



The tension between natural justice and project delivery – integrating approvals to achieve better outcomes



A TETRA TECH COMPANY

Erin Pears - Coffey
Senior Associate Environmental
Consultant
erin.pears@coffey.com



Mat Peel - Arup
Associate Principal
mat.peel@arup.com

INTRODUCTION

In Victoria, three key pieces of legislation regulate major projects in relation to the use of land and impacts on the environment, the *Planning and Environment Act 1987* (P&E Act), *Environment Effects Act 1978* (EE Act) and *Major Transport Project Facilitation Act 2009* (MTPF Act). How and when these regulatory process are applied (the approval pathway) depends on a number of factors: the type of project; statutory requirements; timeframes for project delivery; and the procurement approach.

A key driver for any major project is minimising risk. In relation to project approvals the key risks are: delays to project delivery; the potential for a successful legal challenge; increasing the cost of project delivery; and reputation risk. To minimise these risks, the approval pathway selected is usually based primarily on obtaining approvals as quickly as possible, with the lowest risk to project delivery timeframes and cost. However, this approach to can jeopardise the natural justice elements of the regulatory process, which are critical for successful project delivery.

If the community does not have adequate opportunity to be heard it can increase the risk of a successful legal challenge to a project approval, as well as increase community opposition to a project. These two factors can seriously jeopardise delivery of a project.

There are three broad models for integrating project approvals and delivery: sequentially; in parallel; or integrated. Selecting which model to apply affects the application of natural justice and can influence the success of the project.

NATURAL JUSTICE

Morrison-Saunders and Early define natural justice as “the principle that a decision-maker must afford persons who will be adversely affected by the decision an opportunity to be heard”.¹ For the regulation of land and environmental impacts, this is taken to mean that the assessment process should include adequate notice and opportunity for persons affected by the project to object to or present an argument against a proposal.

In addition to providing the opportunity to be heard, it is also critical that the appropriate documentation has been provided to affected parties when they have this opportunity. This can be difficult to achieve, in particular for large infrastructure projects, where the design and procurement process progresses in parallel or after key approvals are obtained.

The application of natural justice to changes in design was challenged recently in the Victorian Supreme Court for the Caulfield to Dandenong Level Crossing Removal Project in *Lower Our Tracks Inc v Minister for Planning* (although this was not the central consideration of the case). In this case the design of the project was substantially changed (from below ground to above ground) through the procurement process. While in this case, the Court found that the project proponent had provided sufficient evidence of consultation on the design change², the fact this was questioned in Court demonstrates the risk to projects if natural justice is not adequately provided throughout project design.

INTEGRATING APPROVALS INTO PROJECT DELIVERY

Broadly, there are three models for integrating approvals into project delivery, being:

- **sequential procurement and approvals** – where procurement of the construction contractor follows from obtaining environmental and planning approvals (as was the case with Peninsula Link)
- **parallel procurement and approvals** – where procurement of the construction contractor occurs simultaneously with obtaining environmental and planning approvals (as was the case with East West Link)
- **integrated procurement and approvals** – where procurement of the construction contractor informs the environmental and planning approvals (as was the case with West Gate Tunnel).

¹ Angus Morrison-Saunders and Gerard Early, 'What is necessary to ensure natural justice in environmental impact assessment decision-making?' (2012) 26:1 *Impact Assessment and Project Appraisal* 29, 31.

² *Lower Our Tracks Inc v Minister for Planning* [2016] VSC 803, 136, 183.

Each of these processes presents different legal and projects risks. Table 1 provides a comparison of these models for procurement and approvals

Table 1: Comparison of the models for procurement and approvals

Model	Advantages	Disadvantages
Sequential procurement and approvals	<ul style="list-style-type: none"> • Tried and tested approach, accepted by construction market, regulatory stakeholders and the community • Limited approvals risk – greater certainty project would proceed • Limited scope for construction contractor variation due to approvals • Relatively short period between identification of a preferred construction contractor and commencement of works • Less risk of land acquisition impacting preferred construction sequencing 	<ul style="list-style-type: none"> • Longest lead time to commencing construction • No scope for construction market innovation to inform approvals • The community are shown a reference design, not a preferred construction contractor design during the approvals meaning there is no opportunity to comment on the final design • Risk of approval conditions requiring additional public comment on final design • Approvals may not allow preferred construction and/or operation • Comparative delayed completion of works and later benefits realisation
Parallel procurement and approvals	<ul style="list-style-type: none"> • Reduced lead time to commencement of construction • Some initial community views on the project from the approvals process can be conveyed to construction tenderers • Relatively short period between identification of a preferred construction contractor and commencement of works • Less risk of land acquisition impacted preferred construction sequencing 	<ul style="list-style-type: none"> • Public approvals process occurring simultaneously with tender – potential community perception risk • The community are shown a reference design, not a preferred construction contractor design meaning there is no opportunity to comment on the final design • Uncertainty of design leads to a more conservation regulatory assessment • Risk of approval conditions requiring additional public comment on final design • Risk of construction contractor price adjustments due to approvals provides only limited opportunity for construction tender innovation to inform approvals

Integrated procurement and approvals		<ul style="list-style-type: none"> • Risk that approvals may not allow for preferred construction and/or operation • Comparative delayed completion of the works and later benefits realisation
	<ul style="list-style-type: none"> • Significantly reduces lead time to commence construction • Earliest project completion and benefit realisation • Provides opportunity for tender innovation to inform approvals • Interactive tender process provides opportunity to highlight and address approvals issues early • Ability to share approvals risk with construction tenderers • Provides opportunity for construction contractor to inform and engage in public approvals process • Provides the community with greater certainty and transparency that the project subject to public exhibition and approval will be built • Reduces construction program risk by allowing early commencement of critical activities 	<ul style="list-style-type: none"> • Not previously undertaken in Victoria, so unfamiliar to regulatory stakeholders and the community • Perception that a decision has already been made that the project will proceed, in advance of the approvals process • Risk of construction contractor price adjustments due to changes from the public approvals process • Upfront investment in procurement is at risk if the project does not obtain approvals

CONCLUSION

Each of the models for procurement and approvals is legitimate and could be used for any given project. However, they have different implications for project risks such as legal challenge and schedule. The sequential and parallel approaches both rely on the community commenting on a reference design rather than the final design. It is only the integrated approach where the community has the opportunity to comment on the final design. However, this approach raises other risks such as increased constructor costs and the perception of approval prior to assessment.

Of these models, the integration of procurement and approvals provides that greatest opportunity to reduce overall schedule risk, greater opportunity for tender innovation, opportunity for the community and stakeholders to provide feedback on the preferred tender design during the approvals process, and approvals certainty (for regulators, the community and the preferred construction contractor). This approach is being applied

currently to the West Gate Tunnel project. If this is successful there is potential for this approach to be applied more broadly to infrastructure projects in Victoria.

Bibliography

Lower Our Tracks Inc v Minister for Planning [2016] VSC 803

Morrison-Saunders, Angus and Early, Gerard, 'What is necessary to ensure natural justice in environmental impact assessment decision-making?' (2012) 26:1 *Impact Assessment and Project Appraisal*

ARUP



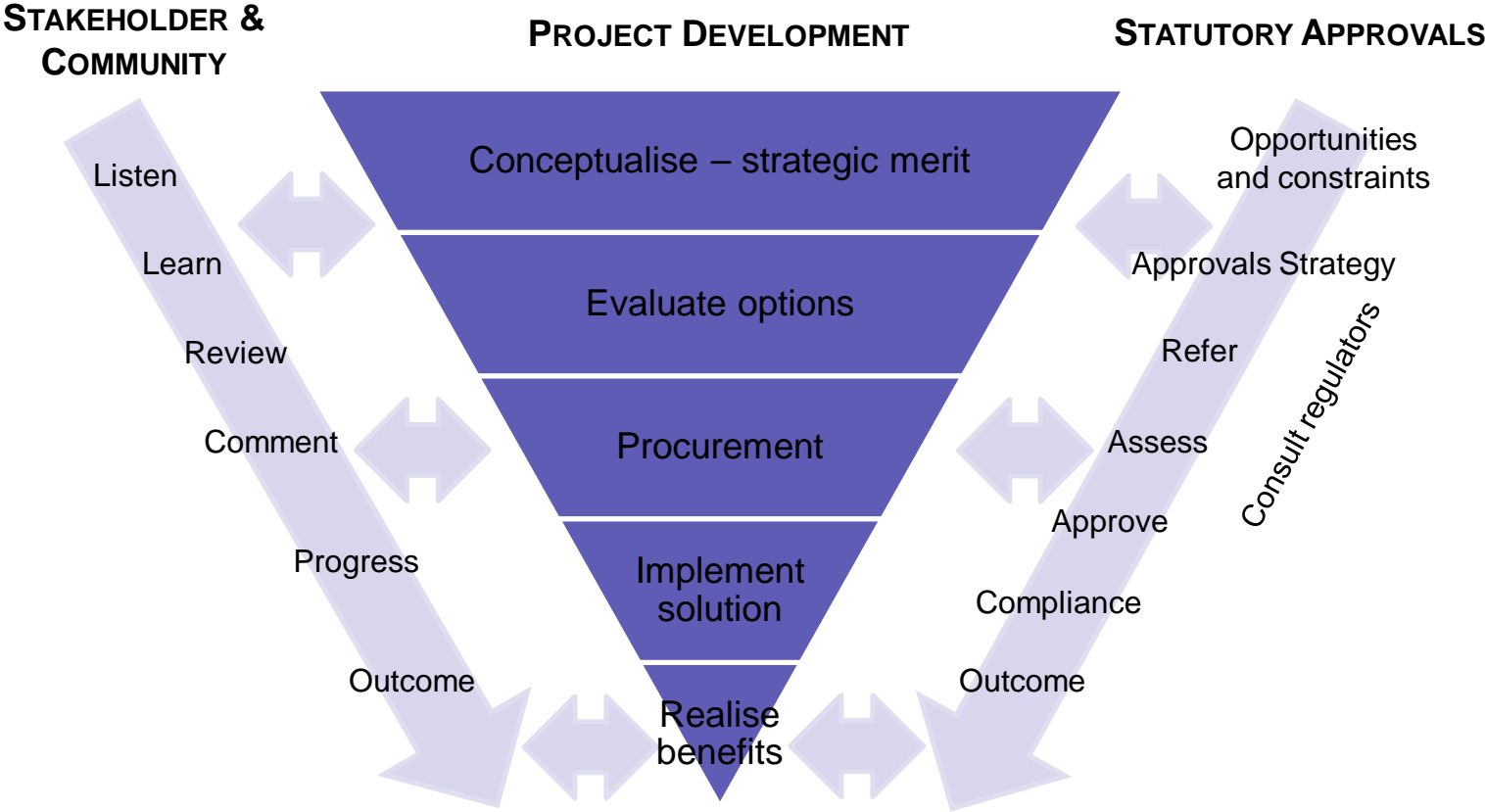
**Tension between natural justice and
project delivery – integrating approvals to
achieve better outcomes**

Erin Pears and Mat Peel

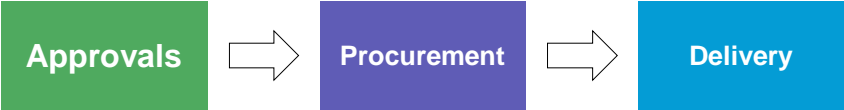




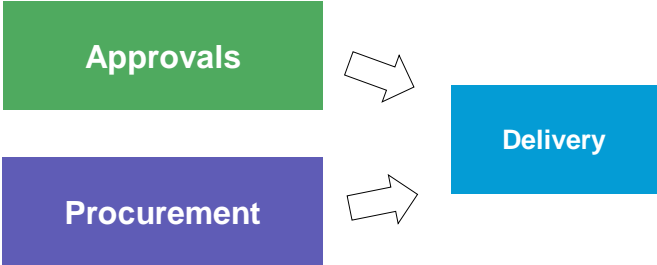
Decision makers must afford persons who will be adversely affected by a decision an opportunity to be heard



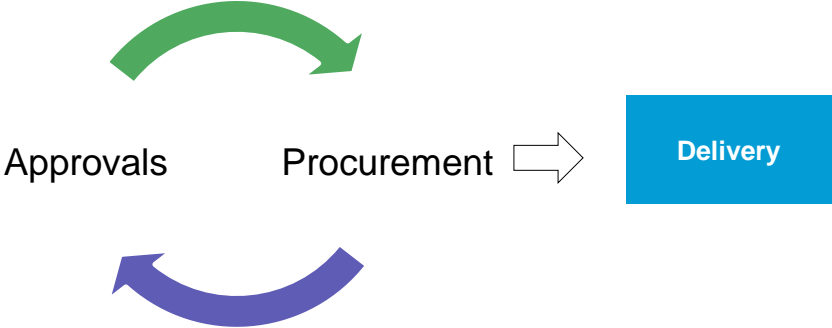
1. Sequential procurement and approvals



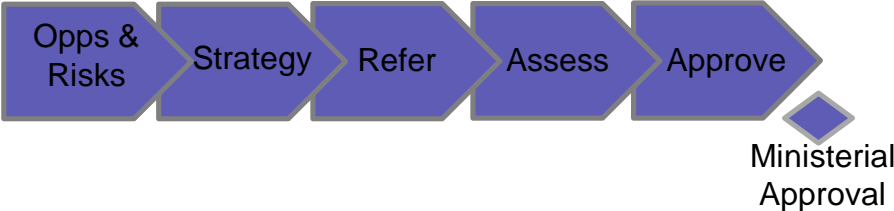
2. Parallel procurement and approvals



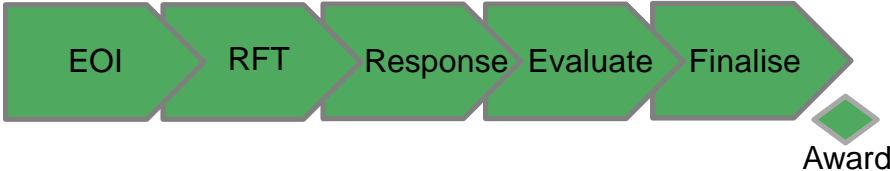
3. Integrated procurement and approvals



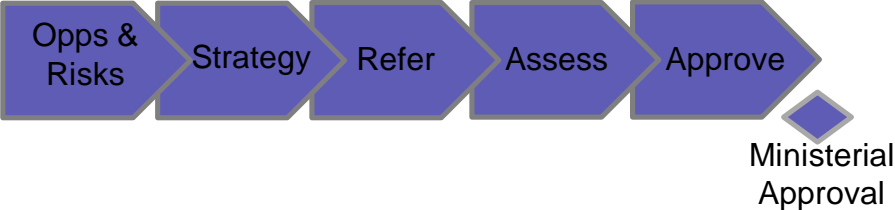
STATUTORY APPROVALS



PROJECT DEVELOPMENT – ENGAGE MARKET

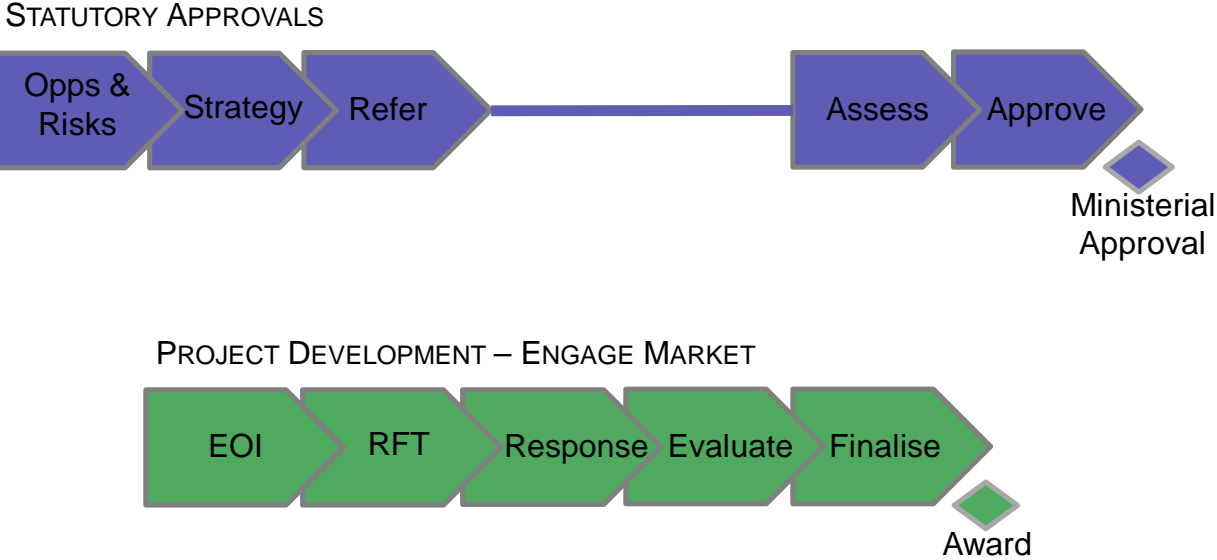


STATUTORY APPROVALS



PROJECT DEVELOPMENT – ENGAGE MARKET







NEWS

East West Link: Third Melbourne council launches court action against East West Link tunnel

Updated Thu 16 Oct 2014, 7:42pm

AUGUST 31 2016

SAVI

Residents launch Supreme Court bid to derail Melbourne sky rail



Questions?
