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Aboriginal Land Council
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Director
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Via email at EIAproject@planning.nsw.gov.au

Submission to the Environmental Impact Assessment Improvement Project

Dear Sirs and/or Madams,

The NSW Aboriginal Land Council (**NSWALC**) welcomes the opportunity to submit comments regarding the Environmental Impact Assessment Improvement Project (**EIA Improvement Project**), including the the Discussion Paper currently on exhibition by the NSW Department of Planning and Environment (**Department**).

NSWALC welcomes efforts to improve EIA processes for State significant projects and has been working closely with the Department in order to improve the way that planning processes take into account the economic, cultural and social interests of Aboriginal peoples in NSW.

Our submission provides recommendations on improving EIA processes in the following key ways:

1. Improving the assessment, protection and management of Aboriginal culture and heritage in NSW;
2. Improving engagement and consultation with Aboriginal peoples and Aboriginal Land Councils; and
3. Ensuring that the social and economic impacts of major projects on Aboriginal peoples are adequately assessed and managed.

We have also outlined responses to the Department's key proposals for the EIA Improvement Project. NSWALC looks forward to working with the Department in order to improve major development assessment processes in NSW.

Yours sincerely,

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Date: 24/11/14

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***The New South Wales Aboriginal Land Council's
submission to the
Environmental Impact Assessment Improvement Project***

November 2016

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Summary of NSWALC's recommendations:

Recommendation 1.1

- ❖ EIA processes and condition-making should include legislated protections of Aboriginal culture and heritage including in the identification, assessment (including cumulative impacts) and management processes.

Recommendation 1.2

- ❖ There must be a mechanism in EIA processes to allow decisions to be made in favour of protection of Aboriginal culture and heritage.

Recommendation 1.3

- ❖ That the Department advise NSWALC as to the status of the proposed Technical notes for the *Guidelines for the economic assessment of mining and coal seam gas proposals*, which are key to ensuring adequate assessment of impacts on Aboriginal culture and heritage for major projects.

Recommendation 2.1

- ❖ EIAs should require mandatory engagement and consultation with Aboriginal peoples for major projects.

Recommendation 2.2

- ❖ The principle of *Free, Prior and Informed consent* from the UNDRIP should be incorporated into State significant development assessment processes.

Recommendation 2.3

- ❖ That the Department provide targeted information to stakeholders, proponents and the community regarding best practice engagement with Aboriginal communities.

Recommendation 3.1

- ❖ Social impact assessment as part of EIA processes should be improved in NSW. Social impact assessments must be mandatory for State significant developments and require an assessment of impacts on Aboriginal peoples.

Overview

NSWALC is the peak body representing Aboriginal peoples in NSW. NSWALC is a self-funded statutory authority established under the *Aboriginal Land Rights Act 1983* (NSW) (**ALRA**). NSWALC provides support to the network of 120 Local Aboriginal Land Councils (**LALCs**) which exist in NSW. With over 23,000 members NSWALC is the largest Aboriginal member-based organisation in Australia.

The preamble of the ALRA recognises that *'Land is of spiritual, social, cultural, and economic importance to Aboriginal peoples.'* The ALRA was established to facilitate the return of land in NSW to Aboriginal peoples through a process of lodging claims for unused Crown land. The network of Aboriginal Land Councils was established to acquire and manage land as an economic base for Aboriginal communities, as compensation for historic dispossession and in recognition of the ongoing disadvantage suffered by Aboriginal communities.

Aboriginal peoples in NSW and the network of Aboriginal Land Councils are key stakeholders in relation to planning processes. LALCs are significant landowners and managers of lands across NSW, as well as custodians of expansive cultural heritage assets. As per the ALRA, LALCs hold land for the economic, social and cultural benefit of Aboriginal people living within their boundaries. With the consent of their members, LALCs may seek to develop or sell land that they hold. LALCs may also seek to maintain key parcels of land for its cultural or environmental values.

Development assessment processes such as EIAs are an important issue for the Aboriginal community and Aboriginal Land Councils. State significant development has the potential to significantly impact on the economic, social and cultural interests of Aboriginal peoples, especially on vulnerable Aboriginal culture and heritage. NSWALC has long advocated that there is an urgent need to improve development assessment processes to ensure that the interests of Aboriginal peoples are being properly considered.

NSWALC are working closely with the Department on a number of fronts in order to improve the way that planning processes interact with and impact on Aboriginal peoples. We note that a number of planning-related reform processes are currently being undertaken by the Department. While NSWALC regularly provides advice and feedback to the Department, we believe that meaningful reform for Aboriginal peoples can only be achieved if approached in a holistic and integrated manner throughout these various and on-going reform processes.

Key issues for Aboriginal Land Councils

Page 3 of the Discussion Paper lists a range of overarching issues with EIA processes identified by the Department. NSWALC is generally supportive of this list of issues, especially the “*need for better and earlier community engagement*” and the “*need to better consider the cumulative impact of projects.*” However, NSWALC submits that a more detailed consideration of the issues affecting Aboriginal peoples and Aboriginal Land Councils is needed in order to enact effective and targeted reforms for EIA processes. We have outlined below key issues for consideration of the Department.

1. Improve EIA processes for the assessment, protection, management and compliance of Aboriginal culture and heritage

The protection and promotion of Aboriginal culture and heritage is one of the key functions of Aboriginal Land Councils as per sections 52(4) and 106(7) of the ALRA. It is well recognized that Aboriginal culture and heritage provides immense value for the cultural identity and wellbeing of Aboriginal communities, as well as being of broader value to NSW and Australia as a whole.

NSWALC has long advocated that the current system fails to protect Aboriginal culture and heritage and is in fact facilitating widespread harm and destruction to these precious assets¹. While Aboriginal culture and heritage is regulated chiefly under the *National Parks and Wildlife Act 1974* (NSW) and associated guidelines, planning laws play a central role in regulating impacts on Aboriginal culture and heritage.

For example, the State of the Environment Report 2011 points to a number of trends which significantly undermine the protection of Aboriginal culture and heritage in NSW, which include development pressures and government approval-processes leading to “*progressive, cumulative destruction of the Indigenous cultural resource.*”² Given this, NSWALC sees enormous potential for constructive improvements to development assessment processes to improve outcomes for Aboriginal peoples in NSW.

Currently there is no legislated requirement that Aboriginal culture and heritage must be considered during the assessment and approval of State significant developments. Where this is required, it is generally only in the form of undertaking an assessment of Aboriginal heritage, and developing a consultation plan. Furthermore, NSWALC’s research on major project approval processes has shown that only about 30% of State significant development projects had conditions relating to Aboriginal heritage, with many only requiring management plans, rather than protections for Aboriginal heritage. Legislated protections of Aboriginal culture and heritage including in the identification, assessment and management processes are needed. Assessment processes must also include mechanisms to identify and account for cumulative impacts.

¹ NSWALC’s position with regard to culture and heritage and the NSW planning system are outlined in detail in previous submissions to the NSW Government – see NSWALC, *More than Flora and Fauna* (2009) Submission in response to the National Parks and Wildlife Amendment Bill 2009 (The Omnibus Bill) and *Submission to NSW Government White Paper: A new planning system for NSW* (June 2013) available at <<http://www.alc.org.au/publications/other-publications.aspx>>.

² Australian Government Department of the Environment and Energy, State of the Environment Report 2011, Chapter 9: Heritage – State and trends of heritage, available at <<https://www.environment.gov.au/science/soe/2011-report/9-heritage/2-state-and-trends/2-2-condition-and-integrity#ss2-2-6>>.

Recommendation 1.1

- ❖ EIA processes and condition-making should include legislated protections of Aboriginal culture and heritage including in the identification, assessment (including cumulative impacts) and management processes.

It is important to note that development assessment processes which fail to protect Aboriginal culture and heritage risk losing legitimacy in the eyes of the Aboriginal community. Approval of State significant development with significant and irreversible impacts on Aboriginal culture and heritage has in the past led to a number of high profile cases of Aboriginal community opposition to projects, including several resource extraction projects in northern NSW. This leads to a loss of social license to operate and on-going costs and delay for proponents.

There is a resulting perception in some Aboriginal communities that planning processes, including EIAs, are not facilitating fair and balanced outcomes for Aboriginal peoples, and that decisions are frequently made which favour economic values over cultural values.

Recommendation 1.2

- ❖ There must be a mechanism in EIA processes to allow decisions to be made in favour of protection of Aboriginal culture and heritage.

Guidelines for the economic assessment of mining and coal seam gas projects

In October-December 2015, NSWALC participated in stakeholder consultations run by the Department for the review of the *Guidelines for the economic assessment of mining and coal seam gas projects* (**Guidelines**). Due to extensive concerns with the content of the Guidelines, especially with the methodology used to assess impacts on Aboriginal culture and heritage, NSWALC did not support the Guidelines in their proposed format.

However, after consultation with the Department NSWALC agreed give the Guidelines in-principle support on the condition that a set of Technical notes were drafted in 2016 to deal more extensively with the valuation of Aboriginal culture and heritage (among other issues). NSWALC began consulting on the Technical notes in mid-2016 but this process was never concluded.

NSWALC is concerned that the Technical Notes have not been finalised. The Technical Notes and the Guidelines play a key role as part of EIA processes. Ensuring that the Guidelines have a robust and transparent methodology for assessing impacts on Aboriginal communities and Aboriginal culture and heritage is critical. We strongly recommend that as part of the EIA Improvement Project, the Department review progress of the Technical Notes and continue stakeholder consultations to finalise the Technical notes.

Recommendation 1.3

- ❖ That the Department advise NSWALC as to the status of the proposed Technical notes for the *Guidelines for the economic assessment of mining and coal seam gas proposals*, which are key to ensuring adequate assessment of impacts on Aboriginal culture and heritage for major projects.

2. Improve EIA processes with regard to the involvement and engagement of Aboriginal peoples

It is positive to see that the Department has identified the “*need for better and earlier community engagement*” as a key issue in the EIA Improvement Project. NSWALC strongly agree and submit that engagement with Aboriginal peoples for major projects is in urgent need of improvement.

There are limited provisions which require consultation with Aboriginal peoples in the *Mining Act 1992* (NSW) or *Environmental Planning and Assessment Act 1979* (NSW) unless the activity is proposed on land owned by Aboriginal peoples. Ensuring that State significant projects are able to accurately assess and mitigate specific impacts on the cultural, social and economic interests of Aboriginal peoples and Aboriginal Land Councils requires effective consultation mechanisms.

Recommendation 2.1

- ❖ EIAs should require mandatory engagement and consultation with Aboriginal peoples for major projects.

Free, Prior and Informed Consent

NSWALC submits that the Department should ensure that EIA processes are consistent with international best practice. The *United Nations on the Declaration on the Rights of Indigenous Peoples* (UNDRIP), to which Australia is a signatory, outlines the right of Aboriginal peoples to free, prior and informed consent in Article 32:

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

Recommendation 2.2

- ❖ The principle of *Free, Prior and Informed consent* from the UNDRIP should be incorporated into State significant development assessment processes.

Best practice community engagement

The Department is urged to recognise that some LALCs and Aboriginal communities may need additional support to effectively engage with the planning system. Long term capacity building is required to improve engagement and communication between Aboriginal communities and local councils, planning authorities, proponents and the general public. To assist in facilitating this engagement, the Department could provide more detailed and targeted information to stakeholders, proponents and the community regarding best practice engagement with Aboriginal peoples.

In general, engagement processes with Aboriginal peoples must provide adequate notification, be culturally appropriate, and allow for genuine input into decision-making processes. Often, not enough time is given to communities to consider significant amounts of information. This could be improved by providing enough time and resources for community engagement. Consultation should be broadly undertaken, inclusive of Aboriginal Land Councils, any native title applicants for the area, local Aboriginal peoples and any other Aboriginal representative organisations such as Elders groups.

Recommendation 2.3

- ❖ That the Department provide targeted information to stakeholders, proponents and the community regarding best practice engagement with Aboriginal communities.

3. Improve EIA processes with regard to the assessment and management of social and economic impacts on Aboriginal peoples and Local Aboriginal Land Councils

NSWALC is aware that the Department is currently undertaking a review of how to improve social impact assessment for major projects (the *Social Impact Assessment Guidance for Major Resources* project). As part of the initial scoping stages of that process, NSWALC provided the following general feedback:

- There are limited processes in EIAs that require proponents to consider the specific social and economic impacts of major projects on local Aboriginal communities and LALCs – there is need for improvement;
- Aboriginal peoples are important stakeholders for development assessment processes and experience unique and specific impacts from large-scale resource projects;
- It is crucial that social impact assessment processes include specific guidance on issues which affect Aboriginal peoples, including taking into account their social, cultural and economic interests; and
- Social impact assessment guidance material should be developed through best practice engagement and consultation with Aboriginal peoples, including Aboriginal Land Councils as key stakeholders.

Recommendation 3.1

- ❖ Social impact assessment as part of EIA processes should be improved in NSW. Social impact assessments must be mandatory for State significant developments and require an assessment of impacts on Aboriginal peoples.

Responses to key proposals by the Department

NSWALC notes some general comments to key proposals by the Department for the EIA Improvement Project below. However, further detail is requested as the proposals develop regarding the mechanisms proposed and how they will be implemented, to enable NSWALC to provide more targeted feedback. NSWALC recommends further consultation being undertaken at a later stage.

Proposal 1: focus the EIA on the important issues

While NSWALC supports the objective of improving EIA processes, improving efficiency must not preclude a thorough assessment of all potential project issues. A key consideration is how decisions will be made as to what an “important issue” is, and whether there will be appropriate mechanisms to ensure community input into these decisions. Likewise, not all important issues may be known at the outset of a project. NSWALC submits in response to proposal 1 that:

- While moves to streamline EIA processes are generally supported, this must not come at the expense of a thorough consideration of EIA processes must allow for further engagement once more data becomes available;
- The Department should provide clarification regarding what decision-making processes will determine the “important issues” in an EIA process;
- There should be mechanisms for on-going community and stakeholder input, including appeal and review mechanisms; and
- Aboriginal culture and heritage must be recognized as a priority issue.

Proposal 2: Earlier and better engagement with the community

NSWALC strongly supports the need for better and earlier community engagement, as we have outlined in section 2 above. While it is positive to see the Department recognizing this as a key issue, please note that NSWALC strongly advocates for continued engagement throughout the life of a project, and does not support moves to limit engagement to early stages of development assessment.

Please refer to section 2 above for recommendations to improve engagement and consultation with Aboriginal peoples for major development assessment processes.

Proposal 3: Professionalism and integrity of those leading the EIA process

NSWALC agrees that professionalism and integrity of EIA decision-makers is critical to ensuring the integrity of the planning system in NSW. While a Code of Practice may be a good start, NSWALC submits that integrity and professionalism of EIA decision-makers should be backed by binding and enforceable means. Furthermore, NSWALC submits that there must be mechanisms available to appeal and review decisions made under EIA processes and that merit review avenues should be expanded.

Proposal 4: Improve the quality of EIA documentation through all stages of the process

NSWALC is supportive of the proposed improvements to EIA documentation, including requiring a consolidated project description and an inclusion of subsequent modifications in a consolidated chapter.

Proposal 5: Performance based mitigation measures and conditions

NSWALC is in principle supportive of an approach to setting consent conditions which is performance or outcomes based, given that there are stringent and mandatory requirements for the protection of Aboriginal culture and heritage in project areas. This should include:

- ❖ Involving local Aboriginal peoples in decision-making regarding the best ways to manage or mitigate Aboriginal culture and heritage impacted by major projects;

- ❖ Ensuring adequate resourcing for compliance and auditing of consent conditions or performance-based conditions; and
- ❖ Stronger penalties for breaches of Aboriginal culture and heritage conditions.

Case study – Need for stronger penalties for breaches of Aboriginal culture and heritage conditions

The Department's Compliance Reports for September 2016 refer to the Fraser Drive Development at South Tweed Heads being in breach of conditions relating to the protection of Aboriginal culture and heritage on-site. The proponent was required to erect a fence around an Aboriginal midden prior to on-site work commencing but failed to do so. Over the course of four months, the Department issued three penalty notices and an Order to remedy this breach, which was still not complied with by the proponent at the date the Compliance Report was drafted.

NSWALC is extremely concerned that work has been allowed to continue on-site for four months without any protective measures for the Aboriginal midden, which could be irreversibly damaged. It is clear that the penalty notices to date have not been sufficient to incentivize the proponent to comply with the conditions to protect Aboriginal culture and heritage. This is a clear example of the need for stronger penalties for breaches of Aboriginal culture and heritage conditions.

This submission has been prepared by the NSW Aboriginal Land Council. We thank you for the opportunity to submit feedback to the EIA Improvement Project and we look forward to working further with the Department with regard to planning and development reforms in NSW. If you have questions or comments regarding the content of this submission, please contact the Policy and Programs Unit on (02) 9689 4444 or policy@alc.org.au.