



The General Manager

Muswellbrook Shire Council

Submitted via email: council@muswellbrook.nsw.gov.au

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Public Exhibition of the Draft Muswellbrook Shire Community Benefit Fund (MSCBF) Policy and Draft MSCBF Advisory Committee Terms of Reference

AGL Energy (AGL) welcomes the opportunity to make a submission in response to the Public Exhibition of the Draft MSCBF Policy and Draft MSCBF Advisory Committee Terms of Reference (ToR).

Proudly Australian since 1837, AGL delivers around 4.3 million gas, electricity, and telecommunications services to our residential, small, and large business, and wholesale customers across Australia. We operate Australia's largest electricity generation portfolio and have the largest renewables and storage portfolio of any ASX-listed company, having invested \$4.8 billion in renewable and firming generation over the past 20 years and added more than 2,350 MW of new generation capacity to the grid since 2003.

AGL has a proud history of being a strong contributor to the Upper Hunter Region, delivering support and funding to a broad range of community groups, charities and events each year. As a key member of the Upper Hunter community, AGL would like to understand and ensure appropriate governance, engagement and transparency is achieved through the preparation, implementation and reporting of planning agreement funding.

AGL is committed to working closely with the Muswellbrook Shire Council (MSC) on delivering positive outcomes for the communities surrounding our operations, both currently and into the future. This commitment is demonstrated through AGL's recent implementation of the Liddell Closure Memorandum of Understanding (MoU) and Voluntary Planning Agreement (VPA), agreed between AGL and MSC to address the potential socio-economic impacts that may result from the retirement of the Liddell Power Station.

We have outlined our more particular comments on the Draft MSCBF Policy and Draft MSCBF Advisory Committee ToR below.

Governance

AGL has some overarching concerns that the Draft MSCBF Policy and Draft MSCBF Advisory Committee ToR may lack the necessary rigour to ensure that there is an appropriate level of governance of decisions relating to the allocation of funds from the MSCBF.

AGL notes the Draft MSCBF Policy, at Clause 5, references a Muswellbrook Shire Community Benefit Fund Procedure (MSCBF Procedure) which is suggested to set out the approach to assessing the suitability of proposals and initiatives and the allocation of funding. This Procedure has not been included in the documentation available for review in the Public Exhibition process for the Draft MSCBF Policy and Draft MSCBF Advisory Committee ToR, therefore AGL has been unable to ascertain the governance functions and guidelines that will be applied to the assessment criteria and funding allocations. It would be helpful if this document could be made publicly available.



We also acknowledge that the Advisory Committee ToR states that the Committee can only make 'recommendations' for the consideration of Council who then make the final decision on expenditure. It is AGL's view that further detail on the governance guiding MSC's decision making regarding the allocation of funding should also be provided.

To the extent funds are being invested, we note that on page 5 of the MSCBF Policy, it states:

Investment: *Amount invested in the Fund will be managed in accordance with Muswellbrook Shire Council's Investment (Financial Securities) Policy (MSC14E).*

Transparency

AGL welcomes strong collaboration and transparency with its stakeholders to ensure the issues and concerns of the local community are understood and addressed. The Draft MSCBF Policy and Draft MSCBF Advisory Committee ToR discusses the importance of transparency in the following aspects:

- Reporting on the outcomes and benefits of the MSCBF projects, including environmental, social, and economic impacts.
- Providing clear and consistent information on the MSCBF program, its objectives, criteria, processes, and governance.
- Ensuring fair and balanced representation of project proponents in the MSCBF committee, which oversees the allocation of funds.

We would encourage the MSC to ensure that a high level of transparency is applied to the process of allocating, managing and distributing the MSCBF funds.

Scope

It is AGL's understanding that the scope of the Draft MSCBF Policy will apply to all future planning agreements entered into by AGL (and other proponents) under section 7.4 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**).

As a general observation, there is no clear provision within the planning agreement framework outlined in the EPA Act, its subsidiary regulations and guidelines for a fund with purposes and investment flexibility akin to the proposed MSCBF arrangement as outlined within the MSCBF Policy. This may technically make the entire arrangement susceptible to being overturned.

Clause 5 – Policy Statement

As a matter of first principles, planning agreements may provide for payments of monetary contributions for public purposes, for which there is a non-exhaustive list in section 7.4(2) of the EPA Act.

Additionally, the NSW Government *Planning Agreements Practice Note* dated February 2021 (**NSW Practice Note**) advises that planning authorities and developers that are parties to planning agreements should adhere to the following fundamental principles:

- Planning agreements should not be used as a means of general revenue raising or to overcome revenue shortfalls.
- Planning agreements must not include public benefits wholly unrelated to the particular development.
- Value capture should not be the primary purpose of a planning agreement.

At clause 5 of the Draft MSCBF Policy, there is a list of purposes for which the funds allocated to the MSCBF may be used – some of which appear to be public purposes, and some which are not clearly public purposes which are consistent with or analogous to those outlined in section 7.4(2) of the EPA Act.



Relatedly, the clause 1 Policy Objective states that the objective of the MSCBF is to use funds received from planning agreements under the EPA Act to, amongst other matters, diversify and grow the economy. As drafted, this is not a clear public purpose.

To the extent the purposes of the MSCBF in section 5 of the MSCBF Policy may be public purposes, AGL has reservations that these public purposes do not have a nexus with any new projects in the municipality, nor any timing limitations specified which would help address the impacts of a particular project in a timely and meaningful way. In this regard we note that section 2.4 of the NSW Practice Note provides that, while planning agreements are not required to bear the same nexus with a development as required for section 7.11 local contributions, “*planning agreements should provide for public benefits that are not wholly unrelated to [the] development*”.

It is also noted on page 5 of the Draft MSCBF Policy that:

- “*It is the intention of the fund that an increasing percentage of PA contributions are retained for investment to provide longevity of the Fund. The **expectation** is that interest from investment will be the **source of funds for projects** in the long term.*” [emphasis added]; and
- “*Funds may be used to provide supplementary funding for projects that have secured grant funding, capital, or operational funding.*”

This also does not appear to clearly align with the requirement that funds are applied toward a public purpose as required by section 7.4(2) of the EPA Act.

In this proposed investment model, there is no clear and binding plan for expenditure of money on identified public purposes that have any relationship to those projects that have contributed to the MSCBF. Rather, there is a general intention that, at an unidentified point in the future, funds might (i.e., ‘are expected’ to) be applied towards projects in the long term, but:

- the nature of these projects is unclear and unknown. As drafted, these could be any commercial projects for commercial gain rather than a public benefit;
- whether or not they meet a public purpose is unknown;
- there is currently no power for project proponents to direct funds towards specified public purposes that have any nexus with a particular project and community; and
- the timing of the expenditure is unknown. This reduces the likelihood that that funds contributed by a project proponent will be applied to address the impacts of that project.

This notion that ‘the expectation’ is that the interest accruing on MSCBF contributions will be the source of funds for ‘future projects’ is too vague, particularly given that there is no suggestion that the ‘future projects’ might be for a legitimate public purpose to the extent these are included in Clause 5 of the MSCBF or the EPA Act.

These issues raise concerns about transparency around expenditure and accountability for that expenditure occurring appropriately.

As outlined in the NSW Practice Note, “*If probity and public interest are not considered, planning agreements may produce undesirable outcomes, including where:*

- *A planning authority seeks inappropriate benefits through a planning agreement because of opportunism or to overcome revenue-raising or spending limitations that exist elsewhere.*
- ...
- *A planning authority allows the interests of individuals or small groups to demand benefits, which otherwise outweigh the public interest.*



- *A planning authority takes advantage of an imbalance of bargaining power between the planning authority and developer, for example by improperly relying on its statutory position in order to extract unreasonable public benefits under a planning agreement...*

To help address some of these concerns, AGL suggests that MSC look to introduce some more rigour into the Draft MSCBF Policy to ensure that there is a clearer nexus between the developments giving rise to the allocation of funds to the MSCBF by project proponents and the public purposes that the MSCBF funds are ultimately used for. This will also be important in helping build and maintain social licence for the new projects proposed in region.

Lastly, given findings of our socio-economic impact assessment conducted as part of our process of developing the Liddell Closure MoU and VPA, we would suggest that dot point eight of the broad principles outlined on page 4 of the Draft MSCBF Policy be amended as follows to ensure mental health is clearly captured:

*“Assisting with improvements to **the physical and mental** health outcomes and **the physical and mental health** services for the residents of the Shire.” [emphasis added]*

Local infrastructure contributions

It is unclear to AGL what the arrangements will be when a planning agreement has contributions listed for specific activities (e.g. infrastructure, public services, as contemplated by sections 7.11 and 7.12 of EPA Act). Some questions that come to mind include:

- How will the allocation of funding for these specific purposes be managed/agreed?
- Does this sit outside of the MSCBF?
- Is it the expectation that some of the MSCBF funds could still be used for public services/infrastructure? It would appear so given that on page 4 of the Draft MSCBF Policy, it states that one of the broad principles of the MSCBF includes:

Improving infrastructure in accordance with the Community Strategic Plan.

Furthermore, on page 5 of the Draft MSCBF Policy one of the management principles that apply to the MSCBF include:

1. *Where a Planning Agreement (PA) is proposed, Council will negotiate with the proponent regarding the proportion of the PA contributions to be allocated:*

...

- b) *as other expenditure set out in Council's Planning Agreement Policy (P10/1), e.g., road maintenance.*

AGL suggests that the MSC amends the Draft MSCBF Policy to clarify its position with respect to the above questions.

MSCBF Advisory Committee representation

Given AGL's history of being a strong contributor to the Upper Hunter community, we are concerned that project proponents will not necessarily have a say in how the money collected by the MSCBF will be allocated.

To ensure appropriate representation in decision making regarding the disbursement of MSCBF funds, it is our view that all project proponents should have at least one representative on the MSCBF Advisory Committee if they enter into a planning agreement through which funds are to be directed into the MSCBF.



We encourage greater transparency through reporting to the community on contributions made from proponents/projects and how those funds are allocated, providing a verifiable link to demonstrate that money spent will address the impacts of a particular project in a purposeful way.

Accounting

On page 5 of the Draft MSCBF Policy, the stated general provisions for management of the MSCBF include:

*“**Reporting:** Detailed reporting provisions on the Fund will be undertaken in accordance with the requirements of the Local Government Act 1993, and the requirements for managing and reporting Planning Contributions as set out in the Environmental Planning and Assessment Act 1979 and regulations”*

In our view, this introduces an unnecessary lack of clarity and transparency.

AGL submits that the management obligations for the MSCBF need to be set out in detail in the Draft MSCBF Policy to ensure appropriate accountability and transparency and should not be referenced to other legislation, as this places an unfair burden on the community and project proponents to assess what these obligations are.

Interaction between Draft MSCBF Policy and other MSC’s policy documents

There are also a range of policies cited within the Draft MSCBF Policy which do not appear to be publicly available and readily accessible.

We note that the Draft MSCBF Policy has various references to MSC’s Planning Agreement Policy (P10/1). We have been unable to locate a copy of this policy online and would suggest that Council should make these documents available to the public for cross referencing purposes, along with the following relevant MSC policies:

- Muswellbrook Shire Council’s Investment (Financial Securities) Policy (MSC14E)
- Council’s Procurement Policy (MSC01E).
- MSCBF Procedure.

AGL is committed to continuing to work with MSC to ensure that the Upper Hunter community benefits from our operations now and into the future and we would welcome the opportunity to discuss the Draft MSCBF Policy and Advisory Committee ToR further with the MSC.

Should you have any questions in relation to this submission, please contact Leilani Kuhn (Policy Manager) on 03 8633 6934 or Polly Yuille (Manager, Corporate Affairs) at pyuille@agl.com.au.

Yours sincerely,

AGL Energy