REVIEW OF THE EP&A REGULATION 2000

NSWMC SUBMISSION

23 November 2017

NSW MINERALS COUNCIL

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Introduction

This consultation comes at a time where there are a number of ongoing reform initiatives that will need to be reflected in the amended EP&A Regulation. Those initiatives include:

- The amendment of the Environmental Planning and Assessment Act 1979, by the Environmental Planning and Assessment Act 2017 (Amendment Act)
- The updating of the process of assessment and determination undertaken by the Independent Planning Commission (IPC) replaces the Planning Assessment Commission (PAC)
- The Environmental Impact Assessment Improvement Project (EIA Improvement Project), which proposes significant changes to how an EIA is scoped and undertaken and how Secretary's Environmental Assessment Requirements (SEARs) are issued. This project includes nine draft guidelines.

The amendments that need to be made to the EP&A Regulation depend in part of how each of the above reforms is finalised.

NSWMC has made submissions with regards to:

- Legislative Updates reform (which includes the IPC process and the amendments to the EP&A Act)

  http://www.nswmining.com.au/NSWMining/media/NSW-Mining/Publications/Submissions/NSWMC-Submission_EP-A-Act-Amendments.pdf

- The EIA Improvement Project

  http://www.nswmining.com.au/NSWMining/media/NSW-Mining/Attachments/NSWMC-Submission-EIA-Improvement-Project.pdf

As these processes are not finalised, this submission should be read in conjunction with our earlier submissions.

Given the number of outstanding reforms initiatives that will need to be implemented by the amended EP&A Regulation, it is important that the *Review of the Environmental Planning and Assessment Regulation Issues Paper* is only an early step in the consultation and that stakeholders are consulted further as the policy initiatives including the EIA Improvement Project and policies relating the new IPC are proposed. It is also important that the draft amended EP&A Regulation is placed on public exhibition.

Summary of recommendations

1. The Government should consult on the regulation to amend the proposed Environmental Planning and Assessment (Savings and Transitional) Regulation (2017)
2. The Government should provide the following transitional arrangements for Part 3A modification applications:
    a. Modification applications under the former section 75W (including for those consents listed in clause 8J(8) of the EP&A Regulation) should be received for a further 12 months after the commencement of the Regulation.
    b. Where SEARs have been issued, the proponent should have 12 months from the date of the commencement of the Regulation, to lodge an Environmental Impact Assessment.
    c. The Amending Regulation should provide that for the purposes of the 'substantially the same development test' in s96 of the EP&A Act the 'development for which the consent was originally granted' is taken to be the project for which the approval under Part 3A had been granted (including any modifications) at the date of the Amending Regulation.
    d. Clause 118 of the EP&A Regulation should be amended to provide that in the case of s96(2) applications in relation to transitioned consents, the consent authority is not required to provide notice of the application to everyone who made a submission on the original development application.
    e. A provision should be included to provide that following the commencement on the Amending Regulation any Part 3A approval is taken to be a development consent for the purposes of modification of the approval.
    f. The Amending Regulation needs to provide that where Part 3A project approvals are modified after the passage of the Bill, future modification will be assessed against the development at the time it was last modified.
3. In the event that the Government implements a two month window for the lodging of section 75W applications, where the application would not require SEARs, but where the:
    a. The Department of Planning and Environment has confirmed the assessment approach, including that a Part 3A modification is appropriate
    b. The project has been through the *Conceptual Project Development Plan* process

    these projects should be treated in the same way as projects with SEARS and should have twelve months to lodge a section 75W application.
4. The Government should take steps to ensure that the new sub-section (3) to be added to s 104A and clause 7(4) to be contained in the new S&T Regulation commence immediately.
5. Amend clause 49(3A) of the EP&A Regulation so that it is clear that consent of the New South Wales Aboriginal Land Council is only required under that provision where the consent of the Local Aboriginal Land Council is required as owner of the land.
6. Amend the EP&A Act to clarify that Site Verification Certificates and Gateway Certificates can be provided anytime before the determination of a development application or a modification.
7. The amended EP&A Regulation should provide timeframes for the key steps in the development application assessment and determination process, including the following:
    a. Within 14 days of provision of the Scoping Report, place the draft SEARs on exhibition
    b. Within 28 days of the provision of the Scoping Report, publish final SEARs

c. Conduct an adequacy review within 28 days of receipt of an EIS and exhibit the EIS within 7 days of the conclusion of this period (unless DP&E has requested further information from the proponent)

d. Hold a public hearing within 30 days of the end of the EIS exhibition period

e. IPC report to be issued within 30 days from the public hearing

f. Secretary's Assessment Report issued within 60 days of the response to submissions

g. Draft conditions to be issued within 30 days of the Secretary's Assessment Report

h. Determination of the development application within 30 days of the publication of draft conditions

8. NSWMC support the extension of clause 51 and 52 of the EP&A Regulation to modification applications, provided that the right to reject a development application or modification application is limited to circumstances where the consent authority has provided the proponent with an opportunity to rectify any errors or omissions in the original application.

9. Amend the EP&A Regulation to provide that where the landholder's consent to a project application or a development application is not required, the consent of the landholder to the surrender of the development consent or project approval is not required.

10. Instead of requiring proponents to consider and comply with key guidelines prior to the issuing of SEARs, the Government should provide standard SEARs for different development types and require the proponent to justify departure from the standard SEARs in the Scoping Report.

11. The amendments to the EP&A Regulation should include a provision that provides that non-compliance with the EIA Guidelines does not invalidate a development consent or modification granted under the EP&A Act following the commencement of the Guidelines.

12. Amend Schedule 2 of the EP&A Regulation:

    a. To provide for a scoping process based on template SEARs for different development types.

    b. To provide that submissions cannot be accepted outside of the consultation period.

13. The Amended EP&A Regulation should provide for the public exhibition of Draft SEARs, not a Scoping Report.

14. The EP&A Regulation should include an adequacy process. The consideration should take no longer than 28 days from the date of lodgement and the EIS should be placed on exhibition within 7 days of a decision that it is adequate.

15. The Government should not impose development fees on a cost recovery basis

16. With regard to development application fees, the Secretary should retain discretion to require a lower fee

17. The Planning Reform Fee should be removed or replaced by a fix fee paid by all proponents

18. Fees for applications under section 96(2) of the EP&A Act should be amended to reflect the fees payable under clause 2445K for Part 3A modifications.

19. The EP&A Regulation should:

    a. Require consent authorities and developers to consider any final practice note with regard to VPAs when parties enter into a VPA

    b. Require consent authorities to publish policies that comply with any VPA practice note.

c. Provide that any contributions payable under a planning agreement should be 'reasonable'. To be considered 'reasonable' the contribution should be connected to, and calculated on the basis of, the impact of the development on a council's social and economic infrastructure as a result of any increases or movement in the local population as a result of the development.

20. The IPC should provide input during the scoping phase of the environmental impact assessment process.

21. The EP&A Regulation should be amended to include the following matters with regard to the process of the IPC:

    a. The IPC process should:

        i. Allow for only one public hearing 30 days after the end of the exhibition period of the EIS

        ii. Allow the proponent the opportunity to respond in writing to the issues that are raised by the IPC and the community as part of the public hearing process

        iii. Allow the proponent the opportunity to review and respond to draft conditions of consent

        iv. Provide timeframes for the proposed process

    b. Any recommendation or guidance by the IPC in its report should be limited only to issues arising from the submission made in respect of the development (and not used as a way to add additional matters to the SEARs for assessment by the proponent)

    c. A second public hearing should only be held in circumstances where an application has been amended, substituted or withdrawn and replaced after the first public hearing but before it has been determined, and the environmental impact of the development has not been increased.

22. The EP&A Regulation should exclude the making of conditions of development consent requiring financial assurance with regard to mine site rehabilitation where Part 12A of the Mining Act 1992 provides for a security deposit.

1 Development assessment and consent

1.1 Part 3A Transitional Arrangements

Part 1A of the EP&A Regulation contains provisions relating to Transitional Part 3A projects.

The *Environmental Planning and Assessment Amendment Act 2017,* moves Schedule 6A, which provides the transitional arrangements for Part 3A, to a regulation, the *Environmental Planning and Assessment (Savings and Transitional) Regulation (S&T Regulation) 2017*. NSWMC understand that the Government's intention is to amend the S&T Regulation (Amending Regulation) to end the transitional arrangements and transfer current Part 3A project approvals to State significant development (SSD) or State significant infrastructure.

The Amending Regulation has not been released for public consultation. The only information available about the Government's intentions is the *Planning Legislation Updates: Summary of Proposals, January 2017*. The Issues Paper does not address amendments to Part 1A of the EP&A Regulation which deals with Part 3A transitional arrangements.

1.1.1 Transition to SSD

The Summary of Proposals proposed the following transitional arrangements for the modification of Part 3A projects:

- Modification applications under the former section 75W will be received for a period of two months following the passage of the Bill (the 'two month window') and determined under section 75W
- Where Secretary's Environmental Assessment Requirements have already been given for a modification application under the former section 75W, the application will be determined under section 75W provided an environmental impact statement is lodged within 12 months
- Where a modification for a former Part 3A consent is lodged after the two-month window, the modification will be assessed against the development as at the time it is transitioned to either SSD or SSI (in other words, as at the time the development was last modified).

These proposed arrangements do not provide adequate time for proponents to transition to the new arrangements. Department's Legislative Updates project has been underway for over 12 months and the Department has not:

- Provided any timeframe of the amendment of the legislation since the close of submissions in March 2017
- Provided any feedback on the submissions it has received, or any indication of its intentions, simply placed a Bill before the Parliament.

Given this lack of certainty proponents have had to rely on the current legislation to prepare projects and should not be penalised for the Government's lack of certainty on this issue throughout 2017 and current rush to finalise this reform.

Given the complexity of Part 3A section 75W projects the following transitional arrangements should be provided:

- Where SEARs have been issued, the proponent should have 12 months from the date of the commencement of the Regulation, rather than the date of the SEARs, to lodge an Environmental Impact Assessment. To require the lodgement within 12 months of the issuing of SEARs would impose a timeframe which would not otherwise be imposed, and penalise the proponent for no good reason

- Modification applications under the former section 75W (including for those consents listed in clause 8J(8) of the EP&A Regulation) should be received for a further 12 months after the commencement of the Regulation. Imposing a two-month window to apply under section 75W is unnecessarily restrictive given the complexity of these projects given that there has been no certainty about when the new arrangements would commence and proponents have had to make investment and other decisions based on the availability of section 75W. There is no good reason for the Government to be so restrictive, and very good reasons to be more generous in this regard.

In the event that the Government is not willing to provide a 12 month window to make final section 75W applications, for those applications where SEARs are not to be issued, but where:

- The Department of Planning and Environment has confirmed the assessment approach, including that a Part 3A modification is appropriate
- The project has been through the Conceptual Project Development Plan process

these projects should be treated in the same way as projects with SEARS and should have twelve months to lodge a section 75W application.

Other issues that need to be addressed in the transition are:

- The substantially the same development test

  The Amending Regulation should provide that for the purposes of the 'substantially the same development test' in s96 of the EP&A Act the 'development for which the consent was originally granted' is taken to be the project for which the approval under Part 3A had been granted (including any modifications) at the date of the Amending Regulation.

- Notification of submitters on the original development application

  Clause 118 of the EP&A Regulation requires the consent authority to issue a notice of a modification application under s96(2) to everyone who made a submission on the original application. This would not be suitable for transitioned Part 3A consents and should be amended to exclude these consents.

- Restricting the change for the purpose of modifications only

  Following the commencement of the Amending Regulation, any Part 3A approval should be taken to be development consent for the purpose of modification of the approval and the Regulation should reflect this. This is to avoid confusion regarding the status of a Part 3A approval when interpreting provisions of the EP&A Act or Environmental Planning Instruments.

- Status of Part 3A projects modified after the passing of the Amendment Act

  It is not clear what will be the status of those Part 3A projects that are modified after the passing of the legislation in accordance with the transitional arrangements provided above. The Amending Regulation needs to provide where Part 3A project approvals are modified after the passage of the Bill, future modification will be assessed against the development as at the time it was last modified.

Recommendations

1. The Government should consult on the regulation to amend the proposed Environmental Planning and Assessment (Savings and Transitional) Regulation (2017)
2. The Government should provide the following transitional arrangements for Part 3A modification applications:
   a. Modification applications under the former section 75W (including for those consents listed in clause 8J(8) of the EP&A Regulation) should be received for a

further 12 months after the commencement of the Regulation.

b. Where SEARs have been issued, the proponent should have 12 months from the date of the commencement of the Regulation, to lodge an Environmental Impact Assessment.

c. The Amending Regulation should provide that for the purposes of the 'substantially the same development test' in s96 of the EP&A Act the 'development for which the consent was originally granted' is taken to be the project for which the approval under Part 3A had been granted (including any modifications) at the date of the Amending Regulation.

d. Clause 118 of the EP&A Regulation should be amended to provide that in the case of s96(2) applications in relation to transitioned consents, the consent authority is not required to provide notice of the application to everyone who made a submission on the original development application.

e. A provision should be included to provide that following the commencement on the Amending Regulation any Part 3A approval is taken to be a development consent for the purposes of modification of the approval.

f. The Amending Regulation needs to provide that where Part 3A project approvals are modified after the passage of the Bill, future modification will be assessed against the development at the time it was last modified.

3. In the event that the Government implements a two month window for the lodging of section 75W applications, where the application would not require SEARs, but where the:

a. The Department of Planning and Environment has confirmed the assessment approach, including that a Part 3A modification is appropriate

b. The project has been through the *Conceptual Project Development Plan* process

these projects should be treated in the same way as projects with SEARS and should have twelve months to lodge a section 75W application.

1.2 Certain remedial provisions in the Amendment Act should commence immediately in advance of the amendment of the EP&A Regulation

The Amending Act contains two very important remedial and validating provisions which have the effect of, among other things, protecting the validity of approvals granted under the EP&A Act from being exposed to the risk of judicial review challenge on what, are considered by the Government, as being improper grounds.

Those two provisions in the Amendment Act are:

- The new sub-section (3) to be added to s 104A – which deals with the consent authority's role where the making of a new consent requires the surrender of an existing consent.
- Clause 7(4) to be contained in the new S&T Regulation – which deals with the constitution of the Planning Assessment Commission (PAC).

There are three compelling reasons why the Government should ensure that both provisions commence immediately. They are:

- The SSD consent granted by the PAC for the Wilpinjong Mine Extension Project is currently being challenged in judicial review proceedings in the Land and Environment Court on the grounds that are addressed by the abovementioned two provisions. The Government needs to take steps to

ensure that the remedial and validating provisions are commenced, prior to the hearing of the proceedings on 8 February 2018

- There are 131 approvals for other major projects, which include a significant number relating to mining projects, which have been granted by the PAC since 26 March 2014 by PAC panels not comprising three members. Until the new sub-section (3) to s 104A is proclaimed to commence, all of these approvals are vulnerable to challenge in judicial review proceedings. The time bar provision in section 101 would not protect these approvals from being challenged in judicial review proceedings
- The mode of environmental assessment, which is expressly authorised by the new sub-section (3) to be added to s 104A, reflects a mode of assessment which has been undertaken by DP&E in respect of mining projects for many years. Further, it is a mode of assessment which is currently being undertaken by DP&E in respect of pending applications. These approvals will continue to be exposed to the risk of judicial review challenge until this new sub-section is proclaimed to commence.

Recommendations

4. The Government should take steps to ensure that the new sub-section (3) to be added to s 104A and clause 7(4) to be contained in the new S&T Regulation commence immediately.

1.3 Part 6 – Development application procedures for development assessed under Part 4 of the EP&A Act

1.3.1 Land holders consent to a development application

Clause 49 of the EP&A Regulation concerns who can make a development application. The provision provides generally landholders consent is not required for mining and petroleum SSD. However sub-clause 49(3A) provides that the where the owner of the land is a Local Aboriginal Land Council (LALC) the application can only be made with the consent of the NSW Aboriginal Land Council (NSWALC).

The introduction of the requirement for the NSWALC to consent to development applications in relation to land owned by a LALC, was part of a package of amendments prompted by an ICAC investigation into corrupt dealings by LALCs. The amendment was made by way of the *Aboriginal Land Rights Amendment Act 2009* (ALR Amendment Act).

The second reading speech at the time of the introduction of the ALR Amendment Act, makes it clear that the purpose of the amendments, was not to set up a right of the NSWALC to veto development applications, which did not otherwise require landholder's consent, but rather to ensure transparency in the dealings of LALCs. Until 2011, mining projects were not impacted by the amendment as it did not apply to Part 3A. At the time of the introduction of State significant development (SSD), the unintended consequences of clause 49 were raised with the Department, but not addressed. A subsequent decision by the Land and Environment Court in the *Darkinjung Local Aboriginal Council v Wyong Coal Pty Ltd* (No 2) {2014} NSWLEC 71, found that sub-clause 49(3A) applied to a development application for mining.

This differs to an application for mining development made under the Transitional Part 3A provisions where clause 8F(1A) of the EP&A Regulation clearly stipulates that consent of the NSWALC is only required for a development or modification application relating to land owned by a Local Aboriginal Land Council 'if the consent of the Local Aboriginal Land Council is required as owner of the land to the application'.

Pursuant to clause 8F(1), landowner's consent is not required for a mining project, and accordingly under clause 8F(1A) where a planning application (under Part 3A) is made in respect to land owned by a LALC the consent of the NSWALC is not required for such applications.

Recommendation

5. Amend clause 49(3A) of the EP&A Regulation so that it is clear that consent of the New South Wales Aboriginal Land Council is only required under that provision where the consent of the Local Aboriginal Land Council is required as owner of the land.

1.3.2 Provision of a Gateway Certificate/Site Verification Certificate

Clause 50A relates to 'Special provisions relating to development applications relating to mining or petroleum development on strategic agricultural land '. Sub-clause 50A(2) provides that a development application to which the clause applies must be accompanied by a current gateway certificate or a site verification certificate. However the case law provides that where a development application needs to be accompanied by a document, that requirement can be satisfied by providing the document at any time before the determination of the application. To avoid confusion, clause 50A should be amended to reflect the case law with regard to documents that must accompany a development application. The same amendments should be made to clause 119A with respect to modifications.

Recommendation

6. Amend the EP&A Act to clarify that Site Verification Certificates and Gateway Certificates can be provided anytime before the determination of a development application or a modification.

1.3.3 Regulatory timeframes for development applications

Since 2014 the Department has moved to meet targets for the assessment of complex mining projects. This has been a welcome development. However the targets only apply to parts of the process that are in the Department's hands.

The transition of the Planning Assessment Commission (PAC) to the Independent Planning Commission (IPC) and EIA Improvement Project will make changes to the procedures for the scoping, assessment and determination of development applications. NSWMC has made submissions with regard to both of these reforms. Timeframes for the key steps in the development application process should be provided by regulation to provide proponents and the community with certainty.

Table 1 below sets out NSWMC the key steps and time frames that NSWMC propose should be included in the process.

Table 1 Proposed key steps and time frames

	Step	Responsible
1.	Within 14 days of provision of the Scoping Report, place the draft SEARs on exhibition	DP&E
2.	Within 42 days of the provision of the Scoping Report, publish final SEARs	DP&E
3.	Conduct an adequacy review within 28 days of receipt of an EIS and exhibit the EIS within 7 days of the conclusion of this period (unless DP&E has requested further information from the proponent)	DP&E
4.	Hold a public hearing within 30 days of the end of the EIS exhibition period[1]	IPC
5.	IPC report to be issued within 30 days from the public hearing	IPC
6.	Secretary's Assessment Report issued within 60 days of the response to submissions	DP&E
7.	Draft conditions to be issued within 30 days of the Secretary's Assessment Report	DP&E
8.	Determination of the development application within 30 days of the publication of draft conditions	IPC

[1] NSWMC propose that the IPC public hearing should only have one stage

Recommendation

7. The amended EP&A Regulation should provide timeframes for the key steps in the development application assessment and determination process, including the following:

    a. Within 14 days of provision of the Scoping Report, place the draft SEARs on exhibition

    b. Within 28 days of the provision of the Scoping Report, publish final SEARs

    c. Conduct an adequacy review within 28 days of receipt of an EIS and exhibit the EIS within 7 days of the conclusion of this period (unless DP&E has requested further information from the proponent)

    d. Hold a public hearing within 30 days of the end of the EIS exhibition period

    e. IPC report to be issued within 30 days from the public hearing

    f. Secretary's Assessment Report issued within 60 days of the response to submissions

    g. Draft conditions to be issued within 30 days of the Secretary's Assessment Report

    h. Determination of the development application within 30 days of the publication of draft conditions

1.3.4 Rejection of withdrawal of modification applications

NSWMC is supportive of the proposal in the Issues Paper to extend to modifications the provisions that allow for the consent authority to reject and the proponent to withdraw a development application in certain circumstances. With respect to the rejection of a development application, this should be limited to circumstances where the consent authority has provided the proponent with an opportunity to rectify any errors or omissions in the original application.

Recommendation

8. NSWMC support the extension of clause 51 and 52 of the EP&A Regulation to modification applications, provided that the right to reject a development application or modification application is limited to circumstances where the consent authority has provided the proponent with an opportunity to rectify any errors or omissions in the original application.

1.3.5 Surrender of development consents

Clauses 8P and 97 of the EP&A Regulation require that a person proposing to surrender a project approval or development consent, who is not the owner of the land, to provide a statement of the owners consent to the surrender. As noted in the Issues Paper, this is overly onerous, particularly where the owners consent to the original development application or project application was not required.

Consent to the surrender of an approval should not be required where consent was not required prior to the determination of the application being made.

Recommendation

9. Amend the EP&A Regulation to provide that where the landholder's consent to a project application or a development application is not required, the consent of the landholder to the surrender of the development consent or project approval is not required.

1.3.6 Prescribed policy guidance documents for SSD

Section 2.1 of the Issues Paper suggests the introduction of a requirement for the proponent to consider and comply with key guidelines prior to the request for SEARs for example as part of the request for SEARs.

This approach would not provide greater certainty or streamline the scoping process. The requirement to comply with key guidelines could in fact have the opposite effect, as proponents would need to go to additional effort to show how generic guidelines may not apply to a particular project.

A better approach would be to introduce standard SEARs for different types of development. During the process of scoping a project, the proponent would then consider whether the standard SEARs should apply, and justify any proposed departure from the Standard SEARs. This approach is a key recommendation of NSWMC's submission on the EIA Improvement Project.

Recommendation

10. Instead of requiring proponents to consider and comply with key guidelines prior to the issuing of SEARs, the Government should provide standard SEARs for different development types and require the proponent to justify departure from the standard SEARs in the Scoping Report.

2 Environmental Assessment

2.1 The EIA Improvement Project

As noted earlier in this submission the EIA Improvement Project reform is still ongoing at the time of writing. NSWMC has made a submission with regard to the draft nine guidelines and other products that make up the EIA Improvement Project. NSWMC's submission recommends significant departures from a number of the key concepts proposed by the Department.

In the draft EIA Guidelines the Department proposed a number of changes to the EP&A Regulation that would be required to implement the EIA Improvement Project. Table 2 below sets out the changes proposed and NSWMC's response.

Table 2 Regulatory changes proposed by the EIA Improvement Project

	Change proposed	NSWMC position
1.	All EIA Guidelines except the *Community and Stakeholder Engagement Guideline* and the *Community Guideline to the EIS* will be given effect through amendment to the EP&A Regulation	Providing legal effect through the EP&A Regulation will provide proponents, community and the consent authority with certainty about what is required in an EIS. However a breach of a Guideline should not invalidate a consent and this should be explicitly provided for in the amendments
2.	Amendment of Schedule 2 to require the form and content of EIA documents (being the Scoping Report, EIS, Submissions Report and Modification Environmental Assessment) to be in accordance with the EIA Guidelines (rather than the current provisions)	NSWMC's recommendation is that the Department provide template SEARs and that the role of the scoping process is to determine whether the template SEARs are appropriate for the project. Proponents should not be required to respond to submissions that are received outside of the consultation period.
3.	An application for SEARs is to be accompanied by a Scoping Report in a form that is consistent with the Scoping an EIS Guideline. The Regulation will also require the Scoping Report for some applications (including mining proposals) to be exhibited for 14 days	NSWMC proposes a different process, whereby the draft SEARs would be placed on public exhibition, see Table 1 herein and NSWMC's submission on the EIA Improvement Project (section 3.2) The circumstances in which SEARs may be amended should be limited and those circumstances should be set out in the EP&A Regulation. Those circumstances are set out in NSWMC's submission on the EIA Improvement Project (section 3.5).
4.	The existing provisions for consultation with public authorities will not change	No comment
5.	The existing provisions relating to false or misleading information in Schedule 2 will remain but may be broadened	No comment

	Change proposed	NSWMC position
6.	EIA documents are to be signed by members of a relevant professional organization and adhere to a code of conduct	NSWMC does not support this approach as it would be difficult to implement and would not be likely to provide greater confidence in EIS
7.	The grounds for requests for additional information and rejection of applications for consents and modifications of consent will include consideration of the extent to which the information provided in the EIA Guidelines has been provided.	The EP&A Regulation should provide that before an development or modification application is rejected the proponent should be given an opportunity to correct any error or omission. The EP&A Regulation should also provide for an adequacy process for the EIS, to be completed within 28 days of lodgment and for the EIS to be placed on exhibition within 7 days of being deemed to be adequate.

Recommendations

11. The amendments to the EP&A Regulation should include a provision that provides that non-compliance with the EIA Guidelines does not invalidate a development consent or modification granted under the EP&A Act following the commencement of the Guidelines.
12. Amend Schedule 2 of the EP&A Regulation:
    a. To provide for a scoping process based on template SEARs for different development types.
    b. To provide that submissions cannot be accepted outside of the consultation period.
13. The Amended EP&A Regulation should provide for the public exhibition of Draft SEARs, not a Scoping Report.
14. The EP&A Regulation should include an adequacy process. The consideration should take no longer than 28 days from the date of lodgement and the EIS should be placed on exhibition within 7 days of a decision that it is adequate.

3 Fees and charges

While the current methods outlined for calculating a range of development fees paid by the mining industry is quite arbitrary, the industry has found that the Department take a sensible approaching to fees where discretion is provided. This approach should be continued. NSWMC is not supportive of a cost recovery approach to fees. The experience of the cost recovery approach at the Commonwealth level is that it ties up government and proponent resources for no benefit.

3.1.1 Development application fee

Fees and charges for applications for transitional Part 3A applications and SSD applications are based on the estimated cost of the projects. There is no relationship between the estimated cost of a project and the assessment/determination effort. This is one a number of very considerable arbitrary charges imposed on mining projects, including the Administrative Levy, which is also payable to the Department.

The Secretary has discretion to vary the fee. NSWMC support the continuation of this discretion, which is exercised appropriately.

3.1.2 Planning reform fee

The planning reform fee is an arbitrary fee, which is again based on the estimated cost of a project. There is no reason why proponents of higher cost projects should bear a greater burden of funding planning reform. The fee should be removed, or the Government should investigate a fixed fee that would be paid by all proponents.

3.1.3 Fees for modifications

Clause 245K provides for the fees payable in relation to transitional Part 3A projects. For a modification request that will involve a *minor environmental assessment* the maximum fee payable is $5,000.

Clause 256M, which applies to section 96 applications does not provide a similar low fixed fee for applications that only require minor environmental assessment. Instead the fee payable on an application made under section 96(2) is the greater of $5,000 and 50% of the fee payable on the original application. In the case of only an application requiring only a minor environmental assessment, the fee payable will be completely disproportionate to any cost to the Department.

Recommendations

15. The Government should not impose development fees on a cost recovery basis
16. With regard to development application fees, the Secretary should retain discretion to require a lower fee
17. The Planning Reform Fee should be removed or replaced by a fix fee paid by all proponents
18. Fees for applications under section 96(2) of the EP&A Act should be amended to reflect the fees payable under clause 2445K for Part 3A modifications.

4 Development contributions

4.1 Voluntary Planning Agreements

Mining projects negotiate a voluntary planning contribution with the local councils where the project is located, and in some cases other local authorities close to the project.

Negotiation of planning agreements are extremely difficult given the lack of:

- Any requirement for a relationship between the impacts of the project and a planning agreement
- Any framework for the negotiation/arbitration/decision on what is an appropriate contribution to be made under a planning agreement.

NSWMC's members are of the view that planning contributions should compensate the local council for impacts of the project on the social and economic infrastructure of the council. Many mining councils however believe that planning contributions should be related to the revenues earned by the project and seek a contribution based on production. This type of contribution does not have any relationship to the impacts on facilities and services provided by council and impacted by the project.

4.1.1 NSWMC proposed approach

The difficulty with planning agreements is that:

- There is no process for the negotiation of the agreement, which leaves proponents and councils frustrated
- There is no criteria to define what is an appropriate contribution under a voluntary planning agreement, leaving parties with very different ideas of what is acceptable and often a long way apart
- There is no decision maker/arbitrator to make a decision about whether a voluntary planning agreement proposal is acceptable.

NSWMC would propose that the Government should reform the voluntary planning agreement process to address these issues and give certainty and structure to the negotiation of a planning agreement. The work for an amended EP&A Regulation in relation to these reforms would be for the Regulation to provide that the quantum of a contribution payable under a planning agreement needs to be 'reasonable'. To be considered 'reasonable' the contribution should be connected to, and calculated on the basis of, the impact of the development on a council's social and economic infrastructure as a result of any increases or movement in the local population as a result of the development. Such a provision would be permissible to be included in the Regulation by way of section 93L of the EP&A Act which provides that the regulations may make provision for or with respect to planning agreements, including the form and subject matter of planning agreements.

4.1.2 Support for the proposals in the paper

The Department has exhibited a draft practice note with regard to voluntary planning agreements in 2016. The draft practice note recommends that consent authorities publish policies addressing a range of matters including:

- The kinds of public benefits sought and, in relation to each kind of benefit, whether it involves a planning benefit
- The method for determining the value of public benefits and whether that method involves standard charging
- The procedures for negotiating and entering into planning agreements.

NSWMC supports the suggestion in the Issues Paper that the EP&A Regulation should require consent authorities and developers to consider the practice note when parties enter into a VPA.

NSWMC supports the suggestion in the Issue Paper that the EP&A Regulation be amended to require the publication of such policies. The EP&A Regulation should require consent authorities to not only address the matters set out on page 2.4 of the draft practice direction, but also to address how the consent authority's policy provides that planning agreements entered into by the consent authority meet the generally applicable acceptability test set out in the draft practice direction (page 9 and 10). The generally applicable acceptability test should require that planning agreements:

- Are directed towards proper legitimate planning purposes, that can be identified in the statutory planning controls and other adopted planning policies applying to development
- Provide for public benefits that bear a relationship to development that is not de minimis (that is benefits that are not wholly unrelated to development)
- Produce outcomes that meet the general values and expectations of the public and protect the overall public interest
- Provide for a reasonable means of achieving the desired outcomes and securing the benefits
- Protect the community against planning harm.

Recommendation

19. The EP&A Regulation should:
    a. Require consent authorities and developers to consider any final practice note with regard to VPAs when parties enter into a VPA
    b. Require consent authorities to publish policies that comply with any VPA practice note.
    c. Provide that any contributions payable under a planning agreement should be 'reasonable'. To be considered 'reasonable' the contribution should be connected to, and calculated on the basis of, the impact of the development on a council's social and economic infrastructure as a result of any increases or movement in the local population as a result of the development.

5 PAC/IPC functions

5.1 The role of the new Independent Planning Commission

The EP&A Amendment Bill proposes to replace the PAC with the IPC and contains a number of provisions with regard to the functions of the Commission and how it is constituted.

It is assumed that much of Division 4 and Part 16B of the EP&A Regulation will be repealed. Schedule 2 of the EP&A Amendment Bill provides that that the Regulation may make provisions with respect to:

- The procedures of the IPC, including procedures for public hearings
- Providing for circumstances where parties are or are not to be represented
- Requiring the provision of information to the IPC for the purposes of a public hearing or the exercise of any of its functions and
- The provision of information or reports by the Commission.

5.1.1 IPC input to the environmental impact assessment

One of the key objectives of the Department's EIA Improvement Project (the Project) is to identify the important issues for assessment early in the assessment process. The Project has a significant focus on the scoping of projects to fulfil this objective. Involvement of the IPC at the Scoping Phase would ensure that issues of concern to the IPC are properly dealt with in the environmental impact assessment. To wait to appoint to IPC and seek their views on matters for assessment until after the environmental impact statement is lodged is a lost opportunity to both streamline the system and focus from the outset on what is important.

5.1.2 IPC process

In order to provide certainty with regard to the role of the IPC, the following process should be included in the EP&A Regulation:

- The IPC process should:
  - Allow for only one public hearing 30 days after the end of the exhibition period of the EIS
  - Allow the proponent the opportunity to respond in writing to the issues that are raised by the IPC and the community as part of the public hearing process
  - Allow the proponent the opportunity to review and respond to draft conditions of consent
  - Provide timeframes for the proposed process
- Any recommendation or guidance by the IPC in its report should be limited only to issues arising from the submission made in respect of the development (and not used as a way to add additional matters to the SEARs for assessment by the proponent)
- A second public hearing should only be held in circumstances where an application has been amended, substituted or withdrawn and replaced after the first public hearing but before it has been determined and the environmental impact of the of the development has not been increased.

Recommendation

20. The IPC should provide input during the scoping phase of the environmental impact assessment process.

21. The EP&A Regulation should be amended to include the following matters with regard to the process of the IPC:

    a. The IPC process should:

        i. Allow for only one public hearing 30 days after the end of the exhibition period of the EIS

        ii. Allow the proponent the opportunity to respond in writing to the issues that are raised by the IPC and the community as part of the public hearing process

        iii. Allow the proponent the opportunity to review and respond to draft conditions of consent

        iv. Provide timeframes for the proposed process

    b. Any recommendation or guidance by the IPC in its report should be limited only to issues arising from the submission made in respect of the development (and not used as a way to add additional matters to the SEARs for assessment by the proponent)

    c. A second public hearing should only be held in circumstances where an application has been amended, substituted or withdrawn and replaced after the first public hearing but before it has been determined, and the environmental impact of the development has not been increased.

6 Conditions relating to financial assurance

The EP&A Amendment Bill provides for the making of conditions of development consent relating to financial assurance. This consent making power can be restricted by the regulations. Mining projects are already required to provide financial assurance by way of a security deposit to cover the estimated costs of rehabilitating the mine under the *Mining Act 1992*. This form of financial assurance should be explicitly excluded from the conditions of consent.

Recommendation

22. The EP&A Regulation should exclude the making of conditions of development consent requiring financial assurance with regard to mine site rehabilitation where Part 12A of the Mining Act 1992 provides for a security deposit.