***Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7**
What will and won't change as a result of this decision

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On 8 February 2019, Preston CJ handed down his decision in *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, refusing consent to the proposed Rocky Hill Coal Mine in Gloucester. This was a planning appeal decision deciding to refuse consent on the merits. It was not, like many other leading climate change decisions, a judicial review decision.

The Court has seldom been in a position to decide whether or not to approve a new coal mine.[1] In *Gloucester Resources*, the matter was only before the Court because it was refused by the Planning Assessment Commission (**PAC**), and the proponent appealed against that decision to the Land and Environment Court (**the Court**). This is something that seems to have been overlooked in the media coverage of the case. The Court was not standing in the way of State-sanctioned coal mining development, but rather upholding the decision previously made by the PAC as delegate for the Minister for Planning to refuse consent to this particular coal mine.

Coal mines (other than very small ones) are designated development[2], and so in principle both proponents and objectors have a right of appeal to the Court.[3] However, merits appeal rights are lost if the decision is made by the Independent Planning Commission (**IPC**) (the successor to the PAC) after a public hearing.[4] Since the IPC is consent authority for all reasonably-sized coal mines attracting more than 25 objections,[5] and the IPC usually does hold public hearings, appeals to the Court are usually not available. A similar regime has been in place since the enactment of Part 3A of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) in the early 2000's.

Gloucester Resources was an appeal brought by the applicant for consent, in which the only necessary parties were the applicant and the Minister for Planning. However an objector group, Gloucester Groundswell, was joined at its own request[6] and participated as a full

[1] There has been at least one case in which the Court refused to allow an extension to an existing approved coal mine: *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure* [2013] NSWLEC 48; (2013) 194 LGERA 347. That decision was upheld on appeal in *Warkworth Mining Limited v Bulga Milbrodale Progress Association* [2014] NSWCA 105. In another case the Court allowed an extension of a coal mine: see *Ironstone Community Action Group Inc v Minister for Planning* [2011] NSWLEC 195.
[2] *The Environmental Planning and Assessment Regulation 2000*, Schedule 3, Item 11.
[3] *Environmental Planning and Assessment Act 1979* (**EP&A Act**) ss.8.8, 8.10(2).
[4] EP&A Act s.8.6(3).
[5] *State Environmental Planning Policy (State and Regional Development) 2011*, cl 8A.
[6] Pursuant to EP&A Act s.8.15(2).

party, represented by Robert White of Counsel and the Environmental Defender's Office. The participation of this objector group allowed the climate change arguments to be presented and adjudicated upon in a way which would not have occurred if the Minister for Planning and the mining company had been the only parties.

Although it is the climate change aspects of the decision which have attracted the most attention, and which are the focus of this talk, it is important to note that Preston CJ did not refuse consent on the grounds of climate change alone. The decision to refuse was made based on a combination of climate change impacts, visual impacts, amenity impacts and social and economic impacts.[7] Gloucester is an area which is highly valued for its scenic qualities, which are critical to the local tourist-based economy. Climate change impacts aside, it was probably always going to be an uphill battle for the proponent to gain approval for a coal mine in this location.

The Rocky Hill Coal Mine, proposed by Gloucester Resources Limited (**GRL**) was to be a medium-sized coal mine, producing 2 million tonnes per annum (**mtpa**) of coking coal, that is, coal used in steel production, rather than power generation.[8]

The consent authority was specifically obliged to consider an assessment of downstream greenhouse gas (**GHG**) emissions of the proposal under cl 14 of *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (**the Mining SEPP**). "Downstream" emissions in this context means the emissions caused by burning the coal produced by the mine by end users. The estimated downstream emissions of the Rocky Hill Coal Mine were approximately 36 mtpa.[9]

The nature of the obligation imposed by cl 14 of the Mining SEPP was considered in a recent decision of Sheahan J in *Wollar Progress Association v Wilpinjong Coal Pty Ltd* [2018] NSWLEC 92. It is also being considered in proceedings currently reserved before Moore J, *Australian Coal Alliance v Wyong Coal.*

In *Gloucester Resources,* the objector group, Gloucester Groundswell, called evidence from Professor Steffen, an earth systems scientist at the Australian National University. He gave evidence of the likely impacts of climate change, and expressed the opinion that in order to limit global warming to 2 degrees to meet the targets of the Paris climate accord, worldwide GHG emissions would need to peak by 2020, and thereafter decline rapidly to net zero emissions. In the Professor's view, this goal could not be achieved while continuing to develop new fossil fuel projects. His Report was quoted at paragraphs [446]-[447] of the judgment as follows (emphasis from the original):

[7] *Gloucester Resources* at [699].
[8] *Gloucester Resources* at [11].
[9] *Gloucester Resources* at [428].

> *Most of the world's existing fossil fuel reserves – coal, oil and gas – must be left in the ground, unburned, if the Paris accord climate targets are to be met. I say that because the exploitation, and burning, of fossil fuel reserves leads to an increase in CO2 emissions when meeting the Paris accord climate targets requires rapid and deep decrease in CO2 emissions….*
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> *An obvious conclusion that follows from this fact is that: No **new** fossil fuel development is consistent with meeting the Paris accord climate targets. That is, paragraphs 47-50 above demonstrate clearly that to meet the Paris accord, emissions must be reduced rapidly and deeply (cf Figure 3 below), and to do this requires the rapid phase-out of **existing** fossil fuel mines/ wells. It is an obvious conclusion that no new fossil fuel developments can therefore be allowed.*

GRL's arguments against refusal on climate change grounds ran along familiar lines. Its expert Dr Fisher did not dispute that climate change was real, or that global GHG must be reduced rapidly in order to limit global temperature rise to 2 degrees. However, he said that this did not require an embargo on new fossil fuel development, as the Paris accord left it up to the signatories how they would achieve their targets. He also pointed out that each countries' emissions targets were based on the amount of carbon that they emitted directly, not indirectly from coal sold to consumers in other countries, and that the choice of emissions reduction options should be guided by principles of economic efficiency.[10]

Preston CJ accepted the arguments put forward by Gloucester Groundswell and the evidence of Professor Steffen, and largely rejected those of GRL and Dr Fisher.

First, his Honour confirmed that downstream emissions were a relevant factor to be considered in evaluating the environmental impacts of the proposal under s.4.15 of the EP&A Act. His Honour did not accept that the international convention of accounting for emissions at the point of combustion prevented them from being a factor to be taken into account by a consent authority determining an application for a coal mine under Part 4 of the EP&A Act.[11]

That the impacts of downstream GHG emissions formed part of the indirect impacts of coal mine development and were a relevant factor to be taken into consideration in had already been well established in several decisions in the land and environment Court.

An early example of this was *Greenpeace v Redbank Power Co* (1994) 86 LGERA 143, an application for approval for a small power station which would generate electricity from the tailings of two existing coal mines. Greenpeace argued that the application should be refused on the grounds of is climate change impacts. There was discussion of the then state of international agreement and national policies regarding GHG emissions, and Pearlman CJ found that this policy did not mandate the cessation of any particular kind of development.

[10] *Gloucester Resources* at [451]-[459].
[11] *Gloucester Resources* at [487]-[492].

The precautionary principle was applied to find that climate change impacts should be taken into account notwithstanding that there was scientific uncertainty about how much the emissions of this one small power station would contribute to global emissions. Nevertheless, weighing the climate change risk against the environmental benefits of reusing waste coalmine tailings, her Honour decided to approve the development.[12]

Perhaps the most famous climate change case was *Gray v Minister* [2006] NSWLEC 720; (2006) 152 LGERA 258. In that case, the applicant sought judicial review of a decision of the Director-General of the Department of planning to place on public exhibition an environmental assessment for the Anvil Hill Coal mine which failed to take into account downstream emissions. The applicant argued that this failure to take into account downstream emissions demonstrated a failure to take into account the principles of ecologically sustainable development (**ESD**), which were referred to in the objects of the EP&A Act, in particular the precautionary principle and the principle of intergenerational equity. Pain J found that downstream emissions should be regarded as an impact of the development, notwithstanding that they were to be emitted by third parties, mostly in other countries, and notwithstanding that by international convention countries were only responsible to account for their direct, not indirect emissions. The exhibition of the environmental assessment was declared invalid and there was no appeal against this decision. Instead, the proponent rectified the omission by exhibiting the required assessment, and the coal mine was approved soon after.

Gray was distinguished by Jagot J in *Drake-Brockman v Minister for Planning* [2007] NSWLEC 490. Jagot J, while willing to assume that the principles of ESD were a mandatory relevant consideration, found that they operated and a high level of generality, and did not mandate the assessment of any particular impact, such as the impacts of greenhouse gas emissions.[13]

The role of climate change considerations in Part 4 decisions was again highlighted in *Walker v Minister for Planning* (2007) 157 LGERA 124 where Biscoe J at [165] found that ESD itself was not a mandatory relevant consideration in making all decisions under Part 3A, but instead found that there was a mandatory obligation to consider ESD arising from the obligation to consider the public interest under then cl 8B of the *Environmental Planning and Assessment Regulation 2000,* and that in the circumstances of that case a failure to consider climate-change related flood risk was evidence of a failure to consider the principles of ESD.

The decision of Biscoe J in *Walker*, along with aspects of the decision in *Gray* were overturned by the Court of Appeal in *Minister for Planning v Walker* (2008) 161 LGERA 423. There Hodgson JA (Campbell and Bell JJA agreeing) held that decision-makers under Part 3A were not required to consider the principles of ESD *per se*, but that they were obliged to

[12] At 155.
[13] At [132].

consider the public interest, and that a time may come (but had not yet arrived) when the principles of ESD may come to be seen as so plainly an aspect of the public interest that a failure to consider them could be equated to a failure to consider the principles of ESD.[14] Significantly, Hodgson JA agreed with the findings of Biscoe J in that, if it had been necessary to consider the principles of ESD, this would have necessarily involved a consideration of climate-change related flood risk.[15]

The practical effect of the decision in *Minister for Planning v Walker* changed in 2012 when Pepper J in *Barrington-Gloucester-Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure* (2012) 194 LGERA 113 decided that the principles of ESD had by that time become so plainly an aspect of the public interest that they were themselves a mandatory relevant consideration.[16] Therefore, it seems well established now that the principles of ESD are a mandatory relevant consideration, and that in some cases a failure to consider climate change risks may amount to a failure to consider ESD. Although *Barrington-Gloucester-Stroud* and its predecessors were Part 3A decisions, where s.4.15 did not apply, if the principles of ESD are mandatory relevant considerations under Part 3A by virtue of an oblique reference to the public interest in the regulations, then they must be even more obviously so under s.4.15 which expressly instructs the decision-maker to have regard to the public interest.

Of course Preston CJ in *Gloucester Resources* did not need to find that the impacts of downstream GHG emissions were a mandatory relevant consideration, only that they were a permissible consideration, to have regard to them as consent authority in a merits appeal. That could be established also by the line of authority dealing with indirect impacts. The leading authority in this area is the Full Federal Court decision in *Minister for Environment and Heritage v Queensland Conservation Council* (2004) 139 FCR 24. Preston CJ also cited other local and international cases in which downstream emissions had been considered in either a judicial review or merits context at [503]-[513].

The question of the extent of the obligation to consider indirect impacts caused by downstream GHG emissions is closely related to the question of the proportionate contribution of the project's emissions to GHG emissions. Consent authorities today still sometimes reason when discussing the GHG emissions of a particular project, that the project's impacts on climate change are not something that they can realistically measure or factor into their decision, because any one project will only ever contribute a tiny fraction to the world's overall emissions. However, that view has been out of favour in the Land and Environment Court since *Redbank.*

[14] At [56].
[15] At [59]-[60].
[16] At [169]-[170].

Preston CJ did not find that the proportionately small contribution of the project to global GHG emissions was a reason for discounting the impacts of downstream GHG emissions from the proposal. Instead, his Honour adopted the evidence of Professor Steffen, that "all emissions are important because cumulatively they constitute the global total of greenhouse emissions, which are destabilising the 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".[17]

Second, his Honour accepted Professor Steffen's evidence that the approval of new fossil fuel emissions was inimical to reaching the Paris accord target of net zero emissions by the second half of the 21st Century.[18] His Honour did not accept GRL's arguments to the contrary that there was no incompatibility, because of the possibility of the emissions being abated in ways unrelated to the project. This part of the judgment is interesting because it upends a common justification for approving coal mine developments at a state level, that the control of GHG emissions is a matter for policy-makers not approval authorities. In doing so, His Honour focused squarely on the Court's role as consent authority, and its obligations under s.4.15.[19]

> *A consent authority, in determining an application for consent for a coal mine, is not formulating policy as to how best to make emissions reductions to achieve the global abatement task. The consent authority's task is to determine the particular development application and determine whether to grant or refuse consent to the particular development the subject of that development application. Where the development will result in GHG emissions, the consent authority must determine the acceptability of those emissions and the likely impacts on the climate system, the environment and people. The consent authority cannot achieve this task by speculating on how to achieve "meaningful emissions reductions from large sources where it is cost-effective and alternative technologies can be brought to bear" (Fisher Report [13]). Such emissions reductions from other sources are unrelated to the development that is the subject of the development application that the consent authority is required to determine.*
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> *If a consent authority considers that the GHG emissions of the development for which consent is sought, and the impacts of those emissions, are unacceptable, and as a consequence determines that the development should be refused… it would not be rational to nevertheless approve the development because greater emissions reductions could be achieved from other sources at lower cost by other persons or bodies….*

Third, Preston CJ rejected the argument of "market substitution"; that if this mine was not approved the demand for coal would need to be met by other sources, and so the same

[17] *Gloucester Resources* at [515].
[18] *Gloucester Resources* at [527].
[19] *Gloucester Resources* at [532]ff.

amount of GHG emissions would be produced at the end of the day. This is another justification commonly used by state approval bodies for putting to one side the climate change impacts of new coal mine approvals. They may need to re-think this justification based on the following ([545]):

> *There is… a logical flaw in the market substitution assumption. 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….*

Finally, his Honour resolved to refuse consent, saying [699]:

> *In short, an open cut coal mine in this part of the Gloucester valley would be in the wrong place at the wrong time. Wrong place because an open cut coal mine in this scenic and cultural landscape, proximate to many people's homes and farms, will cause significant planning, amenity, visual and social impacts. Wrong time because the GHG emissions of the coal mine and its coal product will increase global total concentrations of GHGs at 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. The Project should be refused.*

The decision in *Gloucester Resources* will not prevent the IPC from approving fossil fuel developments in the future. It is to be expected that most such decisions will be made without leaving the door open to merits appeal rights to objectors, or indeed the proponent. Even if appeals do occur, the reasons of the Chief Judge in *Gloucester Resources* only constitute his Honour's resolution of the issues in this specific case. They do not set a legal precedent, and the IPC or other officers of the Court appointed to hear merits appeals may take a different view of the acceptability of climate change impacts based on the evidence which is presented to them.

Nevertheless, the views expressed by Preston CJ in *Gloucester Resources* regarding appropriate ways of taking climate change impacts into account when assessing fossil fuel developments are likely to be highly influential. In a planning system which values consistent decision-making, other decision-makers, both commissioners of the Land and Environment Court and the IPC are likely to apply similar principles when they make decisions about similar issues. Typically, merits appeals in the Land and Environment Court are decided by Commissioners, but the Chief Judge has discretion to appoint a judge to decide a merits case, and his Honour appointed himself to decide a number of complex cases which have provided a framework for merits-based decision-making. An early example of this was *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 a case about a proposed mobile phone tower which dealt with the application of the precautionary principle in making merits decisions.

More recently in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure* [2013] NSWLEC 48 Preston CJ applied what he called a poly-centric decision-making approach to weighing the costs and benefits of a proposed coal mine expansion. The proponent appealed that decision in *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* [2014] NSWCA 105, arguing that his Honour had erred in taking a polycentric approach to reject the evidence of its economic experts. The Court rejected this argument, finding that it was not apparent how the adoption of a particular approach to the exercise of his Honour's discretion in weighing expert evidence could be described as an error of law.[20]

His Honour's carefully reasoned rejection of the three main arguments usually put forward by the proponents of coal mines will make it more difficult for consent authorities in the future to brush aside the issue of downstream emissions with a few of formulaic sentences saying that climate change is an issue for policy-makers not consent authorities, that the impacts of any one coal mine are negligible relative to global emissions, and that refusal of one coal mine development in NSW will simply result in more coal mines being built elsewhere. They will have to acknowledge that the consent authority bears a real responsibility to decide whether or not the downstream GHG emissions of each development are acceptable, and if not, whether this should lead to a decision to refuse consent.

[20] At [173].