Submission No 100

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

Organisation: Riverina Joint Organisation

Date Received: 11 July 2021

RIVERINA JO
JOINT ORGANISATION

RESPONSE TO REVIEW OF THE INFRASTRUCTURE CONTRIBUTIONS BILL

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RIVERINA JOINT ORGANISATION

Response to Review of the Infrastructure Contributions Bill
Upper House Inquiry

The Riverina Joint Organisation, which represents the councils of Bland, Coolamon, Cootamundra-Gundagai, Greater Hume, Junee, Lockhart, Temora and Wagga Wagga has consulted with our Members on the proposals presented in the *Environmental Planning and Assessment amendment (Infrastructure Contributions) Bill 2021.*

Our Members would like to express our serious concerns about the timeframe that has applied to the introduction of this Bill. The Bill contains some significant changes to the operation of the Infrastructure Contributions regime in NSW and yet there has been virtually no time for consultation with local government, the key stakeholder in the delivery of the regime. The Bill contains provisions that were not canvassed in the consultations that were conducted on Infrastructure Contributions in mid-2020 and to which the Riverina Joint Organisation responded.

Our Members appreciate that the Bill, in the main, seeks to introduce enabling legislation to allow the implementation of many of the reforms proposed by the Productivity Commission's review of the infrastructure contributions system. However, these legislative amendments are significant and will open the gates to regulations and subordinate legislation that could disadvantage councils and the communities they represent.

For example, the proposed changes to s7.17(1)(h) could result in a Ministerial Direction that significantly delays the collection of a contribution or levy. Local government was not consulted on this proposed change, which could have enormous negative impacts on the ability of councils to meet the infrastructure needs of their communities.

We are grateful that there is an Upper House Review of the legislation but respectfully request that the Committee consider recommending that the Government withdraw the Bill until such time as the Department can consult widely with local government about its impacts. This should include undertaking regulatory impact analysis as well as developing further detail about the regulations and subordinate legislation that will support its implementation. We are cognisant that some of the comment we make in this submission may be "jumping at shadows", however with no knowledge of what the regulations are likely to contain we have interpreted their intent as best we can.

It has been difficult to prepare a response without knowing the details of the operation of the new provisions which will rest in the regulations and subordinate legislation. Nevertheless, given that the regulations are to be formulated we lodge this submission in the hope that perhaps some of the concerns that we raise in relation to operation will be addressed in the design of the Regulations. Our feedback on the Bill falls into three main areas of concern:

- *Section 7.12:* Fixed Development Consent Levies;
- *Section 7.16A:* Regulations – Local Infrastructure Contributions;
- *Section 7.17:* Directions by Minister;
- *Sections 7.18 -7.19:* Preparation and Approval of Contributions Plans by Council; and
- *Subdivisions 4 and 5:* The Regional Infrastructure Contribution Fund.

1. Section 7.12 Fixed Development Consent Levies

Our Members have, since September 2018, been making representations to the Planning Ministers, firstly Hon Anthony Roberts MP and then Hon Rob Stokes MP, in relation to the application of s7.12 contributions to State Significant Developments. The issue of concern for our Members is the on-going failure of the Independent Planning Commission, to apply the s7.12 contribution levy to State Significant Developments.

Our Members are disappointed that the issue of applying s7.12 contributions to State Significant Developments has not been addressed in the Bill. Our Members believe that the failure to apply s7.12 to State Significant Developments creates an uneven playing field for developers and an inequitable situation that favours the big end of town.

Section s7.12 contributions do not require that a link between the development and its impact on local infrastructure be established, providing that the council has adopted a s7.12 Contributions' Plan then the contributions will apply to all developments within the Plan's area of coverage regardless of the type of development. Business, industrial and commercial development, as well as residential developments including alterations and additions are captured by a s7.12 Plan and providing there is no requirement to pay s7.11 contribution the developer's obligation is to pay the levy.

However, in the case of State Significant Developments where the Consent Authority is the Planning Commission the requirement to pay the s7.12 contribution is not always applied. Our Members have advised us the Planning Commission is using the discretion under s7.12(1) of the *Environmental Planning and Assessment Act* (the Act) to not require the payment of the contribution as a condition of consent. The Act currently states at s7.12(1):

> *(1) A consent authority may impose, as a condition of development consent, a requirement that the applicant pay a levy of the percentage, authorised by a contributions plan, of the proposed cost of carrying out the development.*

The amendment proposed by the Bill leaves the situation unchanged stating at s7.12(1):

> *A consent authority may impose a local levy condition on a development consent requiring an applicant to pay a monetary levy if a local infrastructure condition is not imposed on the development.*

The position of the Planning Commission, which appears to be supported by the Department, is that in lieu of the s7.12 contribution, councils should enter into a Voluntary Planning Agreement (**VPA**)

with the developer. While many of our Member Councils would be willing to enter into negotiations for a VPA, without the obligation to pay the s7.12 contribution forming part of the development consent, councils question whether a developer will be a motivated participant. The current situation, whereby the developer has the choice to negotiate a VPA, means councils must rely on the developer choosing to be a "good corporate citizen".

The issue has become more pronounced with the development of solar farms in our Region. Over the next 5 years it is anticipated that in the vicinity of 4.5 million solar panels will be deployed on solar farms across the Riverina-Murray region. Almost every LGA in the Riverina JO has developers with solar farms either in the approval process or already approved, almost all are State Significant Developments. While there is no doubt that they will create economic benefits for the Region, they will also create indirect impacts on local infrastructure. On current experience we expect that none of these developments will be required to pay a either a s7.11 or a s7.12 contribution.

We strongly believe that it is inequitable that State Significant Developments are released from their obligation to pay the contribution because the Planning Commission is not including the requirement in their consent conditions. These contributions are vitally important to councils as they provide a revenue stream that assists our Members to maintain and renew community infrastructure, such roads and footpaths and public amenities like libraries, pools and community halls.

It is unacceptable that the Commission is effectively creating a financial benefit for developers with local government meeting its cost. The situation is inequitable because within LGAs that have adopted s7.12 Contribution Plans every other development is required to make the payment, whether it be for a residential home, an industrial building, or even a small solar farm that falls below the State Significant threshold.

Our Members agree that the wording of s7.12 (1) of the *Environmental Planning & Assessment Act* ("**the Act**") should be changed from "may impose" to "must impose" the contribution. We believe that the proposed amendment would provide greater certainty to developers, the community and councillors and result in all developers being subject to the same costs of development. The current practice of relying on the developers of State Significant Developments, striking Voluntary Planning Agreements ("**VPAs**") with councils provides no certainty in the planning process.

In addition, the current regime has led some developers to believe that if they strike an arrangement with the council for a VPA, then by default council will not oppose the development. Developers struggle to understand that the negotiations for the VPA and the support of council for the development are two completely separate activities.

Recommendation:
***Amend Schedule [19]*: amend the wording of s7.12(1) to be changed from "may impose" to "must impose".**

We understand that the State may have concerns about the levy being applied to all State Significant Developments which would encompass hospitals and schools. However, we believe that the exclusion of public good infrastructure from the levy could be achieved through regulation. Section 7.12(5) states that regulations may make provision for "*the types of development in relation to which a local levy conditions may be imposed*". Regulation is to be used to determine the quantum of the levy and therefore could also be used to determine a set of exclusions.

Further we understand there has been a reluctance to apply the levy because of the quantum of funds required as an upfront cost. We believe this could be addressed through regulation with the introduction of scaled fees. In addition, this could be further mitigated through agreements that allowed the payments to be made over a fixed time period, perhaps using the indexation methodology the Bill includes in s17.16A.

The current regime is inequitable, if developers are fortunate enough to have a development that meets State Significant requirements, then it is unlikely to pay a s7.12 contribution simply because the Planning Commission will undertake the assessment and in our experience is unlikely to include a condition of consent requiring the contribution to be paid. Meanwhile, conditions of approval for small developments that are assessed by councils will include a condition requiring payment of the contribution. The regime encourages "jurisdiction hopping", if a project is already large, it is in the developer's interest to inflate its value so that it can be assessed by the State instead of local government.

2. Section 7.16A: Regulations – Local Infrastructure Contributions

This is a new section to be introduced to the legislation which reads as follows:

> ***7.16A Regulations—local infrastructure contributions***
> *The regulations may make provision about local infrastructure contributions, including the following—*
>
> *(a) the way in which local infrastructure contributions must be determined,*
> *(b) the indexation of monetary contributions and levies,*
> *(c) when and how monetary contributions and levies must be paid,*
> *(d) reporting on contributions or levies received by consent authorities,*
> *(e) the circumstances in which a consent authority may refuse to consider development applications for development on land for which a land value contribution has not been satisfied.*

This new section would appear to allow the Minister to determine how and when contributions and levies should be paid, which is of great concern to our Members. Our Members are vehemently opposed to ceding more development control powers to the State Government. It should be a matter for council to determine how and when levies are paid, not the State.

Our Members are currently looking at ways in which they can structure development contributions to actively encourage investment in residential housing. The Committee may be aware that in many

areas of NSW there is a housing shortage, in the Riverina JO it is a significant problem which we are addressing through the formulation of a Regional Housing Strategy. Some of the actions identified in the Strategy include councils initiating policies that delay not just the payment of contributions but also ways to offset the costs of infrastructure for developers. We do not support a situation where the power to make these decisions locally is abrogated to the State.

In addition, we are also concerned that there is a provision for determining indexation on monetary contributions. We would not want this to be a form of rate pegging on developer contributions. It is unclear from the Bill what is actually proposed and therefore we believe that this new section needs far more clarification and consultation prior to its introduction.

Recommendation:
***Delete Schedule [22]*: which proposes the introduction of s7.16A allowing for regulation to make provisions on how and when contributions will be paid and allowing for indexation of levies.**

3. Section 7.17: Directions by Minister

Our Members are very concerned about the extension of the Minister's discretion under s7.17(1)(h) to direct a consent authority in relation to "*the time at which a monetary contribution or levy is to be paid"*. Currently this discretion can only be exercised subject to s7.17(1)(1A) which states:

> *A direction under subsection (1)(h) may be given only during the prescribed period within the meaning of section 10.17.*

Section 10.17 refers to COVID-19 pandemic Ministerial Orders. The Bill removes this fettering of the Minister's discretion and instead amends s17.1(1A) to allow the Minister to extend a s7.17(h) Direction. The existing provision applies only during the prescribed pandemic period consequently it is subject to a sunset provision which is tied to Ministerial health-related directions. The new provision grants this power to the Minister permanently.

The Bill appears to enable the Minister to make directions allowing the deferral of contributions payments for a period of time which is solely at the Minister's discretion. We note that the Department's Guide to the Bill indicates that the amendment defers *"payment of contributions to occupation certificate stage"* however, although this was a recommendation contained in the Productivity Commission's Final Report, we cannot find this caveat in the proposed legislation. It may be that there is an intention to put the caveat in place through regulation, however this is not clear from the documentation at hand.

This is a significant policy change; it permanently delegates what appears to be an unfettered power to the Minister that directly impacts on the generation of local government revenues. Consequently, we believe that it requires a regulatory impact analysis of the consequences for local infrastructure delivery. Local Government was not consulted on this proposed extension of Ministerial power, which is unacceptable. We believe this provision should be removed at least until further analysis on its impact is undertaken.

Recommendation:
***Delete Schedule [24]*: which proposes to replace sections 7.17 (1A) and (1B) and retain the existing sections 7.17(1A) and (1B) provisions which fetter the Minister's ability to permanently delay the payment of contributions.**

4. Sections 7.18-7.19: Preparation and Approval of Contributions Plans by Council

This section repeals the current legislation in relation to the making of contributions' plans replacing it with a new process. Our Members are concerned that there appears to be no transitional arrangements in place that allow existing plans to remain in effect until a new plan that complies with the new legislative regime is prepared and approved by council.

Our Members have questioned where that will leave their contributions regime once the Bill passes. The current plans will not be compliant and consequently in breach of the Act, meaning they cannot rely on them to levy contributions.

Recommendation:
***Delete Schedule [25]*: which proposes to replace sections 7.18 and 7.19 that transitional arrangements be put into place that provide councils with at least 12 months to prepare and approve new contributions plans and that during that time the existing plans remain in effect.**

5. Subdivisions 4 and 5: Regional Infrastructure Contribution Fund

The new Subdivision 4 and Subdivision 5 repeals the current legislation that relates to Special Infrastructure Contributions in order to establish a Regional Infrastructure Contributions (RIC) Fund, which is to be administered by Treasury.

We are somewhat confused about the Inquiry's directions in relation to the creation of the Regional Infrastructure Contribution Fund. The Inquiry's media release states that the Bill includes the following reforms:

> *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."*

However, the Bill states at s7.22 that the definition of a region is as follows:

> *"**region** means an area of land identified in a SEPP as a region for the purposes of this Subdivision."*

Further, s7.23(3) states:

> *"A SEPP may require a **regional infrastructure contribution** towards the provision of regional infrastructure."*

Consequently, our reading of the Bill leads our Members to believe that the RIC will do far more than *"replace current special infrastructure contribution"* as indicated in the Department's Guide to the Bill.

We believe that the RIC Fund has the capacity to extend to every corner of the State, not just those mentioned in the Inquiry's media release. If the Minister determines that a SEPP should include the regional infrastructure contribution provision, providing the Treasurer concurs (s7.26(1)), then regardless of where the development is occurring s7.27(1)(a) requires that *"the consent authority must impose a condition on the development consent".* Section 7.27(1)(b) places the same obligation on certifiers of complying developments.

For example, the Minister could determine that the *Koala Habitat Protection SEPP* should include the provision of a regional infrastructure contribution which would be directed to the Strategic Biodiversity Component Fund (SBC Fund) which will be established under s7.30 of the Bill. Any objective view of the SEPP would probably find it reasonable for this to occur, however most of the koala habitat in NSW is nowhere near the regions mentioned in the Committee's media release.

We note that there is no discretion in relation to the application of the contribution, even if the consent authority or the certifier fails to impose the condition s7.27(3)(a) and (b) ensure that it is still imposed, stating:

> *If the consent authority or the certifier fails to impose the condition, the condition—*
>
> *(a) is taken to have been imposed in the terms required by the SEPP, and*
>
> *(b) the condition has effect as if it had been imposed by the consent authority or the certifier.*

We are assuming that it will be local government's responsibility to collect and remit the fee to the State and our Members are concerned that this will be yet another administrative activity that is cost-shifted to councils.

In addition, there is no indication of the quantum of the RIC which will be levied regardless of whether a s7.11 or s7.12 contribution are required as well. In addition, there appears to be no requirement that the contribution be spent within the region in which is collected. Section 7.23(4) states:

> *A regional infrastructure contribution may be imposed to provide regional infrastructure outside the region or the State.*

While the current regime of s7.11 and s7.12 requires that developers contribute to the locations in which the development is impacting, the RIC Fund contributions will not do the same. There could be millions of dollars in revenues going into the RIC Fund and by extension the Strategic Biodiversity Component (SBC) Fund without a single cent being spent in the region where the development occurs. In addition, s7.31B allows payments from the RIC Fund to be made for the "*associated administrative expenses"* of public authorities.

Our Members strongly support the "tagging" of RIC Fund contributions so that the money that is sourced from a region is spent in the region.

In addition, other than priorities for Fund expenditure being required to *"have regard to relevant strategic plans"* (s7.31B(3)) there appears to be no requirement for the State to produce an overall plan as to how the money raised from developers will be spent. Local government is required to justify planned expenditures for developer contributions through Contributions Plans, we believe that State should be required to prepare similar plans for expenditures from the RIC Fund and the SBC Fund.

Our Members are also concerned about double dipping in relation to the SBC Fund. Developers are already required, under the *Biodiversity Conservation Act 2016,* to fund Biodiversity Offsets as part of their development, which can run to many thousands of dollars. It appears that the Bill can also require those same developers to make a contribution to the SBC Fund, where their development is subject to a SEPP that contains a RIC provision.

We are also concerned that councils, particularly those in rural and regional areas, may come under pressure to use their discretion not to impose s7.11 and s7.12 contributions where the developer must pay the RIC Fund contribution. As there is no guarantee that the RIC Fund contribution will be spent in the region in which it is collected, if such a scenario arose the community would be the loser all the way around.

The proposed operation of the RIC Fund requires a great deal more scrutiny and consequently our Members would support delaying the introduction of the amendments relating to the RIC Fund until that detail can be provided and consultations held with local government.

Recommendation
The implementation of the RIC Fund provisions be delayed until further details are provided on its operations, likely impact and integration with other legislation such as the Biodiversity Conservation Act.

Conclusion

Our Members welcome the opportunity to provide input to the proposed changes. We note that many of the proposed changes will impact significantly on local government, but we have had very little opportunity to analyse the legislation and consider its ramifications.

Accordingly, we support LGNSW's recommendation to request that the NSW Government withdraw the Bill until such time as current and proposed reviews have been completed, further analysis and modelling of impacts is undertaken and more detail is known about ensuing regulations and subordinate legislation. Further, the Government should commit to extensive consultation on these additional elements.

We welcome the opportunity the Committee has provided to present our views at its Public Hearings and look forward to further discussions.