



## **Submission on Strategic Regional Land Use Plans for New England North West and Upper Hunter**

3 May 2012

### **The EDO Mission Statement:**

To empower the community to protect the environment through law, recognising:

- the importance of public participation in environmental decision making in achieving environmental protection
- the importance of fostering close links with the community
- the fundamental role of early engagement in achieving good environmental outcomes
- the importance of indigenous involvement in protection of the environment
- the importance of providing equitable access to EDO services around NSW

### **Contact Us**

Environmental  
Defender's Office Ltd  
Level 5, 263 Clarence  
Street  
Sydney NSW 2000  
Freecall 1800 626 239  
tel (02) 9262 6989  
fax (02) 9264 2414  
email:  
[edonsw@edo.org.au](mailto:edonsw@edo.org.au)  
website:  
[www.edo.org.au/edonsw](http://www.edo.org.au/edonsw)

Submitted to: [srlup@planning.nsw.gov.au](mailto:srlup@planning.nsw.gov.au)

For further inquiries on this matter contact [rachel.walmsley@edo.org.au](mailto:rachel.walmsley@edo.org.au)

## Introduction

The Environmental Defender's Office NSW (**EDO**) welcomes the opportunity to contribute to the development of the NSW Government's Strategic Regional Land Use Plans (**SRLUPs**) for the Upper Hunter and New England North West regions of NSW.

The EDO is a community legal centre with 25 years' experience in public interest environmental and planning law matters. Through our litigation, law reform and outreach activities, we have a strong history of engagement with government regulation of mining and coal seam gas (**CSG**) activities. To date in the 2012 financial year, we have conducted ten workshops to educate members of the community on the law concerning CSG and mining. We have also provided submissions to various government consultations and inquiries on mining and related topics. These include submissions to,<sup>1</sup> and an appearance at,<sup>2</sup> the NSW Legislative Council Inquiry into Coal Seam Gas; a submission on the NSW Coal and Gas Strategy;<sup>3</sup> and a submission to the NSW Planning Review Issues Paper.<sup>4</sup> We have also published a discussion paper on mining law in NSW.<sup>5</sup> In addition, we have undertaken public interest litigation on behalf of a number of clients concerned about the environmental impacts of CSG and mining developments.<sup>6</sup>

We consider that the SRLUPs are a missed opportunity to set out a truly proactive, progressive and considered approach to the management of competing land uses in the Upper Hunter and New England North West regions. We limit our comment to four key aspects of the plans:

1. The Gateway Process;
2. Measures for Environmental Protection;
3. Protection of Cultural Heritage;
4. Implementation of the Plans.

We have prepared separate submissions on the Draft Aquifer Interference Policy and on the Code of Practice for Coal Seam Gas Exploration.

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<sup>1</sup> [www.edo.org.au/edonsw/site/pdf/subs/110912csg\\_inquiry.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/110912csg_inquiry.pdf);

[www.edo.org.au/edonsw/site/pdf/subs/110912csg\\_inquiry\\_appendix1.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/110912csg_inquiry_appendix1.pdf).

<sup>2</sup> [www.edo.org.au/edonsw/site/pdf/subs/111208csg\\_inquiry.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/111208csg_inquiry.pdf).

<sup>3</sup> [www.edo.org.au/edonsw/site/pdf/subs/110415nsw\\_coal\\_gas\\_strategy.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/110415nsw_coal_gas_strategy.pdf).

<sup>4</sup> [www.edo.org.au/edonsw/site/pdf/subs/120314ncc\\_edo\\_tec\\_joint\\_sub\\_planning\\_system\\_review\\_issues.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/120314ncc_edo_tec_joint_sub_planning_system_review_issues.pdf).

<sup>5</sup> [www.edo.org.au/edonsw/site/pdf/pubs/110628mining\\_law\\_discussion\\_paper.pdf](http://www.edo.org.au/edonsw/site/pdf/pubs/110628mining_law_discussion_paper.pdf).

<sup>6</sup> See, for example, *Barrington-Gloucester-Stroud Preservation Alliance Incorporated v Planning Assessment Commission and AGL Upstream Infrastructure Investments Pty Limited* (points of claim available at [www.edo.org.au/edonsw/site/pdf/casesum/110705bgspa\\_points\\_of\\_claim.pdf](http://www.edo.org.au/edonsw/site/pdf/casesum/110705bgspa_points_of_claim.pdf)); *Bulga Milbrodale Progress Association Inc v Minister for Planning & Ors*; *Ironstone Community Action Group Inc v NSW Minister for Planning and Duralie Coal Pty Ltd* [2011] NSWLEC 195.

We make the following recommendations:

### **Recommendations**

- 1. The SRLUPs must identify areas where mining and coal seam gas exploration and production are prohibited.*
- 2. The gateway process should also apply to all mining and CSG activities, including exploration.*
- 3. Remove the 'exceptional circumstances' exception to the gateway process.*
- 4. Clarify the implications of submitting a proposal to the gateway panel.*
- 5. Ensure that the independence of the gateway panel is maintained.*
- 6. Remove or substantially revise the 'cost benefit analysis' criteria.*
- 7. Make reliance on offsets the last resort for biodiversity protection.*
- 8. Prioritise comprehensive assessment of cumulative impacts.*
- 9. No gateway decisions should be made until all biodiversity mapping is completed.*
- 10. Clarify provisions relating to private conservation of biodiversity.*
- 11. Ensure appropriate aboriginal engagement in the processes for developing consultation procedures in relation to Aboriginal cultural heritage.*
- 12. Ensure that intellectual property and privacy rights of Aboriginal people are protected when their cultural heritage is catalogued.*
- 13. Ensure clarity of legal mechanisms for the implementation of SRLUPs, particularly as concerns the protection of biodiversity.*

## The Gateway Process

The SRLUPs propose the gateway process as the 'key policy response for resolving land use conflict between mining and coal seam gas proposals and agricultural land'.<sup>7</sup> The gateway process is to apply to State significant mining and CSG development located within two kilometres of strategic agricultural land.

The definition of State significant mining and CSG development is located in schedule 1 to the *State Environmental Planning Policy (State and Regional Development) 2011*.<sup>8</sup> The effect of the definition is that the gateway process applies only to developments that require development consent, and that occur within two kilometres of strategic agricultural land. These developments are:

- Mining and coal seam gas production;
- Some coal seam gas exploration, but not mining exploration.

The gateway process:

- Does **not** apply to land that is not classed as strategic agricultural land, even if it is tier 1 biodiversity land, unless the land is an 'environmentally sensitive area of State significance' and the proposed project is for mining development or certain CSG exploration;<sup>9</sup>

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<sup>7</sup> See p 6 of each SRLUP.

<sup>8</sup> See clauses 5 and 6. Under this definition, the following developments classify as State significant:<sup>8</sup>

- Coal or mineral sands mining;
- Mining development that is in an environmentally sensitive area of State significance;
- Mining that has a capital investment value greater than \$30 million;
- Extracting a bulk sample as part of a resource appraisal of more than 20,000 tonnes of coal or of any mineral ore;
- Development for the purpose of mining related works that is ancillary to or is an extension of another State significant development project; or has a capital investment value of more than \$30 million;
- Development for purposes of underground coal gasification;
- Development for the purpose of petroleum production;
- Development for the purposes of drilling or operating petroleum exploration wells, with some exceptions (these exceptions are stratigraphic boreholes; monitoring wells; or a set of 5 or fewer wells that is more than 3 kilometres from any other petroleum well, other than an abandoned well, in the same petroleum title);
- Development for the purpose of drilling or operating petroleum exploration wells (not including stratigraphic boreholes or monitoring wells) that is carried out in an environmentally sensitive area of State significance;
- Development for the purpose of petroleum related works (including pipelines and processing plants) that is ancillary to or an extension of another State significant development project, or has a capital investment value of more than \$30 million.

<sup>9</sup> The following are classed as environmentally sensitive areas of State significance under cl 4 of *State Environmental Planning Policy (State and Regional Development) 2011*:

- coastal waters of the State;
- land to which *State Environmental Planning Policy No 14—Coastal Wetlands* or *State Environmental Planning Policy No 26—Littoral Rainforests* applies, or
- land reserved as an aquatic reserve under the *Fisheries Management Act 1994* or as a marine park under the *Marine Parks Act 1997*, or
- a declared Ramsar wetland within the meaning of the *Environment Protection and Biodiversity Conservation Act 1999* of the Commonwealth, or

- Does **not** set aside no-go zones for either strategic agricultural land or Tier 1 biodiversity land;
- Does **not** apply to mining exploration, such as for coal; or certain CSG exploration activities.

Under the gateway process, a proposal that falls within the relevant criteria cannot proceed to development assessment unless it has been issued with a gateway certificate by the gateway panel. The gateway panel is to be comprised of an independent group of experts, with expertise, variously across the SRLUPs, in fields such as agricultural science, soil science, hydrology, economics and mining. The panel is to make its decision on whether or not to grant a gateway certificate based on five considerations.<sup>10</sup>

Under the terms of the SRLUPs, the gateway panel will not engage in the development assessment process, beyond the decision of whether to allow a proposal to pass to the assessment stage. Without access to further detail on the criteria that the panel will use to make its decision, it is difficult to assess whether the added layer of scrutiny that the panel provides can provide for substantial improvement in decision-making on land use conflicts. Nonetheless, on the basis of the information that has been made available about the gateway process, we make the following recommendations.

*Recommendation 1: The SRLUPs must identify areas where mining and coal seam gas exploration and production are prohibited.*

The Plans must identify no-go areas, where mining and CSG activities are prohibited. These no-go areas should protect areas of high environmental, water supply, social and agricultural values. As consistently submitted by EDO, legislative no-go zones and ‘red flag’ mechanisms are essential in any robust land-use planning exercise for the effective protection of important biodiversity.<sup>11</sup> It is also consistent with the Government’s pre-

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- a declared World Heritage property within the meaning of the *Environment Protection and Biodiversity Conservation Act 1999* of the Commonwealth, or
  - land identified in an environmental planning instrument as being of high Aboriginal cultural significance or high biodiversity significance, or
  - land reserved as a state conservation area under the *National Parks and Wildlife Act 1974*, or
  - land, places, buildings or structures listed on the State Heritage Register under the *Heritage Act 1977*, or
  - land reserved or dedicated under the *Crown Lands Act 1989* for the preservation of flora, fauna, geological formations or for other environmental protection purposes, or
  - land identified as being critical habitat under the *Threatened Species Conservation Act 1995* or Part 7A of the *Fisheries Management Act 1994*.

<sup>10</sup> The 5 criteria are: soil, water and aquifer impacts on biophysical strategic agricultural land; impacts on surface area disturbance, access to resources and landscape values of the critical industry cluster; a public benefit test based on triple bottom line cost benefit analysis; advice of the Minister for Primary Industries on aquifer impacts, which takes into account the advice on the Independent Expert Scientific Committee; and advice of the Independent Expert Scientific Committee.

<sup>11</sup> See: Environmental Defender’s Office New South Wales, *Submission on the Draft Biodiversity Certification Methodology*, 30 July 2010,

[www.edo.org.au/edonsw/site/pdf/subs/100730draft\\_biodiversity\\_certification\\_methodology.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/100730draft_biodiversity_certification_methodology.pdf); and Environmental Defender’s Office New South Wales, *Submission on the Review of the Threatened Species Conservation Act 1995*, 17 November 2010,

[www.edo.org.au/edonsw/site/pdf/subs/101117review\\_tscact.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/101117review_tscact.pdf). See also: Environmental Defender’s Office New South Wales, *Mining Law in New South Wales: Discussion Paper*, June 2011, 35, [www.edo.org.au/edonsw/site/pdf/pubs/110628mining\\_law\\_discussion\\_paper.pdf](http://www.edo.org.au/edonsw/site/pdf/pubs/110628mining_law_discussion_paper.pdf)

election document on strategic regional land use plans, which stated '[t]he NSW Liberals and Nationals believe that agricultural land and other sensitive areas exist in NSW where mining and coal seam gas extraction should not occur'.<sup>12</sup> The SRLUPs should put this commitment into practice by demarcating areas that are explicitly off-limits to development. This should begin with Tier 1 biodiversity lands, and land set aside for private conservation and for biodiversity offsetting. Allowing mining in NSW's highest value environmental lands is an unacceptable trade off, and does not reflect the public interest. These areas cannot be mined without significant detriment to the environment.

*Recommendation 2: The gateway process should apply to all mining and CSG activities, including exploration*

The gateway process should apply to all invasive mining and CSG activities, beginning from the exploration stage. In practice, this would require amending the definition of SSD in the *State Environmental Planning Policy (State and Regional Development) 2011*; so that, in the case of CSG, the exemptions for stratigraphic boreholes, monitoring wells and well locations are removed. For mining, invasive exploration techniques should also be classed as SSD. We do not propose here a specific set of criteria for what constitutes 'invasive' techniques, but note that at a minimum, such categorisation should apply to all drilling activities and other activities with potential to disturb substrate or surface environments. Exploration activities can cause significant community concern and agricultural and environmental disruption, and should be managed as part of any broad strategic framework. It is inconsistent and unjustified to exclude these activities from the gateway process. Ensuring that the gateway process applies to all invasive mining and CSG activities will help promote clarity and certainty in the strategic planning process. Similarly, as discussed in the following recommendation, exceptions to the gateway process should be removed.

*Recommendation 3: Remove the 'exceptional circumstances' exception to the gateway process*

The SRLUPs propose to allow Cabinet to declare a project to be an 'exceptional circumstances project' if the subject resource is of exceptional value to the State. These projects would not be required to go through the gateway process, but would instead proceed directly to development assessment.<sup>13</sup>

Exempting these 'exceptional circumstances projects' from the gateway process is problematic. The criteria for what constitutes 'exceptional value to the State' are not set out in the SRLUPs, and the exception could potentially incorporate a very broad range of projects. The existence of the exception reintroduces uncertainty and overriding discretion into the strategic planning process. If the gateway process is to operate at all, then there should be no exceptions to it. The 'exceptional circumstances project' exception should be removed.

*Recommendation 4: Clarify the implications of submitting a proposal to the gateway panel*

The SRLUPs should make it explicit that once a development application is granted a gateway certificate by the gateway panel, it cannot be materially varied without being

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<sup>12</sup> NSW Liberals and National, *Strategic Regional Land Use: Triple Bottom Line Assessment to Protect Our Regions* [grip.org.au/documents/doc-47-strategic-regional-land-use-policy---document.pdf](http://grip.org.au/documents/doc-47-strategic-regional-land-use-policy---document.pdf), 2.

<sup>13</sup> See each SRLUP at 86.

resubmitted to the panel. It is also important to emphasise that the grant of a gateway certificate does not mean that the development will be approved, or that the development assessment process will be any less rigorous than it otherwise would be. We note in this regard that existing provisions relating to Site Compatibility Certificates that concern infrastructure developments provide that the grant of a Site Compatibility Certificate does not prevent a consent authority imposing more stringent site and design features on the proposal than those contemplated in the Certificate, or rejecting the proposal entirely.<sup>14</sup>

As the SRLUPs propose that the gateway process is to be implemented through the *State Environmental Planning Policy (Mining, Petroleum and Extractive Industries) 2007 (Mining SEPP)*, at a minimum the SEPP should enshrine similar provisions among its gateway criteria.

*Recommendation 5: Ensure that the independence of the gateway panel is maintained*

Rigorous mechanisms must be in place to ensure that the gateway panel remains independent, and functions as an expert body removed from politics. Expertise on the panel must be drawn from relevant, specific fields. The SRLUPs variously state that expertise will be drawn from such areas as agricultural or soil science, water, hydrology, economics and mining.<sup>15</sup> These categories should be defined with greater precision, and should include such areas as hydrogeology and ecology. It should also be stipulated that a range of expertise must be represented on the panel at all times. The process for appointing experts must be transparent and must be designed to ensure the ongoing independence of the panel.

*Recommendation 6: Remove or substantially revise the 'cost benefit analysis' criteria*

A material component of the gateway panel's decision will come from the outcome of a public benefit test that will be based on a 'triple bottom line cost benefit analysis'.<sup>16</sup> We are concerned at the level of reliance that the panel is to have on this test. While we understand that the methodology for undertaking this analysis is still being developed, we note that cost benefit analysis has historically been ill-suited to value the environment appropriately. Of particular concern is a lack of scientific data to underpin a realistic assessment of the nature of existing groundwater systems, and the potential cumulative impacts on these systems of multiple CSG extraction activities.<sup>17</sup> We believe that setting out strict no-go zones, where mining is to be prohibited, provides a more robust and balanced approach to the preservation not only of valuable environmental features, but also of agricultural land.

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<sup>14</sup> See, for example, *State Environmental Planning Policy (Infrastructure) 2007*, s 57(3).

<sup>15</sup> See each SRLUP at 82.

<sup>16</sup> See each SRLUP at 86.

<sup>17</sup> Katherine Owens, 'Strategic Regional Land Use Plans: Presenting the future for coal seam gas projects in New South Wales?' (2012) 29(2) *Environmental and Planning Law Journal* 113, 118-120; Geoscience Australia and M.A. Habermath, *Advice in Relation to the Potential Impacts of Coal Seam Gas Extraction in the Surat and Bowen Basins, Queensland: Phase One Final Report* (2010), 82-84; Australian Government, National Water Commission, *Position Paper: Coal Seam Gas and Water*, December 2010.

If the cost-benefit analysis mechanism is to be retained, it is essential that it values the environment and ecosystem services fully. It will also be essential to specify the geographic scope of the analysis – that is, whether costs and benefits are being assessed at local, regional, state or national levels. Similarly, it will be essential for the timeline of the analysis to be specified. Short-term economic benefits from mining and CSG activities must be appropriately weighed against long term, possibly permanent, damage to environmental features such as biodiversity and water.

While the task of weighting the environment is complex, methodologies for doing so are being developed internationally.<sup>18</sup> We strongly recommend that best practice methods be investigated and enacted in this regard.

## Protection of the Environment

As the principal policy documents setting out the government's approach to land use conflicts in the regions that they cover, it is imperative that the SRLUPs set up frameworks for robust and proactive environmental protection. At present they fail to do so. We make the following recommendations to improve their mechanisms in this regard.

*Recommendation 7: Make reliance on offsets the last resort for biodiversity protection*

The environment protection actions proposed by the SRLUPs have an excessive focus on offsetting, whereby damage to biodiversity in one area is proposed to be offset by protection of another area of like biodiversity.<sup>19</sup> It is our firm view that this is a misguided approach.

Offsets should not be relied on as the sole, or even the most significant, measure for long-term environmental protection. Instead, there should be a greater focus on avoiding impacts on biodiversity from the outset, including through the establishment of no-go zones as set out above. While the SRLUPs make mention of a hierarchy that would seek first to avoid impacts on the natural environment, and then to mitigate them, with offsets used only where these mechanisms cannot be achieved,<sup>20</sup> this should be a legal requirement.

The reliance on offsets is especially concerning given the lack of detail on how these offsets are proposed to be secured in the long term. For example, despite the government's stated commitment to secure offsets 'in perpetuity'<sup>21</sup>, in a recent decision the Planning Assessment Commission approved extension of the Warkworth mine despite the proposal requiring mining through offset areas that were intended to be

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<sup>18</sup> See, for example, *The Economics of Ecosystems & Biodiversity Study*, [www.teebweb.org](http://www.teebweb.org).

<sup>19</sup> See each SRLUP, pp 61-63.

<sup>20</sup> See Upper Hunter SRLUP, p 59 and New England SRLUP, p 60.

<sup>21</sup> See New England SRLUP, p 62 and Upper Hunter SRLUP, p 61.

protected in perpetuity.<sup>22</sup> The EDO has previously noted a range of concerns associated with using offsets in regional strategic planning.<sup>23</sup>

However, if *as a last resort* offsets are permitted, priority offsets must be large enough in extent, and contain biodiversity of sufficient quality to compensate for what will be lost through mining. Priority offsets should be identified at a regional level, so that cumulative loss can be planned for, and avoided. The SRLUPs state that identified priority offset landscapes are 'guides' only; this should be removed and offset landscapes should be identified, and protected in perpetuity prior to the mine approval being granted.

*Recommendation 8: Prioritise comprehensive assessment of cumulative impacts*

The Government should implement a comprehensive cumulative impact assessment methodology to assess the cumulative impacts of mining and CSG activities on the environment. The SRLUPs already provide for cumulative impact assessments to be undertaken in relation to health and amenity impacts<sup>24</sup> and infrastructure.<sup>25</sup> They also note that the development of measures to control, mitigate and regulate cumulative impacts of mining on the environment is a key challenge,<sup>26</sup> but do not propose specific actions in this regard. The SRLUPs suggest that cumulative impact assessment methodologies will be developed to assess the cumulative impacts of mining, in particular noise and dust impacts and loss of agricultural land and water resources.<sup>27</sup> It is not clear, however, what benchmark is to be used to develop this methodology: that is, whether it will consider cumulative impacts on the environment, or only in relation to health, amenity and agricultural uses. It is important that cumulative impacts on the environment be fully accounted for.

*Recommendation 9: No gateway decisions should be made until all biodiversity mapping is completed*

Gateway decisions should not be made until the entire SRLUP region has been mapped for biodiversity. These maps should be used to determine no-go areas for Tier 1 biodiversity. Complete biodiversity maps should then be used if offsets are required as a last resort (as discussed above), to develop regional priority offset areas that reflect the value of both the biodiversity that is expected to be lost, and the strategic conservation of the biodiversity that will remain. It is not sufficient to simply identify areas that are outside of expected mine impacts and call these priority offsets.

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<sup>22</sup> See Determination by the Planning Assessment Commission, Mt Thorley-Warkworth Mining Complex, Warkworth Extension Project,

[http://majorprojects.planning.nsw.gov.au/index.pl?action=view\\_job&job\\_id=3639](http://majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=3639).

<sup>23</sup> See Environmental Defender's Office New South Wales, *Submission on the proposed Sydney Growth Centres Strategic Assessment* 25 June 2010,

[http://www.edo.org.au/edonsw/site/pdf/subs/100625growth\\_centres\\_strategic\\_assessment%20\\_EPBC.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/100625growth_centres_strategic_assessment%20_EPBC.pdf); Environmental Defender's Office NSW, *Submission on the Draft Biodiversity Certification Methodology*, 30 July 2010,

[http://www.edo.org.au/edonsw/site/pdf/subs/100730draft\\_biodiversity\\_certification\\_methodology.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/100730draft_biodiversity_certification_methodology.pdf).

<sup>24</sup> See both SLRUPs, p 56.

<sup>25</sup> See New England SRLUP, p 37 and Upper Hunter SRLUP, p 36.

<sup>26</sup> New England SRLUP, p 60 and Upper Hunter SRLUP, p 59.

<sup>27</sup> See both SRLUPs, p 86.

*Recommendation 10: Clarify provisions relating to private conservation of biodiversity*

Both SRLUPs state that land set aside for biodiversity offsets should not result in the significant loss or destruction of agricultural resources<sup>28</sup>. This should be clarified, so that landowners wishing to conserve biodiversity on private land are free to do so if they choose.

## Protection of Cultural Heritage

The protection of cultural heritage should be a key consideration in the development of strategic regional land use plans.

*Recommendation 11: Ensure appropriate aboriginal engagement in the processes for developing consultation procedures in relation to Aboriginal cultural heritage.*

The SRLUPs contain provisions for the development of consultation procedures with Aboriginal people in relation to Aboriginal cultural heritage, to be completed by the Department of Planning and Infrastructure and the Office of Environment and Heritage by July 2012. In particular, the SRLUPs contain an action to 'prepare Aboriginal cultural heritage assessment guidelines for state significant projects to ensure early and thorough consideration of Aboriginal cultural heritage in the assessment process.' These guidelines are to highlight the importance of consulting with Aboriginal people in determining the significance of places and objects to them.<sup>29</sup>

It is important that in these guidelines, it is made clear that these consultation procedures must identify and reasonably accommodate the concerns of the traditional owners who speak for their country and non-traditional owners who can speak about the country affected. In addition, despite any one agreement made with one Aboriginal stakeholder, this cannot preclude consideration of the legitimate and reasonable concerns of other Aboriginal stakeholders in relation to the protection of heritage. Development of the guidelines must be based on comprehensive and iterative consultation with Aboriginal communities.

In 2009 and 2010, the EDO held roundtable discussions with Aboriginal peak bodies, elders and experts in the field of Aboriginal cultural heritage, in relation to the need for reform of cultural heritage protection laws. It was identified by the Roundtables, heritage assessment must not be a means of deciding how much Aboriginal heritage can be destroyed, but how the existing heritage can be protected from further harm. Relevant Key issues relating to consultation and assessments that were identified by our EDO clients and experts are most relevant to the current strategic regional land use planning process. These include:

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<sup>28</sup> See Upper Hunter SRLUP p 61, and New England SRLUP p 62.

<sup>29</sup> See each SRLUP, pp 78-79.

1. Proponents should facilitate community input when conducting their assessments of the subject land. This must include strong encouragement to share community knowledge of the issues and invitation to participate in the engagement process.
2. The importance of oral and cultural traditions should be acknowledged. Elders should feel respected, supported and empowered in an appropriate forum to have their views presented and to participate meaningfully.
3. Aboriginal peoples' rights to access the development sites and document the heritage destined for destruction must be maintained, so that Aboriginal Elders can carry out their responsibilities in their community.
4. A distinction must be maintained between traditional owners who speak *for* country and non-traditional owners who can speak *about* country.
5. The means of engagement with the community must not be through means of 'consultation', but through 'negotiation'. At present, traditional owners feel that their participation in consultations can be ignored. To rectify this, they must have opportunity to give their free, prior and informed consent to any permits to develop on their land.
6. Provision should be made for independent archaeologists to assess and report on the area subject to development, and the views of the community in relation to it.
7. The role of local government should be recognized in protecting Aboriginal culture and heritage at the local level.
8. Regional databases should be created of archaeologists, anthropologists and other relevant experts who have engaged with, and been approved by, the local Aboriginal community.
9. There must be a systematic application of the precautionary principle for consideration of potential impacts to Aboriginal cultural heritage where the proposal involves a risk of serious or irreversible damage to Aboriginal objects or places and that there is uncertainty as to the Aboriginal cultural heritage value of the area proposed to be impacted.

The proposed draft guidelines must be released for public consultation and feedback from affected Aboriginal community groups before they are adopted, in order to properly determine whether they accommodate the recommendations made by Aboriginal stakeholders affected.

*Recommendation 12: Ensure that intellectual property and privacy rights of Aboriginal people are protected when their cultural heritage is catalogued.*

The SRLUPs provide for the ongoing assessment of sites of Aboriginal heritage significance, including mapping and desktop assessment by the Office of Environment and Heritage. It is important that any such assessment and cataloguing pay full respect to the intellectual property and privacy rights of Aboriginal people in relation their cultural heritage. In addition, the Government must also acknowledge and respect the rights of independent Aboriginal individuals and groups to hold their own knowledge and data on the cultural significance of their country in accordance to their customary laws and practices.

## Implementation of the SRLUPs

The legal status of the SRLUPs must be made clear, with clear process and information regarding the legal mechanisms for how the plans are intended to be implemented and enforced.

*Recommendation 13: Ensure clarity of legal mechanisms for the implementation of SRLUPs, particularly as concerns the protection of biodiversity.*

The SRLUPs provide few concrete details on how their contents are to be made legally valid and enforceable. We are particularly concerned at the lack of detail surrounding the protection of biodiversity, including tier 1 biodiversity.

Two major mechanisms are contemplated within the SRLUPs for how aspects of them are to be implemented. First, the SRLUPs provide for implementation of the proposed new gateway process through the *State Environmental Planning Policy (Mining, Petroleum and Extractive Industries) 2007*. This SEPP is to: require the issuing of a gateway certificate; list the criteria that must be considered when issuing the certificate; and include maps of strategic agricultural land. We note that the proposal to include maps within the SRLUP does not appear to extend to including maps of land containing significant biodiversity.

Secondly, in relation to the SRLUPs themselves, as policies these will have no legal status unless they are incorporated into law. It is proposed that a Direction under section 117 of the *Environmental Planning and Assessment Act 1979* (NSW) will be issued to require local environmental plans (LEPs) for areas covered by the SRLUPs to be consistent with the plan's content. Because LEPs are a matter required to be considered in assessing development under section 79C of the EPA Act, the SRLUPs will be a matter required to be considered as part of the assessment of applications for State significant development. In addition, the Mining SEPP must also be considered under s 79C.

The practical implications that this proposal would have for conservation of Tier 1 biodiversity are unclear. We submit that any amendment to LEP zoning provisions be made with a view to protecting all areas of Tier 1 biodiversity. This would be effectively implemented through requiring the zoning of such lands to be 'E1 – National Parks and Nature Reserves'.<sup>30</sup> Further detail on implementation and enforcement is required to provide certainty to farmers, miners and the broader communities of the Hunter and New England.

***For further information please contact Rachel Walmsley, Policy & Law Reform Director, EDO NSW on (02) 9262 6989 or [rachel.walmsley@edo.org.au](mailto:rachel.walmsley@edo.org.au)***

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<sup>30</sup> *Standard Instrument – Principal Local Environment Plan – Land Use Table.*