

**Submission on the EIA Improvement Project –  
Environmental impact assessment for  
major projects**

prepared by

**EDO NSW**  
**November 2016**

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### Submitted to:

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## Introduction

Thank you for the invitation to make preliminary comments on stage 1 of the Department of Planning and Environment's (**Department's**) Environmental Impact Assessment Improvement Project (**the Project**) and high-level discussion paper.<sup>1</sup>

We understand the aim of the Project is to review each step of the EIA process for major projects (State Significant Development (**SSD**) and Infrastructure (**SSI**)); identify ways to 'streamline the EIA process and improve environmental outcomes'; and to develop a series of new EIA guidelines and supporting documents ahead of implementing any agreed improvements. The Department could clarify whether the Project will involve legislative reform, and how it intersects with proposed reforms to the *Environmental Planning and Assessment Act 1979* (**Planning Act**) in 2017.

As you know we have commented on a number of departmental guidelines and related areas such as the integrated mining policy, economic assessment guidelines for mining and gas projects, Community Consultative Committees, SSI guidelines, Planning Assessment Commission (**PAC**) processes and draft windfarm guidelines.<sup>2</sup> Our comments on those matters remain relevant to improving EIA, but are not repeated in detail here.

This submission comments briefly on the initial scope of the Project and the eight initiatives listed under 'Proposed improvements'. We then refer to four further issues that the project should address in more detail: cumulative impacts; climate change; negative effects that 'streamlining' can have on public trust; and equitable appeal rights. We are happy to discuss our comments to inform the Project's future stages.

## Scope of the EIA Improvement Project

The initial scope of the project provides a useful starting point for improvement.<sup>3</sup> As does the list of eight high-level themes emerging from past consultations – such as public access to documents, public confidence, cumulative impacts, post-approval project changes (modifications) and verifying compliance.

In addition there are some areas of the EIA process where improved guidance alone may be undercut by gaps in existing law and policy, or inequitable access to justice. An example of a legal gap is that the *Environmental Planning and Assessment Act 1979* (NSW) (**Planning Act**) and regulations do not refer to climate change impacts.<sup>4</sup>

Another gap is the lack of full environmental assessment and public scrutiny of mining exploration. Exploration is categorised as 'Part 5' activity normally reserved for public infrastructure, which lowers the level of impact assessment and upfront

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<sup>1</sup> NSW Department of Planning and Environment, *EIA Improvement Project Discussion Paper* (Oct. 2016) (**Discussion Paper**).

<sup>2</sup> See EDO NSW policy submissions on planning and mining laws at [www.edonsw.org.au/law\\_reform](http://www.edonsw.org.au/law_reform).

<sup>3</sup> Discussion Paper, pp 2-3. i.e. Early engagement, efficient decision-making, public confidence in EIA integrity, clarity and guidance, EIA consistency and quality.

<sup>4</sup> See EDO NSW, *Planning for Climate Change: How the NSW planning system can better tackle greenhouse gas emissions* (July 2016), at [http://www.edonsw.org.au/planning\\_for\\_climate\\_change](http://www.edonsw.org.au/planning_for_climate_change).

local input. The production phase is assessed separately (often as SSD), but as the Chief Scientist's 2014 *Review of Coal Seam Gas* noted, the system makes it 'very difficult to restrict the production phase' once exploration is underway.<sup>5</sup>

Examples of inequities in access to justice that guidance alone cannot address include: 'spot rezoning' and review processes; and merit appeal rights, including where the Planning Minister has the discretion to remove those rights by referring a project to a public hearing by the PAC.<sup>6</sup> Major projects are often those with the most significant and long-lasting effects. As a recent EDO NSW report demonstrates, the right of interested members of the public to bring merit appeals (however rarely this right is exercised) provides a range of benefits to the planning system. Benefits including improved project scrutiny and conditions; more consistent and higher-quality decisions; wider acceptance of final decisions; confidence in the system's integrity; and safeguards against corruption.<sup>7</sup>

### **Initiative 1 - Develop a consistent framework for scoping within EIA process**

*Survey explanation:*<sup>8</sup> "Develop a way for proponents to identify the important issues for the project at the earliest stage when the scope of the EIA is being developed, to ensure the assessment is focused on these issues."

We welcome efforts that assist the upfront transparency and robustness of EIA documents – for decision-makers, agencies, local councils and community members. We also welcome the early identification of key social, environmental and economic impacts and risks. In our view this early EIA scoping process should involve communities, independent experts, agencies, good data and robust scientific methods. Review processes and safeguards should ensure risks aren't misidentified.

#### **Identifying community concerns and technical risks**

It is important that any scoping identifies both community concerns and technical areas of risk (which may or may not overlap). To ensure communities are able to give informed input there must be minimum requirements for providing information and community engagement. Community and technical issues should not be 'balanced' but should each be recognised as issues of focus in the full environmental impact statement (**EIS**).

The EIA process must ensure that there is sufficient assessment of all environmental impacts, that sufficient information is provided to explain complex interactions between potential environmental impacts, and that any risks that are not identified or given sufficient priority at the beginning of the process will be properly assessed, if information later shows there is a high risk of environmental impacts.

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<sup>5</sup> Chief Scientist & Engineer's Review of CSG, *Regulatory compliance report* (2014), Appendix p A-32.

<sup>6</sup> *Environmental Planning and Assessment Act 1979* (NSW) (**Planning Act**), s. 98(5). This discretion disproportionately affects community appeal rights because almost all major projects are approved.

<sup>7</sup> See further EDO NSW, *Merits Review in Planning in NSW* (2016), at [http://www.edonsw.org.au/merits\\_review\\_in\\_planning\\_in\\_nsw](http://www.edonsw.org.au/merits_review_in_planning_in_nsw).

<sup>8</sup> We have included quotes from the department's online survey to briefly clarify what each initiative is.

It should also be made clear to proponents at the scoping stage what environmental impacts are considered unacceptable so that proponents can decide whether to progress development applications with an understanding of the 'red lights' that will apply to their project. This is one benefit of identifying high conservation value areas.

### Applying ESD principles

The Department should also develop upfront guidance on embedding principles of ecologically sustainable development (**ESD**) in the design, assessment and approval of major projects. This should step through key principles and examples,<sup>9</sup> such as:

- a precautionary approach to uncertainty, risk and minimising serious harm;
- ensuring biodiversity and ecological integrity are fundamental considerations in public and private decision-making (e.g. loss avoidance hierarchy, integrity of offset programs, identifying and protecting high conservation value areas);
- maintaining healthy ecosystems, assessing the costs and benefits of development, and equitably sharing these, for this and future generations; and
- internalising the full social and environmental costs of major development across the project lifecycle (e.g. examining public health consequences, carbon emissions, polluter-pays incentives, rehabilitation costs).

We welcome the Planning Minister's reaffirmation of ESD as being central to the planning system. Nevertheless, there have been mixed signals about ESD principles in recent years. For example, a shift within some agencies, laws and assessment processes to 'facilitating' ESD in a way that is sometimes interpreted as a simple balancing of economic, social and environmental factors, or a vague 'triple bottom line'. In other recent legislation, such as the *Crown Lands Management Act 2016*, ESD principles have been avoided altogether, without clear justification. Additional guidance on embedding ESD in major project EIAs could therefore improve assessment outcomes and decision-making.

### Climate Impact Statements as a new part of Environmental Impact Statements (EIS)

The discussion paper notes that stakeholders have raised 'Lack of focus on the most important issues' as a reason for improved scoping of EIA. In our view this includes climate change mitigation and adaptation. Given the long project lifecycles of major projects, planning laws and EIA guidelines should require all major projects to include a Climate Impact Statement as part of the EIS.<sup>10</sup>

Climate Impact Statements would draw attention to:

- how the project contributes to or conflicts with emissions reduction targets and global goals (including the recent NSW target of net-zero emissions by 2050);
- potential climate-friendly alternatives and improvements; and
- how project design contributes to resilient communities and infrastructure.

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<sup>9</sup> Consistent with Planning Act objects, s 5; *Protection of the Environment Administration Act 1991* s 6.

<sup>10</sup> See EDO NSW, *Planning for Climate Change: How the NSW planning system can better tackle greenhouse gas emissions* (July 2016), [http://www.edonsw.org.au/planning\\_for\\_climate\\_change](http://www.edonsw.org.au/planning_for_climate_change).

This proposal would be supported by assessment guidelines and standards on greenhouse gas emissions, by sector or project type. We refer to climate change again under 'Further issues' at the end of this submission.

## **Initiative 2 - Earlier and better engagement**

*Survey: "Initiative 2a - Proponents should be required to engage with the public on the proposal and the key issues at the earliest stage of the environmental impact assessment process."*

We welcome policies and guidelines that require developers to engage with the public on potential proposals and to identify the key issues at the earliest stage of the EIA process. This seems to be the approach proposed in the Department's draft Wind Energy Planning Guidelines. Our comments on that policy noted that principles of leading-practice, early engagement should apply equally to other major projects.

We agree that the public should be able to comment on (or help identify) key issues identified by the proponent during the earliest stage of the process. The role of proponents, departments, independent experts and the community in identifying risks should be clear. We note that there is significant community concern about proponent-led engagement and whether this results in appropriate consideration of community issues. Proponents should bear the costs of engagement, but there must be safeguards so that community members feel respected and can trust the process.

To ensure that this initiative also builds public trust, guidelines on early engagement should explain what leading-practice consultation is; the benefits and incentives that arise from it, and from being responsive to community uncertainties and concerns. Developers may be encouraged to 'go through the motions', but what matters is the level of responsiveness to community issues. How will the Department assess this? What is the process if a proponent under-delivers or doesn't comply with agreed processes?

The Planning Department and partner agencies should also examine any systemic factors that may hinder public trust, or the benefits of early engagement, such as:

- the separation of mining exploration as a 'Part 5 activity', which includes little if any requirement for consultation and public exhibition compared with Part 4;
- legal rights that may favour developers and reduce incentives to respond to legitimate community concerns (for example, major projects exceeding LEP limitations;<sup>11</sup> seeking merits review of rezoning refusals or project refusals; and the Planning Act's suspension of environmental agency concurrences<sup>12</sup>).
- the tension between genuine, iterative engagement (which takes time), and 'streamlining' assessment processes and timeframes (see Initiative 6 below).

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<sup>11</sup> See for example the Mining SEPP 2007, clauses 6-7.

<sup>12</sup> Planning Act, ss 89J, 89K, 115ZG and 115ZH.

### **Initiative 3 - Improve the consistency and quality of EIA documents**

*Survey: "Initiative 3 - The EIS should contain a consolidated description of the proposal for which approval is sought and all measures proposed to address any impacts. These would be updated each time the project is modified."*

We support the premise of this initiative – as the ability to access, understand and respond to issues raised in EIA is critical to community input and acceptance. The key issue in our view is the accuracy and completeness of a 'distilled' EIA summary.

Safeguards are needed to ensure any summary is objective and not biased towards a certain outcome. For example, if the summary is prepared by the proponent, not an independent third party, there is a risk that it becomes more like a sales pamphlet or media release that glosses over genuine risks or community concerns. This suggests a role for a peer reviewer or other objectivity requirements. Importantly, peer review should include an open and transparent assessment of the work undertaken, not a narrowly defined review focused on specific aspects of a project.

We agree that the Department should clarify who the audience(s) are for the EIA summary and other documents, who is likely to rely on them, and their legal status.

A more wide-reaching solution would be to examine each stage of the EIA process for potential information bias, and to improve the independence of the information before the decision-maker. This includes presentation of technical EIA information, but also processes where the proponent controls how community input, submissions and concerns (and responses to them) are expressed or summarised. Proponents should bear the costs of this process, but they must not compromise its objectivity.

The goal of providing a consolidated description does not remove the need for technical assessments, including supporting data, to be available to the community for consideration and review. Communities should be supported to obtain independent expert advice on issues of concern and there must be a requirement for genuine proponents engagement and response to these concerns.

This initiative, and issues of objectivity, are closely related to Initiative 5 below.

### **Initiative 4 - Set a standard framework for conditioning projects**

*Survey: "Initiative 4 - Environmental management involves the implementation of controls for a project during construction and operation. Such controls will be strengthened if we specify the outcomes to be achieved rather than the way they are to be achieved."*

#### **A note of caution on outcomes-based conditions**

Having had the opportunity to review federal and state policy proposals, EDO NSW believes project controls should be a mix of prescriptive, process and outcome-

based conditions.<sup>13</sup> In particular, in the interests of accountability and enforceability, proponents should not be able to design their own preferred, flexible conditions.

There are risks in specifying broad, long-term outcomes with little detail on how to achieve them. These risks may exacerbate existing problems that this Project is attempting to address – such as lack of public information, enforceability issues, or clear compliance standards to hold approved operations to account. It also risks significant environmental degradation in the short-term for a promise of long-term environmental outcomes. Parameters of acceptable environmental impacts throughout the life of the project must be specified as part of any conditions.

To address the risks of unclear long-term conditions (and the difficulty of predicting long-term outcomes), the discussion often turns to waypoints or milestones to ensure staged compliance. In our view, this ultimately leads to a finding that a good mix of outcomes and prescriptive standards is needed.

### Clear categories and definitions

In our experience, there is also some confusion as to what is ‘outcomes-based’, what is a prescriptive condition, and where objective standards such as air and water quality guidelines (which we strongly support in project conditions) fit in these categories.

We agree that decision-makers should specify environmental outcomes that conditions are designed to achieve, but that must not be done at the expense of clear standards to hold proponents to account; and as noted it must not mean freedom for proponents to effectively design their own preferred and flexible conditions. We therefore welcome further discussion on the categories in the discussion paper (p 5).

We have commented on the role of post-approval management plans in other forums, and would be pleased to assist the Department on further specific issues.

### **Initiative 5 - Improve the accountability of EIA professionals**

*Survey: “Initiative 5 - Confidence in the EIA process should be supported through the use of codes of conduct for those involved in the environmental impact assessment process along with peer reviews, guidelines and training.”*

As noted, Initiative 5 is closely linked to Initiative 3 on quality and consistency of EIA. There are potential co-benefits of designing these initiatives together and ensuring they are complementary (see discussion above including in relation to objectivity).

We support this proposed initiative for codes of conduct, peer review, mandatory guidance and training.

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<sup>13</sup> See for example EDOs of Australia, *Submission on Draft Outcomes-based Conditions Policy* (October 2015), at [http://www.edonsw.org.au/planning\\_development\\_heritage\\_policy](http://www.edonsw.org.au/planning_development_heritage_policy). [Download PDF](#).



Closely tied to this should be a clear commitment from relevant departments to reject any EIS documentation that does not meet minimum standards.

### Consultant Accreditation

Requiring accreditation through industry-recognised certification such as ECA and EIANZ (or co-regulatory schemes drawing on these) would also improve public trust.

EDO NSW supported proposals in the Planning Reform Green Paper (2012) that EIA consultants for all major projects should be professionally accredited. This would include economic consultants. Despite many submissions in support, this was not progressed in the White Paper or Planning Bill 2013. We reiterated our support in our 2013 White Paper submission and outlined options to implement accreditation.<sup>14</sup> Those options drew on existing industry certification and government schemes, such as the Contaminated Lands Site Auditor Scheme, with a series of enhancements.<sup>15</sup>

Accreditation would ultimately be supported by independently allocating consultants to major projects, to reduce the potential risk of proponent pressure or public perceptions of bias. Above all, EIA information should be objective information to inform the decision-maker. Reliable information could then be aggregated for reuse.

### **Initiative 6 - Provide greater certainty on EIA timeframes**

*Survey: "Initiative 6 - The EIA process and timeframes for decision makers should be clearly defined to provide transparency and certainty for project delivery."*

Faster decisions are not necessarily better decisions – particularly if they truncate processes of community engagement or proper agency scrutiny. While the EIA process should be clear for all stakeholders, the public benefit of setting timeframes for major project approvals does not seem clear.<sup>16</sup> Furthermore, the need to tailor assessment to the complexity of projects and available agency resources, and the desire for better engagement and public trust in EIA, may work against this proposal.

A risk-based approach means major project assessments are likely to need the most scrutiny, consultation and coordination. Public servants should not be pressured to make decisions too quickly for the available resources.

### The value of expert concurrence from environmental agencies

On inter-agency coordination, we are also concerned by the tendency to exempt major projects from standard environmental safeguards, which fragments the EIA

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<sup>14</sup> Appendix 1 pp 92-93, [Download PDF; www.edonsw.org.au/planning\\_development\\_heritage\\_policy](http://www.edonsw.org.au/planning_development_heritage_policy).

<sup>15</sup> For example, a process to address/accredit different areas of expertise (hydrology, ecology, traffic etc); EIA consultant public registers and reporting, and fair processes for community complaints and review of accreditation (while learning lessons from poor governance of small-scale private certifiers).

<sup>16</sup> We note for some projects, local landholders inevitably face uncertainty over pending decisions. However, it is not clear that landholders would benefit from time-limited decisions compared with project proponents. For example, if a time-limited decision leads to a refusal (which is statistically rare), this may not actually provide certainty to the landholder. For example, a proponent has additional (and lengthier) rights to appeal the decision, or may resubmit an amended project proposal.

process and undermines public confidence in the system. Examples include where ‘concurrent’ approvals from environmental agencies are no longer required; where broad discretion is centralised within one department (and with limited transparency); or where major projects can proceed even though they may cause ‘significant and irreversible’ environmental harm (as in Part 7 of the new *Biodiversity Conservation Act 2016*).

If a major project proposal affects a sensitive environmental site, it is important that the expertise of environmental agencies is engaged early, is transparent, and has real weight in the decision-making process. This is an example where ESD principles should clearly apply, including taking a precautionary or preventative approach to serious harm, and ensuring biodiversity and ecological integrity is a ‘fundamental consideration’.

While we would be happy to discuss further specifics on Initiative 6, we would suggest the need for a marked improvement in community engagement and public confidence as priorities, ahead of decision timeframes or ‘streamlining’ coordination.

### **Initiative 7 - Strengthen monitoring, auditing and reporting of compliance)**

*Survey: “Initiative 7 - A system to report compliance with the conditions of approval should be applied consistently to all projects to improve confidence that projects are carried out in accordance with their approval.”*

EDO NSW supports strong and improved monitoring, auditing and public reporting. We welcome recent improvements to the Department’s compliance capacity and reforms that increased maximum penalties and smaller fines under the Planning Act. We would also support giving effect to this initiative via a central compliance portal.

To improve public confidence in longer-term regulatory performance, we would also support an independent performance audit of the monitoring and compliance capacity and governance of agencies, including the Department of Planning and Environment and the Department of Industry - Division of Resources and Energy.

‘Default’ compliance monitoring and reporting should enable short-term risks and immediate breaches to be identified; as well as comparison of annual performance and longer-term trends. This should apply within and across sectors to identify systemic issues. For major projects, reporting should extend to statistics on complaints and responses.

There could be some tailoring of the level of scrutiny and reporting based on risk – rewarding good performance and responsiveness to community issues; and placing higher scrutiny on low performance or low responsiveness. For example, for high-performing and highly-responsive projects, proactive complaint-reporting could end after 12 months of operation. For other major projects, longer public reporting on complaints would continue by default, with more scrutiny of poor-performing projects.

### Statewide ecosystems assessment and environmental accounts

Finally, at a more strategic level, compliance monitoring and reporting would be greatly assisted by a comprehensive statewide ecosystems assessment (as in the UK) and the development of a regional 'environmental accounting' framework. Environmental accounts would identify environmental values and ecological services (benefits that nature provides to humans), track trends in the extent and condition of these factors over time, and aid project-based and cumulative impact assessment.

### **Initiative 8 - Project change processes following approval**

*Survey: "Initiative 8 - There needs to be an improved process to address changes to the approved project and better ways to communicate these changes."*

We agree with the need for improvement, and would welcome further information on the intended direction of such changes. We make three framing comments below.

First, the modification process for SSI and Part 3A (and attempted in the final Planning Bill 2013) is too discretionary. The more prescriptive SSD modification is better (in the way it links to the original project), but could be improved to ensure proper public scrutiny and environmental assessment.

Second, communities don't always understand that in practice, modifications happen routinely – especially in the mining sector – and that the final project may last much longer, or be far more expansive, than first approved. Modification processes need to respond to changing conditions, including environmental, social and economic conditions. However the current process sees high scrutiny and community engagement focus on the upfront approval, and relatively little on modifications.

Third, the modification process can therefore wear down concerned communities and contribute to mistrust of the EIA process (or that the process is 'loaded' towards expanded approvals). It is important that neither the community nor proponents see the initial approval being the 'thin edge of the wedge' – either to allow repeated modifications that provide for less input and scrutiny; or as a way to undertake projects that would have been rejected, had they been considered in their entirety at the time of approval.

### **Further issues**

*Survey: "Please list below any other initiatives to address issues related to the environmental impact assessment and post approval process or any other issues that you would like to make us aware of."*

### **Cumulative impacts**

Legal amendments and clearer guidance for proponents, consultants, agencies, decision-makers and communities are needed on how to assess cumulative impacts, and what should be considered at each stage (including strategic planning, major project assessment, and consent conditions if approved).

## Climate change

Similar comments apply in relation to climate change as for cumulative impacts. Our recent report on *Planning for Climate Change* (2016) sets out 14 recommendations to improve the planning framework and assessment of greenhouse gas emissions.<sup>17</sup> This includes submitting a Climate Impact Statement as part of all major project EIS. We welcome the Department's further consideration of our report recommendations, and opportunities to collaborate on making the NSW planning system climate-ready.

## 'Streamlining' can affect public trust

There is a significant tension between, on the one hand, the desire to 'streamline' EIA processes for major projects (or bypassing standards such as environmental agency concurrence, threatened species protections and exclusions); and on the other hand, the desire to improve EIA quality, consistency and public trust. Recent CSIRO social research on public attitudes to mining is instructive.<sup>18</sup> It found:

*... there is a risk that streamlining government approval processes may be perceived by the public as reducing the capacity of governments to hold the mining industry to account against its environmental impact commitments and conditions. Paradoxically, reducing the legislative and regulatory burden on industry may make it easier to get a mine approved and operating, but may simultaneously erode public confidence in legislative and regulatory power, which may reduce the acceptance of mining more broadly and make it harder to operate a mine efficiently under conditions of increased social conflict.*

## Appeal rights should be more equitable, not subject to discretion

Discretionary removal of merit appeal rights via PAC public hearings has eroded confidence in the fairness of approval processes for resource projects in particular. PAC public hearings are not a substitute for merit appeal rights for interested parties.

Even though community appeal rights to the courts are rarely exercised when they are available, their role as a safety valve for independent oversight is widely recognised, and too important to be overridden at the discretion of the government.

A positive start is ICAC's *Anti-corruption safeguards in the NSW planning system* (2012) which recommends the limited expansion of third party merit appeal rights:

*to include private sector development that:*

- *is significant and controversial*
- *represents a significant departure from existing development standards [or]*
- *is the subject of a voluntary planning agreement.*

For further information and recommendations from EDO NSW, please see our recent discussion paper on *Merits review in Planning in NSW* (2016).<sup>19</sup>

<sup>17</sup> See EDO NSW, *Planning for Climate Change: How the NSW planning system can better tackle greenhouse gas emissions* (July 2016), [http://www.edonsw.org.au/planning\\_for\\_climate\\_change](http://www.edonsw.org.au/planning_for_climate_change).

<sup>18</sup> Moffat et al. (2014), *Australian attitudes towards mining - citizen survey report 2014*, CSIRO, p 14, at <http://www.csiro.au/en/Research/MRF/Areas/Community-and-environment/Resources-in-the-community/Attitudes-to-mining-survey>.

<sup>19</sup> Available at [http://www.edonsw.org.au/merits\\_review\\_in\\_planning\\_in\\_nsw](http://www.edonsw.org.au/merits_review_in_planning_in_nsw).