THE LAW SOCIETY OF NEW SOUTH WALES
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Environment & Planning Law Committee

Integrated Mining Policy

9 July 2015

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The NSW Young Lawyers Environment & Planning Law Committee (the **Committee**) makes the following submission in response to the first stage of consultation on the Integrated Mining Policy (**Policy**).

NSW Young Lawyers

NSW Young Lawyers is a division of the Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The Committee comprises a group of approximately 350 members with a shared interest in our environment. It focuses on environmental and planning law issues, raising awareness in the profession and the community about developments in legislation, case law, and policy. The Committee also concentrates on international environment and climate change laws and their impact within Australia.

Summary of Recommendations

The Committee makes the following recommendations:

1. That the Department clarify the extent of consultation undertaken with the Environment Protection Authority (**EPA**) and NSW Trade and Investment – Division of Resources and Energy (**DRE**) on the Standard Secretary's Environmental Assessment Requirements (**SEARs**), and the extent to which those agencies' requirements with respect to Standard SEARs for state significant mining operations have been addressed in the exhibited document.

2. That the Secretary be required to consult with the EPA and DRE on proposed variations to the SEARs for particular projects where the variations bear on matters relevant to the issue of Environment Protection Licences (**EPLs**) or Mining Leases.

3. That the language used in the Guidelines should be enforceable e.g. 'ought to' should be replaced with 'must' in light of the importance of the consideration of cumulative impacts.

4. That the PEA include the requirement for the applicant to consultation with potentially impacted stakeholders, and to have this process continued and expanded upon in the EIS to sufficient degree appropriate to the nature and extent of the proposed development.

5. That the articulation of the mitigation hierarchy in the relevant legislation should be a priority, with further practical implementation guidance being provided through policy documents, including the Swamp Offsets Policy.

6. That the circumstances in which the impact of a development are so great that they cannot be dealt with by offsets should be outlined in the Swamp Offsets Policy.

Secretary's Environmental Assessment Requirements

The Committee supports the initiative to consolidate and build upon current Government practice surrounding the issuing of Standard Secretary's Environmental Assessment Requirements (**SEARs**) for State significant mining operations.

The Standard SEARs are intended to:

- ensure greater consistency;[1]
- enable the assessment of State significant mining proposals to be integrated across regulatory agencies;
- foster more efficient assessment processes and reduce duplication and uncertainty in regulatory responsibilities and activities;[2] and
- ensure that stakeholders have access to relevant information at each point in the decision-making process.

The Committee wishes to emphasise that the objectives of efficiency and reduction of duplication ought not be pursued at the expense of informed and project-specific input from the Environment Protection Authority (**EPA**) and NSW Trade and Investment – Division of Resources and Energy (**DRE**) on the SEARs for State significant mining applications. This is particularly so in light of the lack of clarity provided in the consultation

[1] Integrated Mining Policy – Overview, p. 2
[2] Standard Secretary's Environmental Assessment Requirements, p. 3

documents as to what extent the Standard SEARs adequately address the EPA and DREs respective requirements.

Legislative Context

Proponents of State significant mining operations are required to submit an Environmental Impact Statement (EIS) as part of their development application for State significant development.[3] Before preparing the EIS, the proponent must make a written application to the Secretary of the Department of Planning and Environment (the **Secretary**) for the environmental assessment requirements that will need to be addressed in the proposed EIS.[4]

In preparing the environmental assessment requirements with respect to an application for State significant development, the Secretary must consult relevant public authorities and have regard to the need for the requirements to assess any key issues raised by those public authorities.[5]

The proponent must ensure that the EIS complies with any environmental assessment requirements that have been provided in writing to the person in accordance with this clause.[6]

The SEARs therefore play a key foundational role in the assessment of State significant mining operations, in that they shape the content required within the proponent's EIS, which, in turn, is the subject of extensive public consultation. It is imperative that SEARs be tailored towards specific projects and be informed by consultation with all relevant government agencies.

Consolidation of Environment Protection Licence and Mining Lease Requirements

A key initiative of the Standard SEARs is the consolidation of the assessment requirements of the Department of Planning and Environment (the **Department**) for

[3] Section 78A(8A) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**)
[4] Clause 3(1) of Part 2, Schedule 2 of the *Environmental Planning and Assessment Regulation 2000* (NSW) (**EP&A Regulation**)
[5] Clause 3(4) of Part 2, Schedule 2 of the EP&A Regulation
[6] Clause 3(8) of Part 2, Schedule 2 of the EP&A Regulation

development consent applications, the EPA for Environment Protection Licence (**EPL**) applications, and DRE for Mining Lease applications.

The rationale behind the consolidation seems clear. Once a development consent for State significant development has been issued under section 89E of the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act), the EPA and DRE cannot refuse to issue any EPL or Mining Lease (respectively) required by the proponent, and the EPL or Mining Lease issued must be substantially consistent with the development consent.[7] As such, the decision of the Minister for Planning whether to grant consent limits the discretion of DRE and the EPA to refuse an EPL or Mining Lease (respectively) or to impose certain conditions on the EPL or Mining Lease. As such, the assessment of the development application conducted through the EIS process under Division 4.1 of Part 4 of the EP&A Act ought to take into account the requirements of the EPA and DRE so that any matters relevant to the issue of an EPL or Mining Lease can be addressed as part of the EIS.

The current approach seems to be that the Secretary consults with the EPA and DRE as to their requirements for the EIS for a given project under clause 3(4) of Part 2, Schedule 2 of the *Environmental Planning and Assessment Regulation 2000* (NSW) (EP&A Regulation),[8] with a view to incorporating those agencies' requirements into the final SEARs issued to the proponent.

The proposed consolidation of the EPA and DRE's requirements with respect to EPLs and Mining Leases into the Standard SEARs is a key concern of the Committee. As a general comment, on the basis of the exhibited Standard SEARs and accompanying documents, it is very difficult to assess the extent to which the EPA and DRE's typical requirements for State significant mining operations have been fully incorporated. The Committee recommends that the community should be given clarification as to the extent of consultation undertaken by the Department with EPA and DRE on the Standard SEARs, and the extent to which their requirements have been addressed in the exhibited document.

Recommendation 1: That the Department clarify the extent of consultation undertaken with the EPA and DRE on the Standard SEARs, and the extent to which those agencies' requirements with respect to Standard SEARs for State significant mining operations have been addressed in the exhibited document.

[7] Section 89K(1)(c) and (e)
[8] DRE, 'Mine Assessment and Rehabilitation', accessed 22 June 2015; EPA, 'Guide to Licensing Under the Protection of the Environment Operations Act 1997 – Part A', Department of Climate Change and Water, October 2009, section 2.4

Further, the introduction to the Standard SEARs indicates that the Secretary may decide to issue varied SEARs for a particular project.[9] This flexibility is clearly necessary. However, it raises the question as to whether the EPA and DRE will have any involvement in the decision to issue varied SEARs. The answer to this question is not clear on the face of the exhibited documents. If the EPA and DRE will not be consulted on any relevant variations to the Standard SEARs for a particular project, then, in the Committee's view, the Secretary in issuing varied SEARs risks failing to substantially comply with the requirement to consult relevant public authorities set out in clause 3(4) of Part 2, Schedule 2 of the EP&A Regulation. The Committee therefore recommends that the EPA and DRE be consulted on proposed variations to the Standard SEARs for particular projects where proposed variations bear on matters relevant to the issue of EPLs or Mining Leases.

Recommendation 2: That the Secretary be required to consult with the EPA and DRE on proposed variations to the Standard SEARs for particular projects where proposed variations bear on matters relevant to the issue of EPLs or Mining Leases.

On a broader level the Committee is concerned that the consolidation of the EPA and DRE's requirements into the Standard SEARs will add to already high levels of community confusion surrounding the multi-layered approval process for State significant mining operations. In particular, there is the risk of confusing the community as to which approval (EPL, Mining Lease, or Development Consent) they are entitled to discuss in their submissions during exhibition of the EIS. For instance, an individual or community group may lodge a submission on an EIS, and then fail to realise that a Mining Lease application is notified separately, and that there are matters relevant to the determination of that application not canvassed in the SEARs or the EIS (such as the environmental performance record of the applicant). [10] In formally integrating the requirements of the EPA and DRE with respect to EPLs and Mining Leases (respectively), the Department risks adding to the confusion of the community when trying to have their say during the approval processes for State significant mining operations.

[9] Standard Secretary's Environmental Assessment Requirements, p. 2
[10] *Mining Regulation 2010* (NSW), Clause 24(1)(a).

Mine Application Guidelines

Overarching purpose

The proposed Mine Application Guidelines (**Guidelines**) represent the most consistent top-level guidance for potential mining applications than has previously existed, and for this reason the Committee commends the first public release draft (May 2015).

While there is no significant deviation from the existing mechanics surrounding the order and substance of the Preliminary Environmental Assessment (**PEA**) and EIS, the Committee commends the Guidelines' call for the clear outlining of economic, social and environmental impacts as separate components to the project description. This requirement represents an opportunity to ensure that the balanced approach to all three factors taken by the courts in cases such as *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* is an approach adopted from the outset of every mining application; that is, that 'there is no priority afforded to mineral resource exploitation over other uses of land, including nature conservation'.[11] The Committee encourages the adoption of this approach to land use at the initial stage of every mining application.

The mine planning process

The Committee commends the reference in the Guidelines to the principles of ecologically sustainable development (**ESD**) being given the same priority and mandatory weighting in the draft Guidelines as in the operational legislation involved.[12] Of particular commendation is the requirement that applications 'ensure that the development of a preferred mine design addresses…the full lifecycle of the mine from construction and operation to rehabilitation and lease relinquishment.'[13] There are many examples of open cut mines that have not been successfully rehabilitated following the end of the run of the mine,[14] and even a few examples of mines that have not had any semblance of an

[11] *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* (2013) 194 LGERA 347 [168].
[12] *Environmental Planning and Assessment Act 1979* (NSW), s 5; *Protection of the Environment Administration Act 1991* (NSW), s 6(2).
[13] NSW Government, *Mine Application Guidelines*, p 2 (May 2015): https://majorprojects.affinitylive.com/public/ac8620dec4589453edd4a0749fd288e3/Mine%20Application%20Guideline.pdf
[14] Department of Trade and Investment, Regional Infrastructure and Services, *NSW Auditor-General's Report to Parliament* (Volume Six 2012): http://www.audit.nsw.gov.au/ArticleDocuments/255/27_Volume_Six_2012_Department_Trade_Investment_Regional_Infrastructure_Services.pdf.aspx?Embed=Y

attempt to rehabilitate the open cut pit.[15] The reference to ESD in the Guidelines represents a significant and welcome shift towards ensuring that the land covered by a mining lease is rehabilitated.

The Committee further welcomes the introduction of the requirement to consider cumulative impact in the Guidelines. However, the Committee submits that the language used regarding the mine's coexistence with surrounding existing and proposed land uses be given consideration.

Recommendation 3: That the language used in the Guidelines should be enforceable e.g. 'ought to' should be replaced with 'must' in light of the importance of the consideration of cumulative impacts.

Specific requirements for SSD mining developments

The Committee sees the value in outlining the mining-specific PEA and EIS requirements for each stage of these reports in the manner that the draft Guidelines include this information. Provided that this top-level guiding document does not allow for any compromise to be made at any stage of the PEA and EIS process, the Committee acknowledges the certainty and ease of understanding that this part of the draft Guidelines provides. An opportunity for improvement lies in sections 4 and 5, addressing Project Rationale and Environmental Impact Assessment. While the Committee recognises that this top-level document is merely summarising by way of example the many consequences of mineral extraction, and making brief reference to the requirements set out in Schedule 2 of the EP&A Regulation and elsewhere, the Committee urges the Government to introduce a requirement to consider the extremely harmful effects that the inevitable burning of the coal extracted from the mines that are the subject of the application will have on the global environment. With the requirement to consider this as part of the application process, the applicant and the Government are able to fully consider, with as much certainty as can be delivered in the circumstances, whether the mine would end up being a stranded asset in the not too distant future, at considerable cost to the taxpayer and the local environment.

The Committee supports early consultation with potentially impacted stakeholders.

Recommendation 4: That the PEA include the requirement for the applicant to consultation with potentially impacted stakeholders, and to have this process

[15] Phillip Geary, *The Conversation - Disused mines blight New South Wales, yet the approvals continue* (23 March 2015): https://theconversation.com/disused-mines-blight-new-south-wales-yet-the-approvals-continue-39059

continued and expanded upon in the EIS to sufficient degree appropriate to the nature and extent of the proposed development.

Policy Framework for Biodiversity Offsets for Upland Swamps and Associated Threatened Species

The Policy Framework for Biodiversity Offsets for Upland Swamps and Associated Threatened Species (**Swamp Offsets Policy**) aligns the calculation and provision of offsets for subsidence impacts of longwall coal mining on upland swamps and associated threatened species with the framework outlined in the *NSW Biodiversity Offsets Policy for Major Projects* (**Offsets Policy**).

The Swamp Offsets Policy appears to contemplate the offsetting of the impacts of mining developments on upland swamps and associated threatened species as a first resort. However, the Independent Biodiversity Legislation Review Panel's recent Issues Paper recognised that offsetting is only an option once avoidance and mitigation measures have been exhausted.[16] The Swamp Offsets Policy does not refer to this mitigation hierarchy, and neither proponents nor decision-makers are given clear instructions in the *Threatened Species Conservation Act 1995* (NSW) or the EP&A Act about how to implement this hierarchy.

Recommendation 5: That the articulation of the mitigation hierarchy in the relevant legislation should be a priority, with further practical implementation guidance being provided through policy documents, including the Swamp Offsets Policy.

The Swamp Offsets Policy does not contemplate circumstances where the impacts of a mining development on upland swamps and associated threatened species are likely so great that the development must be refused, and appears to assume that all impacts on upland swamps and associated threatened species are able to be dealt with through offsetting.

Recommendation 6: That the circumstances in which the impact of a development are so great that they cannot be dealt with by offsets should be outlined in the Swamp Offsets Policy.

[16] State of NSW and Office of Environment and Heritage, *Independent Biodiversity Legislation Review Panel: Issues Paper*, at p 8: http://www.environment.nsw.gov.au/resources/biodiversity/140603IssuesPaper.pdf.

Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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