

30 November 2015

Community Consultation Code
NSW Department of Industry, Division of Resources and Energy
PO Box 344
Hunter Region Mail Centre NSW 2310

Submitted by email: consultationcode.submissions@industry.nsw.gov.au

Dear Community Consultation Code Team,

Draft Exploration Code of Practice: Community Consultation

EDO NSW is a community legal centre specialising in public interest environmental law. Our work includes legal advice and casework, law reform, science and community outreach and education. We welcome the opportunity to comment on the *Draft Exploration Code of Practice: Community Consultation (draft Code)*.

EDO NSW supports all efforts to improve community consultation in the mining and coal seam gas sectors. We also support the increased transparency that will result from mandatory annual reporting as proposed in the draft Code. However, we have significant concerns that the draft Code does not reflect best practice community engagement and will not effectively address the current situation of conflict between industry and local communities. We have two key concerns: first, regarding how the proposed code measures up to best practice consultation in terms of the recognised spectrum of consultation, and second, in relation to the Activity Impact Assessment hierarchy. We make some recommendations to strengthen the draft Code.

1. *Spectrum of public participation options*

We note that the proposed consultation requirements fall at the lower end of the public participation spectrum, as defined by the International Association for Public Participation.¹ The IAPP spectrum ranges from *informing* which aims to “provide the public with balanced and objective information to assist them in understanding the problem, alternatives, opportunities and/or solutions” through *consulting*, *involving*, *collaborating* and *empowering* which aims “to place final decision making in the hands of the public”. The draft Code currently falls between the definitions of *inform* and *consult*.

There is a commitment in the draft Code to require industry to keep the community informed, to listen to and acknowledge concerns and aspirations, and provide

¹ International Association for Public Participation, ‘Public Participation Spectrum’, <https://www.iap2.org.au/resources/iap2s-public-participation-spectrum>.

feedback, but there is little recognition in the draft Code that this information should be used to influence decisions or that the community should be informed about how the consultation process influenced the decision. This is a major failing of the draft Code that should be addressed before the document is finalised.

In this regard, the draft Code would benefit from additional information on how to best engage the community. We note that as early as 2001, the then Department of Urban Affairs and Planning commissioned a report titled “Ideas for Community Consultation: A discussion on principles and procedures for making consultation work”.² Given the strong community concerns around the lack of consultation during the exploration process to date, the draft Code would greatly benefit from more explicit guidance on how to conduct appropriate community consultation.³

Furthermore, the Code should specifically acknowledge that consultation with Aboriginal communities must be culturally appropriate and should indicate that tailored consultation processes will need to be developed and implemented according to requirements articulated in other codes and guides etc.⁴

2. Activity Impact Assessment hierarchy

The second area of concern relates to the proposed Activity Impact Assessment hierarchy and its subsequent influence on the level consultation required. This approach fails to recognise the genuine community concerns that exist around exploration activities and subsequent extraction. While we recognise that exploration is an early stage in the development of any future extraction activity and there may be limited information any future project at this stage, community concern around the level of activity may still be significant. In this regard we note that the Chief Scientist’s review identified the potential for the CSG licensing framework to create inappropriate expectations among exploration proponents that subsequent gas production leases will be issued almost automatically.⁵

Rather than limit the extent of consultation early in the exploration process, the emphasis should be on full consultation as early as possible to ensure that the community is fully informed and able to engage through the entire exploration and, potentially, extraction process. Early engagement can be critical in reducing future land use conflict. The types of community consultation currently required by the draft Code are by no means onerous and are a reasonable level of consultation for any industry that is entering a new region or expanding their existing activities.

The draft Code does not include any feedback loop or process to follow if a proponent’s initial subjective assessment underestimates the level of community

² Available at: www.activedemocracy.net/articles/principles_procedures_final.pdf

³ EDO NSW has undertaken a significant amount of community consultation, especially in rural and regional areas on issues regarding extractive industries. We would be happy to provide further information about our work. Our previous law reform submissions are available at: http://www.edonsw.org.au/mining_coal_seam_gas_policy.

⁴ For example, *Aboriginal Cultural Heritage consultation requirements for proponents* OEH, available at: <http://www.environment.nsw.gov.au/licences/consultation.htm>

⁵ NSW Government, Chief Scientist & Engineer *Final Report of the Independent Review of Coal Seam Gas Activities in NSW – Study of regulatory compliance systems and processes for coal seam gas*, September 2014, Appendix 2, p. A-32: “the discretion to grant a PEL or PAL [for CSG exploration] needs to be exercised with care, as once it is awarded, it is very difficult to restrict the production phase.”

interest. The draft Code should be clarified (for example, in the flow chart in Appendix 3) to show how project consultation requirements will be escalated where there is a higher level of community interest than initially predicted by the proponent.

3. Recommendations

If the draft Code does proceed in its present form, we suggest the following changes as a minimum:

- The Objectives should be broadened to require title holders to not just manage risk but to engage in genuine dialogue with local communities;
- A failure to understand and respond to local knowledge and genuine community concern should be included as a risk;
- Table 2 should require consultation with 'relevant government agencies' and 'indigenous cultural bodies' for all levels of impact;
- Table 4 should be edited to ensure that all levels of impact trigger the need for a dedicated website/page, a dedicated project email address, letters to key stakeholders and community groups inviting submissions, and holding meetings with local communities/organisations. Holding open community forum/public meetings should also be required for medium impact activities;
- The Annual Community Consultation Report should also include a section on how the activity was adjusted in response to community consultation;
- The definition of sensitive environment should be expanded to include all areas with an environmental zoning in relevant local government plans;
- The code should include appropriate links of further references for consultation with Aboriginal communities;
- The guidelines (or at least the principles of integrity etc.) in Appendix 1 should be mandatory; and
- The code should include a feedback loop or process to follow if a proponent's initial subjective assessment underestimates the level of community interest (for example, in Appendix 3).

We would be happy to discuss these issues further. For further information, please contact me on (02) 9262 6989 or [rachel.walmsley\[at\]edonsw.org.au](mailto:rachel.walmsley[at]edonsw.org.au).

Yours sincerely,
EDO NSW

Rachel Walmsley
Policy & Law Reform Director