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The comparative politics of courts and climate change

Lisa Vanhala*

Department of Political Science and School of Public Policy, University College London, London, UK

Disappointment with international efforts to find legal solutions to climate change has led to the emergence of a new generation of climate policy. This includes the emergence of courts as new 'battlefields in climate fights'. Cross-national comparative analysis of the United Kingdom, Canada and Australia supplements research that has found that litigation plays an important governance gap-filling role in jurisdictions without comprehensive national-level climate change policies. The inductive research design identifies patterns in climate change litigation. The three countries illustrate the varieties of climate policies, and thus serve as a useful entry point for thinking more generally about the interplay between climate politics and legal mobilisation. To improve theoretical understandings of the role of courts in climate change politics, the range of litigants and the variety of cases brought to courts under the umbrella of the term 'climate change litigation' are identified.

Keywords: courts; climate change; governance gap; legal mobilisation

Introduction

With the international climate consensus fading with disillusionment at the slow progress under the United Nations Framework Convention on Climate Change (UNFCCC), scholars and stakeholders have begun to propose what they see as a more feasible 'next generation' of climate policy (Jaccard *et al*. 2002, McKibbin and Wilcoxen 2002, Victor 2004). Courts, in both international and national jurisdictions, have been identified as emerging policy actors in the field of climate change governance (Bach and Brown 2008, Peel 2008, Burns and Osofsky 2009, Humphreys 2010). Existing literature on climate change litigation tends to focus on the regulatory role that lawsuits are playing and sees courts as catalysts in climate change policymaking. Scholars have found that courts can 'fill a governance gap' when national legislators are reluctant or unable to address the climate change problem. Environment advocates as well as corporate actors, government departments and sub-national authorities look to the courts to

*Email: l.vanhala@ucl.ac.uk

clarify their obligations under existing environmental statutes and international law or to anticipate future policy action on climate change.

Observers of US climate politics have put forward this governance-gap filling explanation. Despite recalcitrance to regulate in Congress and in the international sphere, US climate policy is progressing through the courts. Cases supporting or opposing action on carbon emissions have been pending in state and federal courts for a number of years and have also featured in several high profile cases before the US Supreme Court. In 2007, in *Massachusetts v. EPA*, 12 states and several US cities brought a suit against the Environmental Protection Agency (EPA) to force it to regulate carbon dioxide and other greenhouse gases (GHGs) as pollutants under the Clean Air Act Amendments 1990. In 2011 in *AEP v. Connecticut*, several states, New York City and a number of non-profit organisations sought a court order requiring five large electric utilities to reduce their GHGs. The court found that Congress had entrusted the regulator, the EPA, in the first instance to determine how GHGs should be regulated, further bolstering the agency's authority in the area. Commentators attribute this court activity to Congress' failure to adequately address the climate issue. For example, Carol Browner, Director of the White House Office of Energy and Climate Change Policy, noted that 'the courts are starting to take control' of climate change (cited in Markell and Ruhl 2010, p. 10646). In 2009 a *Wall Street Journal* op-ed contended that, because of the lack of progress internationally and in Congress, the 'climate change lobby is already shifting to plan B, or is it already plan D? Meet the carbon tort'. Osofsky (2009, p. 383) argues that 'until executive and legislative branches are able to construct effective multiscalar regulatory mechanisms … litigation's formal and informal interactions likely will continue to play an essential role in the overall regulatory framework'. In their exploration of US environmental policymaking, McGrory Klyza and Sousa (2008) similarly claim that environmental policymaking happens despite legislative gridlock. They point specifically to the active role of courts in deciding environmental conflicts. This is not a new phenomenon: the turn to the courts on climate issues can be seen as a legacy of the environmental laws passed in the 1960s and 1970s, which allowed for citizen suits whereby Congress invited citizens to engage actively in policymaking by liberalising access to the courts.

If climate change litigation arises to fill a governance gap, one would expect countries with little legislative or regulatory activity on GHG emissions to have higher levels of climate change-related activity in the courts. Here I explore the interplay between climate policy and levels of climate change litigation across three national jurisdictions: Australia, Canada and the United Kingdom. Comparison suggests no clear relationship between a lack of national policy and levels or types of litigation. The governance gap-filling explanation for climate change litigation is not entirely convincing on its own.

Here, while also concerned with climate change litigation, I shift the focus from the impact or outcomes of climate change litigation and towards the process of legal mobilisation to determine who is bringing cases across jurisdictions and

on what basis. I focus on the front end of legal actions rather than the back end for two reasons. First, in order to better understand how courts fill the 'governance gap', we need to look at the whole range of cases that appear before the courts. As socio-legal scholars have long pointed out, the courts can only play a policy gap-filling function when they are beckoned to do so by litigants. Second, courts are important political actors not only for their policy influence, but also for the vital role they play in granting legitimacy to particular arguments, ideologies and identities. Beyond looking at battles between the upper echelons of the judiciary and other branches of government, I consider the roles of a wide range of legal actors, including grassroots activists, to get a balanced picture of how law is mobilised in the name of climate change.

I begin by outlining the strategy for case selection and data gathering, and consider the limitations of the analysis before discussing the national climate change policy and litigation landscape in Canada, the United Kingdom and Australia. Rather than focusing solely on those legal cases that serve regulatory roles, I survey all types of legal actions. This fills a gap in the literature by painting a picture of the range of litigants and the enormous variety of cases brought to courts under the umbrella of 'climate change litigation'. It provides an overview of the types of issues being litigated and the actors involved in the litigation processes. The three countries illustrate the varieties of climate policies – from environmental leaders to laggards – and thus serve as useful examples for thinking more generally about the relationship between climate policies, legal mobilisation and jurisprudence.

Methodology: the comparative politics of climate change litigation

The research presented here contributes to current debates in a number of different ways. First, in terms of geographic coverage, it studies several different jurisdictions, one which has already been the focus of much scrutiny by scholars interested in climate change litigation (Australia), one which has recently become the focus of more attention (United Kingdom), and one which has not been systematically studied from this angle (Canada). These three countries share a similar legal tradition and generally comparable systems of parliamentary politics. This research design suggests that differences found in terms of levels and types of litigation will likely stem from factors other than those specific to the common law legal system or the political culture. This approach also helps address the implicit problem in many previous analyses of climate change litigation: dependent variable bias. Börzel (2006, p. 129) argues that research on litigation and participation tends to suffer from a selection bias on the dependent variable: 'cases in which citizens and groups fail to bring claims … are hardly considered'.

Second, I contribute a different angle to the theoretical literature on climate change litigation. Previous research focused on climate change litigation as 'filling a governance gap' has illuminated the impact that legal actions,

particularly successful ones, can have on policy. This study, by contrast, takes a bottom-up approach in surveying all types of legal actions, both those that are successful in the courts and those that are not, across the three national jurisdictions. This is important in discovering why some courts might have a high number of climate change cases on their docket and others have only low numbers or no cases. This then feeds into broader questions of why some jurisdictions might grant courts a greater role in climate change policymaking than others. My focus is on the mobilisation of law and policy by actors broadly concerned with climate change. This pushes conventional legal analyses to the background and replaces it with a political perspective on law and social change (McCann 1994, Scheingold 2004).

The research strategy deployed here is exploratory and inductive, and seeks to identify patterns and offer hypotheses on the recursive relationship between policy and legal mobilisation. In order to study the nature of the relationship between existing national policies, legal mobilisation and climate change litigation, I survey the levels and nature of climate litigation across countries and explore similarities and differences, not just in the relative numbers of climate change cases taken before the courts, but in the significance and subject of those cases. I adopt the definition of climate change policy used in the *GLOBE Climate Legislation Study* (Townshend *et al*. 2011, p. 4):

> Legislation, or regulations, policies and decrees with a comparable status, that refer specifically to climate change or that relate to reducing energy demand, promoting low carbon energy supply, tackling deforestation, promoting sustainable land use, sustainable transport or adaptation to climate impacts.

My analysis focuses on policies at the national level that have come into effect, but also examines important bills that failed to pass through legislative processes.

Turning to litigation, like Markell and Ruhl (2010, p. 10647), I define climate change litigation as any piece of litigation in which either party or the judicial decision 'directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts'. As an initial source of cases I relied heavily on the climate change litigation inventory developed by the Center for Climate Change Law at Columbia University. Climate change cases were also identified through legal search engines (CANLII, BAILII and AUSTLII) and secondary literature, as well as through non-governmental organisation (NGO) documents, online newspaper archives and general web browser searches. Cases identified ranged from those decided in 1994 to those decided by the end of June 2011 (see appendix). Cases were coded with the help of a research assistant. We sought several types of information: the identity of the complainant (who brought the legal action); the identity of the defendants (the target of the lawsuit); the tribunal (in what forum was the case brought); the year of decision; the outcome of the case; the impact of the decision on developments in policy.

Relying on data like this offers only a very limited, and at times even misleading, picture of legal mobilisation. There are a number of dimensions on which this type of analysis falls short. Without a baseline for comparison it is difficult to interpret whether the number of legal cases and the number of 'successes' is 'high' or 'low' for a jurisdiction. Consequently, this type of data are used to make more limited claims. It is relied on to highlight empirically that there is at least some level of legal mobilisation activity around the issue of climate change in these jurisdictions. For a number of reasons – including difficulties in gathering data on cases, particularly in lower courts – it is the relative levels of litigation that should be interpreted as indicating something about the nature of legal mobilisation. That is, it is the comparative exercise that can provide analytical leverage.

Cases not reaching a final court ruling, because they are dropped or settled or because they do not pass through the permission stage, often tell an important story. As Hilson (2010) points out, methodologically such cases are difficult to identify as they are not recorded in official law reports or legal databases. I have tried to identify such instances through the secondary literature, media searches and NGO contacts; I include a discussion of these cases where relevant.

There is also a difficulty in considering the idea of 'success', as not all cases are the same, and there may be some that address issues of greater importance for the litigating party. Litigants who are 'repeat players' (Galanter 1974) in the courts may lose the majority of their cases but win most of the cases (or win on the issues) that are most important to them. Judicial decisions are often not binary decisions but instead address a number of legal issues put forward by the parties to the case. It is frequent for both sides to claim victory after a high court decision. Counting case results is clearly a limited tool and, in order to understand the multiple and complex motivations of (potential) litigants, qualitative and ethnographic research would be more useful. Instead, my research leverages the cross-national comparison to sketch an overall picture of the nature and types of cases being brought (or not brought) across jurisdictions and considers whether the existence of climate change policies shapes the levels and types of cases.

Climate change litigation: a comparative picture

This section surveys the climate change litigation landscape across the three countries to explore the levels and nature of legal mobilisation around climate change. It considers how climate change-specific policies, or a lack thereof, may influence or drive legal mobilisation; it focuses on domestic initiatives though some legislation is explicitly based on international or supranational commitments, such as the Kyoto Protocol or regulation mandated by the European Union (in the UK case). An overview of litigation trends across the three countries is followed by an exploration of litigation activity highlighting

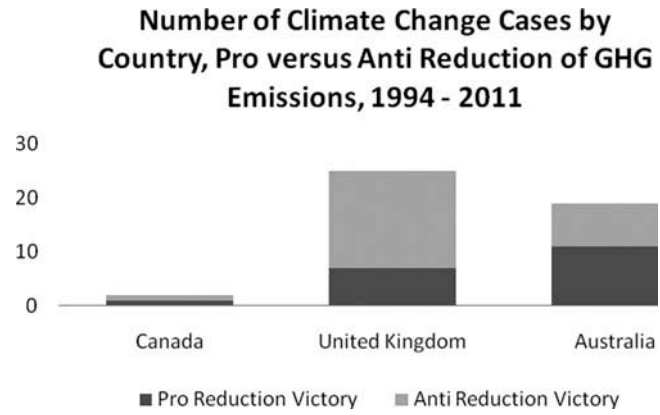

Figure 1. Relative numbers of climate cases by country.

particular cases which either exemplify these trends or have proven significant for their policy impact (or lack thereof).

An empirical overview

Figure 1 demonstrates approximate levels of climate litigation across countries. Again, these figures should be read with caution as the method used to identify and count cases has undoubtedly underestimated the number of disputes; the comparison between countries is more useful here than the absolute figures. According to this analysis the United Kingdom has a relatively high number with 25 cases identified according to the criteria discussed above. Australia, on which there has been much more focus in academic analyses, has 19 cases, but Canada has only five. While it is difficult to discern any identifiable trends in Canada with such a small number of cases there are some commonalities across the types of cases in the other two jurisdictions.

In the United Kingdom, corporate actors have brought more than a third of cases. This confirms Hilson's (2010) observation that many anti-climate policy cases are brought by industry actors which typically seek to challenge policies that affect their commercial interests. However, NGOs have also been significant players, bringing six of the 25 cases, all with the aim of reducing GHG emissions or promoting renewable energy policies. Local governments have also allied with community groups and NGOs in bringing a handful of cases. Central and local governments have been the sole targets of legal actions in the United Kingdom, with the exception of those examples of reactive litigation where direct action protestors are the subject of prosecutions. This is perhaps not surprising as judicial review – a challenge to the way in which government decisions have been made – has in the United Kingdom been the dominant form of legal action on climate change. Thus far there have been no examples

of tort litigation or public nuisance claims such as are increasingly seen in the United States.

The Australian picture is somewhat different. Climate change litigation has largely been driven by claims taken or supported by NGOs; NGO-driven litigation accounts for 10 of the 19 claims. Corporate actors have been less litigious than their UK counterparts, representing 16% of claimants. However, as in the United Kingdom, the majority of claims have been brought against various government authorities. State governments have been the target of almost half of the claims. Interestingly, the Commonwealth government has been the target of only three of the lawsuits identified, but academic analyses to date have focused very much on these cases and specifically on litigation invoking the duties of the federal government under the Environmental Protection and Biodiversity Conservation Act (EPBC) 1999.

Canada: climate change policy and litigation

Canada has no comprehensive federal climate change legislation. In recent years a number of private members' bills have attempted to establish binding commitments to reduce GHG emissions, but all failed. The closest the House of Commons came to passing overarching and longer-term climate change legislation was with the *Climate Change Accountability Act* (Bill C-311). The proposed regulation, comparable to UK climate legislation, would have required the federal government to set regulations to bring GHG emissions 25% below 1990 levels by 2020 and to bring emissions to 80% below the baseline by 2050. It passed through the House of Commons in May 2010 but died in the Senate (Townshend *et al*. 2011).

The evidence presented here counters claims that climate litigation is in any significant way 'working its way north to Canada' and also contradicts the assertion that 'litigation has become a tool for claimants to address the absence of an overarching federal policy in both countries [Canada and the United States] in respect of greenhouse gas (GHG) emission reductions' (Schatz 2009, p. 129). There is relative quiet on the climate litigation front in Canada. This quiescence is not only striking when contrasted with the hundreds of cases brought in the United States, but also in comparison to the levels of legal activity in the United Kingdom and Australia. Two issues have been the subject of legal activity in Canada: the federal government's obligations under the Kyoto Protocol; and the development of oil sands in Northern Alberta. NGOs initiated both sets of cases.

The first applications concerned Canadian implementation of the Kyoto Protocol, which came into force in Canada in 2005. In 2007, in *Friends of the Earth v. The Minister of the Environment*, a NGO made a Federal Court application seeking declaratory relief that the government was in violation of its international obligations under the Canadian Environmental Protection Act (CEPA). Section 166 of the CEPA mandates the Environment Minister to take action if she has reason to believe that a substance released in Canada may

reasonably be anticipated to contribute to air pollution that violates or is likely to violate an international agreement binding on Canada. However, before this application could proceed, a private member's bill was passed into law as the Kyoto Protocol Implementation Act (KPIA) 2007. The opposition in parliament passed the KPIA 2007 despite resistance from the minority Conservative government; the act's aim was to implement Canada's targets under the Kyoto Protocol during the first commitment period of 2008–12. It required the Minister for the Environment to prepare a climate change plan that included a projection of Canada's emissions for each year of the commitment period and to prepare a statement indicating whether each measure to reduce emissions proposed in the previous year's plan was implemented by the deadline. As a private member's bill without government backing, the KPIA had no teeth: it could not authorise the expenditure of public funds to achieve its objectives. When the minister delivered his climate change plan in August 2007, as mandated by the act, Friends of the Earth (FoE) brought a series of three applications – grouped together as *Friends of the Earth v. The Governor in Council et al.* (2008) – seeking a declaration from the court that the minister had failed to fully comply with the legal requirements of the KPIA and directing him to take such steps.

The applications were denied on the basis that the legislation was not justiciable, i.e. not an issue for the courts to resolve. Justice Barnes concluded that 'the Court has no role to play reviewing the reasonableness of the government's response to Canada's Kyoto commitments' (para. 46). In the decision the judge highlighted that, as a private member's bill, it created a tension between the Conservative minority government's policy and the intentions of the act passed by the House of Commons: 'the KPIA was not supported by the government which had earlier stated that Canada would not comply with the Kyoto Protocol targets. The KPIA thus embodies a legislative policy which is inconsistent with stated government policy' (para. 8). The court's view corresponded with that of the respondent: the KPIA creates a system of parliamentary accountability that the court cannot and should not assess; and their 'accountability for their failure to fulfill Canada's Kyoto obligations will be at the ballot box and cannot be in the courtroom' (para. 7). In November 2008, FoE appealed the decision to the Federal Court of Appeal, which dismissed its case. These decisions effectively removed any domestic legal requirement for Canada to adhere to its Kyoto commitments.

The second issue that became the subject of litigation was the consideration of GHG emissions in the authorisation of an oil sands mine in Alberta. The project's carbon footprint is enormous, with projected average emissions of 3.7 million tonnes of carbon dioxide equivalent per year contributing 0.51% and 1.7% of Canada's and Alberta's annual GHG emissions, respectively (Schatz 2009, p. 135). A group of NGOs – the Pembina Institute for Appropriate Development, Prairie Acid Rain Coalition, Sierra Club of Canada and Toxics Watch Society of Alberta – brought an application challenging the authorisation of the proposed project by the review panel. Established by the Alberta Energy

and Utilities Board and the Government of Canada, the panel had concluded that the project was not likely to cause significant adverse environmental effects based on the proposed mitigation measures contained in the Environmental Impact Assessment (EIA). The NGOs alleged that the environmental assessment undertaken by the review panel did not comply with the mandatory provisions in the Canadian Environmental Assessment Act (CEAA), particularly in regard to the consideration of GHGs from the project, which the panel argued were insignificant. The matter was remanded to the review panel, which subsequently issued an addendum to its reasons and provided the necessary rationale. However, following the judicial review decision remanding the matter back to the panel, the Minister of Fisheries and Oceans, which had originally granted a permit to Imperial Oil, retracted the authorisation which was required for the project. Imperial Oil unsuccessfully sought to challenge the minister's decision in the Federal Court. This series of cases appears to constitute a win for the movement to reduce carbon emissions (or at least prevent developments that significantly increase emissions) in Canada. However, the victory is a very qualified one. The review panel delivered additional reasons for its decision in May 2008 and less than a month later the minister re-issued the permit allowing the project to go ahead.

In sum, legal mobilisation in pursuit of a reduction of GHGs in Canada remains embryonic at best and ineffective at worst. First, the series of KPIA cases lends support to Rosenberg's (1991) 'hollow hope' thesis that law and courts cannot serve as the basis for significant social change, particularly when the law in question was passed without the support of the government of the day. In his decision, the judge remarked upon the lack of public funding behind the Act as well as the clear tension between the legislative policy of implementation of the Kyoto Protocol and the explicit policy of the minority Conservative government not to meet its Kyoto commitments. Second, the results of the cases addressing the tar sands development could be interpreted as pyrrhic victories: successive victories in court were unable to halt but at best delayed the project and raised public awareness of the issues with the tar sands.

UK: climate change policy and litigation

In contrast to Canada, the United Kingdom has one of the most ambitious and far-reaching programmes of climate change legislation in the world. Over the last decade governments have passed laws that regulate GHGs directly and developed legal provisions on renewable energy, energy efficiency, biofuels and measures to encourage investment in low-carbon technology. The flagship legislation is the Climate Change Act 2008, which provides a long-term framework for improving carbon management. It includes specific and binding emissions reduction targets of at least 80% reduction from 1990 levels by 2050. The Climate Change Act also established an independent institution, the Climate Change Committee, to advise the government on setting and meeting carbon

budgets and on preparing for the impacts of climate change. Another important source of climate policy is the influence of progressively developing European Union (EU) regulatory action, mainly in regards to EU directives on the EU Emission Trading System (ETS), which entered into force in 2005 to help achieve the targets agreed at Kyoto. More recently the EU adopted the 'Climate and Energy Package' (CARE) that entered into force in June 2009. Most pertinently for the United Kingdom, the package extends and revises the ETS, sets national targets for renewable energy and promotes the development of carbon capture and storage.

As Hilson (2010) has pointed out, while the profile of climate change litigation has expanded rapidly in some jurisdictions it has received relatively little European attention. Hilson identifies the 'healthy existence' of CCL in the United Kingdom and this research affirms it. The types of cases being brought vary across a wide range of issues, a diverse array of causes of action and involve many different policy stakeholders. Yet while the United Kingdom has among the most ambitious climate change legislation in terms of clear and binding commitments to curb GHG emissions, the Climate Change Act 2008 itself has played only a marginal role in climate change litigation to date.

The existence and siting of wind farms dominated the docket of early cases concerned with climate change. There was a subtle shift in decisions of the Planning Inspectorate, where the majority of these cases were heard. All the early cases resulted in losses for climate advocates; in the balance between a commitment to renewable energy and local concerns the latter always prevailed. However, in later cases there was some acknowledgement of this balance. In *Bradford v. West Devon BC* 2007 the planning inspector acknowledged the importance of combating global warming, but concluded that this policy goal must be balanced against visual and landscape concerns and hence upheld the council's refusal of planning permission for two wind turbines.

The UK Export Credit Guarantee Department's (ECGD) (in)action on climate change was also the subject of intensive NGO campaign activity and litigation. The ECGD is a UK government department that provides government-backed loans, guarantees, credits and insurance to help private UK corporations to conduct business abroad, particularly in the developing world. In March of 2005, FoE made a freedom of information request under the Environmental Information Regulations (EIR) to the ECGD regarding an application made to the department for credit for the Sakhalin project, a project proposed by Shell to develop gas and oil production off the north-east coast of the Russian island of Sakhalin. The NGO sought information on inter-departmental commentary on why the project was being treated as potentially sensitive. The ECGD refused to release the information, citing an exception within the relevant regulations for inter-departmental communications; the Information Commissioner upheld this refusal. However, FoE appealed that decision to the Information Tribunal who ordered the ECGD to release the data. The government appealed that decision to the High Court who, three years after the initial

request was made, ordered the ECGD to release the information to FoE. However, the same month that the High Court made its decision it was reported that the energy company behind the project – Sakhalin Energy – had withdrawn its application for funding from the ECGD (and from the US Export Import Bank) but that the project was continuing.

Finally, another phenomenon unique to the United Kingdom among the countries studied here is the rapid growth of reactive climate change litigation (Vanhala 2009, Hilson 2010): activists undertake civil disobedience tactics aiming to raise the public profile of the climate change issue and/or the goal of being taken to court to advance arguments within a judicial venue about particular activities that are environmentally destructive. Among the most high profile of these cases is the acquittal of the 'Kingsnorth Six' in 2008. In this case, a UK trial court acquitted climate change activists of causing criminal damage at the Kingsnorth coal-fired power station in Kent. Six Greenpeace activists had attempted to shut down the station by scaling its chimney and painting the Prime Minister's name down the side. The defendants argued that, by shutting down the coal plant for a day, they prevented greater damage to the climate (an 'even more valuable property'). The jury's verdict was the first instance in which 'prevention of property damage' resulting from the impacts of climate change was used as a lawful excuse in court. The case became very high profile and the 'defense of climate change' was included in the *New York Times*' review of the 'year in ideas' (Mingle 2008). However, the legacy of this case has not been as significant as its initial result and public profile might suggest. Since 2008 there have been at least four other direct action protests with a focus on climate change impacts whose perpetrators offered similar defence arguments but were ultimately convicted.

To summarise, there has been a wide range of legal actions relied upon in proactive litigation by individuals and NGOs in the United Kingdom. Targets of climate actions have included the ECGD, the UK Treasury and the Department for Trade and Industry. Local governments were heavily involved in a number of early cases on planning permissions for wind farms, but these issues no longer appear to be resolved as regularly through the courts as they were in the 1990s and early 2000s. Uniquely among the countries explored here, direct action activists have also figured in climate change cases as subjects of criminal legal sanctions. Of the 25 cases studied here only one, *R (London Borough of Hillingdon & Ors) v. Secretary of State for Transport & Another* (2010) – the case against the expansion of Heathrow airport – has explicitly relied on the Climate Change Act 2008. This is probably because the Act was only recently adopted; future litigation probably will rely increasingly on it.

Australia: climate change policy and litigation

Australia, like Canada, has no climate change-specific, national legislation. Until 2007, among the world's developed nations, only Australia and the United States

had refused to ratify the Kyoto Protocol, leading to their international reputations as climate laggards (Tranter 2011). In 2007, a Labor government, led by Kevin Rudd, was elected in the world's 'first climate change election' (Rootes 2008). Promising to prioritise the climate issue, Rudd ratified the Kyoto Protocol two days after taking power. However, while there was much legislative activity on climate change following Rudd's election, there was little success. The Carbon Pollution Reduction Scheme (CPRS) Bill 2009, the centrepiece of a package of legislation introduced by the Labor government, proposed an ambitious cap-and-trade system of emissions trading. The proposed legislation symbolised a drastic u-turn in policy that moved Australia from one of the last recalcitrant industrialised countries on Kyoto to one of the more ambitious (Wilder and Fitz-Gerald 2009, p. 446). However, the bill failed in the Senate; in April 2010, Rudd announced that the government had decided to delay pursuing the CPRS until 2012, after the current commitment period of the Kyoto Protocol, citing the lack of bipartisan support and slow international progress on climate action, pointing specifically to the need for greater clarity on the action of other major economies including the United States, China and India.

However, the record of litigation in Australia suggests that environmental advocates have successfully influenced the judiciary to interpret and apply the Environment Protection and Biodiversity Conservation (EPBC) Act 1999 to climate change. This is much like the US cases *Connecticut v. AEP* 2011 and *Massachusetts v. EPA* 2007, in which the Clean Air Act was considered to include a role for the Environment Protection Agency in the regulation of GHGs. Through a series of cases, the Australian courts decided that Environmental Impact Assessments (EIAs) required under the EPBC Act and relevant state environmental planning legislation must consider climate change. The analysis here supports Bach and Brown's (2008, p. 39) assertion that 'by taking a general environmental protection statute and applying it progressively to the home-grown causes of global climate change, Australian judges have stepped into a breach that legislators and executive branch agencies have typically avoided'.

However, the emergence of climate cases in Australia was slow. One of the earliest was *Greenpeace Australia Ltd v. Redbank Power Co.* (1994). Greenpeace challenged a state decision granting development consent for the construction of a power station, asserting that its emissions would exacerbate the greenhouse effect. Applying the precautionary principle, Greenpeace unsuccessfully argued that the court should refuse development consent for the project. After that loss, no more climate cases were pursued in Australia for a decade.

In wind farm cases in Australia, tribunals have tended to respond very differently from UK courts. The New South Wales Land and Environment Court (a specialist court) upheld a proposal for a wind farm in the small town of Taralga, noting that the overall public benefits outweighed any private burdens. In *Taralga Landscape Guardians Inc. v. Minister for Planning* (2007), a community organisation challenged the proposal, citing negative impacts on the

people and wildlife of their town and the surrounding countryside. The court held that the concept of ecologically sustainable development, specifically intergenerational equity, is central to any decision-making process concerning the development of new energy resources.

With its reliance on coal as both a source of domestic energy production and as an export commodity, Australia has the world's highest greenhouse gas emissions per capita. Thus it is not entirely surprising that, as Lesley McAllister (2009, p. 48) writes, '[i]n Australia, the most prominent climate change cases have involved attempts to stop greenhouse gas emissions from the burning of coal before that coal is even mined … With this approach, environmentalists have had some notable success in ensuring that such "indirect" or "downstream" greenhouse gas emissions are assessed as part of the decision-making process'.

In *Australian Conservation Foundation v. Latrobe City Council* (2004), a state tribunal overturned the decision of a government panel that refused to consider the GHG impacts of burning coal. The Hazelwood coal-fired power station is one of the largest in the state of Victoria and a significant contributor to GHG emissions. A government panel established to consider the extension of the power station was instructed not to take into account matters related to GHG emissions. The court held that the assessment must consider the GHG emissions impact, the first time in Australia that a public agency was required to acknowledge the implications of GHG emissions from burning coal as part of the process of approving a mining development (McAllister 2009), a decision that 'stands as one of the world's first climate change lawsuits resolved in favor of environmentalists' (Bach and Brown 2008, p. 41).

The *Anvil Hill* case in 2006 took this further. The court held that for projects with the potential to directly or indirectly contribute to GHG emissions, the climate change impacts of the proposal should be properly considered and assessed under the state Environmental Planning and Assessment Act 1979; it is not sufficient to simply raise the climate change issue in the EIA; the project's proponent must attempt precise quantifications. The Anvil Hill mine became the subject of later litigation as well when the Anvil Hill Project Watch Association applied for judicial review of a decision that the mining project was not a controlled action under the federal EPBC Act 1999. The judge found in *Anvil Hill Project Watch Association Inc. v. Minister for the Environment and Water Resources* (2008) that there no was no legal error in the ministerial delegate's approach to determining whether GHG emissions from the coal mine would have a 'significant impact' on a matter controlled by the EPBC Act.

Some of the coal mining cases have focused on the tricky issue of the causality of climate change. The link between coal mining and climate impact came under question in the decision in *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc. v. Minister for the Environment and Heritage & Others* (2006). An Australian federal court upheld a federal agency decision not to require an EIA for a coal mine proposal under

the EPBC Act. Environmental groups argued that the burning of coal harvested from the mines would contribute to global warming; this could have substantial adverse impacts on the ecosystems of world heritage areas like the Great Barrier Reef, triggering the EIA requirement under the EPBC Act. The court held that the GHGs from coal mining and burning had been considered by the agency in its decision not to require an environmental impact statement. The judge was not persuaded that there is a casual link between coal mining activities and damage to ecosystems. A similar legal argument was used in *Your Water Your Say Inc v. Minister for the Environment, Heritage and the Arts* (2008) and was also unsuccessful.

Among the jurisdictions studied here, Australia is the only country where the issue of adaptation to climate change (rather than mitigation to avoid climate change) has been litigated. In *Charles & Howard Pty Ltd v. Redland Shire Council* (2008), the Queensland Planning and Environment Court held that a local council's decision requiring a proposed dwelling to be relocated to an area less vulnerable to tidal inundation was justified. The court considered climate change induced flood risks and concluded that the council's decision was compatible with local planning policy. In the same year, the Victoria Civil and Administrative Tribunal overturned a local council decision granting consent for residential developments in a coastal region. A regional coastal board challenged the council's decision, arguing that the proposed developments were inappropriate in light of projected sea-level rises as a result of climate change. The tribunal applied the precautionary principle, finding that sea-level rise and more extreme weather conditions resulting from climate change presented a reasonably foreseeable risk of inundation of the site, and determined that development consent should not be granted. In *Northcape Properties v. District Council of Yorke Peninsula* (2008), the South Australian Supreme Court upheld a local council decision to refuse development consent on the basis of unacceptable climate change risks to the proposed development. The court found the proposed development in violation of the goals and objectives of the council's Development Plan, and that a hazardous sea-level rise over the next 100 years due to climate change was a sufficient basis to support the refusal of the coastal development application.

Legal scholars have been optimistic about the emergence and progress of climate litigation in Australia. There has been a tendency to apply the precautionary principle: if an action or policy has a suspected risk of causing harm to the public or to the environment then, in the absence of a scientific consensus, the burden of proof that it is *not* harmful falls on those taking the action. This principle – together with judicial discourse on intergenerational equity and the courts' adaptation to climate change issues – all suggests that judicial thinking is ahead of government policy concerning climate change in Australia. However, as socio-legal scholars would be quick to point out, particularly in light of the coal mine litigation victories, wins in court often do not translate to change on the ground. None of the coal mine expansion projects has been stopped in its tracks by litigation. Although some projects were slowed down, and the resulting

requirements more carefully consider the climate change causes and consequences, none was ultimately thwarted.

Conclusion

The failure of international actors to adequately grapple with the urgent nature of the climate change challenge has meant that states and sub-state actors are stepping into the breach. National-level legislation in the United Kingdom and sub-state action in parts of Canada, Australia and the United Kingdom exemplify this. This research has inductively explored data on climate change litigation. The patterns and contrasts outlined above can contribute to theoretical thinking on the role of litigants and courts in comparative climate change politics.

Considerable research on climate change litigation has focused on the role specific, successful cases have played in filling a governance gap. My research, which has taken a broader lens to explore all types of cases, finds no clear relationship between the existence or lack of policy and levels or types of litigation. Among the countries examined, the United Kingdom has seen the most climate cases but the majority were brought before the Climate Change Act came into effect. It is too soon to tell what the relationship between that act and levels of litigation will be. Environmental activists have instead relied on existing protections and statutes, particularly the Environmental Impact Assessment procedures and the Environmental Information Regulations, in taking judicial reviews. In Australia, environmental activists have also been proactive in reframing existing environmental protection policies to address climate change concerns in the courts. Reliance on the specific triggers of action in the EPBC has limited the types of actions and arguments these groups can make, but it has nonetheless proved to be a feasible legal basis on which to take climate claims. Finally, the case of Canada poses a challenge to the claim that climate change litigation is spreading north. There have been only a handful of legal cases invoking climate change impacts or concerns. Attempts to reframe Canadian environmental protection legislation to include considerations of GHGs (as has been done in the United States, United Kingdom and Australia) have been unsuccessful.

When it comes to the impact of legal mobilisation on policy outcomes, the results are somewhat disheartening for those interested in slowing and reversing the growth of GHG emissions. While there have been some significant court victories in terms of holding governments to account in regulating GHG emissions, efforts to force major corporate emitters to reduce their emissions have been largely unsuccessful. The examples of tar sands litigation in Canada and coal mining cases in Australia are among the most worrying for environmental advocates because of the very high levels of emissions involved. As the political science literature on courts has long suggested, victories in court do not necessarily translate into changes on the ground. Future research could more systematically explore the socio-legal implications of climate change litigation for policy but also for levels of public dialogue and awareness.

My research suggests that it is neither the presence nor lack of overarching federal legislation that necessarily drives litigation. Rather, a huge variety of litigants and cases have been activated under the umbrella of climate change. This raises a related research question: do pre-existing, effective and homegrown environmental protections and the mobilisation of actors who are able to successfully reframe this legislation to address climate concerns before the courts offer sufficient conditions for climate change legal mobilisation? My research complements work on the judicialisation of climate change policy by broadening understanding of the range of cases brought in the name of climate change and the role of litigants in climate politics. By looking at cases, both successful and unsuccessful, at all levels of the court system and gaining some insight into the types of actors bringing suits, we can begin to explore the complex and multiple motivations of those who choose to mobilise the law.

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Appendix: Legal actions in Canada, United Kingdom and Australia, 1994–?2011

Table A1. Canadian Climate Change Litigation

Case, year and main issue(s)	Court	Result
Friends of the Earth v Her Majesty the Queen, The Minister of the Environment 2007 Friends of the Earth Canada made an application against the federal government seeking declaratory relief that the government was, or potentially was, in violation of its international obligations under Section 166 of the Canadian Environmental Protection Act (CEPA).	Federal Court	Lost
Friends of the Earth Canada v. The Governor in Council et al. 2008 Friends of the Earth (FOTE) took the Canadian federal government to court for the government's failure to enforce Canada's greenhouse gas (GHG) emission obligations under the Kyoto Protocol Implementation Act (KPIA). The Federal Court dismissed Friends of the Earth's applications finding that the KPIA is not justiciable.	Federal Court	Lost
Pembina Institute for Appropriate Development, et al v. Attorney General of Canada and Imperial Oil 2008 On application from several environmental NGOs, Federal Court of Canada remitted the environmental assessment for Imperial Oil's proposed Kearl Oil Sands Project back to the joint federal/Alberta review panel that had recommended the Project be approved, requiring the panel to explain why the Project's proposed mitigations measures, such as its intensity-based targets for reducing its GHG emissions, would reduce these emissions to a level of in significance.	Federal Court	Won
Imperial Oil Resources Ventures Limited v. Pembina Institute for Appropriate Development et al. 2008 The Federal Court of Appeals dismissed Imperial Oil's challenge to the nullification of the permit authorizing the Kearns oil sands project, upholding the decision in Pembina Institute for Appropriate Development, *et al.* v. Attorney General, *et al.*	Federal Court	Won
Friend of the Earth v. The Minister of the Environment and The Governor in Council 2009 Appeal of Friends of the Earth Canada v The Governor in Council on implementation of the KPIA.	Federal Court of Appeal	Lost

Table A2. UK Climate Change Litigation

Case, year and main issue(s)	Court	Result
City of Bradford Metropolitan Council v. Woodhead and Sons Ltd. 1995 A construction company appealed a local council failure to determine with in a prescribed period an application for the erection of eight wind turbines. On appeal, the Planning Inspector acknowledged that the production capacity of the turbines would provide renewable energy in accordance with government policy, but concluded that the proposal would unacceptably harm the surrounding landscapes and the living conditions of nearby residents.	Planning Inspectorate	Lost
City of Bradford Metropolitan Council v. Gillson and Sons 1995 A construction company appealed a local council failure to determine within the prescribed period an permission to erect three wind turbines in West Yorkshire. On appeal, the Planning Inspector concluded the contribution to the national energy supply in achievement of national policies on renewable energy, though tangible, did not outweigh the serious harm the proposal would cause to the character and appearance of the surrounding landscape, particularly the Brow Moors (considered important in national cultural history, due to their prominence in the writings of the Brontë family).	Planning Inspectorate	Lost
City of Bradford Metropolitan Council v. Feather 1995 A construction company appealed a local council failure to determine within the prescribed period an application for the erection of three wind turbine generators, an electrical sub-station, and cables at a quarry in Haworth, West Yorkshire. The noise created by the turbines, though not a compelling objection on its own, added weighed against approval of the application.	Planning Inspectorate	Lost
Allerdale BC v. Cumbria Wind Farms Ltd. 2000 Cumbria Wind Farms Ltd. appealed local council decision refusing planning permission for the erection of sixwind turbines near a national park. The Planning Inspector affirmed the local council's decision, concluding that the adverse visual effects in this particular case outweighed the need for renewable energy.	Planning Inspectorate	Lost
Rockware Glass Ltd. v. Chester City Council 2005 A Planning Pollution Control License was challenged by a commercial rival. The Court upheld a decision quashing a permit granted to operate an industrial plant for the manufacture of glassware.	High Court	Won

(*continued*)

Table A2. (*Continued*).

Case, year and main issue(s)	Court	Result
Cemex UK Cement Ltd v. Department for the Environment, Food and Rural Affairs 2006 An action by a cement company, which asserted that a change in the commissioning rule under the European Emissions Trading Scheme seriously disadvantaged one of its plants, violating the principle of equity. The court dismissed the case.	Queen's Bench Division, Administrative Court	Won
Laughton Wind Farm Ltd. v. West Lindsey DC 2006 Laughton Wind Farm Ltd. appealed the refusal of planning permission for a proposal to build ten wind turbines. The Planning Inspector concluded that the proposed wind farm would have an un acceptably substantial impact upon the local landscape.	Planning Inspectorate	Lost
Bradford v. West Devon BC 2007 Farmers appealed the refused of planning permission for two wind turbines. The Planning Inspector affirmed the local council's decision. The Inspector acknowledged the importance of the need to combat global warning, but concluded that this policy goal must be balanced against visual and landscape concerns.	Planning Inspectorate	Lost
Heathrow Airport Ltd & Another v. Joss Garman & Others 2007 A United Kingdom court granted injunctive relief to control a probable campaign of direct action and civil disobedience by environmental activists in the immediate vicinity of Heathrow airport. The court ordered an injunction under the common law torts of trespass and nuisance forbidding the protesters from disrupting or impairing the operation of the airport.	Queen's Bench Division, Administrative Court	Lost
Stuart Dimmock v. Secretary of State for Education and Skills 2007 A parent challenged the government's decision to distribute Al Gore's documentary on climate change, "An Inconvenient Truth", to English state schools as a teaching aid the film. The claimant argued this amounted to the promotion of partisan political views in violation of the Education Act of 1996. The Court found the film substantially founded upon scientific evidence and determined that it could be shown, as long as teachers provided guidance.	High Court	Won
Yelland Wind Ltd. v. West Devon BC 2007 Yelland Wind Ltd. appealed a decision by the local council refusing planning permission for a proposal to build three wind turbines. The Planning Inspector dismissed the appeal, finding the proposal's adverse landscape and visual impacts to be decisive.	Panning Inspectorate	Lost

(*continued*)

Table A2. (*Continued*).

Case, year and main issue(s)	Court	Result
R (on the application of Greenpeace Ltd) v. Secretary of State for Trade and Industry 2007 Greenpeace sought a court order to quash a government policy that would allow for building new nuclear plants. Greenpeace sued on alleged breach of legitimate expectation on the basis of a 2003 White Paper (Our Energy Future: Creating a Low Carbon Economy) that that stated the government would not support newly built nuclear plants and would instead promote renewable energy, with an explicit promise requiring 'the fullest public consultation' before reversing this policy. Through the matter was deemed justiciable, the court declined to support Greenpeace's action against the policy.	Queen's Bench Division, Administrative Court	Lost
ECGD v Friends of the Earth 2008 Export and Credit Guarantee Department's appeal to Information Tribunal's decision requiring it to release information to Friends of the Earth on the environmental and human rights impacts of the Sakhalin II oil and gas exploration project off the north-east coast of Sakhalin Island in Russia.	High Court	Won
R. (On the Application of Littlewood) v. Bassetlaw DC 2008 A United Kingdom court upheld the grant of planning permission for project which included a pre-case concrete manufacturing facility. A local resident challenged the district council's decision, citing failure to consider the adverse impacts of the proposed facility on climate change, in particular, from carbon dioxide emissions. The court held that the omission of the effect of concrete production on climate change had not been raised in time, and in any case, did not render the Environmental Statement deficient.	Queen's Bench Division, Administrative Court	Lost
The Kingsnorth Six Trial 2008 A United Kingdom trial court acquitted climate change activists of causing criminal damage at a coal-fired power station. Six Greenpeace activists attempted to shut down the Kingsnorth coal-fired power station in Kent by scaling the chimney and painting the Prime Minister's name down the side. The defendants argued that by shutting down the coal plant for a day, they prevented greater damage to even more valuable property. The jury's verdict was the first instance in which prevention of property damage resulting from the impacts of climate change was used as a lawful excuse in court.	Maidstone Crown Court	Acquitted

(*continued*)

Table A2. (*Continued*).

Case, year and main issue(s)	Court	Result
Kay v Commissioner of The Police of The Metropolis 2008 Appeal to decision that monthly "critical mass" bike ride protest was unlawful. The appelant was supported by Friends of the Earth who put forward arguments about the use of sustainable transport.	House of Lords	Won
R (Lewes District Friends of the Earth Ltd & Ors) v East Sussex County Council & Anor 2008 Challenge to East Sussex County Council's decision to build an incinerator because the planning committee which considered the proposal ignored long term reginal recycling targets.	High Court	Lost
Drax 29 Trial 2009 22 activists were convicted of obstructing a train service carrying 1,000 tonnes of coal to Draxin North Yorkshire.	Leeds Crown Court	Convicted
R. (on the application of People & Planet) v. HM Treasury 2009 Campaigners from the World Development Movement, PLATFORM, and People & Planet brought suit against the United Kingdom Treasury for its lack of adequate environmental and human rights considerations in investing with the Royal Bank of Scotland (RBS). RBS has allegedly used public monies to finance several controversial companies and projects that un dermine the UK's commitment to halt climate change. The High Court denied the request for permission to hold a judicial review over the Treasury's actions.	High Court	Lost
Barbone and Ross (on behalf of Stop Stansted Expansion) v. Secretary of State for Transport 2009 The Court dismissed an application by the "Stop Stansted Expansion" group challenging the grant of planning permission relating to the increase in capacity of Stansted Airport. Plaintiffs claimed that the government had, interalia, failed to take into account the project's effects on greenhouse gas emissions prior to granting the planning permission. The court held that the government had considered the impacts of the proposed development on climate change.	Queen's Bench Division, Administrative Court	Lost
R (Friends of the Earth and another) v Secretary of State for Energy and Climate Change 2009 Appeal regarding Government's failure to take steps to implements targets specified in the Warm Homes and Energy Conservation Act 2000 and the UK Fuel Poverty Strategy. Arguments regarding policy on energy efficiency were put forward.	Court of Appeal	Lost
R (London Borough of Hillingdon & Ors)v Secretary of State for Transport & Anor 2010 Challenge to the planning proposal for a third runway at Heathrow under new Climate Change legislation.	High Court	Won

(*continued*)

Table A2. (*Continued*).

Case, year and main issue(s)	Court	Result
Ratcliffe on Soar Power Station Trail 2010 Twenty activists were convicted for conspiring to shut down Ratcliffe on Soar Power Station, following a month long trial at Nottingham Crown Court. The activists are seeking permission to appeal to the Court of Appeal against these convictions, following an admission by the Director of Public Prosecutions that critical evidence was withheld at the time of the trial.	Nottingham Crown Court	Convicted
Climate 9 Trial 2010 The first climate change jury trial in Scotland. Members of the Climate 9 have been granted leave to appeal against conviction and sentence of Breach of the charges.	Aberdeen Sheriff Court	Convicted
The Manchester Airport Activists Trail 2011 In May 2010 17 Plane Stupid campaigners took direct action at Manchester Airport, temporarily shutting it down.	Trafford Magistrates Court	Convicted

Table A3. Australia Climate Change Litigation

Case, year and main issue(s)	Court	Result
Greenpeace Australia Ltd v. Redbank Power Co. 1994 Greenpeace challenged the granting of development consent of a power station asserting that air emissions from the power station would exacerbate the greenhouse effect. Greenpeace argued that the precautionary principle should be applied.	Land and Environment Court of New South Wales	Lost
Phosphate Resources Ltd v. The Commonwealth 2004 Phosphate Resources challenged a Determination by the Administrator of Christmas Island – compelling large users of electricity such as Phosphate to examine alternative options for power generation as part of an effort to minimize greenhouse gas emissions. The court held that taking GHG emissions into account is a legitimate public policy objective.	Federal Court of Australia	Won
Re Australian Conservation Foundation v. Latrobe City Council 2004 A government panel set up under the Victorian Planning and Environment Act 1987 and the Environmental Effects Act 1978 to consider the extension of the Hazelwood coal-fired power station was instructed not to consider matters related to GHG emissions. The tribunal held that the assessment panel must consider the impacts of GHG emissions on the environment.	Victorian Civil and Administrative Tribunal	Won
Gray v. Minister for Planning 2006 A Court rejected an environmental impact assessment (EIA) prepared as part of a development approval process for a large open-cut coal mine at Anvil Hill. The proposal failed to consider the potential GHG emissions from the burning of coal mined at Anvil Hill by third parties. The court held that, for projects with the potential to directly or indirectly contribute to GHG emissions, the climate change impacts of the proposal should be properly considered and assessed under the Environmental Planning and Assessment Act 1979. It is not sufficient to simply raise the climate change issue in the EIA; the proponent of the project must attempt precise quantifications.	Land and Environment Court of New South Wales	Won
Thornton v. Adelaide Hill Council 2006 A Court upheld a council decision to grant development consent to a shed that would house a coal-fired boiler. Local landowners challenged the council's decision, asserting that the boiler will have detrimental impacts on the local environment by, among other grounds, releasing GHGs. The court found no evidence of a likely increase in GHG emissions compared with the existing operation. However, it did recognize that increasing GHG emissions may be inconsistent with the principles of ecological sustainable development, including the principles of intergenerational equity and the precautionary principle.	Environment, Resources and Development Court of South Australia	Lost

(*continued*)

Table A3. (*Continued*).

Case, year and main issue(s)	Court	Result
Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc. v. Minister for the Environment and Heritage & Ors 2006 Environmental groups challenged a federal agency's decision to not require an EIA. They argued that the burning of coal harvested from the mines would contribute to global warming, which could have substantial adverse impacts on the ecosystems of world heritage areas like the Great Barrier Reef, triggering the EIA requirement under the Environment Preservation and Biodiversity Conservation (EPBC) Act. The judge was not persuaded that there is a sufficient causal link between coal mining activities and damage to ecosystems and upheld the federal agency decision.	Federal Court of Australia	Lost
Drake-Brockman v. Minister for Planning 2007 The applicant challenged a state agency decision to approve a concept plan for a mixed-used development on three grounds, including the agency's failure to consider ecologically sustainable development (ESD) principles in approving the concept plan under the Environmental Planning and Assessment Act 1979. The court held that the agency had considered ESD principles and GHG emissions when approving the project and that a quantitative assessment of emissions was not necessary in this particular case and is not required for every major project.	Land and Environment Court of New South Wales	Lost
Perry v. Hepburn Shire Council 2007 Local residents challenged that the wind energy generated from a community-owned wind farm would not produce sufficient GHG-reduction benefits to justify the negative visual, environmental and amenity impacts of the turbines. The tribunal held that the GHG abatement benefits outweighed the other concerns.	Victorian Civil and Administrative Tribunal	Won
Queensland Conservation Council Inc. v. Xstrata Coal 2007 A Court reversed a lower tribunal's decision, which granted an extension to Xstrata's mining lease and denied Queensland Conservation Council (QCC) the ability to amend the conditions of the extension.	Queensland Court of Appeal	Won
Taralga Landscape Guardians Inc. v. Minister for Planning 2007 The Court upheld a proposal for a wind farm, noting that the overall public benefits outweighed any private burdens. A community organization challenged the proposal, citing negative impacts on their village and the surrounding countryside. The court held that the concept of ecologically sustainable development, specifically intergenerational equity, is central to any decision-making process concerning the development of new energy resources.	Land and Environment Court of New South Wales	Won

(*continued*)

Table A3. (*Continued*).

Case, year and main issue(s)	Court	Result
Charles & Howard Pty Ltd v. Redland Shire Council 2008 The Court held that a local council's decision requiring the proposed dwelling to be relocated to an area less vulnerable to tidal inundation was justified. The court considered climate change induced flood risks and concluded that the council's decision was compatible with local planning policy.	Queensland Planning and Environment Court	Won
Gippsland Coastal Board v. South Gippsland Shire Council 2008 The tribunal overturned a local council decision granting consent for residential developments in a coastal region. A regional coastal board, set up under the Victorian Coastal Management Act 1995, challenged the council decision, arguing that the proposed developments were inappropriate in light of projected sea level rises as a result of climate change. The tribunal applied the precautionary principle, finding that sea level rise and more extreme weather conditions resulting from climate change presented a reasonably foreseeable risk of inundation of the site, and determined that development consent should not be granted.	Victorian Civil and Administrative Tribunal	Won
Minister for Planning v. Walker 2008 The Court rejected a state agency's approval of a residential development project. The agency failed to address aspects of ecologically sustainable development (ESD) in giving its approval to the concept plan. The court held that the agency had an obligation under the Environmental Planning and Assessment Act 1979 to take into account the principle of ESD and the impact of the proposal upon the environment, including whether the flooding impacts of the project would be compounded by climate change.	Court of Appeal of the Supreme Court of New South Wales	Won
Northcape Properties v. District Council of Yorke Peninsula 2008 The Court upheld local council decision to refuse development consent on the basis of unacceptable climate change risks to the proposed development. The court found the proposed development in violation of the goals and objectives of the council's Development Plan, and that hazardous sea level rise over the next 100 years due to climate change was a sufficient basis to support the refusal of the coastal development application.	South Australian Supreme Court	Won

(*continued*)

Table A3. (*Continued*).

Case, year and main issue(s)	Court	Result
Your Water Your Say Inc v Minister for the Environment, Heritage and the Arts 2008 An Australian federal court upheld a federal agency decision to exclude certain environmental assessments in approving a desalination plant proposal. A community organization asserted that the agency failed to consider linkages between additional GHG emissions and potential adverse impacts on matters protected by the Environmental Protection and Biodiversity Conservation Act 1999 (EPBC Act).	Federal Court of Australia	Lost
Anvil Hill Project Watch Association Inc. v. Minister for the Environment and Water Resources 2008 The Court upheld a previous federal court judge's decision to dismiss a community group's application for judicial review of decision in that Anvil Hill coal mining project not a controlled action under the EPBC Act 1999. The judge found that there was no legal error in the ministerial delegate's approach to determining whether GHG emissions from the coal mine would have a "significant impact" on a matter controlled by the EPBC Act.	Federal Court of Australia	Lost
Aldous v. Greater Taree City Council and Another 2009 The Court upheld approval of a development application by a city council for a dwelling on a beachfront property. Applicant land owner argued, inter alia, that the Council had failed to take into account the principles of ecologically sustainable development (ESD), specifically the principles of intergenerational equity and the precautionary principles by failing to assess climate change induced coastal erosion.	Land and Environment Court of New South Wales	Lost
Rivers SOS Inc. v. Minister for Planning 2009 In June 2009, New South Wales Planning Minister approved $50 million expansion of the Metropolitan coal mine, allowing long wall mining to take place underneath the Woronora Reservoir. The Minister approved a substantially revised version of the project at a late stage in the assessment process, without providing any further opportunities for public participation and agency involvement. Rivers SOS, a community group, challenged the legality of the mining approval process.	Land and Environment Court of New South Wales	Lost

(*continued*)

Table A3. (*Continued*).

Case, year and main issue(s)	Court	Result
Peter Gray & Naomi Hodgson v. Macquarie Generation 2010 Environmental activists brought suit against a state-own power company, seeking a declaratory judgment that one of their power stations has been emitting carbon dioxide into the atmosphere in a manner that has harmed or is likely to harm the environment in contravention of the Protection of the Environment Operations Act 1997. Defendant Macquarie Generation motion for summary dismissal was denied. The court found that even if the defendant has an implied authority to emit some amount of carbon dioxide in generating electricity under its license, that authority is limited to an amount which has reasonable regard and care for people and the environment.	Land and Environment Court of New South Wales	Won

Source: Columbia Climate Change Law Center Database; additional cases complied by author and research assistant.