

CLAYTON UTZ

Applying the AGIC rating tool - a legal and commercial perspective

Presentation to AGIC Conference

Nick Thomas, partner

7 October 2011

© Clayton Utz

Overview

- What does sustainability mean?
- From aspirational goal to legal requirement (or from "nice to have" to "must have")
- AGIC scheme and project approvals
- AGIC scheme as a benchmarking device
- AGIC scheme in tenders
- AGIC scheme in contracts
- AGIC scheme in project delivery

What does sustainability mean?

"ecological sustainable development requires the effective integration of economic and environmental considerations in decision-making processes"

Core principles of sustainability

- the precautionary principle -
"if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation"
- inter-generational equity
- conservation of biological diversity and ecological integrity
- improved valuation, pricing and incentive mechanisms
 - polluter pays
 - full life cycle pricing
 - environmental goals should be pursued in the most cost effective way

Why is sustainability important?

*"There are known knowns -
there are things we know
that we know.*

*There are known unknowns -
that is to say there are things
that we now know we don't
know.*

*But there are also unknown
unknowns - there are things
we do not know we don't
know."* (Source: Donald Rumsfeld -
2002)



From aspirational goal to legal requirement

- Sustainability in statutory objectives
- Sustainability as something to consider
- Making sustainability a legal requirement

Sustainability in the Courts

- Sandon Point case (2008) - ESD in major projects
 - there will come a time when ESD will be so important that decision-makers must address it properly in every development decision they make (that time could be now!)
 - "surprising and disturbing" that relevant ESD principles not addressed at the concept planning stage
 - ESD must be addressed in the next level of approvals

AGIC scheme and project approvals

- AGIC scheme and approval risk
 - AGIC scheme focuses on project design, construction and performance, not project selection
- AGIC scheme and approval conditions
 - trend for conditions to address ESD issues
 - better not to require specific AGIC ratings in approval conditions - keep the AGIC scheme voluntary?

AGIC scheme as a benchmarking device

- Independent and "universal" assessment of sustainability
- Promotes awareness of sustainability
- Reduces risk of "green washing"
- An independent benchmark must be reliable

Sustainability in transactions

- Growing concern about climate change related risks
 1. weather related risks (direct physical effects)
 2. regulatory related risks (government response to 1)
 3. market related risks (market/social response to 1 and 2)
- Increasing recognition of legal issues in transactions

AGIC scheme in tenders

- Commitment and capacity to achieve specified rating
- Tenderers to demonstrate green credentials (ie capability and experience) - AGIC scheme can assist
- Principals should retain flexibility in setting and applying tender evaluation criteria

AGIC scheme in contracts

- Design and construct risk
 - express obligations to consider climate change risk
 - fitness for purpose could include mitigation and adaptation
 - requirements to obtain a particular rating or achieve other sustainability targets
 - possibly still more detailed specifications

AGIC scheme in contracts (cont)

- Operational risk
 - ongoing sustainability KPIs (eg. energy use limits, water use limits, emissions limits, waste management targets)
 - more sustainable infrastructure may reduce contractual risks for:
 - change in law
 - force majeure/relief events
 - insurance
 - AGIC operational rating

Allocating sustainability obligations

- Interdependence of the parties
 - work together to achieve green infrastructure
 - sharing of the rewards
- Parties' short and long term objectives
- Degree of prescription in the document
- Range of sanctions - "hard" v. "soft"

www.claytonutz.com