

Mining around Sydney Harbour was “banned”: an 1895 Decision

2 July 2021

Prelude

The following article considers the “Public Trust Doctrine”. We start by describing the historic decision in *Re Sydney Harbour Collieries Co (No 1)* (1895), and then note a more recent revival of the doctrine in *Gloucester Resources Ltd v Minister for Planning* [2019]. It is pleasing to provide a newsletter about judgments which are cognisant of the importance of public land and the need for the protection of finite and limited natural resources.

Background

Encouraged by “predictions of local geologists” and governmental support, a mining company sought to lease land from the Crown to create a mine along the shore from Mosman to Neutral Bay.¹

Upon being made aware of the application to build a mine in the area, local member of Parliament E M Clark objected against the decision in the mining warden’s court. The Warden was persuaded by Clark’s arguments that the lease should be refused as it would “exclude members of the public from an area of great value where the Privy Council had just upheld their rights”. In June, the government rejected the application.²

The company then successfully applied for the grant of a lease over Bradleys Head. The colony Land Board recommended that the lease be granted subject to rent and a royalty fee. The company appealed the decision to the NSW Land Appeal Court, arguing that the terms were “incompatible with the moral obligations imposed on the Executive to aid rather than hinder the Company”.³

Decision

In recommending against the development of the mine, the Court held that it was a governmental “duty” to take the “greatest care to protect” public interests. Moreover, the Court also stated that “if the Crown could be in law a trustee” then the frontages are held in trust “for the health, recreation and enjoyment of an enormous and ever-increasing population”.⁴ In other words, the Court gave significant weight to the preservation of the public commons, despite the economic benefit that might be rendered by the prospective coal mine.

Though the question before the court was limited to questions of rent, the court went on to address in *obiter* the fundamental question of ‘whether the lease should be granted at all?’ The Court held that the government should prevent exploitation of the public domain by refusing possible leases over the land until “all privately-owned sites had been exhausted”.⁵ The Court also factored in Sydney’s growing population and the

¹ Tim Bonyhady, ‘A Useable Past: The Public Trust in Australia’ (1995) 12 *Environmental Planning & Law Journal* 329, 333.

² Tim Bonyhady (n 2), 334.

³ *Re Sydney Harbour Collieries Co* (n 1), 251.

⁴ *Re Sydney Harbour Collieries Co* (n 1), 251 – 252.

⁵ *Re Sydney Harbour Collieries Co* (n 1), 259.

foreshore's finite resources.⁶ Though the Court considered the economic ramifications of the mine, they concluded that the natural beauty of the harbour exceeded "monetary value".⁷

Key Takeaways

Aside from being a landmark decision in regards to the protection of the foreshore, the acknowledgement of the PTD ('Public Trust Doctrine') was similarly revolutionary as it was the 'first Australian case which acknowledged the doctrine as a legal principle'.⁸ The PTD is an ancient concept which provides that certain natural resources should be held on trust by the government for the current and future benefit of the public.⁹

Although *Re Sydney Harbour Collieries* was decided in 1895, the Court's reasoning was adopted in the 2019 case of *Gloucester Resources*, in which the Court refused to grant development consent for a mine near Gloucester, holding that such a mine would be contrary to 'public interest'.¹⁰ Whilst recognising that the location of a coal mine is "dictated by the geological resource of the coal", the Court nevertheless identified that the acceptability of the development was not dependant "on the location of the natural resource, but on its sustainability".¹¹ The Court continued and interestingly observed that the mere existence of unmined coal near Gloucester did not necessarily warrant its exploitation: "...not every natural resource needs to be exploited".¹²

After citing the decision *Re Sydney Harbour Collieries Co*, and further acknowledging that coal mining in the Gloucester Valley is unsustainable and would therefore be viewed by the public as environmentally or social unacceptable, the Court concluded that the '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' outweighed the economic benefit of the Project.¹³

In a future article we will explore how the Court has developed principles preserving historical townships by reference to an idea known as 'solastalgia', or the emotional distress that one suffers through observing the gradual degradation of the environment.¹⁴

⁶ Ibid.

⁷ Tim Bonyhady (n 2), 336.

⁸ Environmental Defender's Office, *Can We Better Use Private Rights to Protect the Public Commons?* (15 November 2003) <http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/678/attachments/original/1381976641/coastal_solutions_forum.pdf?1381976641>.

⁹Raphael Sagarin and Mary Tunipseed, 'The Public Trust Doctrine: Where Ecology Meets Natural Resources Management' (2012) *Annual Review of Environment and Resources* 37, 473

¹⁰ *Gloucester Resources Ltd v Minister for Planning* [2019] NSWLEC 7.

¹¹ Ibid [694].

¹² Ibid [690]

¹³ Ibid [688].

¹⁴ Lindsay Galway, Thomas Beery, Kelsey Jones-Casey and Kirsti Tasala, 'Mapping the Solastalgia Literature: A Scoping Review Study' (2019) *Int. J. of Env. Res. And Pub. Health*, vol 16, 1