

## Court rejects NSW coal mine appeal on community impact and climate change grounds

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### *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7

This February 2019 appeal in the NSW Land and Environment Court before Preston CJ has re-established the requirement for the consent authority to consider Scope 3 Greenhouse Gas (GHG) Emissions in determining an application for approval of a coal mine in NSW.

Local community group, Gloucester Groundswell, argued against approval of the mine and was represented by NSW Environmental Defenders Office, which described the judgment as "...a seminal moment in the development of climate litigation in Australia and well and truly puts us on the map in terms of international climate change litigation."

This judgment will be relied upon in assessing and opposing future applications for coal mining (and potentially other) approvals and associated litigation in NSW and potentially elsewhere.

The application was refused because its benefits were outweighed by its "*disbenefits*" of visual, air quality and social impacts on existing uses in the vicinity of the mine, as well as the impacts of the Scope 1, 2 and 3 GHG emissions (direct and indirect) by the proposed mine.

Preston CJ's extensive analysis of the impacts of GHG from the operation of coal mines and the combustion of coal on climate change, commitments of NSW and Australian governments to the reduction of carbon emissions and how these matters relate to the relevant functions of the consent authority will be of particular interest to coal miners and their opponents.

So what's changed since 2007 when Pain J in *Gray v Minister for Planning* (2006) 152 LGERA 258 (*Gray*) recognised that the contribution to CO<sub>2</sub> in the atmosphere (and its causation of global warming) of one individual mine must be taken into consideration when determining an application for approval, despite the fact that it is just one of many sources of CO<sub>2</sub> around the world? Preston CJ said at para 699 it is now "...a time when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in GHG emissions. These dire consequences should be avoided."

This application was refused because its assessed detriments (of which GHG emissions were just one) were not exceeded by its assessed benefits. This decision does not mean that all future applications for consent for fossil fuel developments in NSW must be refused because of the GHG emissions. The impacts of scope 1, 2 and 3 GHG emissions on global climate change is one of the detrimental environmental effects to taken into account in determining whether the economic and social benefits outweigh the environmental costs. This judgment puts greater prominence in the determination of GHG emitting proposed developments, particularly in the times in which we find ourselves.

His Honour's judgment provides insight into the relevance of GHG emissions, describing the determination function as being "...to evaluate the merits of the particular fossil fuel development...Should this fossil fuel development be approved or refused? Answering this question involves consideration of the GHG emissions of the development and their likely contribution to climate change and its consequences, as well as the other impacts of the development. The consideration can be in absolute terms or relative terms..."

Of concern for coal miners, he goes on to say that "In absolute terms, a particular fossil fuel development may itself be a sufficiently large source of GHG emissions that refusal of the development could be seen to make a meaningful contribution to remaining within the carbon budget and achieving the long term temperature goal. In short, refusing larger fossil fuel developments prevents greater increases in GHG emissions than refusing smaller fossil fuel developments."

That is not the situation in this case. His Honour concluded at para 222 that "The visual impacts of the Project, both by themselves and by reason of the consequential adverse effects on existing, approved and likely future uses of land in the vicinity, and the social impacts that the visual impacts will likely cause, justify refusal of consent for the Project." It is clear, however, that His Honour considers that in appropriate circumstances it is open to a consent authority to refuse approval solely or largely on the basis of the GHG emissions. It is not ruled out and the larger the mine, the greater the risk of that occurring.

## Background

Gloucester Resources Limited (GRL) applied for development consent "...to carry out the Rocky Hill Coal Project on 18 December 2012. The Rocky Hill Coal Project is State significant development within the meaning of s 89C(1) now s 4.36(1) of the Environmental Planning and Assessment Act 1979 (EPA Act)." The proposal was for production of 21 million tonnes of ROM coal over a period of 16 years with a maximum annual production of 2 million tonnes and a workforce during construction of 60 FTE and during operation of 110 FTE.

The application was refused by the then Planning Assessment Commission on 14 December 2017 and was appealed on merit by GRL five days later.

The Court refused the appeal, holding (at para 8) that:

- the construction and operation of the mine will:
  - have significant adverse impacts on the visual amenity and rural and scenic character of the valley
  - cause significant adverse social impacts on the community and particular demographic groups in the area
  - cause significant impacts on the existing, approved and likely preferred uses of land in the vicinity of the mine
  - directly result in the emission of greenhouse gases, which will contribute to climate change, and
- the transport and combustion of the coal, and the transportation and combustion of the coal from the mine, will result in the emission of greenhouse gases that will contribute to climate change.

His Honour stated that “*These are direct and indirect impacts of the mine. The costs of this open cut coal mine, exploiting the coal resource at this location in a scenic valley close to town, exceed the benefits of the mine, which are primarily economic and social. Development consent should be refused*”.

## The legal context

Section 4.15 of the EPA Act applies to the determination of the development application for State significant development (s 4.40 of the EPA Act). Section 4.15(1) provides:

*“(1) In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:*

*(a) the provisions of:*

*(i) any environmental planning instrument, and*

*(ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Planning Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and*

*(iii) any development control plan, and*

*(iiia) any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4, and*

*(iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph),*

*that apply to the land to which the development application relates,*

*(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,*

*(c) the suitability of the site for the development,*

*(d) any submissions made in accordance with this Act or the regulations,*

*(e) the public interest.”*

Clause 12 of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (Mining SEPP) requires the consent authority, before determining a development application for mining, to consider the compatibility of the proposed mine with other land uses in the vicinity of the mine requiring (our emphasis):

*“Before determining an application for consent for development for the purposes of mining, petroleum production or extractive industry, the consent authority must:*

*(a) consider:*

*(i) the **existing uses** and approved uses of land in the vicinity of the development, and*

*(ii) whether or not the **development is likely to have a significant impact** on the uses that, in the opinion of the consent authority having regard to land use trends, are **likely to be the preferred uses of land in the vicinity of the development**, and*

*(iii) any **ways in which the development may be incompatible** with any of those **existing**, approved or **likely preferred uses**, and*

*(b) evaluate and compare the respective public benefits of the development and the land uses referred to in paragraph (a) (i) and (ii), and*

*(c) evaluate any measures proposed by the applicant to avoid or minimise any incompatibility, as referred to in paragraph (a) (iii)."*

Clause 14(2) of Mining SEPP provides (our emphasis)

*"Without limiting subclause (1), in determining a development application for development for the purposes of mining, petroleum production or extractive industry, the consent authority **must consider** an assessment of the **greenhouse gas emissions (including downstream emissions) of the development**, and must do so **having regard** to any applicable **State or national policies, programs or guidelines** concerning greenhouse gas emissions."*

## Interpretation of SEPP Mining

There are two aspects of SEPP Mining where the Court has given guidance on interpretation, which are of interest to mine development applications:

1. Clause 12 of SEPP Mining requires an evaluation of compatibility with and respective public benefits of the development compared with "likely preferred uses". His Honour had held that "likely preferred uses" will not include other mining in the vicinity. This will be of interest in areas where there are other existing mines or prospects
2. Clause 12AB of Mining SEPP<sup>1</sup> provides for development standards for cumulative amenity noise levels and air quality impacts at which the consent authority "...*must not refuse an application on the ground that the development does not comply with those standards*" (e.g. 25 micrograms per m3 of PM10).

A distinction is drawn<sup>2</sup> by His Honour between negative social impacts arising from residents' reaction to any level of noise or air quality (or other) impact and the absolute level of the air quality or noise impact. The Court says "*The negative social impacts that are likely to be caused by residents' annoyance reactions to project-related noise are not impacts that are the subject of the development standard in cl 12AB(3) of the Mining SEPP.*"

Accordingly, whilst ensuring that the absolute level of impact is below the threshold level protects against refusal (on that particular basis)—the residents' reaction to a lower level of impact is a social impact, which is not so protected.

## Noteworthy passages for coal mine proponents

The judgment is extensive and we have included below a number of passages that are important for coal mine proponents.

We have not included critical analysis of the Social Impact Assessment and Economic Assessments, which will also be of interest to coal miners.

All emphases are ours.

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<sup>1</sup> Invoking section 4.15(2) & (3) of the EPA Act.

<sup>2</sup> At Paragraph 262.

## Visual impacts—cognitive mapping

174 The visual impact experienced by viewers of the Rocky Hill Coal Project will be more than just the visual impact at any particular viewpoint. **People build a cognitive map of the locality** and the impact of the mine in that locality. Mr Wyatt considered that, to the extent that the distance of the mine was known to individuals, this would form part of their cognitive map of the locality, **even at such times as the mine itself was out of sight**. So too, Mr Moir considered that the impact of a particular development on **a mental map** of the area extends beyond its visibility, and that the development becomes part of the character of the landscape of the setting. Mr Moir further stated that the view of mining projects from a visual perspective is generally negative.

## Cumulative visual impact

214 There will be a **cumulative visual impact** of the mine. People travelling north on the North Coast Railway or The Bucketts Way will view other mines, principally the Stratford Mine complex, before viewing the Rocky Hill Coal Project. Mr Moir opined, and I agree, that **travellers would experience cumulative impacts of mining activities** on these journeys to Gloucester.

215 There will also be a cumulative visual impact from viewing locations where currently the Stratford mine complex is visible and the Rocky Hill Coal Project would become visible. Examples are The Bucketts Way heading towards Gloucester after passing the Mograni lookout and the rural properties off The Bucketts Way, from where both mining sites will be visible.

## Emergence of noise—comparison to background

The Court accepted that irrespective of noise impacts being below the relevant development standards, due to the very low background noise levels and the “new-ness” of the project noise, the noise would “emerge” from the background much more, resulting in social impacts.

238 Mr Gauld [expert for the Second Respondent, Gloucester Groundswell] explained that the impact of an intrusive noise is “highly **dependent on the environment in which it is experienced**” (Joint Report of Noise Experts, [4.25]). Mr Gauld noted that the **background noise level** for the rural residential receivers is much lower than the minimum assumed rating background levels in the Noise Policy for Industry. The measured background noise levels vary between 26dB(A) and 35dB(A) in the day and between 24dB(A) and 30dB(A) in the evening. In contrast, under the Noise Policy for Industry, the minimum assumed rating background levels are 35dB(A) in the day and 30dB(A) in the evening.

259 I find that the predicted noise levels from the Rocky Hill Coal Project **will comply** with the recommended amenity noise levels and project intrusiveness noise levels in the Noise Policy for Industry. The first is the nondiscretionary development standard in cl 12AB(3) of the Mining SEPP. I find that the mine **would not result** in a cumulative amenity noise level **greater than the recommended** amenity noise levels, as determined in accordance with Table 2.2 of the Noise Policy for Industry, for residences that are private dwellings. The second is the accepted criteria for assessing the acceptability of the intrusiveness of the mine noise.

260 Nevertheless, I find that the mine **will still cause residual noise impacts** on residents in the vicinity of the mine. I accept Mr Gauld’s evidence that the mine **noise levels will emerge** from the background noise levels in locations where the measured background noise level is less than 30dB(A). This will make the mine noise levels more noticeable and more likely to impact the residents’ acoustic amenity. These residents, if they are opposed to the mine, are more likely to find this new impact on their acoustic amenity to be unacceptable.

## Social impacts arising from environmental impacts that are below relevant development standards for air quality and noise

Although the project satisfied development standards for both noise and air quality impacts, the Court found that “*negative social impacts caused by residents’ concerns...*” about project-related impacts could militate against approval, drawing a distinction between the noise and dust impacts themselves and the perceptions

of residents of noise and dust—which, in turn, create social impacts. So whilst impacts below the criteria cannot justify refusal, they can cause annoyance, which causes, in turn, social impacts that can be used to justify refusal.

*261...residential receivers with very low background noise levels will not be placated by being told that the mine noise levels comply with the applicable criteria in the Noise Policy for Industry and are therefore considered to be acceptable. The residents will continue to have annoyance reactions to the mine's intrusiveness noise levels and cumulative amenity noise levels. This persistent annoyance is likely to have social impacts. Existing residents may leave Gloucester and new residents may be inhibited from replacing them. Uses dependent on a "clean and green" environment, including a quiet acoustic environment, will be adversely affected, causing further social impacts.*

*263 The noise impacts of the mine, although not a ground in itself to refuse the development application for the Rocky Hill Coal Project, nevertheless do contribute to adverse social impacts that are a ground for refusal.*

*268...the residents' concerns about the mine's potential adverse effects on air quality, and the concomitant threat to their health and the health of their family, may have social impacts. Concerned residents may leave Gloucester and not be replaced by people who are put off by the perceived risk of deteriorated air quality and effects on their health. Uses that depend on Gloucester having, and being seen to have, a clean and green environment will also be adversely affected. These lead to negative social impacts, which are discussed in the next section.*

*269 The negative social impacts caused by residents' concerns about the project-related air quality impacts, including the perceived threat to their health and the health of their families, are not impacts that are the subject of the cumulative air quality level development standard in cl 12AB(4) of the Mining SEPP. That development standard does not prevent a consent authority from refusing consent on grounds relating to, or imposing conditions to regulate, project-related air quality impacts that are not the subject of the development standard or social impacts resulting from project-related air quality impacts.*

*354...Air, noise and light pollution can directly affect people's health and wellbeing, if the pollution is sufficient, but it can also affect people's perception of their health and wellbeing, such as by increasing stress and anxiety, which can affect their mental health. This indirect effect on people's mental health is significant in this case. As I have found earlier, the Project may well comply with the applicable criteria for air quality and noise, but people perceive that the Project will have a negative impact on their health and wellbeing.*

*367 I find that the Project is likely to affect local residents' health and wellbeing...The particulate, noise and light pollution from the Project may well comply with the applicable regulatory criteria, but will still be perceptible by local residents. The residents are likely to have a high level of concern about the particulate, noise and light pollution from the Project. This concern is likely to raise stress and anxiety, potentially affecting mental health and physical health. These are social impacts in themselves. They might also lead to other social impacts. People who value living, working and playing in a clean and green environment may leave the Gloucester area, adversely affecting the local community and economy.*

*368 I find that the consequence of the potential social impacts on health and wellbeing is "major" and the likelihood of that social impact is "likely", resulting in an "extreme" social risk rating.*

## Distributive inequity

The Court tested the Project against concepts of intra-generational equity and inter-generational equity, criticising the proponent's Social Impact Assessment for failing to address distributive equity. The Court found that there is inequity in the distribution of the environmental, social and economic burdens and benefits of the Project within the current generation [para 414] and also "...inequity in the distribution between current and future generations..." because any social and economic burdens will endure long after the project ends.

*398...Distributive justice concerns the just distribution of environmental benefits and environmental burdens of economic activity. Distributive justice is promoted by giving substantive rights to members of the community of justice to share in environmental benefits (such as clean air, water and land, a quiet acoustic environment, scenic landscapes and a healthy ecology) and to prevent, mitigate, remediate or be compensated for environmental burdens (such as air, water, land and noise*



*pollution and loss of amenity, scenic landscapes, biological diversity or ecological integrity). Issues of distributive justice not only apply within generations (intra-generational equity) but also extend across generations (inter-generational equity).*

## The impacts of the Mine on climate change

In 2007, Pain J in Gray determined that, there was a “...sufficiently proximate link between the mining of a very substantial reserve of thermal coal in NSW, the only purpose of which is for use as fuel in power stations, and the emission of GHG which contribute to climate change/global warming, which is impacting now and likely to continue to do so on the Australian and consequently NSW environment, to require assessment of that GHG contribution of the coal when burnt in an environmental assessment...”

On the question of what weight should be given to such matters by the decision-maker, Pain J noted that Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, stated at 41 that “...in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power.”

In this case the Court has, in the exercise of the discretion to refuse consent, applied a weight to the Scope 3 GHGs that is, arguably, greater than has previously been applied. This is primarily because of the NSW Government’s commitments and the Australian Government’s obligations under the Paris Agreement.

The Court heard (and accepted) extensive evidence about the impacts of climate change (past, present and future) and heard submissions that refusal of the application was justified on a carbon budget approach “...regardless of the fact that the total GHG emissions of the Project would be a small fraction of the total global emissions.” (see para 450).

The Court found that Scope 3 emissions from the Project are required to be taken into consideration in determining the application because:

1. clause 14(2) of Mining SEPP expressly requires it (and extends to “any applicable State or national policies, programs or guidelines concerning greenhouse gas emissions”), and
2. s 4.15(1)(e) of the EPA Act requires that the public interest, which in turn incorporates principles of Ecologically Sustainable Development, which in turn picks up the precautionary principle and principles of intergenerational equity must be considered.

The following passages from the judgment are instructive:

*515 The direct and indirect GHG emissions of the Rocky Hill Coal Project will contribute cumulatively to the global total GHG emissions. In aggregate, the Scope 1, 2 and 3 emissions over the life of the Project will be at least 37.8Mt CO<sub>2</sub>-e, a sizeable individual source of GHG emissions. It matters not that this aggregate of the Project’s GHG emissions may represent a small fraction of the global total of GHG emissions. The global problem of climate change needs to be addressed by multiple local actions to mitigate emissions by sources and remove GHGs by sinks. As Professor Steffen pointed out, “global greenhouse gas emissions are made up of millions, and probably hundreds of millions, of individual emissions around the globe. All emissions are important because cumulatively they constitute the global total of greenhouse gas emissions, which are destabilising the global climate system at a rapid rate. Just as many emitters are contributing to the problem, so many emission reduction activities are required to solve the problem” (Steffen report, [57]).*

526 The approval of the Project (which will be a new source of GHG emissions) is also likely to run counter to the actions that are required to achieve peaking of global GHG emissions as soon as possible and to undertake rapid reductions thereafter in order to achieve net zero emissions (a balance between anthropogenic emissions by sources and removals by sinks) in the second half of this century. This is the globally agreed goal of the Paris Agreement (in Article 4(1)). The NSW government has endorsed the Paris Agreement and set itself the goal of achieving net zero emissions by 2050. It is true that the Paris Agreement, Australia's NDC of reducing GHG emissions in Australia by 26 to 28% below 2005 levels by 2030 or NSW's Climate Change Policy Framework do not prescribe the mechanisms by which these reductions in GHG emissions to achieve zero net emissions by 2050 are to occur. In particular, there is no proscription on approval of new sources of GHG emissions, such as new coal mines.

527 Nevertheless, the exploitation and burning of a new fossil fuel reserve, which will increase GHG emissions, cannot assist in achieving the rapid and deep reductions in GHG emissions that are necessary in order to achieve "a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century" (Article 4(1) of the Paris Agreement) or the long term temperature goal of limiting the increase in global average temperature to between 1.5°C and 2°C above pre-industrial levels (Article 2 of the Paris Agreement). As Professor Steffen explained, achieving these goals implies phasing out fossil fuel use within that time frame.

The Court relied upon these findings in refusing the application. However, these matters were not the only basis of refusal and the court noted that the application could have been refused entirely based upon its social impacts.

The Court rejected the following arguments against reliance on Scope 3 GHGs in refusal:

- The Project would not necessarily cause the carbon budget to be exceeded there may be reductions in GHG emissions from other sources.

**Rejected because** it is "*speculative and hypothetical*" and there is no evidence of any specific action to net out the GHG emissions of the Project [opening the prospect of an offsets arrangement being incorporated into applications].

- Emissions reductions must be made "*where they count most*" and refusing the application would not achieve that.

**Rejected because** such consideration is "...*unrelated to the development that is the subject of the development application...*" (para 532).

- As a result of market substitution and "carbon leakage" the coal will come from somewhere else in any event and (carbon leakage) whereby GHG emissions could actually increase because the coal used would be poorer quality and extracted from environmentally inferior mines.

**Rejected because** the Court found that "*There is no certainty that there will be market substitution by new coal mines in India or Indonesia*" and the risk of "carbon leakage" was not established on the evidence before the Court (para 536 – 538), noting that these arguments had been rejected in a number of international cases noting the logical flaw in the argument as follows:

545...*If a development will cause an environmental impact that is found to be unacceptable, the environmental impact does not become acceptable because a hypothetical and uncertain alternative development might also cause the same unacceptable environmental impact. The environmental impact remains unacceptable regardless of where it is caused. The potential for a hypothetical but uncertain alternative development to cause the same unacceptable environmental impact is not a reason to approve a definite development that will certainly cause the unacceptable environmental impacts. In this case, the potential that if the Project were not to be approved and therefore not cause the unacceptable GHG emissions and climate*



*change impacts, some other coal mine would do so, is not a reason for approving the Project and its unacceptable GHG emissions and climate change impacts.*

- The GHG emissions are justifiable because the coking coal produced by the project will be used for steel making from iron ore for which there is no substitute at present.

**Rejected because** the Court found that *“The current and likely future demand for coking coal for use in steel production can be met, however, by other coking coal mines, both existing and approved, in Australia”* (para 548) and also that *“On this basis, it is not necessary to approve the Project in order to maintain steel production worldwide”* (para 549).

## The decision

The reasons for rejecting the appeal are set out in para 553 - 555 of the judgment:

*553 I consider the better approach [to how to make the decision] is to evaluate the merits of the particular fossil fuel development ...Should this fossil fuel development be approved or refused? Answering this question involves consideration of the GHG emissions of the development and their likely contribution to climate change and its consequences, as well as the other impacts of the development. The consideration can be in absolute terms or relative terms.*

*554 In absolute terms, a particular fossil fuel development may itself be a sufficiently large source of GHG emissions that refusal of the development could be seen to make a meaningful contribution to remaining within the carbon budget and achieving the long term temperature goal. In short, refusing larger fossil fuel developments prevents greater increases in GHG emissions than refusing smaller fossil fuel developments.*

*555 In relative terms, similar size fossil fuel developments, with similar GHG emissions, may have different environmental, social and economic impacts. Other things being equal, it would be rational to refuse fossil fuel developments with greater environmental, social and economic impacts than fossil fuel developments with lesser environmental, social and economic impacts. To do so not only achieves the goal of not increasing GHG emissions by source, but also achieves the collateral benefit of preventing those greater environmental, social and economic impacts.*

Ultimately, the refusal of the application did not turn on the GHG emissions impacts, the Court found *“...the Project will have significant and unacceptable planning, visual and social impacts, which cannot be satisfactorily mitigated. The Project should be refused for these reasons alone.”* The GHG emissions and their impacts were stated to merely *“...add a further reason for refusal.”*

Having found these impacts unacceptable, the Court:

- applied the “intuitive synthesis of the relevant factors” qualitatively
- balanced the public interest in approving or disapproving the Project, and
- considered the competing economic and other benefits and the potential negative impacts.

It ultimately found that *“...the negative impacts of the Project, including the planning impacts on the existing, approved and likely preferred land uses, the visual impacts, the amenity impacts of noise and dust that cause social impacts, other social impacts, and climate change impacts, outweigh the economic and other public benefits of the Project.”*

Nevertheless, that has not stopped those who would oppose the coal mining industry from heralding this as a significant turning point in approvals for coal in NSW. On 11 February 2019, the *Sydney Morning Herald* reported David Morris, CEO of the NSW Environmental Defenders Office, as saying “In one sense this case says the starting point for a new fossil fuel project is “no” because of climate change. A fossil fuel development may argue its unique circumstances justify approval, but it must do so in light of climate change science telling us that there are already sufficient fossil fuel projects approved to exceed the target limit agreed in Paris of a 1.5C rise on the pre-industrial global average temperature.”

We don't think that this judgment has taken matters quite that far, but it may make obtaining approval required for new coal mines more difficult and complex.