



Executive Director
Planning Policy
Department of Planning, Industry and Environment
Locked Bag 5022
Parramatta NSW 2124

PO Box 871
Tamworth
NSW 2340
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Submitted to www.planningportal.nsw.gov.au/exhibition

Dear Sir/Madam,

Re: MERC Submission to the Review of the EP&A Act Infrastructure Contributions System

1. Introduction

The NSW Association of Mining & Energy Related Councils ('MERC') welcomes the opportunity to make comment, for your consideration, as part of the review of the NSW planning legislation's infrastructure contributions system.

The Submission provides:

- a) An introduction to MERC, highlighting the pivotal role its members play in the planning and assessment deliberations on proposed major developments; and
- b) Comments, both general and specific, aimed at facilitating prompt and substantive improvements to the 'transparency and ease of use' of the infrastructure contributions system, with particular reference to planning agreements ('PAS'). MERC also offers comment on the proposed Ministerial Planning Agreement Direction, the EP&A Act Regulations and section 7.11 and section 7.12 contributions.

2. About MERC and its Members

MERC was founded in 1978 by several councils recognising 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 20 plus member councils of MERC, who are all located in **rural and regional** areas of NSW.

In recent years MERC, given its experience in the operational realities of the planning system, has liaised closely with the DPIE in formulating policy, in particular making contributions on matters such as:

- How to improve the environmental impact assessment process;
- How the mining sector could better support businesses in regional economies;
- How to improve the standard of mine rehabilitation;
- Reform of the Voluntary Planning Agreement (VPA) process (in collaboration with the NSW Minerals Council);

- Planning for large scale solar projects;
- Resources for Regions policy; and
- Being an active participant in the Resources Advisory Forum.

In particular, we refer you to our submission to the then Secretary of the Department dated 24th January 2017 on the matter of the DPE's *Draft Practice Note – Planning Agreements (dated November 2016)*. We can provide a copy if required.

3. Comments on the Planning Agreements Practice Note ('Practice Note'), Exhibition Draft, April 2020 (to replace previous Practice Note dated July 2005)

3.1 General Comments

MERC offers the following general comments:

- Whilst this current draft Practice Note does NOT apply to PAs for mining projects it does apply to renewable energy projects (e.g. wind and solar farms) and unconventional gas extraction 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. We submit the Practice Note should be made **less urban centric** by acknowledging there are many PAs secured for such projects in rural and regional locations.
- Rural Councils are often unfamiliar with PAs, their content and how to go about negotiating one. Because of this 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.

In the rural sector a major project such as a wind farm may generate major changes (both positive and also negative) to the environmental, social and economic landscape. The rural landscape is predominantly wide-open spaces, peace and quiet, strong community networks and fewer people per hectare when compared to urban areas.

MERC also recommends the Practice Note be amended to stipulate that energy proponents be required to be more proactive in seeking out PAs with affected rural Councils. At present, there is a tendency for proponents to avoid PAs if possible and to delay reaching an agreement on one until after the project has been approved by DPIE or the IPC, by which stage Councils have lost much of their bargaining power.

3.2 Specific Comments: Appreciative

- Preface - Page ii, Mining: We note the current draft Practice Note does not apply to PAs for mining projects, however aspects therein can be used if Councils desire. Again, MERC recommends the Practice Note acknowledge that significant developments in rural and regional areas include wind farms, solar farms and unconventional gas extraction and that PAs are often adopted in such cases.

By the Practice Note acknowledging developments in rural and regional areas it will help broaden the 'urban centric' focus of the document.

- Preface - Page ii: Throughout the Practice Note terms such as *'public interest'* *'planning benefit'* and *'public benefit'* are used. Given they are pivotal terms we recommend they be clearly defined. The latter term could be defined as benefits that are appropriate in the environmental, social and economic realms, including to the social fabric of communities.
- In the various chapters as listed, MERC supports the following:
 - In 2.2: the statement that PAs 'redistribute the costs and benefits of a development' and that 'the public can comment on whether they think the balance between development and public benefit is achieved successfully';
 - In 2.2: acknowledgement of the need for 'room to accommodate subjective values and varying concepts of the public and private interests';
 - In 2.2: acknowledgement that 'financial, social and environmental costs and benefits of development can be redistributed through a PA';
 - In 2.4 Nexus: the statement that development contributions provided for in a PA are not required to bear the same nexus with development as required for section 7.11 local contributions. MERC accepts however, that PAs should provide for public benefits that are 'not wholly unrelated' to development;
 - In 2.5: that PAs should 'produce outcomes that meet the general values and expectations of the public and protect the overall public interest';
 - In 3.1 that PAs may be directed towards achieving the objective of 'securing off-site benefits for the community so that development delivers a net community benefit'; and

3.3 Suggestions for improvement

- That the draft Practice Note explain that a PA can apply to direct and indirect, tangible and intangible impacts, including impacts on community social fabric and that contributions can also be utilised to provide community social benefits.

To elaborate, we suggest the Practice Note explain that to gain social legitimacy, it is prudent for proponents 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 possibly beyond. This contribution is to be in addition to the standard economic benefits of jobs (i.e. local economic activity). In return, companies are more likely to be seen as socially responsible, which brings reputational benefits.

- Chapters 2.4/2.5/3.2: That the matter of 'unrelated' benefits be explained in more detail as this matter is often a point of conjecture between the proponent and Councils.
- Chapter 3.1: MERC has reservations regarding the suggestion that PAs can be used as *'compensating for the loss of or damage to a public amenity, service, resource or asset by development through replacement, substitution, repair or regeneration'*.

MERC considers that if the development impacts are predicted to be of such a magnitude that there is likely to be **loss or damage** to public amenity, service, resource or asset then those impacts should be rigorously assessed and mitigated outside the PA framework, or the project refused, if necessary.

- Chapter 2.6: MERC notes the proposed requirement that Councils are ‘strongly encouraged’ to prepare and publish PA policies and procedures. MERC suggests this task would require significant time and technical resources to complete, resources most rural and regional councils do not have at their disposal. Thus, MERC requests that in the first instance the DPIE prepare appropriate templates and training modules to guide Councils in such work.
- Chapter 4.3 Costs: MERC requests that the Practice Note be more expansive and definite in its direction, stipulating that proponents should pay the costs incurred by Councils in considering, negotiating and preparing PAs. We consider it warrants acknowledgement that many rural Councils are disadvantaged when it comes to this type of assignment and often need to engage specialist (and often costly) assistance to guide them through the process.

We recommend the wording be in accord with ‘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 PA.’

- Chapter 4.1 Fig 1: Step 3: Based on MERC’s experience it is rare to see the negotiation of PAs sufficiently advanced for a draft to be tabled concurrently with the public exhibition of the EIS. MERC would welcome the Practice Note being more explicit in requiring this step to be mandatory.
- Chapter 4.2 Disputes: MERC recommends the Practice Note acknowledge that in the process of negotiating a PA, the parties may reach an impasse. The Practice Note could assist by encouraging the engagement of a mediator early on to help resolve differences and find a compromise position.
- Chapter 4.4 Recurrent costs & maintenance payments: MERC supports the principle that a PA can require the developer to make contributions towards the recurrent costs of impacted infrastructure such as ongoing road maintenance. However, in MERC’s experience it is implausible that such contributions would cease when ‘a public revenue stream is established to support the on-going costs’. In the case of road maintenance, for example, it is incumbent on the Proponent/Developer to pay for the recurrent costs for the duration of the project-related impacts.

Chapter 4.4 Registration on Title: In the case of renewable energy projects and unconventional gas, large areas of land are often involved. MERC is not convinced of the need for essentially rural land to have a PA registered on the land title. Such an exercise would be time consuming and costly for proponents.

We would be pleased to discuss the matter with DPIE.

3.4 Attachment A - PA Template

MERC offers the following definitions that DPIE may like to consider adding to the VPA template:

Construction Commencement means the first day that Construction Works as defined in this Agreement is to commence. 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.

4. Draft Planning Agreement Ministerial Direction

MERC notes the draft document and that councils 'must have regard to' the Secretary's Practice Note, when finalised. We also note the stance taken here is consistent with a recommendation arising from the Kaldas Review.

Given the content and messaging in the Ministerial Direction, MERC questions the merit of requiring such a document, believing the Practice Note, in and of itself, is sufficient.

5. Proposed Amendments to the EP&A Regulation

MERC notes that the proposed amendments are intended, inter alia, to:

- Require planning authorities to provide additional reporting and accounting information for PAs as follows:
 - o the PA register is to include the type of development proposed
 - o annual financial reports are to include:
 - the monetary amounts actually received and expended;
 - any works in kind delivered, their value and location, including of assets held by receiving agencies; and
 - any land dedications received, their value and location;
- Require planning authorities to publish a Register of Agreements, copies of PAs and annual reports on their website or on the NSW Planning Portal;
- Remove prescriptive requirements related to explanatory notes for proposed PAs and address through a Practice Note; and
- Require explanatory notes for PAs to be prepared in accordance with the Practice Note.

MERC understands the intention of the proposed amendments is to provide greater openness and transparency and improve accountability within the contributions framework and is consistent with recommendations made in the Kaldas Review.

MERC offers in-principle support to the proposed amendments.

6. Improving the Review of Local Infrastructure Contributions Plans (s7.11)

MERC supports plans to improve the efficiency and timeliness of the process of reviewing higher-rate local (s7.11) (previous s94) infrastructure contributions plans where several stakeholders are involved including councils, IPART and DPIE. The improvements centre on:

- Increasing the value thresholds that trigger the review process;
- Indexing the existing thresholds by CPI from June 2010;
- Streamlining and updating the IPART terms of reference;
- Removing existing exemptions to the review process, known as grandfathered contributions plans; and
- Removing the requirement for councils to re-exhibit an IPART-reviewed contributions plan following the receipt of advice from the Minister.

MERC offers in-principle support for these initiatives.

7. Criteria to Request Higher s7.12 (previous s94A) Contributions

MERC notes that, whilst the standard 1% levy will be maintained, the proposed criteria to increase the maximum percentage to up to 2% in a specific area include:

- The land area must be identified in the relevant strategic plan (regional plan or district plan);
- The strategic plan must include a significant employment growth target for the area;
- Local planning controls must reflect relevant strategic direction and targets for the area;
- The contributions plan should focus primarily on delivering place-based community infrastructure and improvements that enhance amenity of the area;
- Plan administration cost must not exceed 0.2% of total value of the contributions plan;

- The contributions plan should clearly set out the relationship between the expected types of development in the area and the demand for additional public amenities and services;
- Demonstrate that s7.11 has been considered and why it is not appropriate in this area;
- Include a financial analysis that demonstrates a 1% fixed levy is insufficient, and forecast the revenue outcomes for a higher percentage levy; and
- Changes to the works schedule require approval from the Minister.

MERC offers in-principle support for these initiatives.

MERC appreciates the opportunity to provide feedback on the abovementioned matters. If you have any queries regarding the above please don't hesitate to contact the Executive Officer of MERC Mr Greg Lamont on phone 0407 937 636 or email greg@yourexecutiveservice.com.au

Yours sincerely,

Cr Peter Shinton
Chair
Association of Mining & Energy Related Councils (NSW) Incorporated