



Environmental Defenders Office

27 November 2020

Attention: Director Infrastructure Policy and Assessment Practice
NSW Department of Planning, Industry and Environment
Locked Bag 5022
Parramatta NSW 2124

By online submission and email: SIA.project@planning.nsw.gov.au

Dear Director Infrastructure Policy and Assessment Practice,

Draft Social Impact Assessment Guideline for State significant projects

Thank you for the opportunity to comment on the draft *Social Impact Assessment Guideline State significant projects October 2020* (**draft SIA Guideline**) and the associated *Technical Supplement to support the Social Impact Assessment Guideline for State-significant projects October 2020* (**Technical Supplement**). Environmental Defenders Office (**EDO**) has engaged extensively in the Department of Planning, Industry and Environment's (**Department's**) processes to strengthen environmental impact assessment. Our previous submissions on this topic are available on request.

As a community legal centre we are not specialists in social impact assessment (**SIA**). We have therefore limited our comments to areas where the draft SIA Guideline and Technical Supplement interact with the broader planning and project assessment framework, including concerns that have been raised with us by individuals and community groups who have experienced the application of the current *Social Impact Assessment Guideline for State significant mining, petroleum production, and extractive industry developments (State significant resource projects)* (**current SIA Guideline**). We are aware that a number of technical specialists intend to make submissions on the draft SIA Guideline and Technical Supplement and encourage the Department to appropriately incorporate that feedback.

Scope of Draft SIA Guideline

A significant change between the current SIA Guideline and the draft SIA Guideline and Technical Supplement is that the updated guideline is intended to apply to all state significant projects, rather than just extractive industries. While EDO supports changes designed to strengthen SIA in a broader range of project assessments, broadening the audience for the draft SIA Guideline necessarily means that the draft SIA Guideline cannot be as targeted at the social impacts likely to be experienced by communities as a result of extractive industries. This has led to statements in the draft SIA Guideline such as "*This Guideline uses words such as 'should' or 'suggested', rather than prescriptive terms such as 'must' or 'will'. This allows for a nuanced approach and reflects the*

T +61 2 9262 6989 **F** +61 2 9264 2414
E info@edo.org.au **W** edo.org.au
Level 5, 263 Clarence St, Sydney NSW 2000
ABN: 72002 880 864

range of development types that the Guideline applies to." As a result, there are no strict requirements in the draft SIA Guideline and so the community has no certainty as to what they can expect from an application of the draft SIA Guideline.

Independent SIA Assessment

The draft SIA Guideline states that it is intended to give community confidence in the environmental assessment process and build social licence. There a number of reasons why the draft SIA Guideline will fail to achieve that objective.

A key issue is the fact that SIAs are done by proponents and applicants. This inherently creates a bias in the process. There is significant community concern about proponent-led engagement and whether this results in appropriate and objective consideration of community issues. This includes presentation of technical assessment information, but also relates to the assessment process where the proponent controls how community input, submissions and concerns (and responses to them) are expressed. Proponents should bear the costs of engagement, but they must not be able to compromise its objectivity. There must be safeguards in the system so that community members feel respected and can trust the process.

EDO has written extensively about the need for genuine independence in appointing consultants that are engaged to prepare assessment materials for development applications, and strongly recommends a system whereby the Department, rather than a proponent is responsible for independently allocating consultants to major projects. This is necessary to reduce the potential risk of proponent pressure on consultants to develop more favourable assessments and to reduce public perceptions of bias. Perceptions of bias are also obvious in the draft SIA Guideline with the language used focussed on project approval rather than genuine assessment that may lead to refusal of a project, including on social impact grounds.

The lack of a clear independent review process for SIAs conducted as part of assessments for state significant projects is also problematic. Unlike other areas of environmental assessment such as air or water pollution where the Department can seek specialist advice from specialist Government agencies or branches, the Department's review of SIAs will only be informed by an independent review if a project is one of a small number that can be referred to the single internal staff member responsible for SIA, or if an external peer review is conducted. To date, there has been little evidence of meaningful peer review of SIA's by Government prior to the consultation on and determinations of project applications. This places the burden of assessing the adequacy of a SIA on communities. Independent consultants engaged by communities have regularly identified significant flaws in SIAs provided to support applications for state significant projects. There must be a clear process for assessing the independence and adequacy of SIAs submitted as part of assessment of state significant projects.

Community members regularly raise concerns with EDO that mitigation strategies proposed during state significant project assessment processes are not tangible, deliverable by the proponent, durably effective, or directly related to the respective impact - requirements which are acknowledged by the Department to be important for effective mitigation of social impacts. There is no evidence that the Department plays a role in ensuring that these requirements are achieved

and, in the absence of independent assessment or meaningful peer review, there is nothing in the draft SIA Guideline that is likely to change this situation.

Free, Prior, and Informed Consent

EDO welcomes the statement in the draft SIA Guideline that “*Engagement with Aboriginal people for SIA should recognise and respect their rights and be culturally appropriate. In practice, this means... ensuring free, prior, and informed consent*”. However, neither the draft SIA Guideline or the Technical Supplement provide information on the standards to be met in terms of obtaining free, prior and informed consent (**FPIC**) or any implications of failing to do so. States are required to obtain Indigenous peoples’ FPIC when the preservation of cultural resources, especially those associated with their way of life and cultural expression are at risk.¹ In these circumstances, FPIC requires affirmative consent (i.e. is a right to veto). The basis for this right to veto is derived from the right to culture and the prohibition on State’s destroying Indigenous culture that risks indigenous cultural survival. In other words, FPIC is not an aspiration or a process, but a right in itself. The draft SIA Guideline needs to ensure that references to FPIC are not tokenistic and meaningless but instead provide for full implementation of our international obligations to provide FPIC.

Social Impact Management Plans

The draft SIA Guideline and Technical Supplement have a strong focus on Social Impact Management Plans (**SIMPs**) as a means of mitigating negative social impacts. While the draft SIA Guideline suggests that a draft SIMP may be developed as part of the assessment of a state significant project, this is not mandated. A condition of consent requiring the development of a SIMP after approval can provide no certainty to the community of what mitigation and management measures can be expected from a project. A SIMP finalised after the fact, generally to the satisfaction of the Secretary of the Department, provides no recourse for affected community members if the approved SIMP fails to deliver adequate mitigation and management outcomes. Unless a condition of consent requires specific social impact mitigation measures, rather than simply the development of a management plan, there are no enforcement options available for a community if a proponent’s promises in relation to social impact mitigation are not met.

Additional Issues for Consideration

There are a number of key issues that are missing from or inadequately addressed in the draft SIA Guideline. The first is climate change. There is no mention of climate change in the draft SIA Guideline or Technical Supplement, despite state significant projects being both a significant potential source of greenhouse gas emissions, and impacting on the community’s ability to adapt to climate change. It is clear from modelling conducted by CSIRO and the Bureau of Meteorology²

¹ For more information on this see: EDO NT, *Submission to the Northern Territory Department of Environment and Natural Resources on draft Environment Protection Bill and draft Environment Protection Regulations* (2018), Attachment B: Australia’s obligations under International Law to Consult with, and to Ensure the Free, Prior and Informed Consent of, Indigenous Communities, https://denr.nt.gov.au/__data/assets/pdf_file/0004/669739/21-submission.pdf.

² <https://www.climatechangeinaustralia.gov.au/en/>

that climate change will cause, and is already causing, impacts that will have substantial social implications. The potential to exacerbate these impacts or affect people's ability to adapt should form an important consideration in SIA for state significant projects. Climate change impacts are particularly relevant to the consideration of intergenerational and distributive equity – both issues which are insufficiently considered in the draft SIA Guideline.

Equally, while 'health and wellbeing' is one of the categories of impacts considered in the draft SIA Guideline, the proposed requirements fall well short of best practice in health impact assessment. For example, Figure 7 of the draft SIA Guideline refers to air quality as a specialist study that may be conducted and that "concern" about air quality should be considered as part of the SIA. This approach in no way considers the public health implications of a project and references to cumulative impacts on health in the Technical Supplement are inadequate.

Technical Supplement

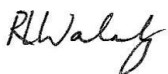
We provide the following specific comments in relation to aspects of the Technical Supplement:

- "Table 3 Guide to determining levels of assessment for each social impact" assumes that the scoping exercise in Phase 1 of an assessment will be sufficiently robust to adequately identify social impacts. However, the draft SIA Guideline suggests that a Phase 1 SIA can be undertaken by the Proponent/proponent's study team. Taken together, the draft SIA Guideline and the Technical Supplement suggest that it is not necessary for a SIA specialist to investigate a project's social impacts prior to determining whether and what level of further assessment is required.
- We note that "Table 6 Defining magnitude levels for social impacts" has changed the categorisation of the most significant impacts in the current SIA Guideline from "catastrophic" to "transformational" in draft SIA Guideline. This change in language creates an inherent change in the context of the draft SIA Guideline, moving away from a clear focus on the importance of understanding and responding to negative community impacts to a more neutral consideration of impact. This risks undermining the focus of an environmental assessment of the need to understand and response to negative social impacts arising from a proposal.

If you would like to discuss this submission further, please contact the author on ph: 9262 6989 or email: rachel.walmsley@edo.org.au.

Yours sincerely,

Environmental Defenders Office



Rachel Walmsley

Head of Policy and Law Reform