

# "Wrong place...wrong time" - Key implications of the Gloucester coal mine decision

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## What happened?

The Chief Judge of the NSW Land and Environment Court in Australia has upheld the decision of the NSW Minister for Planning's delegate to refuse planning approval for the proposed Rocky Hill Coal Project near the town of Gloucester.

## Why is it important?

The Court's decision is, as far as we are aware, the first time an Australian project has been refused on the basis that it will "increase global total concentrations of greenhouse gas (GHG) at a time when what is urgently needed...is a rapid and deep decrease in GHG emissions."

The climate change aspect of the Court's decision has understandably been the subject of most of the media interest in Australia. Even if the case isn't appealed, its approach is likely to be the springboard for legal challenges to other resource, energy and industrial projects around Australia, and possibly elsewhere given the extent to which the judgement draws on overseas and international judicial precedent. As touched on in this newsletter, one key unresolved issue is how the approach taken by the Court would apply to other projects with direct and indirect GHG emissions, in particular future fossil fuel developments.

However, it would be a mistake to dismiss it solely as a "climate change case" and ignore its consideration of broader environmental and socio-economic impacts, especially as the project was also refused on these grounds. The analysis of these issues could have broader implications for the assessment of resource and energy projects throughout regional Australia.

## Key takeouts

- Sustainability:** The acceptability of a proposed resource development is judged by its "sustainability." While this captures concepts such as the precautionary principle and intergenerational equity (among others), it also captures the principle of "sustainable use." This not only requires the use to be "sustainable" and "prudent," but it must also have the capacity to sustain natural processes while maintaining the life-support systems of nature. The Court found that the project failed these tests due to the cumulative effect of its GHG emissions and its landscape, amenity, and socio-economic impacts.
- Climate change:** The Court found there was a causal link between climate change and its effects and the cumulative sum of global GHG emissions and the direct and indirect GHG emissions from the project, even though the project emissions constituted a small fraction of global GHG emissions. The Court was unpersuaded by arguments about the potential for future mitigation or abatement of GHG emissions from the mine, or about the potential for an alternative coal mine to be developed in another country.

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- Landscape impacts:** The project was found to have an unacceptably high impact on a landscape it found to be of high value and significance. The high value of the landscape was partly underpinned by the high value placed on the landscape by the local community. This is an interesting aspect of the Court's assessment, because in our experience most local communities place a high value on their local landscape. Relying on community perceptions and attitudes about landscape may be relevant to assessing the social impacts of a project, but in our experience it is not always a typical consideration in undertaking quasi-objective landscape and visual impact assessments.
  - Amenity and social impacts:** Even though noise and particulate emissions were predicted to comply with regulatory criteria, the residual impact of these emissions were an important factor in assessing the social impacts of the project.
  - Social impacts:** The Court undertook a wide-ranging analysis of the potential social impacts of the project, and gave special attention to its actual and perceived impacts on the wellbeing and sense of place of local community members. It found the project would bring about significant and adverse changes to the composition, cohesion, character and function of the local community.
  - Economic impacts:** The Court accepted expert evidence that criticised the economic assessment and cost benefit analysis for overstating the benefits of the project and underestimating the economic costs of environment, social and GHG emissions.

## Context to the Court's decision

The proponent proposed to develop an open-cut coking coal mine in the Gloucester Valley in NSW. The life of the mine was predicted to be about 21 years. The coking coal would be exported and used in the manufacture of steel.

The Gloucester Valley is flanked by mountain ranges, and the mine site is near the town of Gloucester. The predominant land uses in the vicinity of the mine include agriculture and agribusiness, rural living, and residential and small-scale tourism outlets such as Bed & Breakfast and homestays.

The Project was "State significant development" under the State Environmental Planning Policy (State and Regional Development) 2011, which meant the Minister for Planning was the consent authority for the application. It also meant that even though the underlying environmental planning instrument prohibited mining over about 77% of the mine site, the project was permissible by virtue of cl. 7(1)(b) of the Mining SEPP.

The proponent prepared and publicly exhibited an Environmental Impact Statement (EIS), and 2,570 submissions were made. Of these, 2,308 opposed the project. The Department of Planning published its assessment report and recommended refusal of the project. The Planning and Assessment Commission, acting as delegate of the Minister for Planning, refused consent. The proponent appealed against the refusal decision to the Land and Environment Court.

## Climate change and GHG emissions

### International legal and policy context

The starting point of the Court's analysis was the Paris Climate Change Agreement, to which Australia is a party, and of the Intergovernmental Panel on Climate Change (IPCC) assessments which underpin much of the Paris Agreement commitments.

The Paris Agreement commits parties to hold the increase in the global average temperature to well below 2°C above pre industrial levels, and to pursue efforts to limit the temperature to 1.5°C above pre-industrial levels. To achieve this, each party commits to reducing their national GHG emissions through their Nationally Determined Contributions (NDC). The Australian Government's NDC is to reduce GHG emissions by 26-28% below 2005 levels by 2030, although NSW – like some other Australian States – has separately committed to even more ambitious GHG emission reduction targets.

To achieve the Paris Agreement's temperature goal, the parties also aim to reach global peaking of GHG emissions as soon as possible. The "peaking year" is the year in which global GHG emissions peak before starting their downward trajectory toward the levels required to meet the Paris Agreement temperature targets.

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The Court heard and accepted expert evidence that the later the peaking year occurs, the steeper the reduction in GHG emissions that will be required to achieve the Paris Agreement targets, which in turn will have significant technological and economic challenges.

## **The Court's approach**

The Court then took the IPCC's "carbon budget," which in simple terms estimated in 2013 that up to 1,000Gt of carbon dioxide emissions could limit temperature rise to less than 2°C above pre-industrial levels. After that time, zero net GHG emissions would be required to stabilise global temperatures. After taking account emission of other GHGs and as well as the estimated amount of GHG emissions between 2013 and 2017, the total available emissions left in the global budget was 215Gt of carbon dioxide emissions. Based on present rates of emissions, the globe has 21-22 years of emissions remaining before the world's economy must reach net zero emissions.

The Court then looked at the GHG emissions associated with the proposed coal mine. It accepted that all direct and indirect GHG emissions associated with the project, including the use of the coking coal during steel manufacturing, were relevant in assessing the climate change implications of the proposal. These amounted to 37.8Mt CO<sub>2</sub>-e of GHG emissions, which was a "sizeable individual source of GHG emissions." While this only represented a small fraction of the global total of GHG emissions, this didn't matter to the Court because the global problem of climate change needed to be addressed by multiple local actions to mitigate emissions by sources and remove GHG by sinks. Consequently, what was relevant was not the individual amount of GHG emissions from the project, but the cumulative emissions from multiple global sources as well as the project.

On that basis, the Court found that there is a causal link between the project's cumulative direct and indirect GHG emissions and climate change and its consequences, and is likely to run counter to 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. The Court also observed that the exploitation and burning of new fossil fuel reserves, which will increase GHG emissions, cannot assist in achieving rapid and deep reductions in GHG emissions that are necessary in order to meet Australia's commitments under the Paris Agreement. Coming to this conclusion, the Court accepted expert evidence that the implications of the carbon budget approach is that most fossil fuel reserves will need to be left in the ground, unburned, to remain within the budget and achieve the long term temperature goals set under the Paris Agreement.

Counter-arguments were put by the applicant that there could be future potential to offset or abate GHG emissions from the project, but the Court found these arguments to be 'speculative and hypothetical.' Likewise the Court found that the applicant's arguments about the potential for market substitution and carbon leakage – in other words, the potential for another country to establish a new coal mine to "fill the void" left by the Court's refusal of this Project – was unsubstantiated by any evidence, and contrary to international and overseas judicial precedent.

## **How much is too much?**

A question that many people will ask is that if an individual coal mine that is estimated to emit 37.8Mt of GHGs is refused on the grounds of its cumulative contribution to global warming, what is an acceptable level of GHG emissions? The Court's judgement gives no answer to that question, giving little comfort to the sponsors and proponents of other resource and energy projects, including hydrocarbon and other thermal energy projects.

The Court did acknowledge the possibility that some fossil fuel reserves could be exploited and burned in the short-term. However, the acceptability of a future fossil fuel proposal would depend not only on its contribution to climate change through GHG emissions, but on its broader social and environmental impacts – in other words, to evaluate whether there is a net community or social benefit of the project taken as a whole. In the case of the Rocky Hill project, the Court found that while the project could be refused on the basis of its poor environmental and social performance, its net aggregate contribution of GHG emissions and their likely contribution to adverse impacts on the climate system, environment and people added a further reason for refusal. The Court's findings on the project's environmental and social performance are considered below.

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## Key impact assessment issues

The Court presents an extensive analysis of the following matters which are of broader interest to the impact assessment of resource and energy projects in populated regional areas:

### Landscape and visual impacts

The Court found that the high visual impact of the project would itself justify refusal. There were various reasons for the Court coming to this conclusion, but one notable feature of its analysis was the weight it gave to the large number of EIS submissions that drew attention to the high value the local community members placed on the Gloucester Valley landscape.

The relevance of community views and perceptions about landscape is not new – for example, the draft National Wind Farm Development Guidelines acknowledge the relevance of community perceptions of landscape as being a component of a landscape and visual impact assessment (LVIA) for wind farm projects. However, in our experience this is not uniformly done in practice, and LVIA's typically endeavour to present a systematic, quasi-objective evaluation of landscape and visual impacts. While we do not question the relevance of community perceptions about the importance and character of a landscape and their contribution to a sense of place, to our mind there is an open question as to whether such considerations are more appropriately part of the domain of the social impact assessment than the LVIA.

### Amenity impacts

The Court accepted that noise and particulate emissions from the project would comply with the relevant cumulative noise and air quality targets under the relevant State Environmental Planning Policies. Despite this, the Court found that given the prevailing low background noise levels, the change to the acoustic environment brought about by the mine was relevant to the assessment of the mine's social impacts. Similarly, the community's perception of potential impacts of particulate emissions on their health and wellbeing, and how they might react to those perceptions, was relevant to the social impact assessment.

The Court's analysis of air and noise impacts indicates that mere compliance with regulatory targets will not always be sufficient if the residual impacts of the project could amplify or reinforce an adverse social impact.

### Social impacts

The judgment includes a lengthy analysis of the direct, indirect and cumulative social impacts of the project, benchmarked against the NSW Social Impact Assessment Guideline (2017). In line with the Guidelines' requirements, the assessment addressed the actual and perceived social impacts of the project.

Key points of interest were the Court's observations and conclusions about the adverse social impact of a predominantly drive-in/drive-out workforce and the associated potential for masculinization of Gloucester, the project's adverse impact on the local residents' 'sense of place' and the 'psychoterratic' relationships they have to Gloucester as a place (in part due to the project's high impact on the landscape), changes in access to services and facilities, adverse impacts on the local Aboriginal community and their culture, and problems of distributive equity that had not been satisfactorily addressed or resolved.

The weight given by the Court to perceived social impacts is particularly interesting. Perceived impacts of a project on amenity have occasionally been given weight (though usually not significant weight) by planning and environmental courts and tribunals, but only on the basis that the perceptions are reasonable. The Court appears to have grounded part of its assessment of social impacts on the related changes to the local landscape and the community's associated 'sense of place' and changed acoustic environment, as well as changes to the composition, cohesion, character and function of the local community.

### Economic and public benefits

The Court, like any planning authority, needed to weigh the adverse environmental, landscape and social impacts against the potential economic benefits of the project. It approached this task by examining two issues – whether the benefits of the project outweighed its costs to the local community, and whether the public benefit of the project outweigh the public benefit of other land uses. The EIS included an economic impact assessment prepared in accordance with the Guidelines for the Economic Assessment of Mining and

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Coal Seam Gas Proposals (2015) (Economic Guidelines), which included a cost benefit analysis (CBA) and local effects analysis, as required under the Economic Guidelines. Given the use of the Economic Guidelines in the environmental impact assessment of resource projects in other Australian jurisdictions, this aspect of the Court's decision is of particular interest.

The Court found the CBA overestimated the economic benefits of the project because it relied on over-ambitious coal price forecasts and assumptions about company tax, made erroneous estimations of worker and supplier benefits, and under-estimated likely indirect environmental, social and transport costs – especially in light of the court's findings on the landscape, amenity and social impacts described above. The Court was particularly critical of the failure of the economic impact assessment to address the economic costs of all of the direct and indirect GHG emissions from the project, including the costs of combusting coking coal during the steel manufacturing process, and of the failure to address this in accordance with the methodology in the Economic Guidelines. It also found the failure of the economic assessment to quantify and address residual environmental impacts, based on the Court's findings on landscape, amenity and social impacts, to be a key shortcoming of the assessment.

Ultimately, the Court concluded the economic benefits of the project were uncertain but substantially overestimated by the CBA, and needed to be balanced against the qualitative and adverse assessment of the project's adverse landscape, social and environmental impacts.

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