

Judicial decision-making of environmental disputes

Case study of Gloucester Resources v Minister for Planning

The Hon Justice Brian J Preston

Chief Judge of the Land and Environment Court of
New South Wales



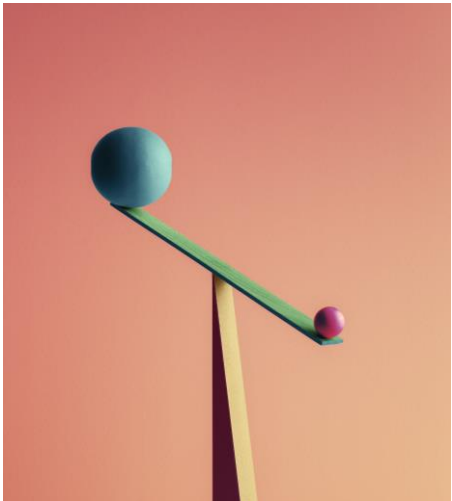
Judicial decision-making in environmental problems

- » Environmental problems involve polycentricity, complexity and uncertainty
- » One cause of polycentricity is the legislative and policy mandate to achieve sustainability or sustainable development
- » The achievement of sustainable development involves integrating in decision-making and balancing the three goals of:
 - economic development;
 - social development; and
 - environmental protection
- » This is a difficult task, and is made more difficult by the absence of analytical frameworks or heuristics in relevant law or policy
- » This poses problems for any decision-maker, but especially for judicial decision-makers



Adjudicating environmental disputes

- » In the absence of legislative guidance for polycentric decision-making, how can courts adjudicate environmental disputes and achieve sustainability?
- » One way is for the judicial decision-maker to structure the adjudicative task by:
 - Isolating the principal contested issues that together contribute to polycentricity;
 - Identifying or developing analytical criteria, derived from and consonant with the relevant law, for the determination of each issue;
 - Provisionally determining each issue, being mindful of the propensity for later issues to change their form and substance with the determination of earlier issues; and
 - Reappraising the provisional resolution of the issues by holistically evaluating and balancing all of the issues to reach the ultimate decision in the proceedings



Case study: *Gloucester Resources Ltd v Minister for Planning*

- » Gloucester Resources Limited (GRL) applied for consent to develop, operate and rehabilitate an open cut coal mine in close proximity to the country town of Gloucester (the Rocky Hill coal project).
- » The Minister for Planning, by his delegate the Planning Assessment Commission, refused the application and the project proponent appealed to the Land and Environment Court of NSW.
- » The development was classified as State significant development under s 89C of the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act) (now s 4.36) with the Minister for Planning as the relevant consent authority.
- » The application was referred to the Planning and Assessment Commission (the PAC), as delegate of the Minister, who determined on 14 December 2017 to refuse the consent, concluding that the project was not in the public interest.
- » GRL filed an appeal with the Land and Environment Court against the Minister's refusal of consent on 19 December 2017 pursuant to s 97 of the EPA Act (now s 8.7)
- » Groundswell Gloucester Inc, a local community group opposed to the mine, was later joined as a party to the proceedings, pursuant to s 8.15(2) of the EPA Act, and raised the impacts of the mine on climate change.



Isolating the principal contested issues that contribute to polycentricity

- » Polycentric problems are unsuited to resolution through adjudication because their resolution involves 'spontaneous and informal collaboration, shifting its forms with the task at hand'.
- » Polycentric problems cannot be resolved by identifying each issue at the start then sequentially resolving each of the originally identified issues.
- » In a polycentric problem, the resolution of one issue will have repercussions on the other issues; the issues may change in nature and scope depending on how the first issue is resolved.

There were five key areas of contention between the parties in *Gloucester*:

1. compatibility with existing, approved and likely preferred uses of the land in the vicinity of the mine (planning impacts);
2. visual impacts of the mine;
3. social impacts of the mine;
4. impacts of the mine on climate change (climate change impacts); and
5. economics and public benefits.

Identifying or developing analytical criteria

- » The next step involves identifying or developing analytical criteria derived from and consonant with the relevant law for the determination of each issue
- » Choices may need to be made as to what is or should be the legal rule to be applied to the legal problem or dispute.
- » Cardozo suggested different methods to choose or develop the legal rule to be applied to the case at hand. The legal rule may be developed along:
 - the line of logical progression (the rule of analogy or the method of philosophy);
 - the line of historical development (the method of evolution);
 - the line of customs of the community (the method of tradition); or
 - the line of justice, morals and social welfare (the method of sociology).
- » Choices are involved in selecting the method and in applying the selected method.
- » See, Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921) 30-31.

Identifying or developing analytical criteria: planning

Issue	Analytical criteria identified and developed by the Court in <i>Gloucester</i>
Planning impacts	Clause 12 of the relevant Mining State Environmental Planning Policy (SEPP) required the consent authority to evaluate the existing and approved uses of land in the vicinity of the development, whether the development would be likely to have a significant impact on the likely preferred uses of that land, and any ways in which the development may be incompatible with any of those existing, approved or likely preferred uses (cl 12(a)). The decision maker must then evaluate and compare the respective public benefits of those uses with the benefits of the mine, considering any proposed measures to avoid or minimise the incompatibility (cl 12(b) and 12(c)).

Identifying or developing analytical criteria: visual impacts

Issue	Analytical criteria identified and developed by the Court in <i>Gloucester</i>
Visual impacts	<p>The parties' experts generally agreed that the approach that should be followed to assess the visual impacts involved:</p> <ul style="list-style-type: none">• an analysis of the existing visual environment to determine the baseline against which the visual impacts of the proposed mine are to be assessed;• a viewpoint analysis to identify sites likely to be affected by the proposed mine;• an assessment of the extent of the visual impacts of the proposed mine on the viewpoints, including the visual impacts during the life of the mine and, after completion of mining, the cumulative visual impacts of the mine and the night lighting impacts of the mine; and• an assessment of the extent to which the visual impacts are mitigated by the proposed mitigation measures. <p>The overall level of visual impact was determined by weighing the level of visual effect by the visual sensitivity of the view place and viewer.</p>

Identifying or developing analytical criteria: social impacts

Issue	Analytical criteria identified and developed by the Court
Social impacts	<p>Assessing the social impacts required identifying, evaluating and weighing the negative and positive social impacts of the project.</p> <p>The Social Impact Assessment Guideline outlined the methodology for assessing social impacts of state significant mining, petroleum and extractive industry development. The guideline listed nine key categories of social impacts:</p> <ol style="list-style-type: none">1. way of life, including: how people live, work, play and people interact with one another on a daily basis;2. community, including its composition, cohesion, character, how it functions and sense of place;3. access to and use of infrastructure, services and facilities;4. culture, including shared beliefs, customs, values and stories, and connections to land, places, and buildings (including Aboriginal culture and connection to country);5. health and wellbeing, including physical and mental health;6. surroundings, including access to and use of ecosystem services, public safety and security, access to and use of the natural and built environment, and its aesthetic value and/or amenity;7. personal and property rights, including whether their economic livelihoods are affected, and whether they experience personal disadvantage or have their civil liberties affected;8. decision-making systems, particularly the extent to which they can have a say in decisions that affect their lives, and have access to complaint, remedy and grievance mechanisms; and9. fears and aspirations related to one or a combination of the above, or about the future of their community.

Identifying or developing analytical criteria: climate change

Issue	Analytical criteria identified and developed by the Court in <i>Gloucester</i>
Climate change impacts	<p>The Court assessed the impacts of the mine on climate change by considering the greenhouse gas emissions of the project and their relative contribution to climate change.</p> <p>The Court held that both the direct and indirect emissions from the project should be considered:</p> <ol style="list-style-type: none"><li data-bbox="443 561 2405 701">1. The Court was required to consider and determine the development application for the project, and the EIS that accompanied the development application. The EIS included a greenhouse gas assessment assessing scope 1, 2 and 3 emissions.<li data-bbox="443 715 2435 803">2. The Court was required, in determining the application, to consider any environmental planning instruments. The Mining SEPP required downstream emissions to be considered.<li data-bbox="443 818 2244 906">3. The Court was required to consider the likely impacts of the development. The likely impacts of a development include both direct and indirect environmental impacts, including scope 3 emissions.<li data-bbox="443 921 2359 1158">4. The Court was required to consider the public interest, which has been held to include the principles of ecologically sustainable development. The principles of ESD, particularly the precautionary principle and principle of inter-generational equity, have been held to require consideration of the impact of a development on climate change and the impact of climate change on a development. The impacts of a development on climate change include both direct and indirect impacts.

Identifying or developing analytical criteria: economic

Issue	Analytical criteria identified and developed by the Court in <i>Gloucester</i>
Economic and public benefits	<p>The public benefits of the mine need to be considered in two ways:</p> <ol style="list-style-type: none"><li data-bbox="435 458 2270 501">1. Whether the benefits of the project outweigh its costs to the members of a specified community; and<li data-bbox="435 508 2074 551">2. Whether the public benefits of the project outweigh the public benefits of other land uses. <p>Two tools were used to provide information for these two relevant matters: a cost benefit analysis used to assess the public interest by estimating the net present value of the project to NSW; and a local effects analysis used to assess the likely impacts of the project in the locality</p>

Provisional determination of issues: planning

- » The next step involves provisionally determining each issue, being mindful of the propensity for later issues to change their form and substance with the determination of earlier issues

Issue	Determination in <i>Gloucester</i>
Planning impacts	<p>The existing, approved and likely preferred uses of land included residential, tourism, agribusiness, commercial, recreational and social infrastructure uses.</p> <p>The mere fact that mining was permissible with consent in the zones in the vicinity of the mine did not mean it was a likely preferred use: at [81]</p> <p>By reason of the visual, amenity (noise and air quality impacts) and social impacts, the Rocky Hill Coal Project would have a significant impact on the likely preferred uses in the vicinity of the proposed mine: at [82]</p> <p>The public benefits were not proven to outweigh either the public costs of the proposed mine or the public benefits of the existing, approved and likely preferred uses in the vicinity if those uses were left unaffected by the proposed mine: at [89]</p> <p>The mitigation measures proposed would not avoid or minimise the incompatibility of uses: at [86]</p>

Provisional determination of issues: visual impacts

Issue	Determination in <i>Gloucester</i>
Visual impacts	<p>The combined impact of a high visual effect with high visual sensitivity is a high visual impact (at [217]). The high visual impact will be experienced from multiple viewpoints on private and public land. This high visual impact in turn has a significant impact on and is incompatible with the land uses carried out on the land. The high visual impact will significantly affect the residential amenity, use and enjoyment of residential and rural residential properties: at [218]</p> <p>The visual impacts of the Project, both by themselves and by reason of the consequential adverse effects on existing, approved and likely future uses of land in the vicinity, and the social impacts that the visual impacts will likely cause, justify refusal of consent for the Project: at [222]</p>

Provisional determination of issues: social impacts

Issue	Determination in <i>Gloucester</i>
Social impacts	<p>The positive social impacts on local employment and the local economy would be counteracted by the negative social impacts on local employment and economy.</p> <p>The Project had caused, and was likely to continue to cause, social divisions in the community between people who oppose and people who support the Project. A large majority of the community opposed the Project: at [289]</p> <p>The project would adversely affect Aboriginal people of the area by impacting their culture and Country, by impacting both specified Aboriginal sites and the landscape as a whole, which is of great significance to the Aboriginal people. These impacts would not only endure for the length of the project, but long after. The consequence of the negative social impacts on Aboriginal people will be “major” and the likelihood of the negative social impacts is “likely”, resulting in an “extreme” social risk rating: at [351]</p> <p>The consequence of the potential social impacts on health and wellbeing is “major” and the likelihood of that social impact is “likely”, resulting in an “extreme” social risk rating: at [368]</p> <p>The project would result in intra-generational inequity: at [413]</p> <p>The project would also result in inter-generational inequity: at [415]-[416]</p>

Provisional determination of issues: climate change

Issue	Determination in <i>Gloucester</i>
Climate change impacts	<p>All anthropogenic GHG emissions contribute to climate change. The increased GHG concentrations in the atmosphere have already affected, and will continue to affect, the climate system. The current and future impacts of climate change, as summarised by the expert for Grounswell Gloucester included: extreme weather events, sea level rise, increase in average temperatures, ocean acidification, decreased rainfall and harsher fire weather climate: at [514]</p> <p>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: at [525]</p>

Provisional determination of issues: economic

Issue	Determination in <i>Gloucester</i>
Economic and public benefits	<p>The Court held that the benefits from royalties and income tax were overstated by GRL: at [570], [583], [586]</p> <p>The Court held that if there will be any worker benefits of the Project, they were likely to be small and much less than contended by GRL: at [605]</p> <p>The indirect benefit from supplier benefits were overstated: [636]</p> <p>The economic benefits were likely to be very small and the impacts of the project were likely to be significant. Thus, the net economic benefit of the project would be significantly reduced: at [666]</p> <p>The Court found that the local effects analysis completed by GRL was deficient. It relied on unfounded assumptions and projections and did not prove that the project would deliver net economic benefits to the Taree-Gloucester region: at [681]</p> <p>The qualitative evaluation undertaken by the Court in relation to the planning impacts demonstrated that the project would adversely affect the public benefits of the existing, approved and likely preferred land uses: at [685]</p>

Evaluation and balancing

- » Finally, the decision-maker must reappraise the provisional resolution of the issues by holistically evaluating and balancing all of the issues to reach the ultimate decision in the proceedings

The Court in *Gloucester* held (at [686]-[687]):

- » The task of determining the development application for the project, requires the Court, exercising the function of the consent authority, “to balance the public interest in approving or disapproving the Project, having regard to the competing economic and other benefits and the potential negative impacts the Project would have if approved” (*Warkworth Mining Ltd v Bulga Milbrodale Progress Association Inc* (2014) 200 LGERA 375).
- » Balancing the public interest in approving or disapproving the project is **a qualitative and not quantitative exercise**.
- » Forms of economic assessment such as cost benefit analysis, which quantify, monetise and aggregate different factors, assist but are not a substitute for the **intuitive synthesis** required of the consent authority in determining the development application.
- » The benefits of the project were outweighed by the costs (at [688]).
- » The mine would cause significant and unacceptable planning, visual and social impacts, which cannot be satisfactorily mitigated. It should be refused on these grounds alone (at [556]).
- » Avoiding the GHG emissions and their likely contribution to adverse impacts of climate change added a further reason for refusal of the mine (at [556]).
- » The project was not in the public interest (at [688]).

Conclusion

- » One way to respond to the polycentric, complexity and uncertainty of environmental decision-making is for the decision-maker to structure the adjudicative task by:
 - Isolating the principal contested issues that together contribute to polycentricity;
 - Identifying or developing analytical criteria, derived from and consonant with the relevant law, for the determination of each issue;
 - Provisionally determining each issue, being mindful of the propensity for later issues to change their form and substance with the determination of earlier issues; and
 - Reappraising the provisional resolution of the issues by holistically evaluating and balancing all of the issues to reach the ultimate decision in the proceedings