KING&WOOD MALLESONS
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MAJOR PROJECT DEVELOPMENT ASSESSMENT PROCESSES

King & Wood Mallesons submission to the Productivity Commission

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Introduction

King & Wood Mallesons is a leading law firm in the Asian region, with more than 380 partners and 1800 lawyers.

With extensive experience advising on the processes for, and risks associated with, obtaining major project approvals in all Australian jurisdictions, our team of expert projects lawyers support the examination and improvement of the approvals system and welcome the opportunity to comment on the Productivity Commission's Major Project Development Assessment Process Issues Paper.

Given our insight into the interface between regulation and industry, we've focused our comments and views on the major project development assessment and approvals (**DAA**) processes, and impacts of those processes on the businesses we advise.

Impacts

Across the Australian jurisdictions in which we practise, our experience has been that major projects proponents face increasing uncertainty as to the timeframes involved in project assessment, decision-making processes, and securing the required approvals themselves.

This uncertainty can adversely affect the financial viability of projects (by jeopardising or requiring changes to financing arrangements) and, our clients tell us, makes it difficult to effectively quantify the risks and benefits associated with a project.

We see this uncertainty as arising from three primary sources:

- inadequate interaction between agencies providing input (both as between the levels of government, and as between various State agencies) resulting in inefficiency and duplication;
- inadequately resourced and experienced regulatory/assessment agencies; and
- complexity and rigidity of, and/or lack of clarity as to, the process requirements.

Reasonable direct costs of the environmental impact assessment process for major projects (the costs of assessing the impacts and seeking approval) can in most cases be regarded as part of the cost of doing business in Australia. However, the more indirect costs of regulatory system inadequacies – the costs of delays for example – are of greater concern because they are difficult to quantify and therefore, to plan for over the medium and long term.

We also have also identified a trend, particularly in Queensland and New South Wales, and at the Commonwealth level, for environmental impact assessment process timeframes to lengthen, but often without clearly resulting in better environmental or planning outcomes. Assessment of major projects will necessarily be a complex and detailed exercise, but we support consideration of the effectiveness of the system not only by reference to its time efficiency, but by reference to its regulatory effectiveness.

We have noted below some specific examples of uncertainties arising from major project DAA processes

Inadequate interaction/ duplication

In NSW, with respect to applications where local government is the consent authority, one of the ways that the NSW Government sought to streamline the process was by introducing the integrated development provisions into the planning legislation. These provisions mean that a developer may, when applying for development consent concurrently, apply for other necessary approvals required to authorise the development.

In our experience, these provisions have not had the effect of substantially shortening the overall process. It is still the case that the referral bodies / concurrence agencies prepare their proposed conditions of consent with little or no interaction with the consent authority or one another which can lead to inconsistent conditions which then requires an applicant to expend time liaising with all of the relevant stakeholders to ensure an appropriate outcome.

A preferable approach would be for the consent authority to take a lead role and provide its draft report on the application to the referral bodies / concurrence agencies which could then (fully apprised of the facts) provide their conditions.

This mirrors the Queensland experience, and in this respect we note recent reforms to the Sustainable Planning Act 2009 (Qld) which suggest the Department of State Development, Infrastructure and Planning would become the single assessment manager or referral agency for a development application.

Another key cause of delay arises where major projects require changes to planning controls. For example, in NSW, developers seeking a re-zoning are at the whim of the relevant council (or particular councillors), as the lack of any appeal right means there is no prescribed end date by which the application is to be determined. This approach is unlikely to change, and attempts to improve the process by the introduction of Gateway applications for example do not appear to us to have expedited the process. It remains to be seen whether the new provisions enabling the Planning Assessment Commission and Joint Regional Planning Panels to review rezoning applications will be actively taken up by the State Government to significantly expedite the process.

This is also an issue in Victoria, mitigated by the Planning Minister's powers of intervention in planning scheme amendments, sometimes criticised for being used inconsistently or politically. Historically, governments have taken the view that policy decisions should remain in the domain of politicians as elected representatives, whereas decisions relating to the implementation of policy have been subject to merit review by the NSW Land and Environment Court or equivalent planning tribunal in other States.

As between the States and the Commonwealth government, an analysis we previously conducted of the conditions imposed on 3 major coal seam gas projects

in Queensland indicated that, broadly, the conditions imposed by the Commonwealth did not substantially differ from those imposed by the State Government except in respect of associated water management and groundwater impacts (which may be attributed to the Commonwealth's greater interest in the Murray-Darling Basin and Great Artesian Basin arrangements).

The scope of the Commonwealth's assessment included a range of matters also assessed by the State Government (e.g. listed threatened species), but the water use and management aspects were the only area to materially differ in respect of the approval conditions imposed. This is so for all 3 projects, 2 of which were assessed using the bilateral agreement process. In our view, this demonstrates that in some areas at least, a dual approval process (particularly where there is only one assessment process) is an unnecessary burden on project proponents.

In the NSW experience, where a project requires approvals from different levels of government it is inevitable that the approval process is lengthy and will more often than not involve unnecessary costs being expended to respond to the often over-lapping requirements of separate agencies.

This is particularly so for projects requiring approvals from all 3 levels of government, for which a proponent may have to satisfy 3 separate decision makers regarding the acceptability of the proposal based on similar, but different, criteria. In our experience the Commonwealth Government has not been prepared to enter into any other bilateral approval agreements despite the fact that the Sydney Opera House bilateral approval agreement appears to be working well.

Further, the existing bilateral agreements for assessment of applications in NSW and some other states have expired and were not renewed. This means that proponents either have to accept the delays and resultant costs occasioned by having to seek approval from 3 levels of government or expend significant cost crafting complicated legal solutions (such as "back to back" heritage agreements under State and Commonwealth legislation for example) which are not a complete solution to the problem and are not guaranteed acceptance by the various decision makers in any event.

In our opinion, it is appropriate that the NSW (and other States) and Commonwealth Governments use bilateral approval agreements for major projects. At a minimum, the previous bilateral agreements for assessment of applications should be renewed.

Inadequate resources and experience

In NSW, for applications where the State is the consent authority, with the introduction of the now repealed Part 3A of the Environmental Planning and Assessment Act 1979, the Department of Planning became responsible for assessment of a range of commercial and residential development applications it was not previously responsible for. This significant additional workload did not appear to be matched by additional resources and there were resultant delays.

While Part 3A has been repealed, the current regime for State Significant Infrastructure bears a striking resemblance to the Part 3A regime and it is hoped that adequate resources will be brought to bear on assessment of applications moving forward so that delays may be minimised.

In NSW, certainly post-GFC, the lack of certainty with respect to timing has meant that projects have variously not received funding, lost funding or were required to be re-financed on less favourable terms. It seems to us detailed assessment of a major project so as to determine the final conditions of consent will inevitably be a lengthy process requiring coordination between the planning authority and a number of other bodies and agencies and that even with the best intentions streamlining that process so that it is in line with market expectations will be difficult.

The key reason for this is that development consents, once granted, are once and for all approvals (in contrast to environmental licenses for example). Accordingly, it is understandable that the relevant government instrumentalities are concerned to undertake an in-depth assessment and impose conditions aimed at regulating all foreseeable impacts and risks.

A better approach may be a fundamental re-think as to the types of planning approvals granted. For example, if "in principle" approval were to be granted initially with detailed conditions to follow in a subsequent approval it would be far more likely that timeframes could be shortened in line with market expectations thus improving the "bankability" of projects, particularly in respect of Chinese and other foreign investors who are not used to dealing with Australia's detailed regulatory requirements. In many of the transactions on which we advise Asian, United-States based, and other international clients, we see the attractiveness of the investment being influenced by uncertainties regarding timing, third party challenges and other risks for approvals.

We note that Queensland has recently reformed its environmental and planning approvals system to recognise the inherent differences between the impact assessment required to determine conditions of construction or development, from that required to determine ongoing conditions for projects in the operations stage.

Similar reforms are also being considered in Victoria to provide a tiered suited of EIA options rather than a 'one size fits all' approach. This risk-based approach is also being considered by the EPA in relation to projects which require works approval. In Victoria, a project can often require an environment effect statement as well as a planning permit and EPA works approval. Provision is made for concurrent exhibition for these approvals, but not in relation to other approvals such as resource tenements and water licences. In addition, the timing and interface with the Commonwealth for EPBC Act approval and satisfying Commonwealth assessment requirements must also be considered. Reforms to properly target and tailor environmental impact assessment and approval processes and reduce duplication are to be encouraged.

In respect of inadequate experience or resources generally, we support the approach of out-sourcing aspects of the overall assessment to certified experts (subject to confidentiality protocols), at the proponent's reasonable cost. This would permit the assessment and resulting approval conditions to be imposed by subject matter experts with greater time and resources and would have the potential to lead to more tailored, appropriate conditions in each case.

Rigidity/lack of clarity

In Queensland, the environmental assessment of major projects may be coordinated under a tailored process, under which the State Coordinator General prepares an initial environmental impact assessment report, which then (largely) governs the conditions imposed by other State agencies in relation to planning and environmental approvals required for the project. However, there is no statutory timeframe for the completion of the initial assessment report (contributing to uncertainty for proponents).

Also, processing times for State tenure-related applications can be lengthy – a matter of 6-12 months for a relatively straight-forward process. This may be partially attributable to inadequate resources in the relevant government department. Until very recently, the ability to secure State tenure could directly restrict a proponent's ability to even lodge applications for planning approvals for development on the relevant land – a road block that affected a large number of projects, particularly with Queensland's coastal offshore land being State tenure and the increase in development proposals for this land. This is an example of a requirement of a major project DAA process where regulatory rigidity contributes to delays and uncertainty, while having no clear public benefit.

We would support a greater focus on ensuring approvals impose conditions that are:

(a) more flexible; and
(b) clear and enforceable,

would assist in pursuing monitoring and enforcement more effectively.

This may include the more regular use of staged approval conditions, which (based on an initial assessment which predicts impacts within a range) could allow for ongoing assessment of real impacts and for measures to be proposed progressively to mitigate those impacts – i.e. "evolving" conditions. We support a an approach to the design of approval conditions which are performance or outcomes-based.

Furthermore, the overall design and structure of a DAA process should be considered when being amended even in minor respects. This would seek to ensure that process steps and further requirements are not simply added incrementally over time without reference to their impact on the system overall and identification of consequential adjustments or reforms that will retain the system's original purpose and clarity. In turn, this would reduce the risk of increasing the burden on business of complying with the system's requirements, and on government of administering them.

Effectiveness and recommendations

Most of our recommendations are set out in the body of our submission above. On the additional matters raised in sections 5 and 6 of the Issues Paper, we wish to add the following.

The Issues Paper notes that the effectiveness of the current arrangements in delivering good regulatory outcomes for the community is a key focus of the Commission's study. In part, this level of effectiveness is to be measured by reference to whether major project DAA processes provide appropriate opportunities for public participation.

In Victoria, greater use could be made of concurrent exhibition and notification processes for all required approvals to avoid duplication to give greater certainty for proponents and the community in relation to opportunities for making submissions and responding to submissions.

Queensland's major project DAA process includes opportunities for public review of environmental impact assessment reports, and for any party to make submissions or objections to be made on the contents. There is also a right of appeal against a decision to grant certain approvals, which has been regularly used by objectors to major projects in the past. A project that has completed a detailed and lengthy DAA process (including objection/submission processes) can still be delayed for a matter of months or years by a merits review in relation to a secondary approval process, e.g. a water licence for mine de-watering.

In general, there are appropriate opportunities for public participation in the major project processes and the processes are open and transparent. Arguably, the opportunities are too great. The ability for objectors to commence a merit appeal with respect to some approvals means that astute proponents of such applications in most jurisdictions would factor in an additional 6-12 months into their development program to account for a potential appeal. The Productivity Commission should carefully consider how useful the merit review right actually is, because while it adds significant time and cost to the process whereby the whole economy suffers, in our experience, very few challenges have resulted in projects being refused.

The Issues Paper also asks whether appropriate monitoring and enforcement mechanism are in place to ensure compliance.

In our view, it is not the lack of enforcement mechanisms themselves that reduces the effectiveness of the current DAA processes, but rather the lack of resources with which to effectively monitor and enforce. At all levels, we suggest that greater direction of resources towards monitoring and enforcement of conditions and less focus on detailed assessment would increase the effectiveness of conditions imposed on major projects.

In NSW in particular, the State Government should provide funding assistance to local councils to ensure that effective compliance monitoring may be undertaken. In recent years, especially in the context of mining applications, the State Government has issued approvals for multiple significant projects in an area where the local authority is particularly under resourced and thereby unable to undertake appropriate compliance monitoring. This was a particular issue in the Hunter Valley and the Department of Planning now has a compliance office in Singleton. Greater direction of resources throughout NSW is required.