environmental defender's office new south wales

Submission on Discussion Paper: Proposals for Amendment to the *Mining Act 1992*

September 2005

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*
- *that the EDO has an obligation to provide representation in important matters in response to community needs as well as areas the EDO considers to be important for law reform*
- *the importance of indigenous involvement in protection of the environment.*

Contact Us

Environmental Defender's Office Ltd

Level 9, 89 York St
SYDNEY NSW 2000

freecall 1800 626 239

tel (02) 9262 6989
fax (02) 9262 6998
email: edonsw@edo.org.au
website: www.edo.org.au

ABN 72 002 880 864

For inquiries on this matter contact rachel.walmsley@edo.org.au

Contents

Part 2 – Interaction of the *Mining Act 1992* and Part 3A *Environmental Planning and Assessment Act 1979*

Summary of EPA Act Part 3A implications

Part 3 – Additional Issues

Public participation

Submitted to:

The Director
Policy & Legislation Coordination Branch
Department of Primary Industries

PO Box K220
HAYMARKET NSW 1240

By email: carolyn.hinde@dpi.nsw.gov.au
Fax: 02 8289 3996

Executive Summary

To date, robust environmental protection and management provisions have been almost non-existent in mining legislation in NSW. Mining has enjoyed a special status in the law since at least 1851. It is no longer acceptable for an industry that has such immense actual and potential environmental impacts to remain a laggard in terms of environmental regulation. Provisions to protect and manage environmental impacts are prolific and well established in other NSW legislation, and this correlates with an increasing expectation from the community for high standards of accountability, transparency, and environmentally sustainable conduct.

The Environmental Defender's Office of NSW (EDO) therefore welcomes the proposed amendments. These amendments bring the mining legislation more in line with existing environmental standards for other industries. We strongly support a number of the proposed amendments, and welcome the opportunity to provide comment.

This submission is divided into 3 parts.

Part One responds directly to each proposed amendment as outlined in the DPI *Position Paper: Proposals for Amendment to the Mining Act 1992*, June 2005. These are addressed under the broad headings:

- Objectives for the Mining Act
- Environmental Management
- Enforcement
- Access Agreements
- Landholder objections to granting mining lease
- Other matters

Part Two discusses the implications of recent planning reforms, namely, the introduction of Part 3A to the *Environmental Planning and Assessment Act 1979*, and the *State Environmental Planning Policy (Major Projects) 2005*.

Part Three discusses additional issues such as the importance of genuine public participation and stakeholder engagement from the development concept stage to the post-closure rehabilitation stage of mining projects.

Introduction

Mining in New South Wales, and indeed in all of Australia, has enjoyed a special status in the law since at least 1851 when the first mining laws of the State codified the policy preference that the Crown should retain ownership of minerals.

As noted in a previous EDO submission on mining law reform:

> "While the philosophy of public ownership continues to make sense in a country like Australia, where vast wealth is held in mineral reserves and mineral exports are such an important trading commodity, it is clear that the regulatory attitude of politicians and bureaucrats has long privileged mining activities over competing land use and the protection of the environment. In many, if not most instances, this is unwarranted."[1]

Until recently for example, section 74 of the NSW *Mining Act* has rendered mining development exempt from many environmental controls under the *Environmental Planning and Assessment Act 1979*. The major planning legislation has not been excluded due to the regulatory self-sufficiency of the *Mining Act*. Rather, it has been excluded *despite* the deficiencies.

It is important to recognise that mining comes into conflict and competes with other land uses during the mining process and that a fundamental purpose of the interplay of mining, planning and pollution law must be the rationalisation and balancing of the competition for land use, and just as importantly, the protection of the environment.

The *Mining Act 1992* has over 400 sections, with a modest 10 sections comprising Part 11- "Protection of the Environment" - relating largely to conditions for protecting the environment, directions to rehabilitate land, and directions to remove mining plant. These are inadequate to address complex and cumulative issues of environmental impact. This is a good indication of the historical focus of the legislation, and the deficiencies with regard to properly addressing environmental impacts. Environmental provisions have historically been implemented to varying degrees through lease conditions. It is long overdue to make these requirements statutory.

The EDO therefore supports the updating of the *Mining Act* and Part 11 to more appropriately address significant environmental issues.

The comments in this submission are based on the proposed amendments as described in the Position Paper. The EDO requests the opportunity to consider the amendments once they have been drafted and the exact wording is available.

[1] See "Mining Law reform in New South Wales. A Preliminary Discussion paper", Don Anton on behalf f the EDO, 1999.

Part 1 – Proposed Amendments

1.1 Objectives for the Mining Act

The Position Paper states that the proposed objects will be similar to the following:

> "To provide for the sustainable and integrated management of the mineral resources of the State for the benefit of both present and future generations and in particular:
> 1. to recognise and foster the significant social and economic benefits to the State that result from the sustainable and efficient use of mineral resources;
> 2. to provide an administrative framework for the effective regulation of titles for prospecting and mining;
> 3. to provide a framework for compensation to landholders for loss or damage resulting from prospecting or mining;
> 4. ensure an appropriate financial return to the State from mining;
> 5. require the payment of security to provide for the rehabilitation of mine sites;
> 6. ensure effective rehabilitation of disturbed land; and
> 7. ensure mineral resources are identified and developed in ways that minimise impacts on the environment,"
>
> The Dictionary of the Act will be amended to define the principles of sustainable development as being those which appear in section 6(2) of the *Protection of the Environment Administration Act 1991*.

The EDO strongly supports the inclusion of an objects clause in the *Mining Act 1992*. This will bring the Act into line with the vast majority of other natural resource and environmental management legislation in the State.

However, objects clauses should not simply be a set of aspirations listed at the beginning of the Act. The objects should be supplemented by provisions throughout the legislation that require decisions and actions undertaken to be consistent with the Objects or in accordance with the objects. By including such provisions, the objects are operationalised as opposed to simply aspirational.

The EDO is concerned that the Position paper does not contemplate an explicit object to promote the principles of ecologically sustainable development. The EDO submits that an explicit object should be included relating to sustainable development. This should underpin all the objectives. This is clearer, than a reference in the Dictionary section.

The importance of managing resources in accordance with the principles of ecologically sustainable development has been explicitly recognised nationally since 1992. Chapter 5 of the *National Strategy for Ecologically Sustainable Development* explicitly states that the efficient management of the renewable and non-renewable resources on which the mining industry depends should be "in accordance with the principles of ESD.[2]

[2] National Strategy for Ecologically Sustainable Development (1992), at 37.

Despite recognition of the importance of sustainable development in industry codes[3], international principles,[4] and frameworks such as "*Enduring Value*", the Australian Minerals Industry Framework for Sustainable Development",[5] it has taken NSW 13 years to consider adopting ESD principles expressly in the legislation.

The EDO strongly advocates the adoption of the definition of ecologically sustainable development from section 6(2) of the *Protection of the Environment Administration Act 1991* in a new objects clause. This is consistent with the definition adopted in a number of NSW Acts (as noted in the Position Paper at page 6).

The proper application of ESD principles would help ensure that the pricing of minerals reflects the full environmental and social costs of exploration, extraction, production and the depletion of total mineral assets. Setting levels of royalties and rents at levels to account for the "externalities" that are not reflected in current charges would ensure that the community is getting a fair return on the depletion of its mineral wealth. Setting the appropriate levels, however, is a difficult task based on getting the true value of environmental capital and services, future value of particular resources, and "intrinsic worth" properly accounted for. Further research and consultation is needed on this issue.

1.2 Environmental Management

Broadening and strengthening existing environmental provisions

As noted, the current Part 11 of the *Mining Act* – "Protection of the Environment" - contains only 10 sections relating largely to conditions for protecting the environment, directions to rehabilitate land, and directions to remove mining plant. These are inadequate to address complex and cumulative issues of environmental impact. The EDO submits that Part 11 needs to be expanded to more appropriately address significant environmental issues.

Environmental impact assessment

The proposed amendments propose to:

1. Replace the reference to particular features of environmental, heritage or resource value with a requirement to consider the impact on the environment as defined in the Environmental Planning and Assessment Act 1979;

The current section 237 of the *Mining Act* refers to the taking into account the need to protect "flora, fauna, fish, fisheries and scenic attractions, and features of Aboriginal,

[3] For example, Minerals Council of Australia, *Australian Minerals Industry Code for Environmental Management* December 1996 and 2000.
[4] See International Council of Mining and Metals (ICMM) "Sustainable development Principles"(10
[5] *Enduring Value*, the Australian Minerals Industry Framework for Sustainable Development" October 2004.

architectural; archaeological, historical or geological interest" in or on the land over which the authority or claim is sought.

By selecting certain aspects of the physical environment, this section is inadequate in addressing cumulative ecosystem or habitat impacts, soils, water tables or surface flows.

The EDO strongly supports adopting a more broad definition of environmental impact, as per the *Environmental Planning and Assessment Act 1979*. The *EPA Act* defines "environment" as:

> ***environment*** includes all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings.

Section 111 of that Act provides further detail provides further detail and a duty to "take into account to the fullest extent possible all matters effecting or likely to effect the environment":

> **111 Duty to consider environmental impact**
>
> (1) For the purpose of attaining the objects of this Act relating to the protection and enhancement of the environment, a determining authority in its consideration of an activity shall, notwithstanding any other provisions of this Act or the provisions of any other Act or of any instrument made under this or any other Act, examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity.
> (2) Without limiting subsection (1), a determining authority shall consider the effect of an activity on:
> (a) any conservation agreement entered into under the *National Parks and Wildlife Act 1974* and applying to the whole or part of the land to which the activity relates, and
> (b) any plan of management adopted under that Act for the conservation area to which the agreement relates, and
> (c) any joint management agreement entered into under the *Threatened Species Conservation Act 1995*.
> (3) Without limiting subsection (1), a determining authority shall consider the effect of an activity on any wilderness area (within the meaning of the *Wilderness Act 1987*) in the locality in which the activity is intended to be carried on.
> (4) Without limiting subsection (1), a determining authority must consider the effect of an activity on:
> (a) critical habitat, and
> (b) in the case of threatened species, populations and ecological communities, and their habitats, whether there is likely to be a significant effect on those species, populations or ecological communities, or those habitats, and
> (c) any other protected fauna or protected native plants within the meaning of the *National Parks and Wildlife Act 1974*.

2. Provide for a requirement that the Department consider the environmental performance of the titleholder prior to decisions to renew titles;

The EDO strongly supports a requirement to take into account environmental performance of title holders. This is an important provision because post-approval penalties are rare. For example, despite records of poor environmental performance, no mining approval has ever been revoked in the history of coal mining in NSW.[6]

We suggest the adoption of the "fit and proper person" test, as used in the *POEO Act 1997*. This is an established and clear legal test, and provides a clear deterrent to non-compliance.

This should be extended to include consideration of the environmental performance of parent and sister companies operating in NSW, elsewhere in Australia, and also overseas.

Further detail is required specifying what kinds of activities and breaches will be relevant according to what performance criteria.

3. Provide that an environmental impact assessment done for the purposes of Part 5 of the Environmental Planning & Assessment Act 1979, in circumstances where one is required, is sufficient for the fulfillment of responsibilities under the section.

The requirement for EIA and levels of environmental assessment required will be determined in many cases by the new Part 3A requirements. These are discussed below in Part 2.

Conditions to protect the environment

The proposed amendments:

1. Require that conditions of titles include conditions necessary to protect the environment, and that these conditions be based on the consideration of environmental impact under section 237; and
2. Apply the section to opal prospecting licences, as well as to authorities and mineral claims.

The EDO strongly supports that conditions necessary for environmental protection be mandatory, rather than discretionary as under the current section 238. Such conditions are relevant to all mining operations, and should not be applied selectively when the Minister or the mining registrar considers it "appropriate."

Similarly, we support the proposal that such provisions relate to environmental impact broadly and not to specific elements of environment, heritage or resource value (as noted regarding the amendment to section 237 above).

The EDO support the provisions applying to opal prospecting licences, as well as to authorities and mineral claims.

Conditions requiring rehabilitation

[6] "NSW Coal Affected Communities" An Overview of communities affected by coal issues, as presented at the Greens NSW Coal Issues Forum, Parliament House, April 2005.

The EDO response to proposed rehabilitation condition amendments are as follows:

1. Require that conditions of titles include conditions necessary to satisfactorily rehabilitate the area affected by prospecting or mining;

The EDO supports the proposal that the rehabilitation conditions must be mandatory and not attached on a discretionary basis as provided for in the current section 239 (1). However, we have concerns as to what "satisfactorily" means. Is this satisfactory in the opinion of the Minister or mining registrar and how is this monitored and measured?

A better standard would be to require that rehabilitation must, in the opinion of an independent accredited auditor, meet specified standards for comprehensive and effective rehabilitation. The standards and criteria, by which rehabilitation efforts are to be measured, should be set out in the Regulation.

2. Include the following definition of rehabilitation and ensure that land uses which require development consent do not fall within the jurisdiction of the Act;

*'**rehabilitation** is the process of treating and managing disturbed land for the purpose of establishing a safe and stable environment which is compatible with surrounding land uses'*

It is submitted that the definition of rehabilitation should be qualified by adding "which are consistent with environmental sustainability" after "land uses".

As noted in the Discussion Paper (page 9), the method and complexity of rehabilitation is linked to the intended site-use post-mining. Such uses vary greatly depending on the site. The Position Paper states: "Any legislative requirement to rehabilitate must be sufficiently broad to permit this wide variety of post-mining land uses, which generally reflect the miner's discussions and agreement with both the landowner and affected Government agencies."

It is submitted that there needs to be substantive opportunities for community input into the post-mining land use of a site. Further rehabilitation conditions need to be transparent and accompanied by opportunities to comment on whether the conditions will "satisfactorily" provide for optimal rehabilitation.

3. Repeal the requirement for other agencies to approve rehabilitation conditions (as this is overtaken by Schedule 1 and other statutory approvals);

The implications of Part 3A of the *EP&A Act* are discussed in Part 2 below.

4. Apply the section to opal prospecting licences, as well as to authorities and mineral claims.

The EDO supports this proposed amendment as rehabilitation is also important for opal prospecting and mineral claims, not just for larger mining projects.

Security deposits

It is proposed to amend the Act to:

1. require that conditions of all titles granted or renewed must include conditions requiring the titleholder to give and maintain a security deposit for the fulfilment of obligations arising under the Act in respect of the title; and
2. require that the security be assessed as the full cost of meeting relevant obligations under the Act, in particular the full costs of rehabilitation under the title.

The EDO supports mandatory conditions for titleholders to give and maintain security deposits, and that the security cover the full costs of rehabilitation. A vitally important aspect of the environmental impact of mining activities is that of rehabilitation. While rehabilitation efforts by the some participants in mining industry have improved in recent years, there continue to be examples of inadequate rehabilitation efforts on the part of certain segments of the industry.

Directions to rehabilitate land or protect the environment

The amendments propose to:

1. provide a clear power for the Minister and prescribed Departmental officers to issue directions to comply with any conditions of title, and address deficiencies in any aspects of environmental management, protection or rehabilitation;
2. authorise directions to be issued on the operator of a mine (not being the titleholder) when the Minister or prescribed Departmental officer reasonably believes that urgent action is required and the mine is operated by a person other than the titleholder;
3. amend section 241 to clarify that the cost of rehabilitation works which the Minister causes to be carried out can be paid for from forfeited security in circumstances where the rehabilitation was an obligation of the former leaseholder who forfeited the security;
4. ensure that the issue of a direction does not, by itself, limit the amount of security or limit the ability of the Minister to apply the security deposit to any resultant costs of rehabilitation;
5. allow the Minister or persons authorised by the Minister to enter land and carry out rehabilitation in circumstances where a direction that could otherwise be given under section 240 cannot be given because the title holder has died, been wound up, is a declared bankrupt or is a company in receivership and the authority has been declared onerous property by the receivers; and
6. ensure that persons (other than former and current titleholders) acting with the authority of the Minister, the State or appropriate regulatory authorities are not exposed to civil or criminal liabilities as a result of doing all that is necessary and reasonable to comply with a direction issued by the Minister pursuant to section 240. Such a provision would be similar to section 305 of the Protection of the Environment Operations Act 1997.

The EDO strongly supports broadening the Minister's powers to give directions. The current section 240 is lacking detail. There must be complementary clear provisions concerning the consequences of failing to comply with Directions (as supported below).

Environmental impacts outside the area of titles

The Position paper states that amendments are proposed to:

1. ensure that environmental impact assessment at the time of grant considers any likely impacts outside the area of titles;
2. ensure that conditions to protect the environment apply outside the area of titles;
3. ensure that conditions to rehabilitate land damaged or adversely affected by prospecting or mining operations apply outside the area of titles;
4. ensure that directions may be issued to protect the environment or rehabilitate land outside the area of the title;
5. ensure that security deposits are lodged for any anticipated rehabilitation likely to be required outside the area of the title, and that any security can be applied to the rehabilitation of such land should it become necessary;
6. ensure that all the provisions of the revised Part 11 of the Act apply to land above a sub-surface mining lease;
7. clarify that prospecting operations undertaken under section 81 are not regarded as illegal prospecting; and
8. ensure that appropriate offence and penalty provisions also apply outside the area of titles.

The impact of mining is often significant outside of the title area, and the current legislation does not adequately contemplate such impacts. Impact assessment, appropriate conditions and rehabilitation should take into account adjacent lands, including the potential costs of addressing impacts on these lands.

The EDO strongly supports the inclusion of provisions regarding off-title impact. These, combined with a broader definition of "environment", should assist in more effectively addressing the full range of potential environmental impacts.

Further information is required as to what "appropriate" offence and penalty provisions will be included.

Exploration licence conditions

It is proposed to amend the Act to:

1. insert into section 29A a provision for the Minister to be able to amend conditions on an exploration licence when the licence holder applies for a variation to the licence.

The EDO submits that it is appropriate for the Minister have the ability to amend conditions where activities that are permitted under the title are varied. Any additional environmental assessment that is required in relation to the activity variation must be transparent and publicly available.

Environmental reports and audits

The proposed amendments will:

1. require that holders of mining leases must prepare a Mining Operation Plan covering up to seven years of mine life. For all underground coal mines, this would include a requirement for an appropriate Subsidence Management Plan. Mining will not be allowed to commence before the Director General of the Department has approved the Plan;

The EDO strongly supports the inclusion of a statutory requirement for environmental reporting, rather than have such an important requirement as a condition.

There should not be a limit of seven years for a MOP given that some mining operations can last for 21 years or more.

All MOPs, AEMRs and SMPs must be made publicly available as soon as practicable.

2. require that holders of mining leases must submit annual or biennial Environment Management Reports to the Director General. The reports are to be of a standard acceptable to the Director General;

The EDO submits that reporting should be annual and not biennial.

Furthermore, the reporting should be "triple bottom line" reporting, rather than "to be of a standard acceptable to the Director-General." For example, reporting should be international best practice and consistent with the requirements and standards as developed under the Global Reporting Initiative (GRI) – *Mining and Metals Sector Supplement Guideline.*[7]

There needs to be more prescription as to what should be in an Environmental Management Report. The reporting criteria should be specified in the Regulation and should include triple bottom line reporting indicators.

3. amend Division 2 (and in particular subsection 129(2)) to give the Minister the power to amend a Mining Operations Plan, conditions of title or the amount of a security deposit:
• upon recommendation by an officer of the Department;
• upon review of a AEMR;
• upon application by a title or claim holder; or
• in such other circumstances the Minister may deem necessary;
provided the Minister considers that the amendments are necessary to give effect to the objects of the Act.

The EDO submits that the amendment should include an ability for the Minister to consider an amendment to a MOP on the basis of information provided by a local community.

4. enable the Director General to require an environmental report from the holder of any title; and

The EDO supports this amendment.

5. provide for mandatory or voluntary auditing of any title, based on the provisions of sections 171 - 183 of the Protection of the Environment Operations Act 1997 and section 122A - 122F of the Environmental Planning and Assessment Act.

The Position Paper refers to *POEO Act 1997* and *EP&A Act 1979* models for voluntary and mandatory environmental audits. Further detail is required relating to how these parallel options would work in relation to mining operations.

[7] http://www.globalreporting.org/guidelines/sectors/mining.asp.

Moreover, further detail is required in relation to the manner in which such audits are conducted – for example, will audits be conducted by DPI or independently? If independently, will the auditors be accredited? A model for accreditation is currently being devised by the Department of Environment and Conservation (DEC) in relation to accreditation to undertake threatened species assessments. A similar accreditation process should apply to mining auditors.

Mine closure planning

The proposed amendments require:

1. Development and implementation of a progressive mine closure plan to be included in the Mining Operation Plan. This would include mines closed and placed on "care and maintenance" pending potential re-opening;

What happens during and after the mine closure stage can have profound impacts on the title site and surrounding lands. Appropriate actions must be planned well in advance and, as noted above, be tailored to the agreed post-mining land use.

The EDO supports making mine closure planning a statutory requirement rather than a condition. We also support the closure planning process being initiated and discussed at early stages of a development approval.

The objectives of a plan for rehabilitation of a site (and conversion of the land use) are likely to differ from objectives of a plan that contemplates "potential re-opening". In needs to be clarified whether, and how, a single plan model provide for conflicting potential options.

2. Preparation and submission of rehabilitation and closure reports. Rehabilitation must be completed to a satisfactory standard prior to the release of security;

As noted above, clarification is required as to what constitutes a "satisfactory standard", in whose opinion, and how this is monitored and measured?

3. Appropriate auditing of rehabilitation and closure works.

As noted above, auditing must be independent, by an accredited person, and the results must be made publicly available.

Derelict and abandoned mines and equipment

It is proposed to include new provisions in and amend Part 11 of the Act to:

1. provide a statutory basis for the rehabilitation of abandoned mines;
2. provide for Departmental officers and contractors to carry out duties regarding derelict mines, whether or not a title currently exists over the land;
3. apply sections 243 to 246 to opal prospecting licences, as well as to authorities and mineral claims; and
4. allow sale of abandoned plant by tender as well as by auction.

The EDO supports these amendments. Enhanced corporate liability provisions (for example, a power to seek rehabilitation contributions from parent companies etc) could assist in reducing the number of derelict sites and equipment. The NSW *Contaminated Land Management Act 1997* provides a model for identifying a hierarchy of "appropriate persons" to be liable for contamination on a site.

Private prospecting and mining

It is proposed to amend the Act to:

1. *Ensure that, in future, mining of all privately owned minerals takes place under a mining title (either a mining lease or a mineral claim) and that it be subject to all the relevant provisions of the Act.*

It is proposed to amend the Regulation to:

2. *Align the conditions to which prospecting for privately owned minerals is subject with all relevant elements of the standard exploration licence conditions.*

The EDO supports these amendments. A specific reference to environmental protection provisions should be added by inserting "including Part 11" after "that it be subject to all relevant provisions of the Act."

1.3 Enforcement

We note that the amendments with respect to enforcement provisions aim to "improve the framing of the offence provisions" rather than change the levels of penalties. Without seeing the specific drafting of how provisions will be framed, it is difficult to comment specifically. Our general comments are outlined below.

Major enforcement powers

It is proposed to amend the Act to:

1. include offence and penalty provisions for breach of the requirements of the Act or the Regulation, or failure to fulfil directions lawfully given under either the Act or the Regulation;
2. include offence and penalty provisions for:
i) breach of the requirements of both the provisions and conditions of titles;
ii) breach of the conditions of approvals granted consequent to either provisions or conditions of titles;
iii) failure to fulfil directions lawfully given under (i) or (ii) above; and
iv) failure to ensure that a section 240 direction is acted upon (in circumstances where the direction is issued on a person other than the titleholder).

The EDO strongly supports the development of appropriate associated offence and penalty provisions for all requirements under the Act. It is essential to include penalty provisions for failure to comply with new requirements created by the proposed amendments.

The new "framing" of offence provisions may more clearly define offences, however this alone is only one aspect of providing an effective deterrent. More detail is required regarding the offence structure under the Act. An effective and flexible enforcement regime requires a hierarchy of offences based on: Tier 1 – intentional offences, Tier 2 – strict liability offences where a defence of honest and reasonable mistaken belief exists; and Tier 3 – absolute liability offences where penalty notices may apply.

We note that it is insufficient to have multiple offence provisions or large penalties, in the absence of a comprehensive compliance and enforcement policy which is supported by adequate resources for implementation, and sufficient powers being vested in enforcement officers.

It is noted that in the case of pollution regulation, many offences are 'instrumental' or 'calculated' crimes and thus capable of being deterred. Nevertheless, it is also noted that criminological research points clearly to the fact that certainty of being caught is a more important factor in deterrence than the penalty. Therefore, increased offence provisions and penalties without increased resources being put into enforcement, are of limited value. As noted by Jacobs J of the High Court:

> "The deterrent to an increased volume of serious crime is not so much heavier sentences as the impression on the minds of those who are persisting in a course of crime that detection is likely and punishment will be certain. The first of these factors is not within control of the courts; the second is. Consistency and certainty of sentence must be the aim… Certainty of punishment is more important than increasingly heavy punishment."[8]

Continuing offences

It is proposed to amend the Act to:

1. include penalties for continuing offences for breaches of the Act and title conditions (including failure to provide security) and failure to comply with directions.

The EDO strongly supports continuing offence provisions for titleholders and former titleholders. "One off" penalties do not create a sufficient deterrent for large companies, which could easily factor a fine into an often substantial operating budget.

Current restrictions on enforcement

It is proposed to amend the Act to:

1. extend the time limit for commencing prosecutions for prescribed offences (including most environmental prosecutions) to three years, with a limit of twelve months for any other offence;

The current time limitation of 6 months to commence a prosecution is highly impractical and out of step with current legislative limitation periods.

[8] *Griffiths* (1977) 137 CLR 293, 327; and see *He Kaw The v R* (1984) 157 CLR 523.

The EDO strongly supports adopting the *POEO Act 1997* model of a three year limit for commencing prosecutions for prescribed offences, and 1 year for any other offence. All environmental prosecutions should be prescribed offences.

2. extend the coverage of section 375A to allow for penalty notices to cover not only breaches of title conditions but also other offences under either the Act or Regulation;

Further detail is needed on exactly what type of offences under the Act can attract a PIN. It should be noted that the commonly accepted rationale for the use of PINs is that they are applicable only to minor "one off" offences, and should not be issued for more serious offences. This should be made clear in the Act, Regulation or a DPI Compliance and Enforcement Policy.

Court orders in connection with offences

It is proposed to amend the Act to:

1. Allow the Crown to request the court, at the same time as it convicts a person prosecuted for an offence under the Mining Act, to impose additional orders similar to those permitted by Part 8.3 of the Protection of the Environment Operations Act 1997. Such orders could include a requirement for the defendant to:

i) pay the State any royalties payable on minerals illegally recovered and the cost of any rehabilitation undertaken by the State;
ii) pay security not lodged following a Ministerial order to do so;
iii) make good any environmental damage caused by the breach or pay for any costs incurred by the Department or other authority repairing the environmental damage;
iv) compensate persons for any losses incurred as a result of the offence;
v) pay interest on any costs; and/or
vi) publicise the offence.

The EDO supports the proposed court orders. We also submit that additional orders could enable a court that finds an offence proved to:

- Order the offender to publicise the circumstances of an offence;
- Require payment of amounts to the Environmental Trust;
- Require offenders, employees and contractors to attend training courses;
- Require offenders to establish training courses for employees;
- Require offenders to provide financial assurances;
- Make a Corporate Probation Order, which allows the court to insist that the corporate defendant undertake satisfactory internal disciplinary action in response to the commission of an offence; and
- Impose an Equity fine - whereby shares from a convicted corporation go to a public interest trust fund whose funds are directed to conservation groups.

Ensuring accountability for breaches - Breach of condition of title

It is proposed to amend the Act to:

1. clarify that, if a title condition is breached, each holder of the title is liable under section 374A, and has no excuse if a person associated with the holder caused the breach, but may have an excuse if some other person caused it and the holder took all reasonable steps to prevent the breach.

The EDO strongly support tightening up the liability provisions of the *Mining Act*. We support this amendment which is consistent with section 64(2) of the *POEO Act 1997*. The EDO also supports a "reasonable excuse" defence in the terms outlined.

Offences associated with corporations

It is proposed to amend the Act to:

1. require directors, servants and managers of corporations to establish a due diligence defence against personal liability in place of the need for the prosecution to prove a knowing authorisation or permission of the breach.

The EDO submits that it is appropriate that the onus be on the individual to establish a due diligence defence. This is consistent with the *POEO Act 1997,* and reflects accepted practice in relation to regulatory offences more generally.

Failure to disclose prior offences

It is proposed to amend the Act to:

1. Extend the provisions regarding prior mining offences so that, if it were found after a grant of title that the applicant had failed to disclose a prior offence, then the title could be cancelled. Failure to disclose by directors or managers of a corporate applicant could similarly lead to cancellation.

The EDO strongly supports this amendment. Such provisions arguably have more deterrence value than the offences and attendant penalties themselves, as they can affect the viability of ongoing operations.

As noted above, provision should be made so that environmental behaviour and prior offences of parent and sister companies can also be taken into account, both in Australia and overseas.

Strengthening powers of inspectors

It is proposed to amend the Act to:

1. Extend the rights of entry of inspectors and other prescribed officers to access any land to which the Act relates or on which activities are, or should be, carried out under the Act or Regulation, or which should be covered by them, including areas where suspected illegal mining or prospecting may be taking place, areas under private mining agreements and derelict mine sites; and
2. Strengthen the powers of inspectors and other authorised Departmental officers to gain access to, and copy, records and require answers to questions. The investigation powers under Part 7 of the Protection of the Environment Operations Act 1997 should be considered as an appropriate template for the investigation powers under the Mining Act.

The EDO supports these amendments, consistent with the *POEO Act 1997* powers. It is widely recognised that the *POEO Act 1997* contains best practice powers in many instances. It should be noted however, that the *POEO Act 1997* is currently under review, with an amending Bill before Parliament. This Bill further refines and strengthens enforcement powers in many respects, and should be examined for potential application under the mining regime.

Offences and penalties under opal prospecting licences

It is proposed to amend the Act to:

1. Include opal prospecting licences within all the provisions to protect the environment found in the Act.

The EDO supports this amendment. Opal mining can have a significant cumulative environmental impact and it is appropriate that such activity is subject to environmental provisions.

1.4 Access Agreements

Compensation and access agreements to be in writing

It is proposed to amend the Act to:

1. Ensure that all compensation/access agreements under Part 13 are in writing and signed.

The EDO supports this amendment, consistent with sections 265(2) and 141.

Suspension of operations and exercise of rights under titles

It is proposed to amend the Act to:
1. Provide for the Minister or Director General to suspend operations for failure by the titleholder to comply with the requirements of any agreement or assessment under Part 13 for the payment of compensation to a landholder; and
2. Clarify that rights granted pursuant to a pre-existing prospecting title (ie an exploration licence or assessment lease) will continue to apply over a newly-granted mining title (ie a mining lease or mineral claim) while the necessary compensation agreements or assessments are finalised.

The EDO supports the extension of suspension powers where there has been a failure to pay agreed or assessed compensation.

However, we do not support the second amendment relating to pre-existing prospecting rights. As stated in the Position Paper (p22):

> The holder of a mining title is not authorised to exercise *any* rights under the title unless there is a valid compensation agreement in place or assessment has been made by the Warden and the amount assessed has been paid into the Warden's Court.

These rights include the right to prospect, as well as to undertake mining operations, mining purposes and primary treatment operations.

The Act should be consistent in that no rights can be exercised pending the finalisation of a compensation agreement.

Compensation at Lightning Ridge

It is proposed to amend the Act to:

1. Provide that compensation within a declared Mineral Claims District can be addressed via amounts to be prescribed under the Regulation, rather than by agreement between landholders and titleholders, or by initial individual or group assessment; and
2. Provide that a portion of compensation payments made by titleholders be held by the Department to satisfy applications by landholders under section 276 to seek additional assessment of compensation by the Warden.

The EDO is unable to comment specifically on the proposed regulatory provisions as they have not been included in the Position Paper. However, in principle, we support the tightening up and regulating of the compensation agreements at Lightning Ridge.

1.5 Landholder objections to granting mining lease

It is proposed to amend the Act in the following ways:

1. Amend section 62 to clarify that, if grant of the lease over a particular area of land later proves to be invalid, this does not invalidate the whole lease;

Further detail is required, for example as to whether the lease is invalid for the particular area indefinitely.

2. Amend section 62(1)(c) to clarify that the Minister may grant a lease over a "valuable work or structure" if a landholder does not make a claim regarding a "valuable work or structure" under clause 23A of Schedule 1;
3. Amend clause 23A of Schedule 1 to clarify that the processes of clauses 23A and 23B only apply to an "other valuable work or structure", and not to the other improvements listed in section 62(1)(c).

Currently, a landholder's consent is required for mining within 200 metres of a dwelling house that is the principal place of residence of the person occupying it, and within 50 metres of a garden or over any improvements (such as a building, dam, reservoir, contour bank, graded bank, levee, water disposal area, soil conservation work or other valuable work or structure). Houses, gardens and improvements must have been in existence prior to the relevant date, as defined in Section 62(5), in order to obtain the protection afforded by Section 62. In most cases the relevant date is the date that the application for the exploration licence (that preceded the mining lease application) was lodged.

Landholders have a somewhat limited right to object to the grant of a Mining Lease on the basis that the affected area is Agricultural Land or has Valuable Works and Structures. A mining company that applies

for a mining lease which includes the surface must notify any landholders within the lease area (Schedule 1, Clauses 20 & 21 of the Mining Act). The land holders may then object to the grant of a mining lease on the basis that the land is agricultural land or may make a claim that something on the land is a valuable work or structure.

Claims in relation to valuable works and structures may, in some cases, require individual items to be specified. Any such objections or claim must be made in writing to the Deputy Director General of the Department of Primary Industries (Mineral Resources) **within 28 days** of the service of the notice by the mining company applying for the lease. If the mining company objects to a landholder's claim that there is a valuable improvement on the land, the dispute must be referred to the Mining Warden, who will make an inquiry and issue a report. The Warden must then announce in open court the Warden's finding, which will include a declaration about whether the item is a valuable work or structure.

The landholder loses the right to object to the grant of the mining lease if the landholder consents in writing to the granting of the mining lease over the land or if the mine will not extend to the surface.

As with objector rights elsewhere, these are construed narrowly. The EDO submits that objector and third party rights be broadened in the legislation.

1.6 Other matters

Mineral claims

Mineral claims are not subject to the same transparency and consultation requirements as mining and assessment leases, and there is no current requirement that a claim be within a mineral claim district. Despite the fact that mineral claims cover small operations (2 hectares or less) this does not mean that such operations cannot have a significant impact on an area.

It is proposed to amend the Act so that:

1. All new mineral claims granted outside a declared mineral claims district carry only the right to carry out prospecting operations (like exploration licences and assessment leases); and
2. Such mineral claims be able to be granted up to a maximum area of two hectares.

The EDO supports the principle but notes that it is undercut by the exceptions allowed. As the Position Paper states:

> There is no intention to restrict operations that may be undertaken on a mineral claim within declared mineral claims districts, such as those that exist at Lightning Ridge and White Cliffs. New mineral claims districts can be proclaimed by the Governor, if at any time it becomes appropriate to do so.

The EDO also advocates increased environmental management and community consultation for mineral claims.

Mining purposes

It is proposed to amend the Act to:

1. Include power to prescribe certain mining purposes which cannot be conducted except under a mining title (ie a mining lease, or a mineral claim granted within a mineral claims district). Prescribed mining purposes would include the construction, maintenance and use of tailings dams; stockpiling of overburden, ore or tailings; and opal puddling; and
2. Provide for the management of mining purposes above a mining lease by subjecting them to the requirements of section 81.

The EDO submits that it is appropriate for activities such as the construction, maintenance and use of tailings dams; stockpiling of overburden, ore or tailings; and opal puddling; be expressly required to be conducted under a mining title.

Streamlining and ensuring independence of dispute resolution

It is proposed to amend the Act to:

1. Streamline and clarify the independence of private dispute resolution processes under the Act by providing that parties can apply directly for determination by a Warden's Court.

The EDO supports the phasing out of mandatory Ministerial involvement on certain minor disputes, but is concerned that Ministerial dispute resolution should remain an available option in larger disputes. Further detail is needed as to the categorisation of disputes for this purpose.

Part 2 – Interaction of the *Mining Act 1992* and Part 3A *Environmental Planning and Assessment Act 1979*

The relationship between mining law and environmental planning law was first elaborated by Hope J in *Wyong Shire Council v Associated Minerals Consolidated Ltd (1972*).[9] In *Associated Minerals* a mining company, with the benefit of a mining lease, argued that town planning laws had no effect or operation in relation to the mining activity authorised by the lease. Both Hope J and later the Privy Council decisively rejected this argument and enunciated the fundamental principle of co-existence of the two regimes.

The relationship between the two regulatory regimes is expressly provided for in the *Mining Act* 1992, and instruments such as SEPP 45 – Permissibility of Mining. However, it seems that the original supremacy given to the *Environmental Planning and Assessment Act* 1979 (*EP&A Act 1979*) - for example, by virtue of s 65(2)) - is largely illusory. For example, until recently, section 65(3) of the *Mining Act* elevated and allowed a mining lease to trump conditions contained in a development consent, and section 74 of the Act declared that "while a mining lease has effect" - including during any interim awaiting renewal - nothing in the planning law operates to prevent the carrying out of mining operations. Recent amendments have gone some way to redress this imbalance, however have also conversely streamlined development assessment for major projects including certain mining developments.

The Environmental Planning and Assessment (Infrastructure and Other Planning Reform) Act 2005 was passed recently by the NSW Parliament, and the State Environmental Planning Policy (Major Projects) (Major projects SEPP) commenced on the 1st August 2005.

The amending Act made some positive changes with regard to the *Mining Act,* such as the deletion of section 74 "Mining unaffected by the *Environmental Planning and Assessment Act 1979*". These changes are discussed briefly below.

The Bill also introduced a new Part 3A to the *EP&A Act 1979*, and this, in conjunction with the Major Projects SEPP, has significant impacts for the assessment process for mining developments. In fact, provisions in the new Part 3A could override many of the positive *Mining Act 1992* amendments proposed in the Position Paper.

2.1. Recent amendments

Section 91 of the EP&A Act 1979

The amendment to section 91 of the *EP&A Act 1979* makes mining integrated development. This is a positive change. It means that the environmental assessment and land use planning process that results in a development consent is no longer rendered irrelevant once a mining lease is granted. This change better integrates the mining lease approval and development consent processes.

Section 65 of the Mining Act 1992

[9] 25 LGRA 305, *aff 'd (1975*) 29 LGRA 323.

The changes to section 65 of the *Mining Act 1992* are a positive development. Section 65 formerly provided that when a mining lease was granted, any special purpose conditions imposed on the development consent in relation to the mine became void when the mining lease was granted and were replaced by the mining lease conditions. The changes to section 65 mean that conditions can be imposed on a development consent for a mine, and those conditions will remain valid and operative even after the grant of a mining lease. Such conditions include those regarding: the preparation of land for mining; the mining methods to be employed; the rehabilitation of land; safety measures; and payment security to guarantee the requirements of the special purpose conditions will be met. Now that the approval processes for obtaining a development consent and a mining lease are integrated, it is appropriate that the conditions of development consent should persist even after the grant of the mining lease. Note however, that the old rules will continue to apply to development consents and mining leases granted before the commencement of the changes.

Section 74 of the Mining Act 1992

The amendment to section 74 of the *Mining Act 1992* means that environmental planning instruments, including Local Environment Plans (LEPs), can prohibit and regulate mining activities. The grant of a mining lease no longer overrides such provisions. Local Councils can now draft LEP provisions which prohibit mining in certain areas. Note however that if a mine is declared to be a Critical Infrastructure Project, then the Minister has power to approve the mine even if it is prohibited under a LEP.

Section 381of the Mining Act 1992

The consequence of the amendment to section 381 of the *Mining Act 1992* is that prospecting activities can be prohibited or regulated by conditions of a development consent, and by State environmental planning policies (SEPPs) made after the commencement of the amendments.

2.2. The new Part 3A

As noted, the NSW Government has introduced a new Part 3A to the *Environmental Planning and Assessment Act 1979* to deal with major projects and critical infrastructure projects. This is supplemented by amendments to the *Environmental Planning and Assessment (General) Regulation 2000* (new Part 1A) and the *State Environmental Planning Policy (Major Projects) 2005*.

Major Infrastructure Projects and Critical Major infrastructure Projects
Major infrastructure projects or any development of State or regional significance under either Part 4 or Part 5 is to be approved by the Minister if a development is declared by the Minister or a SEPP to be a "Major Infrastructure Project" or a "Critical Major Infrastructure Project".

The new Part 3A allows for the approval of concept plans for certain types of projects, and once concept approval granted, they have statutory force.

Approval is subject to a range of non-mandatory environmental impact assessment (EIA) requirements. The Minister has broad discretion in relation to EIA process (ie: not to

require an EIS where it would otherwise have been required, and there are no scientific environment related triggers).

Amendments to the Regulation have been gazetted, however much of the detail of how the new part is to be implemented has been left to "guidelines." These guidelines are not yet finalised. Key points are as follows:

Major Infrastructure Projects

- EIA may involve use of a panel of experts, but there is no mandatory requirement for recommendations to be taken into account;
- Public submissions may be invited for 30 days, but there is no duty to consider these;
- The Director-General is to prepare an assessment report for the Minister, however the content of the report is not specified in Act;
- Developer appeals must be made within 3 months (objectors may be heard); and
- Objector appeals have a time limit of 28 days (unless concept plan approved, Commission of Inquiry, panel of experts have reported).

Critical Infrastructure Projects

- This can be any development that the Minister determines is "essential for the State for economic, environmental or social reasons" by section 75C (this could include a mining development);
- Minister has power to approve a project even if such development is wholly prohibited under an LEP;
- The provisions remove certain requirements for a range of other approvals under other Acts;
- There is no right of appeal for developer or objectors; and
- The public cannot challenge, and the court cannot make orders relating to declarations of projects, approvals of projects, enforcement of conditions, breaches of authorisations (except with approval of Minister). Also, the court cannot invoke stop work orders or environment protection notices.

Consequently, despite the changes to section 65, discussed below, if a mine is declared to be and approved as a critical infrastructure project, then even though the development consent can contain conditions regulating mining activities, those conditions cannot be enforced without the Minister's consent.

In summary, the new Part 3A winds back community involvement with regard to the ability to be involved in pre-approval process; to challenge approval on legal grounds; to enforce approvals; to seek protection orders; or to appeal on merits. It hands largely unfettered discretion to the Minister regarding environmental assessment criteria for approvals; concentrates power in the Minister regarding separate approvals; and allows prohibited development to be approved. It removes longstanding accountability provisions by restricting the ability of the Land and Environment Court to entertain challenges to approvals and enforce approvals.

2.3. Part 3A and the proposed changes to the *Mining Act 1992.*

With regard specifically to mining projects, the proposed amendments to the *Mining Act 1992* regarding "Broadening and Strengthening Existing Environmental Provisions" (for example, regarding environmental impact assessment), whilst being an improvement on current provisions, may be overridden by the Part 3A reforms.

The proposed mining amendments regarding environmental assessment will be an improvement for smaller projects, but for any mining development that falls under the new planning regime (as specified by the Major Projects SEPP – see below), there is no guarantee as to the standard of EIA or level of community consultation which will be required. As noted above, these requirements under the new Part 3A are left largely up to Ministerial discretion.

The Major Projects SEPP sets out classes of development that come under the new regime:

Schedule 1 Part 3A projects – classes of development

Group 2 Mining, petroleum production, extractive industries and related industries

5 Mining

(1) Development for the purpose of mining that:
(a) is coal or mineral sands mining, or
(b) is in an environmentally sensitive area of State significance, or
(c) has a capital investment value of more than $30 million or employs 100 or more people.
(2) Extracting a bulk sample as part of resource appraisal or a trial mine comprising the extraction of more than 20,000 tonnes of coal or of any mineral ore.
(3) Development for the purpose of mining related works (including primary processing plants or facilities for storage, loading or transporting any mineral, ore or waste material) that:
(a) is ancillary to or an extension of another Part 3A project, or
(b) has a capital investment value of more than $30 million or employs 100 or more people.

6 Petroleum (oil, gas and coal seam methane)

(1) Development for the purpose of drilling and operation of petroleum wells (including associated pipelines) that:
(a) has a capital investment value of more than $30 million or employs 100 or more people, or
(b) is in an environmentally sensitive area of State significance, or
(c) is in the local government areas of Camden, Wollondilly, Campbelltown City, Wollongong City, Wingecarribee, Gosford City, Wyong, Lake Macquarie City, Newcastle City, Maitland City, Cessnock City, Singleton or Muswellbrook, but only if the principal resource sought is coal seam methane.

(2) Development for the purpose of petroleum related works (including processing plants) that:
(a) is ancillary to or an extension of another Part 3A project, or
(b) has a capital investment value of more than $30 million or employs 100 or more people.

7 Extractive Industries

(1) Development for the purpose of extractive industry that:
(a) extracts more than 200,000 tonnes of extractive materials per year, or
(b) extracts from a total resource (the subject of the development application) of more than 5 million tonnes, or
(c) extracts from an environmentally sensitive area of State significance.
(2) Development for the purpose of extractive industry related works (including processing plants, water management systems, or facilities for storage, loading or transporting any construction material or waste material) that:
(a) is ancillary to or an extension of another Part 3A project, or
(b) has a capital investment value of more than $30 million.

8 Geosequestration

Development for the geosequestration of carbon dioxide.

9 Metal, mineral or extractive material processing

Development that has a capital investment value of more than $30 million or employs 100 or more people for any of the following purposes:
(a) metal or mineral refining or smelting; metal founding, rolling, drawing, extruding, coating, fabricating or manufacturing works; metal or mineral recycling or recovery,
(b) brickworks, ceramic works, silicon or glassworks or tile manufacture,
(c) cement works, concrete or bitumen pre-mix industries or related products,
(d) building or construction materials recycling or recovery.

Should a mining development be declared to be a "critical infrastructure project" there will be an extremely limited (virtually non-existent) opportunity for public participation, challenge or review. Consequently, the application of Part 3A to mining projects can and will override many positive environmental considerations proposed by the *Mining Act 1992* amendments.

Part 3 Additional issues: Public participation and stakeholder engagement

3.1 Public Participation and Stakeholder Engagement

Current situation

Public Notification and Public Objections to the grant of a mining lease

Before granting a mining lease, a notice must be published in appropriate newspapers.[10] On the basis of such a notice, objections may be lodged to the grant of a mining lease by any person who is not entitled under the *EP&A Act 1979* to make a submission in relation to the granting of development consent that is required before the land concerned may be used for the purpose of obtaining minerals or for one or more mining purposes.[11] Objections under the *Mining Act 1992* are referred to the Warden for inquiry and report.

In reality, this means that in most cases people are not entitled to object under the *Mining Act 1992*, as almost all mining lease grants require a development consent under Part 4 of the *EP&A Act 1979* where people are entitled to make a submission in relation to the granting of development consent.

Objections under the *Mining Act* may only be made where the provisions of Part 5 of the *EP&A Act 1979* apply, or where a lease is being granted as a consequence of a variation to an existing development consent under section 96 of the *EP&A Act 1979*, and opportunities to put in submissions are not available. Any such objection must be accompanied by the appropriate fee.

Note that the new assessment process under Part 3A provides for submissions from the public at s.75H(4). Consequently, objections can not be made to the proposed grant of a mining lease that has been the subject of a Part 3A approval.

Public Inquiries

Public inquiries can still be called in relation to mining proposals. In fact, after the amendments, a public inquiry must be held if the Minister is the proponent of a Part 3A infrastructure project, pursuant to s.75X of the *Infrastructure Act*, which provides:

> **75X Miscellaneous provisions relating to approvals under this Part**
> (1) If the proponent of a project (or proposed project) is the Minister or the corporation constituted by section 8 (1), the project must be the subject of an inquiry held in accordance with section 119 or of a report of a panel of experts under section 75G.

[10] Mining Act, Schedule 1 Clause 24 (3 &4)
[11] Mining Act, Schedule 1, Clause. 28

At the end of the inquiry, the Commissioner makes recommendations to the Minister. Where mining is recommended to proceed, conditions are suggested that should apply to the project to meet concerns of residents and others.

Generally the current situation is still relatively limited for genuine public participation and engagement. Some developments are discussed below.

Community Consultative Committees

While community consultative committees (CCCs) can be convened by DPI or DIPNR to consider impacts of proposed mines on local communities and the environment (sometimes as part of meeting a condition of consent), there have still been problems with access to full information and timeframes that hinder the effectiveness of these forums. For example, one representative has observed a lack of capacity for the community to keep abreast of SMP drafts and inequalities in access to information (for example, consultants get access to Departmental data for reports, but community members do not have access).

Improved Engagement with Communities and Stakeholders

The EDO has previously submitted comment on the MCMPR "Draft Principles for Engagement with Communities and Stakeholders"[12] and concluded that genuine engagement with stakeholders is a fundamental basis for promoting and achieving sustainable development.

At a Federal level, we support the inclusion of "Valuing Community and Contributing to Sustainable Development" as a key priority of the Ministerial Council for Mineral and Petroleum Resources (MCMPR) Vision for 2025, and the recognition of the current lack of effective engagement between government, the mining and petroleum industry, stakeholders, and the community.

From a NSW perspective, the EDO has attempted to assist in bridging the gap in this area in a number of ways. We have conducted a successful workshop for mine affected communities in the Hunter Valley. Over 60 attendees attested to the fact that there is a thirst for knowledge and a great interest amongst members of the community regarding mining developments. The EDO has also attended a forum in Maitland with DPI to discuss engagement with environmental groups and communities, and attended a stakeholder workshop on the "Operational Framework for Sustainable Development" in March 2004. This also revealed a knowledge gap regarding awareness of community concerns within the department and a recognition that current community engagement levels are deficient. Most recently, we have attended a DPI briefing on the proposed amendments in the position Paper, and consequently assisted in running a workshop at NSW parliament for community members interested in the proposed reforms.

In NSW, many environmental statutes contain comprehensive public participation provisions. Increasingly, however, consideration needs to be given to using such public participation effectively, given limited community capacity. As the Department of Environment and Conservation (DEC) has recently recognised in the context of licence reviews, there is a need to actively ensure proper public participation in environmental

[12] EDO, 16th March 2005, see http://www.edo.org.au/edonsw/site/policy.asp.

decision-making beyond simply meeting the formal requirements of the legislation. Such an approach recognises the complexities of public participation in an increasingly technical, difficult and time-consuming operating environment. Recent practice has demonstrated that mechanisms for public participation need to be better managed to ensure the best possible environmental outcomes. Similar challenges exist for Departments dealing with primary industries and minerals. The EDO welcomes the recognition of these challenges by Government departments, such as DPI and DEC at a state level, and MCMPR at a federal level, and supports move towards improvement.

As noted in our previous submission, the key obstacles to establishing and maintaining effective ongoing engagement between the mining industry, DPI, and stakeholders and communities include the following:

• **Early engagement.** Community consultation will be tokenistic if it occurs too late in the process to be taken into account. Community consultation at a late stage must not be simply used to 'rubber stamp' a consultation process. Early engagement has the benefit of identifying key issues important to stakeholders at an early stage so that they may be addressed early. This can prevent confrontation at later stages of a development. Early engagement is recognised in Article 6(4) of the European *Convention on Access to Justice in Environmental Matters 1998* (Aarhus Convention).

• **Who is engaged.** It is important that public consultation can include any person with an interest in the issue. This is best done by ensuring information is widely available, for example on a website. The definitions of who is a stakeholder must not be geographically limited. For example, a Sydney-based environment group may be able to provide support and resources to assist a remote local, host or affected community engage in a consultation process.

• **Commercial in confidence clauses.** These clauses are often used to prevent the community from gaining access to information. While the EDO appreciates that there is a need for certain commercial information to remain confidential, where there are overriding issues of public interest involved (such as the impact on the local health of the community and environment) it is essential that a transparent process be established to ensure the community have all the necessary information.

• **Capacity to engage.** The principles for engagement must recognise the difference in capacity to engage between stakeholders. For example, shareholders and employees may have better resources and access to information than remote indigenous communities. Where there is a clear resource deficit and inability to engage (for example, limited access to information, technology, travel costs to attend meetings, translation of information, obtaining legal advice), the proponent of the development must ensure resources are directed to relevant stakeholders. It is also necessary to broaden the public's access to scientific and technical assistance to complement legal assistance.

• **Time frames for consultation.** The principles must ensure that appropriate time frames are created for consultation. These should take into account remoteness, holiday periods, and coordination of stakeholder groups involved (for instance indigenous stakeholders). For example, currently under Schedule 1 of the *Mining Act 1992*, which provides for "Public consultation with respect to the granting of assessment leases and mining leases,**"** if a person does not object to proposed mining on their land within 28 days, they lose their rights.

• **Notification.** There must be an onus on the proponent and relevant department to go through a thorough process of identifying all stakeholders and notifying them at an early

stage of the development proposal. On-site notices can be missed (especially in remote areas) and newspaper advertisements may need to be repeated.

• **International best practice.** Australia, due to its richness in natural resources and its fragile ecological assets, should strive towards implementing community and stakeholder engagement principles according to international best practice. Provisions of the Aarhus Convention provide such a model.[13]

In relation to NSW processes, the EDO submits that community engagement should be enhanced in the following ways:

- community consultation needs to be defined;
- there needs to be greater public access to information submitted for an approval based on detailed community input;
- include strong 3rd party enforcement rights;
- there needs to be recognition of environmental and social constraints before exploration licences are granted;
- environmental reporting must be accessible for the public;
- MOP and review processes should be public;
- there needs to be greater transparency in SMP process, including availability of baseline monitoring data;
- any independent auditing must be by an accredited person, and the audit reports be made public;
- mine closure plans should be part of the initial approval and publicly exhibited; and
- further information is required on the use of any proposed off-site offsets scheme, with comprehensive community consultation undertaken before any pilot schemes commence.

In summary, while the environmental provisions suggested in the Position Paper are a positive step in bringing the *Mining Act 1992* into line with other environmental legislation in the State, such reforms need to be accompanied by genuine progress in terms of community engagement. This includes inserting open standing for any person to bring an action to restrain or remedy breaches of the Act.

[13] For further information on the Aarhus Convention, see http://www.unece.org/env/pp/.