Submission – draft Environmental Planning and Assessment Amendment Bill 2017

IPART
Independent Pricing and Regulatory Tribunal
New South Wales

1 Our submission

Thank you for giving IPART the opportunity to provide comments on the draft Environmental Planning and Assessment Amendment Bill 2017 (draft Bill). IPART has comments on a number of the proposed amendments to the *Environmental Planning and Assessment Act 1979* (EP&A Act). Our relevant experience includes our recent reviews of local government regulatory burdens, reviewing local infrastructure contribution plans and regulating water and electricity utilities.

We have addressed a number of the themes set out in the Department of Planning and Environment's (DPE's) *Planning Legislation Updates – Summary of proposals* (January 2017).

2 Completing the strategic planning framework

Alignment with our regulatory review findings and recommendations

We support DPE's proposed changes, in particular:

- developing standard or model conditions for major projects
- extending the compliance toolkit for councils through temporary stop work powers, and enforceable undertakings
- ensuring cost recovery, including through a compliance levy, and
- removing regulatory burdens on councils imposed as a result of concurrences and referrals.[1]

Consistent with our review of Local Government compliance and enforcement, we support DPE further reducing regulatory burdens on councils. We note that the requirement for councils to develop and publish local strategic planning statements would be a new obligation, which will require funding, implementation and compliance arrangements.

We also support DPE assessing the costs and benefits of any additional obligations on local government in the Better Regulation Statement or Regulatory Impact Statement accompanying the final amendment Bill.

3 Better processes for local development

We understand that the proposed reforms to the planning system and local development system are incremental rather than holistic. We support proposed changes that reduce the compliance burden on business and councils such as:

- enabling a standard format for Development Control Plans
- implementing a risk-based approach to concurrences and referrals, modelled on the NSW Food Authority's Food Regulation Partnership (FRP),[2] and

1 These changes are consistent with our draft recommendations in our *Review of reporting and compliance burdens on Local Government* (January 2016) and *Local Government compliance and enforcement* (October 2013) reports.

- enhancing the NSW Planning Portal to allow transactions and promote collaborative practices.

In addition, the *Environmental Planning and Assessment Regulation 2000* (EP&A Regulation) could extend the NSW Planning Portal to provide further functionality, including:

- zoning and development standards information and certificates under section 149(2) of the EP&A Act
- joint applications for development approvals and construction certificates, and
- information under section 149(5) of the EP&A Act (advice from a council on relevant matters relating to land) to be accessible via a link to council websites.[3]

Broader reform in some areas would deliver greater benefits to the community by way of reduced red tape and compliance burdens. In our 2014 regulatory review, the CIE estimated that excessive or unnecessary costs of the NSW planning system are between $260 million and $305 million per annum.[4] Areas for broader reform include:

- Standardising local development consent conditions. This would further reduce compliance costs for business and local government.
- Providing more flexibility in how councils notify the public under the EP&A Act and EP&A Regulation to allow more cost effective methods including online advertising, mail-outs and other forms of communication.
- Allowing councils to delegate authority to the General Manager of a council to consider a report by the Fire Brigade, make a determination and issue an order, rather than having the report considered at the next council meeting.[5] Handling this issue at the operational level would speed up enforcement of potentially serious fire safety breaches and lower the administrative burden on councils.

4 Better processes for State significant development

Transferable conditions

We support DPE's proposal to introduce a transferrable conditions regime via amendment to section 80A of the *Environmental Planning and Assessment Act 1979*. This regime would apply when conditions of consent are duplicated across more than one approval. The regime would allow certain consent conditions to cease to have effect, if they are substantially consistent with conditions imposed under another approval or licence.

We support the introduction of a transferable conditions regime because it would reduce regulatory burden and enable greater clarity in terms of regulatory responsibilities.

However, we consider that a notification process should be developed and implemented to support the transferrable conditions regime. The notification process should address matters including how the consent authority will notify the other relevant regulator(s) when

2 As identified by IPART as a best practice regulatory model.
3 This is consistent with recommendations that we made in our *Review of reporting and compliance burdens on Local Government*.
4 The CIE *Local Government Compliance and Enforcement – Quantifying the impacts of IPART's recommendations*, June 2013, pp 13, 17-18.
5 This would require amendment to s121ZD of the EP&A Act.

development consent conditions cease, or would cease, to have effect. We consider that a notification process would support the transferrable conditions regime by ensuring that regulators understand when consent authorities are no longer monitoring or enforcing certain consent conditions.

Part 3A concept plan approvals

Conditions on a Part 3A concept plan approval can require a development to obtain certain approvals under the EP&A Act, such as development consent. IPART supports an approach that preserves the effect of these conditions.

As referred to in Section 5 of this submission, sometimes *Water Industry Competition Act 2006* (WIC Act) licensees may carry out development without development consent or an environmental assessment under the EP&A Act. Preserving the effect of the conditions on a Part 3A concept plan approval could, in some instances, require development consent to be obtained for such development to be carried out.

5 Facilitating infrastructure delivery

Concurrence provisions

Many private or partially privatised infrastructure providers now construct and operate infrastructure such as electricity networks and water supply/sewerage networks. Such private companies include:

- network operators licensed under the WIC Act, and
- authorised network operators under the *Electricity Network Assets (Authorised Transactions) Act 2015*.

These companies, along with public infrastructure providers, may need to be able to reserve infrastructure corridors in order to plan efficiently and effectively over the long term. In order to ensure inappropriate development does not occur within a corridor, planning instruments can require concurrence or notification of infrastructure providers, before a development can be carried out.

The concurrence provisions in Schedule 5 of the draft Bill and section 30 of the EP&A Act do not contemplate the provision of concurrence by private infrastructure providers. DPE should consider whether concurrence provisions in Schedule 5 of the draft Bill, and section 30 of the EP&A Act, should be amended to contemplate the provision of concurrence by private infrastructure providers.

When considering concurrence provisions, DPE should take into account the potentially competing land use objectives, such as using infrastructure corridors for public open space. DPE should consider when it is appropriate for infrastructure providers to have the final say on development in certain areas, or when such power should be limited.

Environmental assessment for water utilities

The NSW Government should review the effect of planning legislation on public water utilities (PWUs) and licensees under the WIC Act. The review, which IPART is well placed to

undertake, should consider how the EP&A Act (and/or *State Environmental Planning Policy (Infrastructure) 2007* (ISEPP)) should be amended to:

- address the regulatory gap arising from the interaction between clause 106 of the ISEPP and the definition of "activity" in section 110 of the EP&A Act (see 'regulatory gap' section below)
- avoid inefficient regulation (see 'inefficiencies' section below), and
- remove barriers to competition between public and private water utilities (see 'barriers to competition' section below).

To achieve some of those objectives in the immediate term, we also propose that:

- references to WIC Act licensees should be immediately deleted from clause 106 of the ISEPP, and
- exempt development provisions for water supply and sewerage systems (clauses 107 and 127 of the ISEPP) should be extended to WIC Act licensees.

We consider that this is the most efficient way to close the regulatory gap, in the immediate term.

We note that DPE released a public consultation draft titled "State Environmental Planning Policy (Infrastructure) Amendment (Review) 2016" (ISEPP Review) on 6 February 2017. We consider the proposed amendments to ISEPP would not address all of the issues we have identified. We will comment on the proposed amendments to ISEPP in a separate submission to the ISEPP Review.

Regulatory gap

In our view, any development activities authorised by WIC Act licences should not be permitted to be carried out unless:

- development consent under Part 4 of the EP&A Act has been granted in relation to that development
- an environmental assessment under Part 5 of the EP&A Act has been carried out in relation to that development, or
- it is designated as 'exempt development' under section 76 of the EP&A Act because it is of minimal environmental impact.

However, currently some activities authorised under WIC Act licences may be carried out without development consent, without an environmental assessment being undertaken, and without being designated as exempt development.[6] This is due to a regulatory gap arising from the interaction between clause 106 of the ISEPP and the definition of "activity" in section 110 of the EP&A Act. In summary:

- Before a WIC Act licence is granted, the development is subject to the requirement to obtain development consent under Part 4 of the EP&A Act. However, such consent does not have to be obtained before the WIC Act licence is granted.

6 The ISEPP does not designate any development carried out by, or on behalf of WIC Act licensees as exempt development (eg, clauses 107 and 127 only apply to public authorities, rather than WIC Act licensees).

- Part 5 of the EP&A Act does not apply to the Minster's consideration of the licence application because it does not fall within the definition of "activity" in section 110 of the EP&A Act.
- If the licence is granted without Part 4 development consent, then clause 106 of the ISEPP is likely to exempt the licence holder from the need to obtain such consent.
- If the development requires no further approval from a Minister or public authority (after the WIC Act licence has been granted), then environmental assessment under Part 5 of the EP&A Act will not be required.

Removing references to WIC Act licensees from clause 106 of the ISEPP will address the regulatory gap in the immediate term. It would mean that consent under Part 4 of the EP&A Act would be required for development for the purpose of sewerage systems, when carried out by, or on behalf of WIC Act licensees. We also recommend that the exempt development provisions in clauses 107 and 127 of the ISEPP be extended to WIC Act licensees, to allow development of minimal environmental impact to be carried out as exempt development.

Inefficiencies

The current provisions in Divisions 18 and 24 of the ISEPP give rise to a number of inefficiencies. WIC Act licensees, licence applicants and regulators (eg, IPART and consent authorities) incur increased costs which in some cases may have little environmental benefit. These inefficiencies arise for the following reasons:

- **It is costly for IPART to determine if the regulatory gap applies:** When assessing WIC Act licence applications, IPART determines whether, if a licence was granted, the regulatory gap would apply. Where the regulatory gap would apply, IPART assesses the environmental impacts of the relevant sewerage systems as part of the licence assessment process (IPART Environmental Assessment). We dedicate substantial resources to determine whether the regulatory gap applies. This is because the planning approvals are often complex and we need to consult extensively with consent authorities to understand the scope of existing approvals.
- **Two regulators can separately assess the environmental impacts of one integrated project:** In some instances, a WIC Act licence applicant may provide drinking water services, sewerage services and recycled water services. In those circumstances, development consent is required for the drinking water infrastructure, but it is often not required for the sewerage infrastructure or the recycled water infrastructure. As a result, the consent authority assesses the drinking water infrastructure under the EP&A Act and IPART assesses the sewerage and recycled water infrastructure under the WIC Act (IPART Environmental Assessment). The water, sewerage and recycled water infrastructure is essentially part of one integrated project, and yet two different regulators assess the impacts of, and may impose inconsistent requirements on, the development.

- **WIC Act licensees may continually apply to vary the scope of their licence:** In the circumstances above, it is common for WIC Act licence applicants to limit the scope of their licence application to those activities which have been granted development consent. After a licence is granted, the licensee then applies to vary the licence scope as consent is granted for each stage of the development. By doing this, the licensee has only one regulatory authority (the consent authority) assessing the environmental impacts of an integrated project. This is more efficient for the licensees as they can prepare integrated environmental assessment reports that cover drinking water, sewerage and recycled water infrastructure. However, it is inefficient for the licensee to continually apply for licence variations, and for IPART to have to assess these applications.
- **WIC Act licensees require consent for development of minimal environmental impact:** Unlike PWUs (as public authorities), WIC Act licensees cannot carry out a range of emergency and maintenance work in connection with a drinking water system as exempt development. This means consent under Part 4 of the EP&A Act is likely to be required for such development. This is inefficient as such development is of minimal environmental impact (a requirement for it to be designated as exempt development under subsection 76(2) of the EP&A Act) and would not require consent if it was carried out by a PWU.

These inefficiencies would be addressed in the immediate term by:

- removing references to WIC Act licensees from clause 106 of the ISEPP, and
- extending the exempt development provisions in clauses 107 and 127 of the ISEPP to WIC Act licensees.

Barriers to competition

The following inconsistencies between the requirements imposed on WIC Act licensees and PWUs under the ISEPP create barriers to competition in the provision of water and sewerage services:

- Under Division 24 of the ISEPP, PWUs (as public authorities) can carry out certain development for the purpose of water supply systems without consent. In contrast, WIC Act licensees are not mentioned in Division 24 and, therefore, do not have equivalent rights.
- An environmental assessment under Part 5 of the EP&A Act must be undertaken every time a PWU carries out an activity that does not need consent and that is not exempt development (such as certain development for the purpose of water supply systems or sewerage systems under Divisions 24 and 18 of the ISEPP, respectively). WIC Act licensees are not subject to a similar ongoing environmental assessment requirement.
- Under clauses 107 and 127 of the ISEPP, PWUs (as public authorities) may carry out a range of emergency and maintenance work in connection with sewerage systems or drinking water systems as exempt development. These provisions do not apply to WIC Act licensees.

We acknowledge that removing references to WIC Act licensees from clause 106 of the ISEPP will create additional barriers to competition as WIC Act licensees will require consent for activities that PWUs do not. That is why we propose that:

- the removal of those references from clause 106 of the ISEPP is only adopted as an interim measure, and
- the NSW Government conducts a more comprehensive review of the relevant legislative framework, which IPART is well placed to undertake.

On balance, we consider that this is the best interim measure because it addresses the inefficiencies described above.

6 Fair and consistent planning agreements

Local infrastructure contributions

The Summary of Proposals, accompanying the draft Bill, outlines that DPE will work with IPART, councils and industry to review current guidelines on the costs, design and provision of local infrastructure delivered through section 94 (s94) infrastructure contributions to ensure they are delivered efficiently and to appropriate standards.[7]

IPART is well placed to assist DPE with a review of local infrastructure guidelines, given:

- our existing role in reviewing certain s94 contributions plans (Box 6.1), and
- our previous work in reviewing benchmark costs for local infrastructure contributions (Box 6.2).

Box 6.1 IPART's s94 contributions plans review function

In 2010 the NSW Government introduced caps on the amount of s94 development contributions that councils can collect. Unless the Minister for Planning exempts the development area,[a] councils can levy development contributions to a maximum of:

- $30,000 per dwelling or residential lot in greenfield areas, and
- $20,000 per dwelling or residential lot in all other areas.

The NSW Government also conferred on IPART the function of reviewing certain plans with contribution rates above the relevant cap. Councils must have their plans reviewed by IPART to be eligible for government funding or to apply for a special rate variation.

Since October 2011 IPART has assessed 13 contributions plans from The Hills Shire Council, Blacktown City Council, Wollongong City Council and Bayside Council. Reports on these contributions plans were presented to the Minister for Planning and the councils, and are available on our website.

a The Minister for Planning exempted all developments where, as of August 2010, the amount of development that had already occurred exceeded 25% of the potential number of lots. The Department of Planning and Environment has advised that developments subject to this exemption were assessed on application from relevant councils.

b Currently through the Local Infrastructure Growth Scheme (LIGS).

7 DPE, *Planning Legislation Updates – Summary of Proposals*, January 2017, p 33.

Box 6.2 Benchmark costs for local infrastructure contributions – April 2014

In September 2013, the Government asked IPART[a] to advise about benchmark costs for infrastructure and how councils can establish the efficient costs of local infrastructure. We were asked to determine benchmark costs for a list of infrastructure items. We were also asked to make recommendations about:

- how to estimate costs for infrastructure items that could not be benchmarked
- how to update the benchmarks
- how to value land
- mechanisms for dispute resolution, and
- whether planning, environmental and other standards have an impact on council's infrastructure costs.

Our Final Report from April 2014 sets out our advice and recommendations and is available on our website.

a Under section 9 of the *Independent Pricing and Regulatory Tribunal Act 1992*.

We consider that there are two key areas of the current local infrastructure framework that are in need of reform:

1. who pays for the infrastructure, and
2. other rules that should ensure there is value for money in infrastructure provision, with a particular focus on cost efficiency and contestability.

Who pays for the infrastructure?

In the current system, there are three main sources of funding for local infrastructure:

1. developers, who usually pass the costs on to homebuyers
2. the NSW taxpayer through the NSW Government's Local Infrastructure Growth Scheme (LIGS), and
3. a council's broader ratepayer base where infrastructure is not funded by contributions on developers or the NSW Government through the LIGS.[8]

The current hard caps on the contributions payable for residential development can limit developers' contributions to the capped amount. Where proposed contributions under a s94 plan would otherwise exceed the cap, the gap in funding is covered by the NSW Government under the LIGS, but only after a review of the plan by IPART and Ministerial approval of the funding request. In this case, the gap is ultimately funded by the NSW taxpayer.

When councils do not seek LIGS funding or the infrastructure does not qualify for LIGS funding[9], any gap would need to be funded by the council's broader ratepayer base. Councils also have the option of submitting a special rate variation (rate increase) request to

8 This might occur if the rate of contributions exceeds the current cap and the infrastructure to be funded is not on the Government's Essential Works List (EWL), such as capital work for community facilities. (The EWL is specified in the Department of Planning and Infrastructure, *2014 Revised Local Development Contributions Practice Note – For the assessment of Local Contributions Plans by IPART*, 2014).

9 This would occur if the infrastructure item is not on the Essential Works List.

fund the gap, after a review of a plan by IPART. To date, councils have not taken up this option while LIGS funding is available.

The caps place the same limits on s94 contributions for residential development regardless of the demand for infrastructure and the associated costs involved. Therefore, the need for any gap funding and the amount of the gap to be funded by an alternative funding source varies from plan to plan.

Since 2011, we have received 12 plans for assessment for greenfield areas in and around Sydney's North West Growth Centre[10] where proposed contributions rates are well above the cap. Over this time, we have also observed large increases in infrastructure costs in these areas that are partly attributable to increased land values (Box 6.3). This results in greater demand for NSW Government LIGS funding to fund the infrastructure.

Box 6.3 Example of increased infrastructure costs in CP20 from 2011 to 2016

IPART has reviewed the contributions plan for Blacktown City Council's Riverstone and Alex Avenue Precinct (CP20) three times – in 2011, 2015 and 2016.

The $745 million in costs proposed by the council in the draft CP20 that we reviewed in 2011 had, by our review of the amended plan in 2016, increased by 42% to $1.1 billion (in nominal terms). This means that the proposed contributions rates in the plan increased from around $60,000 per low density dwelling in 2011 to around $85,000 per dwelling in 2016.

Therefore, with an unindexed hard cap on development contributions of $30,000 per dwelling, the funding gap for local infrastructure in this example increased by around $25,000 per dwelling in the five years to 2016.

Note: The proposed rates in this example applied to the First Ponds Creek catchment for low density dwellings (15 dwellings per hectare). Indicative rates in CP20 vary by catchment and density.

Source: IPART, *Assessment of Blacktown City Council's Amended Section 94 Contributions Plan, Riverstone and Alex Avenue Precinct,* July 2016; IPART, *Assessment of Blacktown City Council's Amended Section 94 Contributions Plan, Riverstone and Alex Avenue Precinct*, March 2015; and IPART, *Assessment of Blacktown City Council's Amended Section 94 Contributions Plan, Riverstone and Alex Avenue Precinct*, October 2011**.**

Conversely, we have not yet received any plans for assessment from councils in the South West Growth Centre because the costs per residential dwelling are lower and the contribution levels are better aligned with the caps. Where costs might exceed the revenue provided for by the caps in these areas, we understand that infrastructure is still being delivered with the councils:

- achieving efficiencies in infrastructure provision to reduce the costs
- absorbing the additional costs in their broader cost base, and/or
- entering planning agreements whereby developers deliver the necessary infrastructure as works-in-kind and might be willing to contribute a higher value of works to expedite the development and servicing of the area.

10 These areas are within the Blacktown City and Hills Shire local government areas (LGAs). We have reviewed other contributions plans for West Dapto (Wollongong) and Rockdale (Wolli Creek).

Need to remove the current hard cap on contributions

In our view, the current hard cap on contributions should be removed as part of broader reform to the local contributions framework. The caps have been in place since 2010, with no mechanism for indexation or review. This policy position is both inefficient and unsustainable:

- The hard cap distorts the price signal to developers which removes the incentive to develop in sequence from lower to higher cost areas.
- The value created by the subsidised infrastructure provision is usually captured by the landowners, rather than being reflected in lower house prices.
- Where infrastructure costs are not funded by the council, councils have less incentive to minimise costs, which passes on higher costs to developers and/or the taxpayer, depending on whether the contributions exceed the cap or not.
- Should the higher costs be considered reasonable, there can still be a significant gap in funding for the proposed infrastructure in the plans, which needs to be borne by either the NSW taxpayer or other funding source. In 2016, we assessed $904 million of the proposed $1.1 billion in costs in CP20 to be reasonable but only $443 million can be funded from development contributions under the cap; the remaining $461 million would need to be funded by the NSW Government or the council's revenue base.[11]

We consider that the funding arrangements for local infrastructure should follow the hierarchy of impactor-pays and beneficiary-pays principles.[12] New development gives rise to demand for new facilities and developers, as the 'impactors', should fund most of the essential local infrastructure required. While the contributions are ultimately passed on to homebuyers in house prices, the access to infrastructure is also capitalised in the value of the property.

However, there are reasonable arguments for a portion of the costs to be shared among beneficiaries in some circumstances. For example, the demand for some aspects of, or extent of the infrastructure, might be driven by broader objectives beyond addressing the impact of the new development:

- The broader ratepayer base might gain some benefit from infrastructure improvements in the LGA such as new district level parks.
- The broader regional community (beyond LGA boundaries) might also benefit from certain local infrastructure eg, when there are downstream benefits from stormwater infrastructure in greenfield areas through water quality improvement in waterways, rivers and estuaries, or when the broader regional community gives rise to the demand for open space facilities.

For these reasons, we recommend that the current hard caps on s94 contributions and the LIGS be abolished, and replaced with a system of soft caps, where development

11 IPART, *Assessment of Blacktown City Council's Amended Section 94 Contributions Plan, Riverstone and Alex Avenue Precinct, July 2016*, pp 4, 8-10, 16 and IPART calculations.

12 We developed a funding approach based on a hierarchy in our Draft Report on the *Review of the funding framework for Local Land Services NSW* for the Minister for Primary Industries in September 2013. In this hierarchy, preferably the impactor/risk creator should pay; if this is not possible, the beneficiary should pay; and as a last resort, taxpayers should pay.

contributions can be supplemented by other funding sources when there are broader benefits from the infrastructure, as outlined below.

Soft caps should replace the current hard caps

We recommend that there still needs to be some limit on the nature and cost of infrastructure in s94 plans to contain the rate of contributions that councils seek from developers. In particular:

- The works should be confined to what is considered to be 'essential infrastructure' only.
- The cost estimates in the plan should be reflective of the efficient cost of providing the infrastructure, which incorporates decisions about land use, the standard of infrastructure, and delivery and costing approaches.

To achieve these objectives, one option could be to introduce '**soft caps'** on contributions rates which refer to limits on contributions per dwelling (or cost rates) which can be exceeded only when justified by an independent review.

To exceed the soft cap, there would need to be a reasonable case for developers to pay higher contributions for certain infrastructure needs in an area. Any new limits on the contribution rates would need to be informed by an analysis of current infrastructure costs across a representative sample of plans, and consideration of the costs and benefits of various policy scenarios. Based on our experience in assessing plans to date, our recommended features for 'soft caps', as a starting point, are identified in Box 6.4.

Box 6.4 Recommended features of 'soft caps' on local infrastructure contributions

We recommend that 'soft caps' should be:

- Specific to categories of infrastructure (eg, as a cap on the contribution for stormwater infrastructure per hectare (based on an estimate of efficient stormwater costs), the contribution for open space per person (which would incorporate consideration of the rate of open space provision and an estimate of efficient open space costs), or the contribution for transport infrastructure per person and/or per hectare (based on an estimate of efficient transport costs).
- Informed by essential infrastructure requirements and the costs of current infrastructure items (such as those costs reported in IPART's local infrastructure benchmark report and as reported in s94 plans), noting that the aim of the soft caps would be to set the limit at minimum or efficient cost levels, to drive efficiencies and innovation.
- Indexed periodically to maintain their levels in real terms.
- Ideally used as a reference point by the council and other stakeholders during the planning process to test that local zoning and infrastructure decisions would result in costs within the caps.
- Subject to regular review (eg, 12 months after the introduction, every three years thereafter).

We also consider that there is the potential for soft caps to be differentiated by:

- the nature of the development area (eg, greenfield versus infill development), and
- land values in the region (where councils would have the option to justify higher contributions due to higher land values, as determined by an independent valuer).

However, these points of differentiation would need to be subject to further cost benefit analysis to determine how appropriate they are in the overall policy setting.

Infrastructure categories (ie, stormwater, transport and open space) provide a reasonable basis for setting 'soft caps' and can be guided by individual benchmarks of infrastructure items,[13] as well as the average costs in a representative sample of contributions plans. Setting the caps as a function of demand (ie, area or population) helps to ensure the caps are reflective of the efficient cost of infrastructure to service an area.

The need for an independent review of costs and funding mechanisms

An independent review of contributions in a plan which exceed the soft cap(s) would serve as a gateway process for the assessment of only those particular infrastructure costs. This would target reviews to areas of potential cost concerns and reduce compliance costs.

The West Dapto Contributions Plan[14] (in the Wollongong LGA) is an example of a s94 plan with transport costs that exceed the average costs in other s94 plans due to the complexity of the road and bridge network. IPART's assessment of that plan in 2016 identified a number of cost efficiencies in the transport items that could be achieved (by up to $204

13 IPART published local infrastructure benchmarks in response to a request by the Government in 2014.

14 IPART, *Assessment of Wollongong City Council's Draft West Dapto Section 94 Development Contributions Plan, Local Government – Final Report*, October 2016.

million), even though the transport costs were still high compared with other plans. The review process served to legitimise the remaining costs.[15]

Given our expertise in assessing s94 contributions plans, benchmarking local infrastructure and pricing and regulatory matters more generally, IPART is well placed to continue to undertake this type of cost assessment function. Similarly, we are well placed to recommend and review the level of 'soft caps' or other limits placed on contributions rates, in consultation with the NSW Government and other stakeholders. If preferred, this could form part of a broader review of funding mechanisms for state and local infrastructure, as required, or of other policy settings which impact the supply of housing in Greater Sydney.

Alternative funding options for local infrastructure

We also recommend that a range of other funding mechanisms be considered to supplement funding for specific infrastructure requirements, thereby further reducing developer contributions in greenfield sites, in particular:

- The council's rates base, in cases where the LGA community would likely benefit from the nature or extent of the infrastructure. One example is when councils seek to achieve standards of infrastructure which result in a higher capital cost but provide for lower lifecycle costs (which in turn, can reduce the burden on ratepayers over time). Another is regional community facilities which would be accessed by the broader LGA.

  Our recent local government rating review made recommendations to increase the revenue base of councils to fund infrastructure and services. We recommended allowing a council's general income to grow in line with the growth in Capital Improved Value (CIV) that arises from new development, and a special rate for new infrastructure that is jointly funded by other levels of government.[16]

- A regional levy on other developers in Greater Sydney. This could fund a share of the land costs for drainage purposes in Sydney's greenfield sites (eg, in the Blacktown LGA new release precincts) where there are downstream benefits from the stormwater infrastructure and outcomes could be improved with a more regional-based planning approach. A regional levy can also contribute towards the funding of regional open space where benefits extend beyond the LGA, as the Sydney Region Development Fund (SRDF), currently provides for.[17]

- NSW Government grants to achieve the State's environmental objectives where they increase the cost of providing local infrastructure. Such objectives could include conserving land or preserving species or habitats. The need to meet these objectives can change the scope or standard of infrastructure in an area (such that larger (and more expensive) basins or new remediation works are required, for example).

15 The difference - should the hard caps be removed and replaced with soft caps - is that developers would be charged higher, but more cost-reflective contributions, instead of the NSW taxpayer funding the gap.

16 IPART, *Review of the Local Government Rating System, Local Government – Draft Report*, August 2016, p 4.

17 The Sydney Region Development Fund (SRDF) was created under section 129 of the EP&A Act for the acquisition of land in the Sydney Region (Greater Sydney Commission, *Metropolitan Greenspace Program 2016-17 Guidelines*, p 15). Councils in Sydney currently contribute annually to the SRDF. It provides funding for the Metropolitan Greenspace Program.

Other rules for local infrastructure provision

The funding mechanisms recommended above, incorporating the option of the soft caps, would provide clearer price signals to developers about the cost of infrastructure.

Such caps would incentivise councils to set contributions based on efficient cost estimates for infrastructure, and to plan ahead to cover funding requirements for any additional (eg, non-essential) infrastructure needs. However, to maximise the system's effectiveness in ensuring efficient development and infrastructure provision, we also consider the need for other complementary reforms.

Earlier integration of cost considerations in the planning process

We recommend that where possible, efficient cost and funding considerations related to local infrastructure be integrated into the planning process at an earlier stage. At present in the Growth Centres, the precinct planning process links into the council's local plans and informs the zonings approved for the area. One of the later steps involves the council, as the planning authority, developing a s94 contributions plan to fund the infrastructure. This apparent disconnect between precinct planning and the preparation of a s94 contributions plan can result in lost opportunities to achieve cost efficiencies.

In our assessment of contributions plans, we have observed that:

- In one plan[18], the provision of open space exceeded commonly accepted standards for the expected population and therefore, there were relatively high open space costs. At the stage that we assessed the plan, however, the zoning process had been completed and there were limited alternative land use options for the land. It remains difficult to reverse the earlier decisions in these circumstances.
- Related to the example above, the dual use of stormwater land for open space purposes can reduce the need for land zoned solely for open space in an area, and so reduce costs overall. If this dual use is only considered at the s94 plan stage and there are reasonable opportunities to achieve this outcome, there could be excessive areas of land zoned for open space.
- There is benefit from planning more holistic, regional solutions to stormwater management (eg, in North West Sydney) which considers the cost impacts across the region, rather than on an individual precinct level.

The introduction of the soft caps would provide a useful indicator to utilise at earlier stages in the planning process. We also recommend guidelines to encourage planners to consider the most cost efficient options for land use at these critical stages.

Encouraging contestability in infrastructure provision

We recommend that the rules of the system include a requirement for councils to adequately test the market to obtain their specifications and cost estimates for infrastructure, thereby encouraging greater contestability in its provision.

The local contributions system allows councils to set the scope and price for local infrastructure (ie, roads, stormwater items and open space embellishment) without cost rates

18 IPART, Assessment of The Hills Shire Council's Section 94 Contributions Plan No 15, Box Hill Precinct, March 2016.

being specifically market-tested until **after** the cost estimates are factored into a plan. For work-in-kind (WIK) agreements, the developer must agree to provide the infrastructure at that price. Any savings in the work can then be captured by the developer at the expense of other developers (or taxpayers in the LIGS).

Some councils do systematically test the market to inform the costing of the local infrastructure requirements for contributions in a s94 plan. For example, Blacktown City Council has a schedule of rates for nominated materials, plant and labour determined through an open tender process, which it then uses to derive its cost estimates for s94 plans. These costs then inform its WIK agreements.

If councils were required to test the market more generally to determine their infrastructure needs and cost estimates as the basis for determining contributions and WIK agreements, there would be more contestability in the process. Although the WIK agreements are usually made with developers who are undertaking development in close proximity to the infrastructure, such market testing could still help to ensure that their capacity and efficiency to do the work reflects that of the market.

In our view, the benefits of contestability include:

- ensuring 'value for money' in infrastructure provision
- increasing clarity and transparency in the specification of infrastructure outcomes
- providing for more alternatives regarding infrastructure options, thereby facilitating consideration of the best design of infrastructure solution, in addition to price and efficiency considerations, and
- stimulating innovation, competition, and potentially housing affordability.

Need for more standardised tools for councils

We also recommend that the system should be supported by greater standardisation of the tools made available for councils to use in preparing s94 contributions plans. This could take the form of standard document templates for s94 plans, and standard spreadsheet templates for work schedules and underlying models, including the net present value (NPV) model option to support the costings and derivation of contributions rates.

In our current s94 plan assessment role, we are developing a standard spreadsheet application template in consultation with councils to improve the level and transparency of information provision.

More standardised tools for councils in the local contributions system would:

- reduce the compliance costs for councils
- reduce the incidence of costing errors
- enhance the accountability and transparency of the costing process, and
- facilitate the incorporation of market-tested cost information.

7 Clearer building provisions

Water certificates of compliance

We consider that DPE should:

- only consider repealing subsections 109J(1)(e) and 109J(1)(e1) of the *Environmental Planning and Assessment Act 1979* (EP&A Act) after adequately consulting on the proposed repeal, and
- review the water certificates of compliance framework to address inefficiencies.

Proposed repeal of subsections 109J(1)(e) and 109J(1)(e1) of the EP&A Act

Consultation on the proposed repeal

We consider that the public has not been adequately consulted on DPE's proposal to repeal subsections 109J(1)(e) and 109J(1)(e1) of the EP&A Act. This is because the Summary of Proposals[19] and the Bill Guide[20] do not include any information on the proposed repeal.

Given the potential effect of the proposed repeal (set out below), we consider that DPE should only consider repealing subsections 109J(1)(e) and 109J(1)(e1) after adequate consultation has taken place.

Potential effect of the proposed repeal

The repeal, if made, could make it less likely that subdivided land will receive necessary water and sewerage services. This is because:

- Subsections 109J(1)(e) and 109J(1)(e1) require a developer to obtain a certificate of compliance from the relevant water utility before land can be subdivided.
- Often, when a developer engages with a water utility to obtain a certificate of compliance, the water utility agrees to provide water and sewerage services to the subdivided land.

Review of the certificates of compliance framework

We recommend that DPE reviews the water certificates of compliance framework to address potential inefficiencies, including:

- In some instances, water supply authority will not provide water and sewerage services to a development because those services are being provided by a WIC Act licensee. In those circumstances, subsections 109J(1)(e) and 109J(1)(e1) require the subdivision certificate applicant to obtain a certificate of compliance from both the relevant water supply authority and the relevant WIC Act licensee.
- The certificate of compliance provisions in the *Sydney Water Act 1994*, *Hunter Water Act 1991* and WIC Act could be revised for consistency with each other.

19 DPE, *Planning Legislation Updates – Summary of Proposals*, January 2017.
20 DPE, *Planning Legislation Updates – Bill Guide*, January 2017.

- The requirement, under subsections 109J(1)(e) and 109J(1)(e1), for a developer to obtain a certificate of compliance from a water utility does not expressly require the water utility to provide water or sewerage services to subdivided land.