



Mining and the Environment – case updates

Australian Centre for Climate and Environmental Law

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What we do

- Litigation and legal advice
- Policy and law reform
- Community and professional outreach and education
- Aboriginal engagement
- International engagement
- Scientific advisory service



Mining and the Environment – case updates

- *Gloucester Resources Limited v Minister for Planning and Groundswell Gloucester Limited*
 - Merits appeal
 - Hearing August 2018
- *Australian Coal Alliance v Minister for Planning and Wyong Coal Pty Limited & Ors*
 - Judicial review
 - Hearing November 2018



ESD Principles in mining decisions

- S4.15, *Environmental Planning & Assessment Act 1979* (formerly s79C) – public interest mandatory relevant consideration
- *Minister for Planning v Walker* (2008) 161 LGERA 423, per Hodgson JA [56]:

... I do suggest that the principles of ESD are likely to come to be seen as so plainly an element of the public interest, in relation to most if not all decisions, that failure to consider them will become strong evidence of failure to consider the public interest and/or to act bona fide in the exercise of powers granted to the Minister, and thus become capable of avoiding decisions. It was not suggested that this was already the situation at the time when the Minister's decision was made in this case, so that the decision in this case could be avoided on that basis; and I would not so conclude.
- *Barrington-Gloucester-Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure* (2012) 194 LGERA 113, per Pepper J [170]-[171]:

[170] I therefore reject the submission of AGL and the Minister that there was no requirement to consider ESD principles. In the words of Hodgson JA in *Walker*, the time has come that “the principles of ESD” can now “be seen as so plainly an element of the public interest” (at [56]).

ESD Principles and mining decisions

- Intergenerational Equity

“That the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations.”

Protection of the Environment Administration Act 1991 (NSW)

“The attainment of intergenerational equity in the production of energy involves meeting at least two requirements. The first requirement is that **the timing of and the subsequent use in the production of energy of finite, fossil fuel resources needs to be sustainable**. Sustainability refers not only to the exploitation and use of the resource ... but also to the environment in which the exploitation and use takes place and which may be affected.

The objective is not only **to extend the life of the finite resources** and the benefits yielded by exploitation and use of the resources to future generations, but also **to maintain the environment, including the ecological processes on which life depends, for the benefit of future generations.**”

Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd (2007) 161 LGERA 1, per Preston J [74]



Recent Cases

**Gloucester Resources Limited v
Minister for Planning & Groundswell
Gloucester Inc ('Rocky Hill')**



**ACA v NSW Minister for Planning &
Wyong Coal Pty Ltd & Kores
Australia Pty Ltd ('Wallarah 2')**



Rocky Hill – Background

- Rocky Hill Coal Project for a greenfield open-cut coal mine at Gloucester
- Same community that opposed AGL's CSG project years earlier
- December 2017 - refused by PAC because of its proximity to the town of Gloucester, visual impact and inconsistency with zoning plans
- GRL appealed to the LEC against the refusal to grant consent.



Rocky Hill – Joinder

“GRL submits that the raising of the climate issue as proposed in a domestic Court if the Intervener were joined would not serve the purpose of improving this particular planning decision; and, instead, would be a *“side show and a distraction”*.

I do not agree.”

-Senior Commissioner Dixon in *Gloucester Resources Limited v Minister for Planning and Environment (No 2) [2018] NSWLEC 1200*.



Rocky Hill – Climate ground

- Paris Agreement goal:

Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.

- Global Carbon Budget: limits cumulative amount of additional CO₂ emissions that can be allowed consistent with achieving the Paris targets
- GG argues: most of the world's existing fossil fuel reserves – coal, oil and gas – must be left in the ground, unburned, if the Paris Agreement climate targets are to be met



Rocky Hill – Intergenerational equity

- GG argues that approval of the mine at this time breaches the principle of intergenerational equity, because
 - the cumulative impact of GHG emissions from the Project is inconsistent with the carbon budget approach towards climate stabilisation and the Paris Agreement climate target
 - the Project's contribution to cumulative climate change impacts mean that its approval would be inequitable for current and future generations.
- First time an Australian court will hear expert evidence about the urgent need to stay within the global carbon budget in the context of a proposed new coal mine
- The Court will also hear evidence and arguments about:
 - social impact of mining on the community
 - noise impacts on residents
 - Economics
 - Visual impacts
 - Town planning

Wallarah 2 – The Proceedings

- Australian Coal Alliance
- Wong Coal (Kores)
- Judicial Review of the PAC determination
- Four main grounds:
 - climate change
 - flooding impacts
 - compensatory water
 - risks to water supply for farmers in the region.
- Four day hearing in the LEC beginning 12 November 2018



Wallarah 2 – Background

- Wallarah 2 involves construction and operation of an underground longwall coal mine on the Central Coast over the next 28 years, until 2046.
- **The total greenhouse gas emissions over the life of the mine will be 264+ million tonnes of CO2.**
- January 2018: PAC approved the Wallarah 2.
- Impacts include: potential loss of water for landholders and Central Coast Council; permanent alteration of landscape; potential flooding



Wallarah 2 – Background

- 2006: First DA for the Wallarah 2 Coal project lodged
- 2011: Refused by the Minister for Planning in 2011 for unacceptable impacts
- October 2012: New DA lodged
- 2014: Reviewed by the PAC - 35 recommendations.
- Second DA abandoned after LEC ruled that the Darkinjung LALC needed to provide consent to railway works on their land which they refused to do
- July 2016: Amended DA lodged which avoided the Darkinjung LALC land.
- 2017: Project referred back to the PAC for determination
- January 2018: Project approved subject to conditions

Wallarah 2 – Climate ground

- “Demand for coal over the next 28 years and **the acceptability of the greenhouse gas emissions associated with the end use of the coal are significant uncertainties for the project**. Renewable energy technologies have advanced substantially since mining of this resource was first contemplated. Global agreement on climate change and the need for mitigation has also strengthened around the Paris Agreement

...

The Commission also acknowledges the greenhouse gas emissions that would be produced from any future burning of the coal extracted, whether it is consumed locally or internationally. It is noted that presently there are alternative coal sources available to the market in the event that this mine does not proceed. **Consequently, the downstream use of the coal (and any emissions abatement or capture technology deployed) will need to be considered at that location.**”

-NSW PAC Wallarah 2 Determination Report, January 2018, p 6.

Wallarah 2 – Intergenerational equity

- ACA argues that the PAC failed to consider intergenerational equity by deferring consideration of the impacts of emissions from the burning of coal to a later stage (ie, at the location of the downstream emissions)
- Intergenerational equity mandatory relevant consideration in the context of this application for a 28 year coal mine

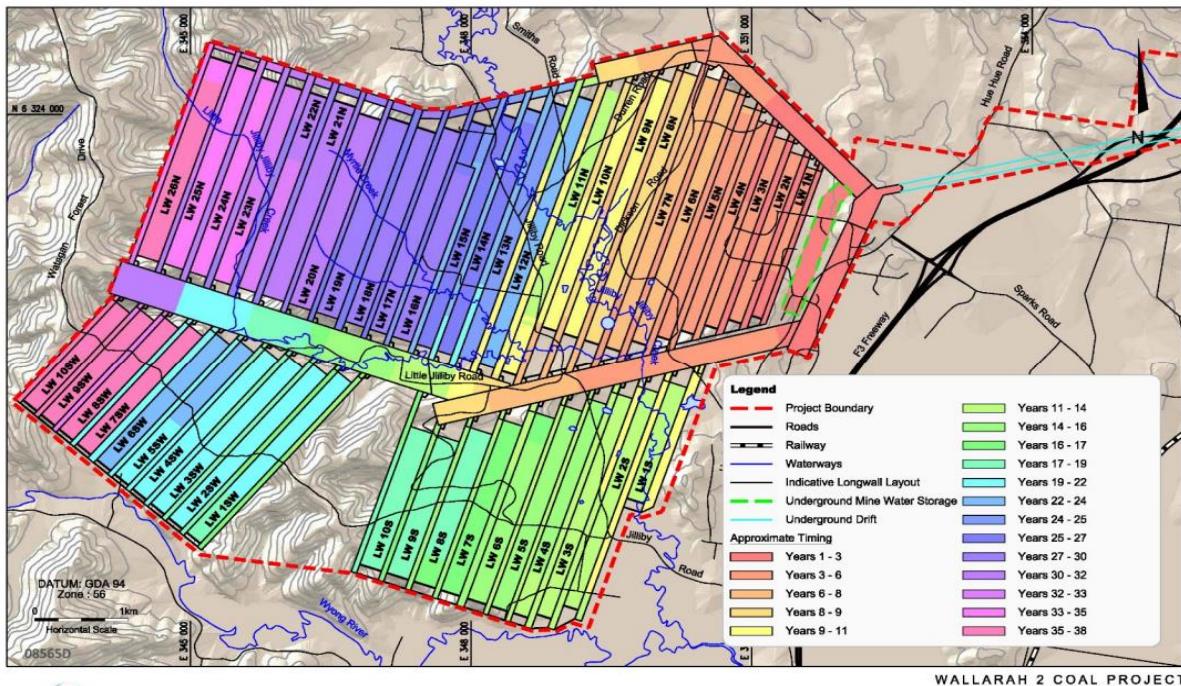


Figure 7 – Conceptual Mine Plan

Any Questions?

