

Mining Development, Environmental Impact Assessment and Green Tape in Australia: Reforming the Approval Process – *Litigation or Conflict Management?*



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Contrary positions held by competing *development ~v~ environment* interests over proposed major resource projects – coal and CSG - have created a major public interest environmental conflict in Australia.

In its Editorial on 6 June 2016, the Brisbane ‘Courier Mail’ summed up the existing situation for Queensland as one in which:

“...we have a handful of eco-warriors determined to foist their ideological opposition to coal on the rest of the world and use every possible legal trick available to delay and disrupt development of the giant Adani project in the State’s Bowen Basin ... In Queensland, the most visible of activist’s ‘lawfare’ are the rolling legal challenges and appeals to approval of Adani’s giant coal play – a project that has so far soaked up more than \$100 million just in the planning and approvals process”.

The regulatory framework prescribed by Government for proposed mining resource projects follows a pathway commencing with environmental impact assessment; environmental protection regulatory evaluation under State and Federal legislation; and finally, a Ministerial decision to approve (*with or without conditions*) – or to not approve - the proposed project.

Sustainable development has been an object of environment protection legislation, throughout Australia, for the past two decades: ‘Jobs and the environment’ now replaces ‘jobs or the environment’.

A sustainable solution requires the multiple and competing objectives of sustainable development – *economic, environmental, social (including cultural)* - to be balanced equitably, and not weighted inordinately in favour of one *e.g. economics*.

A sustainable solution is also equitable. It seeks to minimize the extent to which environmental costs and benefits will be shared disproportionately between Government, industry/developers and the community.

The environmental impact assessment (EIA) process has long-term implications for sustainable development for mining resource projects.

The Position of Mining & Community Interests

The position of mining interests reflects their concerns over the costs and delays associated with project approval. Proposed mining projects, having an estimated value of \$40 billion, are currently delayed because of litigation in Queensland; already, there has already been a 6-year long approvals process for Adani's proposed Carmichael mega mine in central-western Queensland¹.

Mining interests see the failure to resolve the existing deadlock as adversely affecting industry confidence and the potential business investments in Queensland.

But, it is a misconception to believe that legal action is restricted to “*green activists*”. The farming/grazing and Indigenous communities are also involved.

The CEO of the Australian Conservation Foundation (ACF) makes the point that when environmental groups speak out that they do so as part of living in a democracy.

The position for ACF is that it only challenges a resource project when legal advice suggest that the approval process was unlawful; that less than 1% of approvals made under national environmental legislation have been challenged by ACF through litigation².

A local Darling Downs farming community are challenging the proposed \$900 million New Hope Coal Group's Acland mine expansion. Their litigation has been described as “*jobs and economic benefits*” ~v~ “*risk to groundwater*”;

adverse social impacts on a previously thriving and cohesive rural community are also a significant environmental concern for the local community³.

Options for Reforming the Approval Process

There is no dispute that a system needs to be developed that “*gives the citizens their appropriate rights and due process and also gives potential investors in Queensland a clear path to an end point*”.

The Queensland Government has a plan for reform to provide a solution that focusses on the need to tighten up and expedite a legal process that enables complainants to delay a project “endlessly” through litigation⁴.

The Government’s plan is, directed at the final step of the approval process for mining project proposals – the Ministerial decision and litigation that arises.

But, there is an alternative solution for reforming the mining project approval process: The EIA process. This is the first stage of the approval process, where the likely or possible environmental impacts of a proposed development are rigorously assessed by science.

The outcomes from the EIA process are ultimately considered in the decision-making approval process overseen by the Environment Minister.

A solution for reform would focus on the management of scientific information conflicts in the EIA process and its role - to aid decision-making.

Reform Needs: Understanding EIA as a Source of Conflict

The United States statute, the *National Environmental Policy Act of 1969* (NEPA), signed into law on 1 January 1970, was an innovative and pioneering environmental statute. NEPA is regarded as possibly being “*the most successful legal export in history*” as it has been a model for EIA for over 100 countries.

Under NEPA, actions that may have a “*significant*” effect on the environment are required to prepare an *environmental impact statement* (EIS).

An EIS is a carefully researched report which identifies the likely or possible environmental consequences of a proposed development or activity or

policy, alerting the government, developer and the community, as fully as possible, to any environmental risks associated with the proposal.

The process of reviewing the EIS is termed *environmental impact assessment* (EIA).

The EIA process systematically appraises the positive and negative impacts on the environment – *economic, ecological and social (including cultural)* - that are possible, or likely to arise, from a development proposal or activity.

The end-point in Australia is a Ministerial decision which may take the form of an approval, deferment or rejection of the proposal. Approval may be subject to conditions that incorporate measures to mitigate adverse impacts. These conditions become part of the development consent or permit.

It is important to be aware that courts in Australia, the UK and USA recognize that the “EIS is not a decision-making end in itself ... its purpose is to assist the decision-maker.”

(a) Cornerstones of the EIA Process

Disclosure of scientific information and community involvement are two cornerstones of the EIA process.

Almost 50 years has passed since the EIA process was introduced and became the norm to evaluate major developmental proposals. But, compared to the past, society today is now confronted with natural and economic limits that were previously unimaginable.

As a consequence, new challenges for achieving the two cornerstones of the EIA process have emerged. The potential environmental impacts in time and space – *economic, ecological and social (including cultural)* – have now become more numerous, complex and diverse.

Full disclosure of all relevant and reliable scientific information, used to evaluate potential environmental impacts is crucial for EIA . However, given the EIS predicts potential environmental impacts, some scientific information for preparing the EIS may well be “*incomplete or unavailable*”.

Where there are limitations in the available scientific information to predict the severity of potential adverse environmental impacts, with sufficient

precision, difficulty arises in the EIA process for *meaningfully involving the community*.

(b) The EIA Process & “Incomplete or Unavailable Information”

A major procedural step in the United States to address limitations in the available scientific information in the EIA process was a [Federal Regulation](#) that addressed “*Incomplete or Unavailable Information*”: 40 CFR 1502.22.

Under this United States Federal Regulation, a Government agency evaluating “*reasonably foreseeable*” significant adverse effects on the human environment in an EIS, *where there is incomplete or unavailable information*, must make it clear that such information is lacking: By including within the EIS a statement that such information is incomplete or unavailable.

“*Reasonably foreseeable*” is defined in this Regulation to include impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

The Regulation sets out procedures to guide decision-making by the Government agency, in circumstances where “*Incomplete or Unavailable Information*” arises during the preparation of the EIS.

(c) COMMENT: “Incomplete or Unavailable Information” and the EIA Process in Australia

There is no legislation in Australia equivalent to the US Federal Regulation that addresses incomplete or unavailable information in the EIA process.

Yet, one of the consistent concerns expressed by the community over major coal mining and CSG development proposals in Queensland and NSW relates to one key environmental protection issue for Australia: Potential adverse impacts on above-ground and groundwater resources.

This environmental protection issue is a constant in much of the litigation currently now before our courts. Our courts are being asked to settle the law on this issues like this – where scientific data may be incomplete or unavailable.

This specific issue could be more effectively addressed, by science, during the EIA process. The framework for such a solution for reform follows.

Conflict Management & Reform to the Cornerstones of the EIA Process

Past limitations of the EIA process for achieving good environmental outcomes are well documented. Two of these limitations where further reform is justified, today, are outlined in the context of EIA cornerstones.

(a) Meaningful Involvement of Community Interests

Conditions placed on a resource project to ensure that any impacts are avoided, mitigated or offset – no matter how strict or numerous they may be - may not instil public trust and confidence in Government.

But, there is a way forward for Government to offset this obstacle. To recognize, as is the case in the United States:

That “no other strategy offers a more telling acknowledgement of the legitimacy of local concerns” than where those who have to live with a decision that has potential adverse environmental impacts, know they can trust the monitoring and management plans.

Achieving such an outcome, requires a [scientific round-table](#)⁵ to manage scientific information conflicts. *The aim: Meaningful involvement of competing development and environment interests in the preparation and/or review of the monitoring and management plans by the round-table.*

The representatives at the scientific round-table would be scientific professionals representing affected development and environment interests. The structured process would be convened by an independent dispute resolver.

(b) Full Disclosure of Scientific Information and Management of Scientific Information Conflicts

Consideration should be given for the US Federal Regulation for “Incomplete or Unavailable information” to become part of the regulatory framework of the EIA process for Australia e.g. by including it as a Term of Reference for any future EIS for a major resource project proposal.

As is the case for the preparation and/or review of the monitoring and management plans, a scientific round-table needs to be established.

Its role would be to evaluate the available scientific database where issues relating to the assessment of significant adverse environment impacts in the EIS were in dispute. Agreement at the round-table must be consistent with all relevant and reliable scientific data and/or scientific opinion.

Areas of scientific uncertainty for a specific issue, including where there is incomplete or unavailable information, must also be identified by the round-table - especially where it could lead to conclusions being seen as speculation.

Incomplete or unavailable information in the EIS would be evaluated for issues, such as:

- *Whether or not the overall costs of obtaining it are exorbitant - or the means for obtaining it are known; and*
- *The relevance of incomplete or unavailable information for assessing reasonably foreseeable significant adverse environmental impacts;*

The outcome of the scientific round-table would be to provide the Environment Minister with a summary of their agreed finding of facts on the significant environmental impact issues in dispute; as well as any underlying assumptions upon which scientific opinion was based.

Conclusions – Reform Solutions: *Litigation ~v~ Conflict Management*

1.0 It is clearly evident that reform is needed, not only for the approval process for major mining resource project proposals, but also to reconcile relationships between Government and parties holding competing interests for environment and development.

2.0 One solution is the Queensland's Government's plan: To focus on the final stage of the approval process for major resource project proposals – the Ministerial decision: By reforms to the legal process and our courts.

3.0 A flaw with this approach is that litigation is not a dispute resolution process: Judges do not resolve conflicts that are litigated in courts - but adjudicate on disputes. Questions of law are settled in order to decide the ultimate issue.

4.0 The settlement of a particular dispute by a court may result in the underlying causes of conflict being unresolved and remaining as a source of

resentment or irritation; conflict may re-emerge at some later date and require resolution⁶.

5.0 An alternative solution focusses on a different source for the disruption and delays – conflict over scientific information in the EIA process: The first stage of the approval process.

6.0 Conflict management, used as a discrete process, enables conflict over scientific information to be resolved. This outcome would facilitate the integrity of the Ministerial decision-making process that follows.

7.0 Full disclosure of all scientific information and meaningful involvement of the community are its cornerstones.

Dr Ted Christie is an environmental lawyer and scientist with a keen interest in the use of alternative dispute resolution and effective public participation processes for finding solutions for environmental conflicts: Solutions that are sustainable and where environmental justice prevails.

Ted is the author of the cross-disciplinary (law/science/negotiation) book, "[Finding Solutions for Environmental Conflicts: Power and Negotiation](#)" (2008, 2009).

END NOTES

¹ *Miners take aim at green groups 'stifling development' with law* (Sarah Vogler), Brisbane Courier Mail, 6 November 2015.

Adani tiring of Government's slow process and wants assurance of no further delays (John McCarthy), Brisbane Courier Mail, 27 January 2016.

² Letters to the Editor, Brisbane Courier Mail. *Nature's voice lost to mining interests*, Kelly O'Shanassy, CEO, ACF, Melbourne.

³ *Farmers Go to War. Court battle over Acland mine expansion opens* (John McCarthy), Brisbane Sunday Mail, 6 March 2016.

⁴ For Queensland, [options include](#) increasing resources for the Land Court, re-establishing the former Resources Tribunal or adapting models used in other States e.g. a South Australia model where the courts make a determination with the Minister as the ultimate decision-maker. Should a new model be found, opposing sides would have to accept the umpire's decision.

No reference has made in these options to restrict community group's legal rights to legitimately challenge resource projects in the courts.

⁵ Read more on the scientific round-table and conflict management at Chapter 10, "[Managing and Resolving Environmental Conflicts by Negotiation: NIMBY or NIMBI](#)"

⁶ Kirby, M. (1992), 'Mediation: current controversies and future directions', *Australian Dispute Resolution Journal*, **3**, 139–48.