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# Special Infrastructure Contributions

## User Guidelines

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September 2024



Oran Park Drive, Oran Park

# Acknowledgement of Country

The Department of Planning, Housing and Infrastructure acknowledges that it stands on Aboriginal land. We acknowledge the Traditional Custodians of the land and show our respect for Elders past, present and emerging through thoughtful and collaborative approaches to our work, seeking to demonstrate our ongoing commitment to providing places in which Aboriginal people are included socially, culturally and economically.

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Oran Park Drive, Oran Park



## This Guideline uses the following terms

Term	Meaning
<b>Council</b>	Responsible for consent to development applications and processing of local environmental plan amendments
<b>Construction certificate</b>	Confirms that the construction plans and development specifications are consistent with the development consent, and comply with the Building Code of Australia and any other council requirements.
<b>DA</b>	Development Application
<b>Development consent</b>	The formal notice of approval for a specified development proposal. This includes a complying development certificate
<b>DPHI</b>	NSW Department of Planning, Housing and Infrastructure
<b>EP&amp;A Act</b>	NSW Environmental Planning and Assessment Act 1979
<b>LEP</b>	Local Environmental Plan
<b>LCS</b>	Local Character Statement
<b>LUIIP</b>	Land Use and Infrastructure Implementation Plan
<b>Developer</b>	The person or entity having benefit of a development consent for the time being.
<b>Receiving agency</b>	The agency responsible for the ongoing maintenance of the land and/or asset delivered as a result of a Special Infrastructure Contribution Works-in-Kind project
<b>SCA</b>	Special Contributions Area which includes both planned growth areas and planned precincts within NSW
<b>SIC</b>	Special Infrastructure Contributions
<b>Subdivision certificate</b>	Certifies that a subdivision has been completed in accordance with the consent and any subdivision work has been completed in accordance with the construction certificate.
<b>The Minister</b>	Minster for Planning
<b>WIK Agreement</b>	Special Infrastructure Contribution Works in kind Agreement
<b>NDA</b>	Net Developable Area.
<b>Residential accommodation</b>	Attached dwellings; dual occupancies; dwelling houses; multi dwelling houses; residential flat buildings; semi-detached dwellings; seniors housing; shop top housing.
<b>Additional Dwelling</b>	The number of dwellings that the consent authorises to be erected. Note: individual SIC Determinations have exclusions for existing dwellings and demolitions.
<b>GFA</b>	Has the same meaning as the meaning in the standard instrument; Note; exemptions apply either in the standard instrument or the individual SIC Determination.

Term	Meaning
<b>Cost of Development</b>	Generally has the same meaning as clause 25J in the Environmental Planning & Assessment Regulation 2000. Individual SIC Determinations can differ from this meaning.
<b>CPI</b>	ABS Consumer Price Index (All Groups Index) for Sydney; Note: the Pymont Peninsula Metro SIC Determination uses the ABS Producer Price Index (Roads & Bridges Construction NSW) as the basis for SIC contribution increases.



# 1. Introduction

## 1.1 Purpose of this Guideline

This guideline looks at the key processes, roles and responsibilities when preparing, determining and implementing special infrastructure contributions (SICs).

SICs help fund state and regional infrastructure needed to support population growth. Developers contribute towards the cost of delivering state and regional infrastructure within designated special contributions areas.

The scope of infrastructure funded by a SIC and the boundary of a special contributions area are based on the forecast demand for infrastructure in that defined growth area.

SICs are imposed through a ministerial determination. Any information supplied in a SIC determination takes precedence over information in this guideline.

The Department of Planning, Housing and Infrastructure is responsible for managing the SIC program. The department prepares plans and determinations, collects contributions, nominates and prioritises projects and distributes the contribution funds. We manage and assess SIC applications and issue SIC assessments payment and clearance certificates using a digital service hosted within the NSW Planning Portal.

## 1.2 Benefits

A SIC:

- supports strategic planning and helps deliver state and regional infrastructure by providing funds for new infrastructure and a cost recovery mechanism for existing infrastructure
- ensures developers contribute to providing state infrastructure based on the demands of new development
- increases certainty and transparency by considering the infrastructure required to support growth rather than on a project-by-project basis
- reduces project timelines and the need for government and developers to negotiate and enter into voluntary planning agreements for the provision of state infrastructure
- provides flexibility on how contributions can be made – mechanisms include monetary contributions, land dedications and/or works in kind
- allows adjustment of contributions to reflect changes in economic conditions over time.

### 1.3 Planning and policy context

Part 7 of the NSW *Environmental Planning and Assessment Act 1979* (EP&A Act) enables SICs under subdivision 4, sections 7.22 to 7.26 (formerly sections 94ED to 94EH).

The Minister for Planning is responsible for determining the level and nature of contributions in a SIC. The contribution should be reasonable and consider the cost of the infrastructure relative to the development for which a contribution is being sought. A SIC determination for a special contributions area defines the level and nature of the contribution and the infrastructure that will be funded.

Local infrastructure contributions can be levied by councils under sections 7.11 and 7.12 of the EP&A Act. Local contributions apply in special contribution areas.



Aerodrome Drive, Schofields



## 2. Overview

### 2.1 Application

A ministerial direction requires consent authorities to apply SIC conditions on development consents and in some cases, complying development certificates within special contributions areas and for developers to contribute to state and regional infrastructure. Some ministerial directions also applies to registered private certifiers when they issue a complying development certificate.

Even if the consent authority or private certifier fails to explicitly attach the SIC condition, it is taken to have been imposed in the terms required by the ministerial direction where a SIC is payable (section 7.24 (c) of the EP&A Act)

Contributions must be paid for:

- subdivisions before the release of the subdivision certificate
- development that does not involve subdivision before the release of the construction certificate
- complying development – within 60 days of the issue of a complying development certificate or before the commencement of work.

The department has developed a digital service that allows applicants to request and track SIC assessments online via the NSW Planning Portal . The online service provides faster assessment times and improves the department’s communication with applicants and councils during the SIC assessment process.

Users must register for a NSW Planning Portal account to begin the SIC assessment process. Once registered, applicants can access their dashboard to submit, track and add additional information to their SIC assessment request.

## 2.2 Making a special infrastructure contribution

A developer may satisfy their SIC obligations by:

- paying a monetary contribution
- or
- making a works-in-kind (WIK) contribution (see section 4 of this guideline for more detail).

Note that some SIC determinations, such as Pymont Peninsula Metro, do not provide the option to pay via WIK.

The department issues a SIC certificate of payment when SIC obligations are satisfied. This certificate is available to the applicant and consent authority on the Planning Portal as part of the SIC digital service. The certificate in the system is the only 'source of truth' about SIC payments. It provides the necessary proof of payment to enable the release of the subdivision certificate or construction certificate.

If the proposed development does not need to pay a SIC (for instance, due to an exemption) a SIC clearance certificate will be issued within the SIC digital service.

## 2.3 Administration

SICs are paid into a special departmental deposit account known as the Special Contributions Area Infrastructure Fund. The Secretary of the Department of Planning, Housing and Infrastructure administers the fund in consultation with the Secretary of NSW Treasury and the Infrastructure and Place Executive Steering Committee.

Under some SIC determinations, WIK agreements are entered into with the Minister for Planning. The minister has delegated responsibility for these agreements to the Secretary of the Department of Planning, Housing and Infrastructure.

## 2.4 Infrastructure prioritisation and funding

The department maintains a schedule of all infrastructure identified for funding under a SIC determination. Infrastructure is prioritised by the department's Executive Steering Committee and approved for funding by the Minister for Planning. The committee bases its decision on the following factors:

- development activity, rates of growth and related triggers for infrastructure delivery
- availability of and reliance on other funding sources and resources
- the need for enabling infrastructure
- project readiness and assurance
- consultation with and advice from delivery agencies and councils.



## 2.5 Allocation of funds

Monetary contributions are held in the Special Contributions Areas Infrastructure Fund, which is established under the EP&A Act as a fund in the Special Deposit Account. Payments can only be used to deliver infrastructure by public authorities, to meet administrative expenses, or as otherwise authorised by the EP&A Act or Regulations (section 7.30). Apart from works in kind arrangements the legislative framework does not allow allocation of funds to private entities.

SIC funds are allocated separately as per the allocations in individual SIC determinations, such as the biodiversity charge or the proportion of funds to be distributed to the Australian Government in the Aerotropolis SIC.

The department allocates SIC funding to infrastructure projects via a grant process, outlined in Section 2.4, with a funding agreement executed between the department and the relevant delivery agency. Funding aligns with the relevant SIC infrastructure schedule. Delivery is the responsibility of the relevant agency or council. The department retains a broad oversight and monitoring role to ensure these projects are delivered to agreed time, cost and scope.

## 2.6 Reporting

The department uses transparent and accountable procedures to manage infrastructure contributions, monitor delivery and allow consent authorities, industry and the community to see how contributions are applied.

The department reports on the collection of monetary contributions and infrastructure delivered via grant allocations and as works in kind in its Annual Report.



*Rickard Road, Catherine Fields*

## 2.7 Stakeholders

Table 1. Key stakeholders and their main roles

Stakeholder	Role
<b>Consent authority (generally a council)</b>	<p>Issue development consent within special contributions area with SIC conditions attached – also applies where a council issues a complying development certificate</p> <p>Issue construction or subdivision certificates subject to SIC conditions being satisfied</p>
<b>Private certifiers</b>	Issue a complying development certificate with SIC conditions attached or issues a construction certificate where a previous development consent has been granted
<b>Delivery agency (state agencies and councils)</b>	<p>Consult on infrastructure requirements for special contributions area</p> <p>Deliver infrastructure in special contributions areas</p>
<b>Developer (applicant)</b>	<p>Develop in a special contributions area (development includes subdivision)</p> <p>Satisfy SIC obligations</p> <p>Where applicable, deliver a WIK project on behalf of a receiving agency as a party to a WIK agreement</p>
<b>Receiving agency</b>	<p>Deliver infrastructure</p> <p>Where applicable, own and maintain an asset or land delivered through a WIK agreement and party to the WIK agreement</p>
<b>Minister for Planning</b>	<p>Make a determination of special contributions area</p> <p>Issue a direction to consent authorities and private certifiers and make a SIC determination</p>
<b>Department of Planning, Housing and Infrastructure</b>	<p>Administer the SIC program</p> <p>Calculate SIC liability</p> <p>Assess the viability of and prepare WIK agreements</p>

# 3. SIC process

This chapter outlines how a SIC is implemented through the development application or complying development certificate process. Each SIC determination includes more details and takes precedence over this guideline if there is any inconsistency.

## 3.1 Roles in the SIC process

Consent authorities, private certifiers, the department and developers and their consultants (as applicants in Figure 1) all play a role as the SIC is implemented through the development application and complying development processes.

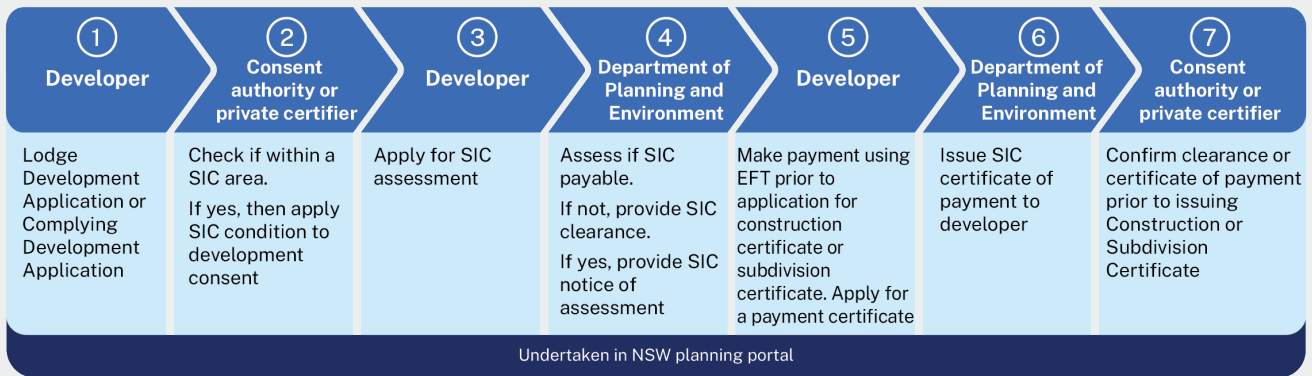


Figure 1. Overview of the application process

When a consent authority grants consent to a development to which a SIC determination applies, a condition will be imposed that requires the developer to contact the department to determine if a contribution is required. Omitting this condition in a development consent does not remove the obligation to pay the contribution.

Whenever a consent authority or private certifier issues a subdivision certificate or construction certificate, it must confirm that the SIC condition has been satisfied by checking the NSW Planning Portal.

Some SICs include development that is approved through the complying development process. In these SICs, councils or private certifiers will impose the condition within the complying development certificate



## 3.2 Steps in the SIC process for development consent

### **Step 1: The developer lodges a development application**

The developer lodges a development application with the consent authority.

### **Step 2: The consent authority applies the SIC condition if the project is in a special contributions area**

The consent authority checks the location of the project. If the project falls within a special contributions area, the consent authority applies the SIC condition to the development consent and directs the developer to contact the department about satisfying the project's SIC requirements.

### **Step 3: The developer applies to the department for a SIC assessment**

The department has developed a digital SIC service on the NSW Planning Portal. An applicant must open an account and submit a request for a SIC assessment.

The method of assessing the amount of SIC payable differs between contributions areas. The SIC digital service will prompt the applicant to provide relevant information based on which SIC area the development is in.

### **Step 4: The department assesses if a SIC is payable**

The department assesses whether the information provided is adequate to determine whether a SIC is payable. All requests by the department to the developer for additional information are made through the NSW Planning Portal.

If a SIC is payable, the department generally issues an assessment within 10 business days. The applicant is notified that the SIC assessment has been issued. The applicant can download the assessment from the NSW Planning Portal.

If a SIC is not payable due to an exemption or prior payment, the department will issue a SIC clearance (see section 3.4 of this guideline). The applicant is notified that a SIC clearance certificate has been issued and is available for download from the NSW Planning Portal.

### **Step 5: The developer pays the SIC**

If a SIC contribution is required, the developer makes payments using electronic funds transfer (EFT) or similar payment methods, providing the SIC reference number as reference:

Department of Planning and Environment - Special Infrastructure Contribution  
Account

BSB: 032-001

Account Number: 167917

Once payment is made, the applicant can request a SIC certificate of payment within the portal.

**Step 6: The department issues a SIC certificate of payment**

Once a developer has met the SIC obligation by paying the contribution, the department issues a SIC certificate of payment, generally within 10 business days of funds being cleared. The certificate can be presented to the consent authority or private certifier to show the consent condition has been met.

**Step 7: The consent authority verifies payment**

The consent authority or private certifier verifies that the appropriate SIC has been paid by accessing the relevant documentation on the NSW Planning Portal.

### 3.3 Steps in the SIC process for complying development certificates

**Step 1: The developer seeks a complying development certificate**

The developer seeks a complying development certificate from a private certifier or council authority.

**Step 2: A registered certifier applies the SIC condition**

The registered certifier applies the SIC condition to the complying development certificate if the development is in a special contributions area.

**Step 3: The developer applies to the department for a SIC assessment**

If the complying development certificate is issued by a private certifier the developer must apply to the department for a SIC assessment within 20 days of the complying development certificate being issued in accordance with the ministerial direction. This provision does not apply where a council has issued the complying development certificate.

Distinct from a development consent where the SIC must be made before the issue of a subdivision certificate or construction certificate, the SIC concerning a development approved via a complying development certificate must be paid within 60 days of the issue of the certificate or before starting work.

#### **Step 4: The department assesses if a SIC is payable**

The department assesses whether the information provided is adequate to determine if a SIC is payable. If the department needs additional information, it will request this through the online SIC management system.

The department will advise the developer of the amount of any SIC payable by uploading a SIC Assessment to the online SIC management system. SIC Assessments, Payment certificates and clearance letters are issued on the Planning Portal with notifications emailed to the applicant and consent authority.

The method of assessing the amount of SIC payable differs from SIC to SIC. The SIC can be based on:

- net developable area
- the number of new or additional dwellings approved
- gross floor area
- the cost of the development
- a combination of the above.

#### **Step 5: The developer pays SIC**

If a SIC contribution is required, the developer makes payments to the following account using the SIC reference number as reference:

Department of Planning and Environment - Special Infrastructure Contribution  
Account  
BSB: 032-001  
Account Number: 167917

Once payment is made, the applicant can request a SIC certificate of payment.

#### **Step 6: The department issues a SIC certificate of payment**

Once a developer has met the SIC obligation by paying the contribution, the department issues a SIC certificate of payment, generally within 10 business days of funds being cleared. The certificate can be presented to the consent authority or private certifier to show the consent condition has been met.

#### **Step 7: The consent authority or private certifier verifies payment**

The consent authority or private certifier verifies that the appropriate SIC has been paid by accessing the relevant documentation on the NSW Planning Portal.



## 3.4 SIC units of charge

### 3.4.1 Net developable area

A net developable area is the area of land to which the development consent or complying development certificate relates. It is sometimes used to calculate the SIC charge for a development. The net developable area must be provided to the department at the SIC assessment stage (step 4 in sections 3.2 and 3.3 of this guideline). It must:

- match the development consent or CDC plans or subsequent modifications approved by the council or private certifier in relation to CDCs (refer to section 3.4.6 of this guideline)
- be prepared under the relevant provisions in the SIC
- state the net developable area in hectares to 4 decimal points
- be prepared and/or signed by a registered surveyor
- if applicable, show and label all lots being created in a subdivision under an approved plan.

Note that the definition of net developable area can differ between SIC determinations.

### 3.4.2 New or additional dwelling units

This method of calculating the SIC is based on the number of new or additional dwellings that have been approved.

If a SIC uses additional dwellings to calculate the contribution, the number of additional dwellings is reduced by the number of existing dwellings on the land subject to the consent.

If a SIC uses new dwellings, this number is not reduced by the number of existing dwellings to be retained or demolished.

Demolition of dwellings can also reduce the number of additional dwellings counted, but provisions about demolitions vary from SIC to SIC. Check the provisions concerning demolitions in each SIC area that uses additional dwellings as a basis for the contribution.

The number of additional dwellings may be varied by modifications to the development consent. The proponent is responsible for advising the department if modifications have increased the number of additional/new dwellings (and therefore the amount of the SIC payable) after payment has been made.

### 3.4.3 Gross floor area

In some cases, the contribution amount is based on the gross floor area of the commercial development. The definition of gross floor area is included in a SIC determination that uses this method. As with the count of the number of additional dwellings, the gross floor area can be varied following modifications to the development consent. The proponent is responsible for advising the department if modifications have increased the amount of gross floor area that would increase the contribution amount after payment has been made.

The Pyrmont Peninsula SIC adopts this method of calculating the contribution for commercial development.

### 3.4.4 Cost of development

This method of calculating the amount of the SIC levy is based on the actual cost of the development and is calculated on a percentage of the development cost. Individual SICs have a minimum cost of development before a percentage charge is applied.

Development cost in SICs is based on section 25J of the EP&A Act.

### 3.4.5 Transitional arrangements

The SIC determination that applies to a development is the determination as in force at the time the development consent is granted.

### 3.4.6 Modifications to development consent

Where a development has been modified under section 4.17(5) or section 4.55 of the EP&A Act, the developer must provide the department with the modified consent and plans when seeking the SIC payable. The amount of the contribution can increase after payment if a modification of the consent increases the number of new/additional dwellings, gross floor area.



Abell Road, Marsden Park

## 3.5 Payment

The developer must pay their contribution as detailed in the SIC notice of assessment. They must pay the contribution before the council or private certifier issues a subdivision certificate or construction certificate. The notice of assessment includes the contribution amount payable for that financial year.

### 3.5.1 Indexing

Where the method of calculating the levy is based on net developable area, new/additional dwellings or gross floor area, the contribution rate is indexed annually on 1 July using the latest Consumer Price Index (All Groups Index) for Sydney. Indexation is calculated using the figure for the March quarter for the year. The Pyrmont Peninsula Metro SIC indexes to the ABS Producer Price Index (roads and Bridges construction NSW).

At the request of the proponent, the department can amend a previously issued notice of assessment to include CPI indexation.

### 3.5.2 Staged payments

Payment is made according to the stages approved in the development consent. The consent authorities need to provide individual subdivision certificates or construction certificates.

### 3.5.3 Refunds

The department will only consider a refund in exceptional circumstances, such as accidental double payment on the same development. Any request for a refund must be made in writing and is at the department's discretion.

## 3.6 SIC clearances

A SIC determination describes where a contribution is not payable. For example, in some SIC determinations, no further SIC is payable where a contribution has been previously paid for that land.

## 3.7 Residue Lots

Individual SIC determinations outline the instances when a SIC can be deferred i.e. where residue lots will be subject to further development and payment can be made at that time.



## 4. Works in kind

A WIK contribution is where physical capital works and/or land are provided by a developer in place of a monetary contribution. This is generally done by developers with larger projects that provide an economic scale for the WIK project.

For the developer, it means more control over infrastructure delivery timing – they are not tied to a state delivery program. For the NSW Government and the community, it means infrastructure and/or land is efficiently delivered for public benefit when it is required. The WIK process provides the community with infrastructure that would otherwise be funded through general government revenue or annual budget allocations.

### 4.1 WIK agreement

A WIK agreement is a legal agreement between a developer and the Minister for Planning (or delegate) that provides for infrastructure and/or land instead of a SIC cash contribution in a special contributions area. WIK agreements are made under the SIC determination to which the contribution applies and relate to infrastructure identified under that SIC determination. Proponents will still need to go through normal approval pathways for the delivery of infrastructure with the relevant consent authority as the terms of the WIK agreement are being negotiated.

Receiving agencies – the agency that in most cases will take ownership of infrastructure assets upon delivery – are key third-party stakeholders in WIK agreements.

WIK agreements set out the developer's obligations in areas including the scope, timing, relevant construction milestones and security. Developers must be fully aware of the obligations they will assume under the agreement, including the risks and penalties for default.

### 4.2 Entering a WIK agreement

The WIK agreement process begins with a developer putting forward a proposal for the department to assess. Once agreed, the proposal will form the basis of the WIK Agreement. Each proposal is different and has different underlying requirements. Accordingly, the department's timeframes for assessment are subject to the specifics of each proposal. Assessments can be expedited if the developer liaises with the consent authority and receiving agency, and both support the proposal.

## Stage 1: Nomination

To initiate discussions with the department, the developer formally makes a WIK proposal in writing to the department via the Planning Portal. The developer must submit a formal letter of offer with the application. A template letter of offer is attached in Appendix A. This formal offer should refer to the provisions of the relevant SIC determination and outline the proposed material public benefits.

The letter of offer must include:

- details of the parties entering into the WIK agreement
- confirmation of agreement to pay the minister's costs incurred with the preparation of the WIK agreement, including any reports, expert engagements such as valuations and/or cost estimates, agency consultation costs and legal WIK agreement drafting costs (SIC offset credits are not provided for these costs)
- estimated SIC liability proposed to be offset by works in kind and/or land dedication
- brief details of the proposal, including:
  - an approximate cost of land to be dedicated (a WIK proposal maybe for land acquisition only)
  - a cost estimate of the proposed works
- reference to the state infrastructure item/s in the infrastructure schedule for the relevant ministerial SIC determination
- justification of how the proposal meets the assessment criteria (outlined in Table 2)
- details of the land (lot and deposited plan references), ownership details and any possible land transfers or purchase options
- an in-principle agreement from the relevant authority for any land dedication and/or WIK that outlines support of the proposal.

The developer should also include the following documents with the letter of offer (if applicable):

- details of the draft/approved development application/s including forms
- plan of (proposed) subdivision
- copy of trust deed (if any of the parties are trustee companies)
- copies of land transfers or sale option agreements
- owner's consent (where the developer does not own the land).

Early engagement with the department and receiving agency, preferably before the principal development application is lodged, can minimise delays in the approvals process. Engaging with the delivery agency will help gather the requirements for the delivery of the work or dedication land, such as timing, scope and approvals. This will help the developer decide if they would like to continue with the proposal.

## Stage 2: Preliminary assessment

The department will consider the merits of the proposal in consultation with the receiving agency, based on the assessment criteria in Table 2. The department may request more information to ensure it has enough detail to consider the offer.

Entering into a WIK agreement is at the discretion of the Minister of Planning or delegate. A proposal may be refused if it does not align with the NSW Government's infrastructure delivery priorities or present a good value proposition to Government.

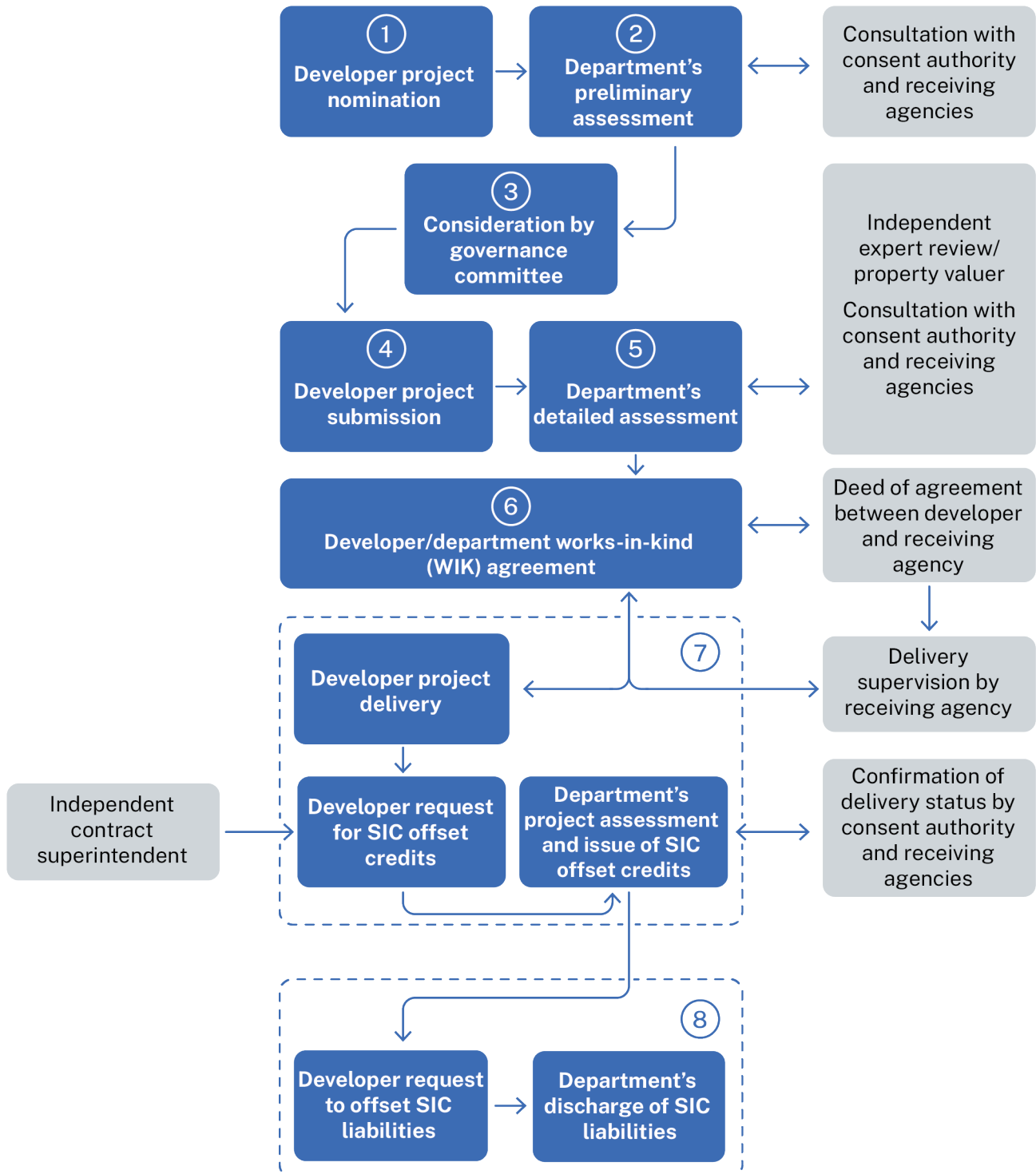


Figure 2. The WIK process



Table 2. WIK proposal assessment criteria

Criterion	Details
<b>1: Meets government objectives and priorities</b>	<p>Will the proposal meet a high-priority need in a special contributions area and does it represent value for money? This will depend on whether the proposal:</p> <ul style="list-style-type: none"> <li>• aligns with the sequencing of land development and infrastructure priorities</li> <li>• complements other investments in the area</li> <li>• provides essential benefits to the area (outline timeframes for delivery including the stage of development the infrastructure will be completed)</li> <li>• demonstrates readiness for delivery within a reasonable timeframe</li> <li>• refers to infrastructure on the infrastructure schedule</li> <li>• achieves better cost and/or time outcomes than if the infrastructure was delivered by the state government i.e. provides good value for money</li> <li>• is provided early in the planning and development phase when costs are lower.</li> </ul>
<b>2: The developer’s ability to deliver the infrastructure</b>	<p>This will be based on past performance and/or demonstrated ability to fulfil WIK agreement requirements at a state or local level.</p> <p>Consultation with the receiving agency will determine their position on the capability of a developer.</p>
<b>3: Assessment of risk</b>	<p>The department, in consultation with a receiving agency, will assess the ability of a developer to deliver the works and the levels of risk to be borne by the government and the developer.</p>
<b>4: The size and cost of the infrastructure compared to that included in the schedule</b>	<p>The size and cost of the infrastructure proposed should generally reflect the purpose and scope of works in the SIC determination.</p> <p>Alternative agreement arrangements for the delivery of works above the developer’s SIC liability are discussed later in this chapter.</p>
<b>5: Contributes to social and environmental sustainability?</b>	<p>Does the proposal:</p> <ul style="list-style-type: none"> <li>• contribute to the creation of jobs and improves access to services such as health or education?</li> <li>• avoid any adverse social or environmental impacts?</li> <li>• deliver infrastructure in a resource-efficient manner?</li> <li>• have the capacity to adapt to new technologies?</li> </ul>

### **Stage 3: Consideration of WIK proposal by SIC governance committee**

If the WIK proposal generally satisfies the WIK assessment criteria, it will be submitted to the SIC governance committee to decide whether to proceed or reject the proposal. The department will advise the developer as early as possible if the WIK proposal is supported by the department and the receiving agency and can proceed to a formal WIK proposal.

### **Stage 4: Submission of WIK proposal**

The developer will provide a detailed WIK proposal to justify the project scope, costing and delivery timeframe. This must give the department sufficient information to enable a rigorous assessment and must meet the detailed design needs of the receiving agency. It must illustrate a value-for-money outcome for the wider community.

The detailed WIK proposal must include:

- details of the developer and the related development
- the works proposed
- written confirmation from the receiving agency of its in-principal agreement to enter into a separate deed for the proposed works
- a detailed cost report prepared by a registered quantity surveyor based on a bill of quantities for the proposed scope of work
- a resumé and/or statutory declaration as proof of independence for the developer's proposed third-party superintendent
- the timing and detailed staging of works and key project milestones
- details of the security, if required by the receiving agency
- details of any other relevant third parties (for example, the owner of the land to be dedicated if it is not the developer)
- if land is to be transferred, a valuation report from a certified practicing valuer detailing the current market value of any land with valuation methodology agreed by the department
- any other reports about the land that may be required
- a percentage value for contingencies
- costs of external consultants for design and project management.

The developer should consult with the department and the receiving agency to ensure the proposal satisfies the requirements.

## **Stage 5: Detailed assessment**

Working with the receiving agency, the department will focus on the scope of the works and whether the proposal aligns with government priorities and represents value for money. The department may seek the advice of:

- the relevant receiving agency about the estimated cost, which will inform the maximum amount of SIC offset credits to be issued (works only)
- other relevant agencies
- independent consulting engineers, quantity surveyors and property valuers
- any other minister with an interest in the WIK proposal, such as the Minister for Transport.

### **Determining an estimated value of works for SIC offset credits**

SIC offset credits represent the amount of SIC liability that a developer can discharge by delivering the WIK project.

During the assessment of the WIK proposal, the department will compare the estimated costs for the proposed works with the estimated cost of the infrastructure in the relevant SIC determination. An agreed upper limit for the value of works will be determined in the WIK agreement against which SIC offset credits will be issued.

The estimated costs for the proposed works are to only include the costs directly applicable to the infrastructure item being delivered. Items not eligible for SIC offset credits include:

- trunk utility services reticulation, which is generally provided to benefit the development
- trunk stormwater drainage, which is generally funded through local contribution plans and is excluded to avoid 'double dipping'.

An allocation for planning, approvals and project management costs are provided in the agreement. However, these must only be related to the infrastructure item being delivered. If the works are part of a larger works project, the costs may be pro-rata'd based on the overall value of the larger contract.

A detailed WIK proposal is unlikely to be approved unless the developer's cost estimate of the works component is acceptable to the department.

### **WIK agreement**

A draft WIK agreement is prepared and issued to the developer for review based on the key terms and details of the letter of offer and any further discussions or negotiations with the developer. The department may request more information to prepare the legal drafting. These details may include total estimated costs, provisions for SIC offset credits, project milestones and SIC credit reconciliation methodologies for the completed WIK contributions. An example WIK agreement is provided in Appendix B.

Road construction agreements must separately identify the road works, whether through a separate bill of quantities or a separate contract.

The WIK agreement will generally require the developer to report annually to the department through a survey detailing anticipated WIK-related transactions, including timing for drawing down any accrued credits to satisfy SIC obligations.

The developer will pay the costs of drafting an agreement, noting that any amendments to the template agreement will add time and cost at this preparatory stage.

The department will issue an invoice to the developer for payment of all the minister's costs incurred in the drafting. This may include legal fees, valuations fees, title and company searches and other searches.

### **Land valuation**

A key step in the negotiation of a WIK agreement is for all parties to agree on the value of any subject land.

The developer must provide a valuation report prepared by a certified practicing valuer that determines the current market value of the proposed transfer land. The developer must also provide any other reports about the land that may be relevant. The developer and the department must agree on the basis on which the valuation will be made, and the valuation report must reflect this methodology.

The department requires a valuation process to occur to ensure that the value of the land is agreed prior to finalising the WIK agreement. The agreed value will form part of the WIK agreement for determining the SIC land credit.

Both parties are to obtain independent valuation reports to determine the current market value. The developer will be liable for all costs associated with the procurement of the valuations (including the department's valuation costs).

The assessment of the current market value of the proposed transfer land enables the department to assess if the proposal represents value for money and informs the amount of SIC credit that will be offered to the developer.

### **Stage 6: Execution of WIK agreements**

If the department is satisfied that all the requirements in the previous stages have been met, a final WIK agreement will be issued to the developer for execution. Upon receipt of the duly executed version by the developer, the Department it will make a recommendation for the WIK agreement to be executed by the minister or delegate.

Once the signed draft WIK agreement is received by the department, it will be reviewed and executed by the Minister for Planning or the appropriate delegate.

The parties to the agreement include the Minister for Planning (or the appropriate delegate) and the developer. The department allows for digital execution of the WIK agreement.

The department will notify the relevant authority and the developer once the minister has executed the agreement. The agreement will then be transitioned for administration.



### **The final agreement with the receiving agency**

The developer may need to enter a separate deed of agreement for the delivery of works and/or transfer of land with the receiving agency. The developer must confirm requirements with the receiving agency to ensure the completed asset matches the design standards required.

The receiving agency will provide the developer with any specifications, standards and requirements needed to develop a detailed design. The receiving agency will also advise its requirements for engineering drawings and architectural plans.

### **Stage 7: Delivery of works and/or dedication of land**

Subject to any formal approvals required by the relevant agencies, once a WIK agreement is executed, the developer can start the process of infrastructure delivery or dedicating land.

A competitive tender process must be used for procuring works to ensure the department's value-for-money provisions are met. The developer must provide details to the supervising officers of the department before works begin. We anticipate that the developer will generally tender and deliver the works concurrently with other works contracts to achieve cost savings through economies of scale.

### **Stage 8: Administration of the WIK agreement**

Under WIK agreement's delivery milestones, the developer may begin to request SIC offset credits for relevant works undertaken.

The department issues SIC offset credits in the form of a SIC credit discharge certificate, which confirms the SIC offset credits issued for each project milestone. SIC offset credits are requested in writing by the developer.

## 4.2.1 Administration of land transfers

The timing of the transfer or dedication of land is subject to agreement between the receiving agency, the department and the developer. For WIK agreements involving works, the dedication is generally required prior to acceptance of the works by the receiving agency.

Once the land transfer is complete, the developer submits to the department:

- a letter of acceptance from the receiving agency
- confirmation of transfer as either a title search showing the receiving agency as the landowner or a registered plan showing the dedication of land to the public for its intended purpose
- a written request for the SIC credit claim.

The department will issue a discharge certificate (or an updated certificate) that sets out the SIC offset credit that has been agreed upon for the land dedication. This will include any indexation to the value of the land required to be applied under the agreement.

## 4.3 Administration of WIK agreements – issue of SIC offset credits

### 4.3.1 Milestones

The template WIK agreement provides for the staged delivery of works and/or land, with milestones established by the department. Any staged delivery must be consulted on and agreed upon by both parties, including the value for each stage.

Any amendment to milestones needs to follow the terms of the agreement and will require approval by the department.

Information on requirements for discharging SIC at milestones is contained in section 4.4.3 of this guideline.

### 4.3.2 Construction superintendent role

To ensure a project is meeting the requirements of the WIK agreement, the developer selects an independent superintendent to ensure the WIK project accords with the agreed scope and approved costs in the construction contract. A superintendent is only required for the delivery of WIK projects, not land transfers.

The 'third-party superintendent' is appointed to evaluate and certify payment and variation claims and ensure practical completion of the agreed scope as per the contract.

The construction contract superintendent's reports ensure SIC offset credits are issued according to the WIK agreement delivery requirements.

### 4.3.3 WIK offset credit claim requests

Entering a WIK agreement does not satisfy the developer's obligation to pay an infrastructure contribution. Delivering infrastructure under a WIK agreement generates WIK offset credits. Once enough works have been delivered and supported by progress claims certified by the contract superintendent, a request can be made to the department to issue SIC offset credits as per the credit milestones in the agreement.

The SIC credit amount will be determined by the department under the WIK agreement.

The developer can submit a SIC credit claim with supporting documentation to the department once the requirements for each milestone (or group of milestones) have been satisfied. If a claim is approved, credits are issued. If the claim is rejected, the developer will need to resubmit their credit claim once the requirements are satisfied.

Credits for early milestones are generally based on the estimated costs established in the WIK agreement. Later milestones reconcile the actual costs of delivery, including related variations and additional costs.

Documentation developers should submit with claims include:

- a copy of the executed construction contract with the contractor providing the infrastructure works
- the contractor's payment claims approved by the superintendent
- a statutory declaration by the developer confirming that all monies owed to contractors have been paid or a letter from the contractor confirming receipt of amounts shown in progress certificates
- a superintendent or project manager's progress certificate for each contractor claim
- a superintendent or project manager's practical completion certificate
- correspondence from the receiving agency confirming handover and acceptance of the work and/or land (for example, signed subdivision plans showing dedication or title searches proving land is in the possession of new authority)
- confirmation from the receiving agency that appropriate security is in place for a defect liability period
- confirmation from the receiving agency of the end of a maintenance period.

Once the department has sufficient information supporting the credit claim, it will issue a SIC discharge certificate (or an updated certificate) to the developer that sets out the discharge amount that has been credited to the developer for the works or land dedication.

The developer is not entitled to credits for any overspending above the agreed estimated cost in the WIK agreement.

## 4.4 Management and use of SIC offset credits

A record of a developer's SIC offset credits is provided in a SIC offset discharge sheet. The credit balance within a developer's SIC offset discharge sheet is like a bank account statement. The department prefers that SIC offset credits be managed by a single delegated officer within the developer's organisation empowered to transfer funds, such as the developer's financial controller.

The developer may satisfy SIC obligations for development consents by drawing down on available SIC offset credits. The SIC process outlined in section 3 of this guideline is used to assess SIC obligations for development consent or stage of the consent and is provided in a SIC assessment certificate.

A developer requests the department draw down on the developer's SIC offset credits to satisfy SIC assessment certificate(s). Currently, a SIC drawdown request is via email to the department's WIK administration mailbox, [wik.administration@planning.nsw.gov.au](mailto:wik.administration@planning.nsw.gov.au). Once the SIC credit transaction has been approved by the department, a SIC certificate of payment will be issued, which can be provided to the consent authority or private certifier to satisfy a development consent's SIC obligation.

SIC offset credits can be used anywhere within the special contributions area they have been generated in. For example, SIC offset credits generated within the Western Sydney Growth Area SIC Contribution Area can only be used to satisfy SIC obligations for development undertaken anywhere within that special contributions area. Credits cannot be transferred between special contribution areas i.e. SIC offset credits generated in the Western Sydney Growth Area SIC Contribution Area cannot be used to satisfy SIC obligations in the Western Sydney Aerotropolis SIC Contribution Area.

If insufficient credits are available to satisfy a SIC assessment, the developer's SIC offset credit balance can be used, and the shortfall paid in cash.

### 4.4.1 Deferred payment arrangements

The developer may also request to provide security to satisfy a SIC assessment (or part of a SIC assessment), which will remain in place until sufficient SIC offset credits are generated under a current WIK agreement.

Acceptance of deferred payment arrangements is at the discretion of the Minister for Planning or delegate. The total security held under a particular WIK agreement by the department may not be less than the outstanding SIC offset credits anticipated to be generated under the WIK agreement.

The security in the form of a bank guarantee must accord with Treasury Circular 14-01 with no expiry date (a copy of the circular is provided in Appendix C). The value of the security is to be equivalent to the SIC assessment value for those assessment(s) for which the developer is seeking a SIC certificate of payment. The department maintains a register of all securities it holds for WIK agreements and the original security documents are held in secure storage.

Bank guarantees are to be made out to the Minister for Planning and the Department of Planning, Housing and Infrastructure, ABN 20 770 707 468.

#### 4.4.2 Third-party payments using SIC credits

To help with cash flow or address surplus SIC offset credit issues, developers can request to use their SIC offset credits to satisfy another developer's SIC assessments within the same special contributions area.

Third-party payment requests need to be made via email to the Department's WIK administration [wik.administration@planning.nsw.gov.au](mailto:wik.administration@planning.nsw.gov.au)

#### 4.4.3 Disputes

The template WIK agreement includes provisions regarding dispute resolution and mediation that must be followed before any referral to the Land and Environment Court.

#### 4.4.4 Surplus SIC offset credits

The developer is not entitled to a cash refund from the Department for surplus SIC offset credits that the developer may hold at the completion of the development. A developer cannot seek a cash refund for SIC obligations previously satisfied by cash payments using SIC offset credits.

#### 4.4.5 Indexation of SIC offset credits

On July 1 of each year, the SIC offset credit balance will be adjusted by the following formula in accordance with the SIC determination:

$$\text{SIC offset balance as at 30 June} \times \frac{\textit{Latest Sydney CPI number}}{\textit{Previous March Sydney CPI number}}$$

'Latest Sydney CPI number' is the Sydney CPI number for the March quarter in the year in which the adjustment is made.



# 5. Special contributions areas

## 5.1 Western Sydney Growth Areas SIC Determination

The Western Sydney Growth Areas SIC Determination was made in 2011. In addition to the overview in this guideline, you can find more information in the Special Infrastructure Contribution – Western Sydney Growth Areas Determination 2011, available from the department’s website.

This SIC determination applies to the special contributions areas indicated in figures 3 and 4 and comprises the North West Growth Area, South West Growth Area, Balmoral Road, Elderslie and Spring Farm.

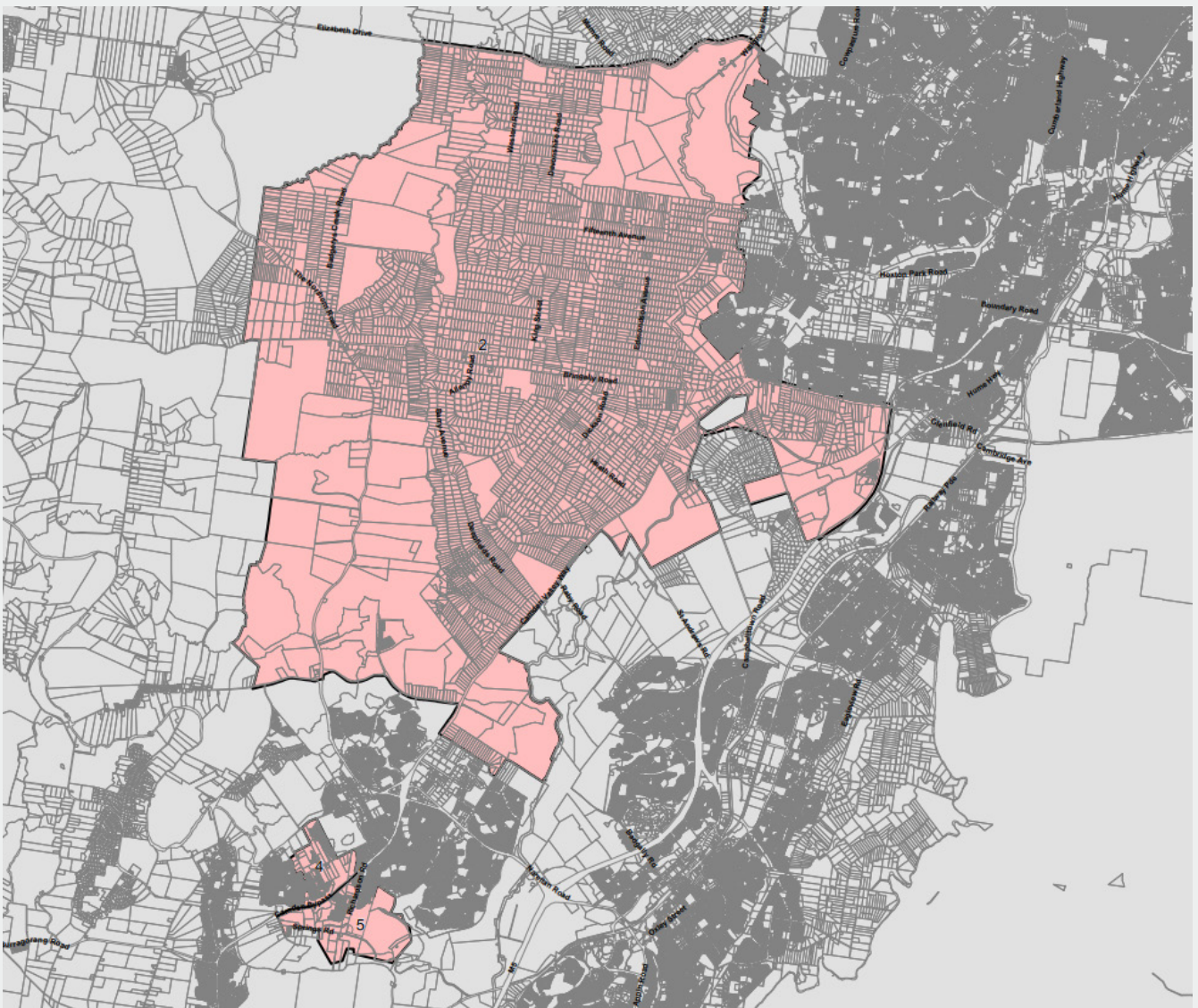


Figure 3. Western Sydney growth areas – South West, Elderslie and Spring Farm





## 5.1.2 Applicable development

The contribution is made for development on the following land, approved via development consent:

- residential and industrial land in a western Sydney growth area precinct subject to a precinct plan
- residential land in the Balmoral Road, Elderslie, Spring Farm areas
- any land in a western Sydney growth area precinct not subject to a precinct plan.

Contributions are not required for certain types of development such as public schools, emergency services and health services facilities, bus depots, some roads, certain types of subdivisions, neighbourhood shops, shop-top housing and recreation areas.

Further policy decisions exempt private schools, places of public worship and cemeteries.

Additional provisions in the SIC determination include that a contribution is:

- required only once in respect of a parcel of land
- not required for complying development.

## 5.1.3 Nature of the contribution

The SIC determination defines the contribution as a monetary rate per net developable area of land. Rates vary according to the type of land (whether residential or industrial) and the location. The SIC determination details the method to calculate the net developable area to which a contribution will apply.

*Contribution amount = SIC rate x net developable area*

As an alternative to a monetary contribution, a contribution of infrastructure or land via a WIK agreement may be made.

## 5.1.4 Net developable area

Net developable area is defined in clause 10 of the Western Sydney Growth Areas SIC Determination. Net developable area is the area of the approved development, including the area of all roads reserved or dedicated as a public road as part of the development consent. Net developable area does not include the area of roads identified in the infrastructure schedule of a local contributions plan or the SIC determination, nor does it include the area of any existing road or the widening of any existing road.

### 5.1.5 Timing of payment

A contribution must be paid before a subdivision certificate or construction certificate is issued under the development consent.

The SIC determination allows for staged payments for development approved in stages by the consent authority. Although the determination provides for deferred payment of monetary contributions, in practice the department does not allow deferred payments.

## 5.2 Warnervale Town Centre SIC determination (Repealed)



Figure 5. Warnervale Town Centre Special Contributions Area

### **5.2.1 Infrastructure funded**

The SIC determination is to fund state and regional roads, bus infrastructure, biodiversity conservation and planning/delivery.

### **5.2.2 Applicable development**

The Warnervale Town Centre SIC Determination requires a contribution to be made for residential development approved via development consent.

Additional provisions in the SIC determination include that a contribution is:

- required only once in respect of a parcel of land
- not required for complying development.

### **5.2.3 Nature of the contribution**

The SIC determination defines the contribution as a monetary rate per net developable area of land and provides details of the method to calculate the net developable area to which a contribution will apply.

### **5.2.4 Timing of payment**

A contribution must be paid before a subdivision certificate is issued if a subdivision is involved, or before a construction certificate is issued if the development does not involve a subdivision in relation to the development consent.





### 5.3.2 Applicable development

The SIC determination requires a contribution for industrial development approved via development consent.

The SIC determination defines the contribution as a monetary rate per net developable area of land and details the method used to calculate the net developable area to which a contribution will apply.

*Contribution amount = SIC rate x net developable area*

As an alternative to a monetary contribution, a contribution of infrastructure or land via a WIK agreement may be made.

Refer to the SIC determination for the definition of net developable area.

### 5.3.3 Timing of payment

A contribution must be paid before a subdivision certificate or construction certificate is issued under the development consent.

## 5.4 Bayside West SIC Determination (Repealed)

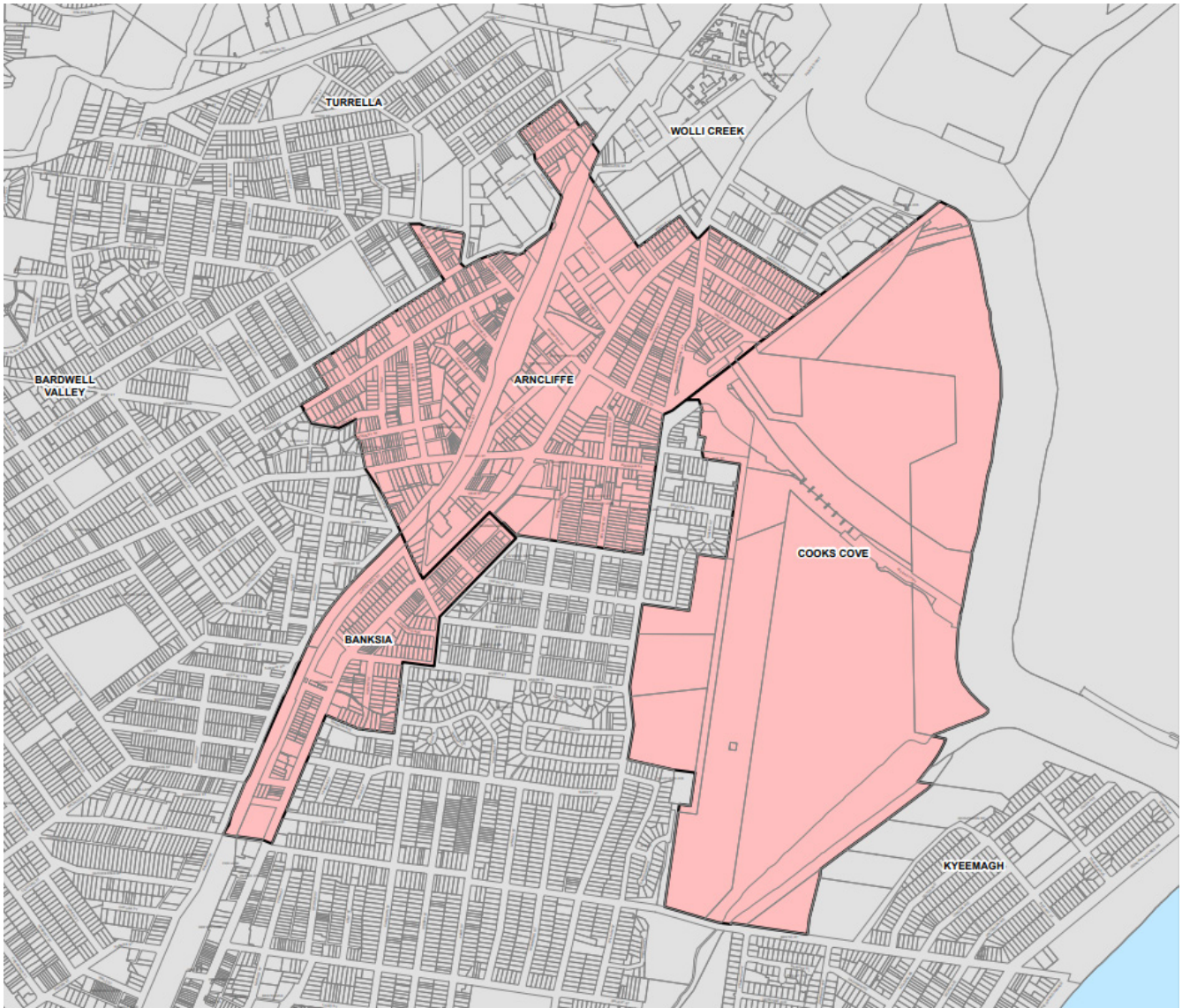


Figure 7. Bayside West Special Contributions Area

### 5.4.1 Infrastructure funded

The SIC determination is to fund state and regional roads, education, open space, pedestrian and cycleway improvements and planning and delivery.

### 5.4.2 Applicable development

The SIC applies only to residential accommodation approved via development consent and complying development.

### 5.4.3 Nature of the contribution

The SIC determination defines the contribution as a monetary rate per additional dwelling approved on the site. Details of how to calculate the net additional dwellings are outlined in the determination. As an alternative to a monetary contribution, a contribution via a WIK agreement may be made.



### 5.4.4 Timing of payment

A contribution must be paid before a construction certificate is issued under the development consent.

## 5.5 St Leonards Crows Nest SIC Determination (Repealed)

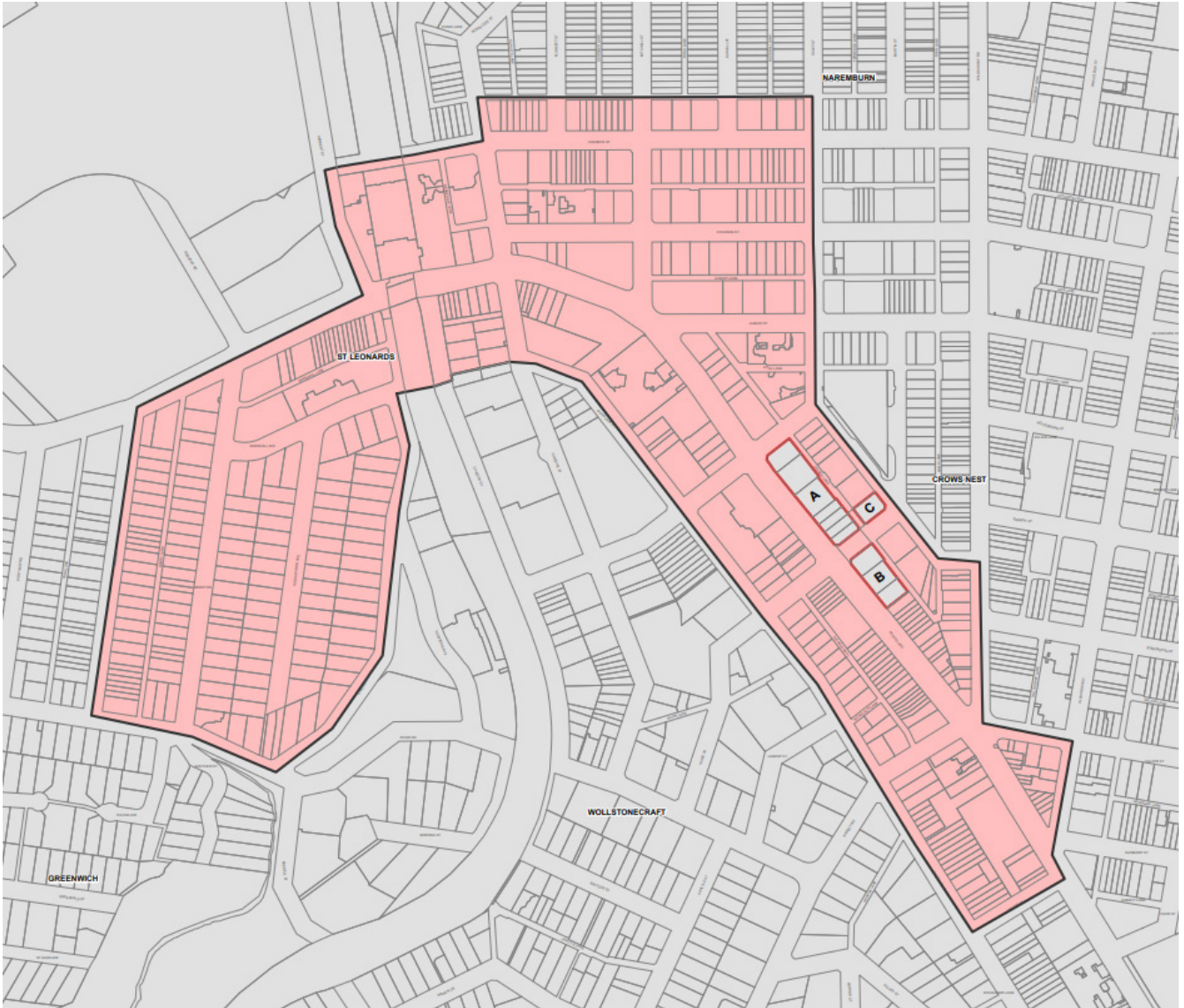


Figure 8. St Leonards Crows Nest Special Contributions Area

### 5.5.1 Infrastructure funded

The SIC determination is to fund state and regional roads, education, open space, pedestrian and cycleways and planning/delivery.

The area subject to the St Leonards Crows Nest SIC Determination can be increased by rezoning approvals. In these cases, the SIC map must be amended to include the additional land.

### **5.5.2 Applicable development**

The SIC applies only to residential accommodation approved via development consent and complying development.

### **5.5.3 Nature of the contribution**

The SIC determination defines the contribution as a monetary rate per additional dwelling approved on the site. Details of how to calculate the net additional dwellings are outlined in the determination.

### **5.5.4 Timing of payment**

A contribution must be paid before a construction certificate is issued under the development consent.



## 5.6 Frenchs Forest SIC Determination (Repealed)

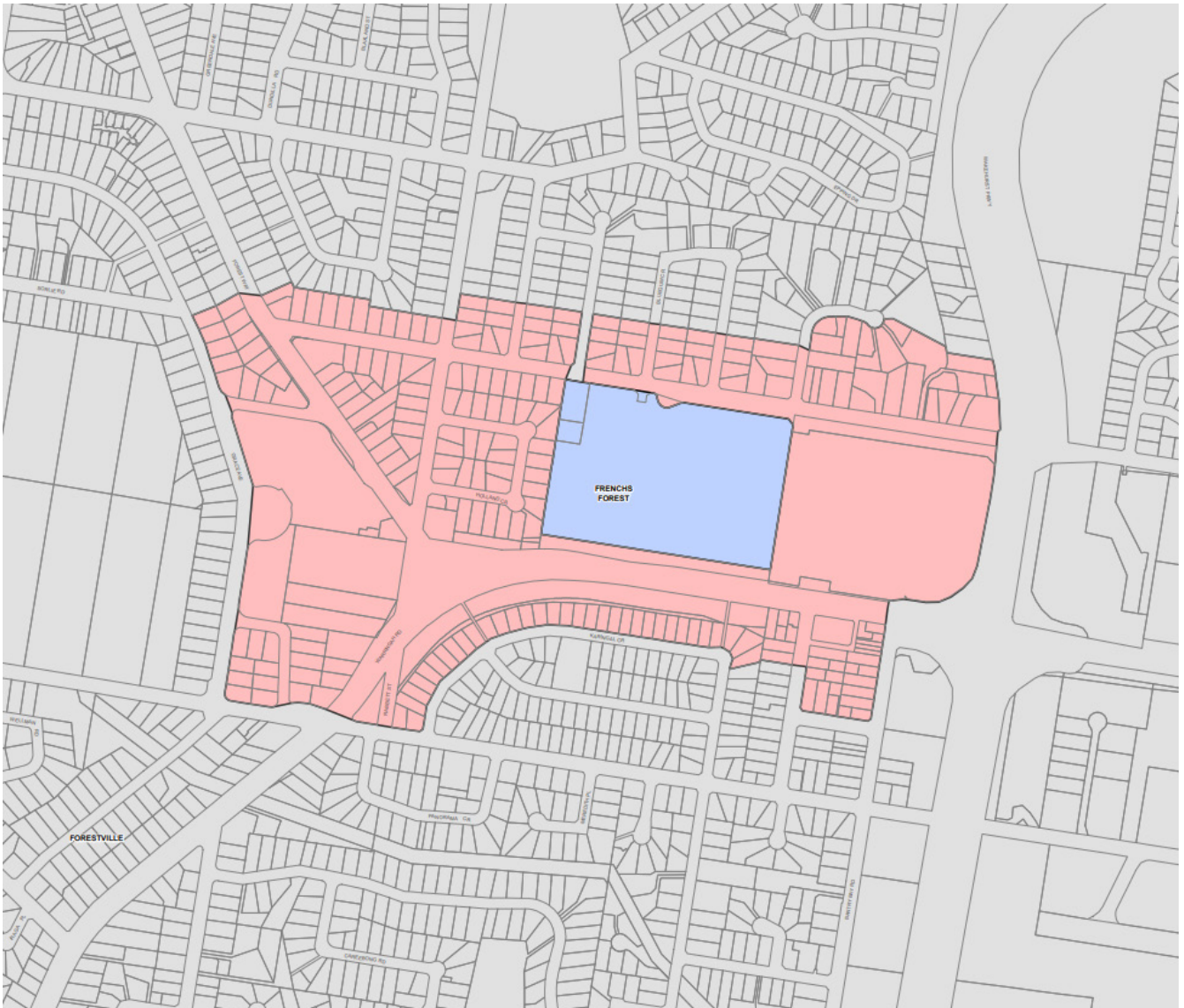


Figure 9. Frenchs Forest Special Contributions Area

### 5.6.1 Infrastructure funded

The SIC determination is to fund state and regional roads, education, public transport, active transport/green links and planning/delivery.

### 5.6.2 Applicable development

The SIC applies only to residential accommodation approved via development consent and complying development.

### **5.6.3 Nature of the contribution**

The SIC determination defines the contribution as a monetary rate per additional dwelling approved on the site. Details of how to calculate the net additional dwellings are outlined in the determination.

### **5.6.4 Timing of payment**

A contribution must be paid before a construction certificate is issued under the development consent.

## 5.7 Pyrmont Peninsula Metro SIC Determination (Repealed)



Figure 10. Pyrmont Peninsula Metro Special Contributions Area

### 5.7.1 Infrastructure funded

The SIC determination is to fund the Sydney Metro Pyrmont Station and associated infrastructure and planning/delivery.

### 5.7.2 Applicable development

The SIC applies to development within an urban intensification site approved via development consent. Urban intensification sites may be added to the SIC over time.

An additional provision in the SIC determination specifies a contribution is not required for complying development.

### **5.7.3 Nature of the contribution**

In the case of residential development, the SIC is applied to the number of dwellings authorised by the development consent.

Note that:

- the number of existing dwellings on the site, which are to be retained, is not included in the number of dwellings for calculating the SIC charge
- demolitions do not reduce the number of dwellings to be counted when assessing the SIC amount.

For commercial buildings, defined as any building not for residential accommodation, the SIC is calculated using the gross floor area.

The SIC can only be made in the form of a monetary contribution.

### **5.7.4 Timing of payment**

A contribution must be paid before a construction certificate is issued under the development consent.



# 5.8 Illawarra and Shoalhaven SIC Determination (Repealed)

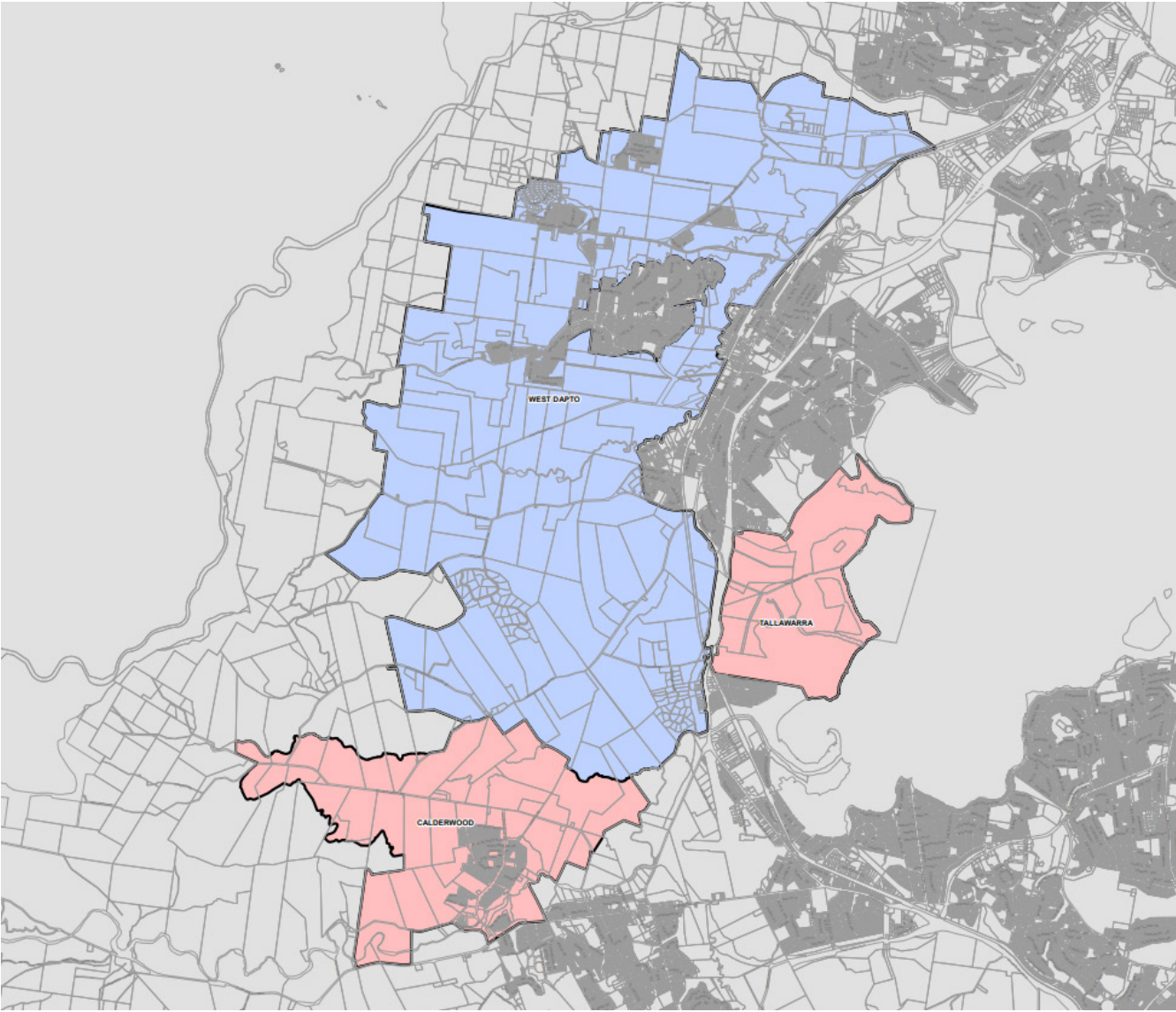


Figure 11.1 Illawarra and Shoalhaven Special Contributions Area



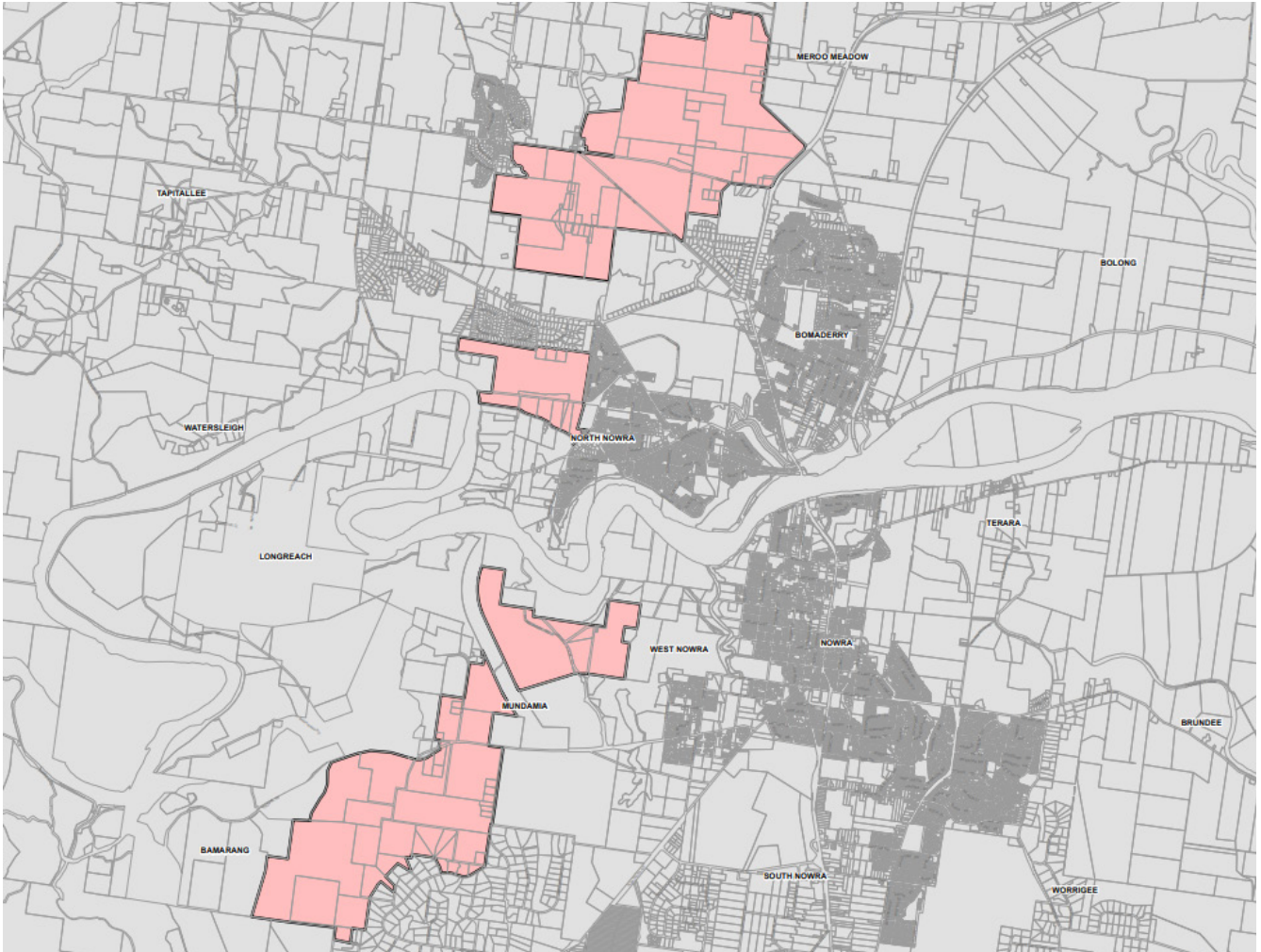


Figure 11.2 Illawarra and Shoalhaven Special Contributions Area

### 5.8.1 Infrastructure funded

The SIC determination is to fund state and regional roads, education, active transport, open space, emergency services, community health facilities, biodiversity and planning/delivery.

### 5.8.2 Applicable development

The SIC applies to development on land that is defined as ‘greenfield residential land’ approved via development consent and complying development.

### 5.8.3 Nature of the contribution

The SIC is determined based on the net developable area to which a development consent or complying development certificate applies.

The SIC rate is different in three designated growth areas – Nowra–Bomaderry, Calderwood–Tallawarra and West Dapto.

An additional provision in the SIC Determination states that a contribution is required only once in respect of a parcel of land.

### 5.8.4 Timing of payment

A contribution must be paid before a subdivision certificate or construction certificate is issued under the development consent.

## 5.9 Gosford City Centre SIC Determination (Repealed)

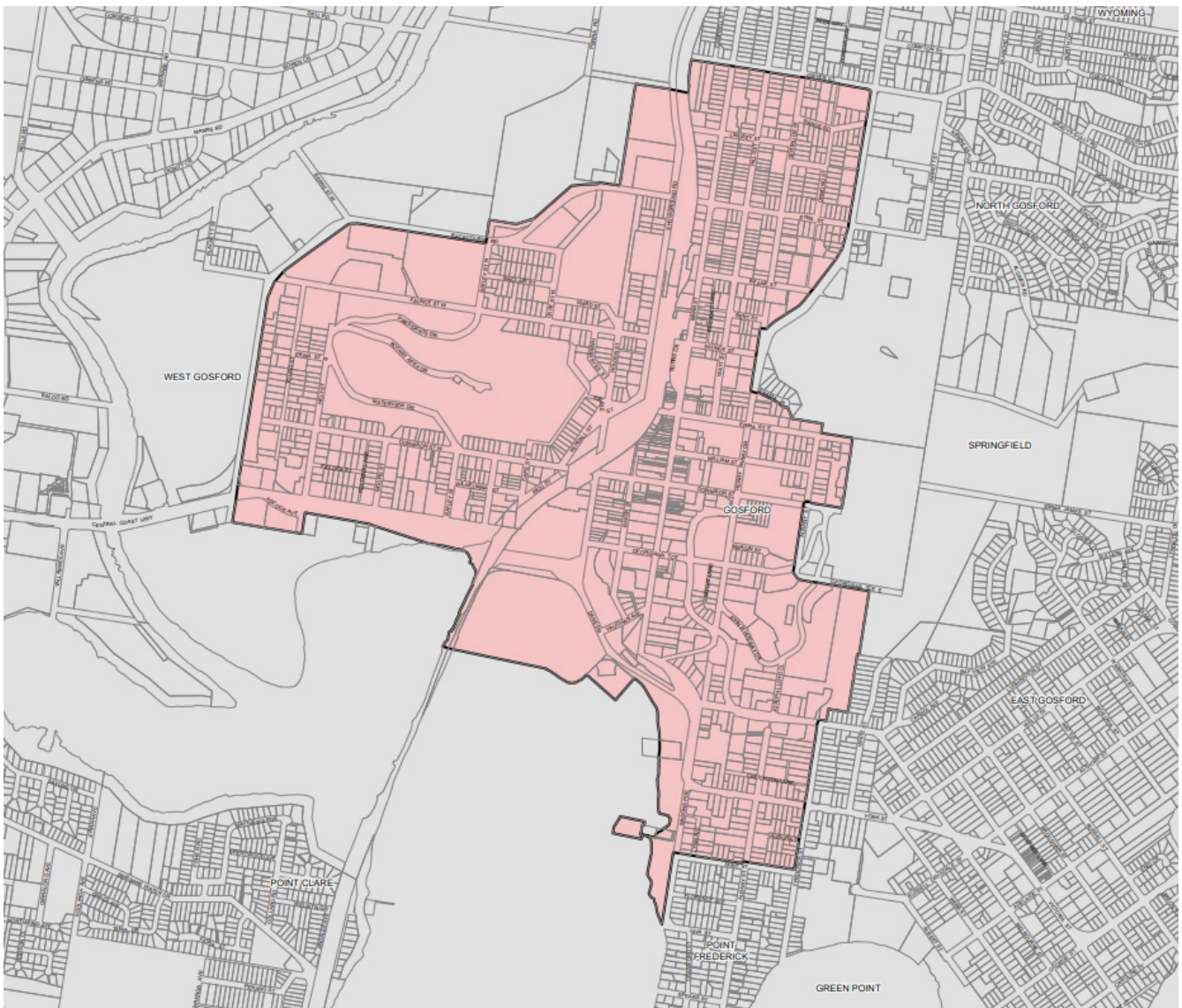


Figure 12. Gosford City Centre Special Contributions Area

### **5.9.1 Infrastructure funded**

The SIC determination is to fund state and regional roads and active transport, community facilities and open space, education/health/emergency services and planning/delivery.

### **5.9.2 Applicable development**

The SIC applies to development in a residential or business zone with a cost exceeding \$1 million, approved via development consent. The SIC does not apply to complying development.

### **5.9.3 Nature of the contribution**

The SIC charge is 2% of the cost of development. The items included when determining the cost of development are outlined in the SIC determination.

### **5.9.4 Timing of payment**

A contribution must be paid before a construction certificate is issued under the development consent.



## 5.10 Western Sydney Aerotropolis SIC Determination

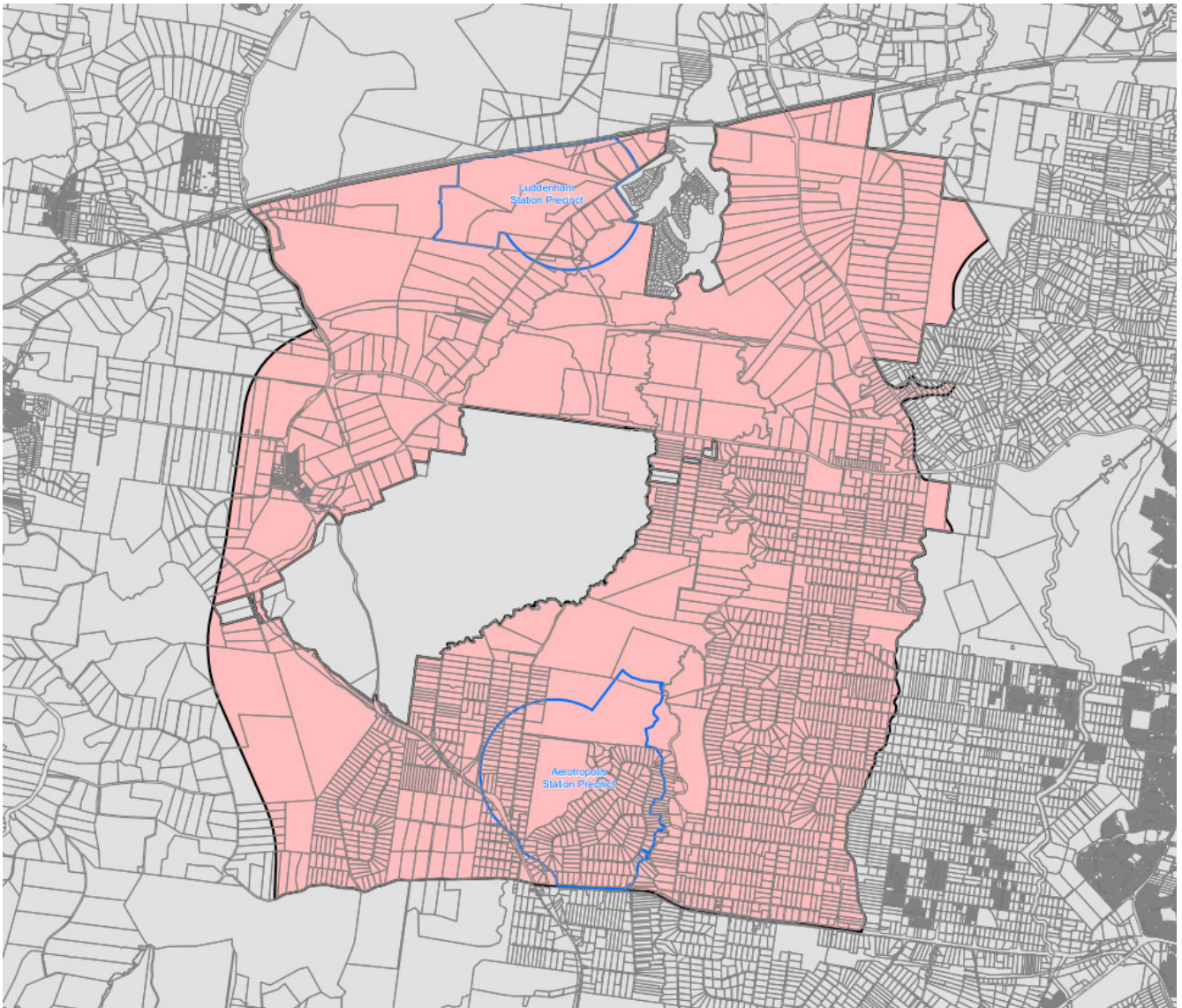


Figure 13.1 Western Sydney Aerotropolis Special Contributions Area

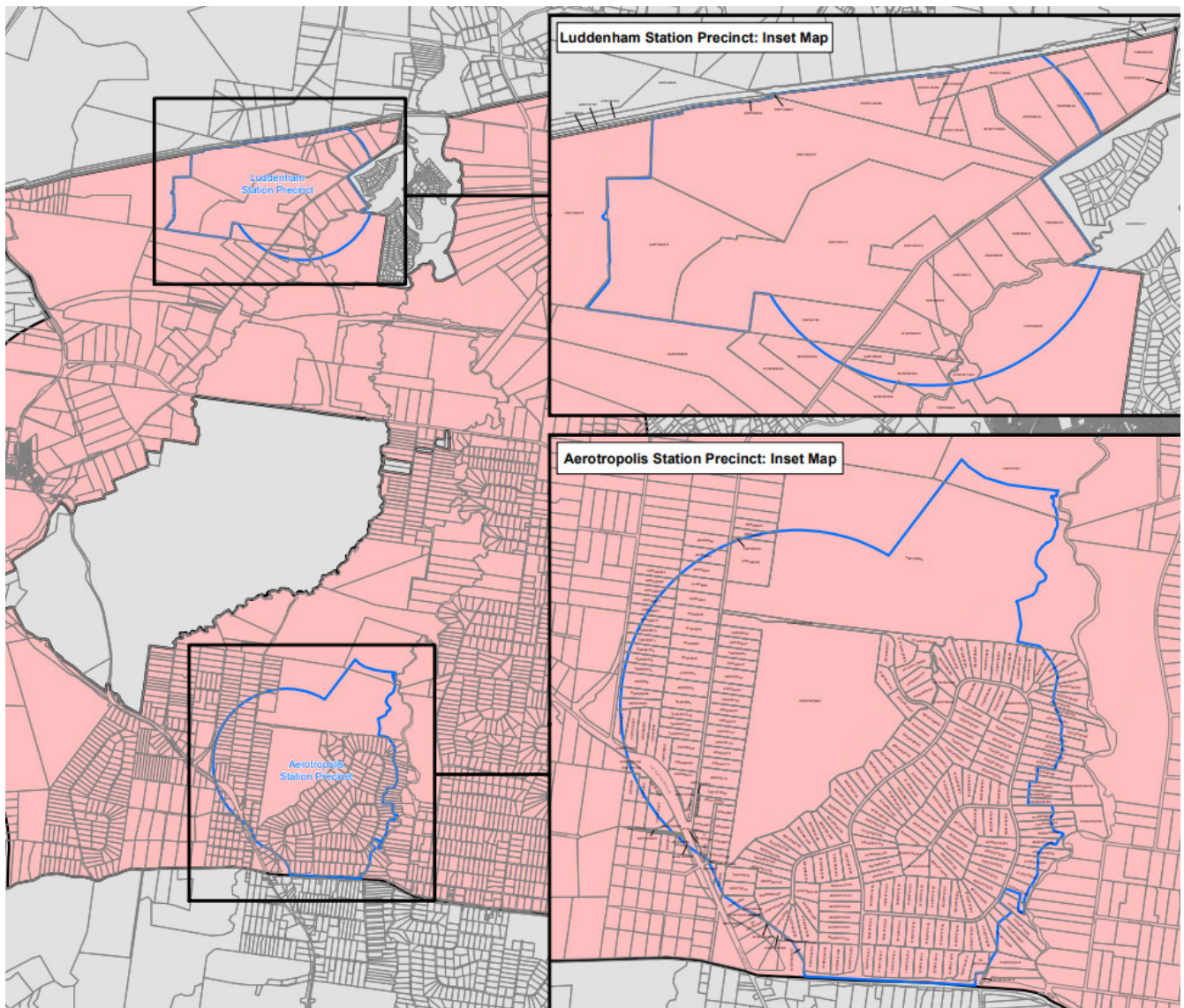


Figure 13.2 Western Sydney Aerotropolis Special Contributions Area

### 5.10.1 Infrastructure funded

The SIC determination is to fund state and regional roads, bus and rail infrastructure, cycle networks, green infrastructure, health, education, justice, emergency services, community and planning/delivery.

### 5.10.2 Applicable development

The SIC applies to development on land zoned Agribusiness, Enterprise, Mixed Use and Mamre Road Industrial. The SIC applies to development approved via development consent and complying development.



### **5.10.3 Nature of the contribution**

The SIC is calculated based on the net developable area. In the station precincts, there is an additional SIC charge for development with a cost exceeding \$200,000. This charge is:

- 1% of the cost of development in an Enterprise zone
- 2% of the cost of development in a Mixed Use zone.

The items included when determining the cost of development are outlined in the SIC determination.

### **5.10.4 Timing of payment**

A contribution must be paid before a subdivision certificate or construction certificate is issued under the development consent.

## 6. Appendix A: Draft letter of offer

Company letterhead [if developer is a company] [Company Details]

[Date]

[Insert Name]

Director, Infrastructure Programs and Coordination

Department of Planning, Housing and Infrastructure

4 Parramatta Square, 12 Darcy Street,

Parramatta NSW 2150

CC: Email:

Dear [Insert Name and title]

SUBJECT: Letter of offer – Offer to enter into a special infrastructure contribution works-in-kind agreement for .....

....., (“developer[s]”) wish to make an offer to enter into a special infrastructure contribution works in kind agreement in accordance with sections 26(3) and (4) of the Environmental Planning and Assessment (Special Infrastructure Contribution – Refer to relevant) Determination date.

We propose the following material public benefits described in the ministerial direction dated 14 January 2011 (or other):

- construct/fund [Insert name of works and description]
- dedicate approximately [insert size of land] of land on which [name of infrastructure] will be constructed and dedicated to [insert relevant Receiving Authority].

The total value of this offer is [insert value]. Of this total, [insert amount] is for construction of [insert infrastructure item] and [insert amount] is the land component. We therefore seek SIC discharge credits in the order of [insert amount].

[insert reasoning/justification for work and/or background information with reference to the checklist provided and any other relevant information / attachments in relation to the proposed agreement]

Insert Signature[s] of developer[s]:

[Insert Full name]

[insert position description]

[Company]

## 7. Appendix B: Example WIK agreement

**Deputy Secretary of the Department of Planning, Housing and Infrastructure** for and on behalf of the Crown in right of the State of New South Wales

**[Developer]**

**[ACN#]**

### **Special Infrastructure Contributions Works-in-Kind Agreement**

**[description of the Road Work Land]**

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**EXECUTED AS A DEED**

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**SCHEDULE 5 – Address for Service (clause 10.15)**



**PARTIES:**

**DEPUTY SECRETARY OF THE DEPARTMENT OF PLANNING, HOUSING AND INFRASTRUCTURE** FOR AND ON BEHALF OF THE CROWN IN RIGHT OF THE STATE OF NEW SOUTH WALES of 4 Parramatta Square, 12 Darcy Street, Parramatta, New South Wales, 2150 (**Deputy Secretary**); and

**[DEVELOPER]** (ACN **[ABN#]**) of (**the Developer**).

**INTRODUCTION:**

- A** The Developer proposes to carry out development within the Western Sydney Growth Areas (**WSGA**) Special Contributions Area.
- B** The Ministerial Determination provides for the making of SICs for development on certain land within the WSGA Special Contributions Area.
- C** The *Environmental Planning and Assessment (Special Infrastructure Contribution – Western Sydney Growth Areas) Direction 2020* requires councils for the local government areas that lie within the WSGA Special Contributions Area to impose a condition (in the terms set out in the Direction) for the making of a SIC on the grant of Development Consent for any development for which a SIC is required to be made under the Ministerial Determination.
- D** The Ministerial Determination provides that a SIC may be made as a monetary contribution or a contribution of a kind specified in a SIC works-in-kind agreement.
- E** Development Consent granted to the Developer in relation to **[DA number]** as modified by **[MOD number]** for (**Development**) on land within the WSGA Special Contributions Area requires the making of a SIC.
- F** It is anticipated that other Development Consents that may be granted to the Developer for development on land within the WSGA Special Contributions Area will also require the making of such contributions.
- G** The Developer proposes to construct **[description of the road to be constructed and dedicated/transferred to the Roads Authority]** and dedicate the land on which that part of the road is located as a public road, or otherwise transfer it to the relevant Roads Authority, in order to fully discharge its liability to make a SIC imposed under the Development Consent granted to the Developer in relation to **[DA number]** as modified by **[MOD number]**.
- H** The Parties have agreed to enter into this Deed to give effect to the above proposal.

**IT IS AGREED:**

**1 DEFINITIONS AND INTERPRETATION**

**1.1 Definitions**

In this **Deed**, unless the context clearly indicates otherwise:

**Actual Cost**, in relation to the Road Work, means the Final Certified Contract Cost at completion of the Construction Contract, together with any other costs (not exceeding 15% of the Final Certified Contract Cost) incurred and paid by the Developer to third parties for the following:

- (a) design of the Road Work, project management, investigations, studies or reports specifically required for the Road Work;
- (b) any licence, approval, authority, permit or permission specifically required to be obtained for or in relation to the carrying out of the Road Work,

with both the Final Certified Contract Cost and any other costs both to be certified as accurate and reasonable by the Superintendent for the Road Work;

**Address for Service** means the address of each party appearing in Schedule 5 or any new address notified by any party to all other parties as its new Address for Service;

**Authorised Progress Claim Certificate** means a certificate signed by the Superintendent for the Road Work confirming that the Developer has paid the amount specified in that certificate to the third party contractor for work performed under the Construction Contract;

**Bank Guarantee** means an irrevocable and unconditional undertaking to pay the face value of that undertaking (being such amount as is required under this Deed) on demand:

- (a) by an Australian bank that is an eligible financial institution for the purposes of Treasury Circular NSW TC14/01 dated 24 January 2014 as amended, supplemented or substituted from time to time; and
- (b) on terms, acceptable to the Deputy Secretary, in the Deputy Secretary's absolute discretion;

**Business Day** means any day that is not a Saturday, Sunday, public holiday or bank holiday in Sydney, and concludes at 5 pm on that day;

**Construction Contract** means the contract between the Developer and a third party contractor, referred to in clause 3.5, for the carrying out of the Road Work by that third party contractor;

**Construction Certificate** has the same meaning as in the Act;

**Department** means the NSW Department of Planning, Housing and Infrastructure;

**Deputy Secretary** means the Deputy Secretary of the Department or Nominated Officer;

**Development** has the meaning given to it in Paragraph E.

**Development Consent** means a consent under Part 4 of the Act for development;

**Estimated Cost**, in relation to the Road Work, means the estimated cost of the Road Work set out in column 1 of the Table, and, from 1 July, that cost as indexed in accordance with clause 3.2(a);

**Final Certified Contract Cost**, in relation to the Construction Contract, has the same meaning as in the Construction Contract;

**GST** means any form of goods and services tax payable under the GST Legislation;

**GST Legislation** means *A New Tax System (Goods and Services Tax) Act 1999* (Cth);

**Milestone** means works or other activities specified in Column 3 of the Table relating to the carrying out of the Road Work;

**Milestone Notice** means a written notice from the Developer to the Deputy Secretary notifying the Deputy Secretary that the Developer has achieved the Milestone specified in the notice;

**Minister** means the Minister for Planning;

**Ministerial Determination** means the *Environmental Planning and Assessment (Special Infrastructure Contribution – Western Sydney Growth Areas) Determination 2011*, made under the former section 94EE (now section 7.24) of the Act and dated 14 January 2011;

**Nominated Officer** means an officer of the Department for the time being assigned to a role nominated by the Deputy Secretary for the purpose of this Deed;

**Occupation Certificate** has the same meaning as in the Act;

**Road** has the same meaning as in the *Roads Act 1993*;

**Road Work** means those works described in Schedule 3;

**Road Work Land** means [the area of the land on which the road is to be constructed and dedicated/transferred to the Roads Authority] of land on which the Road Work is to be constructed generally as shown on the plan in Schedule 4;

**Roads Authority** has the same meaning as in the *Roads Act 1993*;

**Note:** The Roads Authority for [road or part of road to be constructed and/or dedicated/transferred] is [relevant Roads Authority].

**SIC** means a special infrastructure contribution being a development contribution determined under section 7.23 of the Act for the WSGA Special Contributions Area or any part of that Area;

**SIC Discharge Amount** means:

- (a) an amount specified in Column 2 of the Table for a Milestone specified in Column 3 of the Table, and, from 1 July, means that amount, if it is the amount for Milestone 1, 2 or 3, indexed in accordance with clause 3.8(b); and
- (b) the Value of the Road Work Land;

**SIC Discharge Balance** means the amount shown on the SIC Discharge Certificate as the final or unapplied SIC Discharge Balance, being either “zero” amount or the amount that remains available to the Developer for the discharge of SIC obligations for development that is not listed on the certificate for the time being;

**SIC Discharge Certificate** means a certificate referred to in clause 3.6(d)(ii) and clause 3.7(e)(ii) as amended from time to time under this Deed to reflect the SIC Discharge Balance;

**Subdivision Certificate** has the same meaning as in the Act;

**Superintendent** means an independent third party nominated by the Parties to:

- (a) issue Authorised Progress Claim Certificates;
- (b) certify the accuracy and reasonableness of the cost of works performed under the Construction Contract; and
- (c) certify whether the Road Work meets the requirements of the Roads Authority;

**Table** means the Table in Schedule 1 relating to the Road Work;

**the Act** means the *Environmental Planning and Assessment Act 1979* (NSW);

**Value of the Road Work Land** means the value of the Road Work Land as determined in accordance with Schedule 2, being \$[value of the road work land] and, from 1 July, that value as indexed in accordance with clause 3.3(b); and

**WSGA Special Contributions Area** means the Western Sydney Growth Areas Special Contributions Area being the land described in Schedule 4 to the Act as the

land shown edged heavy black on the map marked “Western Sydney Growth Areas – Special Contributions Area”.

## 1.2 Interpretation

In this Deed, unless the context clearly indicates otherwise:

- (a) a reference to **this Deed** or another document means this Deed or that other document and any document which varies, supplements, replaces, assigns or novates this Deed or that other document;
- (b) a reference to **legislation** or a **legislative provision** includes any statutory modification, or substitution of that legislation or legislative provision and any subordinate legislation issued under that legislation or legislative provision;
- (c) a reference to a **body** or **authority** which ceases to exist is a reference to either a body or authority that the parties agree to substitute for the named body or authority or, failing agreement, to a body or authority having substantially the same objects as the named body or authority;
- (d) a reference to the **introduction**, a **clause**, **schedule** or **annexure** is a reference to the introduction, a clause, a schedule or an annexure to or of this Deed;
- (e) **clause headings**, the **introduction** and the **table of contents** are inserted for convenience only and do not form part of this Deed;
- (f) the **schedules** form part of this Deed;
- (g) a reference to a **person** includes a natural person, corporation, statutory corporation, partnership, the Crown or any other organisation or legal entity;
- (h) a reference to a **natural person** includes their personal representatives, successors and permitted assigns;
- (i) a reference to a **corporation** includes its successors and permitted assigns;
- (j) a reference to a right or obligation of a party is a reference to a right or obligation of that party under this Deed;
- (k) an **obligation** or **warranty** on the part of 2 or more persons binds them jointly and severally and an obligation or warranty in favour of 2 or more persons benefits them jointly and severally;
- (l) a requirement to do any thing includes a requirement to cause that thing to be done and a requirement not to do any thing includes a requirement to prevent that thing being done;



- (m) **including** and **includes** are not words of limitation;
- (n) a word that is derived from a defined word has a corresponding meaning;
- (o) **monetary amounts** are expressed in Australian dollars;
- (p) the singular includes the plural and vice-versa;
- (q) words importing one gender include all other genders;
- (r) a reference to a thing includes each part of that thing;
- (s) any paragraph marked “note” is not to be used in the interpretation of this Deed; and
- (t) neither this Deed nor any part of it is to be construed against a party on the basis that the party or its lawyers were responsible for its drafting.

### **1.3 Construction of certain references**

- (a) A reference in this Deed to the dedication of the Road Work Land as a public road, or the transfer of the Road Work Land to the relevant Roads Authority, is reference to the dedication or transfer free of all encumbrances, estates, interests, rights or claims, other than as agreed in writing with the Roads Authority.
- (b) A reference in this Deed to development is a reference to development within the meaning of the Act and includes a reference to part of a development that is the subject of a development consent.
- (c) A reference in this Deed to issuing a SIC Discharge Certificate includes a reference to amending and re-issuing a SIC Discharge Certificate.

## **2 OPERATION OF THIS DEED**

### **2.1 Operation**

The parties agree that this Deed commences from the date this Deed is signed by all the parties.

## **3 AGREEMENT BETWEEN THE PARTIES**

### **3.1 Road Work and Road Work Land**

The parties acknowledge that:

- (a) Development Consent granted to the Developer in relation to [DA number] as modified by [MOD number] for development on land within the WSGA Special Contributions Area requires the making of a SIC;

- (b) it is anticipated that other Development Consents that may be granted to the Developer for development on land within the WSGA Special Contributions Area will also require the making of SICs;
- (c) the Developer has elected to carry out the Road Work, and dedicate the Road Work Land as a public road or otherwise transfer the Road Work Land to the relevant Roads Authority, in accordance with clause 3 of this Deed, to discharge its SIC obligation imposed under the Development Consent granted to the Developer in relation to [DA number] as modified by [MOD number] for development on land within the WSGA Special Contributions Area;
- (d) the Road Work forms part of the [the relevant road] works in the [North West Sector/South West Sector] of the WSGA Special Contributions Area and the attributable cost shown for that item in Appendix 1 to the Ministerial Determination is \$[attributable cost] (identified as item [insert]);
- (e) the maximum amount of liability to make a SIC for development in the WSGA Special Contributions Area that may be discharged by the carrying out of the Road Work is the Estimated Cost of the Road Work;
- (f) the maximum amount of liability to make a SIC for development in the WSGA Special Contributions Area that may be discharged by dedicating the Road Work Land as a public road or otherwise transferring the Road Work Land to the relevant Roads Authority is the Value of the Road Work Land;
- (g) the Deputy Secretary will, on the terms set out in this Deed, accept the Road Work, and the dedication of the Road Work Land to the Roads Authority, in full discharge of the liability of the Developer to make SICs for development in the WSGA Special Contributions Area; and
- (h) this Deed constitutes a SIC works-in-kind agreement within the meaning of the Ministerial Determination.

### 3.2 Estimated Cost and Actual Cost of Road Work

- (a) The parties agree that on 1 July [insert], and on 1 July in each subsequent year, the estimated cost of the Road Work, being \$[the estimated cost of the Road Work] as specified in Column 1 of the Table, is to be adjusted by multiplying the estimated cost by the following fraction:

latest Sydney CPI number/base Sydney CPI number

where:

**latest Sydney CPI number** is the Sydney CPI number for the quarter ending on 31 March in the year in which the adjustment is made; and

**base Sydney CPI number** is the Sydney CPI number for the quarter ending 31 March [insert].

- (b) The parties agree that the amount of the liability to make a SIC for development in the WSGA Special Contributions Area that the Developer may discharge by carrying out the Road Work is the Actual Cost of the Road Work.
- (c) However, if the Actual Cost of the Road Work is more than the Estimated Cost of the Road Work, the amount of the liability to make the SIC for development that the Developer discharges by carrying out the Road Work is the Estimated Cost of the Road Work.
- (d) The parties agree that the Deputy Secretary may make any determination required to be made for the purpose of calculating the Actual Cost of the Road Work, following consultation with the Developer and having proper regard to all matters put before the Deputy Secretary by the Developer.

### 3.3 Value of Road Work Land

- (a) The parties agree that the amount of the liability to make a SIC for development in the WSGA Special Contributions Area that the Developer may discharge by dedicating the Road Work Land as a public road, or otherwise transferring the Road Work Land to the relevant Roads Authority, is the value of the Road Work Land, being \$[value of the Road Work Land], as adjusted in accordance with clause 3.3(b).
- (b) The parties agree that on 1 July [insert], and on 1 July in each subsequent year until the value of the Road Work Land is credited to the Developer as a SIC Discharge Amount on a SIC Discharge Certificate, the value of the Road Work Land is to be adjusted by multiplying that value by the following fraction:

latest Sydney CPI number/base Sydney CPI number

where:

**latest Sydney CPI number** is the Sydney CPI number for the quarter ending on 31 March in the year in which the adjustment is made; and

**base Sydney CPI number** is the Sydney CPI number for the quarter ending 31 March [insert].

SIC WIK Agreement – [description of Road Work Land] – [Developer]

### 3.4 Amount of the SIC if paid as monetary contributions before 1 July [insert year]

The Development Consent in relation to [DA number] as modified by [MOD number] for development granted to the Developer imposes a condition requiring the making of a SIC that, if made as monetary contributions and paid in full before 1 July [insert], would total approximately \$[the total amount of contribution].

### 3.5 Development Procedure and Construction Contract for the Road Work

- (a) The Developer must:
  - (i) carry out and deliver the Road Work in consultation with and having regard to the requirements of the Roads Authority; and
  - (ii) consult in good faith with the Roads Authority and act reasonably in relation to the scope, design and delivery of the Road Work.
- (b) The Developer may provide written notice to the Deputy Secretary that confirms that it intends to commence the Road Work (**the Notice**).
- (c) The Notice must be accompanied by a copy of the proposed Construction Contract for the Road Work.
- (d) The Construction Contract must:
  - (i) identify a Superintendent for the Road Work;
  - (ii) separately identify those works comprising the Road Work, whether through a separate bill of quantities or separate contract;
  - (iii) identify the proposed contract value for each item of the Road Work; and
  - (iv) identify the terms and conditions applicable to the carrying out of the Road Work.

### 3.6 Attainment of Milestones relating to the Road Work

- (a) If the Developer considers that it has achieved a Milestone, the Developer may forward the following to the Deputy Secretary:
  - (i) a Milestone Notice;
  - (ii) an Authorised Progress Claim Certificate or, in the case of the fifth Milestone Notice, a certificate from the Roads Authority confirming that any defects liability period for the Road Work has been satisfactorily completed and that satisfactory arrangements have

- been made with the Roads Authority to address any defects that arise during the defects liability period;
- (iii) a statement by the third party contractor under the Construction Contract confirming that the Developer has paid the amount specified in the Authorised Progress Claim Certificate and that the third party contractor has paid all subcontractors;
  - (iv) a statement by the Superintendent for the Road Work that the amount specified in the Authorised Progress Claim Certificate is an accurate and reasonable cost for the works performed;
  - (v) a statement by the Superintendent for the Road Work that the portion of the Road Work meets the requirements of the Roads Authority; and
  - (vi) such other supporting documentation as is necessary for the Deputy Secretary to determine whether that a Milestone has been achieved.
- (b) The Developer must promptly provide any additional information requested by the Deputy Secretary.
- (c) The Deputy Secretary must, within 30 days of receiving the Milestone Notice and all the certificates and information required under clause 3.6(a), determine whether the Milestone specified in the Milestone Notice has been achieved.
- (d) If the Deputy Secretary, in his or her absolute discretion, is satisfied that the Milestone has been achieved, the Deputy Secretary is to:
- (i) accept that portion of the Road Work undertaken that is directly referable to the Milestone in lieu of the Developer paying a monetary contribution equal to the SIC Discharge Amount for that Milestone, and
  - (ii) in respect of each Milestone achieved, issue a SIC Discharge Certificate to the Developer that sets out the SIC Discharge Amount that has been credited for that Milestone.
- (e) If the Deputy Secretary, in his or her absolute discretion, is not satisfied that the Milestone has been achieved, the Deputy Secretary will notify the Developer and provide an explanation as to why he or she considered that the Milestone had not been achieved and, if applicable, provide details of:
- (i) any additional work or tasks that must be undertaken; and/or
  - (ii) any information or documents that must be provided,



by the Developer, in order to achieve the Milestone. The Developer may, after taking into account the Deputy Secretary's explanation and undertaking the work or providing the information or documents required, re-submit a Milestone Notice together with any necessary documentation.

### **3.7 Dedication of Road Work Land**

- (a) This clause 3.7 applies where the Developer has dedicated the Road Work Land as a public road or has otherwise transferred that land to the Roads Authority.
- (b) The Developer may request, the Deputy Secretary in writing, to issue a SIC Discharge Certificate to the Developer that sets out the Value of the Road Work Land as a SIC Discharge Amount that has been credited to the Developer.
- (c) The request must be accompanied by a registered deposited plan or any other document that shows the Road Work Land as dedicated as a public road or otherwise transferred to the Roads Authority.
- (d) The Developer is to provide the Deputy Secretary with any other supporting documentation requested by the Deputy Secretary with respect to the dedication or transfer of the Road Work Land.
- (e) The Deputy Secretary will, within 30 days of receiving the request from the Developer and other material referred to in this clause 3.7, determine the Developer's request. If the Deputy Secretary is satisfied, in his or her absolute discretion, that the Road Work Land has been dedicated as a public road or otherwise transferred to the Roads Authority, the Deputy Secretary is to:
  - (i) accept the dedication or transfer of the Road Work Land in lieu of the Developer paying a monetary contribution equal to the SIC Discharge Amount for the Road Work Land pursuant to clause 3.3; and
  - (ii) issue a SIC Discharge Certificate that sets out the Value of the Road Work Land as a SIC Discharge Amount that has been credited to the Developer.

### **3.8 Indexation of SIC Discharge Amounts for a Milestone**

- (a) The SIC Discharge Amount for a Milestone represents the value allocated to each portion of the Road Work that the Deputy Secretary agrees to accept in discharge of the Developer's obligation to make a SIC for development in the WSGA Special Contributions Area.
- (b) The parties agree that each of the amounts specified in Column 2 of the Table for Milestones 1, 2, and 3, on 1 July [insert], and on 1 July in each

subsequent year until each of those amounts is credited to the Developer as a SIC Discharge Amount on a SIC Discharge Certificate, is to be adjusted by multiplying that amount by the following fraction:

$$\frac{\text{latest Sydney CPI number}}{\text{base Sydney CPI number}}$$

where:

**latest Sydney CPI number** is the Sydney CPI number for the quarter ending on 31 March in the year in which the adjustment is made; and

**base Sydney CPI number** is the Sydney CPI number for the quarter ending on 31 March [insert].

### 3.9 Drawing down credits – application of SIC Discharge Amounts

- (a) The Developer may request the Deputy Secretary to amend the Developer's SIC Discharge Certificate in lieu of making a monetary payment (or in addition to making a monetary payment) to indicate that a SIC, or a proportion of a SIC, has been made, in relation to a development, by drawing upon the SIC Discharge Balance. If the SIC Discharge Balance exceeds "zero", the Deputy Secretary is to amend the SIC Discharge Certificate accordingly, so as to include an entry for the development and to specify the new SIC Discharge Balance.
- (b) For the purposes of amending the SIC Discharge Certificate under clause 3.9(a), the amount of the SIC for the development is the amount of the SIC that would otherwise be payable as a monetary contribution for the development under the Ministerial Determination if paid on the date that the SIC Discharge Certificate is amended.

### 3.10 Reconciliation clause

- (a) The parties agree that in the event that the Actual Cost of the Road Work is less than the sum of the SIC Discharge Amounts credited for Milestones 1, 2 and 3 as shown on the Developer's SIC Discharge Certificate:
  - (i) the Deputy Secretary may re-issue the SIC Discharge Certificate to reflect the Actual Cost of the Road Work; and
  - (ii) if such an amendment results in a negative SIC Discharge Balance, the Developer must pay the amount necessary to bring the SIC Discharge Balance to a "zero" amount, within the period of time notified in writing by the Deputy Secretary and in the manner so notified.
- (b) If the SIC Discharge Certificate is amended as referred to in clause 3.10(a), the Deputy Secretary is not required, under clause 3.6(d)(ii), to issue an

updated SIC Discharge Certificate for the achievement of Milestones 4 and 5.

**3.11 Developer not to apply for Subdivision Certificate, Construction Certificate or Occupation Certificate for development unless relevant certificate issued for that development**

The Developer may not apply for a Subdivision Certificate, Construction Certificate or an Occupation Certificate (as the case may require having regard to the time by which the SIC, if made as a monetary contribution, would have to be paid) in relation to development within the WSGA Special Contributions Area for which a SIC is required to be made unless the Developer:

- (a) has obtained from the Deputy Secretary a certificate to the effect that the SIC for that development of the value or amount shown on the certificate has been made; or
- (b) has entered into a deferred payment arrangement as referred to in the Ministerial Determination in relation to that SIC; or
- (c) has obtained from the Deputy Secretary written advice that the Developer has provided a Bank Guarantee for the amount of the SIC that would otherwise be payable for that development.

**3.12 Land ownership**

The Developer warrants that it has a legally enforceable right to complete the Road Work (and to dedicate the Road Work Land as a public road or otherwise transfer it to the relevant Roads Authority) to enable it to comply with all its obligations under this Deed as and when they arise.

**4 SECURITY**

**4.1 Security relating to the Developer's obligations**

- (a) Where the SIC Discharge Balance on the Developer's SIC Discharge Certificate is insufficient to satisfy the Developer's obligation to make a SIC for development, before the issue of a Subdivision Certificate, Construction Certificate or an Occupation Certificate for that development, the Developer may provide a Bank Guarantee, in terms acceptable to the Deputy Secretary in the Deputy Secretary's absolute discretion, for the amount of the SIC.
- (b) If the Developer achieves a SIC Discharge Balance that is sufficient to discharge the liability to make the SIC for which the Bank Guarantee has been provided, the Developer may request the Deputy Secretary, in writing, to return the Bank Guarantee. The Developer must provide the

Deputy Secretary with such other supporting information that the Deputy Secretary reasonably requests.

- (c) If the Deputy Secretary is satisfied that the SIC Discharge Balance is sufficient to discharge the Developer's liability to make the SIC, the Bank Guarantee is to be released and returned to the Developer within 90 days of the Developer's written request.
- (d) The Bank Guarantee may be called upon, and the proceeds of such claim retained, to facilitate the delivery of the items of infrastructure to which the Ministerial Determination relates, if the Bank Guarantee has not been released and returned to the Developer within 2 years of the date of its issue.

## **5 DISPUTE RESOLUTION**

### **5.1 Not commence**

A party must not commence any court proceedings relating to a dispute unless it complies with this clause 5.

### **5.2 Written notice of dispute**

A party claiming that a dispute has arisen under or in relation to this Deed must give written notice to the other party specifying the nature of the dispute.

### **5.3 Attempt to resolve**

On receipt of notice under clause 5.2, the parties must endeavour in good faith to resolve the dispute expeditiously using informal dispute resolution techniques such as mediation, expert evaluation or other techniques agreed by them.

### **5.4 Mediation**

If the parties do not agree within 21 days of receipt of notice under clause 5.2 (or any further period agreed in writing by them) as to:

- (a) the dispute resolution technique and procedures to be adopted;
- (b) the timetable for all steps in those procedures; or
- (c) the selection and compensation of the independent person required for such technique,

the parties must mediate the dispute in accordance with the Mediation Program of the Law Society of New South Wales, as published on its website and as varied from time to time. The parties must request the president of the Law Society of NSW or the president's nominee to select the mediator and determine the mediator's remuneration.

## **5.5 Court proceedings**

If the dispute is not resolved within 60 days after notice is given under clause 5.2 then any party that has complied with the provisions of this clause 5 may in writing terminate any dispute resolution process undertaken under this clause and may then commence court proceedings in relation to the dispute.

## **5.6 Not use information**

The parties acknowledge the purpose of any exchange of information or documents or the making of any offer of settlement under this clause 5 is to attempt to settle the dispute. No party may use any information or documents obtained through any dispute resolution process undertaken under this clause 5 for any purpose other than in an attempt to settle the dispute.

## **5.7 No prejudice**

This clause 5 does not prejudice the right of a party to institute court proceedings for urgent injunctive or declaratory relief in relation to any matter arising out of or relating to this Deed.

# **6 GST**

## **6.1 Definitions**

Words used in this clause that are defined in the GST Legislation have the meaning given in that legislation.

## **6.2 Intention of the parties**

The parties intend that:

- (a) Divisions 81 and 82 of the GST Legislation apply to any supply made under and in respect of this Deed; and
- (b) no additional amounts will be payable on account of GST and no tax invoices will be exchanged between the parties.

## **6.3 Reimbursement**

Any payment or reimbursement required to be made under this Deed that is calculated by reference to a cost, expense or other amount paid or incurred is limited to the total cost, expense or amount less the amount of any input tax credit to which any entity is entitled for the acquisition to which the cost, expense or amount relates.



#### **6.4 Consideration GST exclusive**

Unless expressly stated otherwise, all prices or other sums payable or consideration to be provided under this Deed are exclusive of GST. Any consideration that is specified to be inclusive of GST must not be taken into account in calculating the GST payable in relation to a supply for the purposes of this clause 6.

#### **6.5 Additional Amounts for GST**

To the extent an amount of GST is payable on a supply made by a party (**Supplier**) under or in connection with this Deed (the **GST Amount**), the recipient will pay to the Supplier the GST Amount. However, where a GST Amount is payable by the Deputy Secretary or the Minister as recipient of the supply, the Developer must ensure that:

- (a) the Developer makes payment of the GST Amount on behalf of the Deputy Secretary or the Minister, including any gross up that may be required; and
- (b) the Developer provides a tax invoice to the Deputy Secretary or the Minister.

#### **6.6 Non-monetary consideration**

Clause 6.5 applies to non-monetary consideration.

#### **6.7 Assumptions**

The Developer acknowledges and agrees that in calculating any amounts payable under clause 6.5 the Developer will assume the Deputy Secretary, or the Minister is not entitled to any input tax credit.

#### **6.8 No merger**

This clause does not merge on completion or termination of this Deed.

### **7 ASSIGNMENT**

#### **7.1 Consent**

- (a) This Deed is personal to each party and no party may assign the rights or benefits of this Deed to any person except after having obtained the written consent of the other party to the Deed.
- (b) The other party is to give its written consent if it is satisfied that the person to whom it is proposed to assign such rights or benefits (such as a related body corporate) has sufficient assets, resources and expertise to perform all of the assigning party's obligations under this Deed.

- (c) A party is taken to have given its consent unless it has notified the first party that it objects within 14 days of a request for consent by that first party.

## **8 WARRANTIES OF CAPACITY**

### **8.1 General warranties**

- (a) Each party warrants to each other party that this Deed creates legal, valid and binding obligations, enforceable against the relevant party in accordance with its terms and
- (b) has not entered into this Deed in the capacity of trustee of any trust.

### **8.2 Power of attorney**

If an attorney executes this Deed on behalf of any party, the attorney declares that it has no notice of the revocation of that power of attorney.

## **9 REPORTING REQUIREMENT**

### **9.1 Reporting**

- (a) By 1 September each year or as otherwise agreed with the Deputy Secretary, the Developer must deliver to the Deputy Secretary a report (in a format acceptable to the Deputy Secretary) for the period 1 July to 30 June of the preceding financial year which must include the following matters, as applicable:
  - (i) details of all Development Consents, Subdivision Certificates, Construction Certificates and Occupation Certificates issued in relation to the Development;
  - (ii) when the Developer expects to lodge the next application for a Development Consent, a Subdivision Certificate, a Construction Certificate or an Occupation Certificate in relation to the Development;
  - (iii) a compliance schedule showing the details of all SICs made in respect of the Development or Bank Guarantees provided under this Deed as at the date of the schedule and indicating any non-compliance with this Deed and the reason for the non-compliance;
  - (iv) a description of the status of the Road Work including a plan that identifies what parts of the Road Work have been completed, are under construction and are to be constructed; and
  - (v) a forecast in relation to the anticipated progression and completion of the Road Work.

- (b) Upon the Deputy Secretary's request, the Developer must deliver to the Deputy Secretary all documents and other information which, in the reasonable opinion of the Deputy Secretary are necessary for the Deputy Secretary to assess the status of the Road Work and the Developer's compliance with this Deed.

## **10 GENERAL PROVISIONS**

### **10.1 Entire Deed**

This Deed constitutes the entire agreement between the parties regarding the matters set out in it and supersedes any prior representations, understandings or arrangements made between the parties, whether orally or in writing.

### **10.2 Variation**

This Deed must not be varied except by a later written document executed by all parties.

### **10.3 Waiver**

A right created by this Deed cannot be waived except in writing signed by the party entitled to that right. Delay by a party in exercising a right does not constitute a waiver of that right, nor does a waiver (either wholly or in part) by a party of a right operate as a subsequent waiver of the same right or of any other right of that party.

### **10.4 Further assurances**

Each party must promptly execute all documents and do every thing necessary or desirable to give full effect to the arrangements contained in this Deed.

### **10.5 Time for doing acts**

(a) If:

- (i) the time for doing any act or thing required to be done; or
- (ii) a notice period specified in this Deed,

expires on a day other than a Business Day, the time for doing that act or thing or the expiration of that notice period is extended until the following Business Day.

- (b) If any act or thing required to be done is done after 5 pm on the specified day, it is taken to have been done on the following Business Day.

### **10.6 Governing law and jurisdiction**

- (a) The laws applicable in New South Wales govern this Deed.

- (b) The parties submit to the non-exclusive jurisdiction of the courts of New South Wales and any courts competent to hear appeals from those courts.

#### **10.7 Severance**

If any clause or part of any clause is in any way unenforceable, invalid or illegal, it is to be read down so as to be enforceable, valid and legal. If this is not possible, the clause (or where possible, the offending part) is to be severed from this Deed without affecting the enforceability, validity or legality of the remaining clauses (or parts of those clauses) which will continue in full force and effect.

#### **10.8 Preservation of existing rights**

The expiration or termination of this Deed does not affect any right that has accrued to a party before the expiration or termination date.

#### **10.9 No merger**

Any right or obligation of any party that is expressed to operate or have effect on or after the completion, expiration or termination of this Deed for any reason does not merge on the occurrence of that event but remains in full force and effect.

#### **10.10 Costs**

- (a) The Developer is to pay the Deputy Secretary's reasonable valuation costs and costs of preparing, negotiating, and executing this Deed.
- (b) The Developer must provide the Deputy Secretary with bank cheques, or an alternative method of payment if agreed with the Deputy Secretary, in respect of the Deputy Secretary's costs:
  - (i) where the Deputy Secretary has provided the Developer with written notice of the sum of such costs before execution of this Deed, on the date of execution of this Deed; and
  - (ii) in any other case, within 30 days of demand by the Deputy Secretary for payment.

#### **10.11 Relationship of parties**

Unless otherwise stated:

- (a) nothing in this Deed creates a joint venture, partnership, or the relationship of principal and agent, or employee and employer between the parties; and
- (b) no party has the authority to bind any other party by any representation, declaration or admission, or to make any contract or commitment on behalf of any other party or to pledge any other party's credit.

#### **10.12 Good faith**

Each party must act in good faith towards all other parties and use its best endeavours to comply with the spirit and intention of this Deed.

#### **10.13 No fetter**

Nothing in this Deed is to be construed as requiring the Deputy Secretary to do anything that would cause the Deputy Secretary to breach any of the Deputy Secretary's obligations at law and without limitation, nothing in this Deed is to be construed as limiting or fettering in any way the discretion of the Deputy Secretary in exercising any of the Deputy Secretary's statutory functions, powers, authorities or duties.

#### **10.14 Expenses and stamp duty**

The Developer must pay all taxes assessed on or in respect of this Deed and any instrument or transaction required by or necessary to give effect to this Deed (including stamp duty, if applicable).

#### **10.15 Notices**

- (a) Any notice, demand, consent, approval, request or other communication (**notice**) to be given under this Deed must be in writing and must be given to the recipient at its Address for Service by being:
  - (i) hand delivered;
  - (ii) sent by post to the address of the recipient most recently notified by the recipient to the sender; or
  - (iii) sent by email transmission.
- (b) A notice is given if:
  - (i) hand delivered, on the date of delivery;
  - (ii) sent by post, on the date which is 7 Business Days after the date of posting; or
  - (iii) sent by email transmission, at the time the email was sent provided the sender does not receive a delivery failure notice.



**EXECUTION PAGE**

**EXECUTED** as a Deed

**Signed sealed and delivered** by the  
**Deputy Secretary of the Department of  
Planning, Housing and Infrastructure**  
for and on behalf of the Crown in right of  
the State of New South Wales, in the  
presence of:

.....  
Signature of Witness

.....  
Signature of the Deputy Secretary

.....  
Name of Witness in full

.....  
Name of Deputy Secretary

.....  
Address of Witness

**Signed sealed and delivered** by  
**[Developer]** (ACN **[ACN#]**) in accordance  
with section 127 of the *Corporations Act  
2001* (Cth):

.....  
Signature of Director

.....  
Signature of Director/Secretary

.....  
Name of Director in full

.....  
Name of Director/Secretary

**Signed sealed and delivered** by  
**[Developer]** (ACN **[ACN#]**) in accordance  
with section 127 of the *Corporations Act*  
2001 (Cth):

.....  
Signature of sole director and secretary

.....  
Name of sole director and secretary

**Signed sealed and delivered**  
by **[Developer]** in the presence of:

.....  
Signature of witness

.....  
Signature of **[Developer]**

.....  
Name of witness in full

.....  
Address of witness

## SCHEDULE 1 - SIC Discharge Amounts for Road Work – Table (clause 3.8)

### Notes relating to Schedule 1

**Column 1** specifies, in dollars, the maximum amount of the cost of the Road Work that will be credited to the Developer (being the estimated cost as at 1 July [current year] which will be indexed in accordance with clause 3.2(a)).

**Column 2** specifies, in dollars the SIC Discharge Amount to which the Developer will be entitled on completion of a Milestone as at 1 July [current year]. The estimated cost of the Road Works and the SIC Discharge Amounts for Milestones 1-3 will be indexed in accordance with clauses 3.2(a) and 3.8(b) respectively.

**Column 3** describes a *Milestone*, as defined in clause 1.1.

### Stage A

Column 1	Column 2	Column 3	
Estimated Cost	SIC Discharge Amount per Milestone	Milestones	
		No.	Description
\$	\$	1	Expenditure of 25% of the value of the Construction Contract.
	\$	2	Expenditure of 50% of the value of the Construction Contract.
	\$	3	Expenditure of 75% of the value of the Construction Contract.
	The lesser of: (the Actual Cost less the sum of the SIC Discharge Amounts for Milestones 1 to 3 inclusive) x 80%; and 80% of the Estimated Cost less the sum of the SIC Discharge Amounts for Milestones 1 to 3 inclusive.	4	Expenditure of 100% of the value of the Construction Contract and the handover of the Road Work, including the acceptance of the Road Work by the relevant Roads Authority.
	The lesser of: the Actual Cost less the sum of the SIC Discharge Amounts for Milestones 1 to 4 inclusive; and	5	The later of: <ul style="list-style-type: none"> <li>• satisfactory completion of any defects liability period for the Road Work; and</li> <li>• provision of evidence of satisfactory arrangements made with the Roads Authority to address any defects that arise during the defects liability period.</li> </ul>

	the Estimated Cost less the sum of the SIC Discharge Amounts for Milestones 1 to 4 inclusive.		
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## SCHEDULE 2 - Valuation of Road Work Land

### 1 Appointment of registered valuers

#### 1.1 Appointment of independent valuer by each party

Each party is to appoint a valuer for the purposes of determining the Value of the Road Work Land, not more than three months before the lodgement of a plan of subdivision or other plan bearing a statement of intention to dedicate the Road Work Land as a public road or the lodgement of a transfer of the Road Work Land to the Roads Authority.

#### 1.2 Qualifications for appointment

A person may be appointed as a valuer for the purposes of this Agreement (the Valuer) only if the person:

- (a) is a registered valuer under the *Valuers Act 2003* (NSW) and is not restricted under that Act from valuing the Road Work Land;
- (b) is both an Associate (or a Fellow) Member and a Certified Practising Valuer of the Australian Property Institute (Inc) NSW Division;
- (c) is practising as a valuer at the time;
- (d) is independent and not related to any party to this Agreement;
- (e) has at least 5 years' experience in valuations; and
- (f) has a practical understanding of the planning process necessary to prepare valuation of the Road Work Land.

### 2 Matters to be taken into account in valuation

#### 2.1 Market value to be determined

The market value of the Road Work Land is to be determined, as at the date of inspection.

For the purpose of determining the market value, the Road Work Land is to be treated as freehold land, with vacant possession.

#### 2.2 Bases on which valuation to be made

The determination of the market value of the Road Work Land must be made on the basis that the Road Work Land is free of all encumbrances and have regard to the highest and best use of the land.

#### 2.3 Road work to be disregarded

In valuing the land, any increase or decrease in the value of the Road Work Land by reason of the carrying out of the Road Work is to be disregarded (that is, the Road Work Land is to be valued as if the Road Work had not been carried out).

#### 2.4 Compliance with applicable Practice Standards and Guidance Notes



A valuer appointed under this Schedule must, in carrying out a valuation, comply with any applicable Practice Standards and Guidance Notes as published from time to time by the Australian Property Institute (NSW Division), except to the extent that those standards or notes are inconsistent with this Schedule.

### **3 Valuation report**

Each party must ensure that a comprehensive valuation report is prepared by the valuer appointed by it under this Schedule, being a report that includes the following matters:

- (a) confirmation of instructions;
- (b) identification of the land being valued;
- (c) date of inspection and valuation;
- (d) registered proprietor of the Road Work Land;
- (e) legal description of the subject land, including the certificate of title folio identifier and reference to any easements, rights of way, covenants, caveats and/or other encumbrances on title;
- (f) location description;
- (g) zoning and other planning considerations;
- (h) a detailed explanation of the valuation methodologies adopted including all calculations and workings;
- (i) details of any relevant sales of comparable land appropriately analysed to support the valuation; and
- (j) the valuation amount.

### **4 Adoption of valuation**

#### **4.1 Valuations vary by less than 10%**

If the valuation amounts determined by the valuers appointed by the parties under this Schedule vary by less than 10%, the average of those amounts is to be adopted as the Value of the Road Work Land.

#### 4.2 Valuations vary by 10% or more

If the valuation amounts determined by the valuers appointed by the parties under this Schedule vary by 10% or more, then the valuers are to compare their valuations, attempt to find common ground (whether this be agreement on value or agreement as to valuation drivers, methodologies or inputs) and review their valuations. If the valuations continue to vary by 10% or more, the valuation to apply to the Road Work Land will be determined by a further valuer appointed by the president of the Australian Property Institute (NSW Division). If a further valuer is appointed, he or she must:

- (a) prepare a valuation report for the Road Work Land in accordance with clause 2 and 3 of this Schedule; and
- (b) act as an expert whose decision is final and binding on the parties, in the absence of manifest error; and
- (c) the Developer and the Deputy Secretary must pay the costs associated with the appointment of the further valuer in equal proportions.

### **SCHEDULE 3 – Road Work (clause 1.1)**

Road Work comprises the following works carried out on the Road Work Land:

**SCHEDULE 4 - Plan of the Road Work Land**

[insert]

**SCHEDULE 5 - Address for Service (clause 10.15)**

**Deputy Secretary**

**Contact:** Deputy Secretary, NSW Department of Planning, Industry and Environment

**Address:** 4 Parramatta Square, 12 Darcy Street  
Parramatta, New South Wales, 2150

**Email:** [SIContributions@planning.nsw.gov.au](mailto:SIContributions@planning.nsw.gov.au)

**Developer**

**Contact:**

**Address:**

**Email:**



# 8. Appendix C: Treasury Circular 14-01



The  
Treasury

## Treasury Circular

NSW TC 14/01  
24 January 2014

### Acceptance of Performance Bonds or Unconditional Undertakings by Government Agencies

**This circular outlines the conditions under which a Performance Bond or Unconditional Undertaking covering contracts entered into by NSW Government agencies are acceptable. This Circular is issued as a Treasurer's Direction to all agencies under section 9 of the *Public Finance and Audit Act 1983*.**

#### Summary:

This Circular applies to the acceptance of Performance Bonds and Unconditional Undertakings from a financial institution in relation to contracts entered into by NSW Government agencies (i.e. as purchasers of goods or services).

Agencies may accept a Performance Bond or Unconditional Undertaking from financial institutions regulated by the Australian Prudential Regulatory Authority (APRA). Where the financial institution is not subject to prudential oversight by APRA, specific requirements must be met, including that the financial institution must meet a specified credit rating threshold as assessed by an independent credit rating agency, e.g. Standard and Poors, Moody's Investors Service or Fitch Ratings.

The credit rating threshold is also recommended (although not mandatory) as an additional benchmark for institutions subject to APRA oversight. Agencies should also ensure that procedures are in place to avoid an undue concentration of risks with a single third party.

This Circular does not apply to situations where an agency is requested to provide a Performance Bond covering work contracted to be carried out for another party.

This Circular withdraws and supersedes the previous NSWTC 08/01 *Eligible Financial Institutions – Issue of Performance Bonds or Unconditional Undertakings Obtained for Government Contracts or Private Finance Projects*. There are no substantive changes to these requirements compared to NSWTC 08/01.

This Circular is issued as a Treasurer's Direction to all agencies under section 9 of the *Public Finance and Audit Act 1983*.

Mark Ronsisvalle  
for Secretary

**Further Information:** Crown Asset and Liability Management Branch  
Michael McGrath. Tel: 9228 4568

**email:** [michael.mcgrath@treasury.nsw.gov.au](mailto:michael.mcgrath@treasury.nsw.gov.au)

**NSW Treasury website:** [www.treasury.nsw.gov.au](http://www.treasury.nsw.gov.au)

## Acceptance of Performance Bonds or Unconditional Undertakings by Government Agencies

Performance Bonds are guarantees or undertakings that may be provided by a financial institution in relation to a contract with a Government agency. In cases where a contractor fails to fulfil its contractual obligations, a Government agency can immediately call on the guarantee or undertaking. The financial risk of contractual failure is therefore transferred from the agency to the financial institution which issues the Performance Bond.

This Direction also applies:

- To Unconditional Undertakings (to pay on demand) which require a security from a financial institution covering part or all of the obligation of a contractor; and
- Private finance projects where Performance Bonds or the like are sought to cover obligations between a design and construction company and its owner consortium.

For the purposes of this Circular, the term financial institution may include a bank, a non-bank financial institution (i.e. building society or credit union), an investment bank or an insurance company.

Australian-owned banks, foreign subsidiary banks, branches of foreign banks, building societies and credit unions operating in Australia as “Authorised Deposit-taking Institutions” under the *Banking Act 1959* are all prudentially supervised by the Australian Prudential Regulatory Authority (APRA). Insurers authorised under the *Insurance Act 1973* are also subject to prudential supervision by APRA. Investment banks are not subject to APRA supervision.

Agencies may accept a Performance Bond or Unconditional Undertaking from any of the above APRA regulated financial institutions (agencies should formally confirm that the financial institution they are dealing with is subject to APRA supervision – see APRA website: [www.apra.gov.au](http://www.apra.gov.au)).

Where a financial institution is not subject to prudential oversight by APRA (e.g. investment banks), the following minimum requirements must be met:

- The financial institution must have a credit rating of “A” or above (as assessed by Standard and Poors) or “A2” or above (as assessed by Moody’s Investors Service) or “A” or above (as assessed by Fitch Ratings).
- The total value of Performance Bonds held by an agency with that institution must not exceed 10 per cent of the institution’s net assets.

In cases where institutions are a local branch or subsidiary of an overseas parent company, agencies should also ensure the branch operation is covered by a parental company “Deed of Guarantee” which covers all financial obligations including both primary and contingent liabilities.

Agencies are not encouraged to approve a contractor obtaining a Performance Bond or Unconditional Undertaking from a financial institution that does not operate in Australia. Where special circumstances arise, agencies (excluding State-owned Corporations) are required to seek Treasury approval. State-owned corporations are advised to have special regard to any material risks arising from this type of arrangement.

While a credit rating test is not mandatory for institutions subject to prudential oversight by APRA, it is recommended that agencies use these requirements as an additional benchmark to reduce potential risks of default.

This Circular does not apply to situations where an agency is requested to provide a Performance Bond covering work it contracts to carry out for another party.

