

It was one thing to persuade a surveyor that a heap of boulders were the eggs of the Rainbow Snake, or a lump of reddish sandstone was the liver of a speared kangaroo. It was something else to convince him that a featureless stretch of gravel was the musical equivalent of Beethoven's Opus III

-BRUCE CHATWIN, *THE SONGLINES*

On February 8 this year there was a huge amount of media coverage of a decision by the New South Wales Land and Environment Court (Preston CJ) rejecting an appeal by mining company Gloucester Resources Limited (GRL) which sought consent to construct the Rocky Hill Coal Mine on the southern doorstep of the small Mid-North Coast town of Gloucester. The case was *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7.

The reason the case resulted in so much publicity was because his Honour dismissed the appeal partly on the basis on the likely contribution of the coal mine to climate change causing, greenhouse gas emissions. That aspect of the case has been extensively discussed, (rationally and otherwise), in the media and in a number of articles. However, his Honour did not reject the mine solely on the basis of its likely climate change impact. He rejected it also because of its significant social impacts. One significant element related to social impact was the failure by GRL to properly assess the impacts of the mine on Aboriginal people. This aspect, which, in the opinion of the authors, has not received adequate attention so far, is the subject of this article.

GRL lodged its development application in December 2012. It was a State Significant development application within the meaning of s4.36(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act). In August 2016 an amended application was lodged together with an amended environmental impact statement (EIS). The proposal was for the development of three contiguous open cut pits covering an area of over 800ha and being up to 220m in depth. The proposal also involved the construction of a haul road to transport coal by truck to an existing facility several kilometres to the south. The EIS explained that the operations would involve:

- Vegetation clearing;
- Soil removal and stockpiling;
- Overburden removal and the construction of so called “amenity barriers”;
- Coal recovery and transport; and
- Rehabilitation.

The amended application was placed on public exhibition by the Department of Planning and Environment (the Department) and 90% of submissions which were lodged were opposed to the mine. After all submissions were received and after GRL had responded to the submissions the Department indicated that it did not recommend approval of the development.

Under the EPA Act it was the Planning Minister who was the relevant consent authority, but the Minister delegated the decision-making power to the Planning and Assessment Commission (PAC). The PAC accepted further written and oral submissions and then refused consent to the application giving three reasons:

1. The location of the mine would be in contravention of the relevant zoning under the Gloucester Local Environment Plan 2010;
2. The visual impact of the mine would be significant; and
3. The project was not in the public interest.

As can be seen, there was no mention by the PAC of the social impact of the mine generally, and certainly no mention of any Aboriginal heritage or social issues as being reasons for rejection.

The social impact of the development was one of the matters required to be taken into account by the PAC when considering the application. GRL's EIS did deal with the social impact of the mine and touched upon some Aboriginal issues. The EIS indicated that nine Aboriginal "sites" would be affected by the mine. GRL provided the following measures to mitigate impacts to Aboriginal cultural heritage:

- Salvage all identified Aboriginal artefacts;
- Storage of the artefacts in a way agreed to by "Aboriginal stakeholders";
- Attempt to locate further artefacts;
- Produce an Aboriginal Cultural Heritage Management Plan in consultation with Aboriginal stakeholders;
- Devise an appropriate procedure should any human remains be discovered; and
- Preparation and delivery of an Aboriginal Cultural Heritage education campaign for the GRL workforce.

During the assessment process members of the Cook family made comprehensive and detailed submissions relating to Aboriginal heritage. They are descendants of Jack Cook and Jessie Brummy who were First Nation people of the Gloucester and surrounding region. Jack Cook was a Worimi Aboriginal Elder who was born in 1838. He was the last traditionally initiated man of the Barrington Tops area and died in 1925. In 2016 over 150 of Jack Cook's descendants assembled in Gloucester and unveiled a plaque recognising the contribution of Jack and Jessie to the Gloucester area.

The Cook family submission raised concerns that the Heritage Assessment undertaken by GRL had failed to meet the appropriate guidelines and requirements and that GRL had not undertaken proper and effective consultation. The submission explained that the Cook family had a number of important concerns including:

- The number and type of Aboriginal sites that would be destroyed by the project;
- The manner in which Aboriginal artefacts would be proposed to be removed and stored;
- The proximity of the mine to sacred areas; and
- The impact of the mine on Aboriginal cultural, traditional and historical ties to the area.

The Cook family also highlighted that a significant defect in the GRL assessment relating to Aboriginal heritage was that it concentrated almost exclusively on archaeological artefacts and sites and largely ignored broader cultural and historical issues, including those related to its impact on 'Country'.

Gloucester and the proposed mine are located in a valley between two large rocky ranges generally known as "The Bucketts" and "The Mograni". As part of the Cook family submissions, Worimi Elder Ken Eveleigh said:

"The Bucketts and The Mograni look down upon this valley; it is a very spiritual and sacred place. If you belong to Country you feel the spirit and hear the rivers flow and you know that your Ancestors are still here with nature and it is not just in one spot; it runs through the valley.

By looking down the valley, you can see that it is a significant and very spiritual place for Aboriginal people of the Worimi and its history needs to rest in peace. My Ancestors need to

travel with the Dreaming through the valley and along the rivers. One who loses his dreaming is lost.”

GRL’s response to the Cook family submissions appeared to confirm that GRL and its consultants did not understand the broad and spiritual aspects of Aboriginal culture or did not take them seriously. Notwithstanding the Cook family submissions, the Department largely accepted GRL’s proposals and considered that all Aboriginal Heritage issues could be adequately dealt with by appropriate conditions of consent. Its Assessment Report did not really come to grips with the points that the Cook family were making concerning the need for proper and effective consultation, and for the need to consider broader cultural and spiritual issues.

In New South Wales the right to seek a merits appeal of an approval or a refusal of a mine by the PAC is not available where the Minister directs the PAC to hold a public hearing which is what happens in the majority of cases. However, and unusually, GRL was on this occasion permitted to retain its right to appeal the PAC decision to the Land and Environment Court because the PAC was not directed to hold a public hearing.

When GRL lodged its appeal the only parties to the case were GRL as Applicant and the Minister as Respondent. Local community group, Groundswell Gloucester (Groundswell), had played a significant role leading up to the appeal in opposing the mine. Groundswell took the view that the grounds for the Department’s opposition to the mine were far too narrow and sought consent from the Court to join the proceedings as Second Respondent. GRL strongly opposed the application but the Court gave consent, nevertheless. Groundswell was represented by the Environmental Defenders Office.

The two broad issues that Groundswell wished to agitate were the climate change impact and the social impact of the proposed mine. The hearing before Preston CJ was over about 3 weeks, including at Gloucester, where his Honour viewed the area and heard oral submissions from those opposing and from those supporting the mine, including a detailed submission on behalf of Aboriginal people. Three social impact experts were qualified to give evidence and the Court also had the benefit of all the written material previously provided to the Department and the PAC on the Aboriginal Heritage issue.

The social impact experts qualified by the Minister and Groundswell placed great significance on the potential impacts on Aboriginal culture. The expert qualified by GRL said in evidence that she “accepted that there needed to be, but there had not been, a reasoned and comprehensive assessment of the social impacts of the Project on the Aboriginal people, particularly having regard to the significant proportion of Aboriginal people in the area (around 9.5%)”ⁱ

On 8 February 2019 Preston CJ handed down his decision dismissing the appeal and providing detailed reasons. Whilst it was the climate change reasons that received most publicity, it was by no means the main basis for the rejection of the GRL’s appeal. The “net negative social impacts”ⁱⁱ of the mine was a significant reason for its rejection, including the social impact on Aboriginal people. His Honour found that the GRL Social Impact Assessment had failed to assess the social impacts of the mine on Aboriginal people and that consultation had been inadequate.

His Honour noted that the mine would have both positive and negative social impactsⁱⁱⁱ. He assessed that impact by having regard to the *Social Impact Assessment Guideline* (Department of Planning and Environment 2017). The Guideline describes a social impact as “a consequence experienced by people due to changes associated with a State Significant resource project.” The Guideline lists nine key categories being changes to people’s:

- Way of life;
- Community;
- Access to and use of infrastructure, services and facilities;
- Culture;
- Health and wellbeing;
- Surroundings;
- Personal and property rights;
- Decision-making systems; and
- Fear and aspirations.

It was noted by the Court that the impacts did not have to be actual but could be perceived^{iv}. His Honour then proceeded to assess the social impacts of the mine under each of the nine categories^v and dealt with Aboriginal heritage issues under the heading of *Impact on people's culture*.

His Honour commenced his discussion of this topic with the following comment:

“Social impact related to culture includes shared beliefs, customs, values and stories, as well as connections to land, places and buildings. Culture includes both Aboriginal and European culture and heritage.”^{vi}

At the hearing Michael Manikas gave evidence on behalf of the Cook family and his Honour had this to say about that evidence:

“He observed that, because of past violence against and displacement of Aboriginal people, knowledge about Country and culture in the Gloucester area is incomplete. “We just don’t know the full extent of the importance in this area”. However, knowledge has been retained by many of our elders and we are in the early phases of capturing and collating that knowledge. We’re learning where the sacred ceremonial sites were for women’s business and men’s business, along with other important areas.” Mr Manikas expressed concern that: “If the mine goes ahead, the family will lose some of our connection with each other and this place as the land will be destroyed. The culture and connection we have been rebuilding will once again be lost. Gloucester and the surrounding valley is an extremely valuable resource to our family in its current state.”^{vii}

Ken Eveleigh also made an oral submission to the Court describing the cultural significance of the Gloucester valley and the Bucketts and the Mograni ranges to Aboriginal people. He said that the valley:

“ is a significant sacred place as this is our Ancestor’s daughters’ birthing and naming area, as they travel (sic) over this part of the land they shared knowledge of our Ancestor’s medicines, hunting and gathering of food, the weaving of fish baskets whilst singing to the spirits of the Ancestors.”^{viii}

After reviewing all the expert and other evidence his Honour concluded as follows:

“I find that the Project will have significant negative impacts on culture. The Project will adversely affect Aboriginal people in the area, by impacting their culture and Country. The impacts are not merely to the individual Aboriginal sites that have already been identified, but also there is the risk that other unidentified Aboriginal sites might be affected. There is also the broader impact on the landscape that is of high spiritual significance to the Aboriginal people.”^{ix}

This decision makes it clear that issues surrounding Aboriginal heritage must be taken seriously by proponents of State Significant developments and that there must be genuine and effective consultation. It is concerning to the authors of this article that the Department and the PAC were prepared to accept that GRL had adequately dealt with the Aboriginal Heritage issue when the Court found to the contrary. If Groundswell had not joined as a party to the case then this issue, and the broader social impact issues would never have been canvassed at the hearing. We hope that the case might lead to better outcomes for affected Aboriginal communities in the future and help promote a better understanding of the high significance of Aboriginal history and culture, including the need to properly consider impacts on that culture in the impact assessment process.

A shortened version of this article by John Watts, Jeff Kite, Michael Manikas and Ken Eveleigh was published by the NSW Law Society Journal on 1 July 2019. John Watts is a retired barrister and Jeff Kite is a retired water resources engineer. They are both members of the Groundswell Gloucester committee. Michael Manikas is a Worimi and Biripi descendant and Ken Eveleigh is a Worimi elder.

ⁱ Paragraph 349
ⁱⁱ Paragraph 421
ⁱⁱⁱ Paragraph 270
^{iv} Paragraph 274
^v Paragraph 271
^{vi} Paragraph 340
^{vii} Paragraph 348
^{viii} Paragraph 347
^{ix} Paragraph 351