

NSW



**DEFENDING THE ENVIRONMENT
ADVANCING THE LAW**

Submission on Environmental Impact Assessment (EIA) Improvement Project – Draft EIA Guidelines

prepared by

**EDO NSW
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About EDO NSW

EDO NSW is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 25 years' experience in environmental law, EDO NSW has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO NSW is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

EDO NSW is part of a national network of legal centres that help to protect the environment through law in their states.

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Introduction

Thank you for the opportunity to comment on the Department of Planning and Environment's *Draft Environment Impact Assessment Guidance Series* (June 2017) (**EIA Guidelines**). EDO NSW has attended workshops on this and past stages of the project and made submissions in November and December 2016, available on our website.¹

Part 1 of this submission makes general comments and **recommendations** on the EIA improvement project and the draft EIA Guidelines series. In particular: the approach to delivering the EIA improvement project, including via regulatory amendments; and the need to address three overarching barriers to improved EIA.

Part 2 makes specific comments and **recommendations** on draft Guidelines 1-9:

1. **Overview and Phases of EIA**
2. **Community Guide to EIA**
3. **Scoping an Environmental Impact Statement (EIS)**
4. **Preparing an EIS**
5. **Responding to Submissions (and Public Exhibition)**
6. **Community and Stakeholder Engagement**
7. **Approach to Setting Conditions**
8. **Modifying an Approved Project**
9. **Peer Review**

Part 3 comments briefly on additional EIA improvements that are in progress for the next stage of the Department's project, including professional codes of conduct, cumulative impact assessment and grounds for further project information or refusal.

¹ Available at http://www.edonsw.org.au/planning_development_heritage_policy. See for example EDO NSW, *Submission on the Environmental Impact Assessment Improvement Project – Environmental impact assessment for major projects* November 2016 – [Download PDF](#).

Part 1 – General comments on the Project and draft EIA Guidelines

EDO NSW welcomes the Department's efforts to improve the rigour of, and confidence in, EIA processes for major projects. Policy and guidance material is not a substitute for law reform, but it is an important complement to fit-for-purpose planning laws, by clarifying community and stakeholder understanding, and applying the law more clearly, consistently and effectively.

As a community legal centre specialising in planning and environment law, we and our community clients have frequently raised concerns about the quality and independence of EIA information, as well as the level of scrutiny this EIA information receives. We therefore commend the Department for responding to these concerns including its substantial work on this project. We note the Department expects a range of benefits from the project (Guideline 1, at 1.2).

We also welcome the proposal to give mandatory effect to (most of) the EIA Guidelines, via the *Environmental Planning and Assessment Regulations 2000* (**planning regulations**) but note that giving regulatory effect to the guidance should not create minimum standards that reduce the quality of EIA. We query the proposal to *not* give regulatory effect to the community engagement guideline. This is unlikely to promote community confidence. We strongly encourage the Department to publicly exhibit the proposed regulations for comment before they are finalised.

It is important that the Department continues to be clear about how different policy or legislative reform initiatives interact, such as the Environmental Planning and Assessment Amendment Bill 2017.² We therefore welcome the inclusion of a section to this effect in Guideline 1.

Approach to delivering the EIA improvement project

Before turning to each draft Guideline, this section makes general comments on:

- *Draft Principles to Guide EIA (Application of ESD, Building trust in EIA)*
- *Giving effect to the Guidelines in Regulation,*
- *Proposed future EIA improvements, and*
- *Addressing some overarching barriers to improved EIA.*

Draft Principles to Guide EIA

EDO NSW generally supports the seven principles proposed in Guideline 1 to underpin the EIA approach for State Significant Projects (at 1.3.2). We **recommend** referring to these principles in the revised planning regulation. We comment on two specific principles below.

Ecologically Sustainable Development (ESD)

We welcome the primacy of ESD as underpinning major project assessment. However the proposed description of ESD is too high-level. To assist the effective integration of economic and environmental considerations, we **recommend** three things.

First, a clear upfront explanation of what ESD is – the effective integration of long and short-term economic, social and environmental considerations, so that present development does

² See our submission on the Bill at:
http://www.edonsw.org.au/environmental_planning_and_assessment_amendment_bill_2017.

not deplete natural resources or degrade natural assets in a way that deprives future generations from using them.

Second, a brief explanation of each key principle of ESD – adopting a precautionary approach to preventing serious harm; ensuring equitable distribution of costs and benefits within society and across generations; and making biodiversity and ecological integrity a fundamental consideration in decision-making by all parties.

Third, specific guidelines on how ESD and its principles should be applied by project proponents and decision makers to real-life situations and scenarios. While some agencies (e.g. RMS) have internal guidelines on ESD or particular principles (such as biodiversity conservation), EIA quality would benefit from specific ESD guidelines.

Building confidence and trust in EIA

EDO NSW strongly supports professional standards for EIA for the following reasons:

First, for any major project, affected communities seek high-quality development with the lowest possible adverse impacts. Communities also expect and deserve to know the true extent of likely impacts and risks over time – not simply an optimistic portrayal of the project, or information about a single stage of a broader long-term plan. This is much more likely with a process that is rigorous, quality-assured, arms-length and accountable.

Second, for decision-makers, independent, reliable and complete information is essential for making sound decisions and setting appropriate conditions if the development is approved. Baseline data gathered for individual projects can also be re-used for strategic planning and monitoring (but only if information is reliable).

Third, the major projects planning system often operates in a context of low or limited public confidence, high anxiety and uncertainty. The public is unlikely to view departmental assessment as independent if they never see the Department refusing or questioning a major project. Ways to improve this situation include professional standards (within and outside government), transparent processes and clear decision criteria, and a willingness to exercise refusal powers when inappropriate projects or unacceptable impacts are proposed.

As another important means for building confidence, we **recommend** the Guidelines note that some projects will have *unacceptable impacts*; and explain how the Department will identify these early (including via community engagement). There is currently no clear guidance on the process to identify such unacceptable impacts.³ Nevertheless, the Department's willingness to prevent poorly-designed or inappropriate projects from proceeding beyond preliminary stages will have significant bearing on public confidence in the EIA process. Identifying flaws in EIA should not be left to affected community members working in their spare time, in some cases with no prior experience or professional assistance in navigating the planning system.

Giving effect to the Guidelines in Regulation

We strongly **support** giving legal effect to the Guidelines via the planning regulation. In light of this proposal it is vital that each Guideline contains best practice standards and the regulation provides for these standards to be strengthened as knowledge changes over time. The Department must avoid embedding standards that reduce the quality of EIA or set a poor (lowest common denominator) benchmark.

³ In contrast, early refusal based on “unacceptable impacts” is used in Part 7 Div. 1A of the *EPBC Act 1999* (Cth).

We also query why Guideline 5 – *Community and Stakeholder Engagement* would *not* be given legal effect, as currently proposed (Guideline 1, p. 4). No clear explanation is given in the Guidelines. If the intent is to provide a level of flexibility, the Guidelines could include mandatory, specific and flexible requirements. For consistency with other Guidelines, and to build public trust, we **recommend** giving effect to the community engagement guideline in the planning regulations.

We strongly **support** amending Schedule 2 of the Planning Regulation to allow early public comment on major project proposals (including the Scoping Report for the EIS and/or any draft SEARs). We **recommend** a requirement for the Secretary to take such public comments into account before SEARs are issued.

We also **recommend** that a public exhibition period should be the default approach for *all* major projects, rather than attempting to define which projects are of interest to the community and which are not.

Finally, we **support** the continued requirement for a declaration that an EIS is not false or misleading (and have commented on the form and content of declarations in previous submissions). We would also welcome the clarification or expansion of the Planning Act's offence provisions to include all supporting documents for a project. As prosecution is the highest tier of enforcement action, it is important that various other checks and safeguards exist to regulate the objectivity of project assessment.

Proposed future EIA improvements

We **support** the Department developing related improvements that will form the next stage of the EIA Improvement Project (Guideline 1 p. 5) – namely:

- Options for codes of professional practice;
- Cumulative impact assessment; and
- Clarifying grounds for the Department to request further project information and refuse inappropriate development or modifications.

The inadequacies of the present planning system to deal with the above matters are significant, high-level barriers to EIA improvement. These are discussed further at the end of the submission (Part 3). We would welcome further consultation on them.

Need to address overarching barriers to improved EIA

Finally, we note three additional, overarching barriers to improved environmental outcomes from EIA, and indeed strategic planning in NSW. We **recommend** these deficiencies be addressed, including by the Department of Planning and Environment:

1. ***A general lack of whole-of-government environmental goals, targets or projections in NSW***, in contrast to a range of state-wide social and economic goals, targets and projections (making it difficult for communities, EIA consultants and decision-makers to contextualise environmental impacts).
2. ***Under-investment in whole-of-government data and monitoring systems*** on environmental and natural resource management (**NRM**) outcomes, conditions and trends (for example, a national/regional environmental accounts framework; and a systematic post-approval monitoring and auditing framework for major projects).

3. ***A lack of integration between NSW planning, environmental and NRM law and policy***, and at times inconsistency between their objectives and outcomes. Biodiversity and climate change provide two live examples:

- The *Biodiversity Conservation Act 2016* proposes a 'no net loss' standard for biodiversity assessment, but this is undercut by weak offsetting options and 'variation rules', and non-scientific self-assessable codes for clearing of rural native vegetation, including endangered ecological communities.
- The NSW Government has adopted an encouraging target of net-zero greenhouse gas emissions by 2050. However, there is no systematic mechanism to achieve this via the planning or pollution licencing systems (i.e. the systems under which the majority of NSW emissions are authorised).

To effectively improve EIA processes these barriers need to be comprehensively addressed in relevant, legislative, regulatory and policy reforms.

Part 2 – Specific comments on draft EIA Improvement Guidelines 1 - 9

This part of the submission refers to proposed changes in the draft EIA Guidelines as summarised in draft **Guideline 1 – Overview of the EIA Improvement Project**, and as detailed in draft **Guidelines 2-9**. We ask that our comments and recommendations be addressed in each relevant Guideline as they are finalised.

We note that some of our recommendations for improving EIA may also require regulatory or legislative amendment as well as strengthened language in the guidelines and relevant policy instruments.

Guideline 1 – Overview and Phases of EIA

Section 3.1 of Guideline 1 provides a well-rounded summary and diagram of key stages of EIA, focus points for improving EIA, and the main changes to EIA that are proposed in the draft Guidelines series (p. 8).

In addition, we **recommend** the project identify and address three other key areas for improvement:

- Interaction between strategic plans and development assessment;
- Systematic data capture and quality-assurance; and
- Post-approval monitoring and reporting on ESD and environmental outcomes.

First, the **interaction between strategic planning documents⁴ and individual development decisions** is complex, uncertain and currently in flux (as Regional and District Plans commence). We **recommend** EIA guidance clarifies:

- What processes and safeguards exist where a major project or precinct plan does not comply with local development rules; and
- How conflicts will be fairly and openly resolved when a major project or precinct proposal meets some strategic criteria, but conflicts with others.

Second, a consistently identified problem not accounted for in the EIA improvement project is **systematic data capture**. We **recommend** this project ensure environmental information is quality-assured and fit-for-purpose; and is captured for re-use in policy making and continuous improvement (e.g., for strategic planning, environmental accounting).

A third issue is **post-approval outcomes monitoring and reporting**. Historically, major project monitoring has focused on economic outputs (building approval and completion rates, housing or employment estimates, and total capital investment value) rather than social or environmental outcomes. In particular, we **recommend**:

- The EIA project should establish systematic impact monitoring and continuous improvement systems that is readily accessible to regulators and the public.
- Monitoring and reporting should be properly linked to the goal of ESD.
- Compliance and development outcomes should be measured against other important environmental goals and data (biodiversity impacts, energy, water, waste and carbon footprints).

⁴ For example, State Environmental Planning Policies (**SEPPs**); Regional Plans and District Plans; and Local Environment Plans (**LEPs**) and Development Control Plans (**DCPs**). State plans and priority statements, infrastructure documents and intergovernmental agreements are also influential.

Guideline 2 – Community Guide to EIA

We **welcome** the Department’s endeavors to better explain the EIA process in plain language. Planning and development laws and policies are complex and continually changing, and there are few community resources to explain them (EDO NSW factsheets and legal guides being one independent source).⁵

We **recommend** the *Community Guide to EIA* provide significantly more detail on:

- what factors the decision-maker needs to take into account (including s. 79C),
- how the Department expects decision-makers to weigh up and integrate different (and often competing) criteria, and
- how submissions can inform decision-makers to make good decisions.

The guideline should also provide further information about how/whether a community can engage:

- When a scoping report is not exhibited (flowchart p4 and 3.3);
- If a modification application is not exhibited (flow chart p4 and 8.3). The guideline should make it clear there may be minimal opportunities for engagement on Type 1 and 2 modifications if that is to be the case in order to manage community expectations;
- How/whether communities can provide additional information that may be outside the scope of set “online questions” (p7 and 3.4.2); and
- When a Submissions Report is not made public? The guideline should explain when/why this would occur. (p13 and 5.2.3).

The Scoping section that refers to “what the project means to people” (3.1) should cross reference the Social Impact Assessment Guidelines.

The *Community Guide to EIA* also provides an opportunity to help align proponent and community expectations with different phases of the assessment. For example, section 5.1.2 *Responding to submissions* states (p 12):

Proponents are expected to carefully consider issues raised in each submission and provide responses to the issue raised including changing the project design, performance criteria or mitigation measures, if considered appropriate. It is not appropriate to just repeat or refer to the information presented in the EIS unless the proponent considers the matter raised has been comprehensively addressed. [our emphasis]

This approach effectively invalidates community concerns, if the proponent deems they have provided sufficient information. Such an approach is not consistent with requiring a proponent to genuinely engage with community stakeholders.

Furthermore regarding responding to submissions, we **recommend** that the statement in footnote 8 should be in the body of the guideline to make it clear that the Department will consider feedback provided on projects at any phase in the EIA as part of its assessment of the project (p12).

The Department should also take this opportunity to improve the ease with which community members can access the materials available as part of the EIA process. In the current situation, any projects that are assessed by the Planning Assessment Commission (**PAC**)

⁵ Available at: http://www.edonsw.org.au/planning_development_heritage.

have different information available on different websites. For example, the EIS and Response to Submissions (**RtS**) information will be available on the Major Projects website, while any information prepared for the PAC assessment process will be available on the PAC website. There is no single place a community member can look for the full EIA documentation. This process continues after project approval where changes to the project descriptions and conditions or licence requirements are not immediately available in a single location. Similarly, where conditions of consent require issues to be dealt with in management plans, the information and any associated reporting is available in a separate location.

Finally we recommend that the contact details for the Compliance team (p20) should be bold or more prominently displayed in the guideline.

Guideline 3 – Scoping an Environmental Impact Statement (EIS)

Scoping key impacts

In December 2016, EDO NSW made a brief submission following a stakeholder workshop on the Department's draft 'scoping key impacts flowchart' and 'scoping worksheet' for project proposals.

Our 2016 submission noted the need for a clear and transparent process for identifying what issues are important to local communities, and making information reliable, accessible, understandable and comprehensive. For example:

It can be difficult for the community to meaningfully engage in a process if they are not given sufficient information on the matter at hand. A risk that arises from the proposed Scoping Key Impacts Flow Chart is that insufficient information will be available for third parties to understand how a proponent formed their view on likely impacts. ...

Reviewing the 2017 exhibition-draft Scoping Guideline, we **support** the proposal to include both the worksheet and the scoping report as part of the formal assessment documentation, and these being accessible to the public when they review the EIS. We also **support** including 'meeting minutes' (assumed to be the scoping meeting).

Clear terms and definitions

We also noted in 2016 that key terms needed clear meanings and objective standards, such as: rating impacts as 'important', of an 'acceptable level', 'likely' or 'unlikely', and 'key' impacts as distinct from 'other' impacts.

We **recommend** such terms be reviewed to ensure they are well-defined. For example, the meaning of 'likely' should be clarified in both the detailed guidance (p 19) and summaries – to assist proponents, agency staff and the community having a shared understanding. The Guidelines should draw on relevant case law on such terms.⁶

⁶ In *Friends of Tumblebee* (2016), Pepper J of the NSW Land and Environment Court usefully explains that 'likely', in the context of significant effects on threatened species, means 'a real chance or possibility'. Contrary to some consultants' understanding, it does not mean 'more probable than not'. The judgment also notes that 'significant' [effect/affect] means 'important', 'notable', 'weighty' or 'more than ordinary'. See *Friends of Tumblebee Incorporated v ATB Morton Pty Limited (No 2)* [2016] NSWLEC 16 at 79-80.

Clarity and objectivity is important for terms like 'key', 'important' or 'acceptable' impacts and 'duration'; because different agencies and community members may have a different view to proponents (and to each other) about what is acceptable or important – yet detailed EIA is generally conducted by the proponent or their agents.

Impacts in the scoping worksheet

In our 2016 submission we proposed a further list of matters that might be impacted by a project for inclusion in the draft Scoping Worksheet. We again **recommend** these matters (emphasis added) be included in the worksheet in Guideline 3, p 25:

- **Aboriginal Cultural Heritage** as a specific item and the definition should reflect the need to consider landscape and social impacts as well as impacts on individual items.
- A broader suite of **economic impacts** which reflect, as a minimum, those issues captured by the draft Guidelines for the economic assessment of mining and coal seam gas proposals.
- An expansion of the Biodiversity category to include **connectivity and ecosystem functionality**.
- An expansion of the Land category to include consideration of the **likelihood of land being rehabilitated** to its current state, post activity.
- An expansion of the Water category to include **groundwater and groundwater/surface water interactions**.
- An expansion of the Risks category to include the **ability to rehabilitate** the site and prevent post-activity **legacy impacts**.
- **Cumulative impact** as a separate category for consideration. This should include cumulative impacts of the specific proposal as well as impacts arising from other existing and/or approved projects.

Further, in relation to the 'RISKS' category, we are very concerned at the absence of *climate change*, and *potential for land use conflict*, as important risks to consider for major projects by default. We **recommend** these be added as specific listed matters.

It is difficult to think of a major project that would not need to consider climate change from an emissions mitigation or adaptation perspective (from transport infrastructure to hospitals to sewerage systems). Many projects will need to consider both.

On adaptation, the Productivity Commission (2012) notes the following principles:⁷

In order to effectively take into account climate change risks, planning systems should:

- *facilitate a risk management approach [i.e. '...policies and decisions that are robust across a range of climate outcomes and are responsive to new information.']*
- *incorporate transparent and rigorous community consultation processes and take into account the community's acceptable levels of risk for different types of land use*
- *consider the full costs and benefits of land use from a community-wide perspective.*

At a minimum we **recommend** the EIA Guidelines adopt this approach to climate risks. Impacts of climate change and impacts of a project's greenhouse gas emissions should both be listed as specific matters in the scoping worksheet.⁸

⁷ Productivity Commission, *Barriers to Effective Climate Change Adaptation* (2012), pp 16-17; rec. 9.1.

⁸ For example, under Air and Risks respectively. Also, column 2 – '...will the proposal impact on the matter' – should include 'or vice versa', to account for a project's exposure to natural disasters, human emergencies and other climate risks.

Scoping report

We **recommend** that Baseline Information (Guideline 3 p 27) should include key 'environmental pressures' such as pollution, traffic or habitat loss. Baseline information descriptions should help to clarify cumulative impacts by identifying major industrial or urban operations (location dependent; including past, present or foreseeable future operations) that contribute to key environmental pressures.

Characterisation of impact and level of assessment (Guideline 3, 4.2 and Appendix A)

We make five comments here.

First, EDO NSW has noted concerns about certain matters not being fully addressed in the EIS where a proponent assigns them either 'no impacts' or 'other impacts'. Guideline 3 notes that where agencies disagree with the proponent, SEARs will be added. But beyond an unlikely prosecution for false or misleading information, it does not make clear any penalty or disincentive if agencies are required to correct the proponent's finding. We **recommend** this be further considered.

Second, part 4.2 should specifically require *evidence* for a finding of 'no'/'other' impact – not just *reasons* or *justification*.

Third, we welcome the inclusion of cumulative impacts as step for identification and a potential area for detailed assessment (pp 8-9). We **recommend** further explaining the concept and practice of identifying and assessing cumulative impacts upfront, instead of leaving it to the Appendices (pp 22-23, 28). Further, identifying cumulative impacts at the scoping phase should not be limited to 'other recently completed projects... or reasonably foreseeable future development...'. The rationale for excluding long-standing and legacy impacts at the scoping stage is unclear (p 23). The community would expect a proponent to be aware of existing cumulative effects.

We **recommend** 'legacy' impacts and long-standing operations be identified upfront. This is consistent with the need to identify Baseline Information in the scoping report (pp 27-28), where we have recommended identifying key environmental pressures.

Fourth, the meaning of 'material effect' is not clear upfront (p 8). Material effect should refer to environmental assets or qualities, and whether there is a potential or a risk that these are lost or diminished. The term is addressed in an ambiguous way on p 19 (i.e. likely to require mitigation and/or technical assessment – which still sounds like a subjective opinion) and more satisfactorily on p. 20 (i.e. extent, duration, severity, sensitivity). We **recommend** these explanations be clarified, cross-referenced or merged; and that ESD principles be used as reference point. Of further concern is the proposal in Appendix A to require that two or more characteristics of an impact must be likely to have a material effect on a matter before it is considered relevant for further assessment. **Any** material effect should trigger the need for further assessment. The guidelines should make it very clear when the impact rating guide is applied (p22), and it should be clear that the proponent or assessor is not to consider the counter-effect of compensatory measures, such as biodiversity offsets, when determining the effect of a potential impact.

Finally, the proposed impact characterisation process would be more reliable if conducted by independent assessors rather than proponents and their consultants. Safeguards are needed to protect from conscious or unconscious bias.

Earlier and better engagement needs public input on draft assessment requirements (SEARs)

We **welcome** the Department seeking to engage the community in identifying the issues that matter to them. We strongly support this happening at the scoping phase, and **recommend** that this process be reflected in the planning regulations.

We agree the scoping stage needs to be more transparent and accessible to the community. To ensure early and better engagement, we **recommend**:

- Early public exhibition of project documents (e.g. Scoping Report) at the same time as other agencies are consulted to allow the community to inform SEARs. (We **support** this as one of the Project's most positive proposals.)
- Scoping reports on *all* major projects should be exhibited for early public comment (State Significant Development (**SSD**) and Infrastructure (**SSI**)). By contrast, as proposed, scoping reports would not be published for all major projects, but certain projects only, such as critical SSI projects, coal seam gas (**CSG**) projects, new mines and extensions (p 12). Exhibition should be the default. We also query how *CSG exploration* projects will be exhibited more transparently (currently these are classed as 'Part 5', not as major projects).⁹
- Clarifying the period for accepting public feedback, how the community will be notified and stepped through the EIS requirements and their input considered.
- Requiring the Secretary of the Department to consider any public submissions before the SEARs are finalised for the proponent to address in the EIS. (We also **support** a Statement of Reasons to accompany SEARs, as proposed).
- A process for agency staff (including but not only the Department of Planning) to hold early community discussions about the project and local concerns.
- A transparent process in the Guidelines for deciding which agencies are most relevant to be consulted on a major project proposal (or type) and why.
- All agencies should have well-qualified staff, and ongoing professional development on how their agency's area of expertise intersects with the planning system and outcomes that achieve ESD.
- Publishing minutes of scoping meetings between the Department and proponent on the public register to promote transparency and public trust.

The proposals for early engagement must be supported by a greater consideration of community concerns. Under these proposals it is open to the proponent or the Department to decide that community concerns do not trigger a need for further assessment. Such an approach will not address the current lack of trust in the EIA process. Further, it needs to be recognised that many community members will, for a variety of reasons, not be engaged in an early assessment process. The scoping phase and associated generation of SEARs must ensure that valid community concerns that are raised at a later stage are not excluded from the EIA process.

Climate Impact Statements, greenhouse gas emissions and 'net-zero' by 2050 target

Guideline 3 on EIA Scoping aims to address a lack of focus on the most important issues and the need for earlier and better engagement. Climate change and greenhouse gas emissions are arguably the most important contemporary issues that receive little scrutiny in the planning system and major project assessment process. We are concerned that climate

⁹ We have consistently expressed concerns that CSG and other exploration receives little upfront scrutiny, despite the fact that it often leads to production (which is when it becomes a 'major project'). Private resource exploration should not continue to be assessed via a process akin to small-scale public infrastructure under Part 5 of the Planning Act, as Part 5 does not provide sufficient oversight.

change could be downgraded to an ‘other matter’, particularly if: it is not prominent in the scoping worksheet and report; there is no central agency responsible for responding climate change; and/or a proponent would prefer not to deal with climate risks and greenhouse gas emissions in detail. As noted below, a mandatory *Climate Impact Statement* is a potential solution.

We strongly **recommend** the EIA scoping stage address climate change and greenhouse gas emissions as a mandatory consideration for major projects – both for mitigation (reducing emissions) and adaptation (preparing for unavoidable risks and impacts, i.e. resilience to environmental and human emergencies).

Our 2016 report, *Planning for Climate Change*, makes **14 recommendations** on how the planning system can better tackle greenhouse gas emissions.¹⁰ We **recommend** the EIA improvement project consider our 2016 report. In particular, the Guidelines should specify that all major projects must prepare a *Climate Impact Statement* – addressing mitigation, adaptation and consistency (or not) with emissions goals and targets. To ensure compliance and continuous improvement of emissions estimates, post-approval emissions should be monitored via a public register.

It is encouraging that the NSW Government has adopted a target of net-zero greenhouse gas emissions by 2050 since our 2016 report was published. Now is a good opportunity for the Government to adopt a ‘carbon budget’ approach towards net-zero, and specific emissions reduction mechanisms, via new climate legislation linked to the planning system. It is difficult to see how net-zero emissions can be achieved without clear links to planning.

Scoping and inter-agency coordination

The Scoping Guideline emphasises the role of inter-agency coordination. EDO NSW supports transparent upfront agency involvement in the public interest. However, from the community’s perspective, inter-agency engagement tends to be hidden behind closed doors.

We **strongly support** continuing the practice of publishing agency submissions on major project proposals. In addition, we **recommend** this should be supplemented by early interaction and briefings between the relevant agencies and the affected community. We also **recommend** the inter-agency decision-making process be made more transparent, including greater clarity on:

- How inter-agency disagreements are resolved; and
- What happens when the proponent does not fully address agency concerns about environmental or health impacts (i.e. how principal decision-makers are to respond).

Guideline 4 – Preparing an EIS

We **support** requirements for an updated central project description to ensure all elements of the project for which approval is sought remain current. There also needs to be accessible information showing how a project has changed over time (akin to ‘version control’ for the project description).

We agree it is ‘important summaries are accurate including highlighting any assumptions made and areas of uncertainty...’ (Guideline 4, p 14). To reflect the aims of building public

¹⁰ See EDO NSW, *Planning for Climate Change: How the NSW planning system can better tackle greenhouse gas emissions* (2016), at: http://www.edonsw.org.au/planning_for_climate_change.

trust and confidence, we **recommend** an independent verification process to ensure the project description and EIS Volume One accurately reflects the full EIS.

To increase transparency around project change and community understanding of the EIA process, we **recommend** that proponents be obliged to forecast, upfront in good faith, the potential for long-term project expansion after approval. This is particularly important for natural resource projects which may expand over decades.

For example, an initial approval may be sought to extract 20 per cent of an available resource. However, the company may well have plans to extract the remaining resource over the next 20 to 50 years (or sell the right to do so) subject to economic conditions. The community should be properly informed of this potential upfront. While this does not resolve all concerns about the practice of multiple modifications to expand projects over time, local people should be entitled to a minimum level of transparency and expectations.

We make the following comments on specific sections of the EIS:

- 3.5 Executive Summary – should be explicitly required to include an **accurate** summary of the impacts identified in the technical supporting material;
- 3.7.1.2 Detailed Description – should include an accurate summary of the key environmental, social and economic impacts of the project;
- 3.7.1.3 Plan, figures and images – important features should include key species and ecological communities within the project boundary and surrounding areas;
- 3.7.2 Maximum Parameters – there is a significant risk that a maximum parameters approach will allow proponents to ignore the avoid and minimise hierarchy by simply specifying the largest area possible as the maximum parameters of impact. While such an approach is useful for understanding maximum impacts it should only be applied in a situation where commitments to avoid and minimise have already been articulated, embedded into project design and committed to for the full life of the project.

Guideline 5 – Responding to Submissions (and Public Exhibition)

Guideline 5 aims to respond to issues of inconsistent quality, accessibility, project clarity, and uncertainty around major project EIA, approvals and modifications.

We **recommend** briefly explaining the public exhibition process in Guideline 1 (Overview).¹¹ This should include departmental expectations and tips for best practice (for example, drawing on guidance by the International Association for Public Participation, departmental research and other best practice). At present, section 3.5 of Guideline 1 refers to *Public Exhibition and Responding to Submissions* together (p. 12), but does not summarise the public exhibition process in any detail.

We also **recommend** including a visual timeline showing public engagement opportunities, proposed periods for exhibition and comment, and noting the sources of these opportunities (the Planning Act, regulation or policy). This could be in the style of the EIA stage icons.

Noting the Department's expectations with regard to the process for responding to submissions (Guideline 5 pp 4-7), we consider this stage has two distinct components: (1) collating, analysing and summarising submissions received, and (2) formulating a response.

¹¹ Or cross-referencing at a minimum, for example, see draft *Community Guide to EIA*, p 12.

We recommend:

- on component (1) – an independent and qualified person or organisation should be responsible for analysing and summarising community and stakeholder views to ensure a transparent, objective and well-informed decision-making process (funded at arms-length by the proponent); and
- on component (2) – the proponent should be responsible for thoroughly understanding all submissions and responding to them by way of project design, further studies, discussion and collaboration with the community.

Where significant changes are made to a project the Department should commit to exhibiting the PIR or amended DA and Submissions Report for comment. Currently the Department **may** exhibit changes. Similarly, a proponent must be required to respond to any submissions made during re-exhibition.

There is not sufficient public confidence to rely on proponents to objectively summarise submissions, due to their potential for a conflict of interest. A proponent's primary interest is having a project approved on its preferred terms, costs and timelines. This may conflict with the public interest in ensuring all comments and objections are fully considered, accurately recorded and fairly weighed up by the consent authority 'when deciding whether to approve or refuse a project' (Guideline 5, p 1).

Similarly the 'Key principles' for preparing a Submissions Report (at 4.1) do not refer to the need for impartiality or objectivity as to the scope and strength of submissions. At a minimum we **recommend** this section note that an independent arms-length reviewer should be engaged. The report should provide details as to whether this occurred.

In this context we also **recommend** Guideline 5 needs to address the following:¹²

- What if any safeguards are built in to prevent issues being raised but ignored, or downplayed, as a result of the proponent's potential conflict of interest?
- Some issues raised will be intractable without rejecting the project altogether (for example, an infrastructure project that would run through a significant Aboriginal cultural site; or a mining extension proposal that comes close to a village). In practice, how should calls for rejection be equitably addressed?
- How will the Department verify that community views are accurately represented?
- What is the Department's expectation as to how form letters or petitions should be treated? For example, considering these as one submission only may not be representative of the breadth of concern about broader impacts.
- How individual submitter's privacy is to be maintained when clustering responses for further consultation?

Finally, as proposed: 'The Submissions Report will describe additional environmental assessment and engagement undertaken, if any, to understand impacts arising from changes to the project.'¹³ We **recommend** the Guidelines clarify:

- Further EIA should in part be informed by the level of public concern about an issue (noting we **support** the guidance on 'Providing meaningful responses').
- Including a list of submitters is useful and appropriate, but is not in itself a sufficient indicator that the proponent has substantively considered issues raised.¹⁴

¹² For example, at part 4 'Preparing the Submissions Report'.

¹³ See for example Guideline 5, 'Further environmental impact assessment', p 9.

- All submissions should be given fair and equal consideration.
- The Submissions Report is published online when the Department receives it.
- There is a process for the community to raise concerns about Submissions Reports.¹⁵
- The Department will send back sub-standard Submissions Reports (whether they are published or not). Revised Submissions Reports will also be published.

We agree the Submissions Report should be of a high standard and give confidence that all issues have been properly considered (Guideline 5, p 12). We also **welcome** the examples of when the Department may request further information (5.2, p12) - although we **recommend** this also note that a poor Submissions Report may be rejected.

A similar standard of “being accountable to the community and other stakeholders” should apply to the Department’s Assessment Reports where the Department should justify with evidence how they reach their conclusions on issues where there are disagreements on likely impacts between stakeholders.

Our recommendation (above) that submissions summaries be independently compiled by qualified, arms-length experts should reduce the risk of poor Submissions Reports. This would also enable parties to focus on the quality of the proponent’s response to submissions; and consider whether the project should be approved or refused on its merits.

Guideline 6 – Community and Stakeholder Engagement

We **welcome** the Department’s efforts to give thorough guidance on improving community participation in major project EIA, including the engagement toolkit at Appendix B to Guideline 6. Our **recommendation** above for greater independence and arms-length support applies broadly to this Guideline; for example, reporting and evaluating participation against desired outcomes;¹⁶ and responding to submissions (section 5).

We query why Guideline 6 on *Community and Stakeholder Engagement* is one of the only draft guidelines that is proposed *not* be given legal effect. No clear explanation is given for this. We **recommend** giving legal effect to the Guidelines via the planning regulation.

As noted under Guideline 3, we strongly **support** the early exhibition of project documents (e.g. the Scoping Report) to inform SEARs. We **support** community input during EIA scoping via early public exhibition at the same time as agencies are consulted. We also **recommend** a process for agencies to discuss project proposals early with the community; and a transparent process for deciding which agencies are consulted and why. All agencies should have well-qualified staff and ongoing professional development. As noted, we **recommend** the Scoping Report for all major projects be published for early community input (see Guideline 6, p 15). We note that all such consultation should be meaningful, responsive and genuine. We note that Table 1 (p 6) on the value of early engagement –the points in the “Department” column potentially give the impression of presupposing recommending/giving approval – rather than an objective early scoping exercise. Community members invest significant amounts of volunteer time in responding to Government and proponent engagement processes. Engagement processes that do not respond to the

¹⁴ Particularly if the list includes names only rather than referring to issues raised. This could be clarified with regard to ‘Being accountable...’ in Guideline 5, at 4.7.2.

¹⁵ For example, Guideline 5 at 5.2: ‘Requests for further information’.

¹⁶ At 4.3-4.4. The closest and only example we note in draft Guideline 6 is that ‘Proponents may draw on the expertise of community engagement professionals to advise them...’ (at 4.2 CES Plans, p 18).

concerns raised and appear to have a pre-determined outcome, are likely to reduce rather than enhance trust in the EIA process and make future engagement less likely.

We **recommend** the Guidelines clarify how desirable ‘participation outcomes’ are determined. We agree this should include asking communities and stakeholders what they expect. We consider the outcomes in Table 4 describe appropriate generic processes (Guideline 6, pp 13-14). Beyond this however, desirable outcomes, expectations and evidence of success (see 4.4) may differ significantly between the proponent, the government and the community. Overall, desirable outcomes should centre on what is in the public interest (which may or may not result in project approval), and should reflect the community’s reasonable expectations of a fair, informed and responsive process.

When identifying interested community members and stakeholders, we **recommend** cross-referencing sections 3.1.1 and 3.3.1. We **support** prominent guidance that directs proponents to reach vulnerable groups and other important voices who may otherwise be disengaged or excluded from traditional consultation processes. This includes culturally and linguistically diverse groups and Aboriginal community members. Engagement should be tailored to the most convenient forms for those people.

We generally **support** the proposal that the Department will meet with the community during EIS exhibition, although this is limited to ‘on some projects’. The Department should gauge community interest in all major projects upfront, with the intent to arrange public meetings and be available on any major project if the community requests. Transparency is needed on meetings with the proponent and other private parties. Access to agency advice should be transparent and equitable.

As a means of building public trust and accountability in decision-making, we have consistently **recommended** that public hearings should not displace the limited right of objects to a merit appeal in Court. Section 6 of Guideline 6 (which refers to public hearings) should acknowledge that a current consequence of public hearings is the removal of those merit appeal rights.¹⁷

EDO NSW **supports** clear standard conditions requiring all post-approval documents, including management plans and monitoring data, to be made publicly available online. Public access must be required without delay.

We **recommend** participation during post-approval should include clear methods for complaints, dispute resolution, recording and public reporting of these and related outcomes (Guideline 6, section 7).

Guideline 7 – Approach to Setting Conditions

We generally support the key principles outlined for condition-setting (at 3.1).

EDO NSW has provided detailed feedback to the Department and to the federal government about the need for clear and enforceable conditions based on the best available science, up-to-date environmental standards and other robust evidence.¹⁸

¹⁷ This could be clarified by legislative amendment. For further information on the value of merits review see: EDO NSW Discussion Paper, June 2016, available at: http://www.edonsw.org.au/merits_review_in_planning_in_nsw.

¹⁸ See for example our past submissions on Commonwealth outcomes-based conditions, *EDOs of Australia submission on Draft Outcomes-based Conditions Policy*, October 2015 - [Download PDF](#), Available here: http://www.edonsw.org.au/planning_development_heritage_policy. Others by request.

We support a suitable mix of process and outcome conditions, and recognise no condition type is perfect. While we agree that achieving positive environmental outcomes is vital, we have noted a range of reservations about the process of setting 'performance-based conditions'. In particular, we are concerned at the potential for performance-based conditions to effectively enable proponents to draft their own conditions based on their own preferred outcomes (which may or may not coincide with the public interest in good conditions). We **recommend** the Department to consider how this can be prevented, and consult other agencies such as the NSW Ombudsman on minimising such risks. We are also concerned by the suggestion (p 9) that performance-based conditions could be used in situations where there is "*residual uncertainty about a proponent's ability to achieve the performance criteria*". The implication of this approach is that a project is assessed on the basis that a certain environmental impact can be achieved in a situation where it is not known that this standard can be achieved. If a project cannot demonstrate that it can meet required performance criteria then this information should inform consideration of whether to approve the project at all. Finally, performance based measures must capture the entire life of the project (construction, operation and decommissioning) and not merely rely on achieving a particular outcome at the end of the project.

Regarding administrative conditions (p24), we note 3.2.1 that the project Description does not include any detail on limiting the scale of the impacts. It will be important that where the Project Description is used as the basis of an administrative condition, the Project Description provides a comprehensive description of any measures undertaken to avoid or minimise environmental impact for matters that are not covered by specific performance-based or prescriptive conditions. We **recommend** that the Guideline clarify this.

We **recommend** that Guideline 7 set expectations that decisions and conditions will be informed by 'best available science' and 'continuous improvement' of environmental performance over time. To encourage leading practice, incentives should be directed toward projects where the data, consultation, etc. is of the highest quality. There should be nothing to gain from the proponent providing less information or less rigorous upfront assessment.

We **recommend** Guidelines 1, 2 and 7 further explain how the consent authority reaches its decision on a project (determination), including with regard to s. 79C.¹⁹ This is a critical stage for community understanding as to how a proposal is ultimately approved or refused and what information and criteria are relevant. The explanation would be assisted by separate guidelines on integrating ESD principles in decisions. For example, the Guidelines should explain how condition-setting will deal with uncertainty (including how and when the precautionary principle should apply in response to uncertain but serious or irreversible environmental or health impacts.)

We **recommend** the enforcement section (Guideline 7 2.3) refer to civil enforcement. Guideline 2 should include brief practical guidance on reporting potential breaches.

We **support** a renewed emphasis on clear conditions to monitor and report on compliance (as well as monitoring under specific environmental conditions). This could be assisted by a transparent register akin to the EPA public register. Importantly, all conditions must be enforceable and where community concerns are raised, the onus of proof for compliance, should be with the proponent. It should not be left to the community to prove beyond reasonable doubt that a breach of conditions has occurred.

¹⁹ *Environmental Planning and Assessment Act 1979* (NSW) (Planning Act), section 79C - Evaluation. There is little guidance on the *Determination* stage in draft Guideline 1 – Overview (section 3.7).

Finally, the Guidelines could clarify the role of ‘non-discretionary development standards’,²⁰ and how assessment and condition-setting take account of these. The Department should ensure that such ‘non-discretionary standards’ improve in line with best available science and technology. When such standards were passed under the Mining SEPP in 2013, EDO NSW expressed concern at the settings in the standards; but also at the fact that projects could not be refused if standards were met, yet discretion remained to approve projects even if the standards were *not* met.

Guideline 8 – Modifying an Approved Project

The draft Guideline on modifications identifies the three main types under the Planning Act – administrative (type 1), ‘minimal environmental impact’ (type 2) and other modifications (type 3/major). We welcome the reference to Land and Environment Court cases and considerations in identifying what is and is not a modification; and in interpreting which type may apply (such as the meaning of ‘minimal environmental impact’, at p 9). However, the proposal to link the use of maximum extent for certain elements of the project, as discussed in Guideline 3, to attempts to minimise the need to seek Modification Applications enhances concerns that proponents will seek to ignore the avoid and minimise hierarchy by specifying the largest area possible as the maximum parameters of impact.

The draft guidance on ‘type 3’ major modifications appears to focus on changes that occur early in project design and/or construction: ‘for example if there is an unforeseen discovery during construction or new technology becomes available’ (Guideline 8, p 2; p 11). In our experience, major modifications that are of particular interest to the community are those that seek to expand the scope and scale of the development, either in the short-term (for example, Barangaroo in Sydney) or that may occur 10-20 years after the initial approval, construction and operation (for example, the Wambo coal mine has been modified 17 times). The lack of guidance in relation to the comparative task involved in considering the environmental impacts of proposed Modification Applications is extremely concerning.

Guideline 8 must recognise that continual modification of major projects, now and in the future, is a real source of community uncertainty and concern. We **recommend** the Guideline provide guidance on both near-term and long-term modifications. As noted above, we also **recommend** a more transparent, upfront disclosure process – by requiring proponents to forecast potential modifications that may emerge during a project’s life – even if these are dependent on future economic factors.

The community and decision-makers should be entitled to upfront information and context about the long-term project lifecycle (for example, whether a mine may seek to operate at five-times the size of the initial proposal over the next 20 years; and may still be operating in 50 years). Early disclosure would also better enable planning for closure and rehabilitation of land.²¹

We note that the minimum regulatory timeframe of 14 days for consultation on major modifications is inadequate in some cases, particularly for complex, long-term operations. We **recommend** Guidelines 6 and 8 clarify that the Department will require longer exhibition timeframes for complex major modifications (Guideline 8, at 6.3). This is consistent with the project’s aims of public trust and proportionate assessment.

²⁰ See for example *Environmental Planning and Assessment Act 1979* (NSW) (**Planning Act**) s. 79C(2)-(3),

²¹ The NSW Audit Office recently recommended improvements to mine rehabilitation funding. See: NSW Audit Office, *Mining rehabilitation security deposits* (May 2017), at <https://www.audit.nsw.gov.au/publications/latest-reports/mining-rehabilitation-security-deposits>.

We also **recommend** rephrasing section 6.4 of the draft Guideline on how a decision is made. We are concerned that it implies the assessment of modifications is solely proponent-driven. We recognise that (unlike pollution licensing) the Planning Act does not include a general modification power at the Department's volition – and we have called for such a power as part of the proposed 2017 planning law reforms. However, when a proponent submits a modification application, we consider that the Department has an obligation to consider the likely impact of that modification in the context of existing impacts and operations.

In rephrasing section 6.4, the Guidelines should encourage community members to raise matters relating to the impacts of the existing operations, or concerns about compliance, that could have a bearing on the proposed project expansion. This may include imposing more stringent approval conditions to minimise those impacts more effectively. This is consistent with the intention to improve cumulative impact assessment, promote continuous improvement, and encourage compliance.

Finally with regard to the principles on documentation to support Modification Applications, we **recommend** these require cumulative impacts to be identified and integrated (including those from the existing project and other pressures external to the project). Similarly, cumulative impacts should be noted at the evaluation stage, particularly in relation to major modifications (see 7.1.2 and 7.5).

Compliance and enforcement post-approval

We note that the Post-Approval stage is not just about modification, but also compliance and enforcement. We **recommend** Guideline 1 (Overview) briefly summarises or refers to relevant regulators' roles (Department of Planning and Environment; Division of Resources and Geoscience; the EPA and OEHL) and enforcement options available. This would be strengthened by examples and guidance on how the community can request information, report concerns, submit evidence of a suspected breach, or take civil enforcement action using that evidence.

Guideline 9 – Peer Review

We strongly **support** proposals for peer review of documents that form part of an EIS. Higher public confidence and trust in planning and development decisions requires a combination of:

- peer reviewed assessment;
- independent, objective and professional EIA (via codes of conduct and ethics, professional accreditation of consultants and agency assessors, and arms-length assessment);
- science-based assessment and high-quality data; and
- a demonstrated willingness of the Department to reject major project proposals that are poorly planned, provide inadequate information, or will have unacceptable adverse impacts.

We are concerned that the Department proposes to define 'peer review' as including a consultant directly paid and appointed by the proponent (Guideline 9, p. 1). We also query the purpose of the draft peer review report as being to 'agree the findings and recommendations of the review'. (p 4) The peer reviewers findings and recommendations should by definition be independent of the proponent, their principal consultant, and the proponent's response. While a proponent may wish to engage in internal peer review processes, this does not replace the need for independent, third-party peer review.

In order to achieve the aim of building public trust and confidence, we **recommend**:

- Clarifying that there is a distinction between an informal peer review initiated by the proponent for their own assurance purposes, and the level of independence required for a formal peer review to fulfil a requirement in the project SEARs or other directions of a government agency; and
- Defining peer review to exclude direct appointment of a consultant by the proponent. Those who undertake reviews must be appointed at arms-length, even if the process is (indirectly) funded by the proponent. This could be done on a cost-recovery basis.
- Further detail in the Guidelines on managing declarations of interest and preventing conflicts of interest, including via codes of conduct. This would be well-supported by a process for arms-length appointment of peer reviewers.
- Content of peer reviews should ensure ‘all significant matters’ have been identified; that the evidence is ‘complete and up-to-date’; that the original report deals appropriately with uncertainty and precautionary approaches; and is a realistic and unbiased assessment of the likely impacts and outcomes.
- The Department should consult the NSW Auditor-General and/or the NSW Ombudsman on Guideline 9, including the application of peer review, proposed criteria for suitable peer reviewers, review practice, content and reporting (Guideline 9, at 2.2-2.3).

The scope of any peer review should also be a fundamental consideration. Community experiences to date suggest that the terms of reference for peer reviews may limit the reviewers to certain aspects of a project rather than a full consideration of the work as presented. The criteria for peer reviews (section 2.3) should be further strengthened to require:

- 2.3.1 suitability of reviewers – in addition to being “independent from the proponent and the project and should not have previously contributed to the project or been consulted during the project’s development”, the reviewer should not have contributed to any other project by the same proponent.
- 2.3.2 review practice - at a minimum, any terms of reference used in peer review should be publicly available and those terms of reference should provide a reviewer with the ability to comment on any issues of concern they identify during their review. Any changes made to a draft report after discussion with the proponent should be clearly document in the final report.

Part 3 – Additional improvements in progress (next stage of EIA Improvement Project)

EDO NSW **welcomes** the Department's intention for this project to further develop professional codes of conduct, new best practice approaches to cumulative impact assessment; and strengthening powers on requests for further information and grounds for rejection.

Codes of Conduct for EIA consultants

EDO NSW has long supported developing codes of conduct (or applying existing professional codes) to improve the objectivity and independence of EIA. We have held discussions with professional standards bodies and have made specific recommendations in submissions on revised planning legislation in 2013 and 2017.²² ICAC has made similar recommendations in relation to government officers.²³ We would be happy to discuss these and other options further with the Department.

Cumulative impact assessment

Cumulative impact assessment is about making decisions that effectively take into account the incremental social, economic and environmental impacts and pressures from past, present and likely future development over time. Cumulative effects may seem acceptable individually, but when combined present a much bigger problem – such as for public health, amenity, biodiversity or greenhouse gas emissions. Cumulative impact assessment guidance should apply to both new projects and requests for modifications.

We **recommend** that future improvements to cumulative impact assessment should:

- be linked to regional plans, goals and solid baseline environmental data;
- recognise the significant cumulative effects of small and large projects; and
- address the lack of State environmental goals and environmental accounts (see Part 1).

First, development proposals should refer to regional plans and natural resource management goals, reflected at the local scale; and account for likely cumulative impacts that may be difficult to assess in line with the precautionary principle. Biodiversity and GHG emissions are two classic examples of cumulative impacts that are not dealt with well at present. Part 1 of this submission discusses ways to weave these strands together.

Second, cumulative impacts can often arise where 'thresholds of significance' exist (including in NSW and federal law²⁴). If triggered, these thresholds call for more detailed assessment. However, even when thresholds are exceeded, biodiversity impacts are usually authorised to proceed with some compensatory conditions. Accordingly, cumulative impacts occur from the many projects *under* the threshold (i.e. those with less stringent assessment

²² See for example, EDO NSW *Submission on Environmental Planning and Assessment Amendment Bill 2017*, March 2017 – [Download PDF](#); See also NSW Government, *A New Planning System For NSW - Green Paper*, p. 58: 'The NSW Government proposes that consultants that provide Environmental Impact Statements should be chosen from an accredited panel, and required to meet certain standards regarding the impartiality and quality of their work.'

²³ ICAC, *Anti-corruption safeguards in the NSW planning system* (2012), recommendation 5: 'That the NSW Government introduces a system of continuing professional development for government planning practitioners.'

²⁴ Such thresholds apply in both the NSW planning system (i.e. the 'significant effects' test and the new Biodiversity Offsets Scheme threshold), and under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act).

standards and therefore less 'visible' impact) as well as projects over the threshold. It is not the case that if an offsets policy is applied to a major project that there is no 'residual' impact. That optimistic view excludes significant risks of policy and project failure, time lag and discounting.

Third, one of the many benefits of good data collection and monitoring, environmental accounts systems and strategic environmental goals, is that they provide a frame of reference to compare and track cumulative impacts over time. This makes environmental costs and benefits visible in decisions, as ESD requires. These tools can make the concept of cumulative impacts much more tangible.

Further information and grounds for rejection

We also strongly support strengthening clauses 51 and 54 of the Environment Planning and Assessment Regulation 2000, regarding **requests for further information and grounds for rejection** (Guideline 1, p. 19)

The EIA Guidelines should note that some projects will have unacceptable impacts and, where possible, these should be identified early (including via community engagement). There is currently no clear guidance on the process to identify such unacceptable impacts. At the federal level, the *EPBC Act* (Cth) explicitly provides for early rejection of unacceptable impacts.²⁵

Both of these proposed additional improvements will foster public trust and also assist the Department of Planning and Environment, development proponents and communities to pursue and encourage ecologically sustainable development. While guidelines are a starting point we **recommend** that cumulative impact assessment and (non-exhaustive) grounds for refusal be addressed in legislation.

Conclusion

We thank the Department for its ongoing work in improving Environmental Impact Assessment for major projects and we hope these comments assist the Department. If you require further assistance or have any queries about this submission, please contact EDO NSW on (02) 9262 6989.

²⁵ Part 7 Div. 1A of the *EPBC Act 1999* (Cth).