



Whether you can successfully raise the tonnage of your operation via Section 96 is dependent on whether it would be ruled to be still substantially the "same development".

FLYING UNDER THE RADAR

Are there more subtle, less time-intensive and less bureaucratic ways of receiving approvals for changes to a development consent? And if so, how should they be pursued? **Gary Peacock** gives some advice to **Mandy-Parry Jones**.

In the 1950s it was common for planes to fly "under the radar", which is when the term originated. Now, with stealth bombers, the term is redundant, but it still has some bearing in the quarry industry.

It is common for quarry operators to hit hurdles when submitting plans for expansion or changes to their operational permit. That's when you want to fly under the radar — but still be above board and legal.

In New South Wales, there's a very legal and low key way to have approvals stamped without the need for costly studies, developmental approvals (DA) and environmental impact studies (EIS).

It's known as a "Section 96", or to be more precise, Section 96 of the *Environmental Planning and Assessment Act 1979*.

"The whole reason Section 96 was put in place was to try to enable an easier pathway to doing changes to a project that enjoys a development consent, without having to go through the onerous kind of delayed, costly process that is involved with a fresh development application," Gary Peacock, director of Outline Planning Consultants, explained.

"So the act was put there with the specific purpose of trying to make it easier to get modifications through. It's been our experience that some local governments have had problems with understanding

what it's all about. There are numerous court cases out there that have shown the path forward and how you should be treating these kinds of applications. Court cases provide a road map."

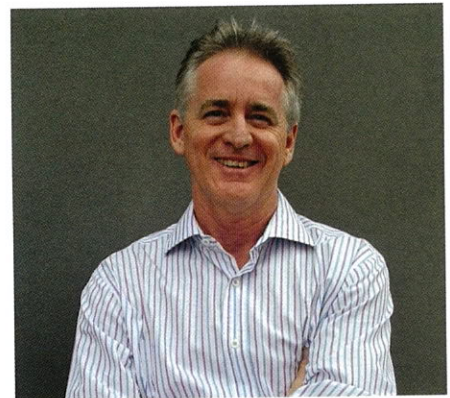
Peacock said in most instances councils had a skills base that was more attuned to dealing with matters such as applications for buildings and subdivisions. Most do not have many quarries within their jurisdiction, so do not receive many applications that concern quarry expansions.

What Peacock tries to do is to give councils examples of other projects, not only ones his company has worked on but others elsewhere in the state.

He also gives them copies of the most recent court judgments concerning these kinds of modifications, so they can see there are legal precedents.

"Some less gracious people call it 'killing them with kindness' but what we try to do is to assist the council in better understanding what we're trying to do," he said.

"Their first reaction tends to be, 'Why don't they just lodge a development application?' Well, the answer to that is you don't need to. Why do that when you basically jeopardise all the existing consent conditions that you currently operate under? Also, approvals are a really handy thing, it actually retains all the other conditions that might apply to your consent."



Gary Peacock: Section 96 is meant to ease the process of making changes to a project that already has development consent.

WHAT APPROVALS CAN YOU SEEK UNDER SECTION 96?

Examples of Section 96 quarry approvals sought and granted in NSW:

- Quarry expansion by two hectares.
- Increased maximum truck traffic from 67 to 250 per day.
- Increased depth of quarrying by 50m.
- Increased quarry production from 45,000 tonnes per annum to 199,000 tpa.
- Increased life of a quarry from 30 to 40 years.
- Increased hours of operation.

OPPORTUNITY FOR EXPANSION

Section 96 is a very useful tool. Instead of preparing multiple studies that are expensive and cause delays to projects, plus time delays for approvals by local government, there is the opportunity to expand within a shorter timeframe and with less expense and worry.

SMART BUSINESS

"For some of those who enjoy a very old development consent, a lot of those consents have no requirements for Section 94 development contributions for roads and there is court dicta that says that a council cannot impose Section 94 contributions for any Section 96 modification unless there are some really exceptional circumstances," Peacock explained.

Outline Planning Consultants has been fast-tracking these proposals for some time. They average between six and eight months from lodgement, but some approvals have been completed in as little as three months.

"You have to work out the main expansion or item that you want to do," Peacock added. "There may be a multitude of things, we don't recommend you do that straight away, you try to knock them over one by one.

"If you do that you're keeping it very simple and you're also keeping the application so simple that it's very hard for the council to say no, because the more complex you make the application, the easier it is for local government to refuse your application."

The scope is broad and Peacock said he could only give examples of types of applications as a guide. There is no definition of what can be captured under Section 96; it hinges on what is meant by substantially the "same development".

"It's not that simple, which is why it's been tested in the courts," he said. "There's been one court case where the extraction increased from 25,000 tonnes to 125,000 tonnes and the Land and Environment Court said that it was substantially the same development. We know we are standing on fairly solid ground when we do our proposals. It is not based on quantum, it is whether it meets the test of being 'substantially the same'.

"You've got to look at what elements you're seeking to change. Some people have put the wrong test on it – 'only has a minor environmental impact' – but that's not the test. It can be that the expansion has a major environmental impact but that it could be substantially the same development."

VIABLE ALTERNATIVE?

If your ears have pricked up at this point and it is starting to sound like a viable alternative, there's another positive – there are no appeal rights by objectors.

However, Peacock cautions that such an application is not something you want to tackle yourself from the quarry office.

"For quarries to do it by themselves is crazy, it could end in tears," he said. "A lot rests on the goodwill of the councils. Some councils who are anti-development, you're going to have a tough time just showing them why it should be dealt with in this way.

"It's actually a planning approval and you need to have a planner to help you get it. So it's essential that you get proper professional help to lead you through the process and to ensure that it actually meets the tests set down by the courts.

"It's one thing to make the application and it's another thing to actually have sufficient facts before the council that you have an application that does qualify." •

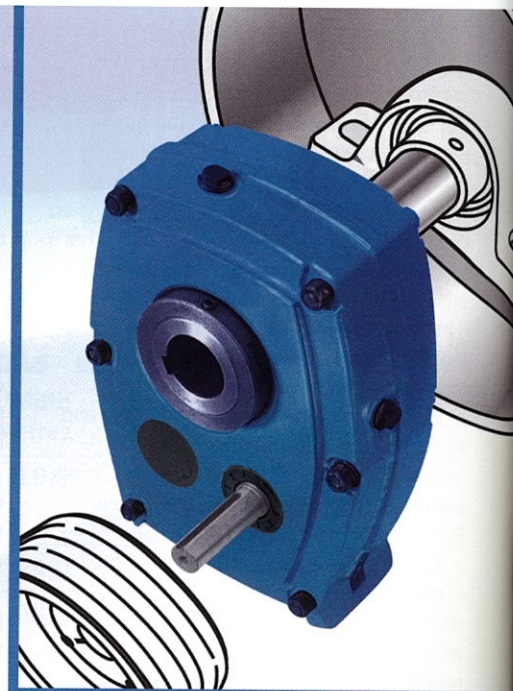
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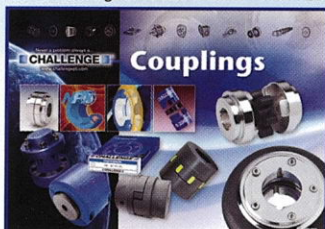
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