LAND AND ENVIRONMENT COURT OF NSW – "WRONG TIME" FOR COAL MINE GREENHOUSE GAS EMISSIONS

Date: 13 February 2019

OVERVIEW

Chief Justice Preston (Preston CJ) of the Land and Environment Court of NSW recently handed down his decision in *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 confirming the decision by Planning and Assessment Commission to refuse State Significant Development consent for the Rocky Hill Mine (Mine) in Gloucester, NSW.

Preston CJ ultimately found that development consent for the mine should be refused on a range of reasons, of which greenhouse gas (GHG) emissions were only one:

> *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 sets a clear precedent requiring a much greater level of analysis and consideration of climate change impacts as part of the assessment of new projects. In particular, the "wrong time" comments made by Preston CJ are likely to be interpreted by consent authorities as setting a very high bar for all new GHG emissions intensive projects which require very significant public benefits to outweigh the adverse GHG impacts.

Project proponents and other associated entities considering GHG emissions intensive projects should be aware of the emerging trend towards placing more weight on climate change impacts in development approvals, and seek assistance to ensure such projects are best positioned to minimise approval risks.

WHAT IS THE DECISION ABOUT?

The case was an appeal brought by Gloucester Resources which sought merits review of the decision of the Planning and Assessment Commission to refuse development consent to the Mine. However, Gloucester Groundswell, a resident's action group was joined to the proceedings. Gloucester Groundswell argued that

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development consent for the mine should be refused because the GHG emissions from the Mine would adversely impact upon measures to limit dangerous anthropogenic climate change with particular reference to the targets to limit a rise in global average temperatures to 1.5-2 degrees Celsius in the *Paris Agreement 2015* (referred to as the 'global carbon budget').

The judgment is the first instance an Australian court has allowed and considered extensive expert evidence to be adduced on:

- not only scope 3 emissions (from the burning of coal generated from the mine) associated with the project; but
- also on the global carbon budget and the adverse impacts of climate change.

GLOBAL CARBON BUDGET

Gloucester Groundswell adduced substantial expert evidence on the effects of climate change and the remaining "carbon budget" that must be adhered to in order to avoid further negative climate change impacts. They alleged a direct link between the approval of GHG intensive fossil fuel projects like the Mine, and global climate change impacts. They contended that the mine should not be granted approval on the basis of expert evidence to the effect that "the existing and already approved but not yet operational mines/wells will more than account for the fossil fuel reserves that can be exploited and burned and still remain within the carbon budget".

In evaluating the climate change arguments put forward by Gloucester Groundswell, Preston CJ endorsed the approach of considering the approval of GHG intensive projects in the context of the global carbon budget, given the pressing need to address GHG emissions to avoid significant climate change impacts. In doing so he held that it was relevant to consider scope 3 emissions from the burning of coal from the mine and recognised a direct link between the mine and global climate change impacts:

> *There is a causal link between the Project's cumulative GHG emissions and climate change and its consequences. The Project'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 Project's cumulative GHG emissions are therefore likely to contribute to the future changes to the climate system and the impacts of climate change. In this way, the Project is likely to have indirect impacts on the environment, including the climate system, the oceanic and terrestrial environment, and people.*

Preston CJ did not accept Gloucester Resources' submissions that the Mine's GHG emissions should be allowed and form part of the remainder of the "global carbon budget". Particularly, he rejected submissions made by Gloucester Resources that:

- denying development consent for an individual coal mine would not amount to the lowest cost of GHG abatement and the project should not be refused development consent on this basis;

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- the emissions avoided by refusing development consent would simply be emitted by mines in other jurisdictions to meet a constant global demand for coal;
- as Australia's Nationally Determined Contribution under the *Paris Agreement 2015* (setting out Australia's GHG reduction commitments under that treaty) does not specify the means by which these reductions were to take place, it could not be applied as a ground to refuse development consent for the Mine; or
- the evidence established that the mine was required to ensure the coking coal required for steel production could continue to be supplied.

The case is a milestone in that climate change impacts, especially the consideration of project approval within a "global carbon budget" were considered in great detail and with a large amount of expert evidence. However, it is important to bear in mind that Preston CJ only considered GHG emissions of the Mine as one reason for refusing development consent. Notably, he found that the mine could have been refused for the planning, visual and social impacts alone:

> *In the case of the Rocky Hill Coal Project, the aggregate GHG emissions over the life of the Project are sizeable, although the Project is not one of the largest coal mines in Australia. The Minister noted that the proposed production of the Rocky Hill mine appears to be about a third of the production of the average coal mine in NSW (Minister's closing submissions, [423]). Refusal of consent to the Project would prevent a meaningful amount of GHG emissions, although not the greater GHG emissions that would come from refusal of a larger coal mine. However, the better reason for refusal is the Project's poor environmental and social performance in relative terms. As I have found elsewhere in the judgment, 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 of the Project and their likely contribution to adverse impacts on the climate system, environment and people adds a further reason for refusal. Refusal of the Project will not only prevent the unacceptable planning, visual and social impacts, it will also prevent a new source of GHG emissions. I do not consider the justifications advanced by GRL for approving the Project, notwithstanding its GHG emissions, are made out for the reasons I have given earlier.*

Preston CJ made it clear that the need to adhere to a carbon budget does not necessarily require that all GHG intensive projects be refused development consent. Instead, he adopted an approach where the GHG emissions of a project must to be considered as one factor in conjunction with the other environmental, social and economic impacts of the development:

> *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.*

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> *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.*

FURTHER GUIDANCE ON SCOPE 3 EMISSIONS

This case also provides a clear confirmation that Scope 3 emissions are relevant in deciding whether to grant development approval for GHG intensive projects.

Preston CJ considered the relevance of Scope 3 emissions in the context of the global carbon budget by recognising that all emissions contribute cumulatively towards climate change and its undesirable effects. He outlines below:

> *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 CO2-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]).*

Scope 3 emissions have been held as a relevant consideration for the granting of development consent for resource projects since Gray v Minister for Planning (2006) 152 LGERA 258, However, that case was a judicial review appeal and decided on narrow grounds. The approach adopted by Preston CJ in this case to considering of Scope 3 emissions in determining development applications has a much wider application and is likely to influence the assessment of all future development applications for GHG emissions intensive projects.

FURTHER INFORMATION

Please find attached a link to the full decision:
https://www.caselaw.nsw.gov.au/decision/5c59012ce4b02a5a800be47f

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