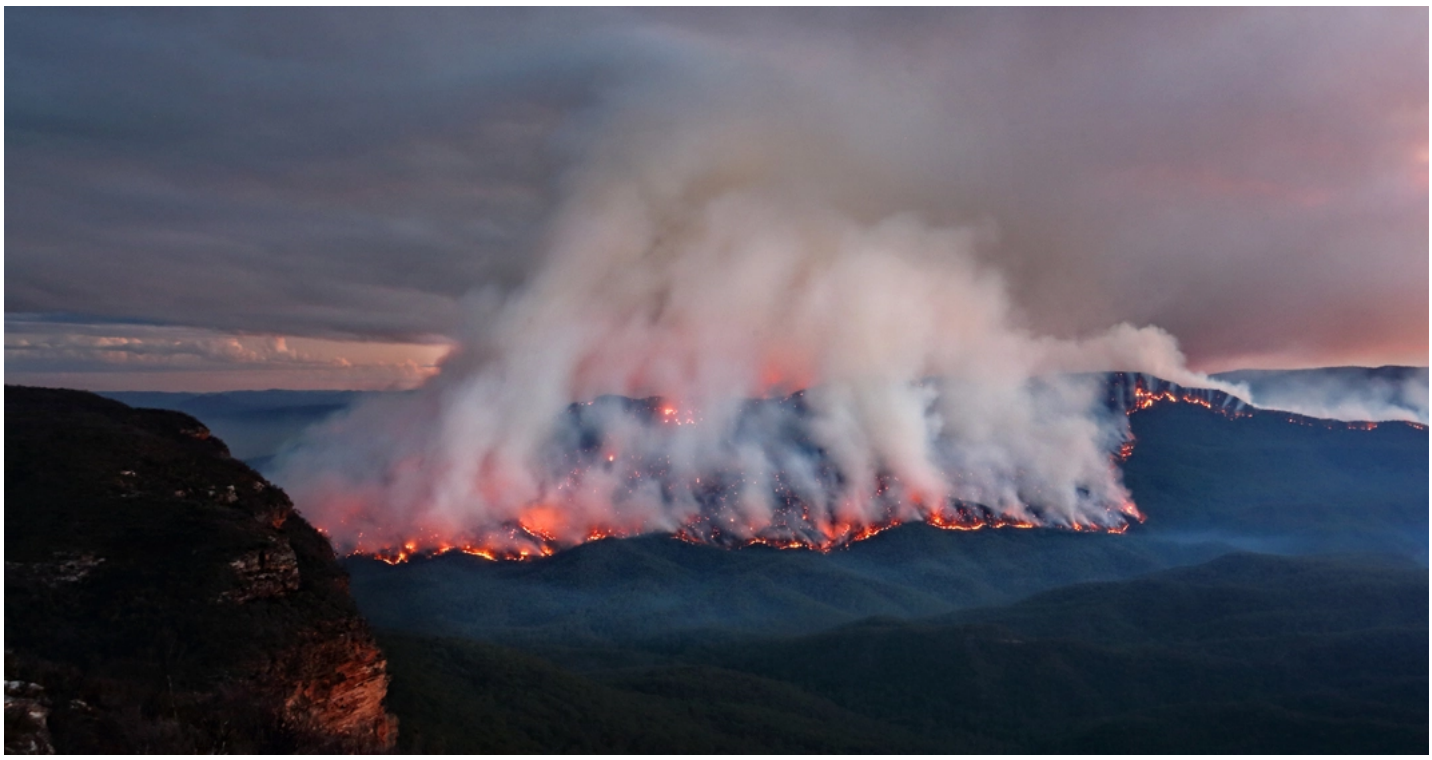
Decision making in uncertain times: pandemics, planning and climate change



By Ballanda Sack, Timothy Allen and Amelia Smillie - Mar 01, 2021 7:55 am AEDT

Snapshot

- Decisions to classify land as being 'at risk' of environmental hazards are often challenged on the basis the science is not certain or the constraint is disproportionate to the predicted risk.
- However, recent NSW decisions suggest a willingness on the part of the courts to support risk-based decision making, even with all the uncertainties and imperfections that entails.

For many of us, a combination of unprecedented events in 2020 catalysed a shifting of attitudes and changing of priorities. Australians experienced extended periods of extreme weather, catastrophic bushfires and enormous losses of biodiversity. The destruction of caves inhabited for millennia at Juukan Gorge prompted long overdue recognition of our shared history, and the global pandemic has, and is still, forcing reconsideration of how and where we work. Despite all this, 2020 gave us useful insights into our future world, changing the boundaries of what we consider 'normal' or reasonably foreseeable conditions. The lessons for decision makers required to assess long term projects should be profound. Embedded in environmental and planning law are mechanisms that allow for decision making in a less predictable world and in NSW, the courts have shown a willingness to support risk-based decision making.

Planning for future risks

Planning for future risk is necessarily an imprecise task. Whilst we may accept that sea level rise will occur and that extreme weather events will become more frequent, we cannot today predict precisely when, where and how these will eventuate. Decisions to classify land as being 'at risk' of environmental hazards such as flooding, bushfire or coastal erosion and the imposition of planning controls can be challenged (often by landowners or developers) on the basis the science is not certain or that the constraint is disproportionate to the predicted risk.

In *Boomerang & Blueys Residents Group Inc v New South Wales Minister for the Environment, Heritage and Local Government and MidCoast Council (No 2)* [2019] NSWLEC 202, local residents challenged the making and certification of a Coastal Zone Management Plan ('**CZMP**'). In essence, they claimed that there was no rational or proper basis for Council and the Minister preparing, adopting and certifying the CZMP and its underlying assessment of coastal hazards. In dismissing the appeal, the Court reinforced:

- Whether the Minister or Council made an incorrect decision, or one that lacked merit, is irrelevant except where it can be established that the relevant decision-maker made a legal error which was 'jurisdictional'. The relevant decisions were considered not reviewable, except potentially on the basis of unreasonableness.
- Demonstrating that a decision is so unreasonable that it is unlawful is extremely difficult, requiring the applicant to establish that the decision 'lacked an evident and intelligible justification' or is contrary to the 'overwhelming weight of the material'.

In response to the residents' claim that Council had not prepared the CZMP strictly *in accordance* with the relevant government guideline, the Court identified that:

i. there is a distinction between 'in accordance with' and 'in compliance with';
ii. the guideline did not impose mandatory requirements; and
iii. in any event the CZMP met its requirements.

Similarly, Council's adopted risk assessment methodology which involved an analysis of the consequences of an event as well as its likelihood, rather than focussing solely on its probability was, while complex, not legally flawed. Inaccuracies in a table summarising information addressed in detail elsewhere in the CZMP were also not considered determinative.

The government was given a similarly wide latitude in *Reysson Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979* [2020] NSWCA 281. In this instance, the landowner unsuccessfully challenged the validity of the mapping of part of its land as a 'coastal wetlands and littoral rainforests area' under the relevant planning instrument in the Land and Environment Court and on appeal. The Court of Appeal considered that whether or not the relevant land had the necessary physical characteristics of a wetland/rainforest was not a jurisdictional fact capable of review by the Court; it would amount to a judicial policy judgment not intended by the legislature. Additionally, the Court considered that the imposition of a blanket 100m buffer zone (where further assessment would be needed to support future development) was a rational and proportionate legislative device.

A proper framework allows flexibility

Coastal land is particularly vulnerable to sea level rise, land adjoining the sea is highly prized and extreme weather/coastal erosion events are complex, difficult to predict and expensive to mitigate against as recently demonstrated in Wamberal, Byron Bay and Collaroy/Narrabeen.

Historically, a range of approaches has been employed by consent authorities for at-risk coastal land including planned retreat, hazard mapping triggering additional assessment and/or time-limited consents. These approaches have been met with a mixed reception from the community and the courts. While there have been instances in which time limited consents have been rejected as an appropriate means of dealing with future coastal risk, in *Salama v Northern Beaches Council* [2020] NSWLEC 143, the Court upheld a consent condition limiting the duration of approval for a seawall to 60 years.

Specifically, the condition required the landowner to procure a report after 57 years which assessed the works and their suitability using evidence and coastal predictions known *at that time*. If the report considered the works remained suitable then Council would consider extending the term of the consent. However, if the report recommended upgrades, removal or replacement of the structure, this would need to be undertaken (subject to obtaining any necessary additional consents). The Court emphasised that the appropriateness of this specific condition turned on its facts including the existence of a 'coherent and comprehensive' strategic planning framework applied by Council to coastal protection works.

These three decisions reinforce:

i. the broad scope which decision makers have in making policy judgments and in developing policy documents, provided that they have complied with any mandatory requirements specified in the authorising legislation; and
ii. the idea that well-considered policies can provide scope for consent authorities to be more creative in conditions of consent where long term risks need to be considered.

Councils also have the benefit of the exemption from liability under s 733 of the *Local Government Act 1993,* for decisions made in good faith regarding flood liable land, land subject to risk of bush fire and land in coastal zones.

Decision making in the face of scientific uncertainty

The principles of ecologically sustainable development ('**ESD**'), specifically the precautionary principle and the principle of inter-generational equity, oblige consent authorities, in appropriate cases, to consider the impacts of a proposed development on climate change and the impacts of climate change on a development. These principles are defined in s 6(2) of the *Protection of the Environment Administration Act 1991*. The precautionary principle provides that 'if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation'. It changes the underlying presumption from exploitation to conservation and places the burden on the proponent to prove that the risk can be mitigated. Under the principle of intergenerational equity 'the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for future generations'.

Consideration of the public interest, including the principles of ESD, is a mandatory requirement in development assessment (*Environmental Planning and Assessment Act 1979*, s 4.15). So far, however, it has been used very sparingly by consent authorities as a reason for the refusal of the grant of development consent.

In 2019 the Independent Planning Commission ('**IPC'**) refused consent for the proposed KEPCO coal mine in the Bylong Valley. It found that the project was not in the public interest, including because it would be contrary to the principles of ESD. This determination was the subject of judicial review proceedings in *KEPCO Bylong Australia Pty Ltd v Independent Planning Commission (No 2)* [2020] NSWLEC 179. The judicial review proceedings ultimately turned on the application of clause 14 of State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 which requires consideration of greenhouse gas emissions. An initial ground relating to the application of the principle of intergenerational equity was abandoned by the applicant.

In its review, the Court found that while 'loose language' may have been used by the IPC in its application of clause 14, that error was not material having regard to the fact that the IPC had clearly and separately concluded, based on several other significant merit issues, that the project was not in the public interest and accordingly the error as asserted by the applicant did not invalidate the refusal of the development application.

In *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 ('the ***Rocky Hill*** case') the principle of intergenerational equity was also a basis for the Court's refusal to grant consent to that proposed open cut mine on public interest grounds.

In both *Kepco* and *Rocky Hill* the direct and indirect future greenhouse gas emissions ('**GHG**') of the proposed coal mines were important and relevant considerations in the decisions not to allow the projects to proceed. However, these two decisions are not necessarily an indication of a future trend as a number of much larger projects generating significantly more GHG emissions have recently been granted development consent.

How might the pandemic inform our response to climate change?

Consent authorities are well equipped by their authorising legislation to address future climate related risks, but it remains controversial and unpopular for them to do so. The pandemic has thrown up many instances of decision making involving high risks and unplanned consequences. It has also demonstrated the public's willingness to support constraints (which might appear at first glance to be excessive/draconian) in order to secure a better future where it is accompanied by effective education campaigns. With the benefit of hindsight (and compared to the way other countries have dealt with the pandemic), these decisions now seem reasonable and proportionate. Perhaps, supported by the courts, decision makers will in 2021 demonstrate more initiative in planning for our future in this more uncertain world.

Ballanda Sack is Special Counsel, Timothy Allen is a solicitor and Amelia Smillie, is a paralegal, all with Beatty Legal.