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ONE JUDGMENT BRINGS UPHEAVAL FOR ENERGY AND CLIMATE POLICY IN AUSTRALIA

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Key Points

- *An environmental court in New South Wales has found that the greenhouse gas emissions of a new coal mining project, even the future emissions from offshore combustion of the coal that is exported by the project, constitute a valid ground for refusing development consent because they will cause the climate to change.*

- *The finding is illusory, if not false.*

- *The finding poses an obstacle to all future coal mining projects and all other projects in NSW that may directly or indirectly give rise to significant emissions.*

- *The finding is likely to encourage opponents of climate change in other countries to consider legal action as a tool in the global campaign against climate change beyond whatever commitments their government may have made under the Paris Agreement.*

- *The finding brings upheaval to domestic energy and climate policy in Australia. It may warrant a re-examination by all governments of their energy and climate policies in the context of their bilateral and multilateral commitments.*

Introduction

On 8 February 2019, the Land and Environment Court of New South Wales blocked the proposed development of an open-cut coal mine near the scenic town of Gloucester in New South Wales (the Project) (see the 172-page case report: *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7).

The Court's judgment will have serious, far-reaching and long-lasting ramifications. It immediately threatens the development and expansion in NSW of coal mines, oil fields, gas fields and power stations fueled by coal, oil or gas. It also threatens other emissions-intensive projects.

The Court was sitting as a government 'consent authority' in the place of the NSW Minister for Planning. It was not sitting in judgment on a claim by a party for injury to health, safety or the environment but, rather, as consent authority in relation to an application for government approval to develop a particular project in a specific location.

The decision is not a legally binding precedent for other development applications in NSW because the environmental impact of each new project is always assessed on its own merits:

> '*The task of determining the development application for the Project, in essence, 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.* (Para 686)
>
> *The ... Project will yield public benefits, including economic benefits, but it will also have significant negative impacts, including visual, amenity, social and climate change impacts and impacts on the existing, approved and likely preferred uses of land in the vicinity of the Project, which are all costs of the Project. Balancing the benefits and costs of the Project is, in the end, a qualitative and not quantitative exercise.* (Para 687)
>
> *I find that the negative impacts of the Project, including the planning impacts on the existing, approved and likely preferred land uses, the visual impacts, the amenity impacts of noise and dust that cause social impacts, other social impacts, and climate change impacts, outweigh the economic and other public benefits of the Project.'* (Para 688)

The decision will nonetheless have enormous future influence because of two related conclusions that were reached by the Court: first, that the offshore emissions of a project could be taken into account (because they would add to the global total of emissions and hence contribute to climate change) and, second, that it does not matter that a project's emissions may represent only a small fraction of the global total (para 515).

A causal link with the climate system?

The Court found there was a causal link between the Project's emissions and the climate system:

> '*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.'* (Para 525)

No-one can deny a correlation between emissions and climate change. However, the finding of a causal link between an individual project and climate change is, in the author's opinion, illusory, if not false.

The Court also found an obligation for the NSW government to honour the goal of the Paris Agreement to achieve net zero emissions by 2050:

> '*The approval of the Project (which will be a new source of GHG emissions) is also likely to run counter to the 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 (a balance between anthropogenic emissions by sources and removals by sinks) in the second half of this century. This is the globally agreed goal of the Paris Agreement (in Article 4(1)). The NSW government has endorsed the Paris Agreement and set itself the goal of achieving net zero emissions by 2050.'* (Para 526)

The finding of such an obligation of the NSW government did not oblige the Court to refuse the Project.

The consequences of the Court decision

The decision is likely to have at least five immediate consequences, not all good but not all bad:

i. It will cause an upheaval of domestic energy and climate policy in Australia.

ii. It will encourage opponents of climate change in Australia to intervene and oppose all future development applications that may directly or indirectly involve a significant increase in the level of emissions. The decision will also influence government responses in such cases.

iii. It will encourage opponents of climate change in other countries to consider legal action as a tool in the global campaign against climate change, regardless of how their respective governments may have decided to give effect to their Paris Agreement commitments.

iv. It will, importantly, encourage proponents of new projects with significant emissions profiles to consider whether they can overcome their negative profiles by employing new

technologies such as High Efficiency, Low Emissions (HELE) power generation, Carbon Capture, Utilisation and Storage (CCUS) and storage technologies.

v. It will also prompt a re-examination by many other governments of their energy and climate policies in the context of their international bilateral and multilateral commitments.

How the Court summarised its decision, warning of 'dire consequences'

At the end of its 172-page decision, the Court summarised its decision:

> '*The Project will be a material source of GHG emissions and contribute to climate change. Approval of the Project will not assist in achieving the rapid and deep reductions in GHG emissions that are needed now in order to balance emissions by sources with removals by sinks of GHGs in the second half of this century and achieve the generally agreed goal of limiting the increase in global average temperature to well below 2oC above pre-industrial levels.'* (Para 697)
>
> *By reason of these various impacts, the Project will have significant impacts on, and be incompatible with, the existing, approved and likely preferred uses of land in the vicinity of the Project.* (Para 698)
>
> *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.'* (Para 698)

What now?

John McDonnell's public policy paper *'Why No Energy Policy?*' published by the Institute in February 2019 argued the case for rigorous cost-benefit analysis to underpin energy and climate policy. This might be contrasted with the Court's 'qualitative' approach to balancing the benefits and costs of a particular project before deciding to accept or refuse it. Of course, it is acknowledged that courts lack the time and resources to undertake any such analysis if a party does not submit one in evidence.

It is worth noting that the Project in question could have been refused by the Court on local social and environmental grounds without attempting to establish a causal link with climate change.

Future proponents of emissions-intensive development projects may need to underpin their proposals with more rigorous cost-benefit analysis. They might also have regard to the deployment of emission reduction technologies, such as HELE Generation or CCUS, or the possibility of offsetting future project emissions by afforestation activities or removal of emissions by sinks.

Policymakers for their part will need to temper their emissions-reduction policies with something more than the blunt instrument of a court deciding to accept or refuse a particular project.

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About the Author

Robert Pritchard *is Executive Director of the Energy Policy Institute of Australia.*

Robert has over 40 years' experience as a lawyer and adviser to industry, governments and organisations on energy projects and policies, both in Australia and overseas, and as a director of companies in the energy sector. This includes serving as chairman of the St Baker Energy Innovation Fund and SMR Nuclear Technology Pty Ltd. Robert was the first chairman of the Energy Law Section of the International Bar Association. He served for nine years on the Finance Committee of the World Energy Council. He is a former member of the CSIRO Energy Transformed Flagship. He is a consultant to the Piper Alderman law firm in Sydney.