



The Secretary,
Department of Planning and Environment
GPO Box 39
SYDNEY, NSW, 2000

3rd February 2017
PO Box 871
TAMWORTH,
NSW, 2340.

Dear Ms M^cNally,

Re: Feedback on Proposed Changes to VPA Policy framework - Draft Ministerial Direction, Draft Practice Note and Draft Planning Circular.

The Association of Mining Related Councils of NSW ('AMRC') appreciates the extension granted by your department and welcomes the opportunity to provide feedback to the Department of Planning & Environment ('DPE') regarding its proposed changes to the Voluntary Planning Agreement ('VPA') policy framework, as contained in the Draft Ministerial Direction, Draft Practice Note and Draft Planning Circular recently exhibited.

1. About the AMRC

The AMRC originated in 1978 when several 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. Currently there are 20 member Councils of the AMRC, most of whom are located in rural and regional areas of the State.

2. General Comments: AMRC Members and VPAs

As the sphere of government directly responsible for the daily governance of its Local Government Area, Councils provide the leadership necessary to deliver equitable services and facilities to their various communities, often across large distances and sparse populations as are found in rural areas. Thus Councils are sensitive to the direct and indirect impacts of major projects - both positive and negative - on the land in their LGA, their economic base and their communities. There are ramifications for hard and soft infrastructure and the wellbeing and social fabric of residents and ratepayers.

In addition to Local Government Act requirements, the EP&A Act also imposes obligations on Councils to be a key player in the decision-making on major projects. AMRC members are thus keen to deliver in accordance with these statutory responsibilities, including VPA matters.

In general, rural Councils are often unfamiliar with VPAs, their content and how to go about negotiating one. Because of this fact they are at a disadvantage and may well miss out on securing



appropriate financial contributions from a developer to offset the impacts and provide community benefit.

AMRC requests the DPE amend the Draft Practice Note and Circular to take account of VPAs in the rural sector, such as for mining and energy projects (eg wind and solar farms) where planning circumstances, size of the land area involved in the project, social and community fabric, lifestyle and local industry are very different to the urban scene. In the rural sector a major industrial project such as a mine or a wind farm may generate major changes (both positive and also negative) to the social, environmental and economic landscape. The rural scene is predominantly wide open spaces, peace and quiet, strong community networks and fewer people per hectare. In an urban area the dynamics are very different in that there is already lots of built form with residential, commercial and industrial activity, all in close proximity and much higher population densities.

AMRC also recommends the Practice Note and Circular be amended to unequivocally stipulate that mining and energy proponents be required to be more proactive in seeking out VPAs with affected Councils. At present, there is a tendency for proponents to avoid VPAs if possible and to delay reaching an agreement on one until after the project has been approved by DPE or the PAC.

AMRC also notes that DPE produced a draft 'Planning Agreement Guidelines for State Significant Mining Projects' in July 2015. We would appreciate feedback from DPE as to what the future holds for that document.

AMRC also notes that the proposed amendments to the EP&A Act contemplate a change to S 93K whereby the **Minister may make determinations or give directions about the method of determining the public benefit provided by a developer under a planning agreement** [s 93K (b1)]. AMRC seeks commentary from the DPE as to what this means in reality. The method of determining the financial contribution quantum is often a contentious matter between a proponent and a Council and AMRC wishes to be fully involved in framing the scope or terms of any 'method'.

3. Specific Comments on the draft documents

3.1 Draft Practice Note ('Note')

a) Terminology (p 5)

- Suggest adding a definition on the term 'public interest', given the term is referred to frequently throughout the Note.
- We support the definitions of 'planning benefit' and 'public benefit' although, given they are key terms, we recommend the latter be expanded to provide examples of the ranges of benefits that might be appropriate in the environmental, social and economic realms, including to the social fabric of communities.

b) Part 1 –Introduction to planning agreements (p 6)



- Editing – appears to be a typo line 1 ‘extract’.
 - Would be beneficial to make it clear in the Note that VPAs are also negotiated for developments in rural and regional areas such as for mining and energy projects as well as in urban areas dealing with infill or urban renewal.
- c) **Part 2 – Principles and policy for planning agreements (p 7)**
- **2.1 Fundamental principles:**
 - We recommend the Note clearly explain that a planning agreement can apply to direct and indirect, tangible and intangible impacts, including impacts on community social fabric.
 - Suggest adding that financial contributions can also be utilised to provide community social benefits.
 - We support para 6 regarding the statement that a VPA ‘allows for a redistribution of the costs and benefits of the development’.
 - Fundamental principles dot points: suggest the matter of ‘unrelated’ benefits be explained in more detail as is often a point of debate between the proponent and Council.
 - **2.2 Public Interest & probity considerations:**
 - Page 3, para 3 editing; ‘public’ repeated and page 10, para 3, appears a word is missing at the end of the last sentence.
 - We agree the Policy should make it clear that it provides ‘room to accommodate subjective values’ such as social aspects. A ‘social impact’ is the social change (both positive and negative) that an organization (say a mining company), creates through its actions - i.e. the impact of its interventions. To be more definitive, it is the effect of the project on the social fabric of the community and well-being of the individuals and families.

We would appreciate the Note explaining that to gain “social legitimacy”, it is prudent for proponents of major projects to make a positive and lasting contribution to the social wellbeing of communities in which they operate. This means providing demonstrable social benefits that permeate all spheres of the community so wellbeing is enhanced both during the life of the project and after it has closed.

This contribution is to be in addition to the standard economic benefits of jobs (ie income) and hopefully payment of royalties and taxes. In return, companies are more likely to be seen as socially responsible, which brings reputational benefits.

AMRC believes allowing scope for social values under the Public Interest banner is most important as impact assessment predictions can be wide of the mark and in addition the following subjects can be difficult to quantify:

- Culture and customs: intangibles such as loss of sense of place (ie changes in the natural and built landscapes that affect resident’s sense of identity and place, and the level of satisfaction with their surrounds), loss of social/community cohesion, shared norms of behaviour, values and cultural heritage conflicts;



- Gender and vulnerable groups: Disproportionate impact and marginalisation of vulnerable and minority groups (eg women, disabled, aged, ethnic minorities, indigenous and the young), equity in participation and employment; and
 - Community safety and security: increased vehicle accidents, alcohol, substance abuse and crime.
- Page 10: the Draft Note states that a consent authority can only enter into a VPA ‘in the terms of an offer made by the developer’. This poses challenges for AMRC members when it comes to negotiating what it considers to be fair and reasonable requests. The playing field is not level, with the proponent holding the upper hand. Thus AMRC requests that the Note be more explicit in stipulating the responsibilities and accountabilities of the proponent of say a major mining development or a wind farm, so that it is clear to all as to reasonable behaviour.
- *2.3 Using planning agreements:*
 - Objectives of planning agreements (p 11):

AMRC recommends that the Note include a new bullet point that makes reference to services that benefit the social fabric of the community and the well-being of individuals and families. We agree with bullet point 3 re ‘securing off-site planning benefits for the wider community so that the development delivers a net community benefit’
 - Planning agreements or other contributions mechanisms (pgs 12-13):

AMRC recommends some rural based examples be added to the planning agreements list on page 13 consistent with very large land areas, valuable water and biodiversity resources and agricultural lands, extensive roading, sparse population and large distances between settlements.
 - Planning benefits (p 14):

AMRC concurs with the statement that ‘the provision of planning benefits for the wider community through planning agreements involves capturing part of the development’s profit’.
 - Planning agreements & strategic planning (p 14):

This section frequently mentions ‘windfall gains’ and ‘land value increases’. The commentary appears to be related to urban redevelopment, particularly apartment block developments. AMRC recommends the section be expanded to provide commentary and direction that is relevant to the rural and regional scene, say for major mining and renewable energy projects.
 - *2.4 Planning agreements policies and procedures:*
 - AMRC notes the proposed requirement that Councils should prepare and publish ‘sufficiently detailed’ VPA policies and procedures. The principles suggested to be addressed in any policy or plan are substantial, both in number and substance. AMRC is of the view that this task will require significant time and technical resources to complete. To this end AMRC requests that in the first instance the DPE prepare appropriate templates to guide Councils in such work.



Furthermore, AMRC requests that the State-wide VPA Policy be more expansive and absolute in its direction requiring proponents to pay the costs incurred by Councils in considering, negotiating and preparing VPAs. It needs to be acknowledged that many rural Councils are quite disadvantaged when it comes to this type of assignment and often need to engage specialist assistance to guide them through the process.

d) Part 3 – Planning agreement procedures and decision making (p 17)

- *3.1 Offer & negotiation:*
 - Efficient negotiating systems (p 17):

Based on the experience of the AMRC the system rarely sees the negotiation of planning agreements beginning at the ‘pre-application stage’ as is suggested in the Note ought occur. We would welcome the Note being explicit in requiring such a process being mandatory.
 - Involvement of independent third parties (p 17):

We recommend the Note outline typical third parties that might be considered, particularly in the situation where there is a dispute to be resolved. As you may be aware AMRC and the NSWMC are proposing that IPART’s services be utilised in the event of a council’s non-acceptance of an offer by a mining company.

- *3.2 Costs & charges:*
 - Costs (p18):

We recommend the wording be rephrased to require proponents to pay for the planning authorities costs, along the lines of ‘there are substantial costs for a planning authority in preparing a planning agreement including negotiation, preparation, execution, registration, enforcement and administration. The developer/proponent is required to fund such costs and the funded amount should be stated in the planning agreement.’
 - Recurrent costs & maintenance payments (p 19):

We recommend inclusion of a rural example, namely the ongoing repair and maintenance of roads utilised by a mining or energy company.

- *3.3 Registration & administration of planning agreements:*
 - Registration of planning agreement (p 19):

Please add relevant commentary regarding this topic in the context of mining projects where thousands of hectares may be owned by the proponent.

- *3.4 Basic statutory procedure for entering into a planning agreement (p 21):*
 - AMRC strongly supports the requirement that ‘planning agreements should be negotiated between planning authorities and developers **before applications are made** so that applications may be accompanied by copies of draft agreements’. We suggest DPE delete the words ‘where possible’ at the commencement of that sentence in the draft Note as it provides



an escape mechanism that is unnecessary. As mentioned earlier in this letter it is unusual for a mining proponent to advance planning agreement negotiations with a council such that a draft is ready at the time a DA is submitted.

e) Part 4 – Examples of the use of planning agreements (p 23)

AMRC concurs with the inclusion of the statement that planning benefits via a planning agreement ‘allows(s) the wider community to share in part of the development profit to achieve specified public benefits’ (p 23).

We recommend the text in Part 4 be expanded to explain that financial contributions via a planning agreement can be utilised for the provision of community based social benefits. In a rural context the social impacts relating to a major mining project can be most relevant, certainly in the context of such matters as:

- culture and customs: intangibles such as loss of sense of place (ie changes in the natural and built landscapes that affect resident’s sense of identity and place, and the level of satisfaction with their surrounds), loss of social/community cohesion, fracturing of shared norms of behaviour, values and cultural heritage conflicts;
- gender and vulnerable groups: Disproportionate impact and marginalisation of vulnerable and minority groups (eg women, disabled, aged, ethnic minorities, indigenous and the young), equity in participation and employment; and
- Community safety and security: increased vehicle accidents, alcohol, substance abuse and crime.

f) Attachment A - Template planning agreement (p 25)

AMRC offers the following information that the DPE may like to consider adding to the VPA template.

Definitions:

Construction Commencement means the first day that Construction Works as defined in this Agreement is to commence on public road infrastructure requirements in accordance with the findings of the Road Condition and Traffic Impact Study prepared for Council. For the avoidance of doubt, construction commencement is not triggered by activities such as geotechnical investigations, surveys of any nature or resource monitoring.

Construction Works means the carrying out of any site preparation or land clearing, building or engineering construction work required for the development including associated works such as public road upgrading and the installation of workshops, power lines and related facilities.

The Proponent must provide written notice to Council 10 business days before Construction Works are planned to commence.



Bank Guarantee means a guarantee or an undertaking by a trading bank or another financial institution acceptable to the Council (acting reasonably) whereby that bank or institution unconditionally and irrevocably agrees to pay the Council on written demand a specified sum of money not less than the amount of the Payment (see Clause XX) or so much thereof as the Council may demand from time to time, and must include an expiry date which is not less than 5 years from the issue date.

Force Majeure Event means an event affecting a Party which is outside that Party's reasonable control including, but not limited to fire, storm, flood, drought, earthquake, war, invasion, terrorist attack, rebellion, epidemic, act or omission (including laws, regulations, disapprovals or failures to approve) of any third person (including but not limited to, subcontractors, customers, state or federal governments or government agencies).

Such events could not have been prevented by a prudent and competent person taking appropriate steps.

Minor works means incidental works where there are no or only demonstrably inconsequential environmental and/or social impacts. Any impacts deemed to be inconsequential must be isolated, generally rare in frequency, short in duration, reversible and minor in terms of size and extent. Such works could include non-disturbance activities, for example non-disturbance land surface surveys.

Clause: VPA Preparation Costs:

The Proponent agrees to pay the Council the sum of \$30,000 being the reasonable costs for preparing, negotiating and executing this Agreement and any document related to this Agreement.

3.2 Draft Planning Circular ('Circular')

a) General comments

The Circular appears to have as its theme VPAs set in an urban context, with the focus on infrastructure delivery, land value uplift and LEP re-zonings.

AMRC requests that the DPE amend the Circular to take account of VPAs in the rural sector, such as for mining and energy projects (eg wind and solar farms) where planning circumstances, size of the land area covered by the project, social and community fabric, lifestyle and local industry are very different.



3.3 Draft Ministerial Direction - Planning Agreement

The AMRC notes the Ministerial Direction, if signed, would mean that the Secretary's Practice Note would apply to **all** local councils in NSW. We also note that councils must 'have regard to' Parts 2 and 3 of the Practice Note.

If not already initiated, it is recommended the DPE engage with Local Government NSW and the various local government regional groupings on the proposed VPA package. The reasons for this include:

- there are a number of rural councils which currently do not have mining or energy or other major projects with VPAs in their LGA but may well have so in the future, so the package should be brought to their attention;
- the exhibition period for the VPA package has been over the busy end of year period with rural harvest and holidays occupying people's time and attention.

AMRC also asks why a Ministerial Direction is necessary, as there are many DPE policies and guidelines in place now without one?

Planning agreements, by their very nature, and certainly those for rural mining and energy projects, tend to be tailored for each particular circumstance so one size rarely fits all. Initiating a Ministerial Direction does seem to elevate the significance of the Practice Note. We would appreciate dialogue with the department on this important matter.

In conclusion the AMRC would like to reiterate that the member Councils of AMRC and other, similar Councils face a major impost in terms of time and resources when they are required to assess major development projects. The task of deliberating on the benefits and costs of the project is often an enormous task that has to be done diligently to protect and enhance the interests of the residents and ratepayers. Negotiating a VPA is but part of that process. The VPA and the broader EIA costs incurred should, in our view, be carried by the project proponent and not the Councils.

The AMRC thanks you very much for the opportunity to provide feedback on these important matters. If you have any queries regarding the above please don't hesitate to contact the Executive Officer of the AMRC Mr Greg Lamont on phone 0407 937 636 or email greg@yourexecutiveservice.com.au

[The AMRC would welcome the opportunity to meet and discuss the matters herein. We look forward to your response in this regard.](#)

Yours sincerely,
Peter Shinton
Chairman
Association of Mining Related Councils