NSW PRODUCTIVITY COMMISSION

REVIEW OF INFRASTRUCTURE CONTRIBUTIONS SYSTEM

5 August 2020

NSW MINERALS COUNCIL

NSW Minerals Council

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Contents

1 Introduction

The New South Wales Minerals Council (NSWMC) appreciates the opportunity to contribute to the review of infrastructure contributions in New South Wales being undertaken by the NSW Productivity Commission.

It's well-established that mining projects contribute significant economic and social benefits to local, regional, State and the National economies. Mining projects are also subject to a range of fees, taxes, levies, and contributions which combined, are significant.

In 2018-19 the NSW mining industry directly spent almost $14 billion on wages, suppliers, community groups and government payments in NSW, including over $2 billion in royalties to the NSW Government. The mining industry directly employs 40,000 people[1] in NSW and supports the jobs of tens of thousands more working in over 7,000 mining supplier businesses across NSW.

The coal industry is the largest export industry in New South Wales, and the second largest export industry nationally after iron ore. NSW exported around 168 million tonnes of coal in 2018-19, representing over 40 percent of national coal export volumes.

It's noted the "*Issues Paper – Review of Infrastructure Contributions in New South Wales*" (Issues Paper) primarily deals with contributions associated with urban development. Whilst it's understood urban development makes up the majority share of developer contributions in NSW, the review should also give adequate consideration to other industries which also provide significant contributions.

For example, the NSW mining industry has contributed around $60 million to a relatively small number of local councils with mining projects through Voluntary Planning Agreements (VPAs) over the last 5 years, which is in addition to royalties, rates, land taxes, wages and other local community contributions. Rates alone over the same 5-year period paid by mining companies totalled almost $200 million.

NSWMC supports the holistic review of the use of development/infrastructure contributions in NSW, which includes consideration of all infrastructure funding sources, as well as principles that achieve greater "*certainty, transparency, efficiency and fairness (equity) in the setting of infrastructure contributions"*.

Feedback from NSWMC is largely contained to those provisions relevant to the establishment and operation of mining projects in NSW, with an emphasis on issues mining companies commonly experience around the use of VPAs.

The use of VPAs for determining contributions for mining projects is increasingly problematic for the industry and is causing significant levels of uncertainty, frustration, and delays for projects. The current practice of requiring a proponent to obtain the agreement of the council/s on the terms of a VPA before the project assessment is finalised is creating an increasingly untenable situation where proponents are effectively being forced to agree to the councils request for contributions. The requirements requested by council often have little if any relationship to an actual increased demand for services generated by the mining project. The industry has raised this issue with government over a number of years with no satisfactory resolution to date. The uncertainty around what contributions will be paid and delays is resulting in significant frustrations for projects.

VPAs, which were developed primarily for urban development projects, have been used by the Department of Planning, Industry and Environment (Department of Planning), local councils and proponents of mining projects as a default local contributions framework in the absence of a fit for purpose contributions framework. This is evidenced by the recently exhibited *Planning Agreement Practice Note* (DPIE 2020) which explicitly excludes its application to mining projects. In short there is

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[1] Australian Bureau of Statistics - Labour Force Statistics

no regulatory or clear policy framework for governing development contributions from mining projects in NSW.

VPAs can offer flexibility for both Councils and proponents as the terms are negotiable and not subject to the same legislative restrictions as other local contribution options. However, this flexibility, combined with the lack of a clear process has created significant challenges for both the councils and proponents. In short, the current approach for developer contributions in NSW is not effective. The absence of a suitable and predictable framework also creates an environment of mistrust between councils, the proponent and ultimately the local communities.

In a report into Planning Agreements between mining companies and local councils commissioned by the Department of Planning in 2018, CW Strategic Planning Services noted that whilst this "*flexibility is to some degree responsible for the popularity of VPAs, the negotiation process can complicate the approvals process and deliver a range of variable outcomes which may not reflect the impacts associated with the relevant mining proposal. There is clear evidence that the process results in inequity in the amount of contributions between projects and local government areas and delays in project delivery*."

The use of VPAs for mining projects, and the practice of requiring approval from local council/s has led to a range of significant problems including:

- Vastly inconsistent outcomes;
- Contributions that have little, if any, relationship (nexus) to the actual demand for community services and local infrastructure expected to arise as a result of the project; and
- Examples where councils have used the VPA approval process to frustrate/delay projects for the purposes of extracting higher contributions.

The issues being experienced by the mining industry appear to be consistent with the discussion around VPAs as outlined in the Issues Paper. The Department of Planning, mining affected councils and NSWMC have attempted to reach agreement on a suitable and mutually agreeable pathway forward over years. Most recently, the Department organised for an independent Senior Counsel to facilitate discussions between NSWMC and the Association of Mining and Energy Related Councils (AMERC). However, for a range of reasons, agreement on a methodology hasn't been able to be reached.

As part of the NSW Productivity Commission's deliberations on infrastructure contributions in NSW, NSWMC and its members recommend that consideration be given to:

1. **Review to consider non-urban development (e.g. mining) -** The review and subsequent recommendations consider other industries which make significant development contributions, such as the mining industry, and not be limited to urban development only.
2. **A transparent, efficient and certain contributions framework for mining projects administered and determined by the NSW Government** - Based on the unique circumstances associated with mining projects, development of a fit for purpose and efficient State based contribution framework developed by the NSW Government that is applicable to mining projects that addresses:
    - The total contributions mining companies deliver through royalties, rates, land taxes, local economic activity, developer contributions, other voluntary community contributions, and conditions of development consents. Developer contributions payable by the mining sector under the planning legislation should be considered in this broader context of the totality of taxes, rates, charges and other contributions made by the sector, to ensure that there is no double-dipping or duplication of contributions and that the mining sector is not being required to pay more than its 'fair share'.

- A contributions framework that creates a clear set of rules based on the actual demand for community infrastructure and services generated by a mining project and removes the ability to obtain contributions for non-related matters, and double-dipping.
- An equitable, simple and efficient contributions framework based on a transparent and enforceable calculation/methodology (for both roads and community infrastructure) that is administered by and determined by the NSW Government as part of the SSD assessment process.
- The contribution plan for mining projects should be developed by the NSW Government and include consultation with the NSW mining industry and mining affected local councils.

3. **Certainty around Rates -** Maintain appropriate State Government regulatory oversight over the NSW rates framework to ensure councils are unable to unreasonably impact on particular rating categories, and that any increases in rates are transparent and justified.

As the Issues Paper correctly notes, improved efficiency and certainty in the infrastructure contributions process and outcomes for projects will ultimately contribute to an improved investment environment in NSW. The economic impacts associated with COVID-19 will place the NSW economy under significant pressure for some time to come. Under these challenging circumstances, it's imperative that industries with a proven track record of providing thousands of jobs and billions in investment, such as the NSW mining industry, are encouraged under a reasonable and certain regulatory environment.

The review provides a genuine opportunity to address the long-term issues around inequity, uncertainty and inefficiency of the contributions framework as it's currently being applied to mining projects in NSW.

NSWMC and its members would welcome the opportunity to be directly involved in the review of the NSW Infrastructure Contributions going forward.

2 Economic Contribution of the mining industry

The following information is provided for the purposes of understanding the total economic contribution mining companies in NSW make to local, regional and the State economies to assist in the review of infrastructure contributions for mining projects.

As highlighted below, the economic contribution of mining projects is significant, and flows to a diverse range of areas. The review being undertaken by the NSW Productivity Commission provides an opportunity to examine the efficiency of development contributions accrued by local councils from mining projects relative to all other taxes, levies and contributions, and to ensure any future contributions scheme applicable to mining projects:

- Avoids duplication of charges;
- Is genuinely linked to the delivery of additional demand for local infrastructure and services created by the project; and
- Provides certainty and consistency of both process and outcomes.

Experience has shown the current approach of negotiating VPAs for mining projects on a case by case basis with individual councils in the absence of a State-wide framework fails to meet the objectives and principles as outlined in the Issues Paper.

In 2018-19 the NSW mining industry directly spent almost $14 billion on wages, suppliers, community groups and government payments in NSW, including over $2 billion in royalties to the NSW Government.

The mining industry directly employs 40,000 people[2] in NSW and supports the jobs of tens of thousands more working in over 7,000 mining supplier businesses across NSW.

The coal industry is the largest export industry in New South Wales, and the second largest export industry nationally after iron ore. NSW exported around 168 million tonnes of coal in 2018-19, representing over 40 percent of national coal export volumes.

2.1 Economic Contribution to Local Councils

Mining companies make significant contributions to the councils within which they operate (and therefore local services and infrastructure) through:

- The payment of rates
- Developer contributions (such as the building or maintenance of roads) agreed as a condition of planning approval
- Voluntary community contributions
- Works in kind associated with any local approvals (e.g. s.138 Roads Act approvals)
- Economic activity through the purchase of local goods and services associated with the operation of mining projects

During 2018/19, contributions from mining companies to local councils totalled over $95 million, consisting of:

  - Rates - $45.1 million
  - Other contributions - $32.7 million

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[2] Australian Bureau of Statistics - Labour Force Statistics

- Voluntary Planning Agreements (VPA)/developer contributions - $11.3 million.[3]

As the table below highlights, over the last 5 years mining companies have contributed over $322 million to local councils within which they operate.[4]

Year	Rates	VPA/Developer	Other	Total
2018/19	$45,067,465	$11,323,376	$32,661,004	$95,468,011
2017/18	$39,808,223	$15,122,982	$4,083,502	$61,229,152
2016/17	$27,435,815	$11,481,201	$5,142,561	$46,519,248
2015/16	$34,995,113	$14,626,402	$6,052,901	$58,617,448
2014/15	$45,913,976	$7,106,830	$7,471,814	$60,638,365
Total	**$193,220,592**	**$59,660,791**	**$55,411,782**	**$322,472,224**

2.2 Rates Paid to Local Councils

Over the last 5 years, mining companies have paid around $200 million in rates to the local councils within which they operate. By way of comparison the total rates paid by mining companies is equivalent to funds being made available by the NSW Government through the Resources for Regions scheme ($50 million in 2020/21).

Rates for mines are based on land valuations, which for mining related land include the value of the resource. The following Table identifies the amount of rates mining companies have paid to local councils over the last 5 years.

Year	Rates paid by mining
2018/19	$45,067,465
2017/18	$39,808,223
2016/17	$27,435,815
2015/16	$34,995,113
2014/15	$45,913,976
Total	**$193,220,592**

Note: Figures are from the NSW Mining Industry Expenditure Impact Surveys from 2014/15 to 2018/19.

It is noted that a number of councils where mining operations are located have significantly increased the rates revenue obtained from land categorised as 'Mining' land, relative to the other rating categories.

The distribution of rates amongst the four separate rating categories (Residential, Business, Farmland & Mining) is at the discretion of a local council, with almost no regulatory oversight by the State Government, and limited opportunity for review or reconsideration if there is an objection to the distribution.

The Table below highlights five mining affected Councils where the rates, both in dollar amount and relative to other rates categories, have either increased, or remain relatively high compared to other categories.

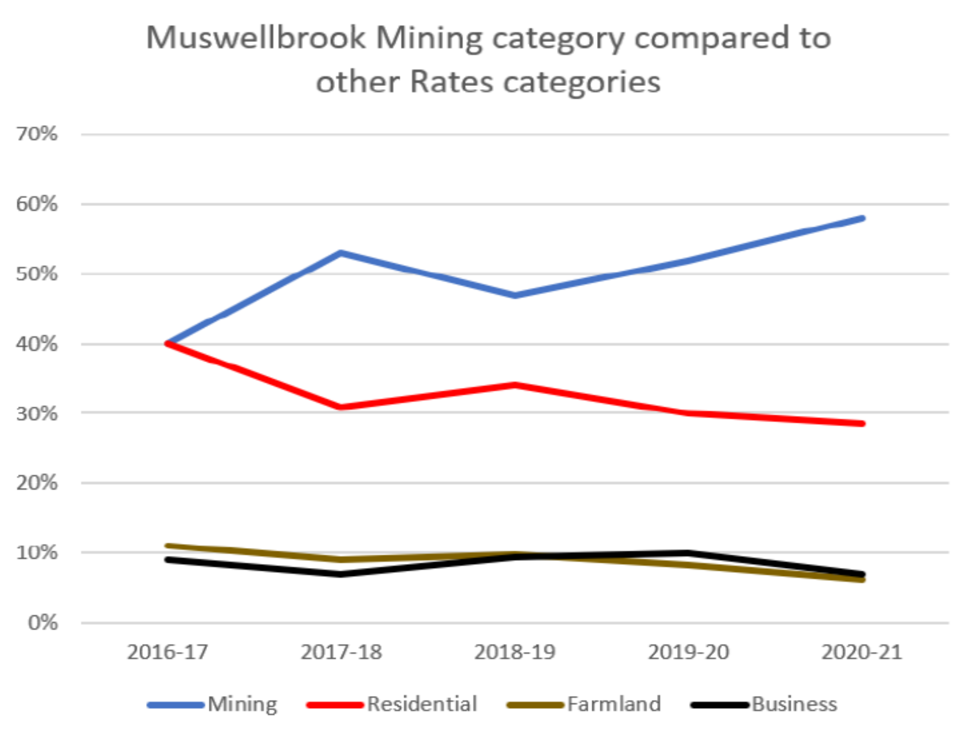
[3] NSW Mining Industry Expenditure Impact Survey 2018/19

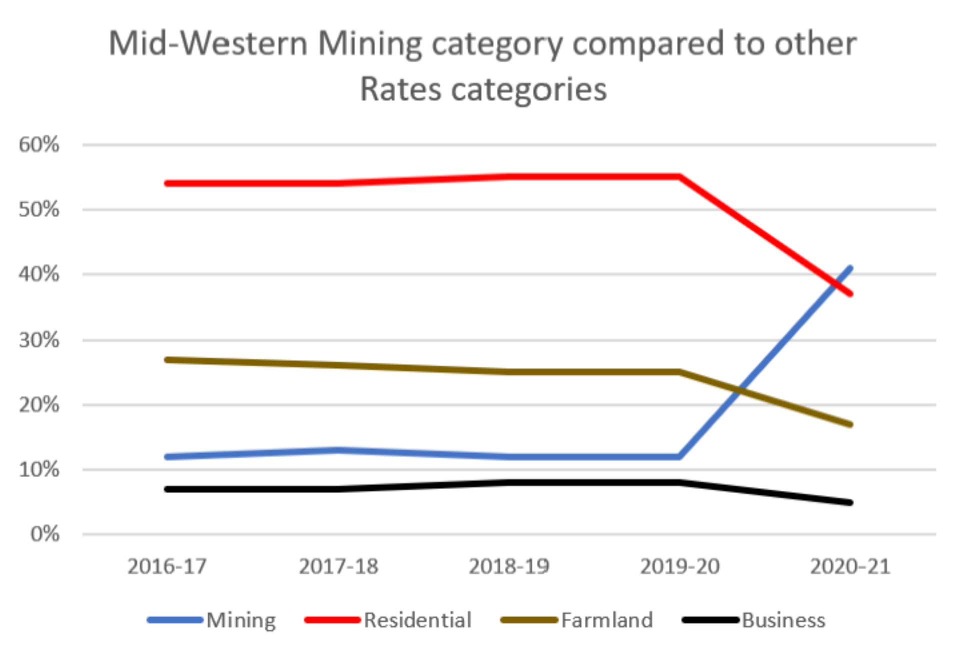
[4] NSW Mining Industry Expenditure Impact Surveys from 2014/15 to 2018/19.

Percentage of total rates received from the mining category					
	2016-17	**2017-18**	**2018-19**	**2019-20**	**2020-21**
Muswellbrook	40%[5]	53%[6]	47%[7]	52%[8]	58%[9]
Singleton	32%[10]	36%[11]	35%[12]	35%[13]	35%[14]
Cobar	30%[15]	58%[16]	43%[17]	43%[18]	43%[19]
Blayney	50%[20]	51%[21]	51%[22]	49%[23]	49%[24]
Mid-Western	12%[25]	13%[26]	12%[27]	12%[28]	41%[29]

The following graphs indicate the upwards trend in the proportion of rates collected from the mining category and the corresponding downwards trend in the other rates categories. In the majority of cases, there does not appear to be a sound basis for the substantial differential between the rates applying to each land use category in consideration of the demand on council infrastructure and services that the mining category creates as opposed to other categories.

[5] OLG time series data (16/17)
[6] OLG time series data (17/18)
[7] IPART - MSC Special Variations & Minimum Rates 2019-20 Part A Excel
[8] Muswel brook Shire Council 2019/20 Revenue Policy
[9] Muswel brook Shire Council 2020/21 Revenue Policy
[10] Singleton Shire Council 2016/17 Revenue Policy
[11] OLG time series data (17/18)
[12] Singleton Shire Council 2018/19 Operational Plan
[13] Singleton Shire Council 2019/20 Revenue Policy
[14] Singleton Shire Council 2020/21 Operational Plan
[15] OLG time series data (16/17)
[16] OLG time series data (17/18)
[17] Cobar Shire Council General Purpose Financial Statements for the year ended 30 June 2019 https://www.cobar.nsw.gov.au/images/Annual_Financial_Statements-GPFS-2019.pdf
[18] Cobar Shire Council Annual Operational Plan 2019-2020 https://www.cobar.nsw.gov.au/images/files/Integrated_Planning/Annual_operation_plan/20192020_Annual_Operational_Plan/01_-__Annual_Operational_Plan_2019-2020_FINAL.pdf
[19] Cobar Shire Council Revenue Policy 2020-2021 https://www.cobar.nsw.gov.au/images/files/Integrated_Planning/Annual_operation_plan/Revenue_Policy_2020-2021.pdf
[20] OLG time series data (16/17)
[21] OLG time series data (17/18)
[22] Annual Financial Statements 2018-19 - Blayney Shire Council
[23] Blayney Shire Council 2019/20 Revenue Policy
[24] Blayney Shire Council 2020/21 Operational Plan
[25] OLG time series data (16/17)
[26] OLG time series data (17/18)
[27] Delivery Program 2017/18 - 2020/21 | Operational Plan 2018/19 Mid-Western Regional Council
[28] Delivery Program 2017/18 - 2020/21 | Operational Plan 2019/20 Mid-Western Regional Council
[29] Delivery Program 2017/18 - 2020/21 | Operational Plan 2020/21 Mid-Western Regional Council





The mining industry acknowledges its responsibility to reasonably contribute to local community facilities and services. However, the recent significant increases of rates for mining projects in some councils is arguably subsidising softer or reduced rates increases in other categories, given there's no apparent material change or increase in demand for services or facilities generated by the mining operations in these local government areas.

Furthermore, there are already mechanisms which some councils with mining operations have used to overcome rate pegging, including through retrospectively re-categorising land as mining land where that land may have previously been categorised as farmland. This appears to be inconsistent with the objective of rate pegging which is to prevent large windfall gains from councils which detrimentally impact rate payers.

At present, the only control that exists for mining companies who are subject to the significant rates increases is the IPART determined "rate pegging". This ultimately limits the overall rates revenue increases a council can achieve from year to year, which provides some protection to all ratepayers in an LGA.

It's noted that "Local government rate pegging" has been identified by the NSW Productivity Commission for further exploration with stakeholders (Chapter 5).

The discussion around rates in the Issues Paper is understood in the context of urban development and particularly increased demand on urban councils' services and infrastructure arising from substantial increases in population. However, consideration should be given to potential implications or unintended consequences associated with any relaxation of or changes to rate pegging, and what controls are necessary/available to ensure ratepayers unfairly affected by increases have a reasonable right of recourse. For example, if additional rates revenue is allowed in an LGA with mining operations, would there be limitations placed on a council from obtaining most of the additional rates revenue from the Mining category?

Recommendation

Maintain appropriate State Government regulatory oversight over the NSW rates framework to ensure Councils are unable to unreasonably impact on particular rating categories, and that any increases in rates are transparent and justified and there is suitable regulatory oversight.

2.3 Developer Contributions and Other Council Contributions

Mining companies make significant contributions to local councils through:

- Developer contributions obtained through VPAs,
- Genuine voluntary contributions,
- Contributions obtained by local councils through other conditions of a development consent or other approvals (e.g. roads approvals or works in kind).

Over the last 5 years, mining companies have contributed almost $60 million to local councils through developer contributions or VPAs.

Year	VPA/Developer	Other
2018/19	$11,323,376	$32,661,004
2017/18	$15,122,982	$4,083,502
2016/17	$11,481,201	$5,142,561
2015/16	$14,626,402	$6,052,901
2014/15	$7,106,830	$7,471,814
Total	**$59,660,791**	**$55,411,782**

It's noted the Report released by the NSW Productivity Commissioner identifies at *Issue 4.11: Works-in-kind agreements and special infrastructure contributions*. The Report notes that works-in-kind agreements can realise savings and efficiencies, but they can result in infrastructure being provided out of the planned sequence and prioritise delivery of some infrastructure (such as roads) at the expense of other infrastructure (such as open space and biodiversity offsetting).

In addition to works required through a VPA, conditions of development consent issued by the State government (or the Independent Planning Commission) and imposed at the request of a local council, are sometimes used to require a proponent of a mining project to deliver infrastructure or community services (e.g. typically roads). There are also circumstances where a council will use its approval authority role under s.138 of the *Roads Act 1993* to obtain additional monetary contributions or works to a local road network through works in kind, despite the original assessment and approval foreshadowing the undertaking of the works, and s. 4.42 of the *Environmental Planning and Assessment Act 1979* requiring any subsequent roads works approval to be issued substantially consistent with the terms and conditions of the original development consent.

These works are often in addition to the package of infrastructure contributions agreed to as part of the VPA. These types of infrastructure works, as well as other payments that have been made directly to local councils (excluding rates and VPA contributions) have totalled approximately $55 million over the last 5 years.

2.4 Voluntary Local Community Contributions

In addition to VPA contributions, rates and other local council contributions, mining companies contribute significant money to other community services within which they operate. Community contributions over the last 5 years totalled around $46 million.[30]

During 2018/19, NSWMC survey respondents directly contributed $9.5 million to 1,137 community groups across New South Wales in a wide range of areas including health, education, environment and the arts.

2.5 State Government Contributions

In addition to the direct contributions made to local councils, mining projects also deliver significant contributions to the State through royalties, stamp duty, payroll tax and land tax.

During 2018/19, the direct contribution made by companies surveyed in state government payments was approximately $2.3 billion – representing an annual increase of 17.1% from the level recorded in 2017/18 ($2.0 billion) – comprised of royalties ($2.1 billion), payroll tax ($159.4 million), stamp duty ($53.7 million) and land tax ($15.5 million).[31]

State Government contributions over the last 5 years totalled $8.6 billion as follows.[32]

Year	Royalties	Stamp duty	Payroll tax	Land tax	Other	Total
2018/19	$2,080.8 million	$53.7 million	$159.4 million	$15.5 million	$28.5 million	$2.3 billion
2017/18	$1,596.5 million	$231.9 million	$143.4 million	$12.8 million	$11.5 million	$2.0 billion
2016/17	$1,541.3 million	$10.7 million	$130.2 million	$18.2 million	-	$1.7 billion
2015/16	$1,124.8 million	$10.2 million	$136.0 million	$19.3 million	-	$1.3 billion
2014/15	$1,153.5 million	$8.0 million	$142.3 million	$19.8 million	-	$1.3 billion
Total	$7,496.9 million	$260.8 million	$711.3 million	$85.6 million	$40 million	$8.6 billion

[30] NSW Mining Industry Expenditure Impact Surveys from 2014/15 to 2018/19.

[31] NSW Mining Industry Expenditure Impact Survey 2018/19.

[32] NSW Mining Industry Expenditure Impact Surveys from 2014/15 to 2018/19.

2.6 Wages and Salaries

Across NSW, the total economic impact of the surveyed companies in 2018/19, based on Type II multipliers (i.e. including both indirect industry and consumption-induced effects), amounted to $11.399 billion in income (wages and salaries) paid to direct and indirect workers.

Most of the workers in the NSW mining industry live close to the place of employment within regional NSW. This means that the incomes obtained by mine workers will predominantly be spent within the local council areas or regions of NSW where the mines are located, which further contributes to the economic viability of the local council.

Wages and salaries over the last 5 years totalled $51.104 billion as follows.[33]

Year	Wages and Salaries
2018/19	$11.399 billion
2017/18	$10.159 billion
2016/17	$9.785 billion
2015/16	$9.605 billion
2014/15	$10.156 billion
Total	**$51.104 billion**

[33] NSW Mining Industry Expenditure Impact Surveys from 2014/15 to 2018/19.

3 Issues Associated with Determining Contributions for Mining Projects

NSWMC considers it timely the NSW Productivity Commissioner is undertaking a holistic review into the infrastructure contribution framework in NSW. Unfortunately, the "*Issues Paper – Review of Infrastructure Contributions in New South Wales*" is almost exclusively focussed on contributions associated with urban development.

Whilst it's understood urban development makes up the majority share of developer contributions in NSW, the review should also give adequate consideration to the experiences and issues being faced by other industries which also provide significant developer contributions to local councils, such as the NSW mining industry.

Recommendation

The review and subsequent recommendations consider other industries which make significant development contributions, such as the mining industry, and not be limited to urban development only.

In addition to outlining the economic contribution mining makes for the purposes of providing context, the NSWMC submission focusses on issues associated with the use of VPAs to determine development contributions for mining projects in NSW, which is based on years of frustrating experience in negotiating VPAs with local councils, and is resulting in significant delays and uncertainty for projects.

It's noted the Report released by the NSW Productivity Commissioner identifies a range of concerns or issues associated with VPAs. These are identified as:

- *Issue 3.1: Principles for planning agreements are non-binding*
- *Issue 3.2: Transparency and accountability for planning agreements are low*
- *Issue 3.3: Planning agreements are resource intensive*
- *Issue 4.8: Improving transparency and accountability*

In addition, the Report notes the following issues relating to VPAs have been identified for further exploration with stakeholders:

- *Lack of principles in s.7.4 Planning Agreements enables flexibility of planning agreements but creates uncertainty and undermines confidence in the planning system.*
- *Lack of transparency and certainty in the way contributions are calculated and spent on infrastructure provision needs to be addressed.*

The issues outlined below are consistent with those that have been identified in the Report prepared by the NSW Productivity Commissioner.

NSWMC and its members would welcome the opportunity to be directly involved in the review of the NSW Infrastructure Contributions framework going forward.

3.1 The use of VPAs for Mining Projects

VPAs, which were developed primarily for urban projects, have been used by the Department of Planning, local councils and proponents of mining projects as a default local contributions framework in the absence of a fit for purpose or defined contributions framework that is directly applicable or suitable for mining projects.

Mining projects, which are categorised as State Significant Development (SSD) are assessed by the Department of Planning under the provisions of the EP&A Act, and typically determined by the Independent Planning Commission (other than modifications).

It's noted that in 2015 the NSW Government released draft *Planning Agreement Guidelines for State Significant Mining Projects' ('VPA Guidelines')* for public comment which aimed to assist local councils and proponents of State significant mining projects in negotiating planning agreements under section 93F of the *Environmental Planning and Assessment Act 1979* ('EPA Act').

Whilst the principles were generally agreed to, the draft document, which was never finalised, provided guidelines only and ultimately would not have compelled a council or proponent to comply to the requirements. Irrespective of this, the guidelines were never finalised and as far as NSWMC is aware have not been used by industry or councils to assist in resolving VPAs.

The lack of a suitable regulatory framework combined with the process for negotiating VPAs has resulted in a number of significant issues for proponents of mining projects as discussed below.

3.2 VPAs are not 'Voluntary'

As the name suggests, an essential element of the VPA is that it is meant to be voluntary on the part of the proponent. Experience over the years however has shown that a number of councils are exploiting the dynamics of the planning approval process for SSD projects, resulting in outcomes being imposed on proponents, and proponents having to accept unsatisfactory outcomes due to potential time and cost penalties.

Whilst the approach by some councils has been questionable, the practice is allowed to occur in the absence of any State Government-imposed regulatory framework that is specific to the mining industry. The lack of oversight is evidenced by the recently exhibited *Planning Agreement Practice Note* which explicitly excludes its application to mining projects. In short there is no regulatory framework governing the process or outcomes for development contributions for mining projects in NSW.

In terms of finalising a VPA, the Department of Planning typically encourages the proponent of a mining project to engage in discussions with the relevant council for the negotiation and agreement of financial contributions under a VPA. In some cases, mining projects can cross multiple local government areas, in which case proponents re required to negotiate separate VPA terms with a number of councils. For example, CleanTeq's Sunrise project's VPA required negotiation with Lachlan Shire Council, Parkes Shire Council and Forbes Shire Council.

Experience has shown however, some councils have used this process as an opportunity to demand contributions above and beyond those that could be reasonably linked to an actual increased demand for community infrastructure or services because of the development. The councils can achieve this outcome by protracting VPA negotiations to the extent there is no agreement at the point where the SSD assessment is nearing completion, often after several years of assessment.

At this point, the matter becomes time critical for the proponent, and with limited ability to rely on a regulatory framework or the intervention of the State Government, the consequential delay to the project approval process and financial penalty involved often results in the proponent agreeing to the demands made by the council. In this respect, the VPA ultimately agreed to can hardly be characterised as "voluntary".

3.3 The Mining Industry Issues with VPAs are Well Known

The NSW Government has been aware of the issues around VPAs for mining projects for some time and has actively attempted to assist discussions between AMERC and NSWMC to reach agreement.

NSWMC has been advocating for more certainty of both process and outcomes associated with VPAs for a number of years.

In the absence of a suitable regulatory framework, NSWMC and AMERC entered a process in 2016, of working together to attempt to reach agreement on a suitable framework to govern the negotiation of VPAs between mining companies and councils. Whilst the discussions were constructive and held in good faith, and various levels of agreement where reached on a negotiation process and a methodology for calculating road costs, agreement was not reached on how contributions towards community facilities should be calculated.

To assist this process, the Department of Planning Commissioned a report in 2018 to consider Planning Agreements between mining projects and local councils, which was undertaken by CW Strategic Planning Services. The report noted that whilst this "*flexibility is to some degree responsible for the popularity of VPAs, the negotiation process can complicate the approvals process and deliver a range of variable outcomes which may not reflect the impacts associated with the relevant mining proposal. There is clear evidence that the process results in inequity in the amount of contributions between projects and local government areas and delays in project delivery*."

On community contributions, the report concluded:

> *"…..both parties advocate different methodologies for calculating non road related infrastructure contributions. Fundamental matters underlying these differences relate to the:*
>
> - *need as identified by the NSWMC that there must be nexus between the project and the contribution, in particular infrastructure requirements resulting from population change; and*
> - *view of MERC that the methodology should include the 'broader community and socio-economic impacts' associated with mining development within the local government area consistent with the voluntary nature of VPAs".*

The report also noted the need for an agreement on a community (non-roads) contributions methodology that provides consistent, timely and sound planning outcomes is fundamental to the success of the VPA package. Without it there will continue to be inconsistent outcomes and project delays.

In response to recommendations from the CW report, the Department of Planning agreed to engage a Senior Counsel to facilitate negotiations between AMERC and NSWMC.

After three negotiation sessions in 2019, agreement was still unable to be reached on how to determine community infrastructure. At the conclusion of discussions, agreement was reached on:

- *a process for negotiating VPAs;*
- *a roads contribution calculator;*
- *a set of guiding principles and calculation options for determining community contributions for mining projects.*

The guiding principles which outline a range of methodologies that could be used have no statutory weight and are voluntary. As such they offer little in terms of certainty.

3.4 Lack of Nexus between Contribution and Actual Demand for Services

The Issues Paper contemplates if planning agreements should require a nexus with the development, as for other types of contributions. It notes the clear need to find a balance between the principles of equity, efficiency and certainty that retains the best features of the current system but is more easily understood.

For mining projects there's often a lack of a clear and direct link between identified impacts on local infrastructure and requests for contributions. There are often expectations from councils that contributions do not need to link to impacts. 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.
- 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 the actual increase in demand for infrastructure services related to the mining project. For example, contributions towards museums or tourist facilities. In some councils a generic approach is taken to VPAs where the proponent's contributions need to be a minimum of 1% of the capital investment value, irrespective of the actual demand of the project on local infrastructure/ services.

Whilst the general VPA guidelines support a flexible approach (note these do not apply to mining projects), they're arguably designed to compensate for urban development that's proposed to take place outside of the publicly endorsed development sequence/staging program, or agreed set of rules or development standards (e.g. additional height). In this circumstance there may be sufficient justification to impose a flexible compensation mechanism.

Mining projects however, which are enabled by the Mining SEPP which applies across the State and are limited to where the resource occurs, should be considered differently to urban development projects in terms of calculating development contributions.

Furthermore, mining projects are subject to years of assessment against a range of environmental standards to ensure they minimise impacts on the surrounding environment. Where unmitigated impacts are considered unreasonable, the proponent is almost always forced to rectify the issue through either change to the project or conditions of consent. (e.g. compulsory land acquisition or noise amelioration requirements).

The comprehensive assessment also identifies actual impacts a project will have on local community facilities and services and how the proponent will mitigate the impacts through a social impact assessment consistent with the SIA Guidelines. In this regard, it is relatively easy to determine what additional demands on local facilities and services a mining project will have as this is clearly defined in the proponent's environmental assessment documents, and often mitigation measures proposed.

Other than contributions to road network improvements, the actual increase in demand for local infrastructure or services is often determined to be negligible given the majority of workers who live in a council area pay local council rates which pay for community services and facilities, and the dwellings they occupy would have been subject to its own contributions. This is particularly the case for modification applications which are often sued by councils as another opportunity to revisit VPA contributions.

Experience has shown that VPAs for mining projects often require contributions for services that have no clear nexus to demand for infrastructure and services. This lack of nexus is further exacerbated when other contributions, taxes and levies paid by mining companies are taken into account, such as rates, that flow to a council.

The lack of any requirement for a reasonable nexus for actual demand for services generated by a project, combined with the lack of process requirements is driving uncertainty and lack of transparency in outcomes. This uncertainty is exacerbated in the absence of any clear rules that apply across the State.

In the interest of achieving certainty and transparency, its recommended the State Government should prepare/develop a methodology for determining appropriate contributions for a mining development which is based on the actual increased demand for local infrastructure and services arising from the project.

This should include a transparent and certain calculation methodology for both roads' infrastructure and community infrastructure based on actual increased demand for such services.

Such a contribution plan for mining projects would give certainty to councils, project proponents and the local councils from the outset, and would remove the current unsatisfactory issues around uncertainty, inconsistent outcomes and delays to projects.

3.5 Inconsistent Outcomes

Consistent with the observations outlined in the Issues paper, the use of VPAs for mining projects has resulted in inconsistent outcomes.

In 2018, the Department of Planning engaged an expert consultant with specialist experience in VPAs and development contributions to review contribution offers between a mining proponent and a local council where agreement could not be reached.

As part of the investigations, the expert consultant analysed 12 VPAs for projects in a range of council areas for the purposes of benchmarking the VPA offers from the proponent and the council. Amongst other findings, the consultant noted the benchmarking clearly shows "*there is significant variation between the quantum of contributions paid among VPAs*".[34]

The lack of consistency across the State for determining VPAs for mining projects unfortunately creates an environment of uncertainty for proponents where they are unable to forecast the potential cost when they undertake an investment decision to proceed with a project.

3.6 Delays and Costs Associated with Prolonged Negotiations

Delays to mining projects caused by VPA negotiations are well known to Government. As noted above, the dynamics of the SSD assessment process combined with the requirement to reach agreement with the local council is driving these delays and uncertainty.

Experience has shown some councils have used the process as an opportunity to demand contributions above and beyond those that could be reasonably linked to an actual increased demand for services. The councils achieve this outcome by protracting VPA negotiations to the extent there is no agreement at the point where the SSD assessment is nearing completion (often several years).

At this point, the matter becomes time critical for the proponent, and with limited ability to rely on a regulatory framework or the intervention of the State Government, the consequential delay to the project approval process and financial penalty often results in the proponent agreeing to the demands made by the council, irrespective of whether or not there's a nexus to an increased demand for services.

Whilst it's noted that the Department of Planning has the ability to impose a condition of consent if an agreement on a VPA has not been reached prior to determination, it doesn't resolve the fundamental issue of uncertainty of outcomes or potential for a council to delay the delivery of project.

Reasons for the delays include:

- VPAs 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.

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[34] GLN advice dated 9 November 2018 on United Wambo Coal Mine Project – VPA contr butions

- Council attempting to extract unreasonable public benefits from developers due to their peculiar statutory position.

Negotiations need to be efficient, predictable, transparent, and fair to avoid unnecessary delays and disputes. There should be a clear and certain process incorporated into the overall assessment process (administered by the Department of Planning), based on clear and transparent State based rules regarding how contributions are to be determined.

A State based contribution framework for mining projects would effectively address this issue as all stakeholders would be aware of contributions which would be based on a clear methodology, which would effectively avoid delays associated with protracted or delayed negotiations.

Ultimately the Independent Planning Commission will decide based on the Department's assessment against all of the regulatory requirements, which should include a State-wide contributions framework for mining projects. This approach would ensure councils, local communities and mining proponents have certainty in the process and would avoid unnecessary delays or additional costs to projects.

3.7 Other matters for consideration

The following other matters related to mining projects and VPAs should also be taken into consideration as part of the deliberations by the NSW Productivity Commission.

It's noted these issues would largely be addressed through a State-wide contribution's framework for mining projects, that is based on actual demand for infrastructure and services and is administered by the Department of Planning as part of the overall assessment process.

- Differences between New Projects and Expansions

For mining projects, the same processes and expectations by councils for negotiating VPAs have been applied to expansions or modifications of existing projects as those typically applied to new mines and sites. This practice can often lead to a council revisiting or recommending a new VPA as part of a minor modification application which often has little or no impact on demand for services.

Greenfield mining projects should be treated differently to Brownfield mining projects given they have different levels of impacts on demand for services. This principle should be reflected in any future contributions framework for mining projects.

There should be clear rules that modifications do not provide an opportunity to reopen discussion around existing VPAs. As modifications are required under the planning legislation to be 'substantially the same development' as the existing approved development, it is unreasonable that councils should seek further contributions in relation to modification applications.

- Mining projects cut across different Council boundaries

Mining projects may be located across different councils and often have impacts which extend over multiple councils. Where this occurs, proponents are required to negotiate with two or more separate councils to determine development contributions that are suitable for all councils, which adds additional uncertainty and delay for a project.

This is a further reason why a coordinated approach and consistent set of rules is required via a State based contribution framework. This would avoid situations such as CleanTeq's Sunrise project's VPA requiring negotiation with Lachlan Shire Council, Parkes Shire Council and Forbes Shire Council.

Recommendation

Based on the unique circumstances associated with mining projects, development of a fit for purpose and efficient State based contribution framework developed by the NSW Government that is applicable to mining projects that addresses:

- The total contributions mining companies deliver through, rates, land taxes, local economic activity, developer contributions, other voluntary community contributions, and conditions of development consents. Developer contributions payable by the mining sector under the planning legislation should be considered in this broader context of the totality of taxes, rates, charges and other contributions made by the sector, to ensure that there is no double-dipping or duplication of contributions and that the mining sector is not being required to pay more than its 'fair share'.
- A contributions framework that creates a clear set of rules based on the actual demand for community infrastructure and services generated by a mining project and removes the ability to obtain contributions for non-related matters, and "double-dipping".
- An equitable, simple, and efficient contributions framework based on a transparent and enforceable calculation/methodology (for both roads and community infrastructure) that is administered by and determined by the NSW Government as part of the assessment process.
- The contribution plan for mining projects should be prepared/determined by the NSW Government and include consultation with the NSW mining industry and mining affected local councils

Appendix: Mining rates 2016-17 to 2020-21

Muswellbrook Shire Council

	2016-17[35]	2017-18[36]	2018-19[37]	2019-20[38]	2020-21[39]
Mining rates	$4.8M	$7.8M	$7.8M	$9.3M	$11.4M
Total rates	$12M	$14.8M	$16.1M	$17.9M	$19.5M
% of total rates	40%	53%	48%	52%	58%

Singleton Council

	2016-17[40]	2017-18[41]	2018-19[42]	2019-20[43]	2020-21[44]
Mining rates	$5.4M	$6.3M	$7.1M	$7.8M	$8.0M
Total rates	$16.8M	$17.7M	$20.2M	$22.1M	$22.7M
% of total rates	32%	36%	35%	35%	35%

Cobar Shire Council

	2016-17[45]	2017-18[46]	2018-19[47]	2019-20[48]	2020-21[49]
Mining rates	$1.6M	$3.1M	1.7M	$1.7M	$1.8M
Total rates	$5.2M	$5.3M	$4.0M	$4.0M	$4.2M
% of total rates	30%	58%	43%	43%	43%

[35] OLG time series data (16/17)
[36] OLG time series data (17/18)
[37] IPART - MSC Special Variations & Minimum Rates 2019-20 Part A Excel
[38] Muswellbrook Shire Council 2019/20 Revenue Policy
[39] Muswellbrook Shire Council 2020/21 Revenue Policy
[40] Singleton Shire Council 2016/17 Revenue Policy
[41] OLG time series data (17/18)
[42] Singleton Shire Council 2018/19 Operational Plan
[43] Singleton Shire Council 2019/20 Revenue Policy
[44] Singleton Shire Council 2020/21 Operational Plan
[45] OLG time series data (16/17)
[46] OLG time series data (17/18)
[47] Cobar Shire Council General Purpose Financial Statements for the year ended 30 June 2019
[48] Cobar Shire Council Annual Operational Plan 2019-2020
[49] Cobar Shire Council Revenue Policy 2020-2021 f

Blayney Shire Council

	2016-17[50]	2017-18[51]	2018-19[52]	2019-20[53]	2020-21[54]
Mining rates	$4.2M	$4.2M	$4.3M	$4.4M	$4.5
Total rates	$8.4M	$8.3M	$8.5M	$8.9M	$9.1M
% of total rates	50%	51%	51%	49%	$49%

Mid Western Regional Council

	2016-17[55]	2017-18[56]	2018-19[57]	2019-20[58]	2020-21[59]
Mining rates	$2.1M	$2.2M	$2.2M	$2.3M	$12.7
Total rates	$17.0M	$17.5M	$18.5M	$19.1M	$30.1M
% of total rates	12%	13%	12%	12%	42%

50 OLG time series data (16/17)
51 OLG time series data (17/18)
52 Annual Financial Statements 2018-19 - Blayney Shire Council
53 Blayney Shire Council 2019/20 Revenue Policy
54 Blayney Shire Council 2020/21 Operational Plan
55 OLG time series data (16/17)
56 OLG time series data (17/18)
57 Delivery Program 2017/18 - 2020/21 | Operational Plan 2018/19 Mid-Western Regional Council
58 Delivery Program 2017/18 - 2020/21 | Operational Plan 2019/20 Mid-Western Regional Council
59 Delivery Program 2017/18 - 2020/21 | Operational Plan 2020/21 Mid-Western Regional Council