

**MINING &
ENERGY**
RELATED COUNCILS NSW



Mr Peter Achterstraat AM
NSW Productivity Commissioner
NSW Treasury
52 Martin Place, Sydney
GPO Box 5469, Sydney NSW 2001

26 August 2020

Submitted to:



Dear Sir,

RE: SUBMISSION IN RESPONSE TO ISSUES PAPER ON INFRASTRUCTURE CONTRIBUTIONS SYSTEM (NSW PRODUCTIVITY COMMISSION, JULY 2020).

1. Introduction

The NSW Association of Mining & Energy Related Councils ('MERC') welcomes the opportunity to comment on the Issues Paper relating to the infrastructure contributions system prepared by the NSW Productivity Commission. Thank you for your understanding in permitting a delayed submission.

There are several points that MERC wishes to convey initially in this submission for your appreciation and consideration.

The first point is that there are a large number of councils in NSW that are defined as rural and/or regional and hence the infrastructure contributions system needs to be fit-for-purpose for **all** councils, not just those in the urban environs.

Secondly, Councils best understand the needs of their residents and ratepayers and are accountable to them for performance. Thus, Councils should be given more freedom to make budgetary decisions as cost shifting and rate pegging is hindering the ability of Councils to deliver what is best for their Local Government Areas (LGA's).

Thirdly, the Planning Agreement negotiating experience of our members is extremely positive, with the impact of major industrial development being negated, particularly in more recent years, by the availability of funding provided by Planning Agreements. It is essential that this mechanism remain available to rural and regional councils.

2. About MERC and its Members

MERC was founded in 1978 when several rural and regional councils recognised that Local Government Areas associated with coal developments would benefit from a co-ordinated approach when liaising with proponents and the NSW State Government. In 1993 the scope broadened to include metalliferous mines. In 1999 it expanded further to represent Local

Government on all extractive industries, including unconventional gas and in 2017 added renewable energy projects to its remit. Currently there are 21 rural and regional member councils of MERC.

A feature of the MERC membership is that it has extensive first-hand experience in the operational realities of the planning and infrastructure contributions system. To that end it has liaised closely with the DPIE and other NSW Government instrumentalities in influencing policy - in particular, making contributions on matters such as:

- Reform of the Planning Agreement process (in collaboration with the NSW Minerals Council);
- Improving the environmental impact assessment and determination process;
- Improving how the mining sector could better support businesses in regional economies;
- Improving the standard of mine rehabilitation;
- Planning for large scale solar projects;
- Reform of the Resources for Regions grant policy; and
- Being an active participant in DPIE's Resources Advisory Forum (now defunct).

3. Local Government: Section 7.4 Planning Agreements

3.1 General Comments

MERC is surprised by the rather critical analysis of Planning Agreements (PAs) as portrayed in the Issues Paper. One wonders as to the genesis of the criticism. Whilst some (developers perhaps?) might long for a simple, prescriptive, 'cookie-cutter' type mechanism, the fact that PAs are negotiated agreements is their very strength, for the reasons outlined below.

A key positive of PAs is that they represent an **agreement** between the developer and the council. It is definitely-not something foisted upon developers. If there is an impasse either party can always call on a third entity to help adjudicate, for instance DPIE.

Rural and regional councils in NSW have secured innumerable PAs with mining and energy companies. MERC is only aware of two cases where agreement was not reached. One involved the Cobbora Coal Project (where the State Government was the proponent and did not proceed) and the host council Warrumbungle Shire Council. The other involved Narrabri Shire Council (which was critical of the proponent's poor social licence to operate) and Whitehaven Coal in relation to the Vickery Coal Mine Extension Project, recently approved by the Independent Planning Commission.

Unlike in a major urban area such as Sydney where large developments are mainstream in the landscape, mining and energy projects in rural and regional areas often dominate or impose large upon a district or region, given:

- the size of the land area involved in the project;
- the often "vast" scale of the development; and
- the often "substantial" change from a rural landscape and society to an industrialised one.

Rural and regional councils see PAs as vitally important components of the infrastructure contributions system because they provide a win-win-win outcome, namely:

- a) A win for the council with commitments of financial contributions by the proponent;
- b) A win for local communities as a PA acknowledges there may be adverse environmental, social and economic costs from the development externalised to the local population which should be compensated; and
- c) A win for the proponent with the PA representing a strengthening of the company's social licence to operate.

To summarise, MERC strongly supports Planning Agreements being a key and essential element in the infrastructure contributions system well into the future.

3.2 Specific Comments

Below are comments in response to specific queries posed about PAs in the Issues Paper.

3.2 a) What is the role of planning agreements? Do they add value, or do they undermine confidence in the planning system?

In the rural and regional scene, a major development may have profound ramifications (both positive and negative) to the local environmental, social and economic landscape. The form and intent of a Planning Agreement lends itself appropriately to acknowledging these wide-ranging consequences, especially as the usual conditions of approval often gloss over or under state environmental and social impacts.

For almost all mining and renewable energy projects (e.g. wind and solar farms), rural and regional councils would initiate a PA. This is because PAs definitely add value and represent a vital element in the infrastructure contributions toolkit.

3.2 b) Are Planning Agreements too resource intensive to be worthwhile?

MERC considers the allocation of resources to secure PAs to be a very worthwhile investment because:

- i. In the context of the quantum of the financial contributions often secured, the time and resources invested by a council are relatively modest;
- ii. PAs acknowledge the externalised environmental, social and economic costs of the project and enable the redistribution of benefits;
- iii. PAs apply to direct and indirect, tangible and intangible impacts, including impacts on community social fabric;
- iv. PAs allow proponents to make a positive and lasting contribution to the social wellbeing of communities in which they operate. This contribution is in addition to the standard economic benefits of jobs. In return, companies are more likely to be seen as socially responsible, which brings reputational benefits; and
- v. The public exhibition phase of a draft PA enables the community to engage and hence have some ownership as to whether it thinks the balance between development and public benefit is achieved successfully.

It is worth also noting that it is not unusual for a rural council to partner with one or more other councils during PA negotiations to achieve a co-ordinated and balanced outcome that benefits not only the local area 'hosting' the development but a much wider region that might include larger towns/cities and broader accommodation capacity.

3.2 c) Is it correct that transparency and accountability for Planning Agreements are low?

Page 34 of the Issues Paper quotes "Planning agreements are often less transparent than other mechanisms because negotiations are confidential. Even after agreements have been struck, they are not always fully open to public scrutiny." MERC contends this assertion is not correct for the following reasons:

- i. PAs are public documents, negotiated in good faith by council executive management (that is, the government entity charged with statutory obligations to best represent local residents and ratepayers) and specialist service providers as required;
- ii. In addition, on occasions the Community Consultative Committee established for a particular major development and chaired by an independent party appointed by DPIE, also liaise with the council during the formative stages of negotiating a PA;
- iii. the draft of a PA is placed on public exhibition for a month - thus involving the community - and comments welcomed and then addressed;
- iv. A public committee of local ratepayers and council delegates usually decides on the allocation of the financial contributions to worthwhile projects; and
- v. A council must maintain a public register of PAs and report on the performance of same on an annual basis.

Perhaps the agenda behind the criticism of PAs is that it is for the very reasons articulated above that some in the development sector do not support PAs, namely there is too much transparency and things are not kept confidential.

3.2 d) Do Planning Agreements reflect a lack of strategic planning?

Proper strategic infrastructure and land use planning for the development of the mining and energy sectors in NSW is clearly the responsibility of the State Government. MERC would warmly welcome more proactive leadership by the State Government in this important element of planning.

If the State Government was more proactive in this regard (for example in the mineral extraction and renewable energy hubs) much of the ad hoc nature of development in these sectors could be avoided and local government could be better prepared to plan for and capitalise on such development.

As it is, the lack of strategic planning by the NSW Government for the renewable energy hubs has substantially constrained that industry and consequential economic activity due to the lack of power transmission capacity.

Thankfully, the PA mechanism has been available to at least provide some flexibility to local government regarding infrastructure contributions.

It should also be noted that a Council is required to prepare a Community Strategic Plan ('CSP') that describes the community's vision and aspirations for a period of ten or more years.

It documents a four-year delivery plan for the current council term with annual operational plans for delivery and a long-term financial plan. The CSP helps provide direction and confidence to a rural Council when it is negotiating a PA on a mining or energy project because it is already aware of the community's plan for the future.

MERC recommends that the Productivity Commissioner invite the State Government to give greater priority to strategic rural and regional planning, addressing both land use and infrastructure needs and co-ordinating and sequencing development.

3.2 e) Should Planning Agreements require a nexus with the development, as for other types of contributions?

DPIE has made it quite clear that whilst PAs provide for public benefits that are not wholly unrelated to a development, they are not required to bear the same nexus with development as required for section 7.11 local contributions. MERC strongly supports the continuation of this practice as many developments in rural areas impact on communities, but the nexus is difficult to quantify or define.

3.2 f) Should the Planning Agreements Practice Note Principles for Planning Agreements be binding on Councils?

MERC contends that the Practice Note does, in essence, bind councils because the proponents are well aware of the Government guidelines/standards and apply them during the negotiations.

In April 2020, DPIE released a draft revised planning agreements policy framework. The policy includes a draft Ministerial Direction requiring councils to 'have regard' to the practice note.

MERC questions the proposed use of a Ministerial Direction to impose statutory force to the Practice Note. The effect of the Ministerial Direction is to compel all councils to "have regard to" the Secretary's Practice Note. If adopted, this Direction effectively elevates the standing of the Practice Note from a guidance document to a mandated set of considerations and actions applicable to all councils. The use of the Ministerial Direction in this manner is heavy-handed and unnecessary; it is not supported by MERC.

3.2 g) Is 'value capture' an appropriate use of Planning Agreements?

For rural and regional councils dealing with mining and energy projects the 'value capture' aspect is generally not a consideration as matters such as building height or floorspace are not relevant. The mine is located at the site of the mineral resource, the solar farm is adjacent to the power grid and the wind farm is on the western slopes of the Great Dividing Range.

However, based on first principles, given that investment in public infrastructure increases land values and the benefits are largely captured by private property owners, 'value capture' mechanisms should be allowed to return a share of the value created by public investment to the taxpayer. MERC considers it is therefore appropriate and important for councils to have the option of including value capture in Planning Agreements.

3.2 h) Should Councils be required to maintain online planning agreement registers in a centralised system?

MERC considers rural and regional councils should not have to maintain online planning agreement registers in a centralised system because they must already maintain a public register of PAs and report on the performance of same on an annual basis.

4. Local Government - Local Infrastructure Contributions: s 7.11 Contributions

4.1 General Comments

Funding sources available to local Government include local infrastructure contributions, local government rates, direct user charges and State and Commonwealth grants.

Both rate pegging and cost-shifting are undermining the financial stability of local government and its capacity to deliver the services and infrastructure communities need and it is time the NSW and Federal Governments put an end to the practices.

Cost shifting is increasing at an accelerated rate and occurs when state and federal governments oblige councils to assume more and more responsibility for infrastructure, services and regulatory functions, without providing sufficient supporting funding.

In addition, NSW has also experienced the constraint of rate pegging for over 40 years, and local government has strongly opposed the policy since its inception.

Rate pegging carries a range of implications, some of which have unintended consequences and flow-on impacts for population growth. The Independent Local Government Review Panel's Final Report (2013) noted over the period 2001-02 to 2010-11, growth in total revenue of NSW councils was 5.7 per cent per annum. This compared to an average 8.0 per cent for the other mainland states. Rates revenue increased by 4.4 per cent per annum in New South Wales compared to an average of 8.0 per cent elsewhere.

MERC strongly opposes the maximum caps on s 7.11 local infrastructure contributions. The current thresholds were introduced in 2010 and no evidence or analysis was provided at the time to support the use of the mandated figures.

MERC believes Councils are best placed to understand their communities and to manage their needs. Thus, they should be empowered to conduct the planning for infrastructure within their local areas and to recoup contributions for the provision of infrastructure for the benefit of the community as they see fit.

Councils strive to deliver services and infrastructure to their communities within the strict constraints of IPART's rate peg, which was originally designed to help minimise the cost of living for our communities. However, rate pegging is unnecessary, produces undesirable consequences and should be abolished. It was pleasing to see that recently the Productivity Commissioner acknowledged that rate pegging hinders growth and the delivery of infrastructure and services in NSW communities.

The IPART review process for when a councils' plan predicts contribution rates above the thresholds set by the Minister, is typically long and complicated, potentially delaying the collection and expenditure of funds. It is welcome news that measures are afoot to make the review of contributions plans by IPART more efficient.

The recent DPIE discussion paper proposes to increase the thresholds that trigger the review process. MERC maintains that the thresholds need to be increased to a more realistic level before commencing any form of indexation. They have not been indexed for 10 years which means they have declined in real terms during this period. Also, it is questionable whether the CPI is the appropriate index, and whether the index should be one that more accurately reflects the changes in construction and land value costs.

MERC recommends that moving forward Councils should be empowered to conduct the planning for infrastructure within their local areas and to recoup contributions for the provision of infrastructure for the benefit of the community as they see fit.

It is also recommended that the 'essential works list' be reviewed and amended to include the capital costs of providing community facility buildings.

4.2 Adjusting the rating system to better accommodate industrialisation of the rural landscape

The development landscape has changed significantly across rural and regional NSW over the past 20 years and it is overdue for the rate categorisation to be updated to reflect not only areas of mining but also solar farms, wind farms, coal seam gas and shale gas developments.

MERC contends that all these different land-use types result in at least temporary industrialisation of the rural landscape that should be able to be classified accordingly. It would be prudent to levy rates that reflect their significant capital undertaking and generation of high value economic output.

Just as there is a mining rate, MERC suggests there ought to be, say, an 'energy development' rate.

The rating mechanism should however acknowledge the relatively short-term nature of these developments (maybe 50 years duration) and thus not be based on Ordinary Rating such that it limits a Council's ability to increase its overall ordinary rate pool of funding.

Rather, it is suggested that for rating purposes these developments be treated as designated external rate items or as annual levies paid to the council whilst the development is undertaken, but not part of the general rate category. A key objective is to protect the general income base of councils and to reduce fluctuations both positive and negative across the various categories.

In the case of mining, it is suggested the valuation be based on the resource available and the time period through which the resource diminishes as it is extracted. In the case of wind and solar farms, the valuation could be identified by the designated name plate generation capacity across the life of the project.

MERC recommends the legislation be amended to allow for development of these types to be outside the ordinary rate and be based around the increased costs associated with these developments on a community. To be clear MERC strongly opposes the allocation of the abovementioned developments within the standard 'Business' category.

5. Local Government- Local Infrastructure Contributions: s 7.12 Levies

Under section 7.12 of the EP&A Act Councils may charge contributions as a percentage of the estimated cost of the development. The maximum percentage that can be charged in most areas is 1%. The DPIE has released a series of proposed criteria which are intended to provide clarity where councils wish to apply a levy above the standard 1% maximum to 2% or 3%.

MERC considers the 1% contributions figure should be removed as it was introduced about 15 years ago with no justification or financial analysis. Instead, Councils are best placed to understand their communities and to manage their infrastructure needs and hence should be empowered to levy a higher baseline contribution amount if it deems it justifiable and sustainable.

6. Improving Transparency and Accountability

On the topic of transparency and accountability, it would be an improvement if decision-making by the State Government on such matters as Resources for Regions, etc was based on clear, quantitative criteria and benchmarking, with the avoidance of discretionary assessments.

Clearly such grants are taxpayers' dollars so Council applications should be assessed openly and transparently according to merit, unfettered by political influence (that is, in future can we please avoid repeats of the "Sports Rorts" affair and other comparable pork barrelling efforts prior to elections).

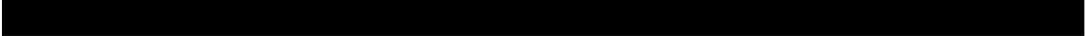
MERC supports the fair and equitable allocation of grant funding that provides value for money infrastructure and services to communities in need, regardless of political representation.

7. Conclusion

MERC appreciates the opportunity to provide feedback on the abovementioned matters.

Our organisation has extensive operational experience across all facets of mining and energy developments in rural and regional areas and would welcome the opportunity to discuss such matters in more detail.

In particular, our experience regarding Planning Agreements could well prove insightful to the Productivity Commission. We extend an invitation to the Productivity Commission to hold a Zoom call on the topic.

If you have any queries please don't hesitate to contact the Executive Officer of MERC 


Yours sincerely,



Association of Mining & Energy Related Councils (NSW) Inc.