

Public Inquiries in Resource Use Decisions: Commentary*

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When Ben Boer sent me a copy of the paper which he has delivered to you today he commented in his covering note that the paper may contain certain conclusions with which I might disagree. He further opined that the likelihood of he and I having somewhat differing views may well have been the reason that I was invited to be your commentator.

While I don't intend commenting on the process undertaken by AMPLA's Organising Committee in its selection of speakers and commentators, I would say in my own defence that my exposure to the inquiry process is limited. The three notable involvements that I've had with such processes include the Planning Permit Procedures in relation to an existing small gold mine near Chewton in Victoria and a proposed sand mining operation near Ballina on the north coast of New South Wales. Of course these two Inquiries pale into insignificance when compared to the Kakadu Conservation Zone Inquiry conducted by the Resource Assessment Commission (RAC) and the concurrent Inquiry undertaken by Justice Stewart under the terms of the Aboriginal and Torres Strait Islander Heritage Protection Legislation. These Inquiries have given me an opportunity to form some views on the role of public environmental inquiries in Australian resource use decision making from the perspective of both an intending resource developer and an Australian citizen. Accordingly, I can reassure Ben Boer that he will not be disappointed. I will be taking a somewhat different perspective towards the value of the inquiry process to Australian society as a whole.

Professor Boer's paper opens with the optimistic assertion that it will provide a critical analysis of the role of public inquiries in decisions relating to natural resource allocation and use in Australia. With the utmost respect to the Professor, the paper fails to be either critical or analytical. The paper chronicles the alleged social benefits of the inquiry process as it has developed in Australia but does not seek to address the implications of the process for those companies or individuals who are subjected to it. The implications to which I allude include serious short- and long-term economic consequences which are in no small measure

* Editor's note: This commentary was prepared for and presented at the Sixteenth Annual Conference of the Australian Mining and Petroleum Law Association Limited in relation to an earlier version of Professor Boer's paper. Professor Boer has, since the conference, revised his paper. In so doing he has taken account of some of the matters raised in Mr Quinn's commentary.

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reflected in the appalling recession—dare I use the “D” word—to which the Australian people as a whole are now being subjected.

Professor Boer's paper makes no attempt to weigh up the benefits he chronicles in his paper in terms of the level of satisfaction achieved by those who he asserts benefit from the process. To some degree I sympathise with him as there are no objective measures now known which I believe can measure across the broad spectrum of Australian society the benefits, if any, that individuals and the community as a whole receive from the public inquiry process. The warm inner glow enjoyed by those who applaud these inquiries cannot and should not be assumed as justification enough, for the participants are few in number but the current and potential cost to the whole community is very significant.

I take particular exception to the suggestion that the value of the inquiries resides in the way they promote equity, cost efficiency, economy and environmental quality in development decisions. Nowhere in his paper does Professor Boer justify this statement and I believe this to be a major flaw.

Professor Boer nominates nine separate functions which he claims are performed by public environment inquiries to the benefit of the Australian community. These nine points are the crux of the Professor's paper and provide the basis for his supportive approach to public inquiries. Accordingly I intend to structure much of my commentary around these nine functions which are asserted as the main attributes of the public inquiry process. I intend to question whether public environmental inquiries actually fulfil these functions and to challenge the implicit claims that these functions are necessary for or add materially to the wellbeing of Australians at large.

Professor Boer's first point relates to the role of the inquiry as a broad policy-making tool to advise governments. It comes down of course to a matter of value judgment as to whether or not governments require yet another tool to assist them in policy making. Governments these days seem to have no shortage of highly qualified public servants and legions of political advisers whose role it is, as I understand it at least, to provide this service. Do our politicians need, and can we afford, yet another layer in this advisory process?

Leave aside the question of the need for such further advisory bodies, based on my experience—with the Kakadu Conservation Zone Inquiry—I doubt very much whether the inquiry process really does serve this purpose or, indeed, insofar as the RAC is concerned, sees itself as having such a role.

Let me take you to the summary of principal findings, conclusions and recommendations from the RAC's Kakadu Conservation Zone Inquiry. In their summary the Commissioners expressed the following views, and I quote:

“the Inquiry's task has been to clarify the options available to the Australian government so that it can make better informed decisions. While not specifically required to do so by its terms of reference the

Inquiry has made recommendations about the ultimate use of the Zone's resources and related matters. It has not made a recommendation about the best course to adopt in relation to the weighing of economic and environmental considerations and of Aboriginal views. *This involves value judgments that only governments can make.*"

The Commissioners were careful to specify their task as clarifying options, for nothing new came from this 18 month long process to provide additional advice to government. Nor in this case did the Commissioners see it as their role to make recommendations, much to the chagrin of some in Canberra.

My reading of the Commissioners' words suggests that we have gone the full circle. The Commissioners are reminding the government that at the end of the day they are elected to make decisions and to govern the country.

The second function specified by Professor Boer relates to conflict resolution and indeed I recall in May 1991 that same function was suggested as a primary component of the RAC role by one of its senior officers at a mining industry function which I also addressed. I have yet to see any evidence that the inquiry process does result in the resolution of conflict. The nature of the process almost inevitably results in the attraction of proponents for and opponents against the particular resource use being examined. It provides an additional platform on which an essentially adversarial process can be played out but rarely satisfies either side.

The reason for this conclusion is really quite simple.

Proponents of projects are generally the development companies, occasionally industry organisations, and occasionally, but rarer still, government departments. Such groups gain nothing tangible from the inquiries. They can only lose—either by costly involvement in the process and by project delay or cancellation. I cannot recall one instance in which a proponent has seen any material gain from these procedures.

Opponents, more often than not, are deeply committed environmentalists either acting individually or more usually organised in some fashion. You would no doubt be familiar with the mainstream environmental groups: the Australian Conservation Foundation, Greenpeace and the like. These organisations are not the only ones, however, and there are many smaller groups which may or may not be affiliated with the larger mainstream organisations. One such smaller group that quickly comes to mind was CASM which stands for Committee Against Sand Mining. This is, as I understand it, predominantly a New South Wales-based group which is opposed to any form of sand mining activity in that State. We had to deal with CASM in the Ballina Sand Mining Inquiry.

Both of these inquiry participant classes espouse firmly held views. Some of the views may be objectively formed based on proper scientific analysis. In many cases, however, emotional commitment drives much of the public contributions to the process. Indeed one might suggest

based upon some of the evidence that I have heard presented during my participation in inquiries that many participants have little interest in and certainly will not be confused or constrained by facts. Beliefs are more often than not asserted with passion but supported by little, if any, real factual evidence.

At the end of the process when a decision is ultimately given, one or other of these deeply committed parties is going to lose and thus feel aggrieved. This is inevitable and to suggest to the contrary is, with great respect, an absurdity.

The third function specified by Professor Boer was the identification of issues and clarification of views and areas of misunderstanding. Well, after about 18 months the RAC came up with seven options that the government could consider for the future of the Kakadu Conservation Zone. After more than 12 months of exhaustive hearings, and no doubt a huge intellectual input on behalf of the Commissioners and their Secretariat, there was absolutely nothing new in those options that was not known to the government before the Commission was required to evaluate the Coronation Hill issue. Again we come back to this implication that the government has sufficient means already available to it within its existing bureaucratic structures to define issues. If governments are not satisfied with the advice they are getting from the bureaucracy they should correct that problem rather than seek supplementary consolation through an inquiry process.

Professor Boer suggests that inquiries can narrow issues and thereby assist in conflict resolutions. I fail to see any evidence in support of this assertion. Again, drawing on my own experiences following both the Kakadu Conservation Zone and the Ballina Mineral Sands Inquiries, the relevant conservation groups both continued to publicly plead their cases long after the inquiries had terminated. In both instances the inquiries had found that there were no substantial environmental impediments to the subject mining operations. I believe it is fair to say that in both instances submissions by the environmental groups had been largely discredited. Notwithstanding the company was subjected to continuing public sniping by CASM long after the inquiry concluded. The ACF in its recent membership renewal drive cited its "success" in the Kakadu Conservation Zone Inquiry as a compelling justification for continued membership support. A curious claim in the circumstances.

Of course the Coronation Hill joint venturers have not let the matter rest either. As you will no doubt be aware, action has been initiated in the High Court.

To suggest that the inquiry process promotes participatory democracy is hardly an arguable proposition. There is no question that the inquiry process as practised in Australia today does provide scope for any citizen with an interest in the subject matter to make representations to the inquiring body. However, the Professor admits in his paper that the inquiry processes tend to be dominated by the mainstream environmental groups and that has certainly been our experience in the Coronation Hill Inquiry.

I believe the best indication of the public's interest in participatory democracy is the statistics relating to membership of political parties in Australia. Membership levels are pitifully low and are declining. If there was a great groundswell of interest in participatory democracy then these statistics of participation at the most basic level do not support the assertion.

Professor Boer goes on to suggest that community frustration with party politics has led to growth in the support for Independents and implies that this support is a direct result of the inaccessibility of the mainstream political framework to the average citizen. I would suggest that an equally plausible—perhaps a more plausible—hypothesis for the growth in support for Independents is the enormous damage our politicians and political parties have done to their own credibility as a result of their inability or unwillingness to govern. All of the reliable opinion polls indicate that the respect for politicians in Australia is extremely low. This has serious implications which are well beyond the scope of this commentary. However I suspect that ineffectual government is a major reason for the low standing of politicians and is a natural springboard for the growth in support for Independents.

Of course the trend away from mainstream political parties is not unique to Australia. It has been a notable political feature in several developed democracies during the 1970s and 1980s. Apart from disenchantment with ineffectual government, several commentators have suggested the trend reflected the relative affluence in these societies which deflected the attention of some electorates away from more fundamental issues. If one can draw conclusions from recent elections in Germany and the United Kingdom, it would appear that support for single issue or Independent candidates has fallen as electorates concentrate on core issues in difficult economic times.

As a further indication of the purported need for the inquiry process to fill a role in participatory democracies, Professor Boer rather sympathetically alludes to the rise in civil disobedience as a legitimate method used by environmental groups in an effort to "stop environmentally destructive development". A number of environmentalist groups have in fact gained enormous publicity as a result of the stunts that they have performed in the zealous pursuit of their own self-centred objectives. Notwithstanding the fact that inquiries have been part of our landscape for many years, I see no evidence to suggest that these organisations have moderated their use of any tactic that seems to come to their mind to press their cases. This remains so notwithstanding that many of these actions can cause significant financial damage for those with economic interests in the matter in dispute and expose people involved, including members of environmental groups, to significant safety risks. Greenpeace has gained great notoriety with recent examples including the Nufarm and the Otway Basin-BHP incidents in Victoria. While all citizens should have the right to express their views, I find it alarming that the Professor gives sympathetic treatment to civil disobedience tactics which more often than not contravene the rule of law.

Professor Boer alludes to the role of inquiries as an educational tool for the shaping of public opinion and to the benefits in their creation of communities of interest. I think the latter is probably more relevant than the former. My experience with public inquiries leads me to the view that the dissemination of information about environmental inquiries through the popular press is generally sensationalist and poorly researched. Rarely does the popular press report comprehensively upon in-depth findings. Most of the population gain their information about the conduct of inquiries from the popular press rather than from the inquiry reports themselves. These weighty tomes generally do not feature strongly as bedtime reading for the average Australian. Accordingly, it seems to me that any broad-based community educational advantages of inquiries are extremely limited. On the other hand, there is no question that people who are directly affected by specific development proposals do gain strength from having access to the inquiry process and the sharing of their views with those who might be like-minded.

Professor Boer points out, and probably quite rightly so, that the inquiry processes in Australia have helped give effect to the precautionary principle. I prefer to refer to the precautionary principle as the "head in the sand" principle. To suggest that life can proceed on the basis that no development decisions can be made unless a project is entirely risk-free from an environmental standpoint is totally unrealistic. All forms of human endeavour impact the environment. The degree of impact is usually quantifiable. However, wherever there are variables, arguments can be mounted about possible impacts. That is where risk evaluation principles can be utilised to assess the probability of environmental damage and thus considered decisions can be made on the viability of projects or the need for added environmental protection measures. These procedures are well catered for and extensively utilised in the preparation and assessment of environmental impact statements which are required for all major resource projects.

To the extent that the inquiry process often necessitates repetition of risk analysis studies, it might give added comfort but rarely will it achieve more than duplication of effort.

The last of the nine points cited by Professor Boer as functions of inquiries is to compel greater accountability associated with economic developments and to promote efficiency in government policy formulation. I can perhaps comment upon these two aspects by reference to our experience at Coronation Hill.

When the Coronation Hill joint venturers filed their environmental impact statement it was hailed as being one of the most comprehensive documents ever received by the relevant government departments. It was nonetheless accused by certain environmental groups as being grossly inadequate and biased towards the development. These opposing arguments were vigorously put to the RAC during the course of its evaluation. After all this additional study the RAC could find no environmental reasons to oppose mining of Coronation Hill. Furthermore, the Commissioners made no substantive recommendations to vary the development plan devised by the joint venturers long before

the Inquiry came into existence. Nothing was achieved in the area of greater accountability, either in the assessment of impact process or in the implementation requirements had the project proceeded.

The Kakadu Inquiry could hardly be said to be a good example of the promotion of efficiency in the making of specific decisions or in the formulation of government policy. I don't think it's unfair to say that the government of the day was somewhat traumatised by the RAC report as it left them in a position of having to make a decision—something which they had hoped to avoid. What transpired in the run up to the fateful day in June 1991, when the Prime Minister effectively overruled the majority of his Cabinet in order to consolidate his leadership position, was nothing short of comic opera. That is, of course, if this farcical set of circumstances had not had such serious repercussions for Australia's reputation as a reliable place in which to invest. At the end of the day short-term party politics and intra-party leadership battles determined the issue. The RAC contributed very little if anything to this decision making process.

Now you have probably gathered by this stage that I am not a strong supporter of inquiries as they are presently conducted in the Australian context. I am, however, impressed to read in the Professor's paper that the field of public inquiries is one in which in certain respects "Australian practice is leading the world". The Professor points out that there are over 5,000—let me repeat that—5,000 various public inquiries conducted each year in Australia. It would appear that the inquiry industry is one of the few growth industries flourishing in Australia during these difficult economic times. If this level of dedication by governments to inquiries persists we can look forward to economic recovery by inquiry for it is unlikely that it will be achieved by the more conventional methods such as the resurgence of capital investment.

There was one major area in Professor Boer's paper with which I can agree—that is the expansion of inquiry activity is related to fundamental issues. He points out, and I agree wholeheartedly, that parliamentarians have been unable to make hard policy decisions and have sought to use, for one reason or another, the inquiry process to defer, delay, or in some other way avoid doing what they are elected to do. We Australian taxpayers support huge bureaucracies, by international standards, in relation to the size of our population. These bureaucracies have as a principal role the provision of advice to government. If government is not satisfied with the advice they are getting then they should fire the incumbent bureaucrats and hire those in whose advice they have confidence. Irrespective of the approach to the advice the government is getting from the bureaucracies, politicians should get on with government, make decisions and discontinue their current cynical abuse of the inquiry process for short-term electoral purposes.

Having dealt with the nine basic functions of public inquiries it would be remiss of me not to make some brief comments on other aspects of the paper.

Professor Boer describes at length the role of the RAC and suggests that the mining industry has been especially hostile to the RAC and called for

its abolition. In justification of this assertion he quotes from the speech I gave in May 1991 to the Australian Mining Industry Council Seminar in Canberra. Flattering though the suggestion might be, I do not speak for the mining industry and I was expressing a view from Newcrest's perspective based upon its experience with Coronation Hill. I would like to remind Professor Boer that the mining industry initially supported the establishment of the RAC, albeit out of desperation and frustration. They did so in the expectation that the RAC would be used to look at macro issues and not as a process of examination of individual development projects. The original rationale for the RAC is now distorted.

The industry has now also had opportunity to assess the performance of the Commission in practice. That experience has not been good and I suspect, although I cannot bind the industry to this view, that we have lost faith in the RAC being an independent, competent and unbiased contributor to the formation of government policy and resource use decisions.

In part 3 of the Professor's paper he addresses the question of effectiveness of the public inquiry as a decision-making tool. He correctly points out when dealing with witness profiles that participation in these inquiries is generally in the form of organised groups such as Greenpeace and the ACF. While individuals are not excluded the inquiries tend to be dominated by the organised groups. The truth is that public inquiries are not a vehicle for broad-based participation.

Accessibility and openness is constantly held up as a principal attribute of public inquiries.

One aspect of our experience in the Coronation Hill affair involved the taking of evidence from Aboriginal witnesses. The experience was disconcerting and requires, in the interests of equity, a considerable re-evaluation of the propriety of the taking of evidence in camera in a public inquiry process. During the Coronation Hill Inquiry the RAC agreed that evidence to be given by certain Aboriginal witnesses would not be taken in public. Specifically the joint venture representatives were not given the opportunity to hear this evidence. The decision was justified on the asserted religious sensitivity of the evidence to be tendered. However while certain involved parties were excluded, non-Aboriginal advisers to Aboriginal groups and certain other "friendly" non-Aboriginal observers were allowed to be present during the course of this evidence. There seems to be a rather fundamental inconsistency between the claimed accessibility and openness of the inquiry process and this aspect of the conduct of the Coronation Hill Inquiry.

The Professor alludes to the role of expert witnesses and advisers to inquiries, and again let me express some views here. During the Coronation Hill Inquiry the Commission felt the need for expert assistance in communication with and understanding of the Jawoyn people. They retained, amongst others, Dr Francesca Merlin, an anthropologist who had spent many years studying the Jawoyn people. During the course of Dr Merlin's previous work she had been retained by the Jawoyn to assist in their Katherine land claim, hence Dr Merlin not only had an academic but also a commercial interest in the Jawoyn.

I retell this story not as a form of criticism of Dr Merlin in accepting the engagement with the Commission, or in suggesting any impropriety on her part in the advice she gave the Commissioners, however I do contend that it was extremely unfortunate that the Commissioners could not find an expert less closely aligned to one side of what was increasingly becoming a very acrimonious argument. If Commissions of Inquiry are to serve the roles that Professor Boer applauds, they must meticulously ensure that the experts they retain are and are seen to be uncompromised as well as being professionally competent.

On the question of competence of witnesses, staff and Commissioners in general, let me also point to some real difficulties inherent in determining social values.

The RAC embraced (at least initially) the application of contingent valuation methodology in determining the financial value placed upon Kakadu National Park by the Australian population at large. The conclusions arising from this study suggest that Australians would in aggregate be willing to pay \$647 million per annum for ten years to avoid possible damage to the environment from mining at Coronation Hill. These results were publicly released with great fanfare by the RAC. Then somebody pointed out the magnitude of the moneys they are talking about and started to look at the methodology applied in achieving this quite amazing result. Predictably this aspect of the RAC's study was considerably downplayed by the time they got to writing the final report. This was an implicit admission that the RAC had initially got it wrong in a very serious way. They'd got it wrong because neither the Commissioners nor their advisers fully understood the methodology of contingent valuation. While this experiment was nipped in the bud before it could do too much damage, it does point to the need for considerable expertise in many aspects of data collection and analysis by these bodies—expertise which on all occasions is not readily available. There is great danger in such deficiencies not becoming apparent until after the horse has bolted, so to speak.

The Professor briefly discusses the cost and efficiency of inquiries. He points out that the RAC alone cost \$6.3 million to operate in the fiscal year 1990-1991. This is only one of the multitude of inquiries going on in Australia at any one point in time. Apart from the cost to government, there are inevitably major direct costs to project proponents. Using Coronation Hill as an example, after spending more than \$1 million completing the EIS, we had to face almost as much again in participating in the RAC Inquiry. It is quite obvious that the direct financial burden is enormous.

The indirect cost was not given the degree of consideration that it really deserves. To give him his due, Professor Boer did acknowledge that time also means money and suggested that delays result in higher cost to industry and ultimately to the consumer. This is a rather naive comment when one is dealing with resource use decision making. Very few resource developers have a capacity to pass on added costs to the consumer. Resource producers are generally price-takers.

Let's not delude ourselves. One inherent cost of this process of luxuriating in participatory democracy is financial jeopardy of projects which are fundamentally important to Australia's future. Insofar as the mining industry is concerned there is clear evidence of such extreme frustration with this process that mining companies are taking their exploration funds outside Australia where the environment is much more predictable than it has become in Australia. One day we are going to sit back and ask ourselves whether the warm feeling in our bellies arising from the opportunity to have our say in each and every development decision is sufficient compensation for the regression of this once great nation's economic standing towards that of a third world country, for that is the direction in which we are rapidly going.

The audience today will probably believe that I have been extremely harsh in my commentary on the Professor's paper. I do not apologise for this. I believe that the Professor is an apologist for a process which is damaging Australia. Public inquiries, used sparingly, may have some utility and social value in modern Australian society. The situation in Australia, however, is totally out of control. We are a country enmeshed in a mire of inquiries. Unless we change the mind-set our economy will suffer and we will no longer be able to afford this great indulgence. Regrettably, it will be our children and our children's children who will have to pay the price.