

**INQUIRY INTO ENVIRONMENTAL PLANNING AND
ASSESSMENT AMENDMENT (INFRASTRUCTURE
CONTRIBUTIONS) BILL 2021**

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Property Council of Australia
ABN 13 00847 4422

Level 1, 11 Barrack Street
Sydney NSW 2000

T. +61 2 9033 1900
E.

propertycouncil.com.au
[@propertycouncil](https://twitter.com/propertycouncil)

Australia's property industry

Creating for Generations

11 July 2021

Hon. Cate Faehrmann MLC
Chair, Portfolio Committee No. 7 - Planning and Environment
Parliament of New South Wales
Macquarie Street
Sydney NSW 2000

Lodged via the parliament.nsw.gov.au portal

Dear Ms Faehrmann,

The Property Council of Australia welcomes the opportunity to provide comment to Portfolio Committee No. 7 - Planning and Environment on the *Environmental Planning and Assessment Amendment (Infrastructure Contributions) Bill 2021* (Contributions Bill).

As Australia's peak representative of the property and construction industry, the Property Council's members include investors, owners, managers and developers of property across all asset classes, including residential, industrial, office and retirement living. In NSW, the property industry provides 390,000 jobs, pays \$25.4 billion in wages and salaries and one in four people directly and indirectly draw their wage from the property industry – the industry is a significant economic contributor.

In November 2020, the NSW Productivity Commissioner Peter Achterstraat produced his final report on the Review of Infrastructure Contributions in New South Wales. We were pleased with the level of industry engagement undertaken by the Productivity Commissioner throughout the review, and his report represents a balanced, sustainable pathway for the reform of development contributions in New South Wales.

With this in mind, we welcomed the commitment of the Minister for Planning to implement all 29 recommendations of the Productivity Commissioner's Review. **For the benefit of all stakeholders it is important these changes are implemented as a complete package**, as a partial implementation is likely to create unintended adverse consequences for either government or industry. This would likely lead to continuing complexity, confusion, delay and inconsistency in the future.

In the months following the Government's commitment to implementing all 29 Recommendations, the Property Council has maintained a productive working relationship with the Department of Planning, Infrastructure and Environment (DPIE) on the implementation of the reform framework, participating in regular meetings of their Infrastructure Contributions External Advisory Group, inviting DPIE representatives to member briefings and making enquiries regarding details and timelines. We anticipate this

productive working relationship will continue as more detail is prepared to support the implementation of reform task beyond the immediate Contributions Bill.

The Productivity Commissioner has recommended the legislative amendments come into effect from 1 July 2022. This is an ambitious task and timeline, but one which is essential if New South Wales is to have the certain, transparent, simple, efficient and consistent contributions framework required to maximise the state's economic recovery into the future. It is similarly critical that the balance of the reforms outside the Bill are delivered within their specified timeline to give all stakeholders the confidence the reforms will deliver on their stated objectives, and unintended consequences of partial delivery are avoided. For this reason, the Property Council looks forward to the passage of the Contributions Bill at the earliest opportunity.

Yours sincerely,

Lauren Conceicao
Acting NSW Executive Director
Property Council of Australia

Submission to Portfolio Committee No. 7 - Planning and Environment

Environmental Planning and Assessment Amendment (Infrastructure Contributions) Bill 2021

11 July 2021

1.0 Executive Summary

There is widespread agreement that the State's infrastructure contribution system is too complex and leads to poor understanding of its operation by industry, planning authorities and local communities. These frustrations were identified by local government and industry groups alike and were reflected in the NSW Productivity Commissioner's Final Report on the Review of Infrastructure Contributions in NSW.

We were pleased when the NSW Government committed to implementing all 29 of the NSW Productivity Commission's recommendations. The shared commitment to positive change across both government and industry is essential to achieving a functional contributions framework and removing barriers to future infrastructure investment in our state. It is for this reason **the Property Council encourages the timely passage of the Contributions Bill through the Parliament.**

In seeking to implement the Productivity Commissioner's Recommendations, the Department of Planning, Infrastructure and Environment (DPIE, the Department) has developed five principles to provide an underlying rationale to their reform agenda:

1. Certain
2. Transparent
3. Simple
4. Efficient
5. Consistent

In addition to these principles, the Property Council as a representative peak body for the industry is keen to ensure future contributions are also feasible and affordable, to ensure the cumulative impact of fees, taxes and charges does not limit the supply (and affordability) of new housing or job-creating enterprise. The Property Council also believes it is important that these contributions are utilised by the relevant Authorities, with the infrastructure delivered in a timely and effective manner to serve the local communities.

Our submission seeks primarily to address the items identified in the media release announcing the Inquiry:

- A regional infrastructure contributions system to collect levies on development in Greater Sydney, Central Coast, Hunter and the Illawarra Shoalhaven while preserving existing special infrastructure contribution arrangements.
- Requiring owners who benefit from their land being rezoned for development to contribute towards the provision of land for local infrastructure when their land is either sold or developed.
- Greater transparency and accessibility for Planning Agreements.
- Incentives for councils to fund infrastructure upfront, allowing councils to borrow and pool their funds.

In addition to this submission, we appreciate the Committee's invitation to present at its hearing on 16 July and look forward to following up any requests for further information members of the committee may require.

2.0 Regional Infrastructure Contributions

Context

The *Environmental Planning and Assessment Amendment (Infrastructure Contributions) Bill 2021* (Contributions Bill) provides for the creation of a Regional Infrastructure Contributions (RIC) system in accordance with Recommendation 5.1 of the Productivity Commissioner's Final Report.

While the suggestion that Regional Infrastructure Contributions would legally sit alongside Special Infrastructure Contributions (SICs), and other existing contribution mechanisms, such as Satisfactory Arrangements Clauses (SACs), the intention of creating Regional Infrastructure Contributions is to transition away from these charges to something which is more broad based, and is in existence before the planning proposal or development application stage, thus delivering on the Government's five principles underpinning this reform, notably certainty and transparency.

Special Infrastructure Contributions tend to govern a narrowly defined focus area, are very detailed and have generally taken significant time to prepare and justify. For example, as at January 2020, the DPIE website entry for the Greater Parramatta Growth Area Infrastructure Schedule currently has noted, *'The SIC framework for the Greater Parramatta Growth Area, including a schedule of infrastructure items and costs, will be released for community consultation later in 2017.'* Where developments are held up by the development of a SIC, certainty is undermined, and holding costs are imposed on industry, driving up the cost of development for all.

To resolve (or sidestep) the longer timeline for the creation of Special Infrastructure Contribution, the Department has inserted "Satisfactory Arrangements Clauses" into Local Environment Plans (LEPs) as the result of successful planning proposals, which require the proponents to enter into agreements regarding the funding of state infrastructure to support the delivery of their individual projects. There is very little transparency regarding the individually negotiated Planning Agreements which come as a result of SACs, so this approach does not align with the values articulated by the government to support contributions reform.

With this in mind, pre-prepared **Regional Infrastructure Contributions represent a superior alternative** to SICs and SACs, providing streamlined processes that are transparent and certain on contributions for all parties.

Recommendation: The Property Council supports the introduction of Regional Infrastructure Contributions to ensure transparency and certainty to all parties.

Industry concerns

While the Property Council is supportive these reforms if implemented as a carefully balance package, further consultation to ensure implementation meets the vision of the Productivity Commissioner and works for all parties is required on a number of areas as these reforms progress.

Double-dipping

The risk associated with supporting Regional Infrastructure Contributions for industry is that the transition away from SICs and SACs may be compromised. It is extremely important that the reform efforts continue in good faith and that the reform package is delivered in its entirety and at the same time.

The Property Council does not support "double dipping" between more than one form of state contribution. Should a project be subject to a SIC or a Planning Agreement arising from a SAC, we believe the payment of a Regional Infrastructure Contribution should not apply. We believe this issue can and should be resolved at the implementation stage, in order to manage the more nuanced transition toward the new contributions.

Affordable housing

The Contributions Bill provides the capacity for a Regional Infrastructure Contribution to be collected for the purposes of providing affordable housing. In our discussions with the

Department, we understand this to be included as a translation of the variety of infrastructure currently able to be included in a SIC so as to facilitate an easier transition between the two mechanisms.

The Productivity Commissioner explored the role of various levy and value capture mechanisms for the provision of affordable housing, and made the following comment, while calling for improved reporting and accountability for affordable housing contributions:

“Affordable housing costs will be incurred regardless of whether development proceeds. They therefore do not fit within an efficient infrastructure contributions system. The section 7.32 mechanism¹ is, however, relatively new and yet to be evaluated. Improved reporting of affordable housing contributions should be required to inform a future review of their efficiency and effectiveness.”

The Property Council agrees with the Productivity Commissioner’s assessment and does not support the inclusion of affordable housing within a Regional Infrastructure Contribution until a future review of the efficiency and effectiveness of the 7.32 mechanism has occurred. We interpret the NSW Government’s commitment to the Productivity Commissioner’s recommendations as being their position until more data becomes available.

Should a Regional Infrastructure Contribution levy include affordable housing in the future, it should occur instead of, rather than in addition to, existing arrangements put in place by local government. This position is in keeping with the Government’s underlying principles of making contributions simple, efficient and consistent.

Recommendation: The Property Council recommends that should a project be subject to a SIC or a Planning Agreement arising from a SAC, the payment of a Regional Infrastructure Contribution should not apply, and that this be resolved at the implementation stage.

Recommendation: The Property Council agrees with the Productivity Commissioner’s assessment and does not support the inclusion of affordable housing within a Regional Infrastructure Contribution until a future review of the efficiency and effectiveness of the 7.32 mechanism has occurred.

Recommendation: The Property Council recommends that should a Regional Infrastructure Contribution levy include affordable housing in the future, it should occur instead of, rather than in addition to, existing arrangements put in place by local government.

3.0 Land value contributions

Context

The cost of land acquisition forms the largest component of contributions for greenfield precincts. While the costs of acquisition are budgeted for in *Environmental Planning and Assessment Act 1979*, Section 7.11² contribution plans, these plans are indexed to between 2-3% annually and are incapable of keeping pace with changes in land values.

The result of the growing gap between contributions collected and the cost of land places significant financial stress on local government and creates uncertainty from industry as councils perpetually update contributions plans to reflect increased costs of acquisition. This creates a significant administrative burden on both local councils and Independent Pricing and Regulatory Tribunal (IPART), with respect to the preparation, exhibition and assessment

¹ [Section 7.32 of the ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979 - Conditions requiring land or contributions for affordable housing](#)

² [Section 7.11 of the ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979 - Contribution towards provision or improvement of amenities or services](#)

of revised contributions plans and with the appropriate policy alternative these resources could be deployed elsewhere.

To solve this problem, the NSW Government is proposing a “land value contribution” which would come due at the time re-zoned land is sold or is subdivided for development. The contribution takes the percentage of land within a precinct and applies the contribution as a percentage to the land transaction.

The Property Council put a hypothetical forward to the Department to resolve misinterpretations regarding how this mechanism would operate following concerns raised that the contribution could disproportionately impact different landowners (against the Department’s consistency principle). The Department’s response clears this up and provides an easy-to-understand translation of how the mechanism would work in practice:

“If I own a \$3m property, and as part of a rezoned precinct, two thirds of the property is identified for a road corridor, would I be liable for a \$2m land value contribution if I were to sell the property tomorrow?”

***No.** The amount of the land value contribution will be determined in reference to how much land is needed for local infrastructure purposes across the whole precinct being rezoned. For example, if the precinct has a total area of 100 ha and the local infrastructure land needed (for parks, drainage etc) is 10ha – then this is 10% of the precinct area. All landowners would have an obligation to provide the equivalent of 10% of their site for this infrastructure purpose. NOTE: the rate will vary from precinct to precinct – as it is directly related to the infrastructure needs of that precinct.*

In real life, the land needed will not be evenly distributed across the precinct. Taking your example, 2/3 of the site is identified as being needed for a local infrastructure purpose. The council can only require you to make a contribution equivalent to 10% (hypothetical above). If you were selling the property, you would need to make a contribution equivalent to 10% of the property value = \$300,000.

By collecting the relevant percentage amount across all landowners, council will have the funds required to purchase the land needed.

In your example - If you were developing the site (not selling first), then other options become available. In this first instance, 10% of your site could be dedicated to the council to satisfy the obligation. You could then either agree with council to dedicate the remaining 56% needed in exchange for credit (assuming you had other sites that would also have land value contributions to satisfy); sale to the council for agreed value or council could compulsorily acquire at just terms.

...

There will be some sites where, because of the nature of the infrastructure (such as drainage), larger portions of their site may be identified as being required for an infrastructure purpose, as is the case currently. Importantly, the land needed is averaged out across the whole precinct (as they all benefit from the infrastructure being provided).

There will be some landowners who do not have any land identified for an infrastructure purpose on their site. They still need to chip-in, as these contributions will fund the acquisition of land from others.

What's different:

For s7.11 a cost estimate for the total land acquisition is prepared. Let's say it's 10ha at \$200/sqm = \$20 million. This cost is then divided by the total number of expected lots. From the date that the plan is prepared, the \$20 million cost estimate is indexed using the Consumer Price Index (typically 2-3%). When council has collected the contributions and is ready to purchase land, the land prices have risen well above CPI (sometimes 20% or more) – leaving council with a funding shortfall that is currently borne by general rate payers.

In the proposed system, we determined (hypothetical above) that 10ha of the 100ha precinct is needed for local infrastructure. Instead of valuing this at a point in time, we impose an obligation of 10% of the land value (to be satisfied when the land is developed or sold, whichever occurs first). This land IS NOT also added in to the s7.11 contributions – but is an alternative approach (i.e. no “double dipping”).

If all the contributions were being satisfied by money – then the payments will be made with reference to the land value at the time of payment. This will overcome the problem of cost estimates not keeping up with rising land values. Ideally though, it will also facilitate more direct dedication of the land that the council needs, which should reduce costs all round.”

Industry concerns

The practical processes for assessing, applying, negotiating and paying a land value contribution are still somewhat unclear for industry. At our regular External Advisory Group meeting with the Department, we were advised that a Technical Working Group is being set up to test the application of land-value contributions to a range of greenfield development scenarios.

In the interests of promoting early acquisition of land (reducing costs for all), limiting s7.11 contributions to essential non-land infrastructure, this approach has the potential to be mutually beneficial to both local government and industry. We look forward to working collaboratively across local government, industry and departmental stakeholders to ensuring this model works as simply and efficiently as possible.

4.0 Voluntary Planning Agreements

Much has been said about the operation of Planning Agreements (VPAs) in New South Wales.

In their media release announcing publication of its 2012 report, *Anti-corruption safeguards and the NSW planning system* the Independent Commission Against Corruption (ICAC) made the following statement:

“The Commission notes that while voluntary planning agreements (VPAs) are seen as a solution to the funding and delivery of infrastructure issues facing councils, they also have the capacity to distort decision-making on development proposals and exclude community participation.

The ICAC therefore recommends that the NSW Government introduces changes to VPAs that are consistent with those proposed in the yet-to-commence Schedule 3 of

the Environmental Planning and Assessment Amendment Act 2008, which includes establishing reasonableness as a consideration in making VPAs and ensuring that council VPAs do not involve public infrastructure without ministerial agreement in certain circumstances. The Commission also recommends that the NSW Government mandates that public submissions are to be considered by a planning authority following the exhibition of a draft VPA.”

Additionally, Nick Kaldas PSM, in his *Review of Governance in the NSW Planning System* (2019) made the following finding:

13. Stakeholder feedback indicates that the current VPA system does not encourage transparent, strategic infrastructure planning and delivery. The current system is vulnerable to corruption as there is a perception that an uplift in land value can be bought through the VPA process. Indeed, one stakeholder went as far as describing VPAs as a ‘legal brown paper bag.’ In addition, many stakeholders commented that VPAs were not voluntary. Indeed, they were almost a requirement for getting a large development approved. I am mindful that VPAs have an important role in providing for public amenities, however, perhaps it is misleading to call them ‘voluntary’ contributions. While the legislation states that “A planning agreement is a voluntary agreement or other arrangement”, it seems to me that the Department may wish to consider whether they should be termed simply as ‘Planning Agreements’.

14. As with any element of discretion or flexibility in planning decision making, stakeholders have concerns surrounding the governance, probity and transparency of VPAs. While many of the Councils that I spoke to confirmed that VPAs can be effective to provide critical infrastructure that otherwise may not be funded, almost all agreed that VPAs needed to be more robust and transparent.

In light of the findings of both Nick Kaldas and ICAC, it comes as no surprise that the NSW Productivity Commissioner’s Final Report made the following comment:

“A lack of consistently applied principles for planning agreements can, however, foster uncertainty and undermine confidence in the planning system. There has been increasing use of planning agreements by councils as a de facto ‘value capture’ mechanism, where the council may agree to provide additional height or floorspace where a developer agrees to pay the council a share of the additional value created. Critics argue that such agreements could create the perception that ‘development is for sale’ especially where they lead to spot rezoning, or allow additional height and floor space without a rationale, other than the generation of council revenue.

Planning agreements are often less transparent than other mechanisms because negotiations are confidential. Even after agreements have been struck, they are not always open to public scrutiny. The EP&A Act requires planning agreements be publicly notified for at least 28 days but has no formal requirement to receive and consider public submissions.”

The Contributions Bill will require planning authorities to publicly exhibit rather than notify draft agreements, and to invite and consider submissions. This approach is supported by the Property Council.

We also note that the Contributions Bill only partially addresses the concerns and recommendations regarding Planning Agreements. The remainder of the recommendations in this area are identified for action through the amendment or creation of new Practice

Notes by the Department and we look to this occurring in line with the 1 June 2022 timeframe.

Recommendation: The Property Council supports the requirement of planning authorities to publicly exhibit rather than notify draft Voluntary Planning Agreements, and for planning authorities to invite and consider submissions.

Recommendation: The Department ensures the amendment or creation of new Practice Notes to action the outstanding recommendations regarding Planning Agreements in line with the 1 June 2022 timeframe.

5.0 Encourage councils to forward fund infrastructure through borrowing and pooling funds

Over the last decade, local councils have come under criticism for holding onto, at time up to billions of dollars in, unexpended developer contributions. S7.11 contributions are held by local councils as “restricted assets” effectively limiting their expenditure to items listed within a specific s7.11 plan. As a result, funds may remain unspent as they accumulate to the point where they can be spent on larger items within the plan.

The consequence of not expending these funds quickly is that infrastructure costs rise beyond the capacity of a contributions plan to fund infrastructure, requiring projects to be “topped up” with general revenue. Additionally, new growth areas are left without the benefit of partially funded local infrastructure.

Proposed within the Contributions Bill is the enablement of Councils to pool contributions without the need for a Ministerial Direction or contributions plan to expressly permit it. The Property Council has no objection to this approach.

Recommendation: The Property Council does not object to the proposal for the enablement of Councils to pool contributions without the need for a Ministerial Direction or contributions plan to expressly permit it.

6.0 Recommendations:

The Property Council encourages the timely passage of the Contributions Bill through the Parliament. We note the fine balance of this package and the importance of keeping this balance in its passage. In addition, we have made a number of recommendations throughout this submission:

1. The Property Council supports the introduction of Regional Infrastructure Contributions to ensure transparency and certainty to all parties.
2. The Property Council recommends that should a project be subject to a SIC or a Planning Agreement arising from a SAC, the payment of a Regional Infrastructure Contribution should not apply, and that this be resolved at the implementation stage.
3. The Property Council agrees with the Productivity Commissioner’s assessment and does not support the inclusion of affordable housing within a Regional Infrastructure Contribution until a future review of the efficiency and effectiveness of the 7.32 mechanism has occurred.
4. The Property Council recommends that should a Regional Infrastructure Contribution levy include affordable housing in the future, it should occur instead of, rather than in addition to, existing arrangements put in place by local government.

5. The Property Council supports the requirement of planning authorities to publicly exhibit rather than notify draft Voluntary Planning Agreements, and for planning authorities to invite and consider submissions.
6. The Department ensures the amendment or creation of new Practice Notes to action the outstanding recommendations regarding Planning Agreements in line with the 1 June 2022 timeframe.
7. The Property Council does not object to the proposal for the enablement of Councils to pool contributions without the need for a Ministerial Direction or contributions plan to expressly permit it.

7.0 For more information:

This submission addresses the aspects of the Contributions Bill identified in the media release announcing the Inquiry. For further comments or enquiries regarding other aspects of the Contributions Bill feel free to reach out to the Property Council's NSW advocacy team on the following details:

Lauren Conceicao
Acting NSW Executive Director

Mobile
Email

Ross Grove
Western Sydney Regional Director

Mobile
Email