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The Hon Tim Moore
Co-Chair
Planning System Review
By email: review@planningreview.nsw.gov.au

12 November 2011

Dear Sir

Input to Community Meeting 9 November 2011: Warringah

1. We apologise for being unable to attend the Community Meeting held in Warringah on 9 November 2011, and hope that feedback received during the consultation period may be considered as input to the Issues Paper.
2. There are two planning issues we wish to raise, first, consultation with Aboriginal People who are knowledgeholders or custodians of the land to which the proposed development relates, and second, protection of sustainable design, and in particular solar easements to solar energy devices.

NSW Planning system should recognize and protect Human Rights

3. As you are well aware, the alienation of Aboriginal Peoples from their land has resulted in considerable social and economic consequences for Aboriginal People.
4. However alienation of property rights does not remove the cultural and spiritual relationship Aboriginal People have with their country, including their cultural obligation to look after their Country. When proposed developments are being considered in NSW, there is no recognition of this relationship in the current planning framework. Aboriginal Peoples with a cultural and spiritual relationship to the land are considered as any other objector.
5. This is a global issue, and there are several international human right instruments directed to addressing this issue, namely DRIP¹ which collates and summarises existing human rights instruments (Annexure A), and the Convention on Biological Diversity.

¹ Full text at: <http://www.cbd.int/convention/text/>

6. The Convention on Biological Diversity² signed in Rio on 5 June 1992 has been ratified by Australia, and provides relevantly at Article 8(j):

“Each Contracting party shall as far as possible, and as appropriate:

.....

(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;.....”

7. The Conference of the Parties 7 made a decision (VII/16) adopting the Working Party on Article 8 (j) recommendations for greater involvement of indigenous peoples in all cultural, environmental and social assessments, at all stages of a development process including the scoping stage, known as the Akwe Kon principles³:

“8. As part of the above stages, the following steps may also be considered in carrying out an impact assessment for a development proposed to take place on, or which is likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities:

.....(d) Establishment of an agreed process for recording the views and concerns of the members of the indigenous or local community whose interests are likely to be impacted by a proposed development;

(e) Establishment of a process whereby local and indigenous communities may have the option to accept or oppose a proposed development that may impact on their community;

(f) Identification and provision of sufficient human, financial, technical and legal resources for effective indigenous and local community participation in all phases of impact assessment procedures;.....”

8. The existing legislative framework for planning in NSW has been limited in its recognition of these rights, An important principle of ESD is “*intergenerational equity*”. Aboriginal peoples’ (particularly future generations) rights to enjoy their spiritual, cultural and physical relationships with land are now recognised as an important component of intergenerational equity⁴.

² Full text at: <http://www.cbd.int/convention/text/>

³ Full text at: <http://www.cbd.int/doc/publications/akwe-brochure-en.pdf>

⁴ *Anderson v DG DECC* (2006) 144 LGERA 43;[2006] NSWLEC 12 at paragraph [199]

9. The NSW Government has previously recognized that the cultural heritage legislation is not the appropriate part of the legislative framework to recognize and protect Aboriginal Peoples' broader and unique role in respect to natural resources and planning issues. The NSW NRAC undertook a program to develop Aboriginal Natural Resource Agreements⁵ to better engage Aboriginal People in natural resource management decisions. This was adopted by the Director Generals of Natural Resource Management Agencies as a way in which these rights could be protected, but has been largely ignored in implementation.
10. Accordingly we hope that the Co- Chairs of the Planning System Review can adopt as a key issue the appropriate level of engagement of Aboriginal Peoples in the NSW Planning system to better reflect international human rights benchmarks.
11. Finally we note that some Local Aboriginal Land Councils own significant land holdings in some Councils, such as 10% land in Warringah is owned by MetroLALC, one of my clients. There should be scope in the Planning System for Councils to engage in a strategic discussion with significant landholders without that being viewed as 'special treatment' and being inappropriate.
12. Rather it should be encouraged as it has significant potential to provide recreational, environmental and social benefits to the ratepayers, as well as economic and social benefits to members of Land Councils as envisaged by the Aboriginal Land Rights Act 1983 (NSW).
13. We commend the joint approach of some NZ councils in specifically addressing these issues⁶ to enable the discussion to be at the level of the appropriate Aboriginal land unit, ie the Local Aboriginal Land Council area in NSW.

Protection of Sustainable Design

14. Many Council LEPs and DCPs do not consider solar access to passive or active sustainable design as an issue in its own right. Instead they treat it as solar access to a living space, an amenity, rather than a sustainability issue. See Lane Cove Council's recent treatment of the concerns of Antionette Farrow who invested \$50,000 in sustainable design, only to see her neighbor build up a story and completely undermine the utility of this design. This is not an isolated occurrence⁷.
15. We recommend the NSW Planning System should protect private investment in sustainable development, particularly solar access to solar generation by

⁵ http://www.boorooengcollege.nsw.edu.au/documents/resource%20kit_web.pdf

⁶ <http://www.hastingsdc.govt.nz/papakainga-development-guide>

⁷ <http://smh.domain.com.au/real-estate-news/the-darker-side-of-urban-development-20111105-1n0th.html>

legislation akin to that which has operated in California for many years. This legislation protects solar easements:

<http://codes.lp.findlaw.com/cacode/CIV/5/d2/2/2/3/s801.5>

16. In our view, it would require an amendment to section 179 of the Conveyancing Act 1919 (NSW), and would be complemented by a specific reference to the promotion of sustainable design in the objects of the Act, and relevant provisions regarding the objects of subsidiary planning instruments.
17. If you have any further queries, please contact Kathryn Ridge on 0438 899 774.

Yours sincerely

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Annexure A – relevant Articles of DRIP

“Article 3

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 11

Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

Article 12

Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.