandable language,” and must contain material that would “reasonably alert lay persons and specialists” to possible problems.\textsuperscript{92}

C. \textit{Exemplars of Trends in U.S. and Australian Climate Change Cases}

In the dozen or so climate change cases presently on the dockets of state and federal courts in the United States\textsuperscript{93} and the more than half dozen cases in Australia,\textsuperscript{94} two in particular stand out for discussion. The U.S. case, \textit{Friends of the Earth v. Watson}, was the first case in which a plaintiff

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\textsuperscript{89} Environment Protection and Biodiversity Conservation Act, supra note 60, § 11.

\textsuperscript{90} Id.; Environment Protection and Biodiversity Conservation Act 1999, supra note 60, §§ 158, 303A (Minister may exercise discretionary power to protect national interest, national defense, national security, and national emergency); The content of an environmental impact assessment is determined by the “issue of directions,” which specify the scope of the assessment to be prepared in each case. Australian Department of the Environment, Water, Heritage and the Arts, supra note 79, at 7.

\textsuperscript{91} BATES, supra note 76.


\textsuperscript{94} See CLIMATE ACTION NETWORK AUSTRALIA: AUSTRALIAN CLIMATE JUSTICE PROGRAM, supra note 14.
\end{footnotesize}
established Article III standing\(^{95}\) in a lawsuit involving injuries caused by climate change.\(^ {96}\) As such, it serves as important precedent for any future climate change case in America.

In the same way, the Australian case *Gray v. The Minister for Planning* is a landmark decision, which potentially sets a new standard for the planning process of future development projects in New South Wales—the most populous and heavily industrialized state in Australia.\(^ {97}\) Each of these cases presents a microcosm for many of the cross-cutting issues in all climate change cases: plaintiffs’ problems establishing standing, an area’s sometimes-conflicting priorities of ecologically sustainable development and robust industry, and stakeholders’ role in resolving an environmental dispute. While not exhaustive, the cases provide a window into some of the important lessons to be learned from a cross-cultural comparison.

1. Friends of the Earth

In *Friends of the Earth v. Watson*, environmental organizations Friends of the Earth and Greenpeace, and the cities of Boulder, Colorado, and Santa Monica, Arcata, and Oakland, California, are suing two government agencies, the Export Import Bank (Ex-Im) and the Overseas Private Investment Corporation (OPIC), for providing financing to overseas fossil fuel projects without conducting an environmental analysis under NEPA. Behind the scenes of this lawsuit are the individual members of Friends of the Earth and Greenpeace, like Vermont sugar maple farmers Arthur and Anne Brendt, who are experiencing the detriment of global climate change and driving the importance of the litigation. After all, it is their livelihoods, health, and future that will be impacted by what is decided by the judge. And it is their story that ultimately pushed climate change litigation in the U.S. to new heights.

\(^{95}\) To have the legal right to initiate a lawsuit, or have “standing”, a person must be sufficiently affected by the matter at hand, and there must be a case or controversy that can be resolved by legal action. The constitutional minimum of standing “contains three elements: First, the plaintiff must have suffered an injury in fact—an invasion of a legally-protected interest which is a) concrete and particularized and b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). These elements can be summarized as injury, causation, and redressibility.


One such plaintiff is Friends of the Earth member Dr. Phillip Dustan, a biology professor at the College of Charleston in South Carolina, who began researching coral reefs off the Florida Keys in 1969. In his capacity as a principal investigator for the United States Environmental Protection Agency’s Florida Keys Coral Monitoring Project, he has reported on the dramatically increasing loss of living coral cover, which diminishes Dr. Dustan’s ability to conduct biological research. He believes the death of the reef has been caused by climate change and says he can no longer “keep his head in the sand and keep studying the pure physiology and evolutionary biology of corals” without speaking up about the relationship between global warming and damage to the reef.

Other plaintiffs have broader concerns. The city of Boulder, Colorado, supplies its citizens with drinking water primarily from mountain snow-pack. According to the complaint, Boulder’s snow-pack at upper elevations is only twenty-five percent of its normal average. At lower elevations, the snow pack was completely gone when measured in April 2002, a condition “never seen” in the decades of record keeping. The city of Boulder, like the other plaintiffs, sees the action by the defendants as recklessly contributing to the dangers posed to them from greater GHG emissions into the atmosphere.

Defendants Ex-Im and OPIC are government agencies that provide insurance, loans, and loan guarantees for overseas projects or to U.S. companies that invest in overseas projects, many of which are fossil fuel and energy related. Both agencies’ projects have contributed significantly to world GHG emissions, producing as much as 1,911 million metric tons of carbon dioxide and methane emissions annually, which equals nearly eight percent of the world's emissions and is equivalent to one-third of the total carbon emissions from the United States in 2003.

More specifically, between 1990 and 2001, Ex-Im provided more than twenty-five billion dollars in loans and financial guarantees to overseas energy projects that produced 204 million metric tons of carbon

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99 Id.
100 Id.
101 Id.
102 Id.
103 Id.
105 Id. at 10.
dioxide emissions annually.\textsuperscript{106} During the same time frame, OPIC supported overseas power projects that emit more than fifty-six million metric tons of carbon dioxide annually.\textsuperscript{107}

In their complaint, plaintiffs argue that the estimated amount of carbon dioxide attributed to or directly released by the projects supported by OPIC and Ex-Im is much higher than the entire amount of carbon dioxide that was released from the worldwide consumption of petroleum, natural gas, coal, and the flaring of natural gas in the year 2000 (32.1 billion tones versus 23.5 billion tones).\textsuperscript{108} Plaintiffs go on to argue that the actions of both the Ex-Im and OPIC have environmental impacts that require, at a minimum, the agencies to complete an environmental assessment.\textsuperscript{109}

Before initiating the lawsuit, plaintiffs tried to induce defendants to prepare the environmental impact statements voluntarily. Greenpeace and Friends of the Earth sent demand letters to OPIC and Ex-Im requesting that each agency prepare an EIS to analyze the effect of their projects on global climate change.\textsuperscript{110} OPIC and Ex-Im refused, claiming that an EIS was unnecessary because their projects did not significantly affect the environment and that their internal environmental assessment was sufficient.\textsuperscript{111} In court documents, defendants argue that NEPA does not apply to projects outside of the United States that impose only generalized environmental harms like global warming.\textsuperscript{112} They also argue that there is insufficient scientific certainty about the local impacts of global warming and the individual contributions of funded projects to make meaningful environmental analysis possible.\textsuperscript{113}

In August 2005, Justice Jeffrey White of the U.S. District Court for the Northern District of California denied Ex-Im and OPIC’s motion for summary judgment, finding for plaintiffs on all grounds. The court held that 1) plaintiffs had sufficiently demonstrated standing; 2) plaintiffs are challenging final agency actions as required under NEPA; 3) OPIC’s statute does not preclude judicial review; and 4) environmental procedures in OPIC's statute do not displace NEPA.\textsuperscript{114} The finding of standing is the

\textsuperscript{106} Id.

\textsuperscript{107} Id.


\textsuperscript{111} \textit{Friends of the Earth v. Watson}, 488 F. Supp. 2d 889, 893 (N.D. Cal. 2007).


\textsuperscript{113} Id.

\textsuperscript{114} Id.
most significant for future potential climate change plaintiffs. Justice White, who was nominated by President George W. Bush in 2002, accepted that, under the relaxed standards of procedural standing and considering the evidence in the view most favorable to the non-moving party, plaintiffs had adequately demonstrated injury in fact, causation, and redressibility to move forward with the case.

Defeating the summary judgment represents an important victory for numerous stakeholders in the effects of global climate change. As the first time that a U.S. federal court has granted standing to plaintiffs specifically seeking judicial review of an alleged failure by U.S. government agencies to evaluate the impacts of their activities on global warming, it stands to be a seminal case for other such claims in the future. Furthermore, as it progresses into the merits of plaintiffs’ claims, the case has the potential to offer more insight into the direction of courts in the U.S. and the road future potential climate change plaintiffs should travel.

2. Anvil Hill

Plaintiffs in the climate change case from Australia, Gray v. the Minister for Planning (Anvil Hill case), had many of the same hurdles as their American counterparts. In both cases, plaintiffs were citizens challenging the actions of their government under statutes notorious for allowing wide agency discretion. Such David and Goliath success stories are important for their impact not only on the individual parties to the suit but also to the greater legal and political ramifications.

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115 In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party. Freeman v. Arpaio, 125 F.3d 732, 735 (9th Cir. 1997).


117 In subsequent history of Friends of the Earth, 2005 LEXIS 42335 (Friends of the Earth v. Watson, 488 F. Supp. 2d 889, 893 (N.D. Cal. 2007)), Justice White addresses the merits of plaintiffs’ claims.

118 Both NEPA and EPBC allow a considerable amount of discretion on the part of the governmental actor in deciding whether an environmental assessment is needed, and whether the one conducted is sufficient to mitigate significant environmental harm. See, e.g., Meyers, supra note 70.

119 For example, the Anvil Hill decision was passed down about four months before seven million voters in NSW participated in state elections, a fact not lost of politicians in the area. See Quentin Dempster, Coal to Burn, STATELINE NEW SOUTH WALES, Jan. 12, 2006, available at http://www.abc.net.au/stateline/nsw/content/2006/s1802963.htm.
Anvil Hill is a quiet, unusually shaped hill west of Muswellbrook in the New South Wales (NSW) Upper Hunter Valley. Unbeknownst to the 178 animal species that call it home, Anvil Hill is also home to a deposit of an estimated 150 million metric tonnes of thermal coal. This fact has spawned a battle between local activists and the NSW Minister for Planning over the future of the Hunter, the first round of which took place 300 kilometers away in the NSW Land and Environment Court in Sydney.

The center of the legal controversy of Anvil Hill is regarding the adequacy of an environmental impact assessment (EIA) prepared as part of the development approval process for the construction of a new coal mine. Plaintiffs in the lawsuit assert that the new coal mine development project required an environmental assessment under Part 3A of the Environmental Planning and Assessment Act 1979, which applies to major development proposals in NSW. Peter Gray, the twenty-six-year-old student activist whose name is in the title of the suit, stated that, “The major problem with the environmental assessment is it does not include the impacts arising from the combustion of the coal that will come from the mine.”

The EIA prepared by defendant Centennial Coal’s environmental consultants considered the potential GHG emissions from the project in accordance with an industry standard known as the World Business Council for Sustainable Development and World Resources Institute GHG Protocol. This protocol applies to the reporting of GHG emissions in three categories, including: 1) direct GHG emissions from sources owned or controlled by defendant; 2) GHG emissions from the generation of purchased electricity consumed by defendant, and 3) other “indirect emissions.”

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120 Anvil Hill is the largest intact stand of remnant vegetation in the Central Hunter Valley. It is home to at least 178 animal species, 420 species of native flora (including three endemics), and is rich in Aboriginal heritage. Anvil Hill Alliance, http://www.anvilhill.org.au/anvil-hill-coal-climate-change-and-renewable-energy (last visited Nov. 18, 2008).


122 Litigation is only part of a broader campaign by the Anvil Hill Alliance against coal mines in the area. See generally, Anvil Hill Alliance, http://www.anvilhill.org.au/ (last visited Nov. 18, 2008).


124 Id.

125 Bevan, supra note 4.

emissions” that the Protocol specifies as an optional reporting category.\textsuperscript{127} The last category of emissions would have covered an analysis of the potential GHG emissions from the burning of coal by third parties outside the control of defendant but were not assessed in the EIA for the Anvil Hill mine proposal.\textsuperscript{128} It was this omission that was challenged by Peter Gray.

Katie Brassil, a representative from Centennial Coal, has responded to accusations about the incompleteness of the EIA, saying, “The Anvil Hill project is a combination of years of research and community consultation to get to the stage where we’ve been able to compile a very comprehensive environmental assessment.”\textsuperscript{129} In finding for the plaintiffs, Justice Nicola Pain disagreed, holding that, “GHG emissions from the burning of coal to be extracted from the new mine should have been considered in the environmental assessment because of their potential contribution to climate change.”\textsuperscript{130} The court applied this holding to both direct and indirect impacts of the project.\textsuperscript{131} She also held that although climate change is a global problem with multiple sources of emissions, local contributors should still be held accountable for adequate assessment.\textsuperscript{132}

The Anvil Hill case was a judicial review action and, as such, the court was limited to reviewing the legality of the procedures followed rather than dealing with the merits of the outcomes of the decision-making process. Because of this inherent limitation, those on both sides of the debate question the efficacy of the decision. Dr. Nikki Williams from the Minerals Council of NSW, who was disappointed with the decision, stated that because of the likelihood of the mine being built either at Anvil Hill or somewhere else, the court’s ruling would have no effect on global emissions.\textsuperscript{133} “In terms of climate change,” he stated, “it’s about as useful as stringing up your Christmas lights in a blackout.”\textsuperscript{134}

Supporters of the court’s ruling, however, see the victory twofold: as important legal precedent for environmental law in NSW and a political victory that forces the issue of climate change to the front of public discussion.\textsuperscript{135} Also, as Jacqueline Peel has pointed out, the holding is

\begin{itemize}
\item \textsuperscript{127} Id.
\item \textsuperscript{128} Gray \textit{v. The Minister for Planning}, (2006) N.S.W.L.E.C. 720, 91 (Austl.).
\item \textsuperscript{129} See Bevan \textit{supra} note 4.
\item \textsuperscript{130} Gray, N.S.W.L.E.C. 720 at 97.
\item \textsuperscript{131} Id. at 91.
\item \textsuperscript{132} Id. at 100.
\item \textsuperscript{133} Dempster, \textit{supra} note 119.
\item \textsuperscript{134} Id.
\item \textsuperscript{135} Anna Rose, \textit{Gray v. Minister for Planning: The Rising Tide, of Climate Change Litigation in Australia}, 29 Sydney L. Rev. 725, 728-31 (2006).
\end{itemize}
especially instructive and potentially useful to future litigants because of
the judge’s analysis of the relationship between environmental assessment
and Australia’s policy goal of ecologically sustainable development.\textsuperscript{136}

\textbf{IV. STRIKING SIMILARITIES INFUSED WITH TELLING DIFFERENCES:
LESSONS LEARNED FROM A CROSS-CULTURAL COMPARISON}

Despite the various similarities between the environmental
assessment processes and the pattern of climate change cases seen in the
United States and Australia, there are telling differences between the
plaintiffs’ courses of action and the ultimate outcome. Part of this
divergence is due to the fact that every legal system is a unique product of
complex social, political, historical, and cultural factors. This serves as an
essential limitation on comparative legal analysis and should not be
forgotten in the endeavor to glean legal similarities and differences across
cultures. Some authors have stated that comparative legal analysis is
“inevitably superficial” because specific laws arise from the whole of a
particular country’s legal system.\textsuperscript{137}

At the same time, however, comparative legal analysis offers an
opportunity to learn from other systems and to provoke thought regarding
legal reform.\textsuperscript{138} Furthermore, a comparison between the U.S. and
Australian environmental assessment is especially apt given that the U.S.
statute–NEPA–served as the model for subsequent development of
environmental assessment legislation throughout Australia.\textsuperscript{139} Perhaps by
identifying strengths, both countries can ameliorate weaknesses.

\textbf{A. The Federal/State Divide: What Co-operative Federalism Means for
Environmental Enforcement}

Although environmental impact assessment procedural injury cases
have been the most successful types of claims in each country, there is a
significant difference in a) which statute and b) which forum these cases
are heard. In the United States, a majority of the climate change cases
have been fought in federal court under the federal environmental impact
assessment statute, NEPA. Australian plaintiffs, on the other hand, have
succeeded in state specialty courts under local land use and planning
statutes. Indeed, the few attempts to challenge the adequacy of

\textsuperscript{136} See Peel, supra note 47, at 100.

\textsuperscript{137} BERnhARD grossfeld, the strength and weakness of comparative

\textsuperscript{138} M. Cappelletti, Comparative Law Teaching & Scholarship: Method &
Objectives, Special Issue No. 1 ASIA PAC. L. REV. 1, 6 (1994).

\textsuperscript{139} B.J. Preston, Public Enforcement of Environmental Laws in Australia, 6 J.
ENVTl. L. & LITIG. 39, 41 (1991); R.J. Fowler, Environmental Impact Assessment,
Planning, and Pollution Control Measures in Australia, AUSTRALIAN GOVERNMENT
PUBLISHING SERVICE 4-8 (1982).
environmental impact assessments under the national EPBC in the Australian Federal Court were summarily dismissed.\footnote{See, e.g., Anvil Hill Project Watch Association Inc. v. Minister for Environment and Water Resources (2007) F.C.A. 1480 (Austl.).}

Part of the explanation is that the federal government in Australia is only recently able to vigorously enforce environmental compliance in its states. The Commonwealth has full power under its Constitution to legislate in respect to Federal Territories, including those that are self-governing or outside Australia.\footnote{Commonwealth of Australia Constitution Act, 1900, s. 122 (U.K.).} In all other cases, it can legislate only on those matters specified in the Constitution; the residue of powers rests with the states.\footnote{Z. Lipman, \textit{Environmental Management in a Multi-Jurisdictional System: An Australian Perspective}, 3 S. Afr. J. Envtl. L. & Pol’y. 105, 106-107 (1996).} Therefore, because the federal government does not have a specific head of power in the Constitution to legislate in relation to the environment, Australian states were traditionally considered to have primary responsibility for environmental matters.\footnote{See M. Crommelin, \textit{Resources Law and Public Policy}, 15 U. W. Austl. L. Rev. 1 (1983).}


In theory, the EPBC is worded in broad enough language to enable the Federal Environmental Minister to mandate environmental assessment and fulfill the Australian policy of ecologically sustainable development. In practice, however, of the number of matters that have been referred to the Minister for consideration, a relatively small number have been considered to be “controlled actions” requiring approval. According to the Annual Report of the Department of Environment and Heritage in the year 2004-2005, 360 referrals were received, of which only sixty-three were deemed to be controlled actions.\footnote{AUSTRALIAN DEPARTMENT OF THE ENVIRONMENT, WATER, HERITAGE, AND THE ARTS, \textit{LEGISLATION ANNUAL REPORTS 2004-2005: ENVIRONMENTAL PROTECTION}} Thirty-eight assessments were
completed and twenty-eight approvals were granted. Incredibly, no actions were refused. The method of assessment was fairly superficial, with sixty percent of referrals being assessed on preliminary documentation, an assessment process which requires no public input. In only four cases was an environmental impact statement required. The 2004-05 statistics are consistent with assessments and approvals in previous years. Indeed, the Minister has only refused an approval in four instances since the EPBC came into operation in 2000.

The Commonwealth’s policy for dealing with contraventions of environment and heritage legislation is set out in the Department of Environment and Heritage Compliance and Enforcement Policy. The focus of the policy is on negotiation and collaboration, with enforcement mechanisms used as a last resort. Measures such as communication, education, and co-operation are recommended to encourage compliance. Only where these approaches fail will enforcement mechanisms be turned to, putting state specialty courts and citizen suits in a particularly powerful position for change.


147 Id.
148 Id.
149 Id.
150 Id.

152 These proposals were as follows: EPBC 2002/571 - approval of an electrical grid system to kill large numbers of spectacled flying foxes; EPBC 2002/911 - construction of a residential home adjacent to a heritage area on Norfolk Island; EPBC 2004/1631 - a subdivision on Kangaroo Island involving land clearing; EPBC 2002/730 - a windfarm at Bald Hills.

154 Id.
155 Id.
B. Litigation Culture: The Costs of Failure

Both the United States and Australia have seen an influx of environmental assessment cases in the last five years. Whether this is “due to an increase in environmentally significant actions by federal agencies and a corresponding increase in challenges to those actions, or environmental parties’ reported perception of the current administration as hostile to the values [environmental assessment] was designed to protect,” is debatable.\(^\text{157}\) Yet despite the similar increase in each country, the United States has seen far more climate change cases litigated—and in more areas than just environmental assessment.\(^\text{158}\) Some Australian scholars have argued that the dearth of cases is no accident, and that Australia designed its environmental assessment statute in such a way as to limit judicial review and thereby avoid the American experience of a deluge of environmental assessment challenges.\(^\text{159}\)

Indeed, in Australia, stringent costs rules are designed to discourage “speculative” litigation. The Australian system has a “costs follow the event” rule that gives the court the discretion to force the losing party to pay most of the expenses of the winning party’s legal costs.\(^\text{160}\) The general rule that has been adopted by many of the courts is that although costs are in the discretion of the court, normally the proper exercise of that discretion will require that the unsuccessful party be ordered to pay the opponent’s costs.\(^\text{161}\) This rule applies in the Supreme Courts,\(^\text{162}\) the Federal Court\(^\text{163}\) and High Court\(^\text{164}\) as well as in some cases of the jurisdiction of the Land and Environment Court of New South Wales.\(^\text{165}\) Given a) the relative newness of climate change claims, b) the standing and evidentiary issues involved, and c) the willingness of industry leaders to vigorously fight climate change claims, plaintiffs are less willing to bring claims when the prospect of paying for the other side is a real possibility.


\(^{158}\) Pidot, *supra* note 93.

\(^{159}\) Bates, *supra* note 76, at 111-12.


\(^{161}\) Id.

\(^{162}\) See Supreme Court Act, 1970, §76 (NSW Austl.); SUP. CT. R. 11 (Austl.).

\(^{163}\) Federal Court of Australia Act, 1976, §43 (Commonwealth Austl.).

\(^{164}\) See Judiciary Act, 1903, §26 (Commonwealth Austl.); HIGH CT. O. 71, R. 1(1).

\(^{165}\) See Land and Environment Court Act, 1979, §69 (NSW Austl.).
The EPBC originally assisted public interest litigants by constraining a court from requiring damages when dealing with matters under the act. However, in January 2007, section 478 of the EPBC was repealed. The amended section allows the Federal Court to exercise its discretion to require a plaintiff to pay damages as a condition of granting an interim injunction.

C. Citizen Suits: The Average Man on the Street Should Average Some Time in the Courtroom

In the U.S., if a concerned local organization wanted to challenge the adequacy of an agency’s EIS or FONSI ruling, there is no explicit language in the act that allows it to do so. Although there is no citizen suit provision in NEPA, private citizens gain standing to sue through the Administrative Procedure Act’s (APA) judicial review provisions once there has been final agency action. The APA states that, “A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof,” which creates a considerably wide door into the courtroom. Furthermore, because NEPA claims are procedural challenges, plaintiffs face a less stringent standing test.

Traditionally, standing to sue has been an obstacle to actions by private citizens in public interest litigation in Australia. A prospective litigant has to meet the test for standing set forth in Australian Conservation Foundation v. Commonwealth. A plaintiff can sue without joining the Attorney General in two cases: first, where the interference with a public right is such that some private right is

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166 Environment Protection and Biodiversity Conservation Act, supra note 60, § 478.


168 Id.


170 Id.

171 Procedural injury cases are afforded so-called “Footnote 7 standing,” named after the seventh footnote in the seminal standing case Lujan v. Defenders of Wildlife, which states, “The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.” Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 (1992).


interfered with; and, second, where no private right is interfered with but
the plaintiff suffers “special damage” peculiar to himself from the
interference with the public right.174 Standing, the Australian Court made
clear, “does not mean a mere intellectual or emotional concern. . . . A
belief, however strongly felt, that the law generally or a particular law
should be observed . . . does not give its possessor locus standi.”175 Any
potential plaintiff, therefore, must rely on explicit statutory provisions
liberalizing standing or have the type of direct interest required by the
ACF case above.

The EPBC provides a provision extending standing to any
“interested person” to apply to the Federal Court for an injunction to
prevent or remedy a breach of the act or to review a decision taken under
the act.176 The definition of “interested person” includes an organization
whose mission is the protection of the environment and has engaged in
environmental protection or conservation activities for the past two or
more years.177

Apparently, Australian states have not been any more liberal in
their approach to standing in environmental assessment cases than the
Federal Court.178 The one exception is New South Wales. The first, best
known, and most used provision allowing citizen suits in Australia is
section 123 of the Environmental Planning and Assessment Act.180 This
provision allows any person to bring proceedings to remedy or restrain a
breach of the act whether or not any private right of that person has been
infringed.181 Despite the warnings of critics in allowing citizen suits, the
provision has been in place for over twenty-five years and has not resulted
in the opening of the “floodgates” to frivolous and vexatious litigants.

V. ROLE AND APPARENT IMPACT OF CLIMATE CHANGE LITIGATION

Despite massive local opposition and the expected dire
environmental impacts both locally and globally, on June 7, 2007, the
NSW Planning Minister Frank Sartor approved the proposed mine at Anvil
Hill.182 When his decision was attacked by local opponents, Sartor

174 Id.
175 Id. at 530.
177 Environment Protection and Biodiversity Act, supra note 60, §§ 487-88.
178 Id.
179 See Mossop, supra note 176.
180 Environmental Planning and Assessment Act, 1979, §123 (NSW Austl.). See supra note 176 (providing the best known and most used comment).
181 Environmental Planning and Assessment Act, supra note 180, § 123.
182 Brendan Trembath, Environmentalists Furious at Anvil Hill Mine Approval,
explained himself in pure economic terms, stating, “This is a very large reserve of coal that would generate revenues of some $9.6 billion at current prices . . . [with] regional economic benefit of some $324 million a year.” Not allowing the mine to be built in NSW, which—in Sartor’s mind—only sends the construction of the mine down the street to the next state, would be “irrational.”

Even a second, federal round of litigation over the proposed mine at Anvil Hill has not dimmed the proposals’ prospects. The outcome for Friends of the Earth is yet to be seen.

At the same time, however, to say the litigation over Anvil Hill accomplished nothing would be to misunderstand the nature of advocacy and the complexity of enacting change. No seasoned activist expects to turn the tide on an issue like coal consumption with a single lawsuit—especially a case that is limited to the judicial review of correct procedure. Instead, advocates are thankful for small mercies and look for more subtle victories. For example, on September 17, 2007, Centennial Coal announced that it was selling the Anvil Hill mine to a much larger mining company, Xstrata, which according to Centennial CEO Bob Cameron, is “better positioned to absorb the risks involved in

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183 Id.
184 Id.
185 In September 2007, Federal Justice Stone upheld the Minister of Environment’s decision that the Anvil Hill mine does not qualify as a nationally significant, controlled action, and thus does not trigger the need for an EIA under the EPBC. Anvil Hill Project Watch Association Inc. v. Minister for Environment and Water Resources, FCA 1480 (2007). Notice of appeal was filed in October 2007, and judgment of the Full Court dismissing the appeal, with costs, on February 14, 2008. Anvil Hill Project Watch Association Inc. v. Minister for Environment and Water Resources, F.C.A.F.C. 3 (2008).

186 The last leg of this litigation was in March 2007, where Justice White found that 1) OPIC has not established that it is not exempt from NEPA’s requirements; 2) plaintiffs’ claims do not involve extraterritorial application of NEPA; 3) did not have enough information to determine whether defendants’ projects constitute “major federal action”; and 4) did not have enough information to determine whether defendants’ projects (identified by plaintiffs) are cumulative actions requiring a single EIS. Friends of the Earth v. Watson, 488 F. Supp. 2d. 889 (2007).


188 Kirsty Ruddock, the head attorney for the Environmental Defenders Office of NSW has said, “[i]t’s merely about the process and whether the correct processes were followed … that does obviously limit some of the outcomes that you can seek in relation to large projects.” Climate Change and Planning Law: Interview with Kirsty Ruddock, ABC RADIO NATIONAL: THE LAW REPORT, Oct. 30, 2006, http://www.abc.net.au/tn/lawreport/stories/2006/1776334.htm.
the development of [the Anvil Hill Project]." \(^{189}\) Making it impossibly hard to do business is one step toward making that business go away altogether.

Another impact of the decision is that it encourages businesses to think differently about the expectations of—and their responsibility to—a community. Business as usual has given way to the “triple bottom line” of assessing environmental risk, social impact, and economic benefit before proceeding with complex projects. \(^{190}\) Such risk assessment has businesses in both the U.S. and Australia beginning to voice a preference for the certainty of government regulation of their GHG emissions over the uncertainty of litigation and the concomitant possibility of loss of autonomous decision-making about their companies. \(^{191}\)

Lastly, taking the dispute over the correct allocation and utilization of natural resources to a courtroom adds a different dimension to the larger debate on climate change. It introduces legal symbolism and rhetoric, which can be used to communicate a movement’s message to the public and increase legitimacy. \(^{192}\) Producing a message that is easily identifiable and understood by the general public, like “rights rhetoric,” can enable more successful collective action. \(^{193}\) Although legal action is generally effective in grassroots mobilization only in concert with other tactics, like demonstrations, lobbying, collective bargaining, and media mobilization, a lawsuit always has a role to play in the fight for change. \(^{194}\)

VI. CONCLUSION

The social, political, and legal context of America and Australia over the last decade has led to quite a quagmire: fractured, seemingly unworkable state legislation on GHG emissions are tucked between soft national measures, a restless public, and a frantic world concerned with the looming effects of global climate change. Knowing that action was needed and that their options were limited, citizens have filed suit looking


\(^{190}\) Katie Brassil from Centennial Coal: “When you’re looking at assessing such a large project like this, it’s about looking at the triple bottom line. You’re looking at the environmental, the social, and the economic considerations with respect to assessing such complex projects.” See Bevan, *supra* note 4.


\(^{193}\) *Id.*

\(^{194}\) *Id.*
for an outlet for their frustration and a measure of governmental accountability. While such tactics have not necessarily stopped harmful development, they have nevertheless been part of a broader victory in a campaign for change that will surely have its day.195

Friends of the Earth and Anvil Hill are important precedents that will no doubt be only the beginning of more frequent climate change procedural injury suits. They have given future plaintiffs a firmer foundation for standing and for the insistence that the policy goal of ecologically sustainable development be respected. Although the U.S. and Australia differ on federal-state relations, costs rules, and the breadth of citizen suit provisions, each country has a lesson to offer for those in the fight against global climate change.

195 Australia is expected to have a carbon trading scheme by the end of 2008, and President-Elect Obama of the U.S. has stated that he is in favor of a similar carbon trading system. Thus, both countries will have significantly different positions on climate change in the coming years. See Australian Department of Climate Change, Carbon Pollution Reduction Scheme, http://www.climatechange.gov.au/emissionstrading/ (last visited Nov. 18, 2008); Barack Obama, New Energy for America, http://my.barackobama.com/page/content/newenergy (discussing climate change) (last visited Nov. 18, 2008).