Public Participation and the Adani Syndrome

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The ability of members of the public to participate in environmental decision-making is regarded as a key component of achieving ecologically sustainable development. Indeed, public participation principles are now incorporated into Commonwealth and State resource development legislation. In recent years, specific projects (particularly coal projects) have been targeted by very well-organised and funded groups, resulting in delays or abandonment of projects, long after Commonwealth and State approvals have been obtained. The Adani Carmichael mine in Queensland is but one case in point. This article argues that, while there is a valid role for members of the public to be consulted and make submissions to the regulators or courts, the public have adequate opportunities to participate by appealing the regulators' decisions in the State court system rather than the current duplication of appeals in both State and federal courts.

I. Introduction

There is a commonly held view that public participation in environmental decision-making results in better environmental outcomes. These principles have, inter alia, been raised by Christopher Stone in the 1970s, in his famous question of "Should Trees Have Standing?" and summarised eloquently by Preston J in his review of Australian environmental law from 1927 to 2007.[1] Public participation principles have been incorporated into various United Nations documents,[2] such as the Rio Declaration and the Aarhus Convention,[3] and are implicit within the Sustainable Development Goals. Australia has included what basically amounts to open standing in its principal Commonwealth legislation – the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*) and States have open standing provisions in their principal resource management legislation. These provisions give the public both the right to make submissions on development decisions, as well as appeal rights in the courts.

Yet while public submissions – both before and during court proceedings – might very well raise issues and emphasise matters that the regulators and decision-makers have not considered – public participation provisions are not without their cost. This article will address the benefits and the detriments of having such open standing provisions in resource development processes and in particular, appeal rights being available in both Commonwealth and State courts. It will also review the rise of the non-government organisation (NGO) movement to the present day where they are now professional organisations, some with budgets rivalling the United Nations Environment Program (UNEP). Even smaller, grassroots organisations, are often funded by philanthropists, allowing them to undertake expensive legal action where previously costs were prohibitive.

This article will argue that there is a place for environmental NGOs to provide submissions and consultation on resource development processes, and lodge an appeal against the decision made by the regulator within the State court system. However, as the Adani Carmichael Mine project illustrates, legal action has been used as a sword and with a clear agenda to ensure that neither Adani or any of the eight other tenement holders in the Galilee Basin in Queensland develop a new coal mine. Regardless of

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[1] Justice Brian J Preston, "Environmental Law 1927–2007: Retrospect and Prospect" (2007) 81 ALJ 616.

[2] See, eg, the World Commission on Environment and Development, *Our Common Future* (OUP, 1987) 328; United Nations Conference on Environment and Development, *Agenda 21*, UN Doc A/CONF 151/4 (Pt III) (1992) 52.

[3] UNECE, *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (Aarhus, 25 June 1998) Convention text <http://www.unece.org/env/pp/treatytext.htm>.

one's views as to correctness or otherwise of this approach, it does beg the question of sovereign risk of doing business in Australia when projects that have been approved by both federal and State regulators can be delayed for years, with every decision being judicially reviewed by the courts and appeals from the decisions of the lower courts. The question of sovereign risk is considered in Part III of this article.

II. Public Participation

It is a common enough experience in life that conflict often expands in a direct ratio to the number of people who wish to opt into the process.[4] The potential therefore in a resource development approval process for rather high levels of conflict (in both scope and intensity) to exist would appear to be immanent in the statutory provisions which outline who can object to an application. The net effect of which is to not exclude anyone from the process. The principle is essentially one of global inclusion.

To illustrate the current public participation provisions that could apply, a resource development in Queensland will be considered, since this is the State where our case study, Adani's Carmichael Mine, is located. First, the *EPBC Act* is triggered if the project involves a significant impact on a "matter of national environmental significance".[5] Judicial review of a decision made by the Minister is available under s 487, which provides that an individual or organisation or association (whether incorporated or not) that has been involved in research or activities designed to protect the environment in the previous two years, has standing to challenge a decision made under the Act. Standing provisions exist in similar terms for persons and organisations to seek an injunction under s 475 if they believe that an act or omission constitutes an offence or other contravention of the Act or the regulations.

Second, Queensland legislation provides that "an entity" may make a submission about the granting of an environmental authority[6] and a submitter has the ability to object to the grant of such environmental authority or decision made in relation to the application in the Land Court.[7] "An entity" can also object to an application for a mining lease[8] and the matter is referred to the Land Court for hearing.[9]

Accordingly, a resource project will be assessed by both the Commonwealth and State Environment departments, with conditions imposed by both regulators. The parties have signed an "Agreement between the Commonwealth of Australia and the State of Queensland relating to Environmental Assessment", which means that only the State environmental impact assessment (EIA) document is required, and the Commonwealth also uses this EIA for its assessment purposes. The public can, rightly, make submissions about the terms of reference of the environmental impact statement (EIS) and on the final document.[10] However, the fact remains that there are appeal rights under both Commonwealth and State legislation. One issue that this article is addressing is the duplication in the appeal rights. The governments have attempted to address the duplication of approval issues by drafting an Approval Bilateral Agreement in 2013 "to delivering a one stop shop for environmental approvals"[11] – although the Approvals Bilateral has not been finalised. Once in place, there would be one decision made by the States, which would include State-required conditions and conditions to protect the Commonwealth's matters of national environmental significance. It is unclear whether an Approval Bilateral will ever be

[4] For an insightful analysis of the role of small and large groups in such processes, see M Olson, *The Rise and Decline of Nations* (Yale University Press, 1982).

[5] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Ch 2 Pt 3. It is likely that a large resource development will have a significant impact on an endangered species or ecological community and hence trigger the Act.

[6] *Environmental Protection Act 1994* (Qld) s 160.

[7] *Environmental Protection Act 1994* (Qld) s 182.

[8] *Mineral Resources Act 1989* (Qld) s 260.

[9] *Mineral Resources Act 1989* (Qld) s 265.

[10] *Environmental Protection Act 1994* (Qld) Ch 3 Pt 1 Div 4.

[11] Australian Government, Department of Environment, *Approval Bilateral Agreements under the EPBC Act – The Queensland Agreement Explained* (October 2013) <https://www.environment.gov.au/system/files/pages/b44206bc-d8e5-450b-a05e-4d7c26d8afa1/files/qld-approval-explanatory-document.pdf>.

finalised. However regardless of whether or not this is implemented, there is no reason why, like the "combined" submissions on the EIS, that Commonwealth issues could not be addressed by the State courts when hearing appeals.

The concerns which are expressed in the following analysis do not have their genesis in an impossible desire to remove all conflict from the system. Conflict and the processes by which conflict is resolved are necessary and essential aspects of any rational decision-making model. Rather, the issue concerns first the question of the scale (and perhaps the intensity) of conflict which is often the consequence of an open-ended policy of inclusion and second, whether, at the end of the day, the majority of resource developments emerge from the assessment and approval process enhanced in some particular aspect or alternatively degraded in terms of their overall conception. In regard to the first issue there can be little doubt that, on occasion, much of the antagonism or even outright aggression sometimes displayed in response to a resource development proposal is misplaced or based on fallacious assumptions concerning the proposal or is simply mischievous. The rise of social media has increased the ability of NGOs to gain momentum against resource developments by mobilising those who might even have difficulty in locating the site of the proposed development on a map. A mention of the Great Barrier Reef is enough to ignite interest, even if the relevant mine is on the other side of the Drummond Range![12] However certainly not all responses to all proposals can be considered in these terms. In many cases submissions from individual members of the public and NGOs do address the issues specifically and do not necessarily proceed on the basis that the proponent's development is pathologically sinister. Accordingly they can represent a valid information input into the system. In some cases, they may even address an issue that had not previously been considered either by the government decision-makers or in the various expert reports compiled for and submitted by the applicant.

Nevertheless, observers of the process may sometimes be left with the impression that after the tumult has died down very little (and sometimes nothing) has been the outcome of a costly and vitriolic public participation process. One could even suggest in such instances that if the participation process is achieving anything it is doing so in areas quite outside the project being reviewed; that the notification may result in neighbour meeting neighbour for the first time, that an embryonic, though ultimately evanescent, sense of community may spontaneously arise and that into some lives an immediacy and an exciting astringency may come to exist for a time. In this sense the participation process may be contributing to some form of public good. However if this is sometimes the only outcome then it is demonstrably not a planning outcome and the two matters should not be confused, though they often are by politicians.

Throughout the 1990s, a recurring theme in what could be loosely called the national or "public conversation" has been "ownership" … as in "ownership of the process", "ownership of the outcome", "ownership of the problem" and so on. In turn, "ownership" has become associated in many instances with the similarly proprietary-sounding term, "stakeholder". These are frequently combined in the public conversation as … "the stakeholder should have ownership of the process … the problem … the solution".[13] Stripped of their sociological gloss these statements are attempting to express a simple normative proposition, namely that those individuals who are affected by a decision, or "outcome" ought to be able to view the process which produces that outcome as morally and factually legitimate. They will perceive it to be legitimate, so the theory goes, if the process is able to demonstrably take account of (or at least, consider) their views and their interests and the most obvious operational means of conveying this impression is to include all such parties within the ambit of the negotiating process.[14]

The philosophy which underlies this general policy of inclusion has been adopted by many jurisdictions in the absence of any readily acceptable means by which those who are adversely affected

[12] The Drummond Range is part of the Great Dividing Range in central Queensland. The Galilee Basin is on the western side of the Range.

[13] "Public Conversation" is, it seems to us, an appropriate phrase for a number of reasons one of which (incidentally) is that such terms gained initial currency in the area of public administration.

[14] All these ideas were expressed as positive goals by New South Wales Government, *Fair Go, Fair Share, Fair Say: New South Wales Social Justice Directions Statement* (Sydney, October 1996).

by a proposal can be separated out at the application stage from those who are not.[15] Consequently, and as previously noted, both the Commonwealth and Queensland jurisdictions permit "any person" or "entity" to make a submission in respect of a notifiable proposal[16] and at a sociological level such a policy generates a degree of support for the reasons touched on above. Citizens, ostensibly at least, become transformed into participants, an internal administrative process may become more transparent, an increased variety of ideas may be canvassed and, presumably, out of this new vitality decisions should be more rational or more efficient (or to use Renn's phrase, "more competent").[17]

While conceding some of the benefits (though not necessarily the *cost*-benefits) adduced by the proponents it sometimes appears that in their enthusiasm for the idea they lose sight of the overall necessity for a development control process to be efficient and not merely to generate a social or collective consciousness in some neo-Durkheimian sense. The ongoing history of public participation in Australia illustrates well that it is indeed a "two-edged sword". At a pragmatic level, one of the aims of development control processes is to produce decisions which can be reasonably justified in terms of established policies and difficulties and dissonances will continue to recur if, as a process, it can be easily co-opted by theorists whose only common starting point is often a disenchantment with what they perceive to be the inequities and limitations of representative government and the capitalist system.[18]

With these broad comments in mind, the dysfunctional aspects of rising community expectations fall into three categories. First, the operation of a general policy of inclusion, together with an unqualified right to object and the coexistence of general appeal rights has undeniably created a sense of empowerment in and among certain sections of local, and particularly middle-class, communities. The outworking of this sense of power has been a tendency by both planners and local politicians to pay almost ritual obeisance to local complaints which has, over time, acted to increase the size of the geographical area over which such groups believe it is legitimate to sustain objections or claims.[19] In short, it has become a commonplace observation that, over time, many such groups – as a natural extension of this sense of empowerment – eventually appear to lay claim to virtual veto rights over any development occurring in their expanded area of local or ideological interest. Such a claim, either expressed overtly or implicit in underlying community attitudes, is always going to be unsustainable but is a direct consequence of the interstitial insertion of a sociopolitical aspiration into a traditional development control process.

Second, this participatory ethos at the local level may compromise efficient regulation even in the short term. This may occur through the unwillingness of local participants to acknowledge the total cost of compliance with an aroused community expectation concerning a matter of perhaps marginal local utility. A simple example may suffice to illustrate this effect: an increase in the size of a "vegetation protection zone" may be the outcome not of a valid or rational concern on environmental or amenity grounds but rather represent an emotional response to the sudden perception that some item, previously happily ignored, now requires preservation or protection. Often this will be depicted by participants and politicians as a "win-win" situation and often it is nothing of the sort. It appears to be "win-win" simply because the costs are imposed on the applicant and politicians sense they have avoided an unfavourable electoral consequence. The hidden cost of this exercise, to impose an unnecessary condition, are often unguessed at by regulators who, in the main, are unfamiliar with the cumulative effect of imposed

[15] Anne N Glucker et al, "Public Participation in Environmental Impact Assessment: Why, Who and How?" 43 *Environmental Impact Assessment Review* (2013) 104, 109.

[16] With the added rider for the Commonwealth legislation of involvement in the environment in some form for two years, as previously discussed.

[17] Ortwin Renn, Thomas Webler and Peter Wiedenmann (eds), *Fairness and Competence in Citizen Participation* (Kluwer, 1995) 17–34.

[18] Renee A Irvin and John Stansbury, "Citizen Participation in Decision Making: Is It Worth the Effort?" (2004) 64 *Public Administration Review* 56; Thomas C Beierle, "Public Participation in Environmental Decisions: An Evaluation Framework Using Social Goals" (Discussion Paper No 99-06, November 1998) 1–31, 5 <http://www.rff.org/files/sharepoint/WorkImages/Download/RFF-DP-99-06.pdf>.

[19] Cheryl Simrell King, Kathryn M Feltey and Bridget O'Neill, "The Question of Participation: Towards Authentic Publication Participation in Public Administration" (1998) 58 *Public Administration Review* 317, 317.

conditions for project financing and on the end capitalised value of a development. In short, the imposition of many hundreds of conditions on resource development approvals without the assessing authority being cognisant of the cost implications can result in the project achieving marginal financial status.

Although the preoccupation of more localised objections tends to be based on more short-term and sectarian issues, the same cannot be said of the now dominant role of NGOs. The involvement of these groups has now given rise to a whole new level of concern about the *national* cost implications of open-sourced participation.

This issue will be dealt with subsequently in the discussion of sovereign risk and the Adani case study.

Although Australian jurisdictions have tended to adopt a traditional, indeed fulsome, participatory ethic which permits the public to intervene via both consultation and objection (appeal) rights, it is perhaps salutary to note that by no means all jurisdictions, even today, have adopted such an approach. For example, in Denmark there is no opportunity to appeal against the content of an adopted plan, as the procedures of public participation are regarded as adequate for the legitimacy of the political decision. Similarly, no appeals can be made against the discretionary decisions of the authorities when administering the adopted planning regulations. However, appeals can be made with regard to legal issues (as opposed to merit issues) involved in the planning process, such as whether the proper procedure was actually followed.[20]

It is, in any event, difficult to avoid the impression that the short history of the participation provisions has sometimes generated a deal of sensitivity to the issue at the political level. Though politicians are sometimes prepared to acknowledge the difficulties created by an often unwieldy and time-consuming process and the absence of any discernible benefit flowing to any party in particular instances, the process has virtually become sacrosanct in Australia, as in many other jurisdictions.

III. Co-opting the Process: The Rise of NGOs

The development of a new form of environmental consciousness was as much a social phenomenon as anything else, and as such its impetus was diffuse and potentially unfocused. How it became focused, developed political credibility, and eventually created a constituency with sufficient depth to attract the attention of politicians, regulators and even the mining sector is the subject of this section.

One of the principal ways public concern has expressed itself is through the formation of private NGOs which draw their membership from those who feel enervated by a particular issue, a particular plant or animal, a wilderness or environmental problems in general. These vary from organisations with only a few members, to "transnational" organisations with many thousands of members and cover the spectrum of human responses from the activism of Greenpeace to the philosophical perspectives of Arne Næss. For the purposes of this analysis, all such environmental organisations will be referred to by the standard name of NGOs.[21] Many NGOs have broader remits than just the environment.

As indicated above, the motivations of the people joining NGOs are as various as the organisations themselves – ranging from protection of the environment for anthropocentric,[22] or ecocentric[23] reasons,

[20] S Enemark, "From Planning Control to Growth Management: Evolution of the National Spatial Planning Framework in Denmark" (Paper presented at the Workshop on Recover from Disaster: Proceedings of International Federation of Surveyors Working Week 2016, Christchurch, New Zealand, 2–6 May 2016).

[21] However, it should be remembered that NGOs can be formed for purposes that have nothing to do with the environment (The Australian Sporting Shooters Association, for example, is an NGO recognised by the United Nations). David Robertson believes that the term NGO is a misnomer, "because most NGOs are funded, at least in part, by government agencies": David Robertson, "Setting the Record Straight – Free Trade, NGOs and the WTO" (2000) 16 *Policy* 19, 21.

[22] For example, one of the earliest NGOs, which was formed in England in 1873, was the National Health Society. A committee of this Society was the Smoke Abatement Committee, which is still in existence today as the National Society for Clean Air.

[23] For example, the Society for the Preservation of Nature Reserves, formed in England in 1912. This Society was established in response to the growing concern that species would be rendered extinct due to "building, drainage, disafforestation or in consequence of the cupidity of collectors": IG Simmons, *An Environmental History of Great Britain: From 10,000 Years Ago to the Present* (Edinburgh University Press, 2001) 178.

to NIMBYs[24] protesting against a particular development because of perceived threats to their local environment or personal financial position.[25] So great is the zeal with which some approach their "protest" that the environment has become the "new religion" for many.[26]

While, as the following brief overview of the rise of such organisations will show, there have always been disagreements and often divergent views among environmental groups, their influence in driving corporations to meet or exceed environmental standards has been significant and it continues to grow in importance. Pronounced differences in emphasis and sometimes ideology can be masked by sheer activity and energy. One fundamental point of difference, however, continued to arise. This was the debate between conservation and preservation.

Along with the extraordinary interest in the environment which arose in the 1960s and 1970s, this period also saw the formation of distinctive pressure groups, such as the Friends of the Earth (formed in 1970 after splitting from the more traditional Sierra Club[27]) and Environmental Defence and Environmental Action (formed in the United States), which openly preached more direct political action. Their message echoed the thinking of the Russian anarcho-syndicalist Prince Peter Kropotkin almost a century before who believed that the only way to prevent environmental and ecological catastrophe was to fundamentally change the values which underpinned all industrialised societies which would, in turn, fundamentally change human nature.[28]

Most emerging NGOs during the period, however, developed in a far more pragmatic, and far less ideological context or at the very least were based on ideologies which were less confrontational. It is their descendants who are now the principal contenders in the global battle for the environment.

NGOs operating in the environmental area today come in various forms, but they all share a common commitment to at least some of a set of environmental values which they define in particular ways. Not all of them will agree on the importance of particular environmental values and not all of them will agree with a process of engagement with the corporate world.

Some NGOs are single-issue organisations, with the sole emphasis on such matters as the preservation of the sea otter in Southern California, the protection of a particular endangered species or the preservation of a wilderness area.[29] Others, for example Greenpeace, with substantial resources, are internationally based and are able to cover the field, or at least engage with a large number of issues simultaneously. The amount of political influence that they have, and the amount of influence they have on the corporate world, varies from issue to issue, from group to group and from political system to political system. It is impossible to generalise as the ability of some groups to galvanise a constituency again varies with the issue and the drive and initiative of the group. One notable quality of some, however, and it is particularly noteworthy in the case of international groups such as Greenpeace, has been their ability to utilise the mass media in creative and sometimes extravagant ways. Often this has left their opponents, and this includes transnational corporations, flat-footed.[30]

[24] "Not In My Backyard", which is often a response to concern over local amenity issues or land valuation.

[25] Significant protest campaigns in Australia by local groups concern mining at Roxby Downs, the Sydney Ocean Outfall, and the Koala Protection League (who protested against the development of a toll road through koala habitat south of Brisbane, and contributed in no small part to the fall of the Goss Labor Government).

[26] At a time when attendance at the "traditional" Christian churches is falling dramatically, the numbers involved in environmental organisations is on the increase: Stephen Hussey and Paul Thompson (eds), *The Roots of Environmental Consciousness: Popular Tradition and Personal Experience* (Routledge, 2000) 1.

[27] John Elkington, *Cannibals with Forks* (Capstone, 1997) 49.

[28] For an overview which accepts Kropotkin's overall thesis, see M Albert and R Hahnel, *Political Economy of Participatory Economics* (Princeton University Press, 1991).

[29] Examples include the Australian Koala Foundation Inc and the Fraser Island Defenders Organisation.

[30] One notable example was the Greenpeace campaign against Shell over residue in the Brent Spar platform. Greenpeace were eventually proven wrong and indeed apologised but the retraction gained far less media attention than the original campaign. Shell could be forgiven for feeling aggrieved.

In line with their expanding role in international and domestic politics and decision-making over the past 30 years, many of the larger NGOs have become increasingly professional and formalised.[31] Despite the fact that most of the groups remain reliant on voluntarism, they began to employ administrators and activists to lobby government.[32] As a result, their enterprise has become equally professional, in some cases almost eco-corporations. NGOs now set the environmental agenda at the forefront of the public psyche, and have not only gained greater notoriety, but also have established an international power and bargaining base concomitant with a healthy bank balance. As an example, Greenpeace had grown from a movement organising a protest campaign in a Vancouver church basement in 1971 to an organisation with an income of over US$100 million per year, offices in 21 countries and over 100 campaigns around the world by the mid-1980s.[33] Greenpeace has a larger budget than the entire UNEP.[34]

There is now an informal network of a professional elite operating in the environment movement, and often cross-membership of professionals between organisations. For example, one person employed as a professional in one movement organisation often holds elected, "honorary" positions in several others.[35] John Elkington notes that:

> It is no surprise today to see leading environmentalists and social activists wearing pin-stripes, rather than jeans and "Save-the-Rainforests" T-shirts. And they are just as likely to be carrying the *Financial Times* or the *Wall Street Journal* as the *Co-Evolution Quarterly*, *Ecologist* or *Utne Reader*. Have the powers of Mammon turned watchdogs into lapdogs – or have the revolutionaries taken the castle? The answer is a bit of both.[36]

It is this aspect of NGOs – their increased professionalism and their involvement in the mainstream political agenda that makes then an important component, even de facto regulator, in the mining sector today. Specifically in relation to the fossil fuel industry and climate change issues, Gunningham comments that "non-governmental organisations and other non-state groups are moving beyond government lobbying and adopting strategies such as engaging in public-private partnerships, educating consumers, advocating as shareholders, pushing for disclosure of emissions and corporate responses to climate change, exerting supply chain pressure (for example, using boycotts), and setting and enforcing standards (for instance, through certification regimes and voluntary principles)".[37]

As an example, one significant NGO operating in Queensland and New South Wales in particular, which was formed in 2010 to campaign against "unchecked mining for coal and coal seam gas"[38] is the Lock the Gate Alliance. The Alliance is "a national grassroots organisation made up of over 120,000 supporters and more than 450 local groups … and include farmers, traditional custodians, conservationists and urban residents".[39] It is an interesting amalgam of groups who could be expected to be ideologically opposed – farmers and the Greens, perhaps epitomised by the leadership of both Drew Hutton (co-founder of the Queensland Greens and Australian Greens) and Sydney broadcaster Alan Jones.[40] The group's

[31] Timothy Doyle and Aynsley Kellow, *Environmental Politics and Policy Making in Australia* (MacMillan, 1995) 105.

[32] Major Australian campaigns where professionals were used by NGOs to lobby government, with mixed success include uranium mining at Kakadu (resulting in the creation of the Nuclear Disarmament Party in 1984 fronted by Peter Garrett (former President of the Australian Conservation Foundation, and later Federal Minister for the Environment, Heritage and the Arts), attempts to stop wood chipping in old growth forests, and the creation of a world park for Antarctica.

[33] Patrick Moore, "Environmentalism for the Twenty-first Century" (2000) 52 *IPA Review* 3, 3–4.

[34] William Wilson, "Environmental Law as Development Assistance" (1992) 22 *Environmental Law* 953, 966. This statement still rings true. For example, as at 31 August 2017, the Environment Fund of UNEP was US$135.5 million. Figures available for all Greenpeace organisations (including Greenpeace International) note that for the year ended 2014, gross revenue received was US$351.9 million.

[35] Doyle and Kellow, n 31, 105.

[36] Elkington, n 27, 42.

[37] Neil Gunningham, "The Fossil Fuel Divestment Movement" (2016) 31 *Australian Environment Review* 58.

[38] Lock the Gate Alliance, *About Us* <http://www.lockthegate.org.au/about.us>.

[39] Lock the Gate Alliance, n 38.

[40] Kristine Taylor, "Drew Hutton and Alan Jones Renew Old Ties for Lock The Gate Movement against Coal Seam Gas Well", *ABC News*, 4 August 2014 <http://www.abc.net.au/news/2014-08-04/alan-jones-and-greens-co-founder-reunite-for-csg-fight/5644506>.

activities include campaigning and education as well as direct action (particularly in relation to coal seam gas wells).

The following section will highlight the impact that public participation, especially dual appeal rights, has had on a major resource development project in Queensland. The authors are not arguing in support of this project per se, but rather that it illustrates the issues of costs and delays involved in the dual appeal process. It also provides an illustration of the evolution of NGOs in Australia in the anti-coal space.

IV. Adani Case Study

Background to the Carmichael Coal Mine

The Carmichael Coal Mine and Rail Project comprises a greenfield open cut and underground coal mine and associated mine processing facilities and a 388 km railway[41] linking the mine with Abbott Point. The proponent is Adani Mining Pty Ltd (Adani), a subsidiary of the Adani Group, based in Ahmedabad, India. The mine is located in the Galilee Basin, the site of nine proposed coal mines, and when fully developed is to be by far the largest coal mine in Queensland with a proposed production of up to 60 Mtpa and an estimated life of nearly 100 years. Current reserves total in excess of three billion tonnes of thermal coal. The estimated total investment for the project is around AU$10 billion and is hence similar in capital requirements to the Roy Hill iron ore project in Western Australia.

As originally conceived, the Adani project envisaged the creation of a totally integrated supply, transport and end-use system stretching from Australia to India. The system entails the creation of a long-duration thermal coal mine of sufficient size to permit exceptionally large annual production, a railway system and rolling stock owned by Adani, a port owned by Adani, bulk carriers similarly owned by Adani, Indian ports owned by Adani and thermal power stations also owned by Adani. It is frankly a project of quite breathtaking scope and at least in retrospect, very courageous.

As a project it had obvious advantages for Adani. To some extent it isolated the revenue stream from fluctuations in the global thermal coal price, it provided some relief, though by no means all, from the slide of the Rupee against the United States (US) dollar and would allow costs to be internally managed and distributed across the system in a manner which most benefited the corporation.

However currently Adani could be excused for thinking that the inclusion of Australia in such a visionary project was the worst possible choice at the time. Certainly Adani had other options: Botswana with significant resources (though necessitating a major railway component), Bangladesh, Indonesia, Mongolia, South America to name a few. Each, of course, had their own particular logistics challenges.

So why Australia? The answer to that question involves understanding that major investments by corporations (and particularly transnational mining companies) always involve an analysis of revenue and risk with "risk" potentially impinging heavily on "revenue". And though revenue can be estimated quite accurately under various pricing and cost scenarios, risk is an adaptable beast that can strike unexpectedly.

When the project is to take place outside the corporation's domestic jurisdiction, risk is even more central to any investment decision. The reasons for this are obvious. There will be differences in cultural attitudes, legal norms, perhaps political instability and corruption and so on. Taken together they constitute "sovereign risk".

Consequently corporations always attempt to moderate this risk and they do so, using a range of strategies. They may attempt to put off the risk through the incorporation of insurance guarantees negotiated with regional banking institutions such as the Asian Development Bank, the new Asian Infrastructure Investment Bank and the World Bank. They may, through a process of cooptation, attempt to bring local elites into the governing structure (though often this is a local permit requirement in many

[41] Another proposal is for a 189 km railway line if the line connects to the Goonyella Railway line, rather than going directly to Abbott Point.

jurisdictions). Increasingly they may be able to fall back on the requirements and processes contained within bilateral and multilateral free trade agreements. The arbitration provisions within the Trans-Pacific Partnership are a classic example of an attempt by corporations to manage risk.

One of the principle advantages possessed by Australia in any country-by-country assessment of sovereign risk has undoubtedly been the perceived integrity of its institutions. As a British colony we inherited not only the British concept of the rule of law but the historical development of that concept from the Provisions of Oxford to the Bill of Rights, the evolution of the mercantile courts and of common law and chancery. Conceptually, the rule of law, as we understand it, was the end result in a long transition from "The King can do no wrong" to "Not even the King is above the law". In commercial terms a central component of the concept was the enforcement of another principle, namely "that promises must be kept" which is the central tenet of the law of contract.

The existence of such institutions should allow for a degree of certainty about outcomes and as such it should reduce a significant portion of sovereign risk. What happens however when the very institutions which were designed to enhance certainty in fact do the opposite? What is happening to the legal, institutional process in Australia that is resulting in increasing uncertainty of outcomes? We say "process" because the problem may not rest with the institution per se or its decisions per se but with the administrative processes enjoined by parliaments.

Overview of the Approval Process and Court Proceedings

The travails experienced by Adani from the Queensland Coordinator-General's recommendation to approve the project in early 2014 to the present are unfortunately an object lesson that will, no doubt, be closely perused by any corporation contemplating a major mining development in Australia.

We have briefly summarised the significant events (although there are also other matters relating to the expansion of the Abbott Point terminal), as follows:

- 24 March 2014: Application to Administrative Appeals Tribunal to cancel Adani's dredging permit at Abbott Point.
- March 2014: Federal Court application against dredging approval.
- October 2014: Wangan and Jagalingou peoples reject Adani Indigenous Land Use Agreement.
- 7 May 2014: Queensland Coordinator General recommends approval under the *State Development and Public Works Organisation Act 1971* (Qld).
- 24 July 2014: Commonwealth Government approval under the *EPBC Act*.
- January 2015: Federal Court application to cancel dredging approval.
- 8 April 2015: National Native Title Tribunal (NNTT) determines the mine can proceed under the *Native Title Act 1993* (Cth) (*Native Title Act*).
- 4 August 2015: Federal Court Judicial Review: Commonwealth Government approval set aside.
- 14 October 2015: Second Commonwealth Government approval.
- November 2015: Federal Court review of NNTT determination – application dismissed.
- 15 December 2015: Queensland Land Court recommends approval subject to new conditions.
- 4 May 2016: Application for judicial review of the second *EPBC Act* approval scheduled for hearing in the Federal Court.
- May 2016: Hearing of appeal against NNTT decision.
- 25 November 2016: Second native title issue before the Supreme Court of Queensland – application dismissed.
- August 2017: Appeal to Full Court of Federal Court against the Federal Court decision on the *Native Title Act* review.
- 22 August 2017 – second native title issue – appeal to Court of Appeal, Queensland – dismissed.

Actions against Adani has been taken by a range of NGOs, including Land Services of Coast and Country, the Mackay Conservation Group, the North Queensland Conservation Council and the Australia Conservation Foundation. The *Courier Mail* has reported that Mr Derec Davies is the spokesperson for

several entities who have taken action against both the Carmichael Coal Mine, GVK Hancock projects in the Galilee Basin and New Hope's Acland Mine Expansion.[42] In this context, it is also relevant to note the "Funding proposal for the Australian anti-coal movement" which was written by representatives of Greenpeace Australia Pacific, Coalswarm and the Graeme Wood Foundation. This project in turn was also funded by the US Rockefeller Family Fund. The strategy of this organisation states:

> We urgently need to build the anti-coal movement and mobilise off the back of the community backlash to coal seam gas. If we fail to act decisively over the next two years, it will be too late to have any chance of stopping almost all of the key infrastructure projects and most of the mega-mines.
>
> The Strategy: Our strategy is to "disrupt and delay" key projects and infrastructure while gradually eroding public and political support for the industry and continually building the power of the movement to win more.[43]

V. Conclusions

There is little to be said about this expensive accumulation of legal applications beyond the simple observation that they speak for themselves. An outside observer could be tempted to assert that, in aggregate, they amount to an abuse of process. And, of course, such an assertion would be wrong. They are not an abuse of process they are a *use* of process. Every citizen or group of citizens has the right to use the available judicial process to their perceived advantage. The end result of groups exercising their statutory rights in the case of Adani is a project delayed and perhaps ended before it even began.

Apart from the obvious expense and delay caused by this endless round of litigation it is worth remembering that the project has been approved by the State government, approved twice by the federal government and recommended for approval by the Queensland Land Court.

There are two observations that should be made about this phenomenon. As mentioned previously, the operation of a general policy of inclusion, together with an unqualified right to object and the coexistence of general appeal rights has undeniably created a sense of empowerment among certain classes of people within the Australian community. This, in itself, is not a bad thing, but it should be moderate and to a far greater extent reflect the outworking of genuine community expectations rather than that of a small, activist group.

Second, many such groups adopt an intellectual position that is essentially ideological and one which does not readily open itself to counter arguments. One consequence of this mind-set is the almost universal inability of some groups to simply appreciate the consequences of their actions. The protection of one environmental value becomes an absolute standard against which all decisions can be reviewed, ultimately on moral grounds because to such activists all alleged ecological values are ultimately founded in morality – or, at least, in their perception of morality. Employment, economic growth, opportunities for families are of no account against this single proposition. We have seen too many examples of this type of mono-dimensional mind-set in past history to be anything but concerned by its predominance in many environmental groups. Add to this the rise of social media and the 24-hour media cycle, which means that momentum on an issue can grow very quickly.[44]

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[42] John McCarty, "Adani to Pursue Legal Action against Land Services Coast and Country over Failed Bid to Stop Carmichael Mine", *The Courier Mail*, 12 February 2016 <http://www.couriermail.com.au/business/adani-to-pursue-legal-action-against-land-services-coast-and-country-over-failed-bid-to-stop-carmichael-mine/news-story/d1cdc0a893106316142f0a19d1d2d508>.

[43] John Hepburn, Bob Burton and Sam Hardy, *Stopping the Australian Coal Export Boom: Funding Proposal for the Australian Anti-Coal Movemen*t (November 2011) 3 <http://www.abc.net.au/mediawatch/transcripts/1206_greenpeace.pdf>.

[44] An example of this occurred during the 2017 Queensland election campaign when the Premier, The Hon Annastacia Palaszczuk, withdrew Queensland Government support that had previously been guaranteed for the Adani loan of AU$1 billion from the Commonwealth's National Australia Infrastructure Facility to build the railway line. In discussing this decision, the Queensland Treasurer, the Hon Curtis Pitt, stated "I think what this shows is that we're a government that responds and listens to the concerns that are being raised": Peter McCutcheon and Casey Briggs, "Adani: Public Opinion behind Queensland Premier Annastacia Palaszczuk's Loan Backflip, Treasurer Admits", *ABC News*, 10 November 2017 <http://www.abc.net.au/news/2017-11-09/public-opinion-poll-behind-adani-loan-backflip-curtis-pitt/9134584>.

The final result of a multiplicity of special interest groups utilising their available statutory rights to intervene, object, and appeal is quite perverse. The very thing that should diminish Australia's sovereign risk, namely a commitment to the rule of law, may in fact be increasing it. The end result is the use of legal "double dipping" and judicial legerdemain to frustrate development proposals in the resources sector. Neither is Adani alone in suffering from this process. Glencore at Wandoan (southern Queensland) and Hancock Coal at Kevin's Corner (also in the Galilee Basin) have suffered a similar fate.

The overriding consideration, indeed concern, must come back to the question of how Australia is perceived in terms of sovereign risk. It may not be sustainable to use a legal system to frustrate and defeat resource proposals on a more or less wholesale basis across an entire continent. Ultimately, the choice is between a continuation of the current regimes that have led to this dysfunctional state or to change direction rather fundamentally.[45]

The strategy suggested by this article is to remove one legal hurdle of duplicating appeals from the process. The State bureaucracy is able to deal with submissions on both State and Commonwealth matters of interest in the EIA, so surely the State courts can deal with both State and (often overlapping) matters of national environmental interest in any appeals. The question may be asked: without judicial review by the Federal Court, who will protect the environment? The answer to that question may be the Parliament, the State courts and, importantly, the administrative and regulatory agencies charged with just that duty. When arguments were gaining momentum in the 1990s in Australia for open standing provisions to be incorporated into legislation, there were still concerns about environmental agency being captured by developers.[46] However these concerns are over 20 years old, and the professional integrity of the regulators, who have the expertise to assess such applications, should not be discounted. Neither should the State courts be discounted or their ability to impartially assess matters of national environmental significance under the *EPBC Act* be discounted.

We believe it is essential that the duplication inherent in the current system should be addressed and the integrity and ability of the State courts be acknowledged as one step towards mitigating a developing international perception that resource developments in Australia carry with them an ever-increasing degree of sovereign risk.

[45] Daniel J Fiorino, "Citizen Participation and Environmental Risk: A Survey of Institutional Mechanism" (1990) 15 *Science, Technology, & Human Values* 226, 236.

[46] See, eg, the concerns expressed by John Braithwaite and Peter Grabosky in *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (OUP, 1986); Criminal Justice Commission, *Report on Improper Liquid Waste in South-east Queensland, Vol 1 Report Regarding Evidence Received on Mining Issues* (Matthews enquiry) (July 1994) <http://www.ccc.qld.gov.au/research-and-publications/publications/cjc/report-on-improper-disposal-of-liquid-waste-in-south-east-queensland-volume-1-report-regarding-evidence-received-on-mining-issues.pdf>.