THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: EP&D:JvdPlb250222

25 February 2022

Mr Matthew Riley
Director, Energy and Resources Policy
Department of Planning, Industry and Environment
Locked Bag 5022
PARRAMATTA NSW 2124

Dear Mr Riley,

Large-Scale Solar Energy Guidelines

The Law Society appreciates the opportunity to comment on the Draft Large-Scale Solar Energy Guideline. The Law Society's Environmental Planning and Development Committee contributed to this submission.

Our comments on the sections discussed below adopt the subheadings used in the draft Guideline.

Application of the guideline
Section 1.2 states:

> Although large-scale solar energy projects are the focus of this Guideline, applicants, Councils and planning panels that are responsible for local and regional solar development applications are encouraged to consider the site selection and impact assessment matters in the Guideline when assessing and determining local and regional solar development applications.

We suggest that it is unlikely that Council planners would consider the Guideline in assessing local and regional solar development applications, unless the Guideline is referenced in the Council's development control plan. We also note that the suggestion to consider the Guideline would be more helpful if it gave some guidance as to the weight that Councils should apply to the Guideline in assessments, other than for State Significant Development (SSD).

When is a solar energy project 'State significant development'?
Under the existing planning framework, a solar energy project is SSD if (among other things):

> it is not permissible without consent and has a:
> • capital investment value of more than $30 million
> • capital investment value of more than $10 million and is in an environmentally sensitive area[1] of State significance.[2]

[1] As defined in 4(1) of Part 1 of the *State Environmental Planning Policy (State and Regional Development) 2011*
[2] Schedule 1, Clause 20, *State Environmental Planning Policy (State and Regional Development) 2011*

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Although beyond the scope of the Guideline, in our view, it is not appropriate to site large-scale developments for the type of solar farming proposed on environmentally sensitive areas of State significance.

Community and stakeholder engagement
The statement on page 25 that 'Applicants are expected to engage' should be amended to make clear whether applicants 'must' or 'may' engage. 'Expected to' is ambiguous and its use risks uncertainty by applicants and in the community about what is required and what is optional.

Agricultural land use conflicts
Visual assessment requires the proponent to prepare a visual impact assessment as part of the Environmental Impact Statement (section 5.3.1). Figure 2 on page 32 demonstrates the visual assessment of impacts. Impacts that are greater than low impact should be avoided. Moderate or high impacts not only impact residential premises in rural areas but also impact agricultural activities, tourism activities and may impact cropping activities where aircraft are used.

The principles listed in 5.3.2 require that land categorised as being of high agricultural significance should be avoided. Unfortunately lands that are classified as being of either low soil or agricultural quality are usually environmental lands or lands set aside for nature conservation. This may lead to unfortunate consequences of further substantial land clearing in regional areas. While this approach is objectively designed to encourage sustainability, the assessment process needs to ensure that any development, particularly through land clearing, does not result in significant detriment to adjoining local areas.

Benefit Sharing and Agreements
Benefit Sharing Agreements are encouraged where identified land holders are significantly affected:

> Where impacts are more specific to identifiable landholders, and those impacts cannot be mitigated by other measures, it would be appropriate for an applicant and landholders to negotiate agreements regarding the management of impacts. It is up to applicants and landholders to agree on what is appropriate to manage impacts (including at different stages of the project's life) in their particular circumstances.[3]

Impacted landholders have only one recourse, and that is to enter into an agreement with the developer. While the applicant must pay the cost of the landholder obtaining independent legal advice, in many cases it may be that the applicant has significantly more resources than the landholder, akin to the situation some regional communities face in their interactions with mining projects. We suggest that sufficient resources are allocated to support engagement with, and other support services for, landowners needing to navigate this process.

Decommissioning
Decommissioning requires that the land be returned to its pre-existing use. This is often not possible, especially where the land was formerly classified as of environmental significance or as environmentally sensitive. We also note that where no bond is required, failure to decommission in accordance with conditions of consent leaves only enforcement options.

[3] NSW Government, Department of Planning, Industry and Environment, *Draft Large Scale Solar Energy Guideline*, 38.

At 5.3.3:

> The consent authority should impose conditions of consent to ensure that the above principles are met. Because the decommissioning and rehabilitation of solar farms is relatively straightforward, these conditions should be outcomes-based and not include post approval requirements such as management plans.

As stated above, it is not always possible to achieve outcome-based solutions, and in such circumstances plans of management are helpful, particularly if parts of the development come on and offline in differing cycles.

Other assessment issues (section 5.7)
There should be a requirement for detailed assessment of bushfire risks to be undertaken, both during construction and once the project is operative. Although this risk is noted under the heading "Hazards", a greater emphasis would serve to reflect the scale of risk represented by the operation of large solar farms.

Appendix B, 3 Content of Assessment
The list of requirements for a Level 1 assessment should include 'and any avoidance or mitigation measures proposed by the Applicant and/or neighbouring landholders' after the words 'on immediately adjacent land' in the second dot point. It is observed that objector appeals of solar projects are often resolved once the objecting neighbouring landholder has provided their proposed avoidance and mitigation measures. Opening a two-way discussion before a development application is even lodged has the potential for mutually acceptable resolutions without the need for court proceedings.

Appendix C
Negotiated agreements may fail to consider other industries in proximity to the project, including tourism and the equine industry.

We suggest removing the statement "remain in force for at least the duration of any predicted exceedance of the relevant assessment criteria" and insert, "remain in force until the project is fully decommissioned and can be modified if additional exceedances occur throughout the duration of the project."

It is often the case that after an initial approval is obtained, the applicant seeks modifications or extensions to the consent, which in turn lead to further exceedances. This should be a factor for consideration in any landholder agreement.

The Law Society appreciates the opportunity to participate in the reform process. If you have any questions about this submission, please contact Liza Booth, Principal Policy Lawyer, at liza.booth@lawsociety.com.au or on (02) 9926 0202.

Yours sincerely,

Joanne van der Plaat
President