

Environmental Planning and Assessment Regulation 2000 proposed amendments

Policy Paper

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Executive summary

An underlying principle of the NSW planning system is that new development should pay a contribution towards the cost of infrastructure needed to support that development.

Transparency and accountability underpin the system to help maintain public confidence in the collection and use of contributions for infrastructure.

The *Environmental Planning and Assessment Act 1979* (the EP&A Act) and *Environmental Planning and Assessment Regulation 2000* (the EP&A Regulation) set out the statutory requirements for infrastructure funding contribution collection and use in NSW.

The EP&A Regulation sets out a scheme where infrastructure costs are passed on in an equitable manner.

The Department of Planning, Industry and Environment (the Department) is proposing changes to the EP&A Regulation for:

- Reporting and accounting on contributions received through contributions plans and planning agreements.
- Online publication of reports and information related to infrastructure contributions received by councils and planning authorities via development contributions plans and planning agreements.
- The making of contributions plans requiring Independent Pricing and Regulatory Tribunal (IPART) review.
- Minor administrative amendments related to fixed development levies (s7.12) in Gosford and Wollongong City Centres.

More detail is outlined in section 4 of this paper.

The changes respond to issues raised by local government and industry stakeholders. They implement recommendations from Government reviews to address outstanding issues in the NSW planning system following recent reforms to the EP&A Act. They also implement proposed policy changes described in Policy Papers exhibited with this paper.

The changes aim to:

- Improve transparency and accountability in how contributions are received and used via contributions plans and planning agreements.
- Streamline existing processes.

The proposed changes are important incremental steps to increase transparency and consistency in the contributions system. They will assist in improving public understanding of and trust in the infrastructure contributions system and in reducing the risk of delays in the development assessment process by streamlining some contribution plan-making requirements.

The proposed changes can be viewed in the draft [Environmental Planning and Assessment Amendment \(Development Contributions\) Regulation 2019](#) (draft instrument).

1. Introduction

1.1 Purpose

The EP&A Act provides the overarching framework for the NSW planning system. The EP&A Regulation supports the day-to-day requirements of this system. It contains key operational provisions including those relating to development contributions and planning agreements.

A number of proposed amendments to the EP&A Regulation were exhibited in 2017 and following changes to the EP&A Act in 2018. This paper outlines proposed amendments to the EP&A Regulation relating to infrastructure contributions levied under development contributions plans and planning agreements. It also explains the rationale for and effect of the proposed changes.

1.2 Improving the infrastructure contributions system

These proposals are part of a wider suite of system improvements intended to fix the uncertainty in the infrastructure contributions system. More information on other current proposals can be found on: planning.nsw.gov.au/infrastructure-contribution-reforms

2. Planning context

Development contributions are a means of funding infrastructure and services needed to support new development. Contributions may be in the form of payment, the dedication of land or the provision of a material public benefit such as works in kind.

State government planning provisions for development contributions are in Part 7 of the EP&A Act (infrastructure contributions) and Part 4 of the EP&A Regulation (planning agreements and contributions plans).

Legislation requiring development contributions towards the provision of public infrastructure was first introduced in NSW in 1980 through section 94 (now s7.11) of the EP&A Act. This was subsequently amended to expand the types of and methods for funding infrastructure to include percentage levies, planning agreements, levies for affordable housing as well as special infrastructure contributions (SICs) for state-provided infrastructure. There are also other mechanisms for funding local infrastructure, such as rates and user charges.

Through the enabling provisions of the EP&A Act and the detailed requirements of the EP&A Regulation, economies of scale can be achieved as infrastructure is strategically planned rather than on a development-by-development basis. The legislative framework also reduces the need for individual developers to negotiate with other developers regarding the provision of larger infrastructure items.

2.1 Environmental Planning and Assessment Act 1979

The EP&A Act requires developers to contribute to public infrastructure and ensures provision of infrastructure is considered in the decision whether to proceed with the development.

The EP&A Act provides mechanisms for State and local government to levy contributions:

- **Planning agreements** – commercial agreements between developers and planning authorities to deliver innovative infrastructure outcomes.
- **Section 7.11 Local infrastructure contributions** – fund local infrastructure with a relationship to development, generally used in high growth and planned precincts.
- **Section 7.12 Local infrastructure contributions** – fund local infrastructure with a relationship to overall development, collected as a flat rate percentage and generally used in rural, infill and mixed-use areas.
- **Special infrastructure contributions** – fund state and regional infrastructure.
- **Affordable housing contributions** – allows conditions to be imposed requiring land or contributions for affordable housing.

In conjunction with other funding sources such as rates these mechanisms provide for the costs of infrastructure and other public benefits to be recovered, or to be delivered, through the planning system.

2.2 Environmental Planning and Assessment Regulation 2000

The EP&A Regulation contains requirements for councils to achieve accountability and monitoring within the developer contributions framework. This includes the way funds received are managed, record keeping, public participation requirements and the procedure for approving, amending, reviewing and repealing contributions plans.

The EP&A Regulation:

- Prescribes the form and subject matter of planning agreements as well as requirements for making, amending and revoking them. It includes requirements for public notice, explanatory notes and public inspection for councils, the Planning Secretary and other planning authorities.
- Details the method of indexation for s7.11 development consent contributions and determination of the cost of development and maximum contribution percentage for the s7.12 levy.
- Prescribes the form and content requirements for contributions plans including that they have regard to practice notes and that councils must not approve them without adhering to any directions from the Minister.
- Requires that draft contributions plans are publicly exhibited, copies are made available and that any person can make a submission.
- Sets out the process for the approval, amendment, review and repeal of contributions plans by councils including any public notice requirements.
- Requires councils to maintain accounting records in a specified format for contributions, and records for inclusion in council's annual financial report and annual statements.
- Identifies public access requirements for contributions plans and their records.

3. Rationale for the Regulation amendments

3.1 Policy intent

The role played by contributions in council and planning authority income and expenditure varies significantly depending on how and when development occurs in different areas. Regardless of the amounts received, probity and governance is essential to ensure the contributions framework fulfils its intended function under the EP&A Act.

Retention and amendment of some provisions in the EP&A Regulation ensures transparency and consistency within the framework, assisting stakeholders to identify what they can expect from the framework and how it should be applied.

The proposed amendments to the EP&A Regulation are aimed at:

- Providing greater direction and transparency in the practical application of the contributions framework.
- Improving accountability and monitoring within the contributions framework.
- Facilitating necessary probity and governance including auditing.
- Promoting efficient infrastructure provision for development.

3.2 Implementation of planning system review recommendations

The proposed changes address recommendations in the Kaldas Report *Review of Governance in the NSW Planning System*¹, as well as the Legislative Assembly - Committee on Environment and planning *Land Release and Housing Supply in NSW*² report.

Kaldas Report

In 2018 Nick Kaldas, former NSW Deputy Police Commissioner and Director of Internal Oversight Services for the UN's Relief Works Agency, was engaged to undertake a holistic review of governance across the planning system including a review of decision-making.

Among other matters, the Kaldas Review identified areas for improvement to ensure best practice against international standards, including in interactions between levels of government.

The NSW Government accepted all of the review's recommendations, including an infrastructure contribution audit.

The proposed changes to the EP&A Regulation respond to the report's recommendations:

Recommendation 10. That the Department of Planning and Environment consider undertaking an audit of all infrastructure contributions and spending of same in NSW to enable evidence-based decision-making on the collection and monitoring of those contributions.

Recommendation 12. The updated Voluntary Planning Agreement framework³ should also include requirements for reporting and auditing where the funds are being allocated. This will further ensure transparency, compliance and accountability.

Legislative Assembly Committee on Environment and Planning - Land Release and Housing Supply in NSW Report

The Legislative Assembly's Land Release Report also called for greater transparency in funding and delivering infrastructure.

The proposed changes respond to the report's recommendation 6:

The Committee recommends that the NSW Government ensure infrastructure funding mechanisms are simple and made transparent by:

- *Undertaking an audit of current infrastructure funding arrangements and funds available, publishing the results, and ensuring ongoing transparency.*
- *Consulting with local government, professional planners and the development industry on the most effective ways to simplify the current arrangements.*

¹ Kaldas Review, December 2018, available at www.planning.nsw.gov.au/Assess-and-Regulate/About-compliance/Kaldas-review

² Land Release Report, October 2018, available at www.parliament.nsw.gov.au/tp/files/74614/Land%20release%20and%20Housing%20Supply%20in%20NSW.pdf

³ Refers to Recommendation 11 calling for an update to the VPA Practice Note which does not require but is being progressed concurrently with the proposed Regulation amendments.

4. Proposed changes

4.1 Improve reporting on development contributions

Part 4, Divisions 5 and 6 of the EP&A Regulation set out accounting and public access requirements for contributions, levies and contributions plans.

It is proposed to amend the EP&A Regulation to:

- Require reporting by councils on development contributions generally rather than just monetary contributions ie works, services or facilities accepted in part or full satisfaction of the contribution obligations, land dedicated in part or full satisfaction of the contribution obligations in addition to monetary contributions.

- Require more detailed reporting on infrastructure contributions such as specific project and location.
- Require councils to publish contributions plans, indexed s7.11 contribution rates, annual statements, and contributions registers on their website or on the NSW Planning Portal.

Councils currently report on contributions as required under the EP&A Regulation and the *Local Government Act 1993* (LG Act). Currently the wording of the EP&A Regulation allows for this to be high level and for monetary contributions only.

The following is a typical layout of councils annual financial statements for developer contributions which follows the [Local Government Code of Accounting Practice and Financial Reporting](#)⁴ (the Code).

Figure 1: Aggregated monetary amounts typically provided by councils now in annual financial statements

Purpose	Opening balance	Total annual contributions received		Total annual interest & investment income \$,\$,000	Total annual expenditure \$,\$,000	Total annual internal borrowings \$,\$,000	Total annual held as restricted assets \$,\$,000
		Cash \$,\$,000	Non-Cash \$,\$,000				
Drainage							
Roads etc							

⁴ www.olg.nsw.gov.au/sites/default/files/General%20Purpose%20Financial%20Statements%20_1.pdf Update 27 March 2019) General Purpose Financial Statements

Detailed reporting requirements (to be outlined in separate guidance to support councils):

- Retain the aggregated report currently required under the EP&A Regulation and the Code, but also require more information on contributions provided as land or material public benefit.
- Require additional information in published reports already required such as contributions registers and annual financial reports required under both the EP&A Regulation and the LG Act including:

Contributions received

- relevant Contribution Plan name
- DA reference, consent authority/ies, date consent was granted and mechanism (s7.11 or s7.12)
- the purpose eg open space
- amount received (monetary)
- details of land, or works in kind including value and location.

Contributions expended/used (for each contribution plan)

- project identification and description
- amount expended
- use of or development of the land or works in kind
- internal borrowings
- percentage of project funded.

Effect of the changes

The new requirements will:

- Allow greater transparency about contributions received and how they are used or expended (in the case of monetary contributions).
- Draw on information councils already collect and hold in their financial management systems.
- Allow for auditing of all infrastructure contributions and use in NSW.

4.2 Improve reporting on contributions received via planning agreements

Part 4 Division 1A of the EP&A Regulation sets out requirements for contributions received via planning agreements.

It is proposed to amend the EP&A Regulation to:

- Require planning authorities to provide additional reporting and accounting information for planning agreements as follows:
 - planning agreements register to include the type of development proposed
 - annual financial reports to include:
 - monetary amounts actually received and expended
 - works in kind delivered, value and location including of assets held by receiving agencies
 - land dedications received, value and location.
- Require planning authorities to publish a Register of Agreements, copies of planning agreements and annual reports on their website or on the NSW Planning Portal (in line with current Departmental practice of publishing [planning agreements](#) entered into by the Minister for Planning)⁵.
- Remove prescriptive requirements related to explanatory notes for proposed planning agreements and address through a Practice Note (see [Draft Secretary's Practice Note on Planning Agreements](#) in infrastructure contributions improvements package).
- Require explanatory notes for planning agreements to be prepared in accordance with the Practice Note.

⁵ Published planning agreements entered into by the Minister for planning are available at www.planningportal.nsw.gov.au/SVPA

Effect of the changes

There are currently limited reporting and publication requirements for planning agreements in the EP&A Regulation. Recommendations 11 and 12 of the Kaldas Report specifically dealt with planning agreements.

The new requirements will:

- Provide greater transparency through new publication and expanded reporting requirements.
- Apply to planning agreements entered into by all planning authorities.
- Promote a strategic approach by councils in the use of planning agreements.
- Ensure detailed guidance on the preparation of planning agreements is contained in the Practice Note.
- Support update and use of the Practice Note for Planning Agreements.
- Allow for auditing of where contributions received via planning agreements are being allocated.

4.3 Streamline the process for making a contribution plan following receipt of the Minister's (or Minister's nominee) advice

Part 7 of the EP&A Act sets out requirements for making contributions plans including that a council, or two or more councils, may, subject to meeting the requirements of the EP&A Regulation, prepare and approve a contributions plan. Schedule 1 specifies a minimum 28 day exhibition period for draft contributions plans.

Part 4 Divisions 1C, 2, 3 and 4 of the EP&A Regulation set out requirements for preparing, exhibiting, approving, amending and repealing contributions plans. Clause 32 of the EP&A

Regulation states that to amend a contributions plan, a council must make a subsequent plan.

It is proposed to amend the EP&A Regulation to:

- Allow for contributions plans to be amended to give effect to the advice of the Minister (or Minister's nominee) in relation to implementing IPART recommendations without requiring a further 28 day exhibition following IPART review (see below).

Effect of the changes

In preparing a contributions plan, councils must publicly exhibit a contributions plan for a minimum of 28 days and consider any submissions received.

Where contribution plans are required to be submitted to IPART for review⁶, IPART also has a practice of publicly exhibiting their draft recommendations 14 days, prior to releasing final recommendations.

When the Minister (or Minister's nominee) issues advice to council on amendments required to the contributions plan following the IPART review and prior to being able to levy their proposed contribution amount, council is currently required to re-exhibit the contributions plan for a further 28 days. Council must then consider submissions received. However council is constrained in their ability to make any further changes as a result of any submissions received.

The amendment will remove the 28 day re-exhibition requirement for contribution plans reviewed by IPART.

To facilitate public review of final approved contributions plans, it is proposed to require councils to publish contributions plans on their websites or on the NSW Planning Portal (see section 4.1 above)⁷. See also paper on improving the [Improving the review of local infrastructure contributions plans](#).

⁶ Is required if councils propose to levy contribution amounts which exceed specified cap.

⁷ Clause 31 requires public notice to be given by a council within 28 days of its decision to approve a plan as exhibited, with alterations or to not proceed.

4.4 Limit the maximum percentage s7.12 levy that can be imposed in Gosford City Centre

Part 4 Division 1B cl25K of the EP&A Regulation specifies a maximum percentage of the proposed cost of carrying out development that may be imposed by council under s7.12 of the EP&A Act (fixed development consent levies) for several environmental planning instruments (EPIs). This includes a maximum 4% levy for development over \$250,000 in Gosford City Centre Local Environmental Plan 2007 (LEP).

A Special Infrastructure Contribution (SIC) for the Gosford City Centre was made on 12 October 2018. As a result, council is no longer required to fund regional infrastructure through the s7.12 levy. It is no longer appropriate for council to levy in excess of 1%.

It is proposed to amend the EP&A Regulation to limit the maximum percentage levy amount council can impose in Gosford City Centre.

Effect of the changes

Clause 25K of the EP&A Regulation establishes a maximum percentage levy Central Coast Council can impose under a local contributions plan, being 4%. However the intention of the Gosford City Centre SIC was to create a contribution rate in Gosford of 3% (2% under the SIC and 1% under the local contributions plans made under s7.12).

The amendment will achieve consistency between the intended levy amount specified in the Gosford City Centre SIC with that which can be imposed by Gosford City Council.

4.5 Update the cl 25K outdated reference to Wollongong City Centre LEP

Part 4 Division 1B cl25K of the EP&A Regulation also specifies a maximum percentage for development levies under s7.12 of the EP&A Act for 'Land within the Commercial Core zone under 'Wollongong City Centre Local Environmental Plan 2007'. This Plan was repealed by the Wollongong Local Environmental Plan 2009 in 2010. The current (2009) LEP includes B3 Commercial Core land.

It is proposed to amend the EP&A Regulation to update cl25K references to the 'Wollongong City Centre Local Environmental Plan 2007' to refer to 'Wollongong Local Environmental Plan 2009'.

It should be noted that some other LEPs referred to in cl25K have also been repealed however retention of the LEPs as currently named is necessary to maintain the effect of clause.

Effect of the changes

The amendment is required as the boundary of the Wollongong City Centre was changed in the 2009 LEP and will provide consistency for land in the Wollongong Commercial Core.

5. Have your say

The Department welcomes your feedback regarding the proposals outlined in this paper and on the [draft instrument](#). Your feedback will help us better understand the views of the community and will assist us in finalising the proposals outlined in this paper.

Submissions can be made via the Department's website:

www.planningportal.nsw.gov.au/exhibition

You may also post your submission to:

Executive Director

Planning Policy

Department of Planning, Industry and Environment

Locked Bag 5022, Parramatta NSW 2124.

All submissions will be made public in line with our objective to promote an open and transparent planning system. If you do not want your name published, please state this clearly at the top of your submission. The Department will publish all individual submissions and an assessment report on all submissions shortly after the exhibition period has ended.

