HERBERT SMITH FREEHILLS

CLIMATE CHANGE IMPACTS USED TO REJECT NEW NSW COAL MINE

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Legal Briefings – By **Peter Briggs and Tom Dougherty**

Proponents seeking consent for new projects, or modifications of existing projects, with 'material' greenhouse gas emissions across all industries in NSW should carefully assess climate change impacts, particularly if the proposal is not 'carbon neutral'.

WHAT HAS HAPPENED?

On 8 February 2019, the NSW Land and Environment Court (**Court**) refused development consent for a new open cut mine near Gloucester, New South Wales.

The Rocky Hill Coal Project (**Project**) was expected to produce 21 million tonnes of coal over a period of 19 years (including rehabilitation) and support up to 110 jobs during operation and 60 jobs during construction.

However, Chief Justice Brian Preston in *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 rejected the development application (**DA**) for the Project on a number of grounds, including the impacts of the mine on climate change.

The Chief Justice's acceptance of the Project's direct and indirect contribution to climate change may have implications for any project in NSW across a range of industries that is a 'material' source of greenhouse gas (**GHG**) emissions.

WHO IS AFFECTED?

Mining, resources, energy and any other projects in NSW, which could be a 'material' source of GHG emissions.

BACKGROUND

In December 2012, Gloucester Resources Limited (**GRL**) lodged a DA for consent to carry out the Project. The DA was subject to a lengthy planning process and GRL lodged an amended DA in August 2016.

Due to objections from Mid Coast Council and the public, the Planning Assessment Commission (now known as the Independent Planning Commission) (**Commission**) was asked to determine the DA. On referral to the Commission, the NSW Department of Planning and Environment (**DPE**) recommended refusal of the DA.

Importantly, the Minister did not previously refer the Project to the Commission for merits review. Rather, the Commission held a 'public meeting' and received further submissions on the Project as part of its determination process.

Following this, the Commission refused the DA on various grounds, including incompatibility with applicable land use zones under local planning controls, significant visual impacts, potential risks associated with increased noise and air quality impacts and the Project was not in the public interest.

Following the Commission's decision, GRL lodged a merits appeal with the Court.

KEY FINDINGS

On appeal, the Court was required to determine the DA on its merits.

In exercising its function as consent authority, the Court is required to balance the public interest in approving or rejecting the DA with regard to the "*competing economic and other benefits and the potential negative impacts of the Project*".[1]

The Chief Justice accepted that the Project would have public benefits, including economic benefits, but found that these benefits were overstated.

The judgment carefully weighed the Project's benefits against significant adverse visual, amenity and social impacts, including significant impacts on existing, approved and likely land uses in the vicinity of the mine. The Chief Justice considered various adverse factors, including:

- visual impacts: high visual contrast with surrounding landscape, intrusive night lighting, changes to the visual character and other factors, contributing to a high visual impact;
- amenity impacts: noise and dust impacts, contributing to social impacts; and
- social impacts: negative impacts on community, access to and use of infrastructure, culture, health and wellbeing and causing distributive inequity.

Notably, the Chief Justice also held that the construction and operation of the mine would result in the emission of GHG and contribute directly and indirectly to climate change.

This reason for refusal was not previously addressed by the Commission in refusing the DA. However, the Project's impacts on climate change were a focus of the submissions made during the proceedings by the NSW Environmental Defenders Office, on behalf of the non-profit organisation Groundswell Gloucester Incorporated.

In dismissing GRL's appeal, the Court found that the negative impacts outweigh the economic and other public benefits of the Project and the "*dire consequences*" of the Project should be avoided.

KEY TAKEAWAYS

Each DA is determined on a case-by-case basis. However, we set out below some takeaways from the Project's extended planning process and eventual refusal of the DA.

PRESERVATION OF MERITS APPEAL RIGHTS

The *Environmental Planning and Assessment Act 1979* (NSW) allows for the Minister to request the Commission to hold a public hearing into any matter.

If the Minister requested a public hearing, this would turn off GRL's (and objector) rights to a merits appeal. This pathway has typically been adopted by the Minister in relation to State significant development (**SSD**) proposals to streamline the planning approval process.

In this case, the Minister's decision to not require a public hearing made a merits appeal available to GRL and objectors, but the Court rejected the appeal.

PRODUCTION OF COKING COAL DOES NOT JUSTIFY GHG EMISSIONS

GRL submitted to the Court that the production of high quality coking coal, not thermal coal, is a critical commodity for steel production with limited substitutes.

However, there was an agreement between experts that existing and approved coking coal mines in Australia could meet current and likely future demand for the commodity for use in steel production.

The Chief Justice found that Australian demand for coking coal would be met by supply from Australian mines operating to the highest environmental standards. The Chief Justice found that this would ensure no moving of coal mining abroad or carbon leakage.

ALL GHG EMISSIONS CONTRIBUTE TO CLIMATE CHANGE

The Chief Justice's determination that there is a "*causal link between the Project's cumulative GHG emissions and climate change and its consequences*" is a clear indication that the Court will place a strong emphasis on direct and indirect impacts on climate change from a proposed development.

The Court acknowledged that the merits of each application for fossil fuel development must be evaluated. In determining whether to approve or refuse any such development, the Chief Justice indicated that the following factors must be considered:

- GHG emissions from the development;
- the likely contribution of GHG emissions to climate change;
- the consequences of this contribution to climate change; and
- other impacts of the development.

The Court also held that it was irrelevant that the Project contributed a small fraction of the global total of GHG emissions.

This indicates that the Court will take a broad approach when accounting for GHG emissions arising from a proposed development and assessing its impacts at a local, national and global level.

‘DOWNSTREAM’ INDIRECT GHG EMISSIONS MUST BE CONSIDERED

The Court closely considered the extent to which direct and indirect (upstream and downstream) GHG emissions associated with the Project should be attributed to any impacts on climate change.

The Chief Justice held that direct or ‘Scope 1’ GHG emissions (e.g. from mining operations) and ‘upstream’ indirect or ‘Scope 2’ GHG emissions (e.g. from a power station that generates electricity purchased for the Project) are undoubtedly a factor for consideration when determining the DA.

GRL argued that ‘downstream’ indirect or ‘Scope 3’ GHG emissions should not be considered in determining the DA. For mining projects, the Court has held that ‘downstream emissions’ generally relate to sold goods and services[2] and may include:

- the transportation and combustion of coal product from a mine; and
- GHG emissions from the combustion of product coal by end users.

Considering the impacts of the Project and the public interest, the Chief Justice held that downstream indirect GHG emissions should be considered in determining the DA, as both direct and indirect GHG emissions (i.e. Scope 1, 2 and 3 emission) contribute to the cumulative impacts of climate change.

The Chief Justice also referred to clause 14 of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* which imposes mandatory requirements before granting consent for mining projects. These requirements include a consideration of conditions that minimise GHG emissions to the greatest extent practicable and an assessment of GHG emissions (including downstream emissions).

The need for robust DA assessment documentation is highlighted by the Court's inclusion of downstream indirect GHG emissions as a relevant consideration in determining a DA.

Proponents will need to comprehensively delineate the type and extent of downstream indirect GHG emissions associated with the proposed development in order to allow for a consent authority to properly consider its impacts.

SPECIFIC OFFSETS FOR GHG EMISSIONS

The Chief Justice also stated that GRL had not provided any "*specific and certain action*" to "*net out*" the GHG emissions of the Project (e.g. carbon capture and storage).

The Project was not proposed to be carbon neutral and the Chief Justice held that GRL could not rely on "*speculative and hypothetical*" sources of reducing GHG emissions (e.g. increases in removals of GHGs by sinks).

Proponents of proposed developments that are not carbon neutral will need to closely assess the requirement for specific offsets actions on a project-by-project basis.

NEXT STEPS

This decision affects proponents of DAs (including modifications) for projects with 'material' GHG emissions in all industries throughout NSW, particularly proposals for new fossil fuel development. The Chief Justice's consideration of impacts on climate change may also have implications for projects in other Australian jurisdictions.

Proponents of SSD and other proposals with GHG emissions will need to carefully consider the expected planning pathway for obtaining development consent, the risk of challenge to any consent, the extent to which the proposal directly and indirectly contributes to GHG emissions and any requirement for specific action to mitigate and offset environmental impact.

ENDNOTES

1. *Warkworth Mining Ltd v Bulga Milbrodale Progress Association Inc* (2014) 200 LGERA 375; [2014] NSWCA 105 at [171].

2. *Wollar Property Progress Association Inc v Wilpinjong Coal Pty Ltd* [2018] NSWLEC 92 at [126].

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

PETER BRIGGS
PARTNER, SYDNEY

+61 2 9225 5155
Peter.Briggs@hsf.com

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