

## **Speech by The Hon. Justice B J Preston SC\***

### **The adequacy of the law in satisfying society's expectations for major projects**

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#### **Introduction**

Society has expectations regarding the rights granted to a business to use land and its natural and mineral resources and the reciprocal responsibilities and accountability of the business to society. The successful operation of the business depends on the degree to which it satisfies society's expectations.

Society's expectations are influenced by the law. The law sets the formal framework within which business can lawfully operate. Society expects that businesses will comply with the law.

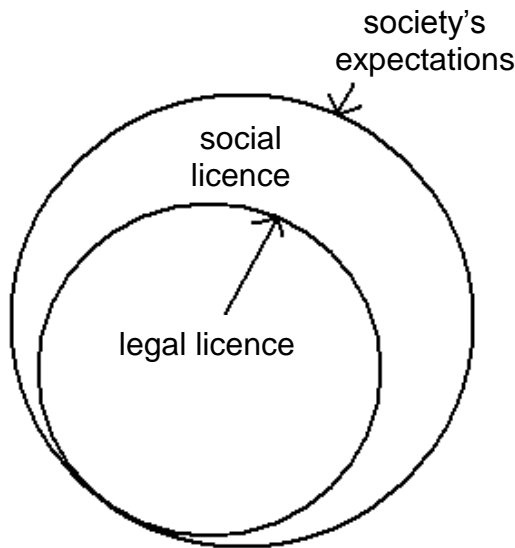
In turn, laws are responsive to society's expectations. The legislature, the elected organ of government in representative democracies, enacts legislation that responds to the current needs, desires and demands of society. The judiciary in common law countries makes and applies the common law that is similarly responsive to current societal expectations. Tort law, especially nuisance and negligence, is a legal mechanism for making business internalise externalities, such as pollution, and its concomitant harm to people and property. It seeks to strike the balance between the reasonable expectations of users of land and its resources and the neighbours and the public harmed by the spillover effects of the use.

The law may encapsulate society's expectations to a greater or lesser degree. To the extent that the law does so, the business can be viewed as having a legal licence to use land and its resources. The legal licence sets the formal framework for obtaining and maintaining the right to use land and its resources and for imposing and enforcing the responsibilities and accountability for the exercise of that right. To the extent that the law does not do so, the business needs to rely on the notion of a

social licence. A social licence describes the latitude or freedom that society allows the business to use land and its resources without interference.<sup>1</sup> Society expects more of businesses than that they just comply with the law.<sup>2</sup>

### Relationship of a legal licence, social licence, and society's expectations

The relationship of a legal licence, social licence, and society's expectations can be depicted graphically:



The outer circle represents society's expectations regarding the rights and responsibilities of a business to use land and its resources. The inner circle represents the legal licence authorising the business to use land and its resources. The diameter of the inner circle varies depending on the degree to which the legal licence encapsulates society's expectations. The greater the encapsulation, the larger the diameter; the lesser the encapsulation, the smaller the diameter. The space between the two circles – those of society's expectations not met by the legal licence – is the subject of the social licence. A business to operate successfully needs to earn a social licence by satisfying these unmet expectations of society.

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\* Chief Judge, Land and Environment Court of New South Wales. I gratefully acknowledge the assistance of my tipstaff, Clara Wilson, in the research and writing of this article.

<sup>1</sup> Paul Martin and M Shephard, 'What is meant by the social licence?' in Jacqueline Williams and Paul Martin (eds), *Defending the social licence of farming: issues, challenges and new directions for agriculture* (CSIRO Publishing, 2011) 4.

<sup>2</sup> *Ibid* 7.

The need for, and the extent of, a social licence is, therefore, dependent on the legal licence. The adequacy, implementation and enforcement of laws requiring businesses to obtain, maintain and implement a legal licence to use land and its resources define the extent to which society's expectations will be satisfied. Dissatisfaction with the laws and their implementation and enforcement may result in the taking of action that may harm a business and its operation. The legislature may amend statutory laws to restrict rights to use land and its resources or to impose legal constraints on the exercise of those rights. The executive may adopt policies regulating the exercise of discretionary powers to grant rights to use land and its resources. For example, the executive may require businesses to establish that they have earned a social licence before granting a legal licence. The judiciary may restrain, in a civil enforcement action by disaffected people, a business that operates unlawfully. Civil society may take action in the marketplace, such as consumer boycotts, or direct action, such as blockades and community protests.

The response to such societal dissatisfaction is not simply for a business to earn a social licence to meet the unmet expectations of society. That certainly is one business risk strategy. It was the strategic response of the oil industry that led to the notion of a social licence.<sup>3</sup> However, improving the law and its implementation and enforcement is a more immediate and definitive means of satisfying society's expectations.

### **Difficulties in identifying society's expectations**

Identifying society's expectations regarding the rights and responsibilities to use land and its resources is difficult. First, there is difficulty in identifying the society or communities within society whose expectations are to be met. The community is not spatially or geographically restricted to the inhabitants of the locality directly affected by the operation of a business. Persons beyond the local geographical community legitimately may have concerns about a business' use of land and its resources. These include business persons such as investors, financiers, trade customers and even trade competitors, environmental and social activists and non-governmental

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<sup>3</sup> Ibid 4. See also Kieren Moffat and Airong Zhang, 'The paths to social licence to operate: An integrative model explaining community acceptance of mining' (2014) 39 *Resources Policy* 61, 61.

organisations, and governments. In short, there are different interest groups within society that legitimately may hold expectations about how a business ought to operate.

Secondly, the communities are not homogenous entities. Even within a particular interest group – each community – there is a diversity of expectations. Members of each community are heterogeneous in their values, interests and perceptions, and in the way in which they are affected by the operations of a business.<sup>4</sup> There is a further feature of this community diversity. Some individuals or social groups in a community may be more vulnerable than others to the negative impacts of the use of land and its resources. They may lack recognition and be marginalised within a community. They may have less capacity to voice their concerns and ensure that their concerns are heard. Consequently, their concerns are more likely to be overlooked.<sup>5</sup>

Thirdly, there is difficulty in identifying the nature and content of the expectations of the different members of the different communities. People do not commit to writing their expectations of how businesses ought to operate. Most often, the nature and content of the expectations are voiced only when a business violates community expectations about how it ought to operate. It is easier to define when a business does not have a social licence to operate than when it does.<sup>6</sup>

Fourthly, the membership of the different communities and the expectations of members change over time. Society's expectations evolve and vary over time in response to varying factors. Factors that shape society's expectations include changes in the law, politics and society; media coverage and debate on businesses that use land and its resources and on issues of relevance to the use of land and its resources; the development of the built and natural environments and the

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<sup>4</sup> Rachel Williams and Andrea Walton, 'The Social Licence to Operate and Coal Seam Gas Development' (Literature review report to the Gas Industry Social & Environmental Research Alliance, CSIRO, March 2013, Canberra) 6. See also Jason Prno, 'An analysis of the factors leading to the establishment of a social licence to operate in the mining industry' (2013) 38 *Resources Policy* 577, 584-585.

<sup>5</sup> Williams and Walton, above n 4, 11.

<sup>6</sup> Justine Lacey, Richard Parsons and Kieran Moffat, 'Exploring the concept of a social licence to operate in the Australian minerals industry: results from interviews with industry representatives' (Research Report, CSIRO, 2012, Brisbane) 6.

concomitant impacts; the environmental management style and environmental performance of businesses; and the experience and perceived quality of businesses' relationships with the community.

## **Environmental and social justice**

Notwithstanding that identification and definition of society's expectations regarding the rights and responsibilities to use land and its resources are difficult, it is fair to conceptualise society's expectations as being largely concerned with the achievement of environmental and social justice in three senses: distributive justice, procedural justice, and justice as recognition.

Distributive justice concerns the distribution of environmental goods (or benefits) and environmental bads (or burdens). Distributive justice is promoted by giving substantive rights to members of the community of justice to share in environmental benefits (such as clean air, water and land, green space and a healthful ecology) and to prevent, mitigate, remediate or be compensated for environmental burdens (such as pollution and loss of green space, biological diversity or ecological integrity).

Claims about distributive justice involve addressing three questions: who are the members of the community of justice to whom distributive justice is due?; what are the environmental benefits and burdens to be distributed?; and what are the principles or criteria of distribution to be applied? Just arrangements should be assessed not only in simple distributive terms, but also in how distributions of benefits and burdens affect the capabilities of members of the community of justice to achieve valuable functionings (both activities and states of existence or being).<sup>7</sup>

Society's expectations about how a business ought to use land and its resources involve, to a significant extent, answering these distributive justice questions. A community that perceives that the operation of a business results in an unjust

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<sup>7</sup> Brian J Preston, 'The effectiveness of the law in providing access to environmental justice: an introduction', a paper presented to the 11<sup>th</sup> IUCN Academy of Environmental Law Colloquium, 28 June 2013, Hamilton, New Zealand, 1.

distribution of environmental benefits and burdens will be dissatisfied and may not support, or refrain from interference with, the business' continued use of the land and its resources.

Procedural justice is a widely accepted requirement additional to distributive justice. Procedural justice is concerned with how decisions, including distributive choices, are made, who is involved and who has influence. Procedural injustice can be a cause of distributive injustice but is also an element of justice in itself. Justice involves not only fair distributive outcomes but also just processes by which distributive outcomes are reached. The importance of procedural fairness is evidenced by its centrality in public law for administrative and judicial decision-making. Procedural justice involves: access to environmental information, entitlement to participate in decision-making, and access to review procedures before a court or tribunal to challenge decision-making or impairment of substantive or procedural rights. Broad, inclusive and democratic decision-making procedures are a pre-condition for distributive justice.<sup>8</sup>

Society's expectations regarding the use of land and its resources again involve, to a significant effect, achieving procedural justice. Society expects access to information on proposed and approved uses of land and its resources, meaningful consultation and community engagement, participation in decision-making processes, and access to review procedures to challenge decision-making. A community that perceives that it has suffered procedural injustice will not support a business' use of land and its resources.

Justice as recognition is concerned with who is given respect, and who is and who is not valued. Access to justice as recognition is promoted by the law giving substantive and procedural rights, but also by affording recognition of social groups and communities, and of the natural environment and components of it. Lack of recognition, in the social and political realms, is demonstrated by various insults, degradation and devaluation. It inflicts damage, constrains individuals and

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<sup>8</sup> Ibid 22, 29.

communities, and leads to ineffective participation in the polity (procedural injustice) and to inequalities in distribution (distributive injustice).

At the core of misrecognition are processes that devalue some individuals, groups or communities compared to others, reflecting unequal patterns of recognition across social groups. Institutions of the state, and businesses, can give unequal recognition to social groups. Misrecognition is evident with respect to indigenous peoples and cultural minorities. Misrecognition is also evident with respect to individuals and groups advocating environmental causes. The cultural domination, non-recognition and disrespect injures the social status of such individuals and groups, constrains their participation in decision-making, and occasions unequal distribution of environmental burdens.<sup>9</sup>

Society's expectations regarding the use of land and its resources involve affording appropriate recognition and respect to all individuals and society throughout the process of application, assessment, approval and implementation of major projects for the use of land and its resources.

### **Assessing the extent to which society's expectations are met**

As earlier noted, there is a need to evaluate the extent to which the laws regulating the use of land and its resources satisfy these expectations of society. I will identify some aspects in which the laws regulating the use of land and its resources inadequately address society's expectations. I will do so having regard to the four stages of the process of obtaining and maintaining a legal licence for major projects for the use of land and its resources: the application, assessment, approval and implementation stages. I will use the legislation regulating major projects in the Australian State of New South Wales ('NSW') to illustrate the respects in which the laws are inadequate.

The application, assessment, approval and implementation of major projects in NSW is regulated by the *Environmental Planning and Assessment Act 1979* (NSW) ('the

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<sup>9</sup> Ibid 2, 42-44.

EPA Act'), as well as subordinate environmental planning instruments ('EPIs'). Under the EPA Act, there are two separate assessment pathways for major projects, known as State significant development ('SSD') and State significant infrastructure ('SSI'). Examples of SSD include certain coal mining or natural gas projects.<sup>10</sup> Examples of SSI include port infrastructure and rail infrastructure.<sup>11</sup> Any SSI may also be declared to be critical SSI if it is of a category that, in the opinion of the Minister, is essential to the State for economic, environmental or social reasons.<sup>12</sup>

### **The application stage**

Development consent is required for both SSD and SSI.<sup>13</sup> For SSD, an applicant may apply to the Minister for consent to carry out development.<sup>14</sup> A development application for SSD must be accompanied by an environmental impact statement ('EIS') prepared by or on behalf of the applicant.<sup>15</sup> The form and content of the EIS is mandated by Part 3 of Schedule 2 of the *Environmental Planning and Assessment Regulation 2000* (NSW) ('the EPA Regulation'). As soon as practicable after the application is made, the Director-General must place the application and any accompanying information on public exhibition for a period of not less than 30 days, and cause notice of the application to be given in a local newspaper.<sup>16</sup> During the 30 day period, any person may inspect the application and accompanying documents, and make written submissions to the Minister with respect to the application.<sup>17</sup> Amendments to an application do not have to be re-exhibited if the Director-General decides that the environmental impact has been reduced by the proposed changes.<sup>18</sup>

For SSI, an applicant may apply for the approval of the Minister to carry out the development.<sup>19</sup> The application is to describe the infrastructure, and contain any

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<sup>10</sup> State Environmental Planning Policy (State and Regional Development) 2011, sch 1 cls 5, 6.

<sup>11</sup> Ibid sch 3 cls 2, 3.

<sup>12</sup> *Environmental Planning and Assessment Act 1979* (NSW) s 115V.

<sup>13</sup> Ibid ss 89E, 115W.

<sup>14</sup> Ibid ss 79A(1), 89D.

<sup>15</sup> Ibid s 78A(8A).

<sup>16</sup> Ibid s 89F(1).

<sup>17</sup> Ibid s 89F(2), (3).

<sup>18</sup> Ibid s 89F(4).

<sup>19</sup> Ibid s 115X(1).



other matter required by the Director-General.<sup>20</sup> The Director-General will prepare environmental assessment requirements, which must include the preparation of an EIS in accordance with the EPA Regulation.<sup>21</sup> These requirements may be merely generic or formulaic, or they may not require the applicant to assess the cumulative impacts of a proposal. The Director-General must make the EIS publicly available for at least 30 days.<sup>22</sup> During that period, any person may make a written submission to the Director-General concerning the application.<sup>23</sup> In some cases, the Director-General may require the proponent to respond to an issue raised in the submissions.<sup>24</sup>

Laws regulating the use of land and its resources may be inadequate in achieving procedural justice and justice as recognition at the application stage in three respects: the level of public participation, the timing of public participation, and in ensuring informed public participation.

#### *Level of public participation*

There are various levels of public participation, ranging from a less involved to a more involved and meaningful level of engagement. The level of public participation is linked to the level of potential public influence on the decision or action being considered.<sup>25</sup> The International Association of Public Participation describes five levels of public participation along a spectrum of increasing potential influence: inform, consult, involve, collaborate, and empower.<sup>26</sup> The two ends of the spectrum relate to the extreme levels of potential public influence, from no opportunity to influence (the inform level) to total influence over the outcome (the empower level). The middle three levels are where most public participation occurs in practice.

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<sup>20</sup> Ibid s 115X(2).

<sup>21</sup> Ibid s 115Y(1), (2).

<sup>22</sup> Ibid s 115Z(3).

<sup>23</sup> Ibid s 115Z(4).

<sup>24</sup> Ibid s 115Z(6).

<sup>25</sup> Sherry R Arnstein, 'A Ladder of Citizen Participation' (1969) 35(4) *Journal of the American Planning Association* 216.

<sup>26</sup> International Association for Public Participation, *IAP2 Spectrum of Public Participation* (2007) [http://c.ymcdn.com/sites/www.iap2.org/resource/resmgr/imported/IAP2%20Spectrum\\_vertical.pdf](http://c.ymcdn.com/sites/www.iap2.org/resource/resmgr/imported/IAP2%20Spectrum_vertical.pdf).

The inform level does not actually provide an opportunity for public participation at all, but rather provides the public with the information they need to understand a land use or resource project and a decision made to approve it. Information might be provided through fact sheets and on websites.<sup>27</sup>

The consult level of public participation is the minimum opportunity for public input to a decision. The decision-maker asks the public for their opinions and considers the public input received in making the decision. At the consult level, decision-makers generally ask for input at set points in the decision-making process and do not provide an ongoing opportunity for input. Consultation techniques include public notice and comment and public meetings.<sup>28</sup>

To be proper, consultation should be undertaken at a time when proposals are at a formative stage; include sufficient information on a particular proposal to allow those consulted to give intelligent consideration and an intelligent response; give adequate time for this purpose; and conscientiously take the product of consultation into account when the ultimate decision is made.<sup>29</sup>

The involve level of public participation is more than a consultation and provides an opportunity to include the public in the decision-making process. At the involve level, the public is invited into the decision-making process, usually from the beginning, and is provided multiple if not ongoing opportunities for input as decision-making progresses. Involvement techniques include workshops. However, there is no expectation of building consensus or providing the public with any high level of influence over the decision.<sup>30</sup>

The collaborate level of public participation includes all of the elements of the involve level as well as working together with the public. At the collaborate level, the public

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<sup>27</sup> 'IAP2 Spectrum of Public Participation', above n 26. See also United States Environmental Protection Agency, 'International Public Participation Guide' (Guide, US Environmental Protection Agency, 2014) 15.

<sup>28</sup> 'IAP2 Spectrum of Public Participation', above n 26; 'International Public Participation Guide', above n 27, 15.

<sup>29</sup> *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213, 258 [107]. See also Brian J Preston, 'Consultation: one aspect of procedural propriety in administrative decision-making' (2008) 15 *Australian Journal of Administrative Law* 185.

<sup>30</sup> 'IAP2 Spectrum of Public Participation', above n 26; 'International Public Participation Guide', above n 27, 15-16.

is directly engaged in decision-making. This may include the development of alternatives and the identification of the preferred solution. Collaboration may also involve an attempt to find a consensus solution. The public's advice and recommendations are incorporated into the decision to the maximum extent possible. Collaboration techniques include consensus building and participatory decision-making.<sup>31</sup>

At the empower level, the public is provided with the opportunity to make decisions for themselves. Empowerment techniques include citizen juries, public voting or ballots, and delegated decisions. Government agencies rarely conduct public participation at the empower level.<sup>32</sup>

The greater the level of public participation, the greater the potential influence of the public over decisions concerning the use of land and its resources, and the greater the likelihood of satisfaction of society's expectations.

Typically, laws regulating the use of land and its resources set public participation only at the inform or consult levels. For some strategic planning and policy decisions regarding the land and resources able to be used and the criteria for allocation of rights to use such land and resources, the public may have no opportunity to participate at all and may merely be informed of the decisions that have already been made.<sup>33</sup> For other project specific decisions, a basic, minimum opportunity of public participation may be provided, usually in the form of public notice and comment,<sup>34</sup> with the decision-maker taking into account any public comments

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<sup>31</sup> 'IAP2 Spectrum of Public Participation', above n 26; 'International Public Participation Guide', above n 27, 16.

<sup>32</sup> 'IAP2 Spectrum of Public Participation', above n 26; 'International Public Participation Guide', above n 27, 16.

<sup>33</sup> For example, there are limited consultation requirements for the making of environmental planning instruments including a State environmental planning policy or a local environmental plan under the *Environmental Planning and Assessment Act 1979* (NSW) ss 38, 57. A State environmental planning policy can also declare any development, or any class or development, to be State significant development, State significant infrastructure or critical State significant infrastructure without consulting the community (ss 89C, 115U, 115V).

<sup>34</sup> See, eg, *Environmental Planning and Assessment Act 1979* (NSW) ss 89F(1)-(3), 115Z(3), (4) (provisions providing for public exhibition, public notice, inspection of and submissions in relation to applications for State significant development and State significant infrastructure).

received in making project specific decisions.<sup>35</sup> The laws are therefore inadequate in allowing public participation at levels that are likely to satisfy society's expectations regarding the rights and responsibilities of businesses' use of land and its resources.

### *Timing of public participation*

Such consultation is usually only required by law after an application for some form of legal licence to use land or its resources is received by the decision-maker. Under the EPA Act, the only legislative prerequisites for public consultation arise after an application has been submitted to the consent authority. For SSD, these include that the application and EIS be placed on public exhibition, that notice of the application be given, and that any person may make written submissions in regard to the application during the exhibition period.<sup>36</sup> For SSI, only the EIS is required to be placed on public exhibition.<sup>37</sup>

There is no legal obligation to consult the community or to allow for public participation at any higher level in the preparation of any application for a legal licence to use land or its resources. This is a problem of the timing of public participation. Public participation will be more effective and more likely to satisfy society's expectations, when it occurs at a stage when it has the potential to influence the nature, extent and other features of the use of land and its resources. Communities could participate at the involve or collaborate levels of public participation to formulate alternatives, identify solutions, and select and design the preferred project for which a legal licence is to be sought.

An unusual example of a situation where an applicant went beyond the statutory requirements for public consultation was the application for an electricity transmission line from Mount Piper Power Station to Marulan Substation. The Electricity Commission of NSW ('the Commission') had approved a high voltage transmission line from Mount Piper to Marulan in New South Wales along a route

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<sup>35</sup> See, eg, *Environmental Planning and Assessment Act 1979* (NSW) s 79C(1)(d) (submissions made in accordance with the Act are to be taken into account in the determination of an application for State significant development).

<sup>36</sup> *ibid* s 89F.

<sup>37</sup> *ibid* s 115Z.

described as 'route B' in the EIS. Prior to selecting that preferred route and publicly exhibiting the EIS, the Commission had conducted an informal public consultation programme. The major elements of this programme were: notifying all affected local councils that the study was being conducted and inviting them to indicate any matters relevant to selecting alternative routes; seeking information from various government departments and other organisations; advertising the study and inviting public comment; conducting briefings and responding to invitations to attend meetings; providing information at appropriate stages on the progress of the study; and seeking submissions from various groups, organisations and individuals on the selection of a preferred route.<sup>38</sup>

Notwithstanding the early public participation in the process of selection of the preferred route, an unincorporated association, the Oberon Power Line Investigation Committee, whose members were largely residents affected by the transmission line along the preferred route, commenced judicial review proceedings in the Land and Environment Court of NSW challenging the Commission's decision to approve the activity. The Committee sought a declaration that the EIS did not meet the requirements of the EPA Act, a declaration that the Commission had failed to take into account three separate matters regarding the impacts of the transmission line, and a declaration that the Commission's approval of the activity was void and of no effect. The Court dismissed the application.<sup>39</sup>

The Court noted that the process of preparing the EIS was characterised by 'public participation over a number of years and on a scale not ordinarily seen by the Court.'<sup>40</sup> Not only were various groups, organisations and individuals able to make submissions during the preparation of the EIS, they played an active role in the selection of the preferred route for the transmission line. The Commission developed a list of 21 'route selection factors', and asked various groups, organisations and

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<sup>38</sup> Garth McKenzie, 'Electricity Transmission Line from Mount Piper Power Station to Marulan Substation' (Environmental Impact Statement prepared by Kinhill Stearns for Electricity Commission of New South Wales, February 1987) 43-44.

<sup>39</sup> *Warren v Electricity Commission of New South Wales* (1990) 130 LGERA 565, 604.

<sup>40</sup> *Ibid* 572.

individuals to rank these factors in order of importance.<sup>41</sup> These ranked preferences were then used to determine the preferred route.<sup>42</sup>

### *Free, prior and informed consent ('FPIC')*

The final aspect in which laws regulating the use of land and its resources may be inadequate at the application stage is in not ensuring the free, prior and informed consent of affected social groups. FPIC is an emerging human right for indigenous or other communities where decisions affect the land or other natural resources these communities use or occupy. FPIC has been recognised in the United Nations Declaration on the Rights of Indigenous Peoples, which provides that 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent' prior to 'adopting and implementing legislative or administrative measures that may affect them', or approving 'any project affecting their lands or territories or other resources'.<sup>43</sup>

The Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent, endorsed by the United Nations Permanent Forum on Indigenous Issues, made findings and recommendations on the defining qualities of FPIC. These include:

- *Free*: decision-making should not be undermined by coercion, intimidation or manipulation;
- *Prior*: consent should be sought sufficiently in advance of any authorisation or commencement of activities;
- *Informed*: information regarding the nature, size, reasons for, duration of, locality affected, likely economic, social, cultural and environmental impacts, and the

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<sup>41</sup> McKenzie, above n 38, 36-39.

<sup>42</sup> Ibid 43.

<sup>43</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) arts 19, 32(2).

personnel involved in a particular project should be provided in a form that is accessible and understandable; and

- *Consent*: the consent process should involve consultation and participation. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions. The consultation and participation process may include the option of withholding consent.<sup>44</sup>

The application process for major projects under the EPA Act does not provide indigenous or local communities with the option of withholding consent, or the option of participating through their customary or other institutions.

### **The assessment stage**

Laws regulating the use of land and its resources may be inadequate in achieving distributive and procedural justice at the assessment stage in three respects: lack of a legal requirement to undertake independent social impact assessment ('SIA'); inadequate consideration of social impacts that are assessed; and failure to consider certain social impacts, such as issues of distributive justice.

#### *Lack of a legal requirement to undertake independent SIA*

The legal requirements for impact assessment of major projects in New South Wales involving the use of land or its resources do not impose specific formal procedures for SIA. Rather, social impacts are assessed along with economic and environmental impacts as part of the broader environmental impact assessment process. An EIS accompanying an application for SSD or SSI must include the 'likely impact on the environment of the development, activity or infrastructure', 'the measures proposed to mitigate any adverse effects of the development, activity or infrastructure on the environment' and the 'reasons justifying the carrying out of the development, activity or infrastructure', having regard to the 'biophysical, economic and social

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<sup>44</sup> *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, UN Doc E/C.19/2005/3 (17-19 January 2005, adopted 17 February 2005) 12-13.

considerations'.<sup>45</sup> Under the EPA Act, the consent authority, in determining a development application, must take into consideration the 'likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality'.<sup>46</sup> Thus, only limited and composite consideration is given to social impacts in the application itself and in the determination of the application.

The United Nations Environment Programme ('UNEP') has stated that for certain projects, 'impacts on people can be by far the most important consideration'.<sup>47</sup> Adverse social impacts can 'reduce the intended benefits of a proposal, and can threaten its viability if they are severe enough'.<sup>48</sup> Types of social impacts that can occur include: lifestyle impacts on the way people behave and relate to family, friends and cohorts; cultural impacts on shared customs, obligations, values, language and religious beliefs; community impacts on infrastructure, services, voluntary organisations, activity networks and cohesion; amenity or quality of life impacts on sense of place, aesthetics and heritage, perception of belonging, security and liveability; and health impacts on mental, physical and social well-being.<sup>49</sup> Furthermore, in instances where a community may have experienced colonialism and other forms of oppression, SIA 'may need to address problems of inequality of power and difficulties in communication and access to decision makers'.<sup>50</sup>

Major projects for the use of land and its resources may cause many of these types of social impacts. The lack of a statutory requirement for SIA independent of the assessment of environmental and other impacts makes it difficult to consider in depth the range of potential social impacts that may arise. The result is often that social impacts are inadequately assessed.

There is a need for the statutory requirements to impose specific formal procedures for SIA of major projects. Such formal procedures should preferably involve

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<sup>45</sup> *Environmental Planning and Assessment Regulations 2000* (NSW) sch 2 pt 3 cl 7(1)(d), (f).

<sup>46</sup> *Environmental Planning and Assessment Act 1979* (NSW) s 79C(1)(b).

<sup>47</sup> United Nations Environment Programme, *EIA Training Resources Manual* (UNEP, 2<sup>nd</sup> ed, 2002) 461.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.* 465.

<sup>50</sup> Donna Craig, 'Social Impact Assessment Bibliography' (East Kimberley Working Paper No 17, Centre for Resource and Environmental Studies, ANU, 1987) Introduction.



community empowerment by affording affected social groups influence over and standing in the formal procedures.<sup>51</sup> This may include: appropriating the formal SIA procedures to community priorities; extending the formal procedures into less formal settings, where avenues for community influence are greater; exercising increased levels of community control over technical inputs into SIA inquiries; and negotiating popular participation in territorially based campaigns for more acceptable local outcomes to project proposals and the mobilisation of popular support.<sup>52</sup>

### *Inadequate consideration of social impacts that are assessed*

Even if social impacts are assessed, the assessment may nevertheless be inadequate. Social impacts may be assessed using different methods of economic analysis, such as cost benefit analysis. This impoverishes the assessment of social impacts. Traditional cost benefit analysis tends to squeeze out qualitative 'soft' values in favour of quantifiable 'hard' values. Undue attention and weight are given to quantifiable data to the detriment of unquantifiable data.<sup>53</sup>

The social and environmental externalities of projects (the social or environmental burdens or costs caused by the use of land or its resources) usually do not have market value and therefore are not able to be quantified in monetary terms. It might be possible, to some limited extent, for some types of social and environmental burdens or costs to be given quantitative value, perhaps by means of surrogates in the marketplace, although this is rarely done.<sup>54</sup> Yet all social and environmental burdens or costs will not be quantified to the full extent. Those social and environmental burdens or costs that are not able to be quantified in monetary terms are excluded from the cost benefit analysis. This is what occurred in *Leatch v*

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<sup>51</sup> Donna Craig refers to this as a political approach to social impact assessment in contrast to a technical approach: Donna Craig, 'Social Impact Assessment: Politically Orientated Approaches and Applications' (1990) 10 *Environmental Impact Assessment Review* 37.

<sup>52</sup> Christiane Gagnon, Philip Hirsch and Richard Howitt, 'Can SIA Empower Communities?' (1993) 13 *Environmental Impact Assessment Review* 229, 247.

<sup>53</sup> See *Telstra Corporation Ltd v Hornsby Shire Council* [2006] NSWLEC 133; (2006) 67 NSWLR 256; (2006) 146 LGERA 10, 48 [174]. See also L Tribe, 'Ways not to think about Plastic Trees: New Foundations for Environmental Law' (1974) 83 *Yale Law Journal* 1315, particularly at 1317; N de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press, 2005) 199.

<sup>54</sup> See *Hunter Environment Lobby Inc v Minister for Planning and Infrastructure (No 2)* [2014] NSWLEC 129, [464], [465].

*National Parks and Wildlife Service*<sup>55</sup> where environmental factors were not included in the cost benefit analysis for a new link road through bushland, including the habitat of threatened fauna species. Similarly, in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited*,<sup>56</sup> where certain social and environmental impacts, which lacked market value, were not considered at all or were inadequately considered in the economic analyses. These included the impacts of noise and dust on nearby village residents, impacts on amenity values, loss of or reduction in environmental and ecosystems services, and matters relevant to biodiversity and ecological integrity. The economic analyses therefore failed to balance all of the costs with the benefits.

The preference for quantifiable data over unquantifiable data also skews the outcome of the cost benefit analysis. Consuming uses of the environment yield quantifiable benefits – the desired products of consumption of the environment (such as the minerals extracted) have quantifiable market value, as do the costs of production, resulting in net quantifiable benefits of consumption. However, as I have noted, all of the social and environmental burdens or costs of consumption will not be quantified to the full extent. The outcome is that, in purely quantitative terms, the market-quantified net benefits of consumption of resources almost always will outweigh the non-market social and environmental burdens or costs of consumption. This quantitative outweighing of the benefits over the costs in economic analyses usually results in the consuming use being approved.<sup>57</sup>

#### *Failure to consider certain social impacts*

The economic analyses may also be deficient in failing to consider issues of equity or distributive justice. Methods of economic analysis, such as cost benefit analysis, are usually only concerned with the aggregation of costs and benefits, not with how or why these are allocated. In *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited*, the economic analyses were held to be deficient in their consideration of issues of equity and

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<sup>55</sup> (1993) 81 LGERA 270, 286.

<sup>56</sup> [2013] NSWLEC 48; (2013) 194 LGERA 347, 448-449 [480]-[482]; appeal dismissed in *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* [2014] NSWCA 105; (2014) 200 LGERA 375.

<sup>57</sup> Preston, above n 7, 6.

distributive justice.<sup>58</sup> First, the Land and Environment Court of NSW held that while the benefit cost analysis ('BCA') and the Choice Modelling used to quantify some non market values considered some of the entities to whom a distribution of benefits would be made if the coal mining project were to be approved, such as Warkworth and its shareholders, the NSW and Commonwealth Governments, local councils, and employees and contractors, they did not consider the entities to whom a distribution of burdens would be made.<sup>59</sup> One of these entities was the people of Bulga who would suffer the burdens of adverse noise, dust, visual and social impacts, as well as degradation of the natural environment of the local area.<sup>60</sup> The assessment also did not consider the broader community in the State and the nation who would suffer from the reduced natural and cultural environment of Bulga village and surrounds in the event that the project was approved.<sup>61</sup> Furthermore, the assessment failed to consider the distribution of burdens to components of biological diversity such as the endangered ecological communities and threatened fauna within the disturbance area.<sup>62</sup>

Secondly, the BCA and Choice Modelling did not address the equity or fairness of the distribution of the benefits or burdens, or the nature and extent of the distributed benefits and burdens.<sup>63</sup> In particular, the assessment did not have regard to the principles of inter-generational or intra-generational equity. The principle of inter-generational equity provides that 'the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations'.<sup>64</sup> The principle of intra-generational equity involves 'people within the present generation having equal rights to benefit from the exploitation of resources and from the enjoyment of a clean and healthy environment'.<sup>65</sup> The Court held that the BCA and Choice Modelling did not determine

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<sup>58</sup> [2013] NSWLEC 48; (2013) 194 LGERA 347, 449 [485].

<sup>59</sup> Ibid 449-450 [487].

<sup>60</sup> Ibid 450 [488].

<sup>61</sup> Ibid 450 [489].

<sup>62</sup> Ibid 450 [490].

<sup>63</sup> Ibid 450 [491].

<sup>64</sup> *Protection of the Environment Administration Act 1991* (NSW), s 6(2)(b).

<sup>65</sup> *Telstra Corporation Ltd v Hornsby Shire Council* [2006] NSWLEC 133; (2006) 67 NSWLR 256; (2006) 146 LGERA 10, 36 [117]. See also B Boer, 'Institutionalising Ecologically Sustainable Development: The Role of National, State and Local Governments in Translating Grand Strategy into Action' (1995) 31 *Willamette Law Review* 307, 320.

whether the project, if approved, would ‘maintain or enhance the health, diversity and productivity of the local environment at Bulga for the benefit of future generations or the value of doing so’.<sup>66</sup> The assessment also failed to consider adequately the burdens that would be placed on entities such as the residents of Bulga and the components of biological diversity in the Bulga environment, and the ability of those entities to live in and enjoy a clean and healthy environment.<sup>67</sup> The Court concluded that the failures to consider adequately inter-generational and intra-generational equity limited the utility of the BCA and Choice Modelling to the Court ‘for the purposes of evaluating, weighting and balancing the relevant matters to be considered in determining the Project Application’.<sup>68</sup>

### **The approval stage**

Laws regulating the use of land and its resources may be inadequate in achieving distributive and procedural justice at the approval stage in three respects: inadequate consideration of the input of public participation; the approval inadequately reflecting the assessment of the application, including by approval conditions inadequately mitigating adverse social and environmental impacts; and the approval and its conditions trading off unlike benefit or burdens, such as trading off social benefits or burdens between different communities or within communities, unfair allocation of burdens but no benefits to vulnerable individuals and social groups within communities, trading off different social benefits or burdens, and trading off social benefits or burdens with environmental benefits or burdens.

Under the EPA Act, applications for SSD or SSI can be determined by the decision-maker granting consent with such modifications of the proposed development or on such conditions as the decision-maker may determine, or by the decision-maker refusing consent.<sup>69</sup>

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<sup>66</sup> *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48; (2013) 194 LGERA 347, 450-451 [493].

<sup>67</sup> *Ibid* 451 [494].

<sup>68</sup> *Ibid* 451 [495].

<sup>69</sup> *Environmental Planning and Assessment Act 1979* (NSW) ss 89E, 115ZB(1), (3).

### *Inadequate consideration of the input of public participation*

Article 6 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('Aarhus Convention') requires State parties to ensure that 'due account is taken of the outcome of the public participation' in the final decision.<sup>70</sup> This means that the final decision should include the reasoning upon which the decision was based and should provide the explanation and evidence on how the outcomes of the public participation procedures were taken into account. Article 6 also provides that parties must ensure that 'when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures'.<sup>71</sup> Parties should also 'make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based'.<sup>72</sup> Implicit in the ambit of these articles is the requirement that public authorities must maintain all the relevant documents, including the application, EIA documentation and final decision, in publicly accessible lists, registers or files.

In some cases, however, consent authorities in determining applications for major projects have not given adequate consideration to the input of public participation, by not giving adequate consideration to the submissions of members of the public. These submissions are one of the factors that need to be taken into account under s 79C of the EPA Act.<sup>73</sup> In *Nambucca Valley Conservation Association v Nambucca Shire Council*,<sup>74</sup> the applicant challenged the validity of a consent granted by the Nambucca Shire Council ('the Council') for a subdivision of land under the EPA Act. While this case did not concern an application for SSD or SSI, the Council was still required to have regard to the factors in s 79C of the EPA Act in making a determination. One of the grounds on which the applicant challenged the decision

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<sup>70</sup> *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, opened for signature 25 June 1988, 2161 UNTS 447 (entered into force 30 October 2001) art 6(8).

<sup>71</sup> *Ibid* art 6(9).

<sup>72</sup> *Ibid*.

<sup>73</sup> *Environmental Planning and Assessment Act 1979* (NSW) s 79C(1)(d).

<sup>74</sup> [2010] NSWLEC 38.

was that the Council had failed to take into account submissions made by objectors.<sup>75</sup>

The Council report on the application had attached three submissions by objectors. However, there were earlier submissions received by the Council that were not attached to the report. The Council report claimed that the issues raised in the submissions concerned the loss of vegetation and adverse impacts on the flora and fauna which would occur on the site. The Court had regard to one of the earlier submissions, which raised issues including water pollution and water management. There was no reference to these issues in the Council report. These were relevant matters for consideration.<sup>76</sup> The Court held that the applicant had rebutted the presumption that the Councillors read the earlier submissions.<sup>77</sup> Since at least one of the earlier submissions raised issues that were not addressed in the Council report, the Court held that there was a failure to comply with the mandatory requirement of s 79C(1)(d) of the EPA Act to consider ‘any’ submission.<sup>78</sup>

Similarly, in *South East Forest Rescue Incorporated v Bega Valley Shire Council and South East Fibre Exports Pty Ltd*,<sup>79</sup> South East Forest Rescue Incorporated (‘SEFR’) challenged the decision of Bega Valley Shire Council (‘the Council’) to grant development consent to a development application for the installation of a pilot wood manufacturing plant using wood harvested from native forests. One of the grounds of challenge was that the Council failed to consider, under s 79C(1)(d) of the EPA Act, all of the submissions made by members of the public objecting to the proposed development and, in particular, those submissions concerning the consistency of the proposed development with the zone objectives of the relevant environmental planning instrument and the principles of ecologically sustainable development (‘ESD’).

The Court held that the Council could not delegate the consideration of submissions to someone else, and that the councillors had to ‘apply their own minds to the

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<sup>75</sup> Ibid [167].

<sup>76</sup> Ibid [186].

<sup>77</sup> Ibid [191].

<sup>78</sup> Ibid.

<sup>79</sup> [2011] NSWLEC 250.

submissions and the issues raised by the submissions'.<sup>80</sup> This did not mean that the Council was denied the assistance of others, such as the Council officer, in the process of ascertaining the facts and contentions contained in the submissions.<sup>81</sup> The officer could ascertain the facts and contentions raised in the submissions and bring them to the attention of the Council in a summary or report.<sup>82</sup> However, the summary or report had to bring to the Council's attention all material facts and contentions raised in the submissions.<sup>83</sup> In this case, a number of the submissions made by persons objecting to the development raised the issues that the development was inconsistent or incompatible with the objectives of the relevant zone and the principles of ESD. Neither of these issues was raised in the two reports that the officer submitted to the Council.<sup>84</sup> Other written materials, including the two s 79C assessments and a separate document prepared by the officer that summarised the submissions, did not consider the issues of consistency with the zone objectives or the principles of ESD, and were not provided to the Council.<sup>85</sup> The Court concluded that the Council had failed to comply with the mandatory requirement of s 79C(1)(d) of the EPA Act to take into account those submissions made which raised the issues of the consistency of the development with the zone objectives and the principles of ESD.<sup>86</sup>

*The approval inadequately reflecting the assessment of the application*

The assessment of the project application is intended to inform and influence the determination of the application. If the assessment, weighting and balancing of all of the benefits and costs reveals that the project or any aspect of the project is unacceptable, approval should be refused for the project or the aspect of the project. It is not right for a decision-maker to conclude that the effect of the relevant

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<sup>80</sup> Ibid [138].

<sup>81</sup> Ibid [139].

<sup>82</sup> Ibid.

<sup>83</sup> Ibid [140].

<sup>84</sup> Ibid [142]-[144].

<sup>85</sup> Ibid [146]-[148].

<sup>86</sup> Ibid [150].

considerations is that one thing should be done, and yet, without more, to do another.<sup>87</sup>

Similarly, if the assessment reveals that a social or environmental impact cannot be mitigated by a condition, approval should not be granted subject to a condition that has been assessed to be inadequate. This was the situation in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited*.<sup>88</sup>

However, if the assessment reveals that a social and environmental impact can be mitigated by a condition, approval needs to be granted subject to that condition. To grant consent without imposing a condition to mitigate an identified social or environmental impact, may reveal a failure to consider the relevant impacts of the project. Failure to consider a relevant matter that the decision-maker is bound to take into account is one of the bases for judicial review.<sup>89</sup>

This was the circumstance that occurred in *Parramatta City Council v Hale*.<sup>90</sup> The appellants challenged the validity of a development consent for a large entertainment and sports complex in a public place. After the submission of the application to the Parramatta City Council ('the Council'), members of the Council were furnished with a lengthy report from the Council's chief town planner and engineer recommending approval subject to numerous conditions, including the provision of car parking facilities and pedestrian access, and the making of road improvements. However, the Council approved the development application without imposing the recommended conditions. The NSW Court of Appeal stated that:

the absence of a reasonable opportunity for a council to understand the significance of the decision about to be made in relation to the mandated matters, followed by a decision which, in material respects leaves important aspects virtually at large, will go far towards establishing objectively that the council, as a group, did not take those mandated matters into consideration as required by law.<sup>91</sup>

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<sup>87</sup> *BP Australia Ltd v Campbelltown City Council* (1994) 83 LGERA 274, 279; *Telstra Corporation Ltd v Hornsby Shire Council* [2006] NSWLEC 133; (2006) 67 NSWLR 256; (2006) 146 LGERA 10, 54 [205].

<sup>88</sup> [2013] NSWLEC 48; (2013) 194 LGERA 347, 399 [264], 425 [385].

<sup>89</sup> B J Preston, 'Administrative law in an environmental context: An update' (2007) 15 *Australian Journal of Administrative Law* 11, 14.

<sup>90</sup> (1982) 47 LGRA 319.

<sup>91</sup> *Ibid* 335 (Street CJ).



The Court found that the development was likely to give rise to great harm due to crowd access problems.<sup>92</sup> In deciding to allow the development and in fixing the conditions, the means that may be employed to mitigate the harm must be taken into consideration.<sup>93</sup> The fact that the approval was granted without conditions regarding car parking facilities, pedestrian access and road improvements, suggested that the Council did not take into consideration the means which could have been employed to mitigate the harm.<sup>94</sup> The Court determined that the Council had failed to take into account relevant matters under the then s 90(1) of the EPA Act.<sup>95</sup>

### *Conditions trading off unlike benefits and burdens*

An approval can also fail to address social or environmental impacts by seeking to trade-off unlike social or environmental benefits and burdens. The approval may require, by condition, the approval of some social or community benefit to compensate for an assessed social or environmental burden or cost. Such trade-offs may be inadequate in five ways.

First, it may trade-off social benefits and burdens between different communities. The affected community is not restricted to the local geographical community. As discussed earlier, there may be multiple communities that may suffer the burdens or costs of the project. Equity or distributive justice demands that any benefits that are to be distributed to compensate for burdens imposed by the project ought to be distributed to those communities that suffer the burdens, not those that do not bear the burdens. In *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited*,<sup>96</sup> for example, the economic benefits of the mining project would have largely accrued to distant towns and the region and the State, while the social and environmental burdens or costs would have been suffered by the local geographical community. Conditions of approval ought not trade-off social benefits or burdens between such different communities.

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<sup>92</sup> Ibid 357 (Moffitt P).

<sup>93</sup> Ibid.

<sup>94</sup> Ibid 357-358.

<sup>95</sup> Ibid 336 (Street CJ), 362 (Moffitt P).

<sup>96</sup> [2013] NSWLEC 48; (2013) 194 LGERA 347.

Secondly, any particular affected community is not an homogeneous entity – there is a diversity of values, interests and perceptions of the members and in the way in which members are affected. Conditions of approval ought not trade-off social benefits and burdens between different members of a community.

Thirdly, some individuals or social groups within a community may be vulnerable and marginalised. Dealing with a community as a homogeneous entity in the distribution of social benefits and burdens may only reinforce established patterns of exclusion and inequity.<sup>97</sup>

Fourthly, care must be taken in trading off disparate social burdens and benefits. For example, members of a local geographical community who suffer the burdens of increased dust and noise and loss of amenity from the carrying out of a project will not be compensated by the allocation of the benefit of a new hospital, school or bridge. The burdens and benefits are dissimilar and not tradeable.

Fifthly, conditions of approval ought not trade-off social benefits or burdens with unlike environmental benefits or burdens. For example, the social (and economic) benefit of increasing employment in a region by approval of a project cannot be traded off against an adverse environmental impact such as a significant loss of a threatened species, population or ecological community, or its habitat. The benefit and the cost are unlike and not tradeable. Conversely, compensatory environmental benefits, such as the establishment of bio-offset areas, cannot be traded off against adverse social impacts such as dust and noise impacts and loss of amenity for residents in the local geographical community.

### **The implementation stage**

Laws regulating the use of land and its resources may be inadequate in achieving procedural and distributive justice and justice as recognition at the implementation stage in four respects: inadequate implementation of the approval; inadequate monitoring and adaptive management under the approval; inadequate ongoing

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<sup>97</sup> Williams and Walton, above n 4, 11.

community engagement in implementing the approval; and inadequate enforcement if the approval is not implemented according to law.

#### *Inadequate implementation of the approval*

Once an approval has been granted for the use of land or its resources, the use needs to be carried out in accordance with the approval. This includes carrying out the use only for the purpose approved, in accordance with approved plans and specifications, and complying with all conditions of approval.<sup>98</sup> The approval as a whole represents the outcome of the assessment, weighting and balancing of all of the benefits and burdens of the project. To implement only part or parts of the approval is to upset the distributive and procedural justice outcome of the approval. This is obvious if conditions that required the provision of benefits to compensate for burdens caused by the project are not implemented. For example, in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited*, the prior approval required the establishment and dedication in perpetuity of a non-disturbance area to conserve flora and fauna and their habitat and to offset the loss of flora and fauna elsewhere by mining. However, although the approved open cut coalmine was carried out, the non-disturbance area was not dedicated in perpetuity and indeed half of the area was proposed to be cleared and mined under a subsequent proposal.<sup>99</sup> This undermined the balance struck in the approval, whereby an environmental burden was to be offset by the grant of an environmental benefit.

#### *Inadequate monitoring and adaptive management*

Assessment of a project and its social and environmental impacts is not restricted to the application, assessment and approval stages. There is a need for ongoing impact assessment after approval has been granted and while the project is being carried out. There is a need for monitoring and adaptive management. An adaptive management approach might involve the following core elements: monitoring of impacts of management or decisions based on agreed indicators; promoting

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<sup>98</sup> *Environmental Planning and Assessment Act 1979* (NSW) s 76A(1).

<sup>99</sup> [2013] NSWLEC 48; (2013) 194 LGERA 347, 370 [80]-[83], 377-378 [139].

research to reduce key uncertainties; ensuring periodic evaluation of the outcomes of implementation, drawing of lessons, and review and adjustment, as necessary, of the measures or decisions adopted; and establishing an efficient and effective compliance system.<sup>100</sup> Monitoring and adaptive management ought to be required by conditions of approval.<sup>101</sup>

Under the EPA Act, the Minister may impose conditions on the approval of a project requiring monitoring or an environmental audit or audits to be undertaken.<sup>102</sup> A condition requiring monitoring may require the provision and maintenance of monitoring devices; the analysis, reporting and retention of monitoring data; and certification of the monitoring data.<sup>103</sup> A condition requiring an environmental audit may require the conduct of the audit by the proponent or an independent person, preparation of written documentation during the course of the audit, preparation of an audit report, certification of the audit report, and production of the audit report to the Minister.<sup>104</sup> It is an offence to include false or misleading information in a monitoring or audit report, to omit information that is materially relevant, or to fail to retain monitoring data or audit documentation.<sup>105</sup>

### *Inadequate ongoing community engagement*

There is also a need for ongoing engagement with the community. Community engagement is needed at the application and assessment stages so as to provide the community opportunities to influence the project design and the determination of the project application. However, there needs to be ongoing engagement with the

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<sup>100</sup> See 'Guidelines for applying the precautionary principle to biodiversity conservation and natural resource management' in Appendix A to R Cooney and B Dickson (eds), *Biodiversity and the Precautionary Principle, Risk and Uncertainty in Conservation and Sustainable Use* (Earthscan, 2005) 304, Guideline 12. See also *Telstra Corporation Ltd v Hornsby Shire Council* [2006] NSWLEC 133; (2006) 67 NSWLR 256; (2006) 146 LGERA 10, 46 [164]; *Newcastle & Hunter Valley Speleological Society Inc v Upper Hunter Shire Council and Stoneco Pty Limited* [2010] NSWLEC 48, [164].

<sup>101</sup> For example, conditions requiring monitoring and adaptive management were imposed in the cases of *Newcastle & Hunter Valley Speleological Society Inc v Upper Hunter Shire Council and Stoneco Pty Limited* [2010] NSWLEC 48 (at [181]-[187]); *Newcastle & Hunter Valley Speleological Society Inc v Upper Hunter Shire Council and Stoneco Pty Limited (No 2)* [2010] NSWLEC 104 (at [11], sch 3, conditions S3.7-S3.31, S5.7, S6.1, S6.2); and *Turnbull v Director-General, Office of Environment and Heritage* [2014] NSWLEC 84 (at [158]).

<sup>102</sup> *Environmental Planning and Assessment Act 1979* (NSW) s 112C.

<sup>103</sup> *Ibid* s 122D(1).

<sup>104</sup> *Ibid* s 122D(2).

<sup>105</sup> *Ibid* s 122E.

community in the implementation stage. This ensures the maintenance of a relationship between the land or resource user and the affected community.

Laws regulating the use of land and its resources typically do not require ongoing community engagement at the implementation stage. At best, the laws may require engagement at the inform level of public participation only. Notice of the determination to approve the project may be required to be given to certain persons, such as persons who made a submission objecting to the project at the application stage, or to be notified on governmental websites or in newspapers, or be recorded in a register of approvals.<sup>106</sup> Rarely, however, is there a requirement for community engagement at higher levels of public participation. Yet, greater community engagement is possible and is beneficial.

Conditions of approval could require the establishment of a community consultative committee, with representatives of the affected communities. The resource user could be required to provide information and monitoring data, and reports on compliance with conditions of approval, to the community consultative committee at regular intervals. The provision of such information involves public participation at the consult and involve levels. It is possible, however, for the community consultative committee to participate at the collaborate level. For example, the community consultative committee could be involved in the adaptive management process, including developing alternative management strategies and identifying the preferred solution to achieve performance outcomes. Examples of approvals requiring community consultative committees include: *Gerroa Environment Protection Society Inc v Minister for Planning (No 2)*;<sup>107</sup> *Ironstone Community Action Group v Minister for Planning (NSW)*;<sup>108</sup> and *Newcastle and Hunter Valley Speleological Society Inc v Upper Hunter Shire Council (No 2)*.<sup>109</sup>

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<sup>106</sup> Ibid s 81 (post-determination notification requirements) and s 100 (register of consents and certificates required to be kept by a Council and available for public inspection).

<sup>107</sup> [2008] NSWLEC 254, sch 5, conditions 8 and 9.

<sup>108</sup> [2011] NSWLEC 195, app A, sch 5, condition 5.

<sup>109</sup> [2010] NSWLEC 104, sch 6, condition S6.5.

Community engagement could be taken further by 'citizen-based monitoring'.<sup>110</sup> Hunsberger, Gibson and Wismer suggest that 'ensuring effective citizen involvement and follow-up monitoring have been among the enduring areas of difficulty for environmental assessment design and practice'.<sup>111</sup> Environmental assessment follow-up includes monitoring of actual effects, as well as monitoring and enforcement of compliance with commitments and approval conditions. Community-based monitoring refers to a range of activities through which concerned citizens gather and record observations about environmental or social conditions.<sup>112</sup>

Hunsberger, Gibson and Wismer used case studies of community involvement in environmental assessment follow-up in Canada to provide lessons in citizen-based monitoring. They identified several common problems for citizen-based monitoring, including: establishing credibility, applying local knowledge to decisions, and securing funding to sustain programs.<sup>113</sup> They also suggested strategies for overcoming these issues. These include:

- *Credibility*: credibility can be established through the use of scientific methods, volunteer training and quality assurance/quality control measures;
- *Local knowledge*: local knowledge can be integrated by fostering working partnerships from the earliest stages of program design and implementation; and
- *Resources*: long-term, stable funding is critical to the success of environmental assessment follow-up activities. Ideally, community-based monitoring and stewardship centres would have financial support from multiple levels of government and coordination through partnerships between local organisations.<sup>114</sup>

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<sup>110</sup> Carol Hunsberger, Robert Gibson and Susan Wismer, 'Citizen involvement in sustainability-centred environmental assessment follow-up' (2005) 25 *Environmental Impact Assessment Review* 609.

<sup>111</sup> Ibid 610.

<sup>112</sup> Ibid 612.

<sup>113</sup> Ibid 618.

<sup>114</sup> Ibid 618-619.

They concluded that increased citizen participation in follow-up activities such as monitoring could help to improve the quality and local relevance of environmental assessment, while advancing the process towards sustainability goals.<sup>115</sup>

*Inadequate enforcement if the approval is not implemented according to law*

If an approval is not implemented according to law, there needs to be enforcement to restrain and remedy the non-compliance. Enforcement is necessary to ensure access to justice, uphold the rule of law, and ensure society's expectations are met. There are six main ways of legal enforcement:

- criminal enforcement by government agencies and citizens, including on the spot fines, penalty notices, and prosecutions;
- civil enforcement proceedings to remedy or restrain a breach of an environmental law;
- civil penalties, which are a hybrid between civil and criminal enforcement;
- administrative measures, including administrative orders such as stop work orders and clean up or restoration orders, and written undertakings from individuals;
- judicial review to enforce compliance by the executive with environmental legislation; and
- merits review appeals in which the reviewing court or tribunal reaches the correct or preferable decision under the law.<sup>116</sup>

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<sup>115</sup> Ibid 624.

<sup>116</sup> B J Preston, 'Enforcement of environmental and planning laws in New South Wales' (2011) 16 *Local Government Law Journal* 72, 72-73.

Part 6 of the EPA Act deals with implementation and enforcement in relation to approved development. Criminal enforcement of the EPA Act occurs through criminal prosecutions brought by state or local government.<sup>117</sup> Civil proceedings can also be brought to enforce compliance with the EPA Act. Under s 123 of the EPA Act, any person may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of the EPA Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach. The Land and Environment Court may make any order it deems fit to remedy or restrain a breach of the EPA Act.<sup>118</sup> This includes: an order to restrain an unlawful use, an order requiring the demolition or removal of unlawful building or work, or an order requiring the reinstatement of a building, work or land to the condition or state it was in immediately before a breach was committed.<sup>119</sup>

Administrative orders may also be issued by the Minister, Director-General, local council or other consent authority ordering a person to do or refrain from doing a certain thing.<sup>120</sup> The range of possible orders is broad and can include an order to cease using premises for a purpose specified in the order, an order to demolish or remove a building, or an order to comply with a development consent.<sup>121</sup>

In circumstances where there has been a wilful and deliberate breach of an order of the Court, the Court can commit defendants for contempt of court.<sup>122</sup> The Court can impose a sentence of imprisonment or a fine.<sup>123</sup>

The main way in which public participation is facilitated at the implementation stage for major projects is through the public being able to bring civil proceedings under s 123 to remedy or restrain a breach of the EPA Act. Under s 98(4) of the EPA Act, a person who made a submission under s 89F(3) of the EPA Act objecting to a development application to carry out SSD can also appeal the decision of a consent

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<sup>117</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 125(1).

<sup>118</sup> *Ibid* s 124(1).

<sup>119</sup> *Ibid* s 124(2).

<sup>120</sup> *Ibid* s 121B.

<sup>121</sup> *Ibid*.

<sup>122</sup> *Witham v Holloway* (1995) 183 CLR 525.

<sup>123</sup> *Supreme Court Rules 1970* (NSW) pt 55, r 13.



authority to grant consent to a development application to the Court. This involves a merit review appeal.

## **Conclusion**

It is clear that society has certain expectations regarding the rights or responsibilities of a business to use land and its resources. These expectations are influenced by law, and the law, in turn, is responsive to society's expectations. However, often there is a gap between the expectations of society and the legal criteria a business is required to satisfy in order to obtain a legal licence to use land and its resources. This means that society's expectations may not be met. It is within this gap that the social licence operates. A business may seek to earn a social licence, in order to satisfy the unmet expectations of society. The greater extent to which society's expectations are met by the legal licence to use land or resources, the less need there is for a business to earn a social licence.

This paper has identified numerous ways in which the laws regulating the use of land and its resources inadequately address society's expectations. These inadequacies are manifest at the application, assessment, approval and implementation stages of the process for obtaining and maintaining a legal licence. One response to these issues is for a business to earn a social licence to meet the unmet expectations of society. However, this paper has suggested that the preferable means of satisfying society's expectations is to improve the law, and its implementation and enforcement.

This paper has outlined numerous ways in which the process for obtaining and maintaining a legal licence could be improved, in order to better meet society's expectations. At the application stage, the level and timing of public participation is crucial to ensuring informed public participation. There should be an involved and meaningful level of public participation, and consultation should occur at the earliest possible stage. Laws regulating the use of land and its resources should also seek to ensure the free, prior and informed consent of affected social groups. At the assessment stage, consideration should be given to social impacts, without subsuming them into the consideration of other impacts such as economic impacts.

The assessment of social impacts should also have regard to distributive and equitable concerns.

The approval stage of the process should take into account the input of public participation, and the approval should adequately reflect the assessment of the application. Conditions of approval should adequately mitigate adverse social and environmental impacts, and should not trade-off unlike social benefits or burdens. Finally, at the implementation stage, there is a need for adequate monitoring and adaptive management under the approval, ongoing community engagement, and adequate enforcement of the approval.