Integrated Mining Policy:

Planning Agreement Guidelines

Submission

NSW MINERALS COUNCIL

September 2015

Executive summary

The NSW Minerals Council (NSWMC) welcomes the opportunity to comment on the draft *Planning Agreement Guidelines (*guidelines*),* which underpin Planning Agreement (PA) negotiations.

Ensuring that planning agreements are informed by proper guidance is critical for the for the mining industry since, historically, PA negotiations have:

- Led to contribution amounts that are unrelated to project specific impacts.
- Lacked accountability and transparency.
- Been prolonged.

Whilst the move toward establishing a guideline and a set of principles to underpin PA negotiations is a positive step, the guideline is either unclear or silent in a number of key respects:

- Although the EP&A Act does not require a direct nexus between the development and the contribution, the guideline appears to move away from the "de minimis" concept, likely widening the application of planning agreements.
- It does not mandate timeframes for the negotiation of a planning agreement, despite mention of a mediation process. Nor does it provide for an arbitration process in situations where negotiation / mediation stalls.
- The 'impacts' of mining can be broadly interpreted to include impacts that are already addressed through an EIS. The impacts should be limited to socio-economic impacts to local infrastructure (which result from a measurable increase in population).
- No guidance is provided on appropriate calculation methodologies.

Overall, the guideline does not deliver the policy framework necessary to facilitate negotiation of timely, certain and appropriately scoped PAs and may not deliver much, if any, contribution toward the Premier's commitment to reducing assessment timeframes by 500 days. The NSWMC recommends that the Government utilise Section 93K to embed requirements regarding timeframes, arbitration and the need for a nexus between a project's impact and the contribution sought, or otherwise to seek legislative reform to implement these recommendations. NSWMC estimates that if its recommendations are taken on board, assessment timeframes could reduce by an average of 30 - 90 days.

About the NSW Minerals Council

The NSW Minerals Council (NSWMC) is the peak industry association representing the NSW minerals industry. Our membership includes around 100 members, ranging from junior exploration companies to international mining companies, as well as associated service providers.

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Introduction

Issues with the historical approach to planning agreements

The Department of Planning and Environment's (DPE's) current approach to planning agreements (PAs) encourages proponents of mining projects to negotiate an agreement. If an agreement is not reached, DPE has in the past imposed conditions of consent requiring the proponent to enter into a Voluntary Planning Agreement (VPA) with the local council. This approach has frequently led to:

- Delays in project approvals and project commencement.
- Significant inequities in the quantum of contributions both between projects and between local government areas.
- Contributions that are not based on, or in proportion to, the impact of a development on infrastructure and services.
- Contribution amounts that are significantly greater than would otherwise be required under s94.
- Proponents being placed in a situation where a VPA is not truly 'voluntary'.

The government has acknowledged that proponents are often asked to pay very high contributions under planning agreements and that these contributions are often for infrastructure beyond what is directly attributable to the development[1]. The experience of the mining industry in recent years reflects this. Other undesirable outcomes of the current system identified by the government include:

- The scope of infrastructure works in contributions plans has become too broad and additional mechanisms have allowed consent authorities to recover additional costs in a manner that is not sufficiently transparent and equitable.[2]
- Development contributions do not always reflect the actual cost of delivering infrastructure, resulting in uncertainty.[3]

In addition to these difficulties, the industry has other concerns, namely:

Lack of Nexus Between Contribution and Impact

There has been a lack of any direct link between identified impacts on local infrastructure and requests for contributions. There are expectations from councils that contributions do not need to link to impacts, as well as requests for standardised or untargeted contributions. Examples of this include:

- Contributions that were in response to (agreed) infrastructure impacts were often informed by needs identified during consultation with councils, rather than conclusions of the project's social impact assessment (SIA) or socio-economic assessment.
- There are instances where a council has made multiple attempts to obtain funding for what it regarded as essentially the same impacts. This is in contrast to Principle 2 '*The value of any contributions under a proposed planning agreement must be fair and reasonable, considering the impacts on the local community*' of the *Guiding principles for planning agreement negotiations for mining projects* (the principles).

[1] NSW Government (2013). A New Planning System for NSW - White Paper, Chapter 7. Prepared by the
[2] Ibid., p.162.
[3] Ibid.

- Councils sometimes request contributions that could not be classified as compensating for the impacts on local infrastructure and services, often in direct contradiction to findings of assessments.
- Requests for contributions that are wholly unrelated to a mine, for example, contributions towards museums or tourist facilities.

Lack of Clarity Regarding Goals and Expectations

Historically, industry feedback indicates that many negotiations around VPAs have had unclear aims, unfocused targets, and lacked clarity regarding parameters and expectations.

Delays and Costs Associated with Prolonged Negotiations

There has been a lack of will, incentive or requirement on the side of councils to finalise agreements, leading to shifting parameters, opportunity costs and approval delays. The most common factor that causes delays is the government's requirement for companies to negotiate a VPA *prior* to approval.

Lack of Consideration of Wider Community Contribution

Many historical VPAs have not considered the considerable contributions already made within the regions or communities by way of corporate community development funds, charity donations, sponsorships and training programs.

Double Dipping

There have been examples of 'double dipping' by local government in terms of receiving multiple funding and revenue from mining companies for what may be regarded as being directed to the same benefit or purpose.

For example, given that increased local infrastructure demand is due to changes in population, it is anticipated that appropriate s94 or s94A contributions plans would be in place, or planning agreements be negotiated, to ensure appropriate contributions are paid by residential developers and assumingly to the eventual residents in the new developments. Should mining proponents contribute to the upgrading of existing or development of new infrastructure for these residents who either work at the mine, or would have otherwise moved into vacant housing stock filled by mine workers, the contributions would effectively be paid twice. This is arguably inconsistent with the underlying principles of reasonableness and in relation to the acceptability test.

Differences between New Projects and Expansions

The same processes and expectations have been applied to expansions or modifications as those typically applied to new mines and sites.

Lack of Guidance or Support from State Government

Proponents have not had adequate guidance and support from DPE during the negotiation process, with a need for increased clarity, accountability and input from the Department.

VPAs are not genuinely 'voluntary'

In accordance with s 93I of the EP&A Act, DPE often requires that a planning agreement with the local council be entered into as a condition of a development consent, making PAs no longer 'voluntary'. Councils often use this bargaining power to make ambit claims (much higher than their actual expectations) and negotiate with mining companies to achieve their desired result. The Planning Assessment Commission (PAC) trigger has also been used by councils as a way to extract a higher amount from companies to avoid going through the PAC process (since opposition by the local council triggers a PAC approval).

Key issues

The articulation of a set of principles – fairness, transparency and accountability to underpin PA negotiations is a positive step, however the guidelines do not adequately address industry's fundamental concerns about timeliness, the absence of an arbitration process, or the need for a nexus between a project's impact and the contribution sought. That is:

- Although the EP&A Act does not require a nexus between the development and the expenditure, the position paper appears to move away from the "de minimis" concept, likely widening the application of planning agreements.
- It does not mandate timeframes for the negotiation of a planning agreement, despite mention of a mediation process. Nor does it provide for an arbitration process where negotiation / mediation stalls.
- The 'impacts' of mining can be broadly interpreted to include impacts that are already addressed through an EIS. The impacts should ideally be limited to socio-economic impacts to local infrastructure (which result from a measurable increase in population).
- No guidance is provided on appropriate calculation methodologies.

It is understood that local governments in mine affected areas shares these concerns. These issues are further discussed below.

The guidelines detract from the original intent of planning agreements – as a means of more flexibly facilitating the delivery of local infrastructure to compensate for the impacts of a development

The original intent of planning agreements was to fund public infrastructure where there is an increase in demand for public amenities and public services. The scope of s94 contributions were widened during the 1990s with the development of planning agreement contributions (and s94A contributions) to allow greater flexibility and to improve the efficiency of the process and allow for innovative contributions ideas by the parties of the agreement.

Despite improving delivery of local infrastructure being an important dimension of planning agreements, the guideline is largely silent on this historical intent. Rather, the guidelines appear to formalise current (inadequate) processes. The guidelines should be an opportunity to realign practice with the intent of the development contributions system as originally stated.

The current legislation does not require a 'nexus' between impact and contribution, however it should still be a consideration, to ensure that planning agreements outcomes are reasonable. In fact, DPE's '*Practice Note for Planning Agreements 2005*' (Practice Note) states, "*safeguards applying to the use of planning agreements should … provide for … the acceptability of a planning agreement, which*

embraces … concepts of reasonableness". The draft guidelines do not make any reference to reasonableness in its discussion of acceptability. As stated within the Practice Note, "*the key principles underlying reasonableness are nexus* [i.e. the relationship between the expected development and the demonstrated need for additional public facilities] *and apportionment* [i.e. to ensure the contribution amount does not lead to 'double dipping']". These principles must be more strongly stated in the guideline.

Further, there are already a number of statements that suggest that some nexus is necessary:

- s93F (4) of the EP&A Act states that planning agreements are "*not invalid by reason only* [emphasis added] *that there is no connection between the development and the object of expenditure*".
- The Practice Note states that, "*as a general indication, planning agreements may be directed towards … meeting the demands created by development for new public infrastructure, amenities and services*".

These statements suggest that at least some connection (nexus) is relevant to PAs. This is not brought out in the guidelines.

Finally, there is an incorrect assertion in the Practice Notes that development would lead to a net loss (i.e. that the costs to the local community would outweigh the benefits), therefore requiring a planning agreement to be formed. Mining projects normally create significant economic and other benefits, and in a planning agreement's consideration of compensating the impacts to the 'public domain' or 'social fabric of the community', the benefits should also be considered. The fact that many of the impacts of a new mining operation are already compensated through conditions of consent, biodiversity offsetting, land acquisitions, social impact opportunities etc. needs to also be considered.

Recommendation

- The guidelines should bring out the importance of reasonableness as a subset of the acceptability test, which is underpinned by the key principles of *nexus* and *apportionment.*
- The guidelines should clarify that some nexus is relevant to planning agreements.
- DPE should consider updating the Practice Notes to better reflect the intention of PAs, and allow them to be more applicable to mining projects.

The guideline moves away from the "de minimis" concept, likely widening the application of Planning Agreements

While the requirements for a 'nexus' does not explicitly apply to planning agreements (since their intent was to facilitate flexibility through efficiency of process and innovation), the provision of contributions is linked to the concept of *de minimis*, that is to say, contributions that are *not wholly unrelated* to a proposed development. Although the guideline refers to this aspect as part of the acceptability test, it does not provide any reference to relevant local infrastructure impacts, and departs from the *de minimis* concept when explaining what a planning agreement is and in the examples that are provided. The guideline widens the application of PAs, rather than providing clear guidance that will assist in streamlining effective outcomes for proponents, councils and the community.

Recommendation

- NSWMC recommends that the guidelines refine the scope of planning agreements, with a clearer link to the *de minimis* concept.
- The 'de minimis' criteria require a definition and/or example. There should be examples of wholly unrelated public benefits that should not be subject to a planning agreement for a mine.

The arbitration processes are inadequate

The guideline points out that negotiations between mining companies and councils can be contentious and protracted. Some of the reasons for the delays and controversy include:

- PAs being used to overcome revenue raising limitations, or as an opportunity to obtain unlimited and untied funding.
- Public benefits being sought that are unrelated to a mine development.
- Allowing the interests of individuals or interest groups to outweigh the public interest.
- Council attempting to extract unreasonable public benefits from developers due to their peculiar statutory position.

Negotiations need to be fast, predictable, transparent and fair to avoid unnecessary delays and disputes. The use of a NSW Courts and Tribunal's mediators is inadequate in meeting these requirements. DPE should be establishing a clear process with clear deliverables and timeframes, and increasing its power to intervene and adjudicate outcomes. Incentives for timely agreement should also be provided.

Recommendation

- NSWMC recommends that DPE establish a process with clear deliverables and timeframes for negotiating planning agreements.

Clear methodologies for calculating contributions are necessary

The guideline does not provide any guidance on appropriate calculation methodologies for determining contributions. The guideline refers to a proposed methodology to identify or calculate the potential local impacts that the VPA is supposed to be offsetting called the "Local Effects Analysis" (LEA), however the details of this are still being finalised. Nevertheless it is understood that this LEA relates more to the economic benefits and costs of a mine development, and has little relationship to the need for additional / upgraded public facilities.

DPE should provide a methodology for determining appropriate contributions for a mining development. In determining an appropriate contribution amount through a planning agreement, the following need to be considered:

- The contribution is related to the level of infrastructure demand created by a project, that is, not entirely unrelated to the development in question.
- The contribution is formulated in accordance with the principles of accountability and reasonableness, including the principles of nexus and apportionment.
- The contribution is different from, and in addition to direct contributions through an appropriate s94 or s94A plan or other planning agreement for the actual residential development.
- The number of employees (and their families) who are anticipated to be in excess of existing infrastructure and housing capacity.
- The overall level of population change related impact as it relates to each LGA, recognising that different councils have different requirements and capacities to accommodate incoming workforces.

Recommendation

- NSWMC recommends that DPE develop a clear methodology for determining planning agreement contributions.

Other issues

Other less significant issues with the guideline include:

- The language of the draft guideline document is quite loose and it is not clear whether it is binding on any party.
- Section 5 - paragraph 3 - The acceptability test *must* be taken into consideration.
- Section 5 - paragraph 4 - Planning agreements *must* not be seen as a mechanism of addressing systemic funding issues.

Recommended next steps

In the NSWMC's view, the guideline does not deliver the policy framework necessary to facilitate negotiation of timely, certain and appropriately scoped Planning Agreements and may not deliver much, if any, contribution toward the Premier's commitment to reducing assessment timeframes by 500 days. The NSWMC recommends that the Government embed requirements regarding timeframes, arbitration and the need for a nexus between a project's impact and the contribution sought by making a number of modifications to the draft guidelines.

NSWMC believes that the modifications could be imposed within the existing legislative framework via Section 93K of the EP&A Act. Section 93K of the EP&A Act allows the Minister to prepare a 'guideline' that is effectively given statutory force through a 'determination' or 'direction'. . The guideline can direct a planning authority (i.e. councils) to follow a particular procedure in negotiating PAs and would allow for tighter controls around the key issues identified above without the need for legislative change.

Section 93K provides:

> ***93K Determinations or directions by Minister***
>
> *The Minister may, generally or in any particular case or class of cases, determine or direct any other planning authority as to:*
>
> *(a) the procedures to be followed in negotiating a planning agreement, or*
>
> *(b) the publication of those procedures, or*
>
> *(c) other standard requirements with respect to planning agreements.*

In interpreting section 93K, NSWMC notes that:

- Neither section 93F nor 93I cross reference section 93K or limit the circumstances or manner in which 93K can operate.
- A guideline can be made to apply to any particular 'class of cases' (such as developments to which the Mining SEPP applies).
- The second reading speech for the *Environmental Planning and Assessment Amendment (Development Contributions) Bill* under which section 93K was introduced into the EP&A Act provides that *'Ministerial directions about the negotiating procedures and other matters will also be able to be given. This will ensure that the new system is implemented reliably and that the planning agreements scheme will operate consistently amongst all planning authorities… By recognising planning agreements under the Act, the Government will be able to set standards for best practice covering planning and public interest criteria that agreements must meet, as well as the way in which agreements are drafted and entered into'*.
- In the case of Sweetwater Action Group v Minister for Planning [2011] NSWLEC 106, Justice Biscoe held that 'section 93K empowers the Minister to make requirements which are additional to, not in substitution of, the requirements in s 93F'.
- On appeal to the NSW Court of Appeal, Beazley JA, Sackville AJA and Tobias AJA confirmed at [26] in *Hunlee Pty Ltd v Sweetwater Action Group Inc*; *Minister for Planning and Infrastructure v Sweetwater Action Group Inc [2011] NSWCA 378* that '*section 93K empowers the Minister to give directions to any other planning authority as to the procedures to be followed in negotiating a planning agreement, publication of the procedures or other standard requirements*'.
- Section 93K (a) expressly provides that any direction or determination made by the Minister can relate to the 'procedures to be followed in negotiating' a PA.
- Additionally, under clause 25B of the *Environmental Planning and Assessment Regulation 2000 (NSW) 'the Director-General may from time to time issue practice notes to assist parties in the preparation of planning agreements. This clause also note that under section 93K of the Act the Minister may give planning authorities directions with respect to planning agreements.'*

This clearly shows that the intent of section 93K was to allow for particular matters, such as those described in this submission to be addressed through a detailed VPA Guideline.

DPE should also note that section 94E of the EP&A Act, which has similar wording to s 93K, has previously been used to provide a direction that:

- Consent authorities regulating Port Botany and Port Kembla cannot impose a condition under sections 94 or 94A requiring the payment of a contribution for development on land within the Port Botany Lease Area or Port Kembla Lease Area (6 December 2013).
- Hawkesbury City Council may not impose a condition under section 94 in respect of development within Pitt Town Residential Precinct that requires contributions towards the cost of specified State and Regional transport infrastructure (24 September 2013).

- All councils and Joint Regional Planning Panels in NSW that impose a cap on contributions can be levied under section 94 of the EP&A Act for residential development in specified local government areas in NSW (28 August 2012).

These examples show that a similar direction could be issued by the Minister to require councils to follow a prescribed process for negotiating PAs.

If the Government is unwilling to use s 93K, then the Government should amend the EP&A Act to stipulate a definitive process for negotiating planning agreements that lays down mandatory requirements for negotiation timeframes, arbitration processes and a nexus between a project's impact and the contribution sought with a mechanism for calculating the contribution.

Recommendation

- NSWMC recommends that the Government embed requirements regarding timeframes, arbitration and the need for a nexus between a project's impact and the contribution sought with a mechanism for calculating contributions. NSWMC believes that the modifications could be imposed within the existing legislative framework via section 93K of the EP&A Act.
- Alternatively, the Government should amend the EP&A Act to stipulate a definitive process for negotiating planning agreements that lays down mandatory requirements for negotiation timeframes, arbitration processes and a nexus between a project's impact and the contribution sought with a mechanism for calculating the contribution.