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Ms Carolyn McNally
The Secretary
Department of Planning & Environment
GPO Box 39
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25th November 2016

Dear Ms McNally,

Re: Feedback on Improving the Environmental Impact Assessment Process

The Association of Mining Related Councils of NSW ("AMRC") welcomes the opportunity to provide feedback to the Department of Planning & Environment ("DPE") regarding its review of the Environmental Impact Assessment process ("Review") for State significant projects [both State Significant Development (SSD) and State Significant Infrastructure (SSI) proposals].

The AMRC congratulates you on your leadership of the Department, especially in introducing reform on environmental planning and assessment policies and the culture of the organisation. Your initiatives in such disciplines as regional planning, social impact assessment, community engagement, planning agreements and the overall EIA process are warmly welcomed and we wish you well in driving further change that enhances confidence in the integrity of the EIA process.

1. About the AMRC

The origins of the AMRC date back to 1978 when several Councils recognised that Local Government Areas associated with coal developments would benefit from a co-ordinated approach when liaising with proponents and the NSW State Government. In 1993 the scope broadened to include metalliferous mines. In 1999 it expanded further to represent Local Government on all extractive industries, including unconventional gas. Currently there are 20 member Councils of the AMRC.

2. Scope of the Review

AMRC understands from the EIA Improvement Project Discussion Paper, October 2016 ("Paper") that:

- the scope of the Review is the entire EIA process including proposal development, Government agency and public consultation, exhibition of Environmental Impact Statements, the assessment and determination of projects and the post approval phase when projects are constructed and operated; and

- at this point in time (Stage 1) the DPE is seeking feedback on what the key issues for improvement are, how the process can be streamlined and environmental outcomes improved.

The Paper indicates that the primary objectives of the Review are to:

- build confidence in the integrity of the EIA process;
- deliver earlier and better engagement with affected communities;
- strengthen monitoring and reporting on project compliance;
- improve clarity and guidance for proponents and the community including key issue identification and development of a standard approach for applying conditions to projects;
- improve the consistency and quality of EIA documents, including the accountability of EIA professionals; and
- make assessment decision making time frames more certain and efficient.

Our Submission leads with a priority item for AMRC members, namely that many rural Council's consideration of major project proposals is hampered by the lack of resources and we seek funding via the Development Application fees collected by DPE.

3. The Role of Local Government in the EIA Process for State Significant Projects

As the sphere of government directly responsible for day to day governance of its Local Government Area, Councils provide leadership and strive to deliver equitable services and facilities across their communities. To this end they are well placed to understand the direct and indirect benefits and costs of major projects on their communities, including to hard and soft infrastructure and the wellbeing and social fabric of residents and ratepayers.

Aside from the Local Government Act requirements, the EP&A Act also imposes obligations on Councils to assist in the assessment of major projects.

AMRC members are most keen to act and deliver in accordance with these statutory responsibilities. However, many Councils, especially those in rural areas, are often limited in the efforts they can make because of resource constraints – both technically and financially. This constrains the ability of Councils to be as effective as they might like to be in providing community leadership on major project proposals.

To illustrate, a member Council was recently involved for over two years in assisting the NSW Government facilitate planning approval for a major coal mine proposal.

It involved:

- attending 12 meetings with the proponent;
- attending 10 meetings with various state Government agencies (plus travel costs to and from Sydney);
- attending 10 meetings with various Members of Parliament (plus travel costs to and from Sydney);
- preparing detailed submissions on the EIS, the Response to Submissions document, a socio-economic assessment and various VPA drafts;
- making presentations to two Planning Assessment Commission hearings;
- numerous deliberations on the proposal at Council meetings; and
- engagement of resources to advise on the project.

This Council supported the mine proposal, subject to adequate compensation for the socio-economic costs likely to be transferred to the Shire's residents and ratepayers (eg roads, water, sewerage, amenities, social impacts, etc).

The point to note is that the Council had to find the unbudgeted funds to undertake all this work.

A survey report released by the Local Government Association of Queensland in 2010 showed that the costs to Councils of assessing and responding to major development proposals was **\$400,000** (*source: Local Government Association of Queensland, September 2010*). AMRC concurs with this figure based on the collective experience of its members.

AMRC requests that the NSW Government, via the processing fees collected by the DPE for major projects, allocate at least \$150K to those Councils likely to be impacted by a major project to facilitate optimal engagement and consideration in that LGA.

This concept of fee for service is not new and two recent examples are cited below:

- Santos contributed to the case management costs of local government in managing its assessments pertaining to the Santos Gladstone Liquefied Natural Gas project. Santos was required to provide financial assistance (ranging from \$75,000 to \$150,000) to Gladstone, Maranoa and Banana Regional Councils to assist in their consideration and response to the EIS; and
- Buru Energy in Western Australia provided significant financial support to the Traditional Owners (Yawuru and Noonkanbah) for access to independent specialist advice regarding proposed shale gas exploration activities.

Such a funding initiative would help subsidise the case management costs incurred by Councils and improve immeasurably the input by local government to the EIA of major projects.

4. Building Confidence in the Integrity of the EIA Process

4.1 Delivering Earlier and Collaborative Engagement with Affected Communities

In today's world key stakeholders, including Councils and their local communities, seek 'a seat at the table' when it comes to planning the types of development that are appropriate in their region and under what terms and conditions. By including the broader populace and being inclusive, collaborative, open and transparent there is increased confidence and assurance in likely future development approaches. The traditional model of a formal, hierarchical top down approach where policy is framed by government allied with strong business lobbying is no longer tolerated by general society.

A recent dynamic, digital connectivity, has generated a more collaborative society. This technological revolution provides a potentially effective tool to enhance how policy is conceived and advocated. Given this new service, the process for the public to make submissions and provide feedback in response to a project EIS could be updated to enable input via social media, and for the DPE to provide rapid responses to facilitate improved dialogue.

Many members of the AMRC are rural councils and, based on representations from their constituents, believe the engagement process could be improved if allowances were made

for the fact that rural landholders and other members of the public are likely to be disadvantaged when assessing a proposed project compared to a proponent. Landholders and other members of the public have limited time, technical knowledge and economic capacity to pursue their interests when compared to a major corporate.

Landholders and others potentially impacted adversely may find that major project proposals cause disruption and distress in their personal lives and uncertainty. For farmers potentially impacted by a major project, questions are raised regarding the future of their agribusiness, for instance, do they commit to capital improvements or the next phase of the farm plan or will this be a waste of money?

The AMRC encourages the DPE to develop mechanisms to protect the rights of landholders, given that the adverse impacts from a major industrial project are not of their making; yet the situation is foisted upon them. Often it is not a negotiation where they are willing participants with an eye to mutual benefits being achieved from the outcome. It is therefore recommended a policy be developed by DPE to assist landholders when they have to negotiate with a proponent. Similarly the DPE is encouraged to be more assertive in requiring proponents to engage in a more respectful, collaborative manner.

For instance, it is recommended that the DPE require a proponent and an affected landholder to jointly sign off when the landholder feels he/she is adequately informed, has a good understanding of the scale and nature of the predicted impacts through the provision of relevant EIA information and the likely risks.

4.2 More Rigour and Transparency in how Decisions are Made

The AMRC supports the reform agenda of the DPE to improve decision-making on major projects and help rebuild trust in the process.

In 2013 the then NSW Commissioner of the Independent Commission Against Corruption The Hon David Ipp AO QC in his report entitled 'Reducing the Opportunities and Incentives for Corruption in the State's Management of Coal Resources' (October 2013) stated that '*an efficient and effective policy and regulatory environment was one where opaqueness, uncertainty and discretion were eliminated from the decision making framework*'.

The AMRC respectfully suggests that, aside from 4.1 above, the following actions be implemented to help deliver as even more rigorous and effective EIA process:

- a) Upfront, the DPE prepare regional or catchment wide strategic plans that are underpinned by the values and aspirations that communities wish to see reflected in the management of the natural, cultural and economic resources in their region. These values ought be articulated in the core principles of the plans. The plans would be based on the Ecologically Sustainable Development philosophy and provide a vision for future development and general land use management in that region, with priority given to delivery of long term economic benefits.
- b) Similarly, it would be beneficial if the assessment of projects reaffirmed the correlation between the regional strategic plan and the proposal.

- c) The Planning Assessment Commission ("PAC") be replaced with a review model where statements of claim by the various parties can be interrogated and cross examined. In the interests of openness and transparency, interested parties ought to be provided the opportunity to examine, challenge or explain the various assertions put before the PAC. Currently, whilst the PAC listens to all points of view, there is limited open discussion and dialogue about the relative merits or veracity of the evidence presented. Interested parties yearn for greater clarity in those forums as to which of all the often competing claims the PAC gives credence to.

The AMRC recommends that the Government replace the PAC with a Development Assessment Commission ("DAC") chaired by a judge or pre-eminent lawyer to determine major projects. Parties would be able to be self-represented and the legal rules of evidence not apply. Cross examination of evidence would be a key aspect of DAC's work. Members of the DAC would be appointed via an independent, transparent process, say on the recommendation of relevant professional bodies. A comparable process that worked very well in the 1980's and 1990's was the NSW Office of The Commissioners of Inquiry for Environment and Planning, chaired by John Woodward. Evidence was tested in the public arena and there for all to see.

- d) A third party merit review process be allowed so parties can challenge the factual basis of any development decisions in the courts. In Australia's democratic society this provision is important and will reduce the scope for opaque deals between proponents and government and catch inappropriate decisions.
- e) Provide a means for those who make a Submission on an EIS to have a right of reply to the Response to Submissions document prepared by the proponent. Sometimes proponents are selective in their interpretation of points raised and valid concerns too easily dismissed;
- f) Separate the functions of strategic planning and development assessment within Government. It is important in a planning sense that the strategic and regional planning process 'lead' the resources development agenda, so that our economic and cultural development is in accord with community aspirations and values and is mindful of the environmental and social values in a region. At present, major resources projects often 'spring up' and catch communities and Councils unawares with little prior knowledge or expectation.
- g) Strengthen the regulatory monitoring and compliance function of Government to reinforce implementation of consent conditions. This is elaborated on in section 5 below.
- h) Introduce to relevant government departments internal and external measures to protect against regulatory capture. Regulatory capture occurs when regulatory agencies change over time and move from acting in the public interest (their assigned statutory function) to promoting or advancing the interests of industries they are supposed to be regulating. It is akin to one interest group on the playing field seizing control of (ie 'capturing') the umpires, such that the game is no longer taking place on a level playing field.

The possibility of regulatory capture is a risk to which the DP&E is exposed by the very nature of its functions. There are many and varied interest groups that lobby vociferously to influence environmental planning and assessment policies and procedures. If not already in place, the implementation of various internal and external checks would help reinforce transparency and accountability and improve public confidence in the system.

Recommended internal checks include:

- Public reporting of the outcome of meetings between DP&E and companies, local government, the various industry groups and other key stakeholders;
- Adopting more explicit guidelines for employee conduct; and
- Ensuring the DPE engages with a diversity of interests, experts and change agents to avoid insulation.

Recommended external checks include:

- If the PAC is to remain, then ensure it is completely independent of and at arms length from the DPE with more resources so it has the unfettered capacity to engage the expert services it requires to address matters of public interest;
- The Auditor General or an Environmental Ombudsman undertaking annual, independent audits; and
- Remaking the law so the burden of proof lies with those promoting the development, not those who may query it.

4.3 Precautionary Principle to Underpin Major Project Determinations

AMRC respectfully suggests that a more strict precautionary approach be adopted to ensure that the major projects are only permitted if they can satisfy the fundamental principles of Ecologically Sustainable Development and the Precautionary Principle.

The EISs for some projects contain information on job numbers and over what time frame, accommodation needs of workers, socio-economic and hydrogeological assessments that are not sufficiently robust to allow for assessments with a high level of confidence. The specialist topics mentioned are important to Councils in their consideration and judgment of projects. To this end the AMRC applauds moves by the DPE to strengthen the SEARS to require more comprehensive baseline data in modelling work and that the reports are fully transparent regarding assumptions and limitations of the model and its predictions.

5. Strengthening monitoring and reporting on project compliance

The AMRC welcomes recent initiatives by the DPE to enhance its compliance management role.

The AMRC supports the commitment to undertake periodic audits of major projects such as mines and wind farms and to enforce conditions of consent. This step in the planning, approval and operation of major projects has been inadequate and upscaling this function will help rebuild community trust and confidence in the assessment and determination process.

The AMRC would encourage similar moves by the EPA to better resource and prioritise regulatory compliance and enforcement. The adequacy of the consent conditions is only as

good as the supporting monitoring, compliance and enforcement regime underpinning the system.

6. Provide improved clarity and guidance for proponents and the community to identify the most important issues and develop a standard approach for applying conditions to projects

AMRC welcomes moves by the DPE to require the proponents of major developments to engage earlier with councils, local communities and the DPE before the scope and intent of a project is finalised.

Councils and local communities wish to be consulted in a meaningful, collaborative way before a PEA is submitted and SEARS issued.

AMRC supports the suggestions that:

- proponents and the DPE be required to inform community members how their views have been taken into account, and if not, why not; and
- The DPE lead engagement/dialogue with the community on key issues.

A common theme of consent conditions is one of 'adaptive management', suggesting that the various management plans for operations, noise, dust, water, etc will be sufficient and that if impacts exceed predictions then the management plans will be modified to address the shortcomings. The AMRC seeks more rigorous, explicit performance standards whereby proponents will be legally liable for Environment Protection Licence and planning consent condition exceedances. The approach by proponents to adapt management plans is providing too much latitude for proponents to not deliver on their EIA commitments. The studies underpinning the impact predictions should be required to be more robust and comprehensive and the proponents held accountable for the results.

Certainly, consent conditions must be prescriptive and performance based. Many conditions as written are too vague and general, thus providing wriggle room for proponents in how they might be interpreted.

Strengthening Social Impact Assessment ("SIA") requirements is urgently required and we note DPE is undertaking an upgrade. AMRC would like to see the SEARS be more prescriptive in requiring proponents to address specific SIA matters, leading to the conditioning of various social impacts in the consents.

Increased obligations should be placed on proponents to be more proactive in seeking out Voluntary Planning Agreements with affected Councils. At present, proponents will avoid VPAs if possible and councils have to be assertive to protect their rights in this regard. It is recommended that the VPA Guidelines be more explicit in stipulating that councils are entitled to seek financial contributions for community based (as distinct from Council based) social and economic impacts.

7. Improve the consistency and quality of EIA documents, including the accountability of EIA professionals

A common concern amongst the communities of AMRC member Councils is that because EISs are prepared by consultants paid by the proponents they are 'advocacy' documents designed to paint the project in the best possible light. The AMRC would like to see improved checks and balances in the compilation of EISs, including that developers no longer be allowed to hire their own consultants. As an alternative, proponents could pay a fee into a fund and consultants are allocated by an independent arbiter.

The challenge with EISs is that, by definition, they are technical documents, so it is important they not be 'watered down' in an endeavor to simplify the message. Rather, the capacity (ie funds) to undertake technical reviews needs to be provided by the Government to the key stakeholders, including Councils.

The DPE is to be commended for engaging more and more independent experts to review the adequacy of the content of EISs. Many studies are by their nature complex and highly technical, so reviewers need the skills and experience to match.

8. Make the assessment decision making time frames more certain and efficient

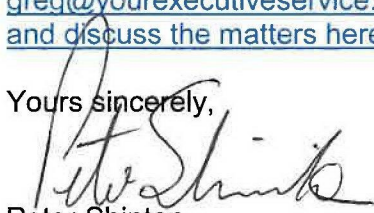
The AMRC is prepared to support the setting of timeframes for each stage of the EIA process providing there are sufficient checks and balances to ensure that there is:

- true collaboration and meaningful dialogue between proponents and local communities and Councils before a PEA is tabled and SEARS issued;
- Ongoing, close dialogue during the EIS preparation by the proponent with Councils and communities;
- increased robustness and accuracy in the content of the EISs;
- Increased openness and transparency in how the DPE engages with all interested parties to optimise confidence in the fairness of the assessment process; and
- Implement an alternative to the PAC process which is more investigative and questioning of the assertions and claims of the various parties, in the public area.

The AMRC thanks you very much for the opportunity to provide feedback on these important matters.

If you have any queries regarding the above please don't hesitate to contact the Executive Officer of the AMRC Mr Greg Lamont on phone 0407 937 636 or email greg@yourexecutiveservice.com.au The AMRC would welcome the opportunity to meet and discuss the matters herein.

Yours sincerely,



Peter Shinton

Chairman

Association of Mining Related Councils

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