

Launch of the book by Amanda Kennedy, *Environmental Justice and Land Use Conflict: The Governance of Mineral and Gas Resource Development* (Routledge, 2017)

by

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Land use conflict over natural resource extraction, particularly coal and gas, has escalated in communities around the world. Partly, this is a product of increased demand for these resources – more is being extracted – and partly this is because resource users are becoming concentrated in certain areas – more extraction in the same areas. However, these two reasons do not fully explain why land use conflicts are becoming more numerous, heated and intractable.

Associate Professor Amanda Kennedy wanted to know the full reasons. Land use conflicts had arisen in her region, north-west New South Wales, over proposals to extract coal in the Hunter Valley and Liverpool Plains and coal seam gas in the Pilliga, near Narrabri. Government efforts to quell the conflicts had little impact and indeed may have exacerbated the conflicts.

Why were these conflicts arising? Why were government interventions not resolving the conflicts?

Associate Professor Kennedy sought to answer these questions by examining real-world case studies of conflicts concerning extractive developments. She explored the local conflicts concerning coal mining and coal seam gas exploration in New South Wales. She contrasted these local conflicts with the conflict of shale gas development in Pennsylvania in the United States.

Associate Professor Kennedy's conclusion was that the cause and escalation, and the lack of resolution, of land use conflicts over natural resource extraction lay in the lack of environmental justice. Her book, *Environmental Justice and Land Use Conflict*, explains how she came to this conclusion.

In Chapter 1, she sets the scene for her investigation by explaining how placing environmental justice as the central element in land use conflict can assist in illuminating the conflict over natural resource extraction. She adopts Schlosberg's tripartite definition of environmental justice. "Justice" is how things ought to be; "evidence" is how things are; and "process" is why things are how they are.

Chapter 2 elaborates further on the “justice” and “process” elements from this framework. Chapters 3 to 6 examine the “evidence” element of environmental justice through the four case studies.

The final chapter, Chapter 7, summarises the environmental justice themes which emerge from the case studies and makes recommendations for improvement of governance of natural resource extraction.

I want to pick up on some of the insights Associate Professor Kennedy offers in the book. I will start with the problem she identified in the process of meta-governance, or governing how to govern.

The existing governance system for extractive resource development is characterised by injustice. I will identify some of the ways in which the governance system is unjust in a moment. Associate Professor Kennedy identifies that justice cannot be achieved through a governance system if that governance system is unjust. There is, therefore, the need to address the injustice of the governance system as a whole. Environmental justice can act as a basis for meta-governance of land use systems. Associate Professor Kennedy posits that:

“A land use governance system guided by the principles of environmental justice – including equitable outcomes, fair processes, recognition and respectful treatment of all stakeholders, and a commitment to enhance the capabilities integral to individual and collective freedom and functioning – which is supported by robust review procedures, has a better chance of governing with integrity.”

Some of the structural or meta-governance system problems include the following.

Most laws do not allow the carrying out of development on a person’s land without that person’s consent. Mining is different. Mining laws allow the exploration for and extraction of minerals, petroleum and gas on other people’s land without their consent. This intrusion on private property without consent is itself a source of conflict.

Although all developments cause externalities, that is uncompensated impacts on land and people external to the development site, the scale of offsite impacts of natural resource extraction developments is very large and place-based. The scale and intensity of these externalities are a source of conflict.

There is also the problem of the involuntariness of the externalities. Burdens or costs are thrust upon neighbours without their consent. The magnitude of the externalities on a neighbour may be so great as to necessitate the compulsory acquisition of the neighbour’s property, heightening the sense of powerlessness.

The uncertainty of whether a natural resource extraction development will be carried out and its impacts if carried out has a greater adverse effect on opponents to the project than proponents. Opponents are left to find individual and communal

strategies for dealing with uncertainty, but with varying success. The uncertainty affects them personally and impedes the effectiveness of their participation.

Public participation is at the project specific stage and not at the strategic planning stage. There is no public participation with respect to strategic policy setting of whether there should be natural resource extraction, such as mining and coal seam gas extraction, in particular areas, such as prime agricultural land or where aquifers occur or areas of high biodiversity value. Rather, public participation is restricted to particular projects. Any public submission on the project needs to be restricted to the merits of the project and not the strategic planning and policies that enable the project.

The operation and effect of the laws and the governance system are such that opponents to a project bear the burden of proof to establish why a project should not be approved, rather than the proponent having to prove why the project should be approved.

There is also agenda-bias in the governance system. The natural resource extraction laws and the government agencies administering the laws tend to be skewed in favour of natural resource extraction, rather than conservation.

The laws do not consider, holistically, all of the potential uses of particular land (such as agriculture, mining and conservation) and seek to ascertain the best use of the land. Instead, the laws only look at the natural resource extraction use proposed in the application for approval. Furthermore, the laws allow inadequate consideration of alternatives to the proposed use. Natural resource extraction projects are particular to the occurrence of the natural resource. It is that resource which the application seeks to extract. The alternative of extracting the same natural resource from alternative locations is not considered.

The government, industry and particular developer also frame the scale of the conflict. For example, as Associate Professor Kennedy noted from her case studies, notions of the “public interest” were framed in terms of regional and State scales of economic and energy security, which displaced the local environmental and social scales. Scale framing affects public participation and decision making. Public participation not according with the scale of conflict as framed is discounted or ignored. Decision making becomes aligned with the imperatives of the scale as framed.

The laws and governance system privilege certain types of knowledge over other types. Thus, so called objective types of knowledge, such as scientific and economic knowledge, is privileged in the decision making process. These types of knowledge deal with “hard” data and values. They are privileged over types of knowledge that deal with “soft” data and values, such as the social sciences and place-based concerns. There is also the privileging of expert knowledge over lay or vernacular knowledge. Other ways of knowing, such as Indigenous knowledge, are ignored.

This privileging of certain types of knowledge skews participation and decision making processes and demands the use of terms and language in the privileged types of knowledge.

There are also issues in the governance system concerning access to review by the courts. There are limited avenues for review of decisions approving natural resource extraction developments on the merits. Under the *Environmental Planning and Assessment Act 1979* (NSW), merits review of such decisions is restricted to developments that are categorised as designated development. However, even with respect to this type of development, if the governmental decision maker holds a public hearing, no person can appeal to the court for merits review of any decision to approve the development.

Changes in the law and arrangements for access to justice have also had meta-governance consequences. The case studies reveal that governments have changed the laws governing the assessment and approval of natural resource extraction developments. For example, in New South Wales, changes were made to the State environmental planning policy governing mining to privilege economic considerations and to discount biodiversity and noise considerations. Governments also changed the funding arrangements for public interest, environmental legal centres, which were critical in providing advice, assistance and representation for people opposed to natural resource extraction developments. This restricts people's ability to access the courts for both merits review and judicial review of decisions to approve natural resource extraction developments.

The structural problems in the governance system do not only include what is there but also what is not there. There is no charter governing public participation in natural resource extraction development decision making. There are no mechanisms to assess and review the inclusiveness, implementation or effectiveness of public participation processes.

I turn now to focus on aspects of procedural injustice and recognition injustice identified by Associate Professor Kennedy.

The analysis of the case studies revealed shortcomings in who can participate in the process of decision making for natural resource extraction developments. Not all stakeholders were able to participate. In fact, there was a skewed representation in the process.

The analysis revealed that there were limited ways for the public to participate. Primarily, participation was restricted to the method of public notice and comment. Public notice was given of the receipt of an application for natural resource extraction development and the public were invited to make a written submission within a limited period of time. There might have been the possibility of a one-off public meeting convened by the governmental decision maker. People could make a verbal submission at that meeting, although the amount of time allocated was limited. By Arnstein's ladder of citizen participation, these methods of participation were tokenistic.

Associate Professor Kennedy also enumerated the many ways in which public participation was ineffective.

Participation was mostly limited to making a written submission, although with the possibility of making a verbal submission at a public meeting within a limited time. There was no multi-directional consultation.

Information about the project was delivered too late, was not responsive to public concerns, was too voluminous (encyclopaedic) and too technical and complex.

The public was restricted in accessing information held by government and the project proponent. Hence, the public were not able to supplement the information about the project that was provided publicly.

The time period allowed to make a submission was insufficient to review the information provided and to make a well-considered submission.

There were issues in relation to the ready availability of information about the project. The project application and information could be inspected but copies could not be taken. Where the information was available electronically, this was unavailable to people without computers or who were not computer literate.

There were geographical barriers to public participation. People living in areas remote from where the project application and information were put on public display or from the venues of public meetings were inhibited in their participation.

There were bureaucratic procedures that inhibited people's ability to access and comment on the project.

The public had inadequate resources to make effective submissions. There was difficulty in accessing advice from suitable experts. Experts may not have been available or available at the time required or at a cost that was affordable. The public lacked financial resources to access lawyers for advice and assistance. As noted, public interest, environmental legal centres had their funding cut, thereby restricting the availability of their services to people.

Individuals and community groups may have inadequate knowledge and experience in making at all or in making an effective submission on the project. They are often first time players in the system. They stand in contrast to the project proponents and the government departments who are more familiar with the regulatory process.

Individuals and community groups lack political influence and clout, unlike project proponents.

Submissions by people and community groups opposing a project that do not address the agenda set by the laws, the governance system and the particular project application tend to be discounted or ignored.

Past public participation on projects also affects adversely current public participation on a project. Prior ineffective participation (procedural injustice) carries over and adversely affects current participation. There can be an over-reliance by government on certain individuals and community groups to provide comment on projects. This leads to “consultation fatigue”. But there is another way in which past participation affects current participation. Opponents of projects fight multiple applications to carry out projects but proponents only have to deal with their own project application. Opponents are worn down by attrition.

Associate Professor Kennedy’s analysis of the case studies also revealed injustice in the recognition of individuals and groups. There was non-recognition, including disenfranchisement of some and ignoring of others. There was misrecognition, including derogatory characterisation of people and groups opposed to projects. And there was mal-recognition, including changing the law to prevent opponents protesting or engaging in acts of civil disobedience. Such non-recognition, misrecognition and mal-recognition restricted public participation, both who could participate and how effectively people could participate.

Associate Professor Kennedy’s book makes a valuable contribution to the jurisprudence on land use conflicts concerning natural resource extraction. The employment of an environmental justice lens permits fresh insights into land use conflicts. It allows an understanding of why these land use conflicts arise and why, despite governmental attempts, they have proven to be difficult to resolve. Associate Professor Kennedy’s recommendations for reform of both the process of meta-governance and the laws and institutional structures within the governance system are thoughtful and topical. They deserve careful consideration by the various actors and institutions within the governance system.

I commend the book and am pleased to launch it.