

Our Ref: F2004/07962
Contact Officer: David Ongkili - 9093 6793

16 December 2016

Ms Erica van den Honert
Director Planning Services, Business Systems
Department of Planning & Environment
23-33 Bridge Street
Sydney 2000

Dear Madam,

RE: IMPROVING THE ENVIRONMENTAL IMPACT ASSESSMENT PROCESS

I refer to the Department's e-mail to Council on 20 October 2016 requesting comments and input on the Department's Stage 1 review of the of the Environmental Impact Assessment (EIA) process for State Significant Development (SSD) and State Significant Infrastructure Projects (SSIP). Council submits the following comments for consideration especially in relation to the following relevant initiatives identified in the review:

Develop a consistent framework for scoping within the EIA process

The need for prioritisation of the most important issues in an EIA process is recognised. However, the methodology for prioritising environmental issues will need to be robust enough to overcome any potential influence from any one dominant group. In this regard, the need to balance technical and community issues in project scoping is important.

Earlier and better engagement

While earlier and better engagement of the community is important for an improved EIA process, it remains a fact that public engagement for SSI and SSD projects are largely proponent led and driven so that engagement terms reflect the proponent's interests rather than the community's. As such, the involvement of the affected community at the beginning of the EIA process where the community has a say in the scoping of a project is important. Likewise, community engagement throughout the EIA process is crucial for public participation to have a role in shaping outcomes that address community concerns.

Improve the consistency and quality of EIA documents

Council supports the initiative to simplify the structure of EIA documents by more effective use of summary sections as well as the clarity of expression and analysis in EIA documents so that public understanding of projects is improved. However, this should not be undertaken to the detriment of technical examination and decisions. The use of peer reviews of EIA documents is also supported especially if affected communities and authorities have a say as to who will peer review documents to ensure that peer reviews are robust and independent exercises.

Set a standard for conditioning projects

The Department's call for greater consistency in the application of conditions of consent for projects is noted. In particular, the EIA review states that an important area of potential improvement is the introduction of "... a standard range of condition types that might be:

- *outcome or performance based,*
- *prescriptive and/or*
- *management based"*

While these may assist in preparing consistent and sound conditions of approval, they remain only guidelines in that the opportunity to draft broad and open conditions where proponents seek to expediently condition the impacts of projects so that these critical projects can proceed, especially major critical infrastructure projects such as motorway and rail networks, remains available to proponents. An example of an open and broad condition is Condition No. B43 of the Stage 2 WestConnex New M5 SSI 6788 consent which reads as follows:

"B43 The SSI is to be designed with the objective of improving, on balance, and not adversely impacting on:

- (a) *the performance of the road network for all road users, including but not limited to vehicles, freight, public transport and active transport; and*
- (b) *existing access arrangements and services for all road users, including consideration of speed and reliability of public transport services."*

In this example, the local community has raised with Council their concerns that the broad and open nature of this condition renders it impossible to be enforce. As the condition is designed in terms of achieving objectives and not key measures that are defined (for example, reducing traffic along a particular road by more than 30%), the scope for alleging that the proponent has failed to incorporate the above matters into the design is limited. Council could, for example, obtain expert evidence from a traffic engineer to support such a position but even where an expert could support the community's position that the design did not achieve the objectives, it leaves the onus on the Land and Environment Court to make a determination whether, "**on balance**":

- (a) The design achieves improvements across the road network for all users; and
- (b) The design does not adversely impact the use of the road network.

Because the creation of this condition does not appear to incorporate the very things that the EIA Review is proclaiming are important in conditioning projects (that is "*performance based, prescriptive or management based*" parameters), it in effect nullifies the ability of relevant compliance authorities to enforce it. Furthermore, the ultimate responsibility in granting any SSIP and SSD approvals, and all conditions associated with such approvals, lies with the Minister for Planning so that, even where it can be established that a breach of such a condition has occurred, any appellant/petitioner must first obtain the consent of the Minister to bring proceedings to remedy or restrain a breach of the SSI or SSD approval. So for example, even if Council were to obtain expert evidence to support a proposition that the design of the WestConnex motorway did not achieve the objectives in Condition B43 and therefore a breach of the consent had occurred, a challenge would not be able to be commenced by Council under section 123 of the EPA Act **without first** obtaining approval of the Minister to commence such proceedings.

In summary, no matter how strict standards are made for conditioning SSI and SSD projects, there are existing provisions in the Environmental Planning and Assessment Act which seek to expressly prevent any challenge being brought in respect of SSI and/or SSD projects and, in particular, critical infrastructure projects. Council's suggests that any initiative to set a standard for conditioning projects in the EIA Review process should be accompanied by relevant legal amendments allowing appeals for breaches of project conditions to be a made without Ministerial approval.

Improve accountability of EIA professionals

A Code of Practice to govern accountability of EIA professionals will increase the awareness, but not necessarily the practice, of accountability in the EIA process unless compelled to. Furthermore, unless EIA expert consultants are appointed independently of the project at hand, they will tend to be beholden to their clients. This inevitably affects their accountability in the EIA process.

In analysing environmental issues through an Environmental Impact Statement (EIS), consideration should be given to discourage proponents and their EIA consultants from "transferring" environmental care issues from the EIS to an 'Environmental Management Plan' or similar plan through conditions of approval. In this regard, the accountability of EIA professionals should be extended to ongoing environmental remediation/restoration if a project that has been approved has worse environmental, economic or social impacts than that predicted in the EIS.

Strengthen monitoring, auditing and reporting of compliance

As indicated in the discussion on conditioning projects above, the effectiveness of compliance monitoring, auditing and reporting at post-approval stage can only be as effective as the wording and intent of the conditions that underpin such compliance, and the legal structures that allow for breaches in compliance to be pursued.

Project change processes following approval

Public understanding of project changes following project approval is often difficult especially for large scale projects; projects that are highly technical in nature; and projects that already have a number of previously approved changes. Accordingly, the EIA must, as far as is practicable, consider both the immediate the long-term cumulative impacts of a project especially where changes to a project is expected due to uncertainties over time.

Council looks forward to participate and contribute to the next stages of the EIA Review process and would request that Council be kept up to date on any developments on this matter. Should you have any queries, please do not hesitate to contact David Ongkill, Council's Coordinator Strategic Planning, on 9399 0793.

Yours faithfully,



Alan Bright
Manager – Strategic Planning