Review of Developer Charges for Metropolitan Water Agencies
Independent Pricing and Regulatory Tribunal
PO Box Q290
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29th January 2008

**Ref: IPART Issues Paper November 2007**
**Section 3.1 - Application of the Determination**

Solutions Seventy Three (Jusdom Pty Ltd) is a development consulting company providing advice to developers and assisting them in negotiating with Sydney Water regarding developer charges. In recent years we have encountered difficulties with Sydney Water regarding the correct interpretation of Schedule 2 Part A (a) of the IPART Determination 2000 especially concerning industrial and commercial land where charges are paid on a per hectare basis.

Under Section 18(2)) of the IPART Act, Sydney Water has an obligation to always charge the maximum charge unless specifically exempted, on a case by case basis, by the NSW Treasurer. Sydney Water does not have the discretionary powers they have assumed which is used to defer payment from subdivision stage to construction stage.

These discretionary powers have been assumed by an unusual interpretation of Schedule 2 Part A (a) of the determination. Schedule 2 requires redrafting to ensure an interpretation that promotes the basic purpose of the IPART Determination i.e. maximum charge on all complying developments.

***Summary***
The current system of determining developer charges based on Sydney Water's interpretation of Schedule 2 Part A (a) is not working. Developers are purchasing lots in newly created subdivisions and, upon application for construction, are required to pay hundreds of thousands of dollars in developer charges even though they are in possession of a Compliance Certificate which certifies that all charges have been paid. This is neither transparent nor equitable. These are not isolated cases but affect nearly all large subdivisions.

There appears to be a flaw in the methodology adopted by Sydney Water relating to the calculation of developer charges and can be compared to a computer virus. The "virus" is particularly nasty as it distorts the calculations so that they can bear little resemblance to the approved charges. It is almost impossible to detect since:

- No one even suspects that a "virus" exists
- It attacks the undocumented practices not the documented procedures
- It is Sydney Water friendly and hostile to developers so, even if discovered, can be ignored.

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Developer charges in some areas are over $500,000 per hectare for commercial and industrial land and there is obviously a huge incentive if charges can be deferred from subdivision to development stage. Sydney Water insist they have discretionary power to determine who is responsible for the maximum charge. However the IPART Determination 2000 and the IPART Act (Section 18 (2)) have removed that temptation by making the maximum charge mandatory for complying developments except for specific exemptions approved by the NSW Treasurer. In some cases there is a perception that Sydney Water does not seem to worry about the requirement for a developer of a complying development to pay the maximum charge, simply that some developer eventually pays the charge.

All of the above matters have been raised with Sydney Water over the past 2-3 years with little success. On two occasions requests have been made to have the matters referred to mediation and/or arbitration. Even though IPART states "Any developer who is dissatisfied with how an agency has calculated its developer charges may have the dispute resolved under Section 31 of the IPART Act", our requests have been refused on the basis that it is the particular developer charge being questioned not the IPART methodology and that Section 31 of the IPART Act does not apply. It is disingenuous of Sydney Water to claim, in their response to the IPART Issues paper (21st December 2007), that "Sydney Water has resolved the issue (dispute resolution) without the need for arbitration". The question is resolved simply by Sydney Water refusing to allow the matter to proceed to arbitration.

In our opinion Sydney Water are not complying with the requirements of the IPART Determination 2000 or the IPART Act relating to the application of developer charges. It is hoped that in this forum Sydney Water can be persuaded to reflect on its current practices that are related to developer charges and comment in a meaningful way.

***History***

In order to understand the problem, it is necessary to understand both the system and the historical content of the system.

Developer charges are nothing new to Sydney Water. Over many years Sydney Water has been formulating and charging major works charges and then developer charges in selected areas to recover the cost of new infrastructure. The mechanism for these recoveries was contained within the Sydney Water Act and Sydney Water had full control over its implementation. However in 1995 with the advent of the IPART Determination No. 9, the system changed. Sydney Water was declared a monopoly service under Section 4 of the IPART Act and developer charges were now regulated by IPART.
(Note that only developer charges are regulated by IPART not amplification charges and the like which still are regulated by the Sydney Water Act).

Whereas previously Sydney Water could only impose developer charges on newly developing areas, the IPART Determination allowed Sydney Water to recover infrastructure costs over the whole Sydney Water catchment. However the trade off was that the charge was to be a mandatory charge (except for approved specific exemptions), which was seen by IPART to be more transparent and equitable to the consumer. Suddenly, since the charge was mandatory, Sydney Water lost control and the flexibility that was available for other charges under the Sydney Water Act could not be applied to developer charges regulated under the IPART Act.

It would have been about 2001 that the "virus" first made an appearance. Developers are notified of Sydney Water requirements (amplifications etc) and IPART Determined developer charges through the same document, the Notice of Requirements. When the new developer charges were introduced, the wording of the Notice was changed to reflect the IPART Determination but the same practices as before, including discretionary power for both types of charges was adopted. Control and flexibility was restored and matters proceeded as usual. Of course there was some conflict between the practice and the procedures (which are based on the IPART Determination), but since the practices were never documented, it was difficult to find a fault. Very quickly the "virus" spread throughout Sydney Water.

***The Anti-virus or Section 18(2) of the IPART Act***

The "virus" almost works perfectly and would work perfectly except for the one vital difference between developer charges payable under the Sydney Water Act and developer charges payable under the IPART Determination. The difference is:

**Section 18 (2) of the IPART Act.**

From Sydney Water correspondence, it would appear that Sydney Water are unaware of this clause or its meaning. The clause states:

***The approval of the (State) Treasurer must be obtained if an Agency (Sydney Water) fixes or attempts to fix the price (developer charge) below the maximum price determined by the Tribunal. The Agency and the developer can negotiate a charge below the maximum charge but in these circumstances the Treasurer must agree to the negotiated charge.***

***How the "Virus" works.***

The IPART Determination mainly covers what could be described as a "macro" view of the Developer Charges. The only interface with developers and how the charge is to be applied by Sydney Water is at a "micro" level, contained within Schedule 2 – Coverage of the Determination. The key to the flaw in the methodology is contained within the interpretation of Schedule 2 Part A (a).

Schedule 2 Part A simply states that:

> "This Determination (i.e. developer charges) applies to all Agencies for all new Developments or stages of Development from the Commencement Date except as follows:
>
> (a) for Sydney Water Corporation, where a Compliance Certificate has been issued by it pursuant to Section 73 of the Sydney Water Act, 1994 for a Development or stage of Development.

One interpretation of this clause would be that it means exactly what it says. Since the charge is a mandatory charge, a compliance certificate cannot be issued without payment of the developer charge. Therefore it follows that if a compliance certificate has been issued, no further payment is due under the Determination. This is particularly relevant where construction follows newly subdivided industrial or commercial land. The clause also prevents Sydney Water from charging twice ("double dipping"), for the same service, once at subdivision and again at construction.

However Sydney Water has adopted an unusual interpretation of Schedule 2 by focusing on the words "from the Commencement Date". Their interpretation is as follows:

*"Sydney Water's interpretation of this clause is that charges calculated in line with the 2000 Determination cannot be applied to Developments that were issued a compliance certificate prior to the Commencement Date of the Determination. And that all new developments and redevelopments occurring after the commencement date of the 2000 determination will be levied charges calculated in line with the 2000 determination".*

This is the "virus" at work. Sydney Water does not consider that Schedule 2 Part A (a) of the 2000 Determination has any relevance to projects after 2000. But more importantly this interpretation effectively removes the "double dipping" clause and that is the only clause in the Determination that provides relief from multiple charging.

When we follow this interpretation to its logical conclusion, we can see the evidence of the "virus". Rather than simplifying the charging procedure, it now becomes extremely complicated and complex. Using this interpretation Sydney Water has a statutory obligation, under the IPART Determination and Section 18(2) of the IPART Act, to impose the maximum developer charge at each and every stage i.e. subdivision, development and redevelopment. Sydney Water avoids this by using a discretionary power to determine when the maximum developer charge is paid.

In order to illustrate the existence of the "virus", some quotations from Sydney Water correspondence have been used and shown in ***italics***. The context of the quotations is in replies to queries to Sydney Water regarding developer charges.

*"It is noted that the IPART Determination is silent on the manner and circumstances in which Sydney Water exercises its threshold discretion to decide whether or not a particular lot is subject to developer service charges".*

Following are some other examples of how the "virus" influences Sydney Water's responses.

In answer to a query as to why developer charges had not been paid on a lot at subdivision time:
*"This is not the concern of Sydney Water as we acted in good faith to a request that was considered reasonable to Sydney Water and transparent in its application to any future purchaser of the lot".*

Again, on a subdivided lot that the subdividing developer wanted to be treated as a residue lot but was in fact sold as a development lot with all services provided:
*"Sydney Water was entitled as a reasonable exercise of its discretionary power, to treat the lot as residue and that Sydney Water's application of charges has been in accordance with the IPART Determination".*

Again where no charges were levied at subdivision stage but at development stage:
*"Charges were levied based on the increased demand resulting from the alterations.*
*In contrast the subdivision creating three lots did not create any additional impact on our systems".*
As can be seen from the above quotations, Sydney Water uses discretionary powers and does not appear to consistently charge the maximum developer charge for applicable developments as required under Section 18(2) of the IPART Act. This in turn leads to further complications.

***Compliance Certificates***
Once a compliance certificate has been issued, it certifies that the developer has fulfilled all conditions required under Division 9 (which includes Section 73 - 74) of the Sydney Water Act. Since Section 74 is linked to the IPART Determination, the understanding is that developer charges have been paid, especially for land subdivisions, since the certificate cannot be issued without payment of the developer charges. But of course, as we have seen from the Sydney Water interpretation, there are minimum developer charges and maximum developer charges and it is impossible to know which charge has been applied to any particular compliance certificate. In truth the certificate really certifies that it has fulfilled only those conditions relating to the relevant Notice of Requirements. But only the applicant knows these conditions, as the Compliance Certificate is the only document on the public record. Sydney Water places the responsibility for disclosure onto the vendor

*"The formal registration or not of a lot as residue should not limit any reasonable request to defer development as long as this information is transparent to all parties involved including any future purchaser".*

The Compliance Certificate is linked to the IPART Determination by the Sydney Water Act and certifies that all conditions have been fulfilled as required by the Act. For complying developments (in particular land subdivisions), it defies logic to suggest that maximum developer charges have not been paid. But Sydney Water, influenced by the "virus" which allows them to determine maximum and minimum payments, refuse to accept that logic.

**Recommendations**

1. Schedule 2 Part A (a) be redrafted so that the meaning is absolutely clear and not open to misinterpretation.

2. Sydney Water should issue Notices of Requirements based solely on the Council development approval and not anticipate future development.

3. The Compliance Certificate should be given true meaning in regard to developer charges. A new clause should be inserted possibly as follows:
    a. Developer charges have been paid with respect to Lots X – Y.
    b. Developer charges have not been paid with respect to Lots Y – Z.

    Both clauses are necessary so that there is absolutely no confusion at a later date.

4. IPART should provide an interpretation of the application of Section 31 of the IPART Act. If objections can only be raised with Sydney Water regarding their methodology in a generic sense and not on particular applications, then some further protection is required to protect the rights of developers.

5. Sydney Water should be instructed to provide a retrospective review of those projects where an objection to developer charges has already been raised because of the effect of the "virus".

Yours faithfully
*Jim Cook*

James M Cook
Director
*Appendix A*

## APPENDIX A *Example of a Developer charge calculation*

The easiest manner to provide proof that the "virus" exists can be shown in the following simple example of a developer charge calculation that illustrates the very basis of the IPART Determination.

In 2003 a developer decides to subdivide his 2 hectare block into two one hectare blocks, Lots 1 and 2. Total developer charges are $100,000 per hectare. After application to Sydney Water he receives a Notice of Requirements and subsequently a compliance certificate.

In 2004 Lot 1 is sold.

In 2005 the purchaser of Lot 1 decides to construct a warehouse on Lot 1 and after application to Sydney Water he receives a Notice of Requirements and compliance certificate.

Now the question. What are the developer charges applicable in both cases and ***what is the exact legislative basis for the calculations?***

### *1st Interpretation*

If we use the first interpretation of Schedule 2 A (a), which is that no further charges are applicable after a compliance certificate has been issued, the calculations would be as follows:

In 2003, since the subdivision was a Development as defined by the Determination, developer charges would be applied. (Schedule 2 (Part A)).
The maximum charge of $100,000 per hectare = $200,000 would then be applied. (Section 18 (2) of the IPART Act.)

In 2005, since a compliance certificate on an area basis had been issued in 2003, no further charges would be applicable. (Schedule 2 (Part A (a)).

### *2nd Interpretation*

Using the second interpretation (which Sydney Water maintains is correct) the calculations become rather more complicated. The 'double dipping" interpretation has been eliminated in this interpretation and Sydney Water are now under a statuary obligation to apply the charge at all stages of development. But Sydney Water believe they have a discretionary power and apparently do not realise that under Section 18(2) IPART Act, they must apply the maximum charge unless specifically exempted by the NSW Treasurer.

In 2003 the subdivision was a complying Development as defined by the Determination. Whether Sydney Water applies the maximum developer charge at this stage can depend on any number of circumstances. However, for the sake of comparison, let us assume that Sydney Water calculated the charges on the subdivision as per the Determination.

In 2003, since the subdivision was a Development as defined by the Determination, developer charges would be applied. (Schedule 2 (Part A)).
The maximum charge of $100,000 per hectare = $200,000 would then be applied.

In 2005, the calculation and the reasons behind the calculation become a little more complex. Using their "discretionary" powers Sydney Water would absolve the constructing developer of the charge i.e. **the developer charge would be $0**. This of course is in conflict with their own interpretation of the IPART Determination under which Sydney Water has a statutory obligation to apply the maximum charge again.

**Because of the way the "virus" has infiltrated the Sydney Water system, it is impossible for anyone within Sydney Water to give an answer to legislative basis of that $0 charge.**

**Why it is impossible? Because the "virus" has destroyed Schedule 2 (Part A (a)).**