

Development Approvals: A Comment

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INTRODUCTION

The development approvals process is becoming increasingly complex, both in terms of form and content. Although efforts can always be made to reduce the complexity of the development approvals process, a project proponent will always be fighting the alligators rather than draining the swamp. While that fight continues, the best strategy to adopt to ensure compliance is an issues-based strategy.

In terms of this commentary is in four parts:

1. A brief analysis of Aidan Kelly's paper
2. A brief analysis of Damien Gardiner's paper
3. A brief reflection upon the experience in Queensland
4. An observation about the successful navigation of the approvals process – that is, the swamp.

PART I

In terms of Aidan Kelly's paper, he has:

- (a) indicated there is an increasingly complex approvals process for projects (resulting from complex and detailed information requirements, extended process time lines and greater opportunities for informal and formal third party involvement);
- (b) indicated this increasing complexity goes hand in hand with the increasing demands of administrative and political decision-making processes (including new regulation) and the increasing expectations of corporate social responsibility;
- (c) provided a matrix of the approvals required in Western Australia to commence a green-fields iron ore project, which looks in itself looks daunting but, effectively, includes as a sub-set the material covered in Gardiner's paper;

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- (d) analogised the increasing regulatory burden as like a house with a leaking roof (or as we would refer to it in Queensland a swamp full of crocodiles);
- (e) identified the Western Australian Government's initiatives to specifically deal with the increasing regulatory burden (which have included the review by Dr Michael Keating and the establishment of ODAC); and
- (f) critically, focused upon the people who need to ensure compliance with the approvals process, which he referred to as the Approvals Team (and which needs to be multi-disciplinary in nature, ensure coordination and, pleasingly, include a role for lawyers).

PART 2

And that takes us to the heart of Damien Gardiner's paper.

His paper is a very thorough analysis of the recent cases that have considered the meaning of impacts under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and other related environmental assessment legislation. More particularly, his paper then examined the cases that specifically deal with whether an environmental approval should also encompass a consideration of greenhouse gas emissions resulting from the relevant project.

Critically and, to my mind, correctly, Gardiner has indicated that:

“it will generally be prudent for the proponents of major projects, particularly in the mining and petroleum sectors, to undertake an assessment of the impacts that may arise from greenhouse gas emissions resulting from the project. Furthermore, given many of the cases in this area have been concerned with the adequacy of the scope of EIAs required by regulatory agencies, it would also be prudent for such agencies to ensure that the scope of any EIA includes an assessment of the potential impacts of greenhouse gases resulting from the project under consideration.”

Having indicated it will generally be prudent to make an assessment of greenhouse gas emissions, Gardiner then flagged some of the difficulties associated with undertaking greenhouse gas EIAs.

Collectively, the papers of Kelly and Gardiner demonstrate that the approvals process is already complex and all the indications are that such complexity will simply continue to increase.

PART 3

The Experience in Queensland

I would like to start by making a few observations about Queensland. In doing so, it will be apparent that the complexity to which Kelly and Gardiner have each

referred is not restricted to any particular jurisdiction. Currently, in Queensland, there is an unprecedented commitment to the development of new projects. For example, consider:

“If we are to sustain, and in fact increase, this level of economic growth, we need to ensure we have the necessary infrastructure in place to support our industries.

We also need to cater for our growing population.

And this is exactly what the Queensland Government is doing.

We have embarked on the greatest infrastructural development program ever committed in Queensland’s history – covering areas such as mining and minerals processing, public transport, roads, rail, energy, ports, water infrastructure, tourism facilities, schools and hospitals.”¹

In terms of the factors that will determine whether Queensland is successful in completing its projects, experience suggests that they are:

- (a) the cost of construction – primarily driven by the need for particular resources (for example, steel if constructing a pipeline) and the cost of human capital;
- (b) the conclusion of the impact assessment process – whether environmental, economic or social;
- (c) obtaining access to the relevant land upon which the new infrastructure is to be developed – whether to complete initial studies or to construct the actual project; and
- (d) the arrangements which are necessary with any Indigenous interests which are affected – in terms of the management and protection of cultural heritage and addressing native title.

For the record, Queensland continually reflects upon the regulatory burden and also has a purpose-built central agency to facilitate compliance with the approvals process for major proponents (known as the Office of the Coordinator-General).

PART 4

Navigating the Approvals Process

Turning then to navigating the approvals process. To my mind, although the approvals process is undoubtedly complex, effective and timely compliance basically operates by reference to some fairly simple touchstones. Importantly, if borne in mind, those touchstones will explain the complexity of the approvals process and assist with ensuring compliance.

The first touchstone relates to the participants in the approvals process, of which there are essentially three:

- (a) the project proponent, whose interest is personal;

¹ See the then Deputy Premier, Treasurer, Minister for State Development, Trade and Tourism in Projects Queensland 2005-2006, Issue No 25.

- (b) key stakeholders (whether supporters or detractors), whose interests tend to be narrow; and
- (c) government (whether local, State, Territory, Commonwealth or, occasionally, transnational), whose interests tend to be broader and more general.

The second touchstone relates to the adoption of an issues-based approach to compliance. It requires a proponent ensuring that four things occur:

- (a) the “optics” of the project are well-managed. Critically, the approvals process should be seen as part of the journey rather than the destination;
- (b) the merits of individual issues are addressed;
- (c) to the greatest extent possible, there is an integration of the various issues that need to be addressed (and, necessarily, ensuring that all relevant stakeholders and governments participate in that process); and
- (d) the various issues are addressed contemporaneously (that is, in parallel) rather than on an incremental basis.

To put these touchstones in the negative, effective and timely compliance with the approvals process generally fails when proponents:

- (a) confuse compliance with seeking amendment to an approval because of its impact;
- (b) seek to forge varying coalitions in order to ensure compliance with individual approvals while failing to ensure broad scale support for the project;
- (c) intentionally isolate participation by particular stakeholders or governments in order to avoid detractors; and
- (d) attempt to deal with approvals on a sequential basis (in the belief that it provides greater certainty and control of the approvals process).

Importantly, I do not wish to give the impression that the capacity to ensure compliance with a complex approvals process is not without its challenges. To that end, there are some fundamental flaws in the broader political process that adheres throughout Australia (primarily related to the dynamics of politics and intergovernmental relations). To return, however, to an earlier analogy, I think it is safe to assume that the swamp will not be drained (in the short term or at all). In my experience, however, the touchstones to which I have referred will at the least provide a canoe to negotiate that swamp.

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