**EIA IMPROVEMENT** PROJECT DISCUSSION PAPER **NSWMC SUBMISSION NSW MINERALS COUNCIL** 

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## 1 Executive Summary

The NSW Minerals Council (NSWMC) welcomes the opportunity to comment on the Discussion Paper for the Environmental Impact Assessment Improvement Project (Discussion Paper) and supports the Department of Planning and Environment's (DPE) review of the Environmental Impact Assessment (EIA) process for State significant projects in NSW.

The proposed reforms rightly propose to drive EIA in the direction of better identifying the important issues and prioritising these issues for detailed assessment during the EIA process. This approach is supported by NSWMC. The industry has heard this message from Government before and does have concerns about the gap between the initiatives proposed and achieving a truly risk based EIA where the issues of the most importance are given priority. The industry is very interested to work with the DPE and other stakeholders to ensure that these reforms meet their objectives in practice.

The industry is also supportive of the initiatives that will provide for greater upfront consultation with our communities and government agencies, including the Commonwealth government.

Importantly the EIA project must help deliver the Premier's commitment, made in 2014, to reduce the timeframes for assessments, without compromising environmental or community standards. Streamlining must continue to be an overarching objective of the reforms as both proponents and the community benefit from the timely assessment of projects.

The discussion paper provides eight initiatives designed to address the key issues that have been identified with the EIA process. This submission expresses support for many of those initiatives. That support is dependent on further detailed proposals being provided and we look forward to engagement in the development of the initiatives.



# 2 Environmental Impact Assessment Improvement Project Discussion Paper: Key Issues

### 2.1 Comments on issues identified by DPE

NSWMC members agree with the list of issues identified in the Discussion Paper in relation to the EIA. In addition we have identified three further issues that are significant and should guide initiatives undertaken as part of the project.

#### 2.1.1 Additional Issues

#### Inter-agency interaction

NSWMC notes that the interaction of government agencies is not included in the list of issues of concern. NSWMC members advise that this continues to be a concern and a cause of uncertainty and delay. This should be included expressly as an issue to be addressed. Areas of concern are:

- A lack of consistency on the approach to Secretary's Environmental Assessment Requirements (SEARs).
- Delay on behalf of agencies in providing comments on the Environmental Impact Statement (EIS).
- A lack of coordination and a whole of government approach to the post-approval management plan process.
- NSWMC has consistently advocated for a lead agency to be identified and empowered to ensure that a whole of government consistent approach is taken to major project assessment.

#### Interaction with the Commonwealth approval process

The discussion paper does not mention the interaction with the Commonwealth approval process. A bilateral agreement is in place with regard to the assessment between the Commonwealth and NSW. Improving the timeliness and consistency of approaches between NSW and the Commonwealth should be an element of the project.

#### The Planning Assessment Commission (PAC) process

The PAC process is a key driver of the EIA process. While reform of the PAC is proposed as part of the proposed amendments to the *Environmental Planning and Assessment Act (1979)* (EPA Act), it is very important that both this process and the amendments to the EPA Act are undertaken with due consideration of the other. The PAC two-step public hearing and public meeting process is the cause of significant delays in the assessment of mining projects. The current PAC process was initially developed in response to the decision by the Government to delegate decision-making, and it is timely to review this process in terms of efficiency of the process.

NSWMC's position with regard to PAC reform is set out in detail in our submission on the EPA Act amendments. The streamlined PAC process proposed by NSWMC is set out in *Figure 1*.



#### Figure 1 Proposed Streamlined PAC Process

# Planning process - includes PAC review, hearing and determination

#### Exhibition period

During this period Secretary of DPE:

\*Decides whether a PAC review is required and issues TOR and sets a Public Hearing date

\*Decides whether a PAC determination is required \*Issues a report on the TOR

PAC Public Hearing (within 14 days of the close of submissions)

PAC Review Report (within 30 days from the hearing)

Proponent provides response to submissions and the PAC review report

DPE issue Secretary's Environmental Assessment Report and draft conditions (within 60 days from the response to submissions)

PAC provide DPE and Proponent with draft conditions for comment (within 60 days from the of Secretary's Final Assessment Report)

PAC determination report and conditions (within 30 days of the draft conditions being provided to proponents)



#### Recommendations

- DPE should recognise interagency interaction as one of the significant issues that needs to be resolved.
- The Government should provide that DPE is the lead agency with regard to major project assessment and empower it to ensure a whole of government approach.
- The interaction between the Commonwealth and NSW assessments should form part of the improvement project.
- The reform of the Planning Assessment Commission process must interact with the EIA improvement project.

#### 2.2 NSWMC's comments on proposed initiatives

#### 2.2.1 Initiative 1: Develop a consistent framework for scoping within the EIA process

NSWMC's members are supportive of the intention of this initiative: to focus the EIA on the issues that are most important for a particular process. There are considerable impediments to an improved scoping process being successful that need to be addressed by DPE when designing the process including:

- Proponents and their consultants tend to be conservative in their scoping, which leads to all
  issues being addressed regardless of risk/importance. This behaviour is driven by a number of
  factors including:
  - Departmental practice of requiring all issues to be dealt with and all issues to be given an equal level of examination by proponents and their consultants, including by providing standard Secretary's Environmental Assessment Requirements for all projects rather than tailored SEARs that respond to the analysis undertaken in the Preliminary Environmental Assessment (PEA).
  - The risk that an approved project will be appealed on the basis that a low-risk, low-priority issue has not been appropriately assessed.
  - The risk that the Planning Assessment Commission will make a different analysis of risk/importance than the proponent and DPE and criticise the Environmental Impact Statement (EIS) and require further assessment leading to delay.

While NSWMC members see value in bringing forward community consultation to the scoping phase the following issues need to be considered and dealt with by DPE when designing the process for community engagement:

- A public submission process will not necessarily provide comments on the scope of the assessment of the project that are actually reflective of the community views on the project.
- This process should not introduce delay in the process. That is in the event that a public submission process is proposed, this must be for a defined period and extensions should not be provided, and DPE should identify how this process would save time at a later stage of the assessment. Importantly the proponent should not be required to provide a formal response to submissions on the scoping document. This would be duplicative of the broader process.
- There will be a role for the Secretary to make a decision about the priority/importance of issues when issuing the SEARs. This will be a key decision that will determine the relevance and materiality of issues, and the way in which they are assessed. Developing an understanding of this process with the community will be key to the success of this change.



DPE needs to consider carefully how the Government's response to the scoping document and submissions on the document are communicated.

Given that the priorities identified in the Secretary's Environmental Assessment Requirements (SEARs) are intended to carry through the entire assessment and determination process (including the review by the PAC) it is vital that there is a very clear statement in the SEARs as to the priority of the issues and how those issues are to be addressed (ie the level of examination given to each issue), as well as any issues that are not required to be addressed. This is critical at the SEARs stage given that DPE cannot provide direction to the PAC at a later stage.

#### 2.2.2 Initiative 2: Earlier and better engagement

NSWMC members are supportive of this initiative. It is most common practice, for our members to have undertaken community consultation well prior to the application for development consent.

NSWMC members do have some concerns about early community engagement led by the Department of Planning and Environment on the project specifically. The Department's role would be better left to engagement around the process, including making proponents aware of the opportunities for input to the assessment. The Department should also have a role in explaining the scoping of a particular project, make the final decision with regard to the SEARs and explain the priority given the issues and the level/type of assessment required.

Examples of good engagement by proponents at early stages of projects would assist the industry to understand what is expected by government. NSWMC has a number of case studies that highlight good engagement both during the EIA and earlier phases of projects. These can be viewed on our website<sup>1</sup> and in our submissions to the Planning System Review. NSWMC members would be interested in working with government and other stakeholders to identify engagement case studies both in NSW and other jurisdictions to provide examples of good practice. Case studies of approaches taken in other industries where practices are transferrable, would also be welcomed by the mining industry.

#### 2.2.3 Initiative 3: Improve the consistency and quality of EIA documents

#### Secretary's Environmental Assessment Requirements

At present, the Secretary's Environmental Assessment Requirements (SEARs) are sometimes accompanied by correspondence from government agencies. There is a lack of clarity around what weight the correspondence carries. NSWMC members view is that the SEARs should be the whole of government assessment requirements and further correspondence from agencies should not be required to be provided or addressed. This should be accounted for in the SEARs.

Assessing the adequacy of EIS is about whether the proponent has addressed the SEARs, not an assessment of the merit of the project. DPE and relevant government agencies should be required to ensure that the EIS has adequately addressed the SEARs before it is placed on exhibition.

#### Recommendations

- Ensure that the SEARs provide a whole of government view of the assessment requirements and do not provide additional correspondence from agencies to proponents.
- Provide confirmation on the adequacy of a proponent's EIS in addressing the SEARs.

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<sup>&</sup>lt;sup>1</sup> http://www.nswmining.com.au/menu/media/case-studies

#### 2.2.4 Initiative 4: Set a standard framework for conditioning projects

An important consideration is the need to ensure that there is consistency of conditions across similar projects. This helps to ensure there is fairness and predictability in the conditions imposed on each similar project. This appears to be a challenge that needs to be first resolved internally within the assessments teams at DPE.

Conversely, standard conditions should not be applied indiscriminately to a project where not justified in the particular circumstances of a project. For example, a requirement for noise attenuation on all mobile equipment (apart from light vehicles) when not all equipment contributes to noise levels at sensitive receivers.

Also there is a need to update standard conditions as appropriate to reflect current government policy and guidance. For example, the current standard land acquisition conditions applied to recent projects, does not reflect the Department's own Voluntary Land Acquisition & Management Policy (VLAMP) that was released in 2015.

#### Recommendations

- · Ensure there is consistency of conditions across projects.
- Standard conditions should not be applied indiscriminately to a project where not justified in the particular circumstances of a project.

#### 2.2.5 Initiative 5: Improve the accountability of EIA professionals

#### Code of practice for EIA professionals

It is proposed to introduce a code of practice for EIA professionals. The discussion paper does not provide details on how this would be introduced. Codes of practice are usually part of a professional association membership. The binding nature of the code and the sanctions imposed for failing to comply relate to the professional's membership of that body. NSWMC considers that there is not a clear professional body that would apply to all EIA professionals.

In addition it is difficult to see how this proposal would add anything to the very strict requirements already provided by the EPA Act. Better communication of those requirements would be a more effective way of building public confidence in the accountability of EIA professionals.

#### Extending the use of peer review

NSWMC notes that peer review is already used in relation to mining applications and is generally supported by our members. What is not clear is the responsibility for the time that a peer review takes. Where the government has engaged the reviewer, this should be considered time in government hands and time targets should attach to the peer review.

If its clear on lodgement of the EIS that an issue such as air quality or economics is likely to warrant a peer review, then the peer review scope, selection and engagement should occur concurrent with exhibition in order to minimise delays.

In addition a peer review should be just that, a peer review of work undertaken by the proponent, not a new primary assessment.



#### Recommendations

- Do not introduce a code of practice for EIA professionals. Instead communicate the much stricter requirements and sanctions already imposed by the EPA Act.
- Provide time targets for peer reviews engaged by the Government.

#### 2.2.6 Initiative 6: Provide greater certainty on EIA timeframes

NSWMC support's greater clarity on EIA timeframes. Clear timeframes should be set for when an assessment is in government's hands to provide certainty and accountability. Where the timeframes are not met, clear consequences should be set out in statutory provisions. Possible consequences could include deeming adequacy/concurrence where a timeframe is not met or a direction from the Secretary for action being given.

Ensuring that timeframes set for periods of public exhibition are strictly adhered to and not extended would also assist in creating certainty and predictability.

Proponents are motivated to ensure that the EIA process proceeds in a timely manner as this is to their advantage. Hence it is not required that timeframes are set for the proponent. This is especially in light of the many variables that the proponent is subject to, such as seeking availability of land, offsets and financing considerations.

#### Recommendations

 Set timeframes for each stage in the EIA process that is in government hands. Set clear consequences for failing to meet these timeframes.

#### 2.2.7 Initiative 7: Strengthen the monitoring, auditing and reporting of compliance

#### Incorporation of the positive elements of the Integrated Mining Policy

The industry invested significant time into providing input into the IMP. The EIA Improvement Project should retain the positive elements of the IMP to ensure that the effort expended in creating these documents remains useful.

#### Recommendations

 The positive elements of the Integrated Mining Policy should be taken into account in the EIA Improvement Project.

#### 2.2.8 Initiative 8: Project change processes following approval

The industry is supportive of the proposals that involve the better communication of what conditions applied to consolidated projects. The second bullet point in initiative 8 proposing greater guidance on the level of assessment and further consultation required for modifications requires further explanation and we look forward to discussing those proposals when they are available.

#### Investigation of alternatives for changes to approvals

The Government should consider where there are opportunities to streamline changes to approved projects. This should include considering which modifications/changes are low risk and can be dealt with, without the need for a development application.



One way of achieving this outcome would be the expansion of the exempt and complying development provisions of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007.* This would permit activities that have minimal environmental impact, such as:

- Accessing of areas by vehicle required for mineral exploration including access by way of new access tracks or minor roads
- Minor forms of development (for example landscaping, emergency equipment, signage) on land adjacent to an approved mine
- Minor alterations to approved surface infrastructure where the total disturbance footprint remains unchanged
- Changes to longwall panel layouts where the total mining area is not increased
- The erection of permanent office buildings required for a mining operation that fit within specified development standards (for example relating to height, setback etc.)
- Any work carried out as a result of a notice issued under the Protection of the Environment Operations Act or any other environmental protection legislation
- The installation of gas drainage infrastructure for any purpose (rather than being restricted to an emergency or safety purpose)
- The installation and use of water reticulation systems.

In relation to complying development in-pit disposal of waste types should be permitted as complying development where it is done so in accordance with an EPL or any other resource recovery exemption.

#### Conditioning project to be 'Generally in accordance with the EIS'

Projects are conditioned as a matter of practice to be undertaken 'generally in accordance with the EIS'. This condition is in response to the need to have some flexibility in what is approved to respond to changes without the requirement to seek a modification. A level of flexibility needs to be maintained. It is imperative that DPE or the PAC does not change the current practice of conditioning projects in this manner without first addressing how an appropriate level of flexibility can be provided. Retention of the word "generally" is important. This retains flexibility for minor changes that do not alter approved environmental outcomes. We understand that DPE have some proposals for addressing this issue and we look forward to further consultation on this issue.

