Public participation, transparency and accountability – Essential ingredients of good decision making

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In the field of land use and environment approvals there is, and has been for many years, a tension between the need for expedition on the one hand, and an abiding desire to ensure that "good decisions" are made. In the land use and environment context, whether a decision can be regarded as a "good" decision can often depends upon one's point of view. Of course, a "good decision" needs to be based upon a rigorous analysis of the best available material, but sometimes not even decisions based upon the best analysis are regarded as "good decisions". Individual proposals often become a focus for the expression of polarised views which are as much (if not sometimes more) influenced by the politics of the subject matter as they are the merits of the particular proposal for consideration. A "good decision" must be defined by more than whether the decision is *per se* "correct". A good decision can only be described as such when it enjoys the confidence of those most affected by the outcome – whether they agree with the decision or not.

The involvement of the public, in one form or another, in the formal process of decision making for substantial projects is essential in that it both:

- facilitates the rigorous analysis that is fundamental to the making of sound decisions (whether by testing the evidence and material advanced by proponents or by advancing evidence and material informed by particular and sometimes local knowledge); and
- gives a level of confidence to members of the public that the decision has been reached through a process which has openly examined and scrutinised all of the available evidence – whether or not the result is universally accepted.

Making project proponents accountable for what they assert in support of the project that they advance, and doing so as part of a transparent process, are features of many environmental approvals systems around the world. They find in one another a common rationale – people want to know whether and, if so, how they might be affected by proposals which have the potential to have an impact on their existence; and people want the comfort that those these important questions have been properly considered – free from corruption and bias in all of the varied forms that these may take.

A system of approvals which holds decision makers and proponents to account, and which is sufficiently transparent to enjoy public confidence in the decision making process necessarily involves time and some delay and can affect the "timeliness" of approvals. It seems that governments across the country continue to grapple with the best way to strike a balance between good process and timely decisions.

The source of that struggle is itself borne of disaffection felt on both proponents and opponents of development with existing systems of approval. Proponents complain that the level of regulation, the requirements for substantiating impacts, the delay associated with consideration of projects at first instance and the need to participate in processes of public consultation which often provoke

[1] Adrian gratefully acknowledges the assistance of Rupert Watters of the Victorian Bar for his efforts in preparing drafts of this paper and in undertaking research which has contributed to the content. The paper was presented at the Accountability and the Law conference on 9 February 2015 in Brisbane.

generic opposition to projects without any critical evaluation are all factors which contribute to a process which is taken together combine to frustrate proposals for no ultimate benefit. Those opposed to development complain that in some instances the legislative framework within which decisions are made deny them of the opportunity to even have a say. In those circumstances they legitimately complain that complex material purporting to justify project proposals is left to bureaucrats unqualified to assess the adequacy of the material, that the process of consideration is often politicised and important decisions made about projects proceeding before any form of analysis is undertaken, let alone the kind of rigorous analysis which makes for a "good decision". Even when the legislative framework does afford an opportunity for public participation, the nature and volume of material that needs to be analysed before constructive criticism can be made is such that a meaningful contribution to the decision maker's assessment is impeded. Under resourced members of the public are often disenfranchised from the process because they are left to generic comments or complaints about proposals which remain unsubstantiated by any kind of probative evidence. Sometimes members of the public band together and exploit one another's special skill sets, attempting to match trained professionals with home spun arguments, often attacking the periphery of a project but otherwise not having much of an impact upon the overall outcome. For project opponents, lack of transparency in the way in which decisions at a government level are made is particularly frustrating and engenders mistrust. Access to resources hampers any real ability to hold the proponent or government accountable.

While the search for the illusive perfect balance continues in different ways around the country, there are some important lessons to be learnt from experience:

- Public engagement has had an effect on the outcome of approvals processes where the opportunity for public engagement in approvals processes has been provided and opponents of projects have been well resourced and focussed upon the issues;
- It is very difficult to say that public engagement and participation in decision making processes is not valuable where such involvement highlights important weaknesses in the material purporting to justify substantial proposals;
- The expectation of scrutiny by the public necessarily raises the standard of government oversight of project proposals and indeed the preparation of project approval material itself; and
- Perhaps most importantly, the spectre of public participation in the process acts as a significant deterrent of corruption in all its many forms.

Taking a moment to reflect upon these matters is timely, particularly in Queensland as many of the former government's reforms over the last three years to improve the "timeliness" and "certainty" of resource approvals have been at the expense of transparency and public scrutiny.

The irony of these reforms lies in the fact that, while the reforms were advanced in the name of "timeliness", the reforms themselves followed proceedings – the result of which stand out as a testament to the value of third party engagement at all levels. In that case a range of community groups and individuals brought proceedings challenging the approval of a new and substantial coal mine in the Gallilee Basin. Some landowners appeared unrepresented, giving evidence of their long experience of the land. Others researched extensively the areas of their interest and cross-examined experts in their field to reveal failures in methodology and inadequate rigour. Other interests were legally represented. The sum total of these efforts was to put the material advanced in support of the project under close scrutiny, and indirectly examine the level of scrutiny which had been applied by government over the preceding years to the test. One might ask: what good is a "timely" decision if it is a bad one?

This latest pendulum swing in Queensland, so close to and seemingly in response to successful and useful public participation in a controversial project approval, has brought into sharp focus the competing imperatives.

The starting point must be to assess the context in which this tension exists.

Since the early 1970s various legislatures in Australia and around the world have enacted legislation directed at attempting to ensure that the environmental consequences of development projects are, at the very least, examined. Over time, the various legislative frameworks across Australia have become increasingly sophisticated as the level of understanding of environmental consequences has increased. Resting upon fundamental democratic principles, this paper adopts the simple premise that if legislation has been passed which is concerned to ensure that the environmental consequences of projects are properly examined, the legislation reflects the aspirations of the majority.

I suggest that it is also a popularly held view that, to the extent possible, development should be environmentally responsible. This is a position advanced on both sides of the debate.

Of course, the aspirant majority also want an economically prosperous Australia.

As recent developments highlight, tension regularly arises in the establishment and implementation of any system which seeks to give effect to these unambiguous and largely uncontroversial, but often inconsistent, objectives. It is within this central tension that both the level of accountability and transparency is the variable – raised or lowered in direct proportion to the risk of exposing the approvals system to the dangers of corruption.

Improving "timeliness" by removing third party scrutiny of proposals rests upon the flawed assumption that third parties have nothing valuable to contribute to the assessment, and only the government and the proponent have an interest in the outcome.

The fundamental problem with the assumption is twofold. On the one hand developers obviously have a vested interest in the outcome. On the other, elected politicians are perhaps the worst judges of approvals of the kind with which we are concerned. Most are untrained in the complexities of environmental impact analysis. Most examine proposals through the prism of political expedience and, in more recent years, against the criteria established by modern journalism – the "sound bite".

Government departments which are ostensibly concerned with environmental matters stand out as that part of government which is on the face of it capable of scrutinising project proposals to the extent required. Of course, the effectiveness of that assessment depends upon the "human resources" within the government department – both in terms of numbers (to handle the workload) and skill sets (to examine often highly complex and specialised information). It also depends upon budget constraints which affect the ability of the department to engage external expertise.

Experience reveals that it is not infrequently the case that departmental oversight of project development or approval has missed, or failed to adequately scrutinise, important features of a proposal.

It must be recognised that there is a place for a proper contradictor that is not government.

Properly resourced contradictors are well placed to reveal significant deficiencies or inconsistencies in the evidence said to support approval of major projects which were not identified during long pre planning and assessment phases undertaken by a proponent and government. This has been proved time and again.

There are many factors which contribute to such a situation – cost pressure on consultants from the proponent; corners cut; time pressure in government; hubris that comes from enjoying the backing of politicians; corruption and bias.

Third party involvement can assume the role of the proper contradictor – but only if all of the conditions are right. The third party can bring a critical eye to bear upon the evidence. It can push to one side the political rhetoric, expose the sloppiness of analysis, and generally improve the

standard of both project proposal preparation and therefore decision making. Indeed, recent comments made by ICAC in NSW suggest that third party involvement is one of the best ways to reduce the risk of corruption. In the ICAC 2012 report "Anti-corruption safeguards in the NSW planning system", the ICAC states:

> Third party appeal rights have the potential to deter corrupt approaches by minimising the chance that any favouritism sought will succeed. The absence of third party appeals creates an opportunity for corrupt conduct to occur…"[2]

In my experience, third parties can be most effective in influencing the outcome of environmental approvals when they are able to channel their energy and enthusiasm into addressing the issues that the decision maker must decide. To be effective in informing the decision making process the third party must focus on the issues and the evidence that is the subject of the inquiry, notwithstanding any underlying political or ethical issues. This is a hard thing for ordinary people untrained in the nuances of environmental approval to do without assistance. Ordinary people sometimes need help identifying the real issues, separating out beliefs from forensic examination, formulating argument and questions to test a proposal so as to be able to arm the decision maker with sufficient relevant information.

No discussion of the "balance" can ignore the fact that there is a built in imbalance in any system of environmental approvals that include third parties – the imbalance generated by the disparity in resources between the State and the proponent on the one hand, and under resourced third party participants on the other. That does not mean that the role of the third party as contradictor is unimportant – it simply means that the effectiveness of third parties as a proper contradictor can be diminished to the ultimate disadvantage of the decision maker, who misses out on the benefit of hearing both sides of the argument.

Proponents and developers justifiably complain that third party involvement in project approvals diminishes the speed, certainty and consequential economy of their projects.

In my view the most important value in designing an approvals process is legitimacy – that is, the public should be able to have confidence that the decisions made by the decision-maker were made for the right reasons, in the right way, by thinking about the right matters absent corrupting influences.

Ultimately, public confidence in decision-makers makes it more likely that the outcome of the decision-making process will be accepted by the public at large. Without community acceptance, the risk of a challenge to that decision whether by way of judicial review, legislative intervention, public campaign and the like, increases.

A good example of this is the Bell Bay pulp mill where the decision to withdraw from the Resource Planning and Development Commission and instead rely on a special statutory approvals process had a variety of negative consequences for Gunns.

Similarly, the reliance on legislative amendment to extent the sand mining lease on Stradbroke Island invites the inference that the decision may have been influenced by irrelevant considerations such as political donations.

If we accept that public confidence is the, or at least the main, goal then we should seek to prioritise those values which are likely to promote public confidence in the decision-making process, such as independence, transparency and public participation which also safeguard against corrupt conduct and the perception of corrupt conduct. Unfortunately, as I will discuss in the rest of this paper, recent trends have been in the other direction – centralisation of decision-making power within government, a lack of transparency in how decisions are made and an attack on the ability of the public to participate in decisions that affect them.

[2] At page 22.

None of this is to say that certainty and timeliness in decision-making are not important values. They clearly are. Having acted for many developers throughout Victoria and elsewhere, I am very aware of the costs that are associated with delays in approvals.

Public confidence that a process is unaffected by corruption is influenced by the following matters which I propose to address in turn:

1. Independence and certainty;
2. Public Participation; and
3. Transparency and rigour.

Independence and Certainty

One of the most obvious ways in which public confidence in decision-making can be enhanced is to make the decision-maker independent. Independent decision-making is also likely to contribute to better decision-making by removing potential conflicts of interest. As the Productivity Commission concluded in its *Research Report on Major Project Development Assessment Process*:

> In the Commission's view, there is a strong 'in principle' rationale for embedding more independence in major project assessment arrangements by assigning this responsibility to an independent regulator. This is particularly the case for comprehensive environmental assessment processes, such as EIAs, which represent the primary assessment requirement for proposed major developments.[3]

The Commission also specifically noted that regulatory independence was particularly desirable where

> the issues (and costs) involved are long-term and likely to be undervalued due to a focus on electoral cycles [and] the regulatory functions require a substantial degree of technical expertise or expert judgment of complex analysis[4]

This clearly applies to many environmental disputes, where the tension is between relatively short term economic and employment benefits, as opposed to long term and potentially irreversible environmental degradation.

There is, however, a tension between independent decision-making and certainty of outcomes – in particular, the power of governments to deliver projects which they consider in the best interests of the State or nation. It is perhaps for this reason that fully independent project assessment is uncommon in Australia and particularly so in the context of environmental decision making.[5] This tension is not new: when the *Environment Effects Act 1978* (Vic) was receiving its Second Reading Speech in Parliament, the Minister, with admirable frankness, was at pains to emphasise that all the Act required was that the decision-maker be informed of the environmental consequences of projects, it would never actually prevent those projects from going ahead.

Recent experience tends to suggest that, notwithstanding the subsequent establishment of numerous independent decision-making bodies across Australia, this attitude remains prevalent throughout governments. Over the last several years, governments have demonstrated a remarkable willingness to intervene to set aside or vary the outcomes of independent assessment processes that they or their predecessors have established. These methods vary in their subtlety:

1. Sideline
2. Legislative Steamroller
3. Thumbs on the scale

[3] Productivity Commission, *Research Report on Major Project Development Assessment Process* (November 2013), p. 166.
[4] *Id*.
[5] Ibid, pp. 162 – 163.

Sideline

This was the approach adopted by the Lennon government in Tasmania when, in 2007, Gunns decided to pull out of the Resource Planning and Development Commission assessment process for the Bell Bay Pulp Mill.

Rather than force Gunns to submit to the same assessment process as other development projects, the Lennon government created a statutory assessment process, the *Pulp Mill Assessment Act 2007*, which appointed a single firm of consultants to prepare a report on the project and then required Parliament to decide whether a permit should issue.

Ultimately, this approach may have hurt Gunns more than it helped it: by not participating in the RPDC process, Gunns lost the benefit of its accreditation under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and had to apply separately, lengthening the time taken to obtain the required approvals and elevating the approval process to a Federal election issue.

Legislative Steam-roller

This was the approach taken by the Bligh government in Queensland in response to the decision of the Queensland Court of Appeal in *Queensland Conservation Council v Xstrata Coal Queensland Pty Ltd.*[6]

In that case, the Court of Appeal held that the Conservation Council had been denied a fair hearing by the Land and Resources Tribunal, which had concluded, on the basis of its own research, that anthropogenic climate change did not exist and, as such, had refused to impose any of the conditions sought by the Council in respect of greenhouse offsets.[7]

The same day as the Court of Appeal handed down its decision, the Bligh government issued a press release saying that it would legislate to grant the mining lease and environmental authorities on the conditions identified by the Tribunal.[8] It explicitly justified this decision by reference to the need for 'certainty'.[9]

True to its word, the Bligh government introduced the Mining and Other Legislation Amendment Bill on 13 October 2007 and the *Mining and Other Legislation Amendment Act 2007* received the royal assent only 12 days later.

A similar example is the Federal government's response to the decision of the Federal Court in *Tarkine National Coalition Inc. v Minister for Sustainability, Environment, Water, Population and Communities*,[10] where it was found that the Minister had failed to comply with an express statutory requirement to consider 'approved conservation advice'. Rather than address the question of whether this might have rendered any of those decisions unsafe, the then- government sought to legislate to validate all the decisions affected by that error (including, oddly, future decisions in respect of which the error had presumably not been made). For a variety of reasons, however, this legislation has not yet passed.[11]

Most recently, in *Hancock Coal Pty Ltd v Kelly* (**the Alpha case**),[12] the Queensland Land Court, found that there were significant concerns regarding the adequacy of the groundwater assessment of the

[6] [2007] QCA 338.
[7] Ibid, [47].
[8] Anna Bligh (Premier) and Geoff Wilson (Minister for Mines and Energy), 'Government to legislate to ensure coal mine's future' (Media release, 12 October 2007), available at: <http://statements.qld.gov.au/Statement/Id/54462>
[9] *Id*.
[10] [2013] FCA 694.
[11] The *Environment Legislation Amendment Bill 2015* was passed on 23 February 2015, however the provisions of the Bill seeking to validate decisions made without reference to conservation advice were removed.
[12] *Hancock Coal Pty Ltd v Kelly & Ors and Department of Environment and Heritage Protection (No. 4)* [2014] QLC 12 http://www.landcourt.qld.gov.au/documents/decisions/MRA082-13-etc-4-12.pdf

large mine and consequential impacts on landholder and recommended that the mining lease be subject to the proponent first obtaining water licences under the *Water Act 2000* which, importantly, had further objection and appeal rights for landholders. On 26 November 2014 the Newman government passed the Water Reform and Other Legislation Amendment Bill 2014, which removed the requirement for large coal mines such as the Alpha mine to obtain water licences under the *Water Act 2000* for 'associated water'. This effectively defeated the recommendation of the Land Court by legislative amendment. The newly elected Queensland Labor party has promised to 'revisit' changes to water management laws introduced under the LNP.

Thumb on the Scales

This was the approach taken by the current NSW government in response to the decision of the Land and Environment Court in *Bulga Milbrodale Progress Association Inc. v Minister for Planning and Infrastructure and Warkworth Mining Ltd*.[13]

In *Bulga*, the Land and Environment Court was not persuaded that the economic benefits of allowing the extension of the Warkworth coal mine, although substantial,[14] outweighed the negative social and environmental consequences of that expansion.

The NSW Court of Appeal dismissed an appeal by the Minister for Planning and the proponent, observing, consistent with well-established High Court authority, that the weight to be given to any particular factor was ordinarily a matter for the decision-maker.[15]

In response, the NSW government amended the *State Environment Planning Policy (Mineral, Petroleum Production and Extractive Industries) 2007* to require that the 'significance of the [mineral] resource' be the 'principal consideration'[16] in determining whether to grant development consent and to accord all other considerations 'proportionate' – that is, proportionately less - weight.[17] Crucially, the SEPP defines significance not simply in terms of objective significance vis-à-vis other mineral resources in the State,[18] but also in terms of the economic benefit to the State from its exploitation.[19]

Arguably, the most concerning approaches are those which seek to create the veneer of independent decision making whilst dictating to the independent decision-maker (whether expressly or by implication) the weight that they are to give to relevant considerations so as to almost assure the result.

It is questionable whether the approach taken in NSW was even necessary. As the original Planning Assessment Commission appointed to assess the Warkworth expansion observed, under the pre-amendment planning framework, approval of coal mines was 'almost inevitable', at least when coal prices were high.[20]

In any event, these interventions are regrettable. Nothing is more likely to jeopardise public confidence in an approval process than the knowledge that any outcome that the government doesn't like is liable to be set aside. If that is the case, participants – proponents or objectors – might well ask why they are being put to the time and expense of engaging in the process in the first place?

[13] [2013] NSWLEC 48.
[14] Ibid, [499].
[15] *Warkworth Mining Ltd v Bulga Milbrodale Progress Association Inc*. [2014] NSWCA 105, [178].
[16] *State Environment Planning Policy (Mineral, Petroleum Production and Extractive Industries) 2007*, cl. 12AA(4).
[17] Ibid, cl. 12AA(5).
[18] Though this is relevant: ibid, cl. 12AA(1)(b).
[19] Ibid, cl. 12AA(1)(a).
[20] Planning Assessment Commission, *Warkworth Extension Project: Commission Report* (3 February 2012), pp. 8 - 9.

In some ways, this seems to have been the thinking behind s 47D of the *Environment Protection Act 1994* (Qld) (**EP Act**), introduced by the recent *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld) (**MERCP Act**), which precludes a right of objection under the EP Act where the Coordinator-General is satisfied that the conditions that he or she has imposed on the environmental authority will adequately address the environmental harm associated with the mining lease. Presumably, that would be every case in which the Coordinator-General imposed conditions, rather than recommending refusal. The motivating idea seems to be that, if the Executive is already satisfied that the project is acceptable, there is no need to waste everyone's time with a public hearing. These changes were strongly opposed by Queensland Labor which I understand promised to act to restore the community objection rights if elected. The pendulum keeps swinging….

The practical reality is, of course, that in a Westminster system, the possibility of legislative intervention can never be ruled out. What does need to be recognised, however, is that these interventions do come at a cost. The utility and legitimacy of an approvals process depends critically on it being used and being seen to produce legitimate and binding outcomes. If there is a widespread perception that the whole thing is a waste of time and money, people will look at alternative measures.

Legislators and government need to carefully consider what kind of system they are creating. Actions taken to speed up approvals processes have knock on consequences. It is desirable that those consequences pull in the same direction – towards greater efficiency in the process itself.

Public Participation

Another important element in enhancing public confidence in decision-making is providing for public participation. Experience reveals that people are more likely to accept the outcome of a process, even an adverse outcome, where they have been able to participate in the process. But even if that is not the case, involving the public (particularly those directly affected by decisions) gives the decision maker the best chance of making the most informed decision.

Of course, such participation needs to be meaningful. There are a number of barriers to meaningful participation:

1. The first is the timing of public participation, which often occurs long after the project in question is 'set in stone'. The Productivity Commission's recommendation that public participation for major project approval should begin before the assessment stage represents an important insight. In my experience, early public participation has the scope to narrow the issues in dispute, reducing the cost of any subsequent hearing and possibly avoiding the need for a hearing entirely in some cases.
2. The second barrier is accessibility for non-technical audiences. I would also agree with the Productivity Commission's comments about the difficulties of making major project assessment processes accessible for non-technical audiences. Generally speaking, proponents are doing a good job of making many of the relevant documents available, but it is often near impossible for a non-specialist to read, comprehend and make informed submissions on an EIS in the time allowed under the relevant legislation. This is particularly so given the sheer volume of most modern EISs. As a result, there can be something of a tendency to object first and figure out later, which might be avoided if the timeframes for making submissions were less rigid.

In this respect, the Commonwealth government's decision to cut all funding for Environmental Defenders Offices (**EDOs**) throughout Australia warrants scrutiny. In my opinion, this was a regrettable decision which seems to be uninformed by the contribution that EDOs make to the administration of justice in this country.

The reasoning behind this decision of the Commonwealth government is unclear. EDOs of Australia (including Environmental Justice Australia, formerly EDO Victoria) do extremely valuable work in broadly two fields: law reform and litigation.

Environmental laws in Australia exist for the benefit of all Australians – were it otherwise, the laws should not exist. There are numerous industry associations which lobby government promoting regulatory change. EDOs enter the domain of law reform with the protection of the environment as their principal concern. In not every case is the position of EDOs adopted by government, but it must be the case that the consideration of legislative change is informed by all views, and in particular the views of talented lawyers who have a proper understanding of the nuances of the legislative framework equal to (if not sometimes better than) the lawyers engaged by the other side of the debate. In this respect, government should not be afraid of hearing all sides of the debate – it should crave informed contribution to the debate and given the modest cost of funding EDOs, government should regard the contribution as a windfall gain rather than an expense that can be cut.

In litigation, EDOs field numerous inquiries for assistance. EDOs do not run every case that comes through the door. They are usually tight run operations which enter the fray of litigation only when the point of principle in dispute warrants curial attention and then apply themselves to the litigation with the same rigour and professionalism that one might expect from lawyers paid considerably more at the big end of town. And they often win the cases they try, or if not have an impact on the outcome. If success is any measure of worth, surely winning vindicates any suggestion that the involvement of EDOs in litigation is a waste of time. Commenting specifically on the Commonwealth cuts in legal aid, the Productivity Commission, in its draft report on *Access to Justice*, singled out EDOs as worthy recipients of government funding, observing:

> … environmental disputes often have public interest elements in either clarifying the law or protecting local or community wide values which can provide justification for government funding. While the Environmental Defenders' Offices have been the subject of recent debate and change, given the public interest element of many environmental disputes, funding is warranted where the expected returns to the community exceed the opportunity cost to the community of the funding.[21]

In fact, EDOs have even broader benefits than this, for example, by acting as a filter for hopeless environmental litigation and avoiding the time and expense that such litigation would cause for proponents. Moreover, where EDOs do bring litigation, the involvement of qualified lawyers – frequently with backgrounds at well-known law firms – enables that litigation to proceed considerably more smoothly than, if say, it was brought by a litigant in person. In my experience (both as barrister for and against), they are frequently the equal of many mid-tier firms, despite having considerably fewer resources.

Simply put, the removal of funding for EDOs will make it harder for ordinary people and local environmental groups to get advice about and participate effectively in decision-making that affects them. It is unfortunate that this seems to have become an ideological issue about environmentalism *per se*, rather than – as the Productivity Commission properly recognised – an issue about access to justice.

The final matter I want to deal with in respect of public participation is the recent amendments to the Queensland *Mineral Resources Act 1989* and the EP Act effected by the MERCP Act. It seems like quite a feat to have managed to produce a piece of legislation that has been criticised by both green groups and Alan Jones. More than that though, the removal – through the loss of objection rights – of the right of the vast majority of people to access the Land Court does raise serious issues of accountability and legitimacy. That the purported objectives of the changes – the avoidance of frivolous and vexatious litigation – could have as easily been achieved by considerably less draconian

[21] Productivity Commission, *Access to Justice* (Draft Report, April 2014), p. 625.

means (such as the power to strike out vexatious and frivolous objections that also formed part of the MERCP Act). Moreover, the recent record of environmental litigation in Queensland – at least in respect of major projects – does not support the existence of a vexatious litigation problem.

In *Queensland Conservation Council v Xstrata Coal Queensland*, the final result of the litigation was a finding by the Court of Appeal that the Conservation Council had been denied a fair hearing and ordered that the matter be reheard. No final, lawful decision on the merits was ever made.

In *Xstrata Coal Queensland Pty Ltd v Friends of the Earth Brisbane Co-op Ltd*, the President of the Land Court dismissed the objections brought by Friends of the Earth (**FoE**) but, in a subsequent judgment, declined to order costs. The President specifically rejected a submission that FoE's conduct in pursuing the case had been 'extreme and unreasonable'. Instead, having noted that FoE were simply exercising their statutory rights to object, her Honour observed:

> The issues raised were complex, both legally and factually. In those circumstances it was not unreasonable for the FoE to test the applicants' evidence, to call evidence in support of the FoE submissions and to have the issues determined by the Court.
>
> Moreover, the FoE's submissions raised a number of legal issues that had not previously been dealt with authoritatively or at all. These included the interpretation of the relevant statutory provisions, including the application of case law from other jurisdictions to the Queensland legislation. The FoE conducted their case in a reasonable manner and did not cause any unnecessary lengthening of the case.[22]

Most recently, in *Hancock Coal Pty Ltd v Kelly & Ors (No 4)*, CCAQ was, on one view at least, successful in that it persuaded the Land Court that it should make a recommendation that the mining lease and environmental authority ought not to be granted on the basis of legitimate concerns about the impact of the mine on groundwater, albeit the Court also made an alternative recommendation.

Finally, the Land Court itself, in a submission to the parliamentary committee considering the MERCP Bill, confirmed that, in its experience, there was no evidence to suggest that the Court's processes were being used to delay project approvals.[23]

In fact, the only 'evidence' of vexatious litigation in Queensland is the 'Stop the Coal Export Boom' manifesto. That document was in fact relied upon in *Hancock* in an attempt to pre-emptively influence the Court's view of Coast and Country Alliance of Queensland as a litigant in the context of a relatively minor interlocutory skirmish in the Alpha proceedings. The Court rejected that attempt, commenting:

> I believe that all parties, when they come before the Court at first instance, unless they already have a finding against them in another place (such as: that they are a vexatious litigant) should be seen as coming before the Court with clean hands. That is the presumption until proven otherwise, or until conduct suggests otherwise. I am concerned that this is obviously a very large project, involving a huge sum of money, and it has been viewed by both the State and Federal Government as a project of national significance. I must take that into account. I must also take into account the rights of the objectors that they too have the right to have their day in Court and be properly heard, and to have the Court properly consider all elements of the case in a fair, open and unbiased way.[24]

The Court went on to specifically observe that it had seen nothing in the conduct of the objectors to demonstrate any intention other than 'seeking a quick, efficient and proper disposition of the matter'.[25]

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[22] *Xstrata Coal Qld Pty Ltd & Ors v Friends of the Earth, Brisbane Co-Op Ltd (No. 2)* [2012] QLC 67, [39] – [40].
[23] Report No. 46 Agriculture, Resources and Environment Committee September 2014 at page 15 http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2014/5414T5822.pdf
[24] *Hancock Coal Pty Ltd v Kelly (No. 1)*[2013] QLC 9, [3].
[25] Ibid, [5].

Overall, the impression that one gets, looking at the content of the MERCP Act, is that it is designed not to prevent vexatious environmental litigation, but effective environmental litigation.

Transparency and Rigour

It is a truism in the legal system that justice ought not only be done, but 'manifestly be seen to be done'. This is no less true in the kind of administrative decision-making used in project approvals.

In this regard, one of the problems affecting environmental decision-making in Australia, at both State and Federal levels, is a lack of transparency. In many cases, the statutory process calls for the submission of an EIS or similar document to an administrative body which then makes a decision with no – or minimal – public involvement. What is frequently left unclear in such cases is how the decision was reached, including what steps – if any – were taken to test the proponent's materials. Although reasons are typically given, these are unsurprisingly reasons which are intended to justify the decision that has been made, rather than to give a comprehensive account of the process that was followed.

The Assessment Committee which was charged with considering the Comprehensive Impact Statement prepared in the East West Link matter stands out as an example of the way to do things properly. The Committee was a model of transparency:

1. It conducted a site visit (actually more of a bus tour, given the circumstances) with representatives from major parties;
2. Its Request for Further Information was made public, so that members of the public were aware of precisely what information was being sought and received by the Committee and, broadly, the reasons why the information was being sought;
3. During the hearing, the Committee was assisted by its own Counsel, as well as two experts with expertise in matters of particular relevance. The Committee also ordered the proponent to brief an additional expert to advise on some of the decisions that had been made in the design of the East West Link that were not adequately explained in the CIS.

The overall effect of this was that people who wished to were able to see and understand how the Committee approached the evidence and see that it was actively testing the evidence. Given the resultant recommendations and the manner in which the hearings were conducted, it would be impossible for any observer to say that the Committee process was "just a rubber stamp".

In my opinion, there would be considerable value – at least in terms of public confidence – in administrative decision-makers being more open and transparent about how they have arrived at their conclusions. If people are able to see that a decision-maker has been rigorous – as opposed to simply being told that the process has been rigorous – then they are more likely to accept the relevant decision.

A very good example of the need for transparency and rigour is the various approaches to the assessment of economic evidence.

In both the Warkworth and Alpha matters, proponents sought to rely on 'input-output analysis' (**IO analysis**) to demonstrate the likely economic benefits of the proposals.[26] The use of IO analysis for the purposes of economic impact assessment has been criticised by the Australian Bureau of Statistics,[27] the Queensland Office of Economic and Statistical Research,[28] the NSW Treasury[29] and

[26] The proponents in *Warkworth* also relied upon a Benefit Cost Analysis in addition to simple IO analysis. This sort of thing is to be welcomed as it permits integration of non-market goods into the analysis, even if the particular BCA was the subject of criticism by the Land and Environment Court.

[27] Australian Bureau of Statistics, "Input Output Multipliers", available at: http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/5209.0.55.001Main%20Features42009-10?opendocument&tabname=Summary&prodno=5209.0.55.001&issue=2009-10&num=&view=

the Victorian Treasury.[30] Perhaps of most significance is the criticism from the NSW Treasury which states:

> First and foremost, input-output analysis is concerned with measuring economic activity, and is not a tool for the evaluation of projects. Input-output analysis does not take account of the alternative uses (opportunity costs) of resources. Input-output analysis, however, will always indicate positive impacts - activity - without providing guidance as to whether such impacts correspond with net benefits. Poor investments, perhaps in heavily subsidised fields of endeavour, could be associated with greater levels of activity than good investments.[31]

If it is accepted that IO analysis is, due to its 'inherent shortcomings',[32] an inappropriate method to evaluate public sector investment, it is difficult to see how it could be a better method for evaluating private sector investments.

In the Alpha matter, two justifications were offered for the use of IO analysis.[33] The first was that an IO analysis was what the Terms of Reference provided by the Coordinator-General asked for. Accepting that that is so, the question remains why a decision-maker should require, or accept, the use of a method of analysis which is recognised as being unsuitable for economic impact analysis? This purported justification highlights the need for government to be held to account for the way in which it approaches the assessment of information provided to it by proponents.

The second justification that was offered was that the Alpha mine was a private project and therefore did not need to comply with the standards applicable to public sector decision-making. If it were the case that opening a coal mine is simply a matter of a private entity spending private money, the use and acceptance of IO analysis might not be concerning. The reality is that it is not. Coal, like all minerals, is a public resource and its exploitation involves public costs in the form of potential environmental and social harms. In such circumstances, it is reasonably arguable that a decision-maker ought not accept a form of economic analysis that most Treasuries in Australia would not accept.

Given the significance of economic evidence in proving the benefits of major projects, it can be expected that this is an area which will be the subject of considerable interest to those who oppose projects over the next few years. Indeed, the treatment of the economic justification for the project lies at the heart of the Supreme Court challenge to the Victorian Planning Minister's decision to approve the East West Link.

Conclusion

Transparency and accountability in project approvals serve not just as a safeguard against corruption but form part of the essential elements that lend legitimacy to the approval process as a whole.

The starting point for any system of approvals must recognise:

- The inherent value of environmental assessment *per se* and the risk that, even if a project is economically valuable, it may not be able to proceed;
- Decisions should be based upon evidence;

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[28] Office of Economic and Statistical Research, Queensland Treasury, *Overview of Some Alternative Methodologies for Economic Impact Analysis* (2006), p. 2.
[29] Treasury (NSW), *NSW Guidelines for Economic Appraisal* (July 2007), p. 12.
[30] Department of Treasury and Finance (Victoria), *Economic Evaluation for Business Cases: Technical Guidelines* (August 2013), pp. 11 and 45, describing IO analysis as having 'various flaws' and being liable to 'overstate benefits'.
[31] Treasury (NSW), *NSW Guidelines for Economic Appraisal* (July 2007), p. 12.
[32] Australian Bureau of Statistics, "Input Output Multipliers", available at: http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/5209.0.55.001Main%20Features42009-10?opendocument&tabname=Summary&prodno=5209.0.55.001&issue=2009-10&num=&view=
[33] I should note in fairness that Hancock's expert witness did, quite properly, identify the limitations of IO analysis in his expert report.

- Approvals processes are a vehicle for obtaining and testing the best evidence available to assist the decision maker;
- No system that relies upon only the proponent (as the principal source of evidence) and the government (as the sole arbiter) can ever hope to be regarded as either rigorous or transparent;
- Meaningful participation in the process and contribution to the outcome by third parties promotes rigour, transparency, and ultimately public confidence and certainty in the final outcome;
- Being rigorous and transparent will often take longer than acting hastily, but if we are serious about implementing the legislative framework, adequate time must be allowed to properly consider the proposals, particularly those which have the potential to cause significant effects.

There will always be individual cases which highlight the extremes, but it important not to lose sight of what are really the important essential elements in any system of approval.