



Ms Carolyn M^cNally
The Secretary
Department of Planning & Environment
GPO Box 39
SYDNEY NSW 2001

31st March 2017
PO Box 871,
TAMWORTH
NSW 2340

Dear Ms M^cNally,

Re: Feedback on Proposed Amendments to the EP&A Act

The Association of Mining Related Councils of NSW ('AMRC') welcomes the opportunity to provide feedback to the Department of Planning & Environment ('DPE') regarding the exhibited proposed legislative updates to the EP&A Act. The exhibited explanatory documents to which we refer are:

- Summary of proposals;
- Draft Bill guide;
- Draft Environmental Planning and Assessment Amendment Bill 2017; and
- Stakeholder feedback summary.

1. The AMRC

The AMRC originated in 1978 when several Councils recognized that Local Government Areas associated with coal developments would benefit from a coordinated 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, most of which are located in rural and regional areas of the State.

2. General Comments: AMRC Members and the EP&A Act

As the sphere of government directly responsible for the daily governance of its Local Government Area (LGA), Councils provide the leadership necessary to deliver equitable services and facilities to their various communities, often across large distances and sparse populations as are found in rural areas.

Thus Councils play a pivotal role in providing leadership and direction regarding the planning and assessment of land uses within their LGA. A key focus is facilitating human endeavour, that is sustainable environmentally, socially and economically. Councils are also mindful that the EP&A Act imposes obligations in the decision-making on major projects.



The comments herein relate primarily to the planning, assessment and determination of major mining and energy projects. AMRC congratulates you on the intent to update the legislation, together with the suite of other reforms recently tabled.

3. Specific Comments on the Proposed Legislative Amendments in the Bill

3.1 *Proposed new objects*

Most of the revised objects in the Bill reflect and simplify existing objects, however the AMRC proffers the following comments:

- New objects proposed to promote ‘good design in the built environment’ and the management of built and cultural heritage, including Aboriginal cultural heritage are supported;
- The Act’s current objects include ‘to encourage *ecologically sustainable development*’ (ESD). The Bill would change this to ‘facilitate *ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment*’.

AMRC suggests the ESD object should be rewritten to ‘achieve’ ESD by ‘implementing’ ESD principles in decision making, or acting ‘consistently’ with them. Further, it should refer to ‘effectively integrating short and long-term’ considerations, not simply ‘relevant’ considerations.

AMRC would support the objects being further refined by adding a new object to respond to climate change, consistent with the NSW Government’s recent target of net-zero emissions by 2050. Given the other objects in the Act, AMRC is of the view this addition would be a prudent move and complement other objects. This new object could stipulate the requirement to respond to climate change through timely mitigation and adaptation, consistent with state, national and global aims for emissions reduction and best available science for a safe climate.

We believe it is time for the Act to explicitly reference climate change in its objects, given the Act frames the policies and procedures by which major projects are planned, assessed and approved. Carbon intensity of projects should now be a core assessment consideration.

3.2 *Community participation and consultation*

- *Community participation plans:* The AMRC supports the concept that Councils, relevant NSW Government agencies and the DPE be required to prepare community participation plans that reflect the community participation principles to be set out in the Act.

In a Council’s case this provision may be met through the community engagement strategy it has



prepared under the Local Government Act 1993. The plans should provide transparency as to how and when a planning authority will undertake community participation on a range of planning functions – preparing environmental planning instruments, assessing development applications and undertaking environmental impact assessments. AMRC recommends the DPE require measurable KPIs that monitor community involvement at the local level.

- *Early consultation:* The AMRC supports refinement of the provisions of the Act to clarify that regulations may be made to encourage or require certain activities to be performed before lodgment of a development or modification application. It is a very positive step forward for State significant development (SSD) proponents to have to demonstrate community consultation prior to lodgment of a Preliminary Environmental Assessment to the DPE seeking SEARS.

3.3 Local planning

- *Local strategic planning:* The AMRC supports the intent that, to fill the gap in the strategic planning hierarchy, Councils will be required to develop local strategic planning statements that provide strategic context and reasoning for local planning controls and take a 20 year horizon consistent with regional and district plans. These statements will assist in informing rezoning decisions and guide development. Many rural Councils are limited in their capacity to resource the preparation of such plans so AMRC recommends the DPE establish a mechanism to provide technical support to facilitate plans.

3.4 Voluntary planning agreements

AMRC supports the use of Voluntary Planning Agreements (VPAs) as a mechanism for proponents to make financial contributions to councils to provide a range of council and broader community environmental, social and economic benefits. We note that the proposed amendments to the EP&A Act contemplate a change to S 93K whereby the Minister may make determinations or give directions about the method of determining the numerical value of public benefit provided by a developer under a planning agreement [s 93K (b1)]. This is an additional power to the Minister for Planning.

AMRC seeks discussions as soon as possible with the DPE as to what this means in reality. The method of determining the financial contribution quantum is often a highly contentious matter between a proponent and a council and AMRC would appreciate the DPE engaging with it in framing the scope or terms of any proposed ‘method’.

As you are aware AMRC and the NSW Minerals Council (MC) have been negotiating for over 12 months to improve the VPA process. A key issue that is currently unresolved is the matter of what is to be the method of determining the financial quantum to deliver the public benefit. The MC prefers a ‘worker domicile’ method whereas AMRC prefers a percentage of the capital investment value or sharing in the



rise and fall of the market by securing a cents/tonne of product. In the case of a wind farm both the proponent and the councils are accepting of dollars/MW installed.

Given the critical nature of this matter the AMRC urges the DPE to establish a taskforce as soon as possible involving those familiar with negotiating VPAs in rural and regional NSW for major projects to establish some definitive process that will guide the Minister in his/her decision making regarding the ‘method’.

3.5 Development assessment

- **EIA reform**

The AMRC draws your attention to its submission dated 25th November 2016 in which it warmly welcomed the proposed reforms to the general EIA process aimed at delivering improved confidence in the integrity of the system, including earlier and better engagement with affected communities and strengthened monitoring and reporting on project compliance.

- **Termination of transitional Part 3A arrangements:** The AMRC supports the Bill’s proposals to effectively end the Part 3A ‘transitional’ arrangements, which allow for the approval and continued modification of projects already in the assessment and determination system when the controversial major projects pathway was repealed in 2011. These provisions have added unnecessary complexity to planning decisions and extended the operation of controversial, discretionary provisions that were repealed six years ago.

We note that Part 3A projects will be moved into the existing system as either State Significant Development (SSD) or Infrastructure (SSI). We applaud the move as it will improve transparency and balance in decision making and add confidence and trust to the process.

We support the requirement that a project proposed to be modified be ‘substantially the same development’ as was originally approved. In our view future modifications should be assessed on whether the Part 3A project is substantially the same as the development originally approved (as is the case for all other section 96 modifications). If not, then in our view a fresh development application and environmental assessment should be prepared.

- **Independent Planning Commission:** We note the Planning Assessment Commission (PAC) will be renamed the Independent Planning Commission (IPC). We remain to be convinced of the benefit of the name change and suggest the reasons for such should be extensively explained so the change can gain traction with communities. Currently the PAC may *review* and report on a major project proposal during the assessment process; or it may *determine* whether to refuse or approve a project in place of the Minister. Sometimes it does both.

We note the IPC will solely be a determining authority and will no longer have a review role in assessing State Significant Developments (SSD). The changes will require public hearings to be held over two stages.



As proposed, the *first hearing* will be held after public exhibition of the project proposal and Environmental Impact Statement. The proponent will then have an opportunity to respond to the issues raised in submissions and the public hearing. The *second hearing* will take place after the assessment and before a final determination. The Commission will be able to examine the DPE's assessment report and any draft conditions. The community will also be able to raise any issues or concerns at this second hearing stage.

We strongly support the move that the hearings will be more inquisitorial than they are at present, with the IPC asking questions and enabling more interrogation. An advantage of the two-stage public hearing process may be that it allows the community and the IPC greater opportunity to influence the project so as to minimise adverse impacts.

AMRC notes that public hearings will continue to remove merit appeal rights to the Land and Environment Court. Yet public hearings are directed at the Minister's discretion and are by no means as rigorous or equitable as a court hearing, where the evidence can be properly tested by both objectors and proponents. We thus oppose the continued exclusion of third party merits appeals following a public hearing.

AMRC understands that the Bill proposes to extend developers' rights to internal review of refusals or conditions on large and complex projects behind closed doors. If this is so it is likely to exacerbate the existing disparity of rights and make decision-making less inclusive and hence is not supported by AMRC.

- **Statement of reasons:** AMRC supports the move that decision-makers will need to provide a statement of reasons for any decision and the detail in the statement is to be proportionate to the scale and impact of the decision. The reasons are to include how community views were taken into account. The statement will highlight specific considerations of particular importance to the decision and must be considered by consent authorities when considering any future modification applications. Providing reasons will enhance transparency in the decision making.
- **Updating conditions post monitoring or audit findings:** Providing the Minister with the authority to update conditions to ensure relevance and enforceability is supported. It is prudent that there is the capacity in the system to refine or fine tune consent conditions to deliver the performance outcomes that are required to protect human health and the environment and as was originally intended.
- **Transferrable conditions:** AMRC notes that conditions may be duplicated across more than one approval creating parallel regimes that regulate the same impacts. For instance mining and energy projects currently have multiple agencies regulating their dust, noise, blasting, biodiversity and other impacts. AMRC supports the move to address this duplication by allowing transferrable conditions of consent to cease to have effect when they are adequately addressed in conditions subsequently imposed under other regulatory authorizations (eg. environmental protection licenses or mining lease). Responsibility for enforcing these conditions will then lie with the NSW Government agency regulating the license, lease or other approval rather than the original consent authority.



- **Step-in power:** AMRC supports the plan for the Secretary of the DPE to be provided with the discretionary power to provide advice, concurrence or general terms of approval if there is conflict between two or more government agencies or if an agency has not provided the necessary information within statutory timeframes.
- **Enforceable undertakings:** AMRC supports the move to provide the DPE and councils with the power to enter into enforceable undertakings with holders of a development consent, to improve compliance outcomes in those cases where fines or prosecutions may be ineffective. For instance, during the startup of operations for major mining and energy projects there are often non-compliances arising from ‘teething issues’ that can be resolved with a proactive, responsible attitude by the proponent. These scenarios potentially suit the implementation of enforceable undertakings. Such undertakings will require holders to remedy any harm that has occurred and improve activities to avoid further non-compliance.

In closing AMRC urges the Government to ensure whatever changes are made to the Act it prescribes a fundamentally robust, transparent and fair process, delivers ecologically sustainable development and is one in which our broader society can have real confidence. Making changes primarily to shorten the assessment and determination timeframes carries with it high risks.

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. We look forward to your response in this regard.

Yours sincerely,
Peter Shinton
Chairman
Association of Mining Related Councils