CENTRAL NSW
JOINT ORGANISATION

Chair Cr John Medcalf OAM, Mayor, Lachlan Shire Council

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Reference: vp:jb 210928
Enquiries: Ms J Bennett: 0428 690 935

The Hon. John Barilaro, MP
Deputy Premier
Minister for Regional New South Wales
Minister for Industry and Trade
52 Martin Place
SYDNEY NSW 2000

cc The Hon Robert Stokes, Minister for Planning and Public Spaces, The Hon, Paul Toole, Member for Bathurst, Ms Steph Cooke, Member for Cootamundra , Mr Phil Donato, Member for Orange and Mr Roy Butler, Member for Barwon and The Hon Sam Farraway, Parliamentary Secretary to the Deputy Premier and for Water Infrastructure.

Dear Deputy Premier,

Re: Environmental Planning and Assessment Amendment (Infrastructure Contributions) Bill 2021

On behalf of the Board, I write to raise with you concerns about the timeframe and the significant changes to the operation of the Infrastructure Contributions regime in NSW with limited 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.

This region respectfully requests 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.

Please see a detailed response that addresses the issue and our concerns that the bureaucracy is getting out of hand (common planning assumptions, biodiversity calculator, various consultations and slippage) with an example of the latest lack of attention to detail is the tourism mapping for EVs which among other things has the State border at Cowra.

We seek an opportunity to meet with you to provide this advice firsthand, we would provide summary dot points and recommendations.

Please contact Executive Officer Jenny Bennett on 0428 690 935 if you would like to discuss further.

Yours sincerely,

Cr John Medcalf, OAM
Chair
Central NSW Joint Organisation

Why the Environmental Planning and Assessment Amendment (Infrastructure Contributions) Bill 2021 should be withdrawn for further consultation

Introduction

As you are aware Local Government Regional Joint Organisations (JOs) were proclaimed in May 2018 under the NSW Local Government Act 1993. The Central NSW Joint Organisation (CNSWJO) represents over 200,000 people covering an area of more than 50,000sq kms comprising the Local Government Areas of Bathurst, Blayney, Cabonne, Cowra, Forbes, Lachlan, Oberon, Orange, Parkes, Weddin, and Central Tablelands Water.

Tasked with intergovernmental cooperation, leadership and prioritisation, JOs have consulted with their stakeholders to identify key strategic regional priorities. The CNSWJO Strategic Plan can be found here: https://docs.wixstatic.com/ugd/51b46b_31886650ecf546bc916f15e99a733b3e.pdf

The Central NSW Joint Organisation provides the following feedback regarding the Environmental Planning and Assessment amendment (Infrastructure Contributions) Bill 2021.

This region 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.

Our region appreciates 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.

This region respectfully requests 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.

It is noted that The Environmental Planning and Assessment Amendment (Infrastructure Contributions) Bill 2021 (the Bill) was referred to Portfolio Committee No. 7 – Planning and Environment for inquiry and report. They subsequently recommended:

> *That the Environmental Planning and Assessment Amendment (Infrastructure Contributions) Bill 2021 not proceed, until the draft regulations have been developed and released for consultation and*

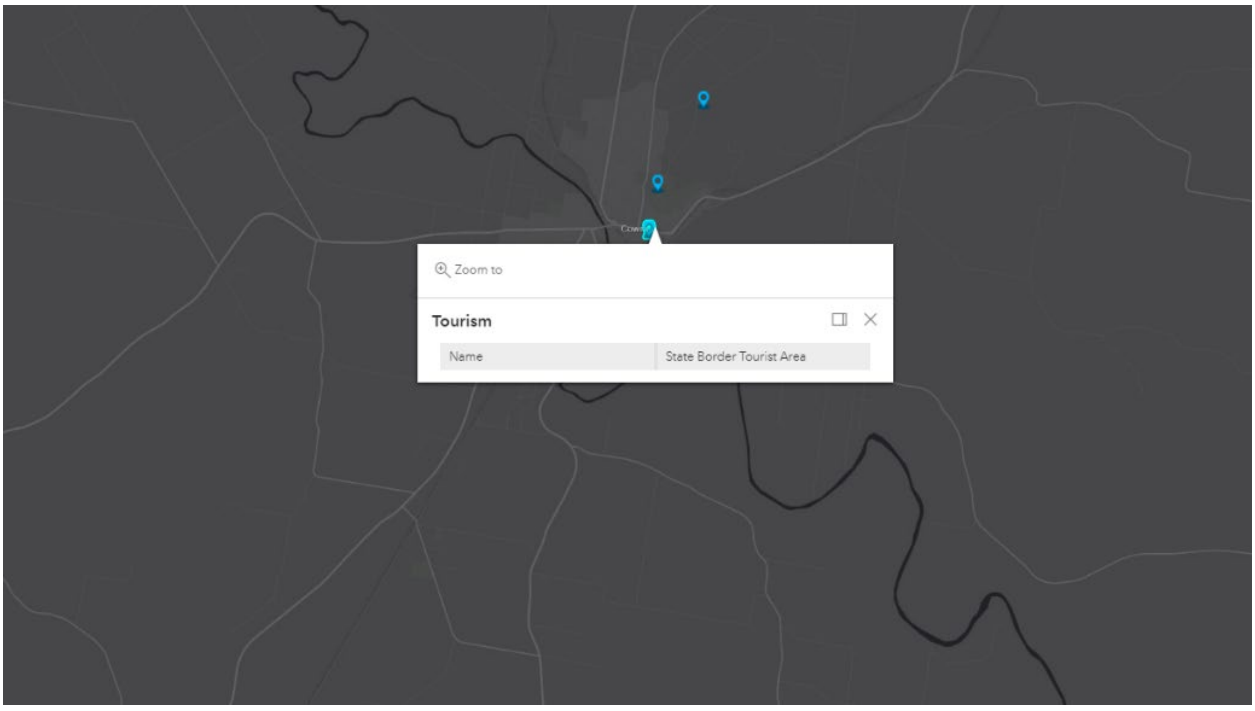
the reviews into the rate pegging system, benchmarking and the essential works list have been published by the Independent Pricing and Regulatory Tribunal.[1]

Finally, this region is concerned that this legislation is reflective of an ongoing erosion of local governance and poor process by the State bureaucracy. On the one hand Central NSW is enjoying the tremendous benefit of the State and Federal Government spend on infrastructure, on the other there is a constant headwind of poor bureaucratic process that Councils and JOs are trying to manage. Whether it be the Biodiversity Offset Calculator, common planning assumptions of Treasury developed by the DPIE, various regional plans, just about any agency engagement - member experience is of 'not fit for purpose processes,' lack of attention to detail, poor and non-strategic engagement, poor understanding of local government and slippage measured in years.

No doubt the intentions of Government are good, however the experience in region is a deluge of good ideas poorly executed. This is on top of the chronic patronisation of local government and disrespect of all political leaders be they local or State, evidenced by their exclusion from various processes. Central NSW is witnessing a growing disconnect between regional communities and the State Government.

The Auditor General will pick up on the need for improvement of various State silos over time but please be aware that Local Government, the canary in the coal mine that has to work with multiple agencies; is singing out loudly about this deteriorating state of affairs.

For example, while amusing, the recently announced NSW Government EV Masterplan's mapping has the Parkes Observatory at South West Rocks, Hunter Valley Gardens at Mt Panorama in Bathurst and the NSW border at Cowra.[2]



[1] Report (nsw.gov.au) p viii

[2] https://www.energysaver.nsw.gov.au/reducing-emissions-nsw/electric-vehicles/electric-vehicle-fast-charging-master-plan

Specific concerns regarding the Environmental Planning and Assessment amendment (Infrastructure Contributions) Bill 2021

s7.12 contributions to State Significant Developments has not been addressed in the Bill.

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. 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 Councils are 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."

Central NSW Councils 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 Council in maintaining and renewing 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 larger 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. **There 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.**

Central NSW Councils 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.

Further, this region understands that the State may have concerns about the levy being applied to all State Significant Developments which would encompass hospitals and schools. However, 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 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 this region's 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 councils. Councils in Central NSW 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.

In addition, this region is also concerned that there is a provision for determining indexation on monetary contributions. It is unclear from the Bill what is actually proposed and this new section needs far more clarification and consultation prior to its introduction where there are concerns that it could become a form of rate pegging on developer contributions.

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; should be deleted.

3. Section 7.17: Directions by Minister

CNSW Councils 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.

CNSWJO notes 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, this caveat does not appear 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, Central NSW Councils believes 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. 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. Central NSW Councils 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. This questions 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. 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, Central NSW Councils are concerned that the RIC will do far more than "replace current special infrastructure contribution" as indicated in the Department's Guide to the Bill.

It appears that the RIC Fund has the capacity to extend to every corner of the State. 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.

It is noted 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. It is assumed 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.

CNSWJO 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, accordingly the State should be required to prepare similar plans for expenditures from the RIC Fund and the SBC Fund.

CNSWJO 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, where the calculator for these offsets is driving perverse outcomes across the State and needs immediate remediation. 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.

Further, 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 CNSWJO members would support delaying the introduction of the amendments relating to the RIC Fund until that detail can be provided and consultation 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.

In conclusion

CNSWJO Councils note that many of the proposed changes will impact significantly on local government. Councils have had very little opportunity to analyse the legislation and consider its ramifications. Accordingly, this region supports 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.