

Draft submission

Parliamentary inquiry into the Environmental Planning and Assessment Amendment (Infrastructure Contributions) Bill 2021

July 2021

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Introduction

Thank you for the opportunity to make a submission to the parliamentary inquiry into the Environmental Planning and Assessment Amendment (Infrastructure Contributions) Bill 2021 (Infrastructure Contributions Bill).

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community-based system of local government in the State.

LGNSW thanks the Committee for the invitation to make a submission on this Bill. LGNSW has been concerned about the lack of broad consultation on the Bill and the attempt to expedite its passage by making it a cognate Bill of the NSW Budget Appropriation Bills, therefore avoiding the level of scrutiny that it requires. We therefore welcome the opportunity this important inquiry provides to gather evidence on the implications and appropriateness of the Bill towards enhancing the infrastructure contributions system.

This submission remains in draft form until endorsed by the LGNSW Board. Any revisions made by the Board will be forwarded as soon as possible.

Opening

LGNSW opposes the Bill in its current form. The Bill introduces legislation that may enable the Government to implement the recommendations of the NSW Productivity Commission Review of Infrastructure Contributions (PC Review) but may also provide the Government with unfettered power to implement other reforms, that are outside the scope of the PC Review, without further parliamentary scrutiny.

Implementation of the recommendations will have far reaching financial implications for councils and communities that are unknown at this stage. The detail will not become clear until all proposed regulatory changes, Ministerial Directions and subordinate legislation that will give effect to the Government's infrastructure contributions reform agenda are released for scrutiny. Councils and other stakeholders are not in a position to provide informed comment without this additional level of detail.

LGNSW has advocated for a review of the infrastructure contributions system for some years with the aim of reducing complexity, improving transparency and equity and releasing the financial burden placed on councils providing local infrastructure to support population growth and/or the changing needs of communities. LGNSW has therefore welcomed reforms to this complex system.

However, it is essential that councils and communities are not left worse off by the NSW Government's infrastructure contributions reform agenda. While the modelling conducted under the PC Review indicates that the reforms will benefit councils, modelling conducted by individual councils and Regional Organisations of Councils (ROCs) refutes this conclusion, instead finding many councils will be negatively affected.

This will result in the delay or removal of projects from council plans, with a detrimental impact on community wellbeing and participation in civic life. It will also result in a consequential loss

of jobs that would have been generated through the design, development, delivery and operation of these public facilities.

Councils have led their communities through the previous 18 month's raft of disasters, headlined by the COVID pandemic. Ensuring councils have access to ongoing funding through infrastructure contributions will empower councils to drive a locally led economic recovery and help them create tens of thousands of new jobs for their communities.

This issue, particularly the determination of costs and benefits, is further complicated by the Government decision to make proposed reforms to the rate peg contingent on infrastructure contributions reforms. LGNSW strongly objects to this linkage and maintains that the respective reforms should be considered independently. This is discussed further below.

Further information is required to provide the necessary assurance that councils and their communities will not be worse off as a result of these reforms.

LGNSW calls on the NSW Government to withdraw the Bill until such time as that complete information has been made available for analysis and the financial implications are understood.

Clarity is required on many aspects of the reforms including:

- the definition of “development contingent infrastructure” and what infrastructure will be retained on the Essential Works List (EWL). The EWL is to be subject of an IPART review that has not yet commenced;
- future caps on s7.11 contributions;
- the introduction of caps and the apparent removal of a percentage levy on fixed rate contributions under s7.12;
- the operations of the proposed land value contributions;
- the rationale for proposing to change the review requirements for council's Local Strategic Planning Statements (LSPS) from 7 to 5 years (without any consultation with councils);
- details on the new Regional Infrastructure Contribution which is to be imposed by a State environmental planning policy (SEPP); and
- the Government response to the recommendations of the current Independent Pricing and Regulatory Tribunal (IPART) Review of the Rate Peg to include Population Growth.

LGNSW support for many other provisions of the Bill is contingent on our views on the regulatory changes that will follow the Bill, which are currently unknown. The Government should also undertake extensive consultation before reintroducing the Bill. At present, LGNSW considers the Infrastructure Contributions Bill is akin to the State Government asking councils to sign over a blank cheque and say “trust me”.

Financial sustainability of councils

The enduring, pre-eminent challenge facing NSW local government is financial sustainability.

Local government is under sustained financial stress. This is a result of the compounding impacts of growing responsibilities, rate pegging and other financial constraints, cost shifting from the Federal and State governments and declining Commonwealth Financial Assistance Grants (in real terms). Cost shifting by the NSW Government onto local government is currently estimated to be around \$800 million per annum (representing over 6% of total local government revenue).

This has a direct bearing on council capacity to fund the provision and maintenance of infrastructure and the mechanisms used by local government to do so.

Rate pegging has been widely identified as a major reason for the financial difficulties and the large infrastructure delivery, renewal and maintenance backlogs faced by NSW councils.

The Productivity Commission identified rate pegging as a major constraint on local government finances and that prolonged rate pegging has produced undesired social and economic consequences. It found that: *“Under current arrangements, options for funding infrastructure are limited. A council’s ability to maintain consistent service levels is particularly constrained for those with growing communities, more so to the extent that community expectations are increasing. A significant contributor to the lack of fiscal flexibility is the local government rate peg, which currently includes no provision for population growth.”*

The Independent Pricing and Regulatory Tribunal (IPART) *Review of the Rate Peg to include Population Growth* also states that: *“Councils are not adequately compensated for population growth under the current rating system, which disincentivises them from accepting development and population growth”* and that: *“Our analysis shows the costs of growth are not being fully met for NSW councils in general, with faster growing councils tending to be unable to recover additional revenue through general income in proportion to their growth. The outcome is an expenditure gap between the cost of growth and what councils spend. Submissions from councils supported our finding, indicating the costs of servicing growth outstrip the revenue that councils can recover through rates to service growth”*.

These conclusions have also been supported by representative bodies such as the Committee for Sydney and the Sydney and Western Sydney Business Chambers.

These findings confirm the long-held views of local government and the findings of numerous other inquiries over past decades that the current rate peg process is undermining the financial sustainability of councils and diminishing their capacity to deliver infrastructure and services.

Over 40 years of rate pegging in NSW has resulted in the under-provision of community infrastructure and services and the deferral of infrastructure maintenance and renewal expenditure resulting in infrastructure backlogs. The backlog was estimated to be \$38 billion in 2018-19.

The NSW Productivity Commission also confirmed that NSW has the lowest per capita rates as the result of rate pegging and estimated that NSW rates are around 30% below the national average with NSW councils having foregone \$15 billion over the past 20 years when compared to Victorian councils. This has inarguably had a negative impact on the provision of local

infrastructure and services and local job creation in NSW and continues to undermine the financial sustainability of NSW councils.

LGNSW advocates the removal of rate pegging as a key measure in strengthening the financial sustainability of local government and reducing the infrastructure backlog. Short of this, LGNSW welcomes changes that will incrementally improve the operation of the rate pegging system and is supportive of the proposal to link the rate peg to population growth, which is currently being reviewed by IPART.

However, LGNSW warns against viewing rates as an alternative or replacement for infrastructure contributions, in part because one of the key purposes of rates is to help maintain existing infrastructure and services rather than to fund new infrastructure associated with new and increased demand generated by development. This is explored in further detail below.

Role of infrastructure contributions

Infrastructure contributions are made by developers to help deliver the infrastructure needed as communities grow. They are a means of financing public infrastructure that is required as a direct or indirect result of new development. They are provided in the form of monetary contributions, the dedication of land and/or the provision of capital works.

This is based on a long-standing impactor/beneficiary pays principle of the existing planning system i.e. new development makes a contribution towards the cost of infrastructure that will meet the additional demand it generates and benefits from.

Councils rely on development contributions to fund new infrastructure to support population growth and new development. Local government infrastructure responsibilities include local road, bridge, pedestrian and cycle networks, local water and sewerage utilities, stormwater and water management, buildings and facilities, regional airports and aerodromes, public domains, parks and open spaces, recreation, cultural, family and community services facilities, and a range of other infrastructure vital to local communities and important for creating liveable communities.

Council contribution plans are generally limited to the initial costs of providing this infrastructure. The ongoing life cycle costs of managing and maintaining infrastructure are not typically included in these plans and are generally funded through rates and other income streams.

Given the magnitude of infrastructure required (and expected) to support new communities, the inevitable reduction in infrastructure contributions will far outweigh any short to medium increase in rate revenue, resulting in funding shortfalls and unnecessary delays in the delivery of critical infrastructure to support those new communities.

Productivity Commissioner Recommendations - LGNSW response

LGNSW welcomed the Productivity Commissioner (PC) *Review of Infrastructure Contributions in NSW* and actively participated throughout the review process, making a [submission](#) in response to the Issues Paper and a [submission](#) in response to the PC Green Paper:

Continuing the productivity conversation. LGNSW supports many of the 29 recommendations made by the Productivity Commission and accepted by the NSW Government. But we also oppose several recommendations and/or have offered highly qualified support for a number of the others.

The Infrastructure Contributions Bill, combined with the other PC recommendations (that do not necessarily involve or require legislation amendment) introduces a major overhaul of the infrastructure contributions system in NSW and has wide ranging implications for councils and the communities they serve.

An overriding concern of the local government sector is that without full understanding of the ensuing details, these reforms will result in further cost shifting from developers onto local government and ratepayers.

LGNSW specifically opposed recommendations in relation to further restricting the essential works list to development contingent costs, permanent deferment of payments of infrastructure contributions, the removal of value capture and value sharing Voluntary Planning Agreements and restricting planning agreements for mining and energy projects to contingent infrastructure.

General comments on the Bill

LGNSW opposes the passage of the Infrastructure Contributions Bill until further details are known.

Notwithstanding the local government sector's general support for reforms to the system, LGNSW is disappointed that the NSW Government did not consult with the sector on an exposure draft of the Bill. Instead, the Government attempted to expedite its passage by making it a cognate Bill of the NSW Budget Appropriation Bills, therefore avoiding the level of scrutiny that it requires. LGNSW is therefore pleased that the Committee is now assessing the merits of the Bill.

It is premature to push forward with this legislation while so much of the infrastructure reform agenda remains unknown. Local government does not feel confident the reforms will create a fair and equitable system that does not make councils worse off. This is generating many questions within the sector and there is resounding agreement that before the Bill can proceed, more detail is required about regulations and subordinate legislation that will follow, including further analysis and modelling of impacts.

A further concern for LGNSW is that this Bill is a rushed attempt to make permanent some temporary arrangements that were put in place in response to COVID-19 and no evidence has been provided to support their permanent adoption. The most concerning example for LGNSW is the provision in the Bill to allow the Minister to make directions which will permanently defer the payment of infrastructure contributions until occupation certificate (OC) stage in the development process. (See details below.)

<p>Recommendation 1: The NSW Government should withdraw the Bill until such time as current and proposed reviews have been completed, further analysis and modelling of</p>
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impacts undertaken, and more detail is known about ensuing regulations and subordinate legislation. Further, the Government should commit to extensive consultation on these additional elements.

Specific concerns

Specific comments related to certain provisions contained in the Bill are outlined below.

Timing of infrastructure contributions payments

LGNSW objects to the Government seeking to extend temporary provisions made in response to the pandemic and make these permanent.

The Bill proposes to replace existing provisions which apply only during the prescribed COVID-19 pandemic period with new permanent provisions that enable Ministerial Directions to set the timing of contributions payments at any time beyond the pandemic period. This is a significant overreach of Ministerial powers and is strongly opposed by LGNSW and the local government sector.

The existing provisions and proposed changes are compared in the table below.

Existing provision in EP&A Act section 7.17	Proposed in the Bill to replace s 7.17(1A) and (1B)
<p>(1A) A direction under subsection (1)(h) may be given only during the prescribed period within the meaning of section 10.17.</p> <p>(1B) A provision of a development consent granted before and inconsistent with a direction under subsection (1)(h) is taken to be modified so as to be consistent with the direction, but only for a contribution or levy (or a component of a contribution or levy) that has not been paid before the direction is given.</p>	<p>(1A) The Minister may extend a direction under subsection (1)(h) to an <i>existing development consent</i>— (a) that was granted before the direction was given, and (b) that is subject to a condition imposing a monetary contribution or levy that has not been paid or has not become due.</p> <p>(1B) An existing development consent to which subsection (1A) applies is taken to be modified to make it consistent with the direction if the direction specifies a later time for payment than is specified in the consent.</p>

The existing provision applies only during the prescribed pandemic period. That is, it is currently the subject of a sunset provision which is tied to Ministerial health-related directions. Whereas, the Bill is proposing that the Act enables the Minister to make directions allowing the deferral of contributions payments on a permanent basis. There is no evidence provided on which to base this significant policy change nor any regulatory impact analysis of the consequences for local infrastructure delivery. This change is also in direct conflict with the NSW Government's aim of delivering the right infrastructure at the right time. LGNSW resolutely objects to this amendment.

This was introduced as a temporary measure in response to the extraordinary circumstances of the COVID-19 pandemic, which in good faith, local government did not oppose.

Our opposition to making this measure permanent is due to the following reasons:

- Permanent deferral of contributions payments to councils to the OC stage will delay provision of essential community infrastructure or require existing communities to carry the burden of paying for the infrastructure costs for new developments until the payments are made. Contemporary community expectations are that essential services and facilities will be available when residents move into an area. It should also be noted that in instances where developers negotiate the delivery of contributions through works-in-kind, it is essential that delivery of those works aligns to the delivery of the associated development.
- Many councils across the State do not have the financial capacity to forward fund multiple infrastructure projects while awaiting vital contributions payments from developers for those projects.
- Councils already face issues recovering significant sums of money owed for infrastructure contributions where private certifiers have issued OCs. The time and administrative costs in pursuing these outstanding payments can be substantial. It also exposes councils to greater risk of default by developers and costly, protracted debt recovery proceedings.
- LGNSW notes that as part of COVID-19 measures the Environmental Planning and Assessment Regulation 2000 was amended to require certifiers to obtain evidence from a council or the Department that there are no outstanding infrastructure contributions before issuing an occupation certificate, and that failure to comply is a breach under the EP&A Act. However, there still remains a risk that private certifiers may be put under pressure to issue OCs and development companies may fold upon building occupation which may make recovery of unpaid contributions very difficult. The burden of enforcement in this area is most likely to fall on councils and the risk of revenue loss is significant.
- Some councils already have policies that allow conditions requiring infrastructure payments at the time of OCs, and LGNSW maintains that this should be a decision for each individual council not a blanket provision imposed by the State.
- While the current economic conditions are acknowledged, in terms of developers' access to liquidity, interest rates have never been lower and are not likely to rise for some time. No doubt, local government will learn from this sleight of hand reform and pause before so readily agreeing to future 'emergency provisions' in which the sector suffers a financial disbenefit.

Recommendation 2: Delete Schedule [24] which proposes to replace sections 7.17 (1A) and (1B) with new provisions to allow the Minister to make directions allowing the deferral of contributions payments on a permanent basis, if and when the Bill does proceed.

Recommendation 3: If Schedule [24] is retained in the Bill, then the current provisions in the EP&A Act and EP&A Regulation that create an offence should certifiers issue a certificate without evidence of an infrastructure contribution payment should be retained.

Essential works list

The PC has recommended that the Independent Pricing and Regulatory Tribunal review the Essential Works List and provide advice on the approach to considering efficient infrastructure design and application of nexus. At the time of writing, the terms of reference had yet to be issued.

The Essential Works List is relevant to contributions plans that propose contribution levels above the relevant contributions cap. A list of essential infrastructure is prescribed by DPIE¹. This list does not include community facility buildings, only the land component of these facilities.

A longstanding policy of LGNSW is the amendment of the Essential Works List to include the capital costs of providing core community facility buildings. It is not sufficient to provide land for such facilities. Contemporary community expectations are that these essential services and facilities will be available and completed before they move into an area. Councils' social licence for increased density and development also comes from associated improvements to community infrastructure and services. As community facility buildings are not included on the current essential works list, local government faces significant funding shortfalls for providing community facilities.

The provision of a high quality public domain and facilities by local government is also instrumental in driving commercial demand, new business formation, private sector investment and investment by developers and is essential in supporting the NSW government's commitment to commercial and economic growth.

Local Government's capacity to plan and deliver high quality public domain works would be impossible to fund without appropriate contributions from development. LGNSW has therefore specifically opposed the PC recommendations in relation to further restricting the essential services list to development contingent costs.

Recommendation 4: The principle that infrastructure contributions should capture both the land and capital costs of providing core community facilities must be recognised in legislation, if and when the Bill does proceed.

Contribution of State significant development towards local infrastructure

In local government areas where major developments such as mining, solar farms and resource activity are placing added pressure on local infrastructure, services and housing, local government needs additional financial resources to augment public infrastructure and cater for the increased demands of industry expansion and population increase. As councils are not the consent authority for state significant development (SSD), they have little control over and cannot rely on the inclusion of developer contributions as a condition of consent for these proposals.

¹ NSW Planning and Environment, Local Infrastructure Contributions Practice Note, January 2019

An area of uncertainty, particularly for rural and regional councils, is that conditions requiring local infrastructure contributions for SSD are not being applied consistently, as they are for locally approved development. In regional areas of the state, SSD commonly includes mines, solar farms and other large resource developments.

Councils are concerned that their communities are being overlooked for important supporting infrastructure because the approval bodies for these developments do not always require payment of contributions for local infrastructure as a condition of approval for SSD. LGNSW is not aware of any mandatory framework to formalise the requirement for such contributions or to extend such contributions to benefit neighbouring councils that may be also directly affected because of the cumulative impacts of many developments in adjoining LGAs.

Recommendation 5: Due to the significance of local government's role in the provision of local infrastructure to support state significant development, the Act should be amended to ensure that where an SSD project occurs within an LGA, mechanisms are in place to ensure that councils can have genuine input to the assessment of the project, including giving the council concurrence on the conditions of consent for SSD.

Two parallel reforms

LGNSW strongly objects to the Government's decision to tie reform of the rate peg to cater for population growth to reductions in infrastructure (developer) contributions. While this was not specified in the terms of reference for the PC Review or the IPART Review, this was implicit in the Government's unqualified acceptance of the PC recommendations, was an integral part of the modelling by the Centre for International Economics (CIE) that supported the PC report and it was the clear message in media and consultations.

LGNSW is of the view that the findings of the PC on the negative effects of rate pegging are independent of the infrastructure contributions process and the matters should be addressed separately. Councils overwhelmingly see the decision to link the two as a cost shift from developers onto ratepayers and councils. While it is acknowledged there may be ways to design the policy to help ensure there is a net gain to councils, the linkage detracts from the primary objective of reducing the negative impacts of rate pegging.

As noted above (under Financial sustainability of councils), both the PC and IPART have found that there is an underlying need to reform rate pegging independently of reforms to the infrastructure contributions framework.

It is relevant to note that the recommendations of the draft report of the current IPART Review of the Rate Peg to include Population Growth presents some major obstacles to the proposed infrastructure contributions reforms. The draft report states that the preferred methodology would have delivered NSW local government an additional \$116 million over the past four years (2017-18 to 2020-21), in total. This represents an increase in total General Income for the sector of only 0.6%. While this is welcome, it is a small amount and will barely assist with the existing financial needs of councils. It clearly does not provide any scope for the reduction of developer infrastructure contributions on the back of increased rate revenues. It is noteworthy that 96 councils would have gained increased General Income (albeit very small increases in most cases) and no councils would have been worse off.

This result challenges some of the underpinnings of the proposed infrastructure contributions reforms and presents another reason for withdrawing the Bill.

Recommendation 6: That the rate peg reforms be decoupled from the infrastructure contributions reform agenda; and that the modelling behind the PC's recommendations be revisited in light of what appears to have been overinflated estimates of increased rate income.

Conclusions

First and foremost, LGNSW opposes the passage of the Infrastructure Contributions Bill and requests it be withdrawn until such time as to allow for consultation with local government and other stakeholders. We cannot support the Bill until we assured that councils and communities will not be worse off under the legislation. We need to be assured that the Bill will not result in further cost shifting from developers onto local government and ratepayers. Communities depend on councils to deliver for the public good. This Bill risks reducing these efforts. More detail is required about regulations and subordinate legislation that will follow. It is premature to push forward with this legislation while so much of the infrastructure reform agenda remains unknown.

Furthermore, LGNSW and the local government sector do not agree with the Government trying to tie rate reform to infrastructure contributions reform and this Bill.

Summary of recommendations

In summary, LGNSW makes the following recommendations:

Recommendation 1: The NSW Government should withdraw the Bill until such time as current and proposed reviews have been completed, further analysis and modelling of impacts undertaken, and more detail is known about ensuing regulations and subordinate legislation. Further, the Government should commit to extensive consultation on these additional elements.

Recommendation 2: Delete Schedule [24] which proposes to replace sections 7.17 (1A) and (1B) with new provisions to allow the Minister to make directions allowing the deferral of contributions payments on a permanent basis, if and when the Bill does proceed.

Recommendation 3: If Schedule [24] is retained in the Bill, then the current provisions in the EP&A Act and EP&A Regulation that create an offence should certifiers issue a certificate without evidence of an infrastructure contribution payment should be retained.

Recommendation 4: The principle that infrastructure contributions should capture both the land and capital costs of providing core community facilities must be recognised in legislation, if and when the Bill does proceed.

Recommendation 5: Due to the significance of local government's role in the provision of local infrastructure to support state significant development, the Act should be amended to ensure that where an SSD project occurs within an LGA, mechanisms are in place to ensure

that councils can have genuine input to the assessment of the project, including giving the council concurrence on the conditions of consent for SSD.

Recommendation 6: That the rate peg reforms be decoupled from the infrastructure contributions reform agenda; and that the modelling behind the PC's recommendations be revisited in light of what appears to have been overinflated estimates of increased rate income.

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LGNSW would welcome the opportunity to assist with further information during this Inquiry to ensure the views of local government are appropriately considered.

To discuss this submission further, please contact Executive Manager Advocacy, Kelly Kwan at kelly.kwan@lgnsw.org.au or on 02 9242 4038.