

# PLANNING AGREEMENT GUIDELINES

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*FOR STATE SIGNIFICANT MINING PROJECTS*

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## Contents

Part A – Process for planning agreement negotiations for mining projects .....	3
1. Introduction to these Guidelines .....	3
2. What is a planning agreement?.....	4
The role of the Department .....	5
3. Why negotiate a planning agreement? .....	5
4. Region wide planning agreements .....	6
5. What matters can be included in a planning agreement? .....	6
Infrastructure.....	7
Public services and public amenities .....	8
Studies and strategic planning .....	8
Other public purposes .....	9
6. Monitoring and reporting .....	9
7. Mediation processes .....	9
Part B – Guiding principles for planning agreement negotiations for mining projects.....	10
Attachment A - Best practice planning agreement negotiation timeline .....	12
Attachment B – The development contributions regime in NSW .....	14
Attachment C – Special variation to the Rate Peg.....	15

## Part A – Process for planning agreement negotiations for mining projects

### 1. Introduction to these Guidelines

A planning agreement is an agreement between one or more planning authorities and a developer whereby the developer agrees to make a financial or in kind contribution towards a public purpose or objective.

Planning agreements are an integral part of the planning system in New South Wales and are an important tool in mitigating community concerns about the impacts of a development.

These guidelines have been developed specifically to assist councils and mining companies in negotiating planning agreements that relate to State significant mining developments.

Both the mining industry and councils have highlighted the need for greater guidance in relation to the process of implementing and negotiating planning agreements and what constitutes a reasonable request in terms of the scope of a planning agreement for these projects.

The Department of Planning and Environment (DPE) has prepared these guidelines as part of the Integrated Mining Policy reforms to provide assistance to parties undertaking planning agreement negotiations for mining projects.

These guidelines identify and outline best practice principles (see Part B of this guideline) and help to build an understanding about the process for negotiations in the context of mining assessment (**see Attachment A**). In particular, these guidelines have been prepared to assist councils and industry understand the steps involved in negotiating a planning agreement.

It is important to acknowledge that the guidelines are not designed to limit the scope and role of planning agreements, rather they seek to promote best practice as a way of bringing parties closer to a resolution. The guidelines also provide ideas for mediation, if this is required.

While the *Environment Planning & Assessment Act 1979* (EP&A Act) provides some parameters that affect planning agreement negotiations, it does not provide specific details (above and beyond what is described in s93F of the Act) about what should or should not be included in a planning agreement.

This guideline should be read in conjunction with the Department's *Practice Note for Planning Agreements 2005* (Practice Note) which provides advice around the use of planning agreements and the legislative framework, as well as a draft template planning agreement.

Importantly, the Practice Note also provides direction on issues such as identifying contributions that provide net public benefit, and reviewing the appropriateness of contributions in draft planning agreements by applying the acceptability test. The acceptability test is described in the practice note as a test which requires that all planning agreements:

- are directed towards proper or legitimate planning purposes, ordinarily ascertainable from the statutory planning controls and other adopted planning policies applying to the development;
- provide for public benefits that bear a relationship to development that is not *de-minimis* (that is, benefits that are not wholly unrelated to the development);
- provide outcomes that meet the general values and expectations of the public and protect the overall public interest;
- provide for a reasonable means of achieving the relevant purposes and outcomes and securing the benefits; and
- protecting the community against planning harm.

## 2. What is a planning agreement?

The rules around how and when a planning agreement can be entered into are set out in sections 93F to 93L of the EP&A Act. Under the Act, a planning agreement is a voluntary agreement entered into between a planning authority (in this case, a council) and a proponent (in this case, a mining company).

A planning agreement can include a requirement for a mining company to provide any of the following to be used for or applied towards a public purpose (see Box 1):

- the dedication of land free of cost;
- a payment of a monetary contribution;
- provision of any other material public benefit (see Box 2); or
- any combination of the above.

It is important to note that planning agreements do not legally require a direct connection (or nexus) between the development and the public purpose that may be negotiated. Because of this, planning agreements may relate to both the direct and indirect impacts of a mine on a community, and may also relate to impacts on the social fabric of the community. However, it is provided for in the EP&A Act that any contributions must be provided for a public purpose.

The impacts of each mine will always be different. Because of this, each Planning Agreement negotiation will be different. Importantly, Planning Agreements are commercial contracts and should therefore be managed and implemented as such.

#### Box 1 – What is a public purpose?

“Public purpose” includes:

- provision of, including recoupment of, the cost of public amenities or public services;
- provision of, including recoupment of, the cost of affordable housing;
- transport or other infrastructure relating to land;
- funding of recurrent expenditure relating to the provision of public amenities or public services, affordable housing or transport or other infrastructure;
- monitoring of the planning impacts of development, and
- conservation or enhancement of the natural environment.

*See section 93F(2) of the EP&A Act*

#### Box 2 – What is a public benefit?

“Public benefit” is defined in the EP&A Act as the benefit enjoyed by the public as a consequence of a development contribution.

*See section 93F(1) of the EP&A Act*

### The role of the Department

DPE does not have a role in the negotiation of planning agreements between industry and councils for State significant mining projects. While DPE is responsible for undertaking the assessment of State significant mining projects and providing advice to the Minister or the NSW Planning Assessment Commission in making a determination, it cannot require that a planning agreement is entered between councils and proponents before development consent is issued. This is because the EP&A Act states that any planning agreement entered into between councils and mining companies must be voluntary.

However, a planning agreement may be required by a development consent condition but only if it requires a planning agreement that is in the terms of an offer made by the developer in connection with the development application. In practice, this means that all parties have negotiated in good faith and an offer is on table that all relevant parties are generally in agreement with.

### 3. Why negotiate a planning agreement?

Planning agreements provide a way for councils and mining companies to negotiate flexible outcomes in respect of development contributions. Because of this, planning agreements can, in certain situations, deliver better outcomes for both mining companies and the community through the delivery of public benefit.

While planning agreements are not compulsory, they may be entered into as a way of mitigating community concern regarding development impacts. In particular, they are able to account for matters that are not conditioned through the development consent or captured through other contributions under the EP&A Act. In this way they can contribute to the social licence of a mining development.

They provide a way for planning authorities and developers to negotiate the provision of contributions that may extend beyond the scope of contributions paid under sections 94 or 94A of the EP&A Act.

Broadly speaking, sections 94 and 94A relate to monetary contributions for public amenities and public services in accordance with a contributions plan. A summary of the contributions regime in NSW, including details about affordable housing and special infrastructure contributions, can be found at **Attachment B**.

#### Box 3 – Examples of matters previously negotiated in planning agreements

- Annual funding for road maintenance
- Road upgrades
- Maintenance arrangements for capital works projects
- The engagement of apprentices from the local area
- Disabled access upgrades
- Development of a masterplan and refurbishment of a park
- Improvements to the local gym/swimming pool facilities
- Upgrades to public toilet facilities
- Funding to support council diversification planning initiatives to be deployed once the mine closes.

#### 4. Region wide planning agreements

Planning agreements can be negotiated on a region-wide basis, with multiple councils being party to an agreement. This may occur where the impacts of a proposed mine are likely to extend beyond the boundaries of a single local government area, such as where impacts are experienced by communities in several local government areas.

One option that parties may consider in a region-wide planning agreement is the inclusion of a review clause that would enable parties to the agreement to reassess the allocation of funds to relevant local government areas based on an updated assessment of impacts on the ground.

While planning agreements are generally signed on the basis of forecasted impacts on local communities, the reality of where employees associated with a mine choose to live, how they commute, and the council resources they call on may differ in practice. The inclusion of review clause in a region-wide planning agreement would allow this to be revisited and reviewed, with funds potentially reallocated based on the findings. One way of achieving this could be to include a formula in the agreement that provides for sharing of impacts across local government boundaries.

#### 5. What matters can be included in a planning agreement?

Planning agreements can deliver contributions that provide a material public benefit to the community by providing for social, environmental and infrastructure amenities. Given this, a range of matters can be considered through planning agreement negotiations.

There are a range of tools available to assist parties in identifying the impacts of a mining proposal on local communities. One such tool is the Local Effects Analysis methodology, which has been prepared by DPE. Proponents are required to include a Local Effects Analysis in their Environmental Impact Statement (EIS) as part of their development application. The use of tools and methodologies, such as this, may assist parties to the agreement assess, calculate and value the impacts of mine proposals.

While planning agreements must be for a public purpose, the definition of public purpose under the EP&A Act is not limited. The broader ‘*acceptability test*’ principle outlined earlier in these guidelines, which requires public benefits to bear a relationship to the development, should be taken into consideration.

Importantly, planning agreements should not be seen as a mechanism to address systemic funding issues, or be seen as an opportunity to obtain unlimited and untied funding.

As part of the development of a best practice process, it is important that councils know the existing capacity of local services and infrastructure in order to better understand the impact of mining developments on their assets and services. In this way, councils can enter into informed negotiations with mining companies and be in a better position to quantify and justify the contributions that are being sought.

Councils should have consideration to the following when negotiating a planning agreement:

- the possibility of providing public services for the life of a specific impact. For example the provision of an additional childcare facility for the life of the mine;
- closure plans for public services or facilities once the impact dissipates, such as through changes in workforce across the life of the mine, or mine closure; and
- any ongoing or out-of-pocket costs to council of maintaining public facilities or services provided through a planning agreement.

There are existing frameworks, such as the Local Government Integrated Planning and Reporting Framework, already being implemented by councils which may assist in identifying matters to be considered in planning agreement negotiations. For example, councils must prepare Community Strategic Plans to outline the broad vision for their local communities, and indicate how that vision will be achieved. In addition, councils must prepare resource strategies which include long term financial plans and asset management plans. Currently, councils may also prepare section 94 or section 94A plans to obtain development contributions towards local infrastructure.

Once councils have such plans in place that outline the existing capacity of infrastructure, and prioritise future funding allocations, the next step is for mining-affected councils to plan for expected mining growth in their LGA.

### **Infrastructure**

While councils must plan for expected growth and manage demands on local infrastructure it is generally mining companies that provide information to the consent authority about the likely impacts on local infrastructure and proposed mitigation measures in respect of development applications for mining activities. This information is often contained in an Environmental Impact Statement.

Planning agreements can deal with impacts on infrastructure not otherwise dealt with through section 94 contributions or conditions of consent.

#### Box 4 – Examples of infrastructure previously negotiated in planning agreements

- Road construction / maintenance / upgrade
- Bridge construction / maintenance / upgrade
- Intersection upgrades
- Supply of materials, for example gravel or sand
- Footpath construction / maintenance / upgrade

#### Public services and public amenities

A planning agreement can also include provision for public services and public amenities, noting that there should be a relationship to the development.

A growth in population and the increased use of existing public amenities are likely outcomes of a mine. In many cases councils will not have planned for this growth and will rely on the terms of a planning agreement to ensure services to the existing community are maintained. However, councils should consider on-going costs of maintenance of these any services and amenities services once funding ceases and / or the mine closes (life of mine planning).

#### Box 5 – Examples of public services and public amenities previously negotiated in planning agreements

- Public car-parking,
- Library / community hall / aquatic centre / childcare facilities and centres
- Park upgrades / public toilet upgrades

#### Studies and strategic planning

Opportunities for life-of-mine planning can also be provided for as part of a planning agreement. Notwithstanding the outcome of the assessment under section 79C of the EP&A Act, further strategic planning may be appropriate. For example, councils may negotiate funding per year for the life of the mine as a monetary contribution. This money could be spent by the council for economic diversification planning – to ensure the LGA is prepared for mine-closure. This contributes to the monitoring of the planning impacts of development and the conservation of the natural environment and is referenced at section 93F.

#### Box 6 – Examples of studies and strategic planning that could form part of a planning agreement

- Strategic planning that would not have otherwise occurred – to identify baseline information to best address mine related growth in the community
- Structural reviews (roads, bridges, etc.)Education and training strategy
- Economic diversification planning
- Reimbursement of costs incurred by councils in preparing studies and undertaking public consultation in preparing for PA negotiations
- Mining exit strategies (following mine closures and end of operational life scenarios)

### Other public purposes

Other public purposes that might be addressed in a planning agreement include apprenticeships or training opportunities. Provisions would ideally be included in the planning agreement to allow councils to readily audit and report on such obligations.

## 6. Monitoring and reporting

Mechanisms for monitoring and reporting on the performance of a planning agreement should form part of any negotiations and be maintained throughout the life of the agreement. It is important to measure both successes and failures of any agreement and to develop strategies to deal with issues that arise.

This reporting should be through the Council's Integrated Planning and Reporting framework. Councils will need to provide information to the community about how contributions have been spent, and the outcomes that have been achieved.

## 7. Mediation processes

Negotiations between mining companies and councils can be contentious and protracted. Where negotiations stall, the parties should consider whether mediation would assist. There are many suitable qualified mediators in the marketplace, and the NSW Courts and Tribunal Services website includes links<sup>1</sup> to a range of alternative dispute resolution service providers.

The purpose of mediation is to assist parties to reach agreed outcomes. Mediators are impartial and do not give their advice or opinion about the issues or have any role in deciding the outcome. They simply seek to provide pathways for the parties to reach agreement themselves.

Any mediation process will need to be voluntarily entered into by parties and undertaken in good faith.

There are different types of mediation, and the way mediation is undertaken will be determined by the mediator appointed.

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<sup>1</sup> **NSW Government – Justice - Courts and Tribunal Services – Alternative Dispute Resolution website:**  
[http://www.courts.justice.nsw.gov.au/Pages/cats/courtguide/alternate\\_dispute\\_resolution/service\\_providers.aspx](http://www.courts.justice.nsw.gov.au/Pages/cats/courtguide/alternate_dispute_resolution/service_providers.aspx)

## Part B – Guiding principles for planning agreement negotiations for mining projects

The EP&A Act does not provide specific details about what should or should not be included in a planning agreement. However, DPE has developed some high-level principles to identify best practice for negotiating planning agreements relating to mining projects.

**Principle 1: Negotiations are entered into early and in good faith by all parties to the agreement, with all parties focused on delivering a planning agreement that is timely and follows best practice process.**

- Information, including methodologies for calculating impacts, is to be shared early and completely between parties and with any mediator noting that parties to a planning agreement are able to seek advice from Government agencies and experts in the field to inform their deliberations.
- Where the impacts of a proposed mine are likely to extend beyond the boundaries of a single local government area, such as where impacts are experienced by communities in several local government areas, planning agreements should be negotiated in an inclusive manner by councils impacted by the mine.
- Councils and proponents should start conversations early in the life of a proposal to ensure that councils and proponents can identify and allocate resources to undertake relevant studies and strategic work to better position themselves to reach an acceptable agreement.
- planning agreement negotiations should have regard to the assessment process, including best practice negotiation timelines (**set out in Attachment A**).

**Principle 2: The value of any contributions under a proposed planning agreement must be fair and reasonable, considering the impacts of the mine on the local community.**

- Reasonable efforts are to be made to assess, calculate and value all impacts of the mine proposal (which may include information contained in a proponents EIS) and this information is to be shared between parties freely and openly.
- A planning agreement should set out how the contributions will address the proposed impacts.
- Planning agreements should not provide for matters otherwise fully funded through other means, including Resources for Regions<sup>2</sup>, section 94 or 94A contributions or council rates. Planning agreements should not be conditional on other funding sources. However, a planning agreement may supplement other funding streams,

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<sup>2</sup> **Resources for Regions** is a grant program established under the NSW Government's Restart NSW Fund with \$217m committed over four years from 2011/12 to 2014/15. The program is managed by Infrastructure NSW and the objective of the program is to fund projects that will improve local infrastructure in mining affected communities.

especially in circumstances where the impacts of new development may not have been accounted for.

- Any contribution made through a planning agreement should account for impacts across the region. Best practice is to measure impacts across the region (which may include one or more local government areas) and proportionally attribute the contribution. Planning agreements that address region-wide impacts should have a review clause so that adjustments can be made in the event that actual impacts are different from forecast impacts.
- In general, impacts that relate to services principally provided by the State, such as State health and education services, should not be provided for in a planning agreement.

**Principle 3: Planning agreement negotiations reflect the priorities of the community, as outlined in council community strategic plans, and addresses impacts on the community over the life of the project.**

- Community strategic plans, relevant operation plans, as well as relevant Regional strategic plans should inform planning agreement negotiations as they identify the main priorities and aspirations of the community for which they have been prepared.
- Councils should consider the needs and aspirations of their communities when negotiating planning agreements, noting that this may have previously been undertaken as part of councils' strategic planning activities.
- Planning agreements should recognise the impacts of the proposal over the life of the project, and this should be reflected in councils spending. There should be particular regard given to the impacts of mine closure on the local government area or areas.

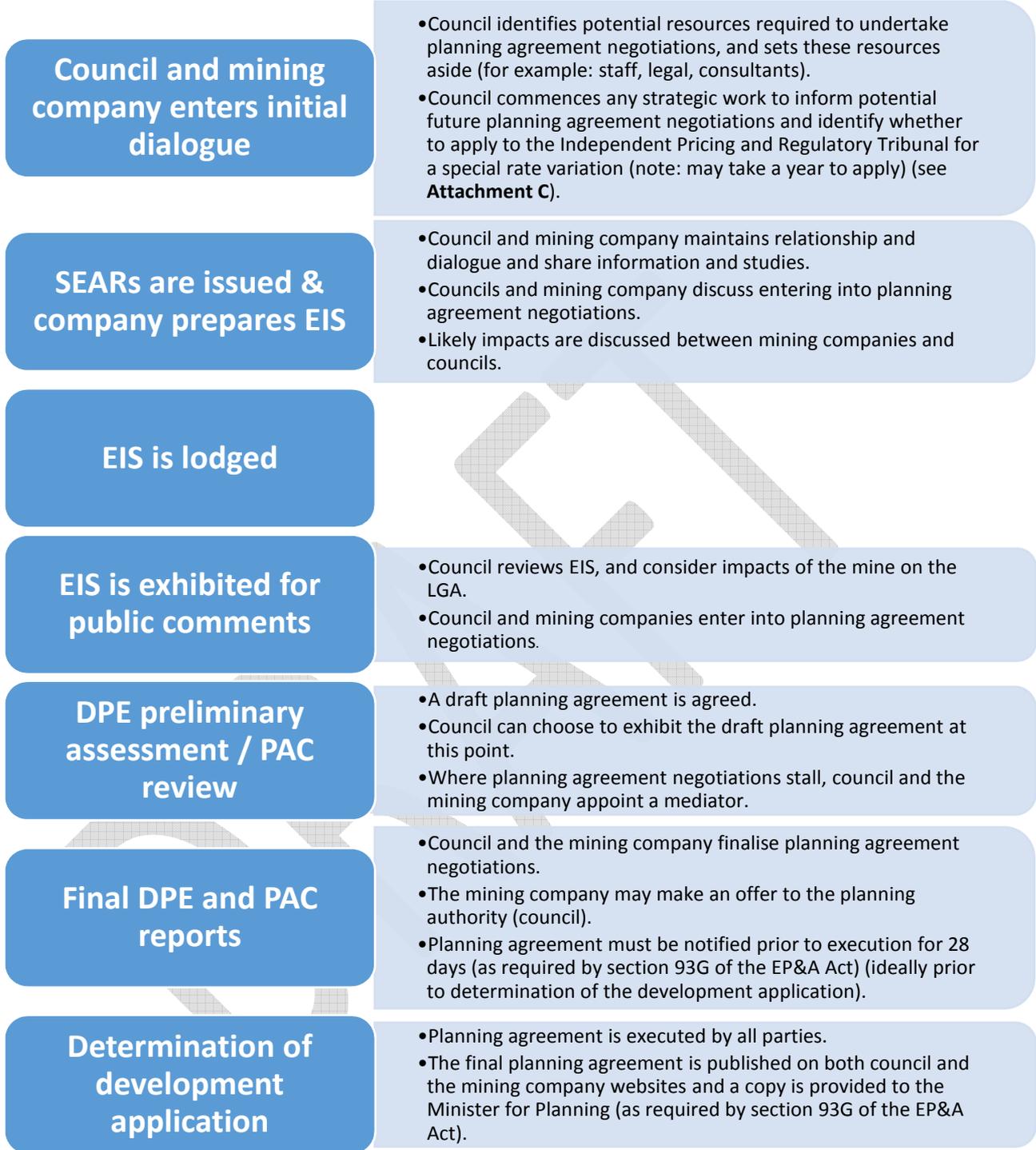
**Principle 4: The implementation of a planning agreement is transparent and accountable, and the final planning agreement is made available to the public.**

- Final planning agreements are to be made available to the community on both the council and developer's websites.
- The planning agreement should be clearly communicated and explained to the community so they can understand what is provided for under the planning agreement and why.
- The planning agreement must be notified for 28 days (as required by section 93G of the EP&A Act) prior to execution.
- The contributions received through a planning agreement should be used in accordance with the agreement.
- Implementation of the planning agreement is reported upon in a clear and transparent manner, and in accordance with standard local government reporting frameworks.

## Attachment A - Best practice planning agreement negotiation timeline

This flowchart flags the best practice time points for planning agreement negotiations and identifies key steps in the development assessment process for a mining project.

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## Attachment B – The development contributions regime in NSW

The following table provides a brief overview of the development contributions regime in NSW, to provide context for planning agreements negotiated under section 93F of the EP&A Act.

It should be noted that other development contributions in the NSW planning system not outlined in the table include contributions under section 64 of *the Local Government Act 1993*, special infrastructure contributions (section 94EF of the EP&A Act), and affordable housing contributions (section 94F of the EP&A Act).

Contribution type	Nexus required	Explanation
Planning agreement (section 93F)	No	A voluntary contractual arrangement to provide development contributions. Planning agreements may be required by a development consent condition but only if an offer is made by an applicant to enter into an agreement.
Section 94 (section 94)	Yes	A monetary contribution required by the imposition of a development consent condition and calculated in accordance with a Contributions Plan. A section 94 contribution can be satisfied by the provision of land or some other material public benefit.
Section 94A levy (section 94A)	No	A monetary contribution required by the imposition of a development consent condition and calculated in accordance with a Contributions Plan. This is an indirect levy that is generally no more than 1% of the proposed cost of carrying out the development, although regulations may increase that figure.
Special infrastructure contributions (section 94EF)	No	A monetary contribution required by the imposition of a development consent condition and calculated in accordance with a determination made by the Minister. A special infrastructure contribution can be satisfied by the provision of land or some other material public benefit.
Affordable housing (section 94F)	Yes	A monetary contribution or the dedication of land required by the imposition of a development consent condition and calculated in accordance with relevant provisions of a State environmental planning policy and the relevant local environmental plan.

Please refer to the Department's website for the *Development Contributions Practice Notes 2005*.

## Attachment C – Special variation to the Rate Peg

The provision of services to local communities is generally funded by councils. Under the *Local Government Act 1993*, councils receive funding from rates, charges, fees, grants, borrowings and investments to fund these measures.

Council rates are overseen by the Independent Pricing and Regulatory Tribunal (IPART) who are responsible for;

- determining the yearly rate peg that applies to ordinary council rates;
- reviewing and assessing council requests for special variations to rates;
- reviewing Contributions Plans where:
  - development contributions are sought to be imposed above the relevant cap, or
  - the council is seeking gap funding through a special variation of rates; or
  - the council is seeking gap funding through the Local Infrastructure Growth Scheme.

Councils have their rates pegged, which is the maximum amount of rates that a council can charge in order to provide the services required in the LGA (permissible income), with the rates peg determined by IPART. Councils are responsible for how the rates are allocated across their LGA.

Where a mine is likely to significantly increase the level of services that councils will need to provide, there is an opportunity for council to apply to IPART for a variation to the rate peg. The process requires the council to make an application to IPART justifying the proposed increase and seeking approval to increase rates. Further details can be found on IPART's website (<http://www.ipart.nsw.gov.au/>).