

The Social Licence to Operate – opportunities and implications for practice

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Introduction

I want to explore Dr Field's proposition that non-adversarial dispute resolution offers some solutions to the challenges to legal service delivery in the 21st century. I will identify a concrete example of an evolving issue for industry that provides future practice opportunities for lawyers, particularly those who have expertise in ADR. I will explore this through the lens of the resources sector and the social licence to operate.

What is a social licence to operate?

The term social licence to operate distinguishes it from the various government licences, approvals and permits that any resources project must secure. There are various definitions. But here is some brief guidance that should suffice for the purposes of my comments:

“A social licence to operate refers to the ongoing acceptance and approval of a mining development by local community members and other stakeholders that can affect its profitability.”¹

The concept emerged within the mining industry in the mid-1990s, as a response to social risk.² That risk includes advocacy and litigation that might delay or defeat a project.

At the level of an individual project, the SLTO is rooted in beliefs, perceptions and opinions about the project.³ An SLTO is granted by the community, or more precisely, by a network of stakeholders, who are either affected by or could affect the project.

Using an example close to home, stakeholders in a Coal Seam Gas project in Southwest Qld would include landowners and local authorities, who may experience both the benefits and

¹ 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.

² Robert Boutilier and Ian Thomson, *Modelling and Measuring the Social License to Operate: Fruits of a Dialog Between Theory and Practice* (2011) Sociallicense <<https://sociallicense.com/publications/Modelling%20and%20Measuring%20the%20SLO.pdf>>.

³ *What Is the Social License?* Sociallicense <<https://sociallicense.com/definition.html>>.

adverse impacts of the project, and non-government organisations and community or environmental groups such as Lock the Gate Alliance, which can affect the project through their advocacy and activism.

It is intangible, and how to measure whether a project has an SLTO is vexed. That is particularly so, given some stakeholders may accept a project and others not.

What constitutes an SLTO, how to measure whether a project has an SLTO and how to achieve an SLTO are all the subject of debate, conjecture and research, particularly within the sustainable development sector.

Acceptance, at worst, and approval, at best, has always been important for a project. Its importance has increased in step with enhanced rights to participation in decision-making processes by community and indigenous peoples and greater transparency through rights to information. More recently, industry has actively engaged with the concept as an indicator of governance.

How significant is the SLTO for projects?

I consider SLTO is now a critical issue for the mining industry. There is a trend to entrenching the concept of an SLTO, which, I believe, is inexorable.

In its report on the Top 10 Business risks facing mining and metals in 2019-20, Ernst and Young identified Licence to Operate as the number 1 business risk, up from risk no 7 in the preceding year.⁴

The report states:

“The issue of licence to operate is now an issue that is broad with far-reaching implications... In the same way as safety, licence to operate needs to become part of a mining company’s DNA: the commitment and contribution to community, government, employees and the environment needs to span beyond [the] life of [the] mine.”⁵

This report is an influential expert assessment of industry risks.

⁴ Ernst & Young *Top 10 Business Risks Facing Mining and Metals in 2019-20* (2018) Ernst & Young <https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/mining-metals/mining-metals-pdfs/ey-top-10-business-risks-facing-mining-and-metals-in-2019-20.pdf> 2.

⁵ Ibid 5.

The assessment reflects the evolution in the use of the concept of SLTO. Last year, the Australian Stock Exchange issued a draft revision of its *Corporate Governance Principles and Recommendations*.⁶ Any ASX listed entity must provide a corporate governance statement demonstrating how they have followed these principles and recommendations. The Principles and Recommendations are also used as a governance benchmark for entities not listed with the ASX.

The draft fourth edition of the Principles and Recommendations contains the following amended principle:⁷

“a listed entity should instil and continually reinforce a culture across the organisation of acting lawfully, ethically and in a socially responsible manner.”

The proposed new commentary for that principle says that a listed entity’s SLTO is “one of its most valuable assets and that it can be lost or seriously damaged if the entity or its officers or employees are perceived to have acted unlawfully, unethically or in a socially irresponsible manner.”⁸

This proposal has certainly generated some controversy. The Chair of the Corporate Governance Council, Elizabeth Johnston, stated:

“It is wrong to label the consultation draft as the work of “left-wing activists” or “social engineers”. It is the work of those who invest in, raise capital from, and provide professional support for, the market... The materials in the consultation draft on “social licence to operate” appear to be the major cause of concern with some stakeholders. As a number have already pointed out in submissions, this issue can be addressed in different terms such as reputation, brand and trust. The Council will listen carefully to the concerns that have been raised about the term “social licence to operate” and consider how best to express and address this issue in the course of preparing the final version of the fourth edition.”⁹

⁶ Australia Securities Exchange *Corporate Governance Council’s Principles and Recommendations* (2018) Australian Securities Exchange <<https://www.asx.com.au/documents/asx-compliance/consultation-draft-cgc-4th-edition.pdf>>.

⁷ Ibid 2.

⁸ *Review of the ASX Corporate Governance Principles and Recommendations* (August 2018) Clayton Utz <<https://www.claytonutz.com/ArticleDocuments/178/Clayton-Utz-ASX-Corporate-Governance-Paper.pdf.aspx?Embed=Y>>.

⁹ ASX Corporate Governance Council, *Communique* (6 August 2018) ASX <<https://www.asx.com.au/documents/asx-compliance/cgc-communique-6august2018.pdf>> 1.

Despite the controversy, the focus of the ASX response is on how to take the concept into account, rather than on whether it should do so.

I regard the ASX draft principles and response as an important indication that the concept is both well-recognised and likely to be increasingly employed in assessing the corporate value.

Reflecting on cases before the Land Court involving objections to mining projects, I can observe that the SLTO has become relevant for our hearings. One factor the Court must consider in making its recommendation on mining related approvals is the past performance of the miner. In cases involving mine extensions, the past performance of the mine in the affected community will have significant implications for the hearing. A community that does not accept a mining operation will not be silent when the miner wants to extend their operation or change their conditions. Likewise, a miner who does not have a social licence to operate in one place is more likely to face opposition with a greenfield project. In these days of global communications and activism, individuals are more able to share their views and experiences to an interested audience.

The New Acland case is a recent illustration of this. The case involved an extension (Stage 3) of an existing mine. Stage 1 commenced in 2002 and Stage 2 in 2007. There were 421 submissions about the environmental authority to the mine. Ultimately, there were 27 objectors to the mining lease and 35 to the environmental authority. The hearing took 98 days, involving evidence from 65 people, 28 of whom were expert witnesses. There were 2,000 exhibits involving tens of thousands of pages of evidence and including complex computer modelling of both environmental and economic issues. The parties filed more than 2,000 pages of written submissions. The judgment was 459 pages long. It has been subject to judicial review. It was remitted to the Land Court for rehearing in a constrained way. The decision on re-hearing was published in November 2018. Now the judicial review decision is under appeal, and its outcome may result in further hearings.

A key issue in both the original hearing and the re-hearing was past performance and how the objectors were treated when they raised issues during earlier stages of the mine. It is a quintessential example of a mine that lacked a social licence to operate from its immediate neighbours when its owner applied to extend the mine.

In summary, then, I regard the social licence to operate as a critical issue for the resources sector. It is currently rated as the number 1 business risk, the ASX has identified it as a measure

of corporate governance and its existence (or absence) has a legacy for approvals of both existing and greenfield projects.

Why is the SLTO relevant to ADR practitioners?

To understand the relevance of SLTO for ADR practitioners, I have to delve a little deeper into the elements of an SLTO and how it might be secured. This chart¹⁰ provides an overview of relationships between concepts associated with an SLTO. This has been derived from social research, including a CSG operation in Qld impacting on numerous and various stakeholders.

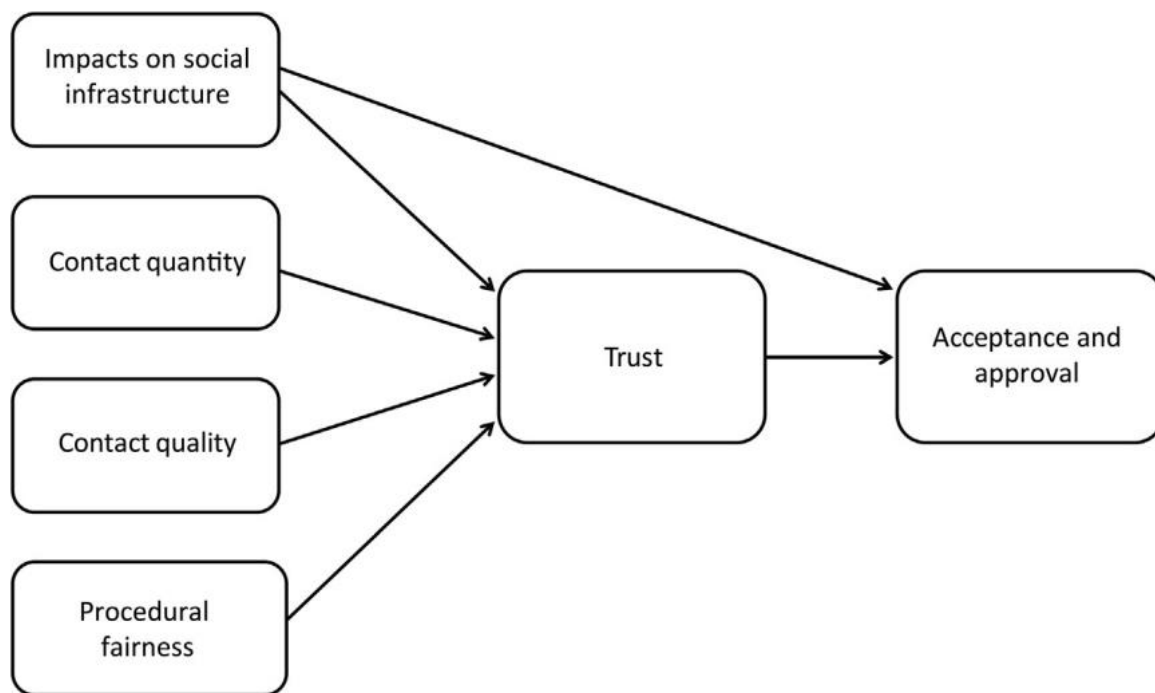


Fig. 1. Overview of relationships between concepts.

More relevant to ADR practitioners is which elements appear to be most important for securing an SLTO and the process for establishing those elements.

This research indicates:

- perception of impacts is the *weakest* factor influencing community members' trust in the mining company;
- contact quantity does not directly contribute to building trust;
- quality of contact is more important than frequency; and

¹⁰ Moffat and Zhang, above n 1, 62.

- procedural fairness is the *strongest* predictor of trust.

Procedural fairness refers to whether individuals perceive they have had a reasonable voice in decision-making process. Being able to actively participate in and being treated with respect during the process are key considerations.

The National Alternative Dispute Resolution Advisory Council (NADRAC) recognised the difficulty in qualitative measures of approval of dispute resolution processes such as satisfaction ratings. Satisfaction is a vague term, it describes a subjective experience, and relies on self-reporting.¹¹ This may be of more concern to legal scholars, who focus on the content and doctrine of procedural fairness than psychologists, who are concerned with the subjective experiences of litigants.¹²

Some research demonstrates the association between procedural fairness and decision acceptance is independent of the content of the decision itself. People care about procedural fairness more than winning or losing particular cases, which seems counterintuitive to a lawyer. There is a link between perceptions of fairness in process and expectations about a fair outcome. “[P]eople view fair procedures as a mechanism through which to obtain equitable outcomes—which is the goal in cases of conflict of interest.” People value fair procedures because they are perceived to ‘produce fair outcomes’.¹³ Nevertheless, it seems a fair process is valued independently of the outcome.

“Simply put, the empirical evidence suggests that individuals value fairness of process, separate and apart from outcome, because of the special message that fairness of process sends to its recipients: an authority who acts in a fair manner is an authority who is legitimate and cares about the dignity and social standing of those who stand before it.”¹⁴

When people experience procedural fairness, they are more likely to: accept decisions; comply with directions; feel satisfied with outcomes; and see authorities as legitimate.¹⁵

One researcher (Tyler) has argued the four primary factors for procedural fairness are:

¹¹ Kathy Mack, *Court Referral to ADR: Criteria and Research* (Australian Institute of Judicial Administration Incorporated, National Dispute Resolution Advisory Council, 2003) 20.

¹² Rebecca Hollander-Blumhoff, “The Psychology of Procedural Justice in the Federal Courts” (2011) 63 *Hastings Law Journal* 127, 130.

¹³ Kevin Burke and Steve Leben, “Procedural Fairness: A Key Ingredient in Public Satisfaction” (2007) 44 *Court Review* 4, 6.

¹⁴ Hollander-Blumhoff, above n 12, 138.

¹⁵ *Ibid* 129, 132, 134.

- how much voice and opportunity to be heard the party believes they have experienced;
- neutrality of the forum;
- trustworthiness of the decision maker; and
- the degree to which the individual has been treated with dignity and respect.¹⁶

Against that background, let me turn to the opportunities for ADR practitioners and the implications for your practice.

What are the opportunities?

A recent study of community consultation in the gasfields¹⁷ reveals discontent with the form of consultation that *provides information* rather than fosters *dialogue*.

Stakeholder engagement has long been the preserve of the communications industry. The focus of a communications strategy is to provide information to educate and inform, not to discuss, develop or negotiate operating conditions.

There is an important difference between a miner that informs a community how it will manage impacts and a miner that develops those strategies collaboratively with the community. Strategic collaboration to minimise adverse impacts and maximise benefits is one indicator of miner with an SLTO.

ADR is a comfortable vehicle to use in travelling the path to an SLTO. In mediations, in particular, dialogue is the foundation for shifting perceptions, building relationships, trust and consensus. As such, an ADR practitioner is well-placed to assist industry to secure an SLTO.

The trend to use ADR in this way is evident already in the requirement for pre-filing ADR for access for petroleum tenures and mining exploration. However, that is well down the track in project development and not what I am talking about. What I am indicating is an opportunity to use ADR at a much earlier stage and on a community wide basis.

¹⁶ Tom Tyler, "Social Justice: Outcome and Procedure" (2000) 35(2) *International Journal of Psychology* 117, 121.

¹⁷ Bríd Walsh, Sien van der Plank, and Paul Behrens, "The Effect of Community Consultation on Perceptions of a Proposed Mine" (2017) 51 *Resources Policy* 163, 168-9.

What are some implications for practice?

This use of ADR is a very different type of practice to dispute-centred ADR. If undertaken in a timely way it will precede conflict and may reduce or confine it. The challenge is to put ADR on the table at a much earlier stage in your dealings with your client.

There are myriad issues:

- Who are your clients?
- How and when can you promote this to your clients?
- How do you prepare them for this sort of process?
- At what level of the corporation should you engage?
- How would you design a process, using ADR, to promote an SLTO?
- How does your role change as you shift from dispute resolver to facilitator?
- Are you the designer of the process or the one who conducts it?
- How do you, or how can you, work with a client as well as retain neutrality in the process?

I do not have the answers to any of these questions. There are, no doubt, many others that arise. My message today is that you should think creatively about constructive by using your ADR skills unshackled from the various court ordered or statute mandated dispute centred processes.

I wish you well as you develop and diversify your ADR practice.

Postscript

On 27 February 2019, a few days after this paper was delivered to the ADR Conference of the Queensland Law Society, the ASX Governance Council published the 4th edition of its Corporate Governance Principles and Recommendations. It also published a Consultation Response, which addressed the Council's decision to omit the expression *social licence to operate* in the final document, and to replace it with the terms *reputation* and *standing in the community*.

The Council noted the proposed introduction of the term SLTO “was unquestionably the most polarising issue addressed in the consultation feedback”.¹⁸ It explained its use of the term was shorthand to convey the notion that “long term sustainable success is dependent on maintaining the trust and goodwill of the various social groups with which it interacts.”¹⁹ Although it considered the concepts of SLTO, reputation and standing in the community are synonymous, the Council stated the latter terms were more likely to be better understood and consistently applied.²⁰

Its commentary to Principle 3, which is to Instil a culture of acting lawfully, ethically and responsibly, references the following statement by Commissioner Hayne from his Interim Report on the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry:²¹

“As [a commercial enterprise], [a listed] entity...rightly pursues profit. Directors and other officers of the entities owe duties to shareholders to do that. But the duty to pursue profit is one that has a significant temporal dimension. The duty is to pursue the long term advantage of the enterprise. Pursuit of long term advantage (as distinct from short term gain) entails preserving and enhancing the reputation of the enterprise. And, lest there be any doubt, it also entails obeying the law. But to preserve and enhance a reputation...the enterprise must do more than not break the law. It must seek to do ‘the right thing’.

¹⁸ *Fourth Edition of the Corporate Governance Principles and Recommendations: Consultation Response* (27 February 2019) ASX Corporate Governance Council <<https://www.asx.com.au/documents/asx-compliance/cgc-consultation-response-fourth-edn.pdf>> 4.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid* 5.

One legal commentator interpreted the change in terminology as one more in form than substance, not a back-down from the spirit of the original draft.²² Another considers the intent remains embedded.²³ A number of commentators have noted the echoes of the themes from the Banking Royal Commission of increased focus on community expectations, the declining level of trust in business, the importance of culture and values and their link to governance and reputation.²⁴

Having reviewed the 4th edition of the Guidelines, the Consultation Response and informed commentary about the change in terminology, I maintain my proposition that SLTO represents a critical issue for the resources sector and offers an opportunity for ADR practitioners to diversify their practice.

²² *Culture Shock: ASX Corporate Governance Principles and Recommendations – 4th Edition* (4 March 2019) Gilbert and Tobin <<https://www.gtlaw.com.au/insights/asx-corporate-governance-principles-fourth-edition>>.

²³ Kate Hilder and Mark Standen *Revised ASX Corporate Governance Principles and Recommendations Released* (4 March 2019) MinterEllison <<https://www.minterellison.com/articles/revised-asx-corporate-governance-principles-and-recommendations-released>>.

²⁴ *Ibid*; Gilbert and Tobin, above n 22; *Client Update: ASX Corporate Governance Principles and Recommendations: 4th Edition – What Do They Mean for You?* (1 March 2019) Allens <<https://www.allens.com.au/pubs/cg/cucg01mar19.htm>>; Miriam Kleiner, Tim Bednall, and Josep Muraca *The Fourth Edition of the ASX Corporate Governance Principles and Recommendations* (4 March 2019) King & Wood Mallesons <<https://www.kwm.com/en/au/knowledge/insights/the-fourth-edition-of-the-asx-corporate-governance-principles-and-recommendations-20190301>>.