

CASE NOTE

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

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1. BACKGROUND

On 8 February 2019, the Chief Judge of the NSW Land and Environment Court (NSWLEC) handed down this decision of a case heard in August, November and December of 2018. The case was an appeal against a decision by the NSW Minister for Planning (through the then Planning Assessment Commission, now the Independent Planning Commission) to refuse the Appellant's application to build and operate a coal mine near Rocky Hill in the Gloucester Valley. Preston CJ dismissed the appeal, summarising the reasons as follows:

The mine will have significant adverse impacts on the visual amenity and rural and scenic character of the valley, significant adverse social impacts on the community and particular demographic groups in the area, and significant impacts on the existing, approved and likely preferred uses of land in the vicinity of the mine.

The construction and operation of the mine, and the transportation and combustion of the coal from the mine, will result in the emission of greenhouse gases, which will contribute to climate change.

*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.*¹

1.1 The proposal

The Appellant, Gloucester Resources Ltd, had made a development application to the Minister for Planning for consent to carry out the coal mine proposal, under the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act).² The development included open-cut pits, a road and an "amenity barrier" intended to mitigate noise and visual impacts.³ The Appellant's proposed operations included clearing of native vegetation, removal of soil and "overburden" (i.e. rock materials, creating the open-cut pit), recovery of a total of around 21 million tonnes of coal, and finally progressive rehabilitation attempting to create a landform resembling the original landscape.⁴ The proposed site of the mine was in the Gloucester Valley, a rural-residential area.⁵

When the proposal was published for public comment, 2,570 submissions were received (2,308 in opposition and 261 in support).⁶

¹ At [8] (line breaks and emphasis added).

² At [9].

³ At [14].

⁴ At [16].

⁵ At [1]-[6].

⁶ At [115].

1.2 *The proceedings*

The case was a merits review proceeding in which the NSWLEC “stands in the shoes” of the Minister for Planning as the original decision-maker in relation to the application. Its decision stands as though it was made by the Minister.

2. THE DECISION

Preston CJ undertook a comprehensive review of the positive and negative impacts of the mine, using a cost-benefit analysis to determine that the approval should be refused.

In concluding the decision, Preston CJ held that:

*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.*⁷

1.3 *Cost-benefit analysis*

In considering the local effects of the mine, Preston CJ found that economic benefits were not established⁸ while public benefits would be adversely affected.⁹ Preston CJ also undertook a cost-benefit analysis of the mine, concluding that it would not be in the public interest, particularly with regard to distributive inequity of any costs and benefits.¹⁰

In considering the likely economic benefits of the mine, Preston CJ used expert evidence of “lower bound estimates”, representing ‘a reasonable but pessimistic view of future prices’¹¹ which would ‘reflect the risk preferences of the community’.¹² The estimated tax benefit to the State of NSW was therefore considered to be under \$17.5 million, and more likely around \$6.2 million,¹³ with Preston CJ citing examples of at least two mining companies in the State paying no company income tax at all.¹⁴ In relation to indirect economic benefits of the mine through employment, Preston CJ found that these would be small, around \$4.3 million.¹⁵ Preston CJ similarly found that indirect economic benefits of the mine to local suppliers would be small, around \$2.86 million, and could be nil.¹⁶ Overall, Preston CJ found that economic benefits were ‘uncertain and in any event substantially overstated’ by the Applicant.¹⁷

Conversely, in relation to indirect environmental and social costs, Preston CJ held that these were difficult to quantify but a figure of \$9.9 million¹⁸ provided as evidence in the case was likely an underestimate.¹⁹

With these findings, Preston CJ concluded that:

*the negative impacts of the [mine], 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.*²⁰

⁷ At [699].

⁸ At [681].

⁹ At [685].

¹⁰ At [669].

¹¹ At [572], [580].

¹² At [576], [580].

¹³ At [586].

¹⁴ At [585]-[586].

¹⁵ At [605].

¹⁶ At [636].

¹⁷ At [664].

¹⁸ At [639].

¹⁹ At [663].

²⁰ At [688].

1.4 Impacts

In relation to **planning and land use** considerations, the area was characterised as primarily agricultural use, with a trend towards more variety in rural activities in the “boutique agricultural sector”²¹ driven by “tree changers”²² moving to the area. Preston CJ then found that the mining proposal would be incompatible with existing and likely land uses.²³

In relation to **visual amenity**, Preston CJ noted the high aesthetic values and significance of the valley “viewshed” to the local community,²⁴ as well as Indigenous connection to country.²⁵ The visual impact of the mine, being visible from many private and public viewpoints,²⁶ forming part of the “cognitive map” of the locality,²⁷ contrasting with the existing landscape²⁸ and likely permanently reducing the vegetation,²⁹ was therefore held to be high.³⁰

In relation to **acoustic amenity**, Preston CJ held that there would be only residual noise impacts, although there was overall compliance with noise limits.³¹ However, Preston CJ highlighted that it would be the first time mining noise was audible in the area³² and the likely “persistent annoyance” would in turn cause adverse social impacts.³³

In relation to **air quality**, Preston CJ found that the dust impacts would likely be compliant with the relevant standard.³⁴ However, the perceptions of the area’s environment and of the mine’s risks to air quality were held to contribute to adverse social impacts.³⁵

Preston CJ held that the significant negative **social impacts** outweighed any positive social benefits to the local economy and employment.³⁶ In addition to the air quality and noise impacts outlined above, the negative social impacts included:

- way of life (temporal employment benefits with the life of the mine, outweighed by long-term detrimental impacts to local tourism businesses³⁷);
- community (tension arising from community division over the mine³⁸ exacerbated by an influx of mining workers adversely affecting the cultural and social composition of the rural town,³⁹ as well as disruption to locals’ connection to place and sense of belonging);⁴⁰
- infrastructure/services (increased demand on social infrastructure such as childcare, housing and healthcare, as well as on roads and traffic);⁴¹
- culture (including both impacting on and failing to adequately acknowledge or consult on Indigenous cultural heritage,⁴² and diminishing the scenic quality of the area over time⁴³ – both of which could not be addressed by mere rehabilitation of the land after mining);⁴⁴

²¹ At [73].

²² At [75].

²³ At [84]-[86].

²⁴ At [90]-[119].

²⁵ At [120]-[123].

²⁶ At [163]-[173].

²⁷ At [174].

²⁸ At [175]-[188].

²⁹ At [189]-[199].

³⁰ At [217]-[222].

³¹ At [259]-[260].

³² At [224].

³³ At [261]-[263].

³⁴ At [264]-[267].

³⁵ At [268]-[269].

³⁶ At [421].

³⁷ At [286].

³⁸ At [289]-[293].

³⁹ At [303]-[309].

⁴⁰ At [310]-[320].

⁴¹ At [327]-[339].

⁴² At [342]-[349].

⁴³ At [350].

⁴⁴ At [351].

- health and wellbeing (both the perceived and proven impacts on air quality, noise levels and night lighting, with the associated social impacts of concerned residents leaving the community on these bases);⁴⁵
- surroundings (high impacts on the aesthetic value and amenity of the natural environment);⁴⁶
- personal and property rights (acquisition of properties by the proponent and a concern that those properties not sold now would be “stranded assets” after the mine is developed);⁴⁷
- decision-making (a reported sense of powerlessness and helplessness in relation to the mine’s development within the NSW planning system, although Preston CJ acknowledged that in relation to this mine the successful campaign by residents did not suggest that the project was the cause of this impact);⁴⁸
- fears and aspirations (the claimed aspirations for the local economy/employment not being established, while the fears of environmental and social impacts of the mine appeared much more likely);⁴⁹ and
- distributive inequity (along with intergenerational inequity,⁵⁰ the long-term negative impacts of the mine would affect the community, some groups such as Aboriginal people and lower socio-economic groups more than others, with short-term economic benefits accruing mainly to the proponent).⁵¹

1.5 *Climate change*

In relation to climate change, Preston CJ set out the mine’s direct and indirect greenhouse gas emissions (GHGs),⁵² including Scope 3 emissions,⁵³ acknowledging that ‘emission of GHGs impacts the environment’.⁵⁴

Preston CJ confirmed that the ESD principles require consideration of climate change impacts and made the following key findings in relation to climate change:

- increased greenhouse gas (GHG) concentrations in the atmosphere have already affected, and will continue to affect, the climate system;
- a rapid and deep decrease in GHG emissions is urgently needed in order to meet generally agreed climate targets;
- approval of the project, which will increase GHG emissions, is likely to run counter to actions that are required to achieve rapid reductions in GHG emissions necessary for net zero emissions and limiting temperature rise to 1.5-2°C;⁵⁵
- Scope 3 and downstream GHG emissions are relevant considerations in the determination and assessment of proposals;
- the mine’s direct and indirect GHG emissions will contribute cumulatively to global GHGe and climate impacts;
- mitigation and offset actions must be specific and certain to justify approval of projects with GHG emissions; and
- assumptions of market substitution and carbon leakage are unproven.

Preston CJ highlights the need for every proposal to be evaluated on its individual merits which includes the proposal’s GHGe, its contribution to climate change and impacts on people and the environment on a local and global scale.

⁴⁵ At [354]-[368].

⁴⁶ At [369]-[379].

⁴⁷ At [380]-[388].

⁴⁸ At [389]-[392].

⁴⁹ At [393]-[397].

⁵⁰ At [415]-[416].

⁵¹ At [398]-[414].

⁵² At [424]-[427]. See also at [486]-[487], where Preston CJ specifically holds that Scope 1-3 emissions should be considered.

⁵³ At [428].

⁵⁴ At [431].

⁵⁵ At [527].

1.5.1. Carbon budgets

Canvassing the scientific consensus on climate change (primarily through UN/IPCC material, as well as expert evidence from Prof. Will Steffen),⁵⁶ Preston CJ accepted the importance of the global carbon budget to find that the cumulative effect of emissions should be considered in assessing the mine for approval.⁵⁷ Preston CJ explicitly held that:

*There is a causal link between the [mine's] cumulative GHG emissions and climate change and its consequences. The [mine's] cumulative GHG emissions will contribute to the global total of GHG concentrations in the atmosphere. The global total of GHG concentrations will affect the climate system and cause climate change impacts. The [mine's] cumulative GHG emissions are therefore likely to contribute to the future changes to the climate system and the impacts of climate change.*⁵⁸

Preston CJ applied the concept of carbon budgets and zero net emissions to hold that approving the mine would 'run counter to the actions that are required ... to achieve net zero emissions (a balance between anthropogenic emissions by sources and removals by sinks) in the second half of this century'.⁵⁹

1.5.2. Dismissal of standard arguments

The Appellant made several arguments against consideration of GHG emissions and climate change impacts from the mine typical of these types of cases. However, these were generally not accepted by Preston CJ.

Preston CJ dismissed the Appellant's argument that GHG emissions reduction through other sources (e.g. electricity, transport) and increases in sinks (e.g. oceans, vegetation, soil) could balance the GHG emissions from the mine, describing it as 'speculative and hypothetical'.⁶⁰ Identified environmental impacts, as in this case, necessitate clear mitigation through emission reduction technology (e.g. carbon capture and storage) or offsets (e.g. revegetation), whereas the Appellant relied on unspecified and uncertain events at an unclear future time, beyond its control.⁶¹

The Appellant argued that a global abatement mission required emissions reduction at least social/economic harm and most effectiveness (i.e. based on cost-benefit analysis).⁶² Preston CJ dismissed this argument and held that the decision-maker is determining an application on its merits (i.e. assessing the identified emissions and the likely impacts on the receiving environment, being the community and climate system), rather than formulating global policy beyond its remit and control.⁶³

In dismissing the Applicant's argument that the coal resource being in the area meant that its location could not be changed to mitigate adverse impacts, Preston CJ noted that '[a] dam can only be located on a river, but not every river needs to be dammed';⁶⁴ hence approval 'depends not on the location of the natural resource, but on its sustainability'.⁶⁵

The Appellant's "market substitution"/"carbon leakage" arguments (that demand would mean other new coal mines overseas would simply replace emissions from this proposal, and that in these countries emissions are less strictly regulated and therefore could be higher)⁶⁶ were also dismissed. Preston CJ held that the grounds were unsubstantiated,⁶⁷ citing other cases which had dismissed them,⁶⁸ and stating:

There is also 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

⁵⁶ At [431]-[450].

⁵⁷ See especially [450], [514]-[516].

⁵⁸ At [525].

⁵⁹ At [526].

⁶⁰ At [529]-[530].

⁶¹ At [530].

⁶² At [531].

⁶³ At [532]-[533].

⁶⁴ At [691].

⁶⁵ At [694].

⁶⁶ At [535]-[537].

⁶⁷ At [536]-[537].

⁶⁸ At [539], cting *Urgenda Foundation v The State of the Netherlands* C/09/456689/HA ZA 13-1396, 24 June 2015; [542], cting *WildEarth Guardians v US Bureau of Land Management* 870 F 3d 1222 (10th Cir, 2017).

*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.*⁶⁹

The Appellant also argued that the GHG emissions are justifiable on the basis the mine would produce high quality coking coal (i.e. for manufacturing steel from iron ore, rather than thermal/steaming coal to burn for generating electricity).⁷⁰ Preston CJ dismissed this argument as overstated,⁷¹ noting that many other coking coal mines exist or are approved in Australia with no evidence that this supply cannot meet steel production demand.⁷² This tied in with the dismissal of earlier points, by which the Appellant argued that the coking coal its mine would produce was not substitutable,⁷³ and was essential as ‘steel is integral to our society’.⁷⁴

1.5.3. Qualification of findings

It is important to recognise that Preston CJ did not find that the climate change evidence necessitated a policy decision to refuse any new fossil fuel development.⁷⁵ Rather, each application would have to be evaluated on its merits, and that evaluation includes consideration of GHG emissions and climate change impacts – in this case, the mine could not be justified against these impacts.⁷⁶

While acknowledging that Australia’s international obligations in relation to GHG emissions reduction did not proscribe approvals of new coal mines per se, Preston CJ held that ‘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 [for net zero emissions and limiting temperature rise to 1.5-2°C].’⁷⁷ In reaching this conclusion, Preston CJ relied upon Prof. Steffen’s explanation of the carbon budget approach ‘that most fossil fuel reserves will need to remain in the ground unburned’.⁷⁸

3. SIGNIFICANCE FOR WA

1.6 Nature of the decision

While the NSWLEC’s decision is encouraging in terms of its official recognition and application of climate change science, it is important to bear in mind the nature of the decision and its status in relation to WA’s legislative and regulatory framework.

3.1.1. Type of proceedings

The NSWLEC has the jurisdiction to conduct merits review appeals and judicial review proceedings. WA does not have an environment court with similar jurisdiction, with WA courts only conducting judicial review proceedings. This case is a merits review proceeding in which the NSWLEC was re-making the Ministerial approval decision by “standing in the shoes” of the Minister. This means the Court’s decision is as though it was made by the Minister and not a court. In NSW, appeals of Ministerial decisions are dealt with by the specialist Land and Environment Court exercising this administrative function, while in WA such appeals are made to the Minister via the Appeals Convenor. Therefore, this case does not create a binding legal precedent for courts in WA in the way that judicial review proceedings would.

3.1.2. Legislative and regulatory framework

New South Wales’ environmental protection legislative and policy framework under the EPA Act differs to the regime established in the *Environmental Protection Act 1986* (WA) (**EP Act**). Firstly, WA has separate environmental and planning regimes, whereas the NSW legislation fuses these areas together, with this case considering the planning provisions of the EPA Act. Secondly, and as further outlined below, the NSW legislation expressly requires the decision-maker to consider the public interest in assessing a proposal’s

⁶⁹ At [545].

⁷⁰ At [546].

⁷¹ At [547].

⁷² At [548]-[549].

⁷³ At [460].

⁷⁴ At [461].

⁷⁵ At [552]-[553].

⁷⁶ At [553]-[556].

⁷⁷ At [527].

⁷⁸ At [550]. See also at [527].

likely environmental, social and economic impacts, as well as any submissions.⁷⁹ Conversely in WA, decisions on appeals under the EP Act, or on the grant or refusal of approvals, are generally subject to very wide discretion for decision-makers.

1.7 Applicability in Western Australia

Despite the above, the subject matter of the case – in particular the consideration of the principles of ecologically sustainable development (**ESD**) and the assessment of GHGe and climate change impacts – could be influential for decision-makers and courts in WA. Preston CJ's reasoning and findings are particularly applicable to two key decision making processes in WA – the EPA's environmental impact assessments of significant proposals, and the Minister for Environment's role in approving and conditioning those proposals.

In conducting environmental impact assessments in accordance with its objectives to protect the environment and prevent environmental harm,⁸⁰ the EPA is guided and required to have regard to the ESD principles which are included as the central objects of the EP Act.⁸¹ This case confirms that the principles of ESD require consideration of the impact of a development on climate change. Further, much of the case turned upon an assessment of the "direct and indirect impacts" of the mine proposal – an assessment which is analogous to an EPA environmental impact assessment against 'key environmental factors'.⁸² The case highlights the need for such assessment to consider a proposal's GHGe, its contribution to climate change, and impacts on people and the environment on a local and global scale. Accordingly, this case confirms that the EPA is required to comprehensively consider GHGe and climate impacts in assessing and reporting on significant proposals under the EP Act.

In WA the Minister for Environment exercises a similar function to the NSW Minister for Planning in this case. As the decision-maker in environmental approvals, the Minister for Environment also is required to have regard to the ESD principles of the EP Act. This case confirms that GHGe and climate change impacts are relevant considerations in exercising this function. A failure by the Minister to consider these impacts may therefore potentially lead to its decision being considered unreasonable.

If administrative decision-makers in WA accept the findings from the case and carry out their roles accordingly, they should ensure that new projects and any potential GHG emissions remain within the carbon budget. As Preston CJ accepted in the case, the carbon budget for avoiding the most dangerous impacts of climate change is already exhausted by existing projects – meaning fossil fuel developments must be phased out and any new projects must demonstrate that they will achieve net zero emissions through avoiding and minimising GHG emissions, and identifying specific and concrete offsets. This was reflected in the EPA's GHG guidance documents, which took a methodical and science-based approach to executing its duties.

4. EPA GHG GUIDANCE

Released on 7 March 2019, the EPA established a separate environmental factor guideline and technical guidance for GHG emissions and confirmed that the EPA is required to consider the effect of proposals with the potential to increase WA's GHG emissions. This guidance was consistent with the findings in *Gloucester* and required proponents to describe:

- scope 1 and scope 2 greenhouse gas emissions per annum and over the life of the proposal;
- scope 3 emissions, where there is an established link between the proposal's activity and these emissions, and where they will be relatively large;
- proposed measures to avoid emissions through best practice design and benchmarking;
- proposed continuous improvement measures to reduce emissions over the life of the proposal; and
- proposed measures to offset all residual (net) direct emissions associated with the proposal that meet the offset integrity principles and are based on clear, enforceable and accountable methods.

This guidance was withdrawn on 14 March 2019 for further consultation.

⁷⁹ EPA Act, s 4.15(1).

⁸⁰ EP Act, s 15.

⁸¹ EP Act, s 4A.

⁸² EP Act, s 44(2).