

What is Necessary to Ensure Natural Justice for Community Participants in Sustainability Decision-making?

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Abstract

International practices for environmental and sustainability decision-making with respect to expectations to uphold natural justice or procedural fairness through full engagement of public stakeholders concerning all information used to guide decisions are reviewed. Best practice principles that emerge from a literature review and survey of international practitioners from the impact assessment field are evaluated. The concept of natural justice relates to a duty to involve those affected by new development proposals to be involved in approval decision-making through meaningful consultation and participation. This includes fully explaining the reasons for a decision that has been made and reasonable provisions for appealing against decisions taken. Typically, natural justice is not something that is prescribed in law but emerges from practice and customs. The more advanced systems of impact assessment generally provide for a high level of transparency, accountability and public participation in decision-making. In systems where the advice to the decision-maker is available for public comment, there is a greater expectation for full disclosure of information relevant to decision-making. The nature of the legal direction provided for the basis of decision-making has direct bearing on the level of public involvement in decision-making. Decision-making by elected ministers is generally less transparent than that at the level of government agencies, and expectations of practitioners concerning natural justice varies accordingly. Balance has to be struck between efficiency of process and provision of endless opportunity for public participation in decision-making – provision of appeal rights along with full disclosure of the reasons behind a decision are important here. Ultimately some judgement is required by decision-makers to decide when and how much information should be disclosed to stakeholders on a case by case basis, realising however, that a fair process is ultimately likely to lead to the most sustainable outcome and in the most efficient way.

Keywords: Natural Justice, Procedural Fairness, Public Participation, Community Participation, Legal Frameworks, Sustainability Decision-making

1. Introduction

A key component of the environment and sustainability agenda concerns the rights of the public to be involved in government decision-making for development proposals that affect the lives or interests of those citizens. In the *Rio Declaration on Environment and Development* signed off at the United Nations Earth Summit in 1992, this was provided for in Principle 10 where it was stated that: 'environmental issues are best handled with the participation of all concerned citizens, at the relevant level' and that 'each individual shall have... the opportunity to participate in decision-making processes'. Principle 10 also establishes that governments 'shall facilitate and encourage public awareness and participation by making information widely available' and provide 'effective access to judicial and administrative proceedings, including redress and remedy' (United Nations 1992). Additionally, Principle 22 provides for the 'effective participation' of 'indigenous people and their communities and other local communities' in the 'achievement of sustainable development'. In legal terms, the effective and equitable involvement of the public in decision-making processes is related to the provision of natural justice or procedural fairness.

The starting point for this paper involved a recent government decision under environmental impact assessment (EIA) procedures in Australia in which refusal by the Minister for the Environment to disclose information utilised in the final approval decision process led to community condemnation (Hannan 2006). Specifically, the Minister's decision to reject the development proposal in question, (an outcome contrary to the publicly available advice provided by the Minister's agency conducting the assessment), was based upon new information obtained during this final step in the EIA process. Failure to publicly disclose this new information was seen as a breach of natural justice by some EIA stakeholders involved.

This paper presents a review of EIA practice with respect to the treatment of new information entering the process near or during the approval decision-making point. Specifically, it considers the expectations and responsibilities of government decision-makers to inform proponents and public stakeholders about significant new information prior to decisions being made. The principal research question was: Prior to the final approval decision, what should be the status of information that has been generated outside the publicly available assessment process? Sub-issues examined in answering this question included consideration of the obligations of decision-makers to disclose information to relevant stakeholders prior to or following approval decision-making as well as any implications of disclosure with respect to timeliness, efficiency and certainty of EIA process.

Information for this review was drawn from a literature review which included legislation, EIA procedural information, international EIA texts and articles and court cases. Much of this material was identified or sourced from an informal survey of international EIA practitioners. The survey was conducted principally by emailing select people (chosen for their known expertise in relevant aspects of EIA) the research questions and issues outlined previously to be answered with respect to their own jurisdiction of EIA practice. In some cases this led to follow-up communication to explore their answers further. Practitioners from jurisdictions generally recognised internationally as having relatively advanced EIA systems and mainly in English speaking countries (i.e. so that relevant legislation or EIA guidelines obtained could be understood by the author) were targeted. In total, 45 practitioners representing 23 individual EIA jurisdictions and 17 countries responded, although owing to space considerations not all jurisdictions have been included in this paper. Wherever possible, printed materials were used to inform this research. However, the insights of practitioners sometimes provided viewpoints not available in printed materials. These viewpoints are acknowledged where used in this paper, although names of practitioners have not been included. The author accepts full responsibility for any mis-interpretations or inaccuracies concerning EIA practice in the various jurisdictions discussed.

An extensive body of EIA literature has emerged during 35 years of experience worldwide. EIA is currently practiced at a national level in more than 100 countries world-wide not to mention the many hundreds of other jurisdictions such as states or provinces, municipalities, national and multilateral agencies and corporations that have adopted their own EIA processes (Gibson et al 2005). Consequently, the review of experience presented in this report is not intended to be comprehensive but rather focuses on the more advanced and experienced (and well documented) jurisdictions.

The review was undertaken in light of best practice principles for public engagement in decision-making and consideration of natural justice. In doing so, distinction was made between the assessment stages of EIA (i.e. when advice is being formulated and is subsequently presented to decision-makers for their consideration) and the actual approval stage itself (i.e. when the decision-maker either accepts or rejects a proposal). Although the focus has been on EIA decision-making, the principles involved and lessons learnt are equally attributable to other sustainability orientated decision-making processes.

2. The meaning of natural justice or procedural fairness

The two terms natural justice/procedural fairness can generally be considered to be synonymous and are used as such in this paper. Hunter and Allan (undated) state that the 'expression natural justice relates to a

general concept rather than a specific rule, and thus there is no precise definition of the term. The essence of the concept is simply a general notion of procedural fairness'.

In Australia, the federal level *Administrative Decisions (Judicial Review) Act 1977* (Cth) provides a requirement that administrators observe the principle of natural justice (ALRC 2002: 14.12). According to the definition given in s3, this Act would apply to EIA decision-making in Australia by federal and state level authorities. A 'breach of the rules of natural justice' (s5(a)) that has occurred in the making of a decision to which the Act applies provides a legitimate ground for any person to apply to the relevant court for an order of review of that decision. Despite this obviously important decision review function, the Act does not specify what actually constitutes natural justice; instead this is derived from common law (ALRC 2002: 14.13). This appears to be the case for many other countries too.

In contrast, in the Republic of South Africa, the *Promotion of Administrative Justice Act 2000* clearly specifies what constitutes a fair administrative procedure. An administrator must give an affected person (s3(2)):

- Adequate notice of the nature and purpose of the proposed administrative action;
- A reasonable opportunity to make representations;
- A clear statement of the administrative action;
- Adequate notice of any right of review or internal appeals, where applicable; and
- Adequate notice of the right to request reasons for the administrative action.

Similarly, and more directly specific to the focus of this paper, the *Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters 1998* (Available: <http://www.unece.org/env/pp/treatytext.htm> - accessed 10 July 2006) provides guidance to countries within the European Union concerning the role and importance of public participation in decision-making. Hartley and Wood (2005) provide an analysis of how public participation in the UK system for EIA implements the Aarhus Convention principles. EIA practitioners from the Netherlands, Hungary and the UK participating in this research emphasised the importance of the convention to EIA practice within Europe.

Several Articles within the Aarhus Convention are particularly relevant. Article 5 requires public authorities to be transparent in terms of making environmental information available to the public and ensuring that it is effectively accessible. Definition of what is meant by 'public' appears in Article 2 as 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making'; thus disclosure of information should effectively be open to any third party stakeholder. Article 6 provides for early, adequate, timely and effective participation of the public in environmental decision-making procedures. This includes access to information 'free of charge and as soon as it becomes available', that decision makers will take due account of the outcome of the public participation and the decision outcome will be disclosed publicly including the 'text of the decision along with the reasons and considerations on which the decision is based'. Article 9 concerns 'access to justice' and provides for the public to have access to a review procedure should they consider that their request for information has been ignored or wrongfully refused. These provisions clearly establish important procedures which conform closely with 'normal' EIA processes concerning public disclosure of information and decisions. However, expectations for the treatment of 'new' information at the decision-making point is not specified. The provisions of the Aarhus Convention are thus open to some level of interpretation with respect to this issue. The Convention may also be implemented differently in signatory countries because it is intended to be enacted 'within the framework of [a signatory country's] national legislation' (Article 4).

The legal doctrine underpinning procedural fairness has two elements: decisions by public officials should be made in an unbiased manner; and those affected by such decisions should be given an opportunity to participate in decisions that affect them (ALRC 2002: 14.13). A recent Australian court case, *Anderson and Another v Director-General, Department of Environment and Conservation and*

Others [2006 NSW LEC 12 – 144 LGERA pp43-95] (hereafter *Anderson v Dept Environment*), established that 'the requirements of procedural fairness cannot be departed from by a decision-maker' (s163). A breach of this (e.g. in an EIA approval) would be grounds for appeal to revoke that decision.

An obligation to accord procedural fairness may arise in one of three ways (*Country Energy v Williams 2005* – in *Anderson v Dept Environment*, s139): (a) the express terms of, or implication derived from, a statute; (b) a public statement or practice adopted by the decision-maker; or (c) an express promise made to, or arrangement with, the person affected. Point (a) is the obvious starting place for considering the expectations for procedural fairness in EIA, by reviewing individual EIA statutes and regulations. Point (b) is also relevant as statutes may not specify exactly what steps are to be taken and specific procedures may emerge through practice over time which are compliant with the legal framework, but not specifically identified within that framework. The survey of EIA practitioners was important here. Point (c) relates to individual circumstances and is not further considered further here.

In the Aarhus Convention mentioned previously, the type of person owed natural justice in environmental decision-making was broadly defined (i.e. effectively any third party stakeholder). Where this is not defined in statute, a person must be able to show that they are affected in a particular way by the making of the decision, that they have 'at the very least a "legitimate expectation" in relation to that decision' (*Anderson v Dept Environment* (s140). This legitimate expectation may be created by (*Anderson v Dept Environment*, s140):

- the giving of an assurance;
- the existence of a regular practice;
- the consequences of denial of the benefit to which the expectation relates; or
- the satisfaction of statutory conditions;

and these factors equate strongly with the three points outlined previously.

Should a decision-maker propose to make a decision inconsistent with a legitimate expectation, procedural fairness requires that the 'persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course' (*Minister for Immigration and Ethnic Affairs v Teoh 1995* cited in *Anderson v Dept Environment*, s163). This position implies that in EIA (or other) decision-making, if new information is not going to be shared with the proponent or public stakeholders in advance of the making of a decision (and where there is an expectation that this would be the case), then they at least have to be notified of this and given the opportunity to argue a case for having the information provided to them.

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3. International principles for public participation in EIA

Two basic principles of best practice for involving the public in EIA decision-making are that EIA should be *participative* (with appropriate opportunities to inform and involve interested publics and to address their concerns in decision-making) and *transparent* (ensuring public access to information and identifying the factors that are to be taken into account in decision-making) (IAIA & IEA 1999). Similar provisions can be found in Sadler (1996) and the Commonwealth Environmental Protection Agency (undated). However the question of *when* this access should occur remains unanswered.

Vanclay (2003) provides similar principles with respect to the practice of social impact assessment (SIA), but makes some further distinctions. A core value of SIA he identifies is that: 'People have a right to be involved in the decision making about the planned interventions that will affect their lives'. Further on he maintains that: 'the opinions and views of experts should not be the sole consideration in decisions about planned interventions' and that 'decision making should be just, fair and transparent, and decision makers should be accountable for their decisions'. In relation to this last point, Asimow (1997) notes that a decision-maker who is compelled to give (written) reasons must at least consider the appropriate factors and produce an apparently justified decision. Furthermore, a statement of reasons helps persons

disappointed by the decision evaluate whether to seek judicial review, and it facilitates judicial scrutiny of the decision.

The Australian and New Zealand Environment and Conservation Council (ANZECC 1991) established principles for key stakeholders in EIA individually. For *assessing authorities*, they suggest that environmental advice should be provided (publicly) on information provided by the proponent and the public during EIA, and that they: 'should seek expert advice on any relevant aspects of significant environmental issues' (p6). This is a key mechanism for how new information can enter the assessment and approval stages of EIA. They further state that the *public*: 'should have timely access to information about proposals ... in a form suitable to enable informed involvement in the EIA process...' (p7) and that a key principle for *government* is to: 'ensure assessment reports are available to the public before or at the time of decision-making' (ANZECC 1991, p8). Similarly, Kinhill Engineers (1994) recommended that an EIA process should ensure there is easy access to 'all information reports and decision documents'. The question that remains is when (and to a lesser extent, how) this access is provided for; i.e. whether information affecting a decision should be put into the public domain *before* a decision is made was not specified in this advice.

Commonwealth Environmental Protection Agency (undated, p16) advocate the principle of 'integrity' which can be achieved in part through having an open, transparent system with clearly defined objectives and processes and realistic opportunities for participation by stakeholders. Further they state that: 'integrity also requires that decisions are based on the best available information'. To satisfy this last point, it clearly would be appropriate for decision-makers to incorporate any relevant new information into the EIA approval process; however, this might be at odds with expectations to devolve such information to the public in accordance with the public participation principles noted previously. This may be especially problematic in jurisdictions where decision-makers are bound to provide a decision within a fixed time-frame, because public consultation may adversely affect the cost and length of EIA decision-making processes (Administrative Review Council 1993, p14). Also relevant here is the view that 'every decision-making process should take account of all interests that might be affected by that process' (Administrative Review Council 1993, p13). If taken to the extreme, implementation of this principle may demand considerable investment of time and resources with respect to public engagement expectations.

4. Public participation in EIA and procedural fairness

The public participation principles for EIA clearly strongly correlate with the legal doctrine of procedural fairness discussed previously. Lawrence (2003, p401-402) explicitly makes the link when addressing the issue of how to make EIAs more ethical as follows:

Procedural fairness is concerned with the fairness of the EIA process. It includes both how consultation with interested and affected parties is undertaken and how choices are made. Procedural fairness principles and standards can pertain to the rights of participants, to the duties of the proponent and EIA team members, and to the responsibilities of process participants.

All interested and affected parties have a right to participate effectively in the EIA process. They may also see it as their right to be involved in designing and adapting the EIA process. They are likely to be particularly concerned with timely access to all relevant information and analysis and to timely (e.g. prior to major decisions) and adequate (e.g. sufficient time to formulate, review, and respond) involvement provisions. Rights also concern the ground rules for participating in and withdrawing from the process. They can extend to how participants are treated and to how their knowledge is incorporated into the process.

Importantly, he notes that there are no fixed rules for determining exactly what constitutes procedural fairness in EIA that can be prescribed for all practice. Indeed he cautions against prescriptive regulation on the basis that 'there is danger in too much precision at the regulatory level' (Lawrence 2003, p408) due to variance in interested or affected parties among different proposals and settings. As he further articulates (Lawrence 2003, p408):

EIA processes frequently involve a negotiation of procedural and distributional rights and duties. These negotiations occur both between proponents and regulators and among interested and affected parties. It could be worthwhile, in many cases, to formalize such negotiations. In this way, confusion can be minimized and conflict contained.

Consequently he advocates an adaptive, flexible and collaborative approach involving all interested and potentially affected parties, as opposed to prescribing the substance of the concept across all assessments. and thus the 'rules' of procedural fairness are 'based on bargaining to reach consensus' (Lawrence 2003, p413). Previously, Davies (1989) similarly cautioned against adopting a rigid approach to public participation procedures on the grounds that it 'may result in a pro forma compliance with procedural requirements but provides little ... to the development of informed consent'.

5. Public participation in EIA decision making

In a generic EIA process, there is at least one opportunity for public participation when the proponent's environmental impact statement (EIS) is subject to public review which occurs prior to approval decision-making. This is the minimum position for public participation. In more advanced systems (e.g. such as in Canada and Australia), there may be other opportunities for public involvement including during screening and scoping and during EIS preparation. In some jurisdictions, the proponent may be required to respond to comments received on an EIS and there may be opportunity for the public to comment on the assessment advice put forward to decision-makers prior to a decision being made and/or the opportunity to appeal against the decision that is arrived at. Practice varies according to the legal framework and customs within a given jurisdiction.

Fundamentally, however, public participation is regarded as proper and fair conduct of democratic government in public decision-making activities (Shepherd and Bowler 1997) and it is a fundamental component of the EIA process (Hartley and Wood 2005). Public consultation can help to ensure the quality, comprehensiveness and effectiveness of EIA leading to better decisions which taken into consideration the views of stakeholders (Glasson et al 2005). Roberts (1995) suggests that most decision-making processes benefit from some degree of public involvement. The final decision will generally be 'better' when local knowledge and values are included by ensuring that the decision maker is fully informed of the potential impact of the decision (Administrative Review Council 1993) and when expert knowledge is publicly examined by local and interested stakeholders (Shepherd and Bowler 1997). Public participation in EIA not only informs and educates the public about proposals and their potential impacts, but also creates channels 'for the type of open, honest two-way communication which has been shown to help avoid worst case confrontations' (Roberts 1995, p225). Thus a project will carry more legitimacy and less hostility if potentially affected parties can participate in and influence the decision-making process (Shepherd and Bowler 1997).

The scope and role of public participation in EIA has evolved over time, along with people's expectations for the process. In the early years (the first EIA process commenced in the US in 1970), EIA practice was largely technical and scientific in nature (Roberts 1995) and the focus was principally related to biophysical issues as well as the economic growth issues associated with development activities giving rise to EIA in the first place. Increasing demands for public participation in EIA has led to a broadening of scope to include social concerns and the emergence of forms of assessment focussed on social issues (e.g. SIA, health impact assessment). Not surprisingly this combination of content and procedural evolution has ramifications for practice and what might reasonably be expected of current EIA processes; especially as interest in 'sustainability assessment' grows.

Gibson et al (2005, p23) suggest that EIA in concept and practice has moved or is moving towards being 'more open and participatory (not just proponents, government officials and experts)' and 'more closely monitored (by the courts, informed civil society bodies and government auditors watching responses to assessment obligations...)'. Similarly, Glasson et al (2005, p157) noted that while the British system of decision-making has traditionally been characterised by 'administrative discretion and secrecy, with

limited public input', there have been recent moves towards 'greater public participation in decision-making, and especially towards greater public access to information'.

Gibson et al (2005, p22) identify four stages in the development from environmental regulations to advanced environmental assessment whereby Stage 4 entails 'integrated planning and decision-making for sustainability, addressing policies and programmes as well as projects, cumulative and global effects, with review and decision processes: devoted to empowering the public'. This stage is characteristic of the more progressive or advanced EIA systems. While public involvement in EIA processes is normal practice worldwide (with some minor exceptions), the minimum position is the ability to comment on the proponent's EIS. Wood (2003, p223) suggests that most jurisdictions forbid the taking of a decision on the action until an EIS has been subjected to review and that this is a fundamental requirement of any EIA system. Petts (1999) notes that participation in the making of the decision is less common. Not all jurisdictions provide for the evaluation of the EIS by officials to be made publicly available before the final decision is made. More typically the degree of public participation at decision-making is 'notification' (Petts 1999, p157).

In reality, many authorisation decisions involving EIA are usually taken behind closed doors (Sadler 1996, Glasson 1999) which means that it is not possible to fully understand the decision-making process. Wood (2003, pp223-224) establishes a number of tests for evaluating the effectiveness of decision-making in a given EIA jurisdiction, many of which correspond with openness and public participation principles. Firstly, for an EIA approval decision to be seen to be fair it is obviously preferable that it should, in general, be made by a body other than the proponent; and there should be some guidance provided for the decision-making process. Further, any summary evaluation prepared for decision-makers by their advisers should be made public as should the decision itself and the reasons for it. Some jurisdictions allow for consultation and participation once the evaluation has been prepared for decision-makers but before an approval decision has been reached. Petts (1999) and Wood (2003) both note that the right of appeal against an EIA decision increases accountability and public confidence in the EIA process and its outcomes.

Wood (2003, p225) derived a series of guiding criteria for evaluating EIA decision-making – those with a public participation and/or procedural fairness element are:

- Must the decision be postponed until the EIA report has been prepared and reviewed?
- Is any summary evaluation prepared prior to decision making made public?
- Must the EIA report, and comments upon it, be used to frame the conditions attached to any consent?
- Are the decision, the reasons for it, and the conditions attached published?
- Must these reasons include an explanation of how the EIA report and review influenced the decision?
- Does published guidance on the factors to be considered in the decision exist?
- Is consultation and participation required in decision-making?
- Is there a right of appeal against decisions?

To satisfy what would be considered best practice, the answer to each of these questions would be 'yes' when applied to a given EIA process. Thus the notion of best practice EIA accords strongly with the principles of natural justice.

6. Treatment of new information in EIA: international examples

Notwithstanding the importance of public participation throughout the EIA process, the emphasis of this paper concerns what happens following release of an EIS through to granting of an approval. A number of discrete steps may occur here. For example, proponents may be required to respond to public submissions received or there may be provision for a Panel hearing in addition to simple provision of written comments on the EIS. Often, once the formal public inputs have occurred, an assessment report will be prepared by a government agency which is presented to decision-makers for consideration. The

assessment report may be subject to public review or disclosure prior to approval decision-making, which in turn may be subject to public appeals.

Generally speaking the more developed countries with the greatest length of experience in EIA practice have come the furthest on this evolutionary path of EIA towards greater openness and participation. The concept of natural justice for jurisdictions in these countries tend to expect all information used in EIA decision-making to be within the public domain prior to decisions being made. At the other end of the spectrum, generally lesser developed countries have EIA processes with minimal or no public involvement in the approval decision-making step. The purpose of this section is to highlight some of the differences apparent across international EIA practice, based on the individual steps up to and including the approval decision.

6.1 Review panels

Some jurisdictions provide for public hearings or review panels in which comments are received by the assessment agency in addition to public submissions on an EIS. Where review panels are used, there seems to be an expectation that all information presented to the panel will be publicly available. In Canada this is clearly specified in sections 33-35 of the *Canadian Environmental Assessment Act 1992* (CEAA). In New Zealand, section 42A of the *Resource Management Act 1991* (RMA) specifies that any report presented to a hearing must be sent to the proponent and 'any person who made a submission and stated they wished to be heard at the hearing'. The only exceptions to this arise if harm would be caused to the witness, proponent or the environment by disclosure of the information. Walsh (1988 p30), Ministry for the Environment (2001, p32) and Hunter and Allan (undated) all note that if a review panel meets privately with certain groups of participants (the proponent, or government agencies or technical experts on a certain subject) or receives submissions after completion of the public hearings, then these practices would violate the principle of fairness as participants do not have an opportunity to question the material discussed in the private meeting or received after the hearings. Thus there should be no opportunity for 'new' information to enter a panel hearing process without full public disclosure.

Similarly, there is an expectation that the findings of a review panel (i.e. assessment advice made to the EIA decision-maker) will be publicly disclosed. All five Canadian EIA practitioners consulted in this research were emphatic that there must be full disclosure of information utilised in the assessment stage of EIA; or put another way, that the advice or recommendations put to EIA decision-makers must only be based upon information presented during the public hearing process or in the proponent's EIS previously. Should new information come to light following the public hearing process but prior to the review panel preparing its assessment of the proposal, it should either be ignored by the panel, distributed to all stakeholders involved in the hearing process or the panel process should be re-opened for a repeat round of consultation and hearings. Thus, as pointed out by one practitioner from New Zealand, a test of significance would have to be applied; if substantive new issues are raised, then the process should be adjourned and there could be grounds for starting the public review process afresh. In New Zealand hearing commissioners have the power to adjourn the process.

6.2 Assessment report/draft decision

Following the public review of an EIS or review panel process, an assessment report by the relevant government agency will be prepared and presented to the decision-maker. In some jurisdictions this is referred to as a draft decision or a final EIS. Generally, there is an expectation that this assessment report will be publicly disclosed, if not before the decision is made then at least after the decision is announced; however, practice varies considerably around the world.

One universal characteristic of the assessment report is that it must be based only on information presented in the EIS, public submissions or any proponent response or hearings (i.e. in the public EIA process to date). Care must be taken to take into account all relevant matters pertaining to the EIA and not

to take into account extraneous matters. This point was mentioned by numerous EIA practitioners (e.g. from the Netherlands, US, Canada and New Zealand) and is reiterated in Hunter and Allan (undated, p30), Quality Planning (2006). In some jurisdictions, there is even a requirement that public submissions must be taken into account in any assessment report (and sometimes even in the final approval decision itself). In the United Kingdom, this has been confirmed in case law (e.g. summarised in *Berkeley v. Secretary of State for the Environment and Another 2000* [3 W.L.R. 420]). Another British case further establishes that conditions cannot be placed on a planning approval for an EIA project that are intended to mitigate impacts unless those mitigation measures have been subject to the same formal public consultation process as the original EIS and that this is also true of any 'further information' that is provided by the project proponent that is intended to 'complete' the EIS (*R (on the application of Lebus and others) v South Cambridgeshire District Council 2002* [EWHC 2009]).

Similar court tests have occurred in South Africa. For example, in *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs & Tourism and Eskom Holdings Limited 2005* [HCSA 7653/03], a successful appeal to the Cape Town High Court was made by the non-government environmental group Earthlife Africa in 2005 concerning the EIA for a nuclear reactor proposal in which a final EIS (equivalent to an assessment report) produced after receiving public submissions on a draft differed substantially from the original, however no opportunity was given to interested parties to comment on the new report (McDaid et al 2005). The court ruling made two important conclusions. Firstly, if a new matter is raised in a final EIS after a draft document has been circulated for public comment, then interested parties should be allowed to comment on the final document. In the words of the judge:

The question for decision can therefore be narrowed down to an enquiry whether it was procedurally fair to take administrative action based on 'substantially different' new matter on which interested parties have not had an opportunity to comment. ... fairness requires that an interested party ought to be afforded an opportunity first to comment on such new matter before a decision is made' [*Earthlife*, 59-60]

Secondly, the public comments received should be placed before the decision-maker in an accurate summary and the decision-maker must consider them (McDaid et al 2005).

In Western Australia, the assessment report prepared by the Environmental Protection Authority (EPA) is a public document and subject to third party appeals (Morrison-Saunders and Bailey 2000). During the appeals process, the Appeals Convenor consults with appellants during the consideration of the appeal. Where there are a large number of appellants, this may be through joint meetings or similar processes. The Appeals Convenor also consults the EPA, the proponent and any other person, authority or group with a special interest in the proposal (Office of the Appeals Convenor, undated). Thus there is plenty of opportunity for 'new' information to enter the process. However, the Appeals Convenor will normally share this information with the affected or interested stakeholders and obtain their advice or views accordingly so that natural justice principles are upheld.

In the Netherlands, the competent authority prepares a draft decision which is released for public review at the same time as the proponent's EIS (Ministry of Housing, Spatial Planning and Environment, undated). In New Zealand (sections 148-149 of the RMA) and the Australian state of Tasmania (sections 22-23 of the *State Policies and Project Act 1993*), a draft decision is required for proposals of national/state significance which is subject to public review and comment prior to final decision-making. This contrasts with the national EIA system operating in Australia under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC) in which the assessment report prepared for the Minister by the Department of Environment and Heritage (s105 of EPBC) must be publicly available, but in practice the assessment advice is released publicly once the final decision is made rather than during the approval process itself.

Clearly the nuances of EIA practice varies from jurisdiction to jurisdiction. However, in general, it can be concluded with respect to the issue of natural justice, that an assessment report or draft decision prepared by a government agency is based on information presented during the publicly available process and is also publicly disclosed (even if this after the final decision has been announced).

6.3 Approval decision

In most jurisdictions, it would appear that final approval decision-making is the responsibility of elected government (e.g. the Minister for the environment portfolio or for the relevant competent authority undertaking an EIA) and here it appears that expectations for upholding natural justice with respect to the treatment of new information are less than for other parts of the EIA process. Some examples follow.

In Australia, under s131 the EPBC, the Minister for Environment must advise other relevant Ministers of the intended decision and invite them to provide comments relating to social, economic or environmental aspects of the proposal. The Minister for Environment may also seek further information for the approval decision (s132) and they are required to consider advice received from other Ministers mentioned previously along with the relevant environmental assessment information when making the approval decision (s133). Clearly this material could be new information, and while there is no requirement for the Minister to disclose this information to stakeholders *prior* to making the decision, it would generally be understood that the information would be disclosed along with the decision itself (s133). The EPBC does provide opportunity for judicial review of approval decisions (s487) by any person.

Similar provisions exist in New Zealand for decision-making under the RMA. Decision-makers are directed in what they must consider when considering an application, but some scope exists for new information to enter the process (s104), the decision and the reasons for the decision must be publicly disclosed (s113) and provision exists for the proponent or people who had made a decision only (i.e. not just any person) to appeal against a decision (s120). The resolution of appeals is equally a public process.

It was pointed out by one Canadian practitioner that in their country, the Responsible Authority, who ultimately advises their Minister on a proposal, may be subject to lobbying by stakeholders or may conduct its own further investigations of a proposal. These inputs to the EIA process may be beyond public knowledge except where Access to Information legislation provisions can be used to force access.

In South Africa, the Record of Decision discloses the basis for an approval decision. Subsequently, any person may appeal or apply for the review of a decision. While the potential exists for the Minister to incorporate new information either into the decision-making process or in resolving an appeal, the *Promotion of Access to Information Act 2000* can be invoked to ensure that public disclosure of this occurs at least after the decision or appeal outcome has been announced.

In contrast, in the UK, all information relative to the decision must be made available for public inspection five days before the decision is made. Coupled with the case law resolutions mentioned previously, it appears that there is no scope for new information to enter the decision-making process in the UK. A similar arrangement exists in the United States where the approving agency has to make its decision based on the Final EIS, and if it strays outside on an environmental matter, it is at risk of litigation. Information on environmental factors that may have been developed for an applicant or agency but not relied upon by the Lead Agency in the assessment document need not be made available to the public. Thus, all information must be made available to all interested parties prior to the final decision; however litigation is then limited to that information - in only very limited circumstances can additional information be presented to a court.

The pattern that appears to emerge from these examples is that full public disclosure of the basis of a decision is expected. In jurisdictions where the decision-making must be limited only to issues raised in the EIA process previously or otherwise publicly disclosed information, appeal rights tend to be limited to directly affected stakeholders. Where the decision is made at a political level and there is scope for new information to enter the process, there appears to be more likelihood for third party appeal provisions.

7. Conclusions: understanding EIA decision-making, public participation and procedural fairness

With respect to EIA practice (and other sustainability decision-making processes) the concept of natural justice relates to a duty to involve those affected by development proposals to meaningfully participate in the assessment and decision-making stages. This extends to fully explaining the reasons for a decision that has been made and reasonable provisions for appealing against decisions taken. Public participation in EIA has a long tradition and the more advanced systems generally provide for a high level of transparency, accountability and participation in the process. This public participation is designed essentially, however, to ensure all the relevant information is available for the decision-maker to consider rather than to provide a role for the public in the actual decision-making. Thus a distinction can be made between the roles of public participation in the assessment and approval stages of EIA.

In jurisdictions where the environmental assessment advice to the EIA decision-maker is available for public comment, there is a greater expectation for full disclosure of information relevant to decision-making. In contrast, decision-making at the political level is generally less transparent. The nature of the legal direction provided for the basis of EIA decision-making also has direct bearing on the level of public involvement in decision-making. Many jurisdictions enable decision-makers to withhold sensitive information from the public domain and there is no way of knowing whether such a provision is abused without first having access to the particular information in question and undertaking some test for reasonableness on it.

The treatment of 'new information' in EIA decision-making is not explicitly addressed by statutes for any of the EIA systems examined in this study and this issue typically becomes a 'grey area' that falls 'between the gaps' in regulation. Thus, the concept of natural justice needs to be determined or interpreted in a given context (i.e. what is acceptable in one jurisdiction may not be adequate in another owing to differences in legislative processes or expectations arising from customary practices).

Expectations for natural justice may vary according to the nature of the decision-maker itself. For example, a competent authority whose specific function is to conduct EIAs may attract higher expectations for public participation in EIA decision-making and the sharing of new information than where the final decision rests with a Minister and where the EIA documents are only one input to what is actually a political decision. This accords with a survey of EIA practitioners in Western Australia with regard to the role of scientific information in the EIA process which recorded significantly lower expectations for the use of science in approval decision-making relative to other steps in the process (Morrison-Saunders and Bailey 2003). The key reason for this was recognition of the political (as opposed to scientific) nature of Ministerial decision-making. A similar expectation would apply to the public disclosure and/or level of consultation concerning new information in EIA decision-making.

Differentiation of stakeholders is not so important with respect to the disclosure of new information in EIA decision-making as consideration of the significance of the information in terms of whether it will substantially change the nature of a proposal or directly affect whether or not the proposal should proceed. This generally conforms with the 'Project' perspective on the significance of environmental impacts advanced by Duinker and Beanlands (1986). The higher the significance of the new information, the greater the expectation to reopen public review processes in the name of natural justice. This is relevant to all EIA stakeholders, not just the proponent or previously involved members of the public.

In conclusion, the main purpose of this research was determine what should be the status of information generated outside the publicly available assessment process during EIA decision-making with respect to natural justice. Prior to the final approval decision,? There is no single 'correct' or agreed position for natural justice in EIA (or other sustainability related) decision-making and it is not something that is prescribed in law in all countries. Instead, expectations for natural justice need to be determined in reference to the customs established in a given jurisdiction. Balance has to be struck between efficiency of process and provision of endless opportunity for public participation in decision-making. The provision

of appeal rights along with full disclosure of the reasons behind a decision are important mechanisms here. Ultimately some judgement is required by decision-makers to decide when and how much information should be disclosed to stakeholders on a case by case basis, realising however, that a fair process is ultimately likely to lead to the best outcome and in the most efficient way.

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