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Mr John Young
Principal Council Officer
Standing Committee on State Development
Parliament House
Macquarie Street
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Dear Mr Young

Inquiry into the NSW Planning Framework – Questions on Notice

Thank you for the opportunity to present to the Standing Committee on State Development. As requested, I have attached the transcript with a number of minor amendments. The completed questionnaire will be returned separately.

Firstly I would like to clarify the discussion around consultation requirements in the planning approvals process, which is recorded on page 33 of the uncorrected transcript. In addition to the consultation undertaken during the project approval process, there are significant consultation requirements in the Subsidence Management Plan (SMP) process for underground coal mines. Proponents are required to advertise SMP applications in local and state newspapers; provide written notice to a range of community, government, Aboriginal and landowner stakeholders; and consult with these stakeholders to identify their views.

It is NSWMC's opinion that in many cases this consultation is unnecessary. Subsidence impacts, along with all environmental impacts, are now assessed in the project approval process. This process allows all stakeholders to comment on any aspect of the project, including subsidence issues. Subsidence assessment is discussed in further detail in NSWMC's answer to the third question on notice.

Responses to each of the three questions on notice are outlined below.

1. Section 75W of the Environmental Planning and Assessment Act

The Committee requested further information on the case before the Court of Appeal regarding section 75W of the *Environmental Planning and Assessment Act 1979* (EPA Act). The Committee also asked what case there is for remedial amendments to section 75W and what NSWMC believes these remedial amendments should be.

Section 75W provides for the modification of projects already approved under Part 3A of the EPA Act. It can also be used to modify certain projects approved under Part 4 of the EPA Act. In the context of mining, modifications include changes such as expansions to existing operations; extensions of mine life; changes to mine layout; the construction of new infrastructure; and the modification of approval conditions. Section 75W saves proponents having to obtain a new project approval for these types of modifications, which in the context of existing mining operations are routine and minor. It also provides the government with a greater level of flexibility as to the level of assessment and consultation required in accordance with the nature of the modification that is proposed.

In March 2008, Barrick Australia Ltd (Barrick) lodged an application under section 75W to modify its Part 4 development consent in order to expand operations at its Cowal Gold Mine. Mr Neville Williams brought proceedings in the Land and Environment Court seeking a declaration that the size of modifications proposed by Barrick did not fall within the scope of modifications permitted under section 75W. In *Williams v Minister for Planning* [2009] NSWLEC 5 the judge declared that Barrick's proposed modification amounted to a 'radical transformation' of the existing project and therefore did not fall

within the scope of section 75W. Barrick's section 75W application was declared invalid and the Minister was injuncted from determining the application.

The decision has created significant uncertainty as to what modifications are permitted under section 75W, particularly since Barrick's proposed modifications involved what the industry and regulators considered to be an incremental expansion of the mine. Without legislative amendments to clarify this issue, the decision will cause proponents and the government to take a conservative approach to modifications and deal with them as new Part 3A project applications. This will have the effect of:

- Prolonging the approval process for many project modifications
- Delaying employment generating projects
- Increasing the assessment costs for proponents and potentially deterring future investment
- Straining the resources of government agencies and the Planning Assessment Commission.

In addition, NSWMC believes the decision raises questions as to the validity of existing section 75W applications, some of which have been approved and are now operating under modified approvals.

While Barrick successfully appealed the decision in *Barrick Australia Ltd v Williams* [2009] NSWCA 275, the appeal was upheld on different grounds and did not address the central issue of the scope of modifications that are permitted under section 75W. This has left the door open for future litigation. It is essential that legislative amendments are introduced so that section 75W can effectively function as a mechanism that can be used to modify major projects with certainty. NSWMC is currently considering what amendments are necessary in light of the two judgements.

2. Southern Coalfield Panel and Wyong Panel – Recommendations to Improve Interaction Between the *Environmental Planning and Assessment Act 1979* (EPA Act) and the *Mining Act 1992*

The Committee requested further information on the recommendations that the Southern Coalfield Panel and Wyong Panel made regarding opportunities to improve the interaction between the EPA Act and the Mining Act. It should be noted that NSWMC's submission only referred to the Southern Coalfield Panel's recommendations on this issue and not the Wyong Panel's (page 9 of NSWMC's submission).

The recommendations that the Southern Coalfield Panel makes on this issue primarily relate to subsidence management processes for underground coal mining. Since 2004, subsidence management has been regulated through conditions on underground coal Mining Leases that require the preparation of Subsidence Management Plans (SMP). SMPs are used to predict the potential impacts of underground mining on natural and built features and identify appropriate management actions. Industry & Investment NSW (formerly the Department of Primary Industries) administers the process, which includes public consultation requirements and input from key government agencies through the SMP Inter-Agency Committee.

At the time the SMP process was introduced, the number of mines operating without a modern approval (Part 4 development consent or Part 3A approval) was relatively high. These mines had not had subsidence impacts assessed under the EPA Act planning approval process. For these mines in particular the SMP process improved the rigour of subsidence assessment and management and led to improved environmental outcomes.

However, the SMP process led to significant duplication in the assessment and approval of subsidence related issues for mines with modern consents. Most mines with modern consents have had potential subsidence impacts assessed under the EPA Act and have an approved 'envelope' of acceptable environmental impacts. Repeating this assessment and approval in the SMP process led to unnecessary delays, costs and complexity for proponents.

The number of mines without modern consents has now reduced significantly and amendments introduced with Part 3A in 2005 require all mines to have modern consents by December 2010. As the Southern Coalfield Panel states in its report, *"the expansive environmental impact assessment role that the SMP application process has taken to date, in the absence of either current development consent or Part 3A approval for many mines, is no longer required"*.

The Southern Coalfield Panel recommended that the assessment and approval process under the EPA Act should be the primary subsidence management mechanism, with the SMP restricted to a management document. Recommendation seven in the Panel's report relevantly states:

> *"7) Part 3A of the Environmental Planning and Assessment Act 1979 should be the primary approvals process used to set the envelope of acceptable subsidence impacts for underground coal mining projects. This envelope of acceptability should be expressed in clear conditions of approval which establish measurable performance standards against which environmental outcomes can be quantified. Once a project has approval under Part 3A, the Subsidence Management Plan approval should be restricted to detailed management which ensures that the risk of impacts remains within the envelope assessed and approved under Part 3A. In cases where a mining project approval under Part 3A of the EP&A Act does not yet exist, the SMP process should take a greater role in assessing and determining the acceptability of impacts."* (page 123)

The Department of Planning and Industry & Investment NSW have been assessing how this recommendation can be implemented in practice. A new approach has been applied for the first time in a recent underground coal mining project approval. While the framework appears to be promising, it has not yet been applied in practice. It is essential that guidance material is developed as a priority to provide proponents, government agencies and the community with clarity as to the new approach being taken, including the roles and responsibilities of all stakeholders in the process.

3. Comparison between NSW and Queensland Planning Systems

The Committee requested further information on the differences between the New South Wales and Queensland approval processes. The Committee was interested in benchmark timelines experienced in each of the two systems and any points of difference that lead to inefficiencies in New South Wales.

NSWMC has looked into Queensland's approvals framework in further detail and has sought some more specific feedback from industry representatives who have experience working in both jurisdictions. The main issues that have been identified include:

- **A 'One Stop Shop' for Environmental Approvals**

  The Queensland Department of Environment and Resource Management (DERM) administers the Environment Impact Statement (EIS) process, issues a single environmental authority and regulates the industry post approval. This one stop shop approach simplifies negotiations between the proponent and the government, avoids secondary approvals and ensures a single set of environmental operating conditions.

  In New South Wales, there are a range of secondary environmental approvals required. DoP administers the approvals process and grants the project approval; the Environmental Protection Authority branch of the Department of Environment, Climate Change and Water (DECCW) issues an Environmental Protection Licence; the Office of Water in DECCW regulates *Water Act 1912* approvals; and Industry & Investment NSW regulates mine rehabilitation. All agencies have a role in ongoing regulation of the industry. This fragmented approach increases the chance of duplication and inconsistency. It also leads to delays in the process.

- **Clear Policy and Guidance Material**

  Queensland has developed specific fact sheets, policies and guidelines for mining to support the legislative framework. This provides certainty to all stakeholders by making the system predictable and ensuring the legislation is applied consistently across different projects. Queensland's mining guidelines can be downloaded from http://www.epa.qld.gov.au/environmental_management/land/mining/guidelines.html

  In New South Wales there is a lack of guidelines that clearly explain the assessment and approvals process. The lack of guidance creates uncertainty around certain aspects of the process as well as the expectations, roles, responsibilities and rights of stakeholders. There is a need to develop guidance material that achieves the appropriate balance between predictability and flexibility in the way assessments are approached.

- **Statutory Timeframes**

  Queensland has statutory timeframes in place for most stages of the assessment process, which are clearly outlined in guidance material (refer to the attached flow chart from one of Queensland's guidelines). Feedback from the industry indicates that these timeframes are generally met. However, there are provisions which allow some timeframes to be extended and feedback indicates that these are also used.

  New South Wales has three statutory timeframes under Part 3A[1], and industry feedback indicates these are rarely met. In New South Wales there are examples of proponents even struggling to elicit a response from some agencies throughout different stages of the approvals process. Examples were given in NSWMC's submission to the Inquiry and NSWMC's members continue to identify additional examples.

  If the recent commitments to timeframes made by Minister Keneally[2] are met in practice, this would go some way to achieving faster approvals. Statutory timeframes could support this policy by ensuring certain aspects of the process do not 'stop the clock'. However, secondary approvals are not incorporated into these commitments and will therefore continue to delay the process for proponents unless changes are made to integrate these approvals into the Part 3A process.

- **Stakeholder Engagement**

  The Queensland DERM is actively engages the industry through forums such as quarterly stakeholder meetings. These forums allow dialogue between the industry and government which helps identify where processes can be improved.

NSWMC's members have also identified some weaknesses in Queensland, including:

- The number of formal steps in Queensland's process could be reduced to improve efficiency
- The process for determining Terms of Reference for the EIS (the equivalent to Environmental Assessment Requirements in New South Wales) was deemed to be lengthy and unnecessary when the outcome tended to be the use of DERM's generic Terms of Reference
- DERM's generic Terms of Reference are too long – at 44 pages, they do not allow proponents to target assessments towards specific areas of risk or community concern.

Both the positive and negative aspects of Queensland's approvals system can inform potential improvements in the assessment and approval process in this state.

In terms of the relative timeframes experienced in New South Wales and Queensland, it is difficult to make direct comparisons because of the differences between the two approval processes. Even within each state the timeframes for different projects can vary widely depending on a range of factors such as size, complexity, the adequacy of assessment documentation and the proponent's target date for construction. However, the general opinion in the industry is that there are too many open ended and unclear elements in New South Wales, which creates a lot of uncertainty and can prolong assessment processes.

In addition to the more certain processes in Queensland, the Queensland Government has taken action to fast track planning approval processes for a range of mining projects in order to stimulate employment during the current economic downturn. The Queensland Government media release in relation to this issue is attached.

At this point in time, NSWMC has not had the opportunity to obtain specific examples of assessment processes from other states.

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[1] See timeframes in Clause 8C of the *Environmental Planning and Assessment Regulation 2000*

[2] DoP is to finalise 85% of major project assessments within three months, 95% within five months and no project assessment is to exceed eight months. Both the Planning Assessment Commission and the Minister are subject to a 14 day deadline to make decisions on projects once an assessment report has been received from DoP.

I trust that this information adequately addresses the questions asked by the Committee. Again, I thank you for the opportunity to present at the Inquiry's hearings. NSWMC is happy to provide any further information that the Committee requires.

Yours sincerely

Sue-Ern Tan
GENERAL MANAGER POLICY AND STRATEGY

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