

December 2019

# Review of the Independent Planning Commission NSW Productivity Commission



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Treasury

The Honourable Rob Stokes MP  
Minister for Planning and Public Spaces  
52 Martin Place  
SYDNEY NSW 2000

Dear Minister Stokes,

I am pleased to provide you with a copy of my report 'Review of the Independent Planning Commission'.

The findings and recommendations have been informed by the views of stakeholders consulted across the community, industry and Government, and an analysis of a broad range of material, including experience in other jurisdictions across Australia and internationally.

This Review has found that an independent decision-making function strengthens the planning system by minimising the risk of corruption or undue political influence. Since its establishment in 2018 the IPC has made several changes to support this primary focus, with greater transparency and more open processes helping build public confidence and trust in the planning system.

The principal recommendation in the review is that the Independent Planning Commission (IPC) plays an important role in maintaining the integrity of the planning system and should be retained as an independent decision-making body for contentious State significant developments. There is also strong stakeholder support for the existence of the IPC, which is generally viewed as an appropriate 'check and balance' on the development application process.

The other eleven recommendations are aimed at addressing the timeliness, consistency, clarity and integrity of the IPC processes and are grouped in two themes:

- Strengthening the independence and governance of the IPC, and
- Improving performance

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Peter Achterstraat'.

**Peter Achterstraat AM**  
NSW Productivity Commissioner  
13 December 2019

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## Executive Summary

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An effective planning system is vitally important to the health of the NSW economy, helping to unlock productivity, support job growth and to create dynamic liveable cities and regions.

Over the past 40 years, there has been an increasing use of ‘panels’ and commissions in planning processes across Australia – both as advisory and decision-making bodies. In New South Wales, the planning framework has evolved to include a role for the Independent Planning Commission (IPC) in determining the most significant development applications at the State level (a summary of the history of the IPC is provided in **Appendix A**).

The level of interest in, and scrutiny of, planning decisions at all levels of government has increased dramatically in recent times, primarily because these decisions are seen to result in ‘winners’ and ‘losers’ in the broader community. Given the importance of planning to the economy and the contested nature of planning decisions, it is not surprising that aspects of the planning system are often subject to criticism. That is certainly the case for the IPC as the decision-maker for the most significant and contentious development applications in the State.

In that context, it is now an opportune time to evaluate how well the IPC is functioning and identify opportunities for further improvement. Most states in Australia are currently undertaking or have recently completed reviews of their planning systems, and the relevant planning panels and commissions in their jurisdictions.

Consequently, in October 2019, the Minister for Planning and Public Spaces requested the NSW Productivity Commission to undertake a review of the IPC’s role and operations. The terms of reference for the Review are attached in **Appendix D**.

In undertaking this Review, the Productivity Commission has analysed a broad range of material and consulted widely with stakeholders across the community, industry and Government. This included 14 face-to-face consultation sessions and consideration of 147 written submissions, including 94 from the general community and environmental groups, 38 from industry stakeholders, 6 from academics, and 9 from government agencies or local councils. A total of 2,881 campaign submissions were also received from Lock the Gate and the Nature Conservation Council.

This Review has found that the existence of the IPC strengthens the planning system by minimising the risk of corruption or undue political influence. The public and open processes of the IPC, where all parties can have their say, help build public confidence and trust in the planning system, even though individuals may disagree with specific outcomes. Since its establishment in 2018, the IPC has improved the openness and transparency of the decision-making process, including by recording and transcribing its meetings and adopting a more consistent approach to publishing documents. It has also made important steps to ensure its decisions are more legally robust. There is strong stakeholder support (over 70 per cent of unique submissions) for the existence of the IPC, which is generally viewed as an appropriate ‘check and balance’ on the planning process for contentious State significant developments.

While the Productivity Commission considers that it is in the public interest to retain the IPC, it notes that there are a range of criticisms raised by stakeholders about the IPC’s operations and processes, particularly regarding certainty, consistency and timeliness. In terms of certainty and consistency, the Productivity Commission has observed that a limited set of projects has attracted the majority of the criticisms, and that these projects were subject to a range of particularly complex policy issues. In terms of timeliness, the Productivity

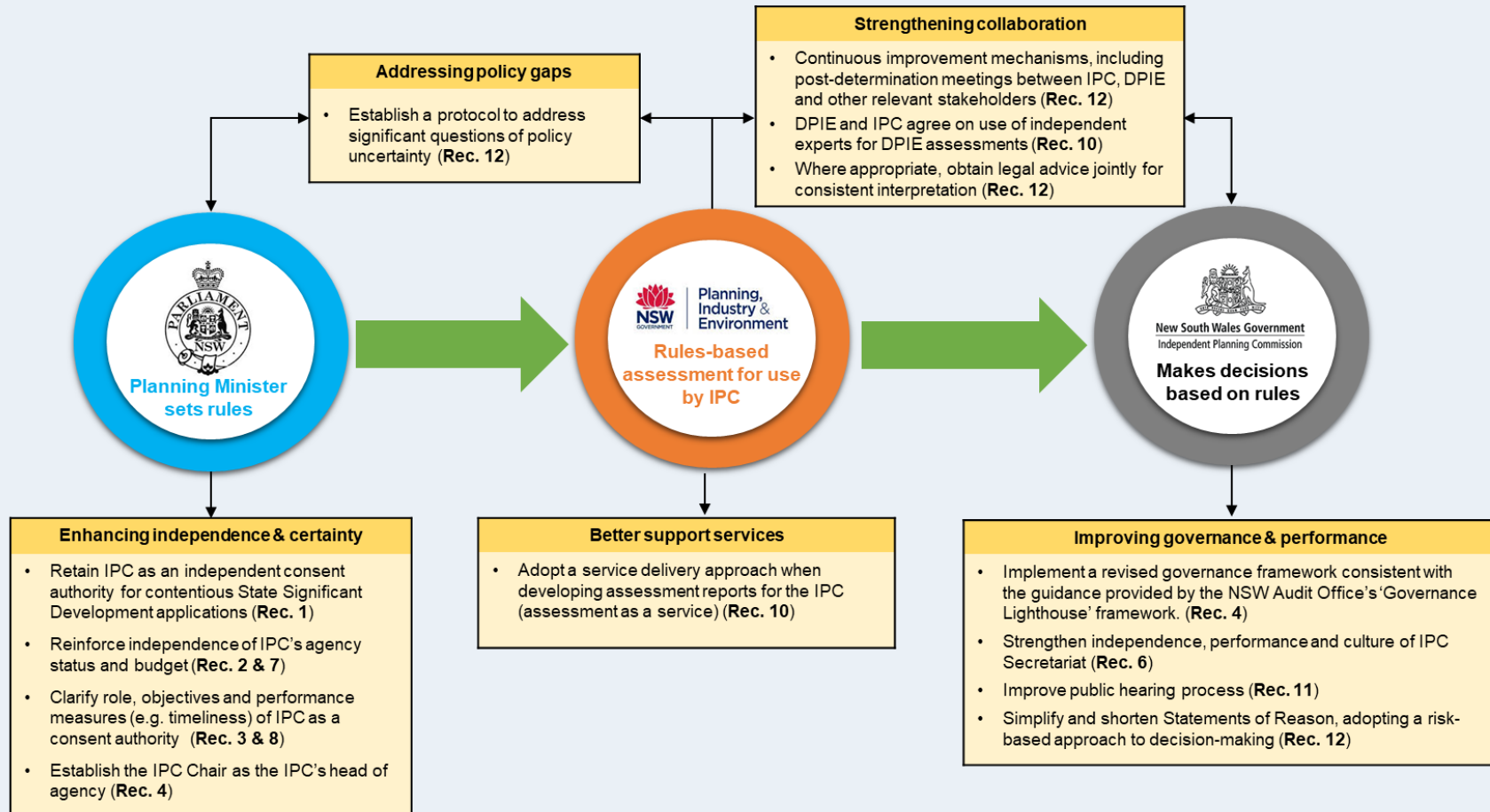
Commission acknowledges that while the IPC's reliance on legal advice has advantages in ensuring rigour, a more risk-based approach is also necessary.

Further, this Review has identified potential improvements to both strengthen its independence and governance, and enhance its performance, which would assist the IPC in the effective execution of its functions. The Productivity Commission recognises that many of these potential improvements have already been identified by both the IPC and DPIE and are currently being progressed. It is also acknowledged that the IPC has faced some difficult circumstances over the past 18 months, including a lack of clarity about its role and purpose, unfortunate personal circumstances of staff, and a range of 'teething' issues.

The following twelve recommendations address all the Review's Terms of Reference (see **Appendix D**) and are covered in detail in the report. The diagram over page illustrates that the implementation of these recommendations will require actions by three key stakeholders:

- the Planning Minister, who sets the rules of the system;
- DPIE, which prepares assessments based on those rules; and
- the IPC, which make decisions based on those rules and the facts as they are assessed.

### Recommendations to improve confidence in the planning system - through increased consistency, clarity and timeliness



## Recommendations

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### Is an IPC in the public interest?

This recommendation addresses Term of Reference 1 and is the key recommendation for this Review.

#### **Recommendation 1: Is an IPC in the public interest?**

The IPC plays an important role in maintaining the integrity of the planning system and should be retained as an independent decision-making body for contentious State significant developments.

### Strengthening independence and governance

Recommendations 2 to 7 address aspects of both Terms of Reference 2 and 3. They are focused on the authorising environment and other enabling matters which are key to supporting the IPC in its independent decision-making function.

#### **Recommendation 2: Independence of the IPC and its agency status**

Reinforce the independence of the IPC by formally establishing the IPC as a 'separate agency' under the *Government Sector Employment Act 2013*.

#### **Recommendation 3: Bringing clarity to the role and purpose of the IPC**

Clarify the role and purpose of the IPC by:

- a. The Minister formally issuing directions on an agreed set of outcome-focused objectives and performance measures (incorporating quality and timeliness targets); and
- b. The IPC reporting against those objectives and performance measures in its annual report.

#### **Recommendation 4: Governance – accountability and control**

Formalise the IPC's governance arrangements:

- a. Establish the Chair as head of the independent agency with accountability to the Minister for Planning and Public Spaces for the performance of the IPC (including both the Commissioners and the Secretariat); and
- b. Develop and implement a governance framework consistent with the guidance provided by the NSW Audit Office's 'Governance Lighthouse'.



### Recommendation 5: Commissioners

Continue to enhance the IPC's efficiency and effectiveness by:

- a. Transitioning to a smaller pool of Commissioners, with a stronger focus on decision-making skills rather than technical expertise (expert advice can be commissioned separately);
- b. Undertaking a review of the appropriateness of the remuneration model for Commissioners; and
- c. Managing conflicts of interests in accordance with the existing IPC framework by:
  - i. Continuing ongoing training of Commissioners and publishing conflict of interest policies; and
  - ii. Reviewing the conflict of interest checking process to minimise the risk of disruption to panels.

### Recommendation 6: IPC Secretariat

Strengthen the IPC Secretariat and enhance its culture and reputation as a matter of high priority by:

- a. Developing and implementing arrangements to formalise the independence of the IPC and Secretariat from DPIE (see Recommendations 2, 3, 4 and 7);
- b. Improving internal systems and procedures (including improving access to data);
- c. Building a culture of excellence, including through recruiting high-calibre staff with appropriate capabilities; and
- d. Renaming the Secretariat to the Office of the IPC to better reflect the functions undertaken.

### Recommendation 7: Budget and support services

Ensure the IPC's financial arrangements support its independent role and functions:

- a. Consistent with Recommendation 2, establish the IPC as a 'separate GSF agency' under the *Government Sector Finance Act 2018*; and
- b. Review and revise the IPC's budget in consideration of the other recommendations of this Review to ensure it is appropriately resourced.

## Improving performance

Recommendations 8-12 address aspects of both Terms of Reference 2 and 3. They cover a range of more detailed matters which are intended to assist the IPC in the performance of its day to day operations. The Productivity Commission has been informed that some of these recommendations are already being implemented by both the IPC and DPIE.

### Recommendation 8: Workload optimisation

The role of the IPC should be more clearly focused on the determination of contentious State significant developments, allowing it to more effectively manage its workload by:

- a. Ensuring only projects that are sufficiently contentious or complex are referred to the IPC for determination by making the following amendments to clause 8A(1) of the *State Environmental Planning Policy (State and Regional Development) 2011* (or alternatively delegating those projects to DPIE to meet the same intent):
  - i. allowing councils to rescind their objections after a development has been exhibited (clause 8A(1)(a));
  - ii. changing the threshold for community objections (clause 8A(1)(b)) by, for example, a combination of:
    - (i) increasing the threshold for community objections (e.g. from 25 to 50);
    - (ii) requiring objections to be unique; and
    - (iii) requiring objectors to reside within a certain distance (e.g. 100km radius) of the development.
- b. Delegating modification applications to DPIE, other than those subject to reportable political donations (cf section 4.55 EP&A Act); and
- c. Discontinuing referrals to the IPC for advice (cf section 2.9(1)(c) EP&A Act) on the assessment of State significant development applications other than those related to functions of the Mining and Petroleum Gateway Panel.

### Recommendation 9: Systems and processes

Support the efficient management of State significant development applications by:

- a. Continuing the development of more comprehensive internal policies and procedures, prioritised according to business risk;
- b. Developing robust ITC systems to support the IPC's management of workloads and workflows (including building on and leveraging the existing DPIE Planning Services Information Management System (PSIMS)); and
- c. IPC and DPIE developing a consistent approach to collecting, monitoring and reporting of performance data.

### Recommendation 10: DPIE assessment services

Minimise the need for further IPC assessment and potential delays by:

- a. DPIE adopting a service delivery approach when undertaking assessments and other consent authority functions for the IPC ('assessment as a service');
- b. Revising the IPC/DPIE Memorandum of Understanding to:
  - i. more explicitly set out how both parties will procedurally go about the execution of their respective functions; and
  - ii. set out key performance indicators for timing of DPIE's response to IPC requests for further information.
- c. Identifying and agreeing on independent experts to be drawn on by DPIE in undertaking assessments.

### Recommendation 11: Public hearings

Improve public hearings by reverting to a single stage hearing process only and facilitating a more interrogative hearing process.

### Recommendation 12: Decision-making

The following improvements should be made to assist in the rigour and timeliness of decision-making:

- a. Establish a protocol to ensure significant questions of policy uncertainty can be raised and resolved effectively, while ensuring the transparency of the process and the separate roles of the IPC, DPIE and the Minister are respected;
- b. Where appropriate, the IPC should obtain legal advice jointly with DPIE to facilitate consistency in interpretation (particularly in regard to statutory interpretation);
- c. Promote a culture focussed on quality and timeliness, including:
  - i. Adopting a risk-based approach;
  - ii. Setting clear performance measures (see Recommendation 3);
  - iii. Closely tracking timeframes (see Recommendation 9); and
  - iv. Regularly reporting on performance and identifying opportunities for improvement.
- d. The IPC should consider simplifying and shortening its Statements of Reasons, including:
  - i. focusing on the key issues on which the determination was based;
  - ii. clearer communication (plain English), minimising legal jargon; and
  - iii. avoiding reproduction of the assessment report and other material.
- e. Implement feedback loops and continuous improvement mechanisms, including:
  - i. oversight by the Chair (see Recommendation 4), including the opportunity for the Chair to comment on, but not over-rule IPC Panel decisions; and
  - ii. in-camera post-determination debrief meetings between Commissioners, the Secretariat and DPIE and reflecting any learnings in revised policies, procedures and training (as appropriate).

# 1. Introduction

1.1. Purpose of this Review

1.2. About the Independent  
Planning Commission (IPC)

1.3. About the NSW Productivity  
Commission

1.4. Our approach to this Review

1.5. Consultation

## 1.1. Purpose of this Review

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In October 2019, the Hon. Rob Stokes, Minister for Planning and Public Spaces, requested the NSW Productivity Commissioner to conduct a Review of the Independent Planning Commission (the Review) and report back to the Minister by mid-December 2019.

The Terms of Reference for the Review are:

1. *To recommend whether it is in the public interest to maintain an IPC, considering, where relevant, the experience with similar bodies in other common law jurisdictions;*
2. *To make recommendations in relation to the IPC's operations and the mechanisms by which State significant development is assessed and determined; and*
3. *Having regard to the above, identify any proposed changes to the IPC's current functions, processes for making determinations, and resourcing. The issues to be considered include but are not limited to:*
  - a) *Thresholds for the referral of matters to the IPC;*
  - b) *The clarity and certainty of policies and guidelines that inform determinations;*
  - c) *The Commissioners' skills, expertise and qualifications;*
  - d) *The adequacy of mechanisms to identify and resolve any conflicts of interest by commissioners;*
  - e) *The IPC's procedures and guidelines;*
  - f) *The extent to which the IPC should rely upon the Assessment Report prepared by the Department of Planning, Industry and Environment, taking into account any additional assessments by other Government agencies;*
  - g) *Resourcing of the IPC and the mechanism for determining budgetary support; and*
  - h) *Whether the IPC's Secretariat should be employed directly by the IPC or provided by another Government agency, and if so, which agency.*

## 1.2. About the Independent Planning Commission (IPC)

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This Review comes as NSW approaches 40 years of the *Environmental Planning and Assessment Act 1979* (EP&A Act). Since the EP&A Act commenced in 1980, there has always been an independent body established under the legislation with comparable functions to the IPC.

The role of these independent bodies has evolved over time from the Office of the Commissioners of Inquiry for Environment and Planning (Commissioners of Inquiry), to the Planning and Assessment Commission (PAC), to the current IPC (See **Appendix A** for further information). The IPC has been in operation since 1 March 2018.



The IPC currently comprises the Chair and 28 Commissioners. The Commissioners are supported by a Secretariat, which is led by an Executive Director and 13 support staff. At the time of this Review, the Secretariat was undergoing an organisational restructure.

In 2017, the EP&A Act was amended to:

- establish the IPC;
- make it a consent authority in its own right for certain State significant development (SSD) applications; and
- remove reviews from the list of functions of the IPC.

Consequently, the IPC is predominantly a decision-making body. While this is different to the advisory focus of the Commissioners of Inquiry and the original PAC, the focus on decision-making, in practice, had already occurred at the PAC from 2011, with the delegation of the Minister’s consent authority powers for certain SSD applications.

### **Mining and Petroleum Gateway Panel**

The *Environmental Planning and Assessment Amendment Act 2017* amended the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (Mining SEPP) to insert clause 17N(1) which states that “*The Independent Planning Commission is to constitute a subcommittee of the Commission as the Mining and Petroleum Gateway Panel.*”

The Mining and Petroleum Gateway Panel exercises the functions set out in clause 17O of the Mining SEPP. These are separate to the consent authority functions of the IPC and were not examined as part of this Review.

The recommendations of this Review are not intended to directly relate to the composition or operations of the Mining and Petroleum Gateway Panel.

### 1.3. About the NSW Productivity Commission

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Peter Achterstraat AM was appointed NSW's inaugural Productivity Commissioner in May 2018 with a mandate to oversee the NSW Government's regulatory framework and shape the Government's productivity agenda.

The Productivity Commissioner is an objective advocate for best-practice regulation and productivity reform in NSW. This Review makes recommendations regarding the regulatory function of executive decision-making within the planning system, having regard to domestic and international best practice. This function has significant impacts on the State economy and societal wellbeing. The Productivity Commission is therefore well-placed to undertake this review.

### 1.4. Our approach to this Review

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In line with the NSW Government's commitment to best practice regulation and evidence-based policymaking, the Productivity Commission has analysed a wide range of materials during the course of this Review. These include evidence presented in previous reviews of independent planning bodies in NSW, stakeholder submissions, face-to-face consultations and cross-jurisdictional analysis of similar bodies in Australian States and other common law jurisdictions. The Productivity Commission has also drawn upon data from the IPC and DPIE to inform an operational assessment.

The Productivity Commission has used quantitative techniques to conduct its assessment where possible. The data provided by the IPC and DPIE was a key input into this analysis, supplemented with an additional dataset created by the Productivity Commission based on publicly available information on the IPC website and the NSW Planning Portal.

The data analysis has informed the Productivity Commission's consideration of the following:

- IPC's caseload and thresholds for referral;
- Number of cases allocated to each IPC Commissioner annually and implications for business continuity, consistency and knowledge management; and
- Timeframes for IPC's decision-making, having regard to the time taken by the IPC, DPIE and proponents, as well as time spent on cases involving public hearings.

The findings from the data analysis have been cross-referenced with qualitative evidence, such as stakeholder feedback and findings of previous reviews, to ascertain the context and implications.

In analysing evidence and developing recommendations, the Productivity Commission has adopted a whole-of-community perspective to ensure its recommendations are designed in a way that provides long-term net benefits to NSW as a whole.

## 1.5. Consultation

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The Productivity Commission has consulted widely with stakeholders across the community, industry and Government, drawing from face-to-face meetings and written submissions.

All written submissions to this Review have been published on the Productivity Commission's website, except where the stakeholder stated that the submission was 'confidential' or 'privileged'. Due to privacy reasons, personal details, including name, address and contact details were redacted from submissions before they were published.

A total of 147 written submissions were received, including:

- 94 submissions from the general community and environmental groups;
- 38 submissions from industry stakeholders, including corporations and peak bodies;
- 6 submissions from academics; and
- 9 submissions from government agencies, including local councils.

A total of 2,881 campaign submissions were received, including:

- 315 submissions from a *Lock the Gate* campaign; and
- 2,566 submissions from a *Nature Conservation Council* campaign.

The Productivity Commission also undertook face-to-face consultation sessions with the following stakeholders:

- Environmental Defenders Office
- Local Government Association
- Land and Environment Court
- NSW Bar Association
- Department of Planning, Industry and Environment
- Greater Sydney Commission
- Property Council of Australia
- NSW Minerals Council
- Independent Commission Against Corruption
- Planning Institute of Australia
- Law Society of NSW
- Independent Planning Commission
- Committee for Sydney
- Urban Taskforce

The most frequently raised issues during the consultation process include:

- The role and purpose of the IPC, including the nature and extent of assessment appropriate for the IPC to make an informed decision;
- The timeliness of the IPC's determination processes
- The need for certainty and consistency in the interpretation of planning instruments;
- The relationships and interactions between the IPC, the Minister, the Department and the various other stakeholders in the planning system;
- Desirable practice and procedures for public hearings, including their effectiveness, inclusiveness, timeliness and consistency;
- The appropriateness of thresholds for referral of matters; and
- The optimal composition of the IPC and desirable expertise of Commissioners.

The Productivity Commission has carefully considered all feedback provided by stakeholders. The findings from the public consultation have informed the Productivity Commission's recommendations throughout this report.



## 2. Is an IPC in the public interest?

### 2.1. The context

### 2.2. Maintaining confidence in the integrity of the planning system

### 2.3. Assessing the need for independence

### 2.4. Stakeholder views on the Independent Planning Commission

### 2.5. Cross-jurisdictional comparison

## 2.1. The context

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It is recognised nationally that a well-functioning planning system is critically important to the economy. There are, however, increasing stresses on the NSW planning system due to population growth, densification of existing communities and the need to provide associated jobs, infrastructure and services.

The planning system is also subject to increased scrutiny as the community has become more engaged in planning decisions, particularly in relation to land use conflicts that affect them. Often there will be both winners and losers in planning decisions, with no clear mechanism to compensate the losers for their loss. In addition, there are a range of complex emerging issues that present challenges to NSW planning decisions, including housing affordability and climate change.

For these reasons, planning decisions are, and always will be contested. Without careful management, the contested nature of the decision-making process will manifest in unnecessary complexity, stakeholder complaints, delays, added costs and the risk of corruption. But increased complexity, longer and more detailed processes and the evaluation and re-evaluation of the issues do not necessarily lead to better decision-making. Rather, good decision-making is the process of identifying the key issues and making decisions that, in the context of the planning system rules, appropriately balance competing interests.

To help address these risks, a planning commission has been an integral part of the NSW planning system since the commencement of the EP&A Act. Over the past decade, the planning commission in NSW has evolved from an advisory-only role to a decision-making body for the most significant development applications at the State level.

## 2.2. Maintaining confidence in the integrity of the planning system

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The need to maintain community confidence in the NSW planning system is paramount. Trust in the system underpins investor and consumer confidence and is essential for meaningful citizen participation.

As highlighted by ICAC's submission to this Review, planning decisions can be vulnerable to corruption risk and perceptions of undue influence given the complexity of the planning system, the substantial economic and non-financial implications of some categories of State significant development and the discretionary nature of some planning rules<sup>1</sup>.

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<sup>1</sup> ICAC has conducted numerous investigations involving planning decisions, including Willoughby Council (2011), Wollongong Council (2008), Strathfield Council (2005), Rockdale Council (2002), Randwick Council (1997), South Sydney Council (1992) and North Coast land developments (1990)<sup>1</sup>. In 2018-19, 21 per cent of complaints received by ICAC under section 10 of the Independent Commission Against Corruption Act 1988 involved development applications and land rezonings.

Since their inception in 1980, there have been no findings of corrupt conduct involving members of the IPC or its predecessors, nor has ICAC received any complaints that indicate that corrupt conduct has occurred.

In 2011 the Commonwealth Productivity Commission acknowledged that the practice of having decisions on major projects made by the (then) PAC rather than the Minister, in circumstances that may raise corruption concerns, “*would seem to be a practice likely to enhance the transparency and accountability of planning system outcome*”<sup>2</sup>. It has also stated its support for the use of expert and independent panels or commissions - “[*use of expert and independent panels or commissions appears to be less contentious and more transparent than ministerial discretion unaided by an open and independent assessment*”<sup>3</sup>.

Maintaining a determination process that is at arm’s length from government has been seen by successive NSW governments as important for managing the perception and risk of corruption, or inappropriate influence, in the development approval process.<sup>4</sup> The 2017 legislative changes that established the IPC were intended to boost transparency, balance and expertise in decision making to improve confidence and trust in the planning system<sup>5</sup>.

### 2.3. Assessing the need for independence

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The IPC is a ‘NSW Government agency’ established under section 2.7 of the EP&A Act. As an independent body, the IPC can and does make decisions that are contrary to the recommendations of its principal department, the Department of Planning, Industry and Environment (DPIE).

The *NSW Public Sector Governance Framework*<sup>6</sup> states that “*as a general rule, government functions should be carried out by Principal Departments*”. The Framework highlights that some regulatory functions require independence from Ministerial influence in order to satisfy public expectations of impartiality or where it is important to signal publicly that an activity is carried out free of political interference.

The Framework also acknowledges that functions that require a high level of independent technical expertise or specialised knowledge may benefit from the focus of a single purpose operating environment. A lower degree of Government control may be appropriate in respect of professional decisions and advice that draws on this expertise or knowledge, but in those cases the entity’s operations would otherwise generally be subject to Ministerial direction and control.

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<sup>2</sup> Productivity Commission 2011, ‘Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessment, Research Report, Canberra. <https://www.pc.gov.au/inquiries/completed/regulation-benchmarking-planning/report/planning-volume1.pdf>

<sup>3</sup> *ibid.*

<sup>4</sup> *ibid.*

<sup>5</sup> <https://www.planning.nsw.gov.au/-/media/Files/DPE/Other/summary-of-proposals-2017-01-09.pdf>

<sup>6</sup> NSW Public Sector Governance Framework, accessed 19/11/2019 <https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/files/Programs-and-Services/Governance/736f5dc2ba/NSW-Public-Sector-Governance-Framework-2013.pdf>

The Webbe-Weller ‘Public Interest Map’, developed as part of the *Independent Review of Queensland Government Boards, Committees and Statutory Authorities*<sup>7</sup>, states that there are four threshold criteria which are relevant to the case for establishing or maintaining a non-departmental government body. These criteria relate to: organisational capability; independence; risk; and public participation and consultation (see **Table 1**).

“At least one of the threshold criteria must be satisfied as a compelling case to override the premise in a consideration of the proposal from whole of government and stakeholder perspectives”<sup>8</sup>.

**Table 1 - Webbe-Weller ‘Public Interest Map’ threshold criteria**

Threshold Criteria	Description
<b>Organisational capability</b>	It is not possible or reasonably feasible for a departmental body (or another body already in existence) to undertake the proposed new activity (functions or powers) or achieve the desired outcomes.
<b>Independence</b>	The nature and extent of actual or perceived independence in order to undertake the activity is beyond that which the department, or any alternative arrangements with the department, can provide.  A degree of autonomy is necessary to attract and retain independent expertise; and hold confidence and trust of stakeholders, in order to perform the proposed role.
<b>Risk</b>	There would be an unacceptable level of risk to the State if the activity were to be undertaken by a departmental entity or another existing body.
<b>Public participation and consultation</b>	Facilitation of a greater degree of public participation in government activity or better and more diverse access to government decision-making (enhancing the political process) may justify the creation or continuation of a body outside the traditional departmental structure.

The application of the NSW Public Sector Governance Framework and the Webbe-Weller ‘Public Interest Map’ both support the case for having an independent planning commission. The primary criterion is independence. This is an environment where separation from Ministerial and departmental influence is required in order to satisfy public expectations of impartiality and signal publicly that decision-making is carried out free of political interference. Similarly, both frameworks identify that managing risk and facilitating greater public participation and consultation are factors that are highly relevant and support the case for an independent planning commission (discussed further below).

<sup>7</sup> *Independent Review of Queensland Government Boards, Committees and Statutory Authorities* Accessed 19/11/2019 from: <https://webarchive.nla.gov.au/awa/20141019200812/http://pandora.nla.gov.au/pan/40556/20141020-0108/www.premiers.qld.gov.au/publications/categories/reviews/boards-committees.html>

<sup>8</sup> *Independent Review of Queensland Government Boards, Committees and Statutory Authorities* Accessed 19/11/2019 from: <https://webarchive.nla.gov.au/awa/20141019200812/http://pandora.nla.gov.au/pan/40556/20141020-0108/www.premiers.qld.gov.au/publications/categories/reviews/boards-committees.html>

## 2.4. Stakeholder views on the IPC

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During the public consultation, 73 per cent of unique submissions to this Review expressed their support for the continued existence of the IPC, with 16 per cent opposed and 11 per cent neither supported nor opposed.

Many stakeholders have recognised the importance of the role the IPC plays in enhancing the integrity of the NSW planning system and providing opportunities for community consultation:

- the **Environmental Defenders Office** supports the role that an independent, expert body can play in the planning process including providing independent advice to the Minister and other planning authorities, and in carrying out planning functions including determining development applications. It considers that “this can help reduce corruption risks, particularly in the case of significant and controversial projects, or where there is significant discretion in decision-making processes.”
- the **NSW Farmers’ Association** suggests it is crucial to maintain the IPC and ensure the functions that it performs continue to be delivered independently to support sound, evidence-based decision-making. It is also noted that the IPC ensures transparency and good governance throughout the determination process and encourages public confidence in the NSW planning system.
- **ICAC** supports the granting of consent powers to a body that is operationally independent from government. It considers that the IPC’s existing determination powers include particular developments that are controversial and associated with high corruption risks, and that the granting of consent powers to the IPC in these circumstances helps promote community confidence in decision-making by ensuring that decisions are not politicised. ICAC indicated that its support for an Independent Planning Commission did not signify any lack of trust in a particular public official or position. Rather, it related to the IPC’s role as a safeguard to enhance the integrity and good repute of planning decisions.
- the **Planning Institute of Australia** supports the ongoing operation of the IPC and recognised its critical role in the planning system.
- the **Centre for Public Integrity** considers that the IPC is a crucial institution within our accountability framework.

While most stakeholders have considered that it is in the public interest to retain the IPC, there have been varying views on what its functions should be, and the nature and extent of operational adjustments required. There has also been a broad consensus on the benefits of improving the certainty, consistency and timeliness of the IPC’s role and operation.

- the **NSW Minerals Council** suggests that the responsibility for determining development applications should be returned to the Minister, and the IPC’s role should be limited to reviewing the DPIE assessment and its recommendation. Should the IPC be retained as a consent authority, the NSW Minerals Council is of the view that its objectives should be to: 1) ensuring IPC determinations are consistent with government policies; 2) avoiding the duplication and repetition of assessments undertaken by DPIE; 3) giving an appropriate level of weight to the DPIE’s assessment; 4) reducing the IPC’s determination timeframes; and 5) holding the IPC accountable to minimum standards.

- the **Association of Mining and Exploration Companies (AMEC)** acknowledges the value of independent oversight for major projects to ensure community confidence in the planning system. However, it considers that the IPC's role should be limited to providing advice to the Minister. AMEC also notes that the IPC's role is not to make government policies, but to provide independent oversight within the legislative framework established by the elected Government.
- the **Urban Taskforce** considers that the IPC should be an advisory body with determination powers to sit with the Minister with an option to delegate appropriate cases to the IPC for determination. The Urban Taskforce also states that a degree of primacy should be given to the assessment undertaken by DPIE, and its recommendations to approve or refuse should only be overturned by the IPC if there is clear evidence of a significant error identified in the assessment process.
- the **Property Council of NSW** supports the retention of the IPC and its role as a consent authority. However, the Property Council suggests that the IPC's current focus is too broad as it currently has a dual role as an advisory body as well as a consent authority, and thereby duplicates other existing avenues for advice on planning and development matters. The Property Council considers the IPC's functions should be narrowed to allow its resources to be reallocated to its decision-making functions, which should then contribute to improved processing times.

## 2.5. Cross-jurisdictional comparison

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### 2.5.1. Australian jurisdictions

The majority of states across Australia operate under a planning system in which separate bodies, agencies, or departments each undertake differing levels of assessment of development applications and planning scheme amendments.

However, the mechanics of each of these bodies is quite different and there is no one model followed exactly by any two states. While most bodies across Australian jurisdictions perform an advisory role, the nature and extent of determination powers of these bodies vary. The planning bodies with determination powers include:

- The State Commission Assessment Panel (SCAP) in South Australia, which has statutory powers to assess and determine applications, such as those with a significant regional impact; and
- The Western Australia Planning Commission (WAPC) which has technical determination powers for a range of large application types, as well as an advisory role to government on several land use planning and land development matters. The WAPC nevertheless typically delegates its determination roles to other agencies, such as Development Assessment Panels (DAP), particularly for lower scale development. The DAPs have a determination role, report directly to the Minister, and are made up of a range of specialist members with expertise across several fields.

Despite nuanced differences, there is general similarity in the scale and quantity of matters managed by each state's independent bodies. Assessment, review or determination of development applications is generally for projects above a certain monetary threshold, of a significant or contentious nature, or where there are potential conflicts.

All states are currently reviewing either their planning systems or the independent planning bodies more specifically and have identified issues also expressed by stakeholders within the NSW planning system.

In summary, the existence of an independent body providing advice on or determinations of planning matters is not unique to NSW, when looking elsewhere in Australia. However, the specifics relating to core role, thresholds for referral, determination powers, and number of commissioners or members make the IPC distinctive.

### 2.5.2. Other common law jurisdictions

As part of this review, a desktop analysis of Canada, New Zealand, and United Kingdom planning processes was undertaken to understand whether comparable bodies to the IPC exist in these common law jurisdictions.

The planning systems within these jurisdictions generally include local plan-making and determination as a local authority responsibility, with determination of significant developments by higher officials. However, this Review has found limited evidence of a standalone agency, established to independently make or review planning decisions on a regular basis separate to the bureaucracy, other than certain cases in New Zealand.

While there are some similarities among the jurisdictions' use of independent bodies, particularly within New Zealand, the IPC appears unique from an international perspective in that it has enabling legislation which results in a constant flow of applications being referred to it for assessment and determination.

Further information about the findings from the cross-jurisdictional research is available at **Appendix C**.

#### Findings: Is an IPC in the public interest?

- Maintaining confidence in the integrity of the planning system is of paramount importance, given the vital role planning plays in the economy and the contested nature of planning decisions.
- The IPC's transparency and separation from politics supports public confidence and trust in the planning system.
- The application of the Webbe-Weller 'Public Interest Map' supports the existence of the IPC on the basis that independence from Ministerial and departmental influence is necessary.
- Most submissions received during this review supported the continued existence of the IPC, however some suggested changes to its functions and operations.
- The majority of Australian states and territories have independent bodies that undertake advisory or determination functions in relation to planning decisions.

#### Recommendation 1: Is an IPC in the public interest?

The IPC plays an important role in maintaining the integrity of the planning system and should be retained as an independent decision-making body for contentious State significant developments.

## 3. Strengthening independence and governance

3.1. Independence of the IPC and status as an agency

3.2. Bringing clarity to the role and purpose of the IPC

3.3. Governance – accountability and control

3.4. Commissioners

3.5. IPC Secretariat

3.6. Budget and support services



### 3.1. Independence of the IPC and its agency status

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There are strong reasons to ensure the independence of the IPC, given the controversial and contested nature of planning decisions and the associated risks of undue influence and corruption.

Since the former PAC was established in 2008, the EP&A Act has explicitly provided that the Commission “is not subject to the direction or control of the Minister”. Beyond that legislative provision, the nature and extent of the IPC’s independence is not entirely clear, yet this is central to understanding of its role and purpose.

The IPC has promoted its independence more strongly than its predecessors. For instance, the IPC elected to ‘rebrand’ with a new logo featuring the NSW coat of arms (which is often used for judicial bodies) instead of the ‘NSW Government’ logo (which is used for most other government agencies).

The 2017 legislative changes established the IPC as a ‘NSW Government agency’. This represented a change from the PAC which was previously called a ‘statutory body’ in the EP&A Act. However, under the *Interpretation Act 1987*, the IPC’s formal status of ‘NSW Government agency’ is not functionally different to the PAC’s previous status as a ‘statutory body’. The IPC’s statutory independence is effectively the same as its predecessor.

While the EP&A Act provides that the IPC is an NSW government agency, it is not listed in Schedule 1 of the *Government Sector Employment Act 2013* (GSE Act), where other similar bodies are listed. Under the GSE Act, agencies are divided into three categories:

1) departments, 2) executive agencies, and 3) separate agencies.

The lack of legislative clarity over the nature and extent of the IPC’s independence presents challenges for stakeholders in interpreting the Government’s intentions regarding the IPC’s role and operations, particularly given its reliance on other parts of government for funding, staff and other services.

#### Findings: Independence of the IPC and its agency status

- The nature and extent of the IPC’s independence is not clear.
- The legislative changes that established the IPC inserted the word ‘*Independent*’ and the IPC has since promoted its independence more strongly. However, the IPC’s statutory independence remains the same as its predecessor (the PAC).
- The IPC should be scheduled as a separate agency under the GSE Act. This would:
  - strengthen the IPC’s independent status;
  - allow the IPC to improve its internal governance arrangements, with reporting lines from the Secretariat, through management, to the Chair, and
  - authorise the IPC to recruit staff on its own terms.

#### Recommendation 2: Independence of the IPC and its agency status

Reinforce the independence of the IPC by formally establishing the IPC as a ‘separate agency’ under the *Government Sector Employment Act 2013*.

## 3.2. Bringing clarity to the role and purpose of the IPC

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Clearly establishing an organisation’s purpose, objectives and associated performance benchmarks are essential for the organisation to perform to expectations and be held accountable.

Section 2.9 of the EP&A Act provides a list of the IPC’s functions, however there are no specific objectives for the IPC outlined in the legislation. While the Productivity Commission understands that the IPC Chair was verbally advised by the then Planning Minister about his expectations for the IPC when it was first established, there is no formal documentation of the Government’s expectations or objectives for the IPC.

In the absence of any statutory or formal direction, the IPC has developed its own vision for “*Well executed developments that benefit the people of NSW*”<sup>9</sup> and its own stated purpose, as reflected in its mission statement, is to “*deliver a high level of independence, expertise and transparency to the assessment and determination of State Significant Development applications in NSW.*”<sup>10</sup>

The IPC states that it acts in accordance with the following values<sup>10</sup>:

- **Independence:** *We will build the community’s confidence and trust in the Commission’s independence by ensuring our processes are open and transparent, and encouraging and promoting greater community participation throughout the assessment and determination process.*
- **Expertise:** *We will draw on the considerable experience, expertise and knowledge of our members in planning and related fields to enhance the capabilities of the Commission to best serve the people of NSW.*
- **Engagement:** *We seek to encourage and promote greater community participation early in the planning assessment process. We acknowledge and respect there will be differences of opinion on planning projects and take seriously the concerns expressed to us by individuals and groups in affected communities.*

This Review has not identified any other statements of purpose, published objectives or performance benchmarks that relate to the IPC and the execution of its functions.

Several stakeholder comments highlighted strong views on the respective roles and responsibilities of the IPC and DPIE in the development application process.

Industry bodies have critiqued the level of assessment undertaken by the IPC, contending that it is unnecessary, it duplicates a process already completed by DPIE and leads to costly delays and industry uncertainty. On the other hand, community and environmental groups have claimed that IPC’s independent assessment is necessary to ensure that economic considerations are properly balanced against social and environmental impacts.

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<sup>9</sup> <https://www.ipcn.nsw.gov.au/about-us>

<sup>10</sup> <https://www.ipcn.nsw.gov.au/about-us>

<sup>10</sup> <https://www.ipcn.nsw.gov.au/about-us>

### Findings: Bringing clarity to the role and purpose of the IPC

- This Review has identified that there is some confusion among stakeholders about the respective roles of the IPC and DPIE, and some strong views about the impacts of perceived duplication of effort.
- Much of this apparent confusion stems from different interpretations of the Government's intent when it legislated in 2017 to transform the Planning Assessment Commission (PAC) into the IPC.
- The amendments to the EP&A Act that created the IPC also established it as the consent authority for certain State significant developments. The IPC therefore exercises statutory executive powers - it is not a judicial body, nor is it an assessment authority.
- Although the functions of the IPC are set out in section 2.9 of the EP&A Act, stakeholder consultation has revealed there is still a lack of clarity about the Government's intent and expectations for how the IPC should go about its functions.
- The establishment of clear objectives and performance benchmarks will enable the Government to be clear about its expectations, allow the IPC's performance to be measured and assist in ensuring accountability can be properly attributed.

### Recommendation 3: Bringing clarity to the role and purpose of the IPC

Clarify the role and purpose of the IPC by:

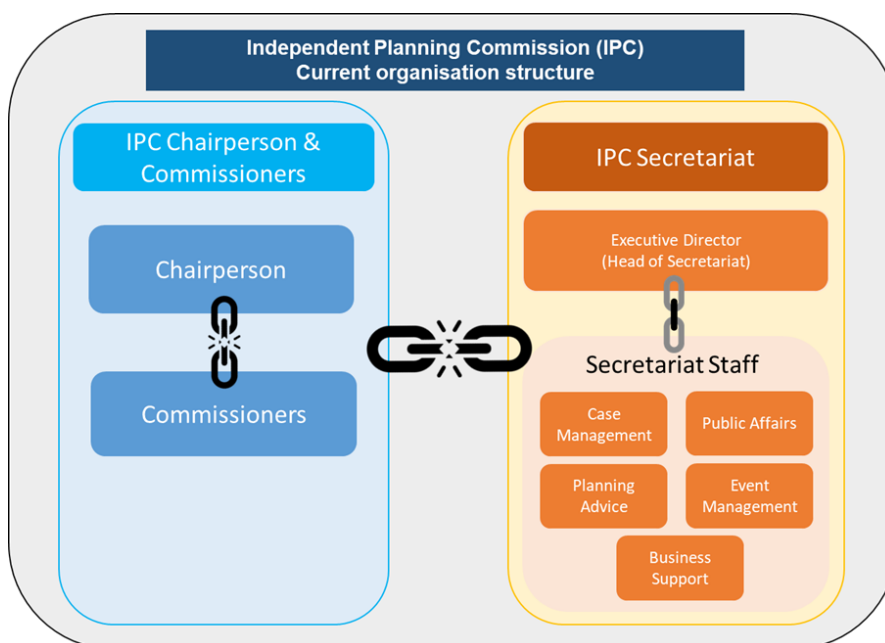
- a. The Minister formally issuing directions on an agreed set of outcome-focused objectives and performance measures (incorporating quality and timeliness targets); and
- b. The IPC reporting against those objectives and performance measures in its annual report.

## 3.3. Governance – accountability and control

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Good governance requires clear lines of accountability and control. This Review has found scope to improve the clarity of the IPC's current organisational design and operating model. In particular, changes to the structure of the IPC and arrangements regarding the head of the organisation would be beneficial.

The Chair of the IPC is seen by stakeholders as the head of the IPC and accountable for the IPC's performance. However, the Chair has no formal control over the Secretariat or the Commissioners (beyond their assignment to panels). At present, accountability and control of the IPC is centred on an Executive Director, who reports formally to the Secretary of the DPIE, as the designated head of agency.



These governance arrangements need to be clarified to ensure the necessary direction, control and accountability structures are in place for the IPC. This Review recommends that the IPC’s governance framework and organisational structure be realigned to support this outcome and that the Chair be defined as the agency head.

Many public sector agencies do not have a board, with the agency head taking on many of the roles of a board and being accountable to a minister or parliament. In these cases, independent assurance functions (e.g. audit and risk committees), should report directly to the agency head.<sup>11</sup>

The NSW Audit Office’s ‘Governance Lighthouse’<sup>12</sup> framework provides practical advice and resources to assist in the implementation of effective governance in the public sector and has been produced specifically for State and local government entities. This framework should inform any redesign of the IPC’s governance structure.

### Findings – Governance: accountability and control

- While the Chair is (in principle) charged with many of the responsibilities of leading the IPC, the Chair is not empowered to control or direct the organisation.
- The development and implementation of a fit for purpose governance framework will maximise the potential for the IPC to perform at an efficient level, achieve their objectives and enhance public confidence in their decisions, while being accountable to their obligations and responsibilities.
- Organisational roles, responsibilities, and reporting lines should be reconsidered within the context of the revised governance framework.

<sup>11</sup> <https://www.audit.nsw.gov.au/our-work/resources/governance-lighthouse>

<sup>12</sup> <https://www.audit.nsw.gov.au/our-work/resources/governance-lighthouse>

#### Recommendation 4: Governance – accountability and control

Formalise the IPC's governance arrangements:

- a. Establish the Chair as head of the independent agency with accountability to the Minister for Planning and Public Spaces for the performance of the IPC (including both the Commissioners and the Secretariat); and
- b. Develop and implement a governance framework consistent with the guidance provided by the NSW Audit Office's 'Governance Lighthouse'.

### 3.4. Commissioners

IPC Commissioners are appointed by the Minister, with one member being appointed as Chair (cf section 2.8 EP&A Act). The Minister may appoint additional members of the Commission for the purposes of exercising specific functions of the Commission.

The IPC currently has 29 Commissioners, 5 of whom are members of the Mining and Petroleum Gateway Panel established under Part 4AA, Division 5, of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*.<sup>13</sup> Commissioners are appointed for a term not exceeding 3 years (cf Schedule 2, clause 11 EP&A Act).

#### 3.4.1. Number of Commissioners

The number of IPC Commissioners has increased substantially from the original PAC, which comprised a Chair and 8 permanent members (with casual members available to be called as substitutes or for specific technical expertise).

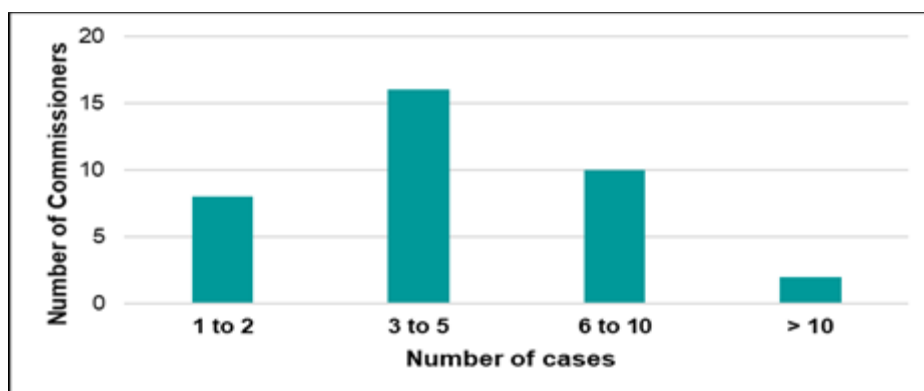
This Review has heard the original PAC's relatively small number of Commissioners had the advantage in that these people gained experience over time and became familiar with:

- the planning system, including relevant legislation and policies
- the PAC's processes (including administrative matters and public hearings), and
- certain categories of developments and associated policy issues, which facilitated a consistency in recommendations and decisions.

Since the IPC was established in its current form in March 2018, 36 Commissioners have worked on at least one case. The workload for most Commissioners is relatively light, as 24 Commissioners have worked on 5 cases or less since March 2018 (8 having worked on just 1-2 cases), while only 2 Commissioners have worked on more than 10 cases during the same period (**Chart 1**).

<sup>13</sup> IPC Website, "Commissioners", December 2019 – <https://www.ipcn.nsw.gov.au/commissioners>

**Chart 1 – Commissioner Caseloads**



The IPC has stated that the primary reasons for this workload distribution are Commissioner availability and (to a lesser extent), the fees charged by individual Commissioners.

There are a range of similar planning bodies in other Australian jurisdictions and most of these bodies have a smaller set of members who are either employed permanent part-time or are otherwise regularly available.

### **3.4.2. Skills, expertise and qualifications**

Section 2.8 of the EP&A Act requires that a Commissioner must have expertise in one of 14 specified disciplines or professional areas. The current IPC Commissioner cohort includes a wide mix of professional backgrounds, with most of the specified disciplines represented. The most common professional backgrounds are planning (11 Commissioners), architecture (5 Commissioners) and environmental science (3 Commissioners), which account for the majority of the 29 Commissioners.

When the IPC was established, it also subsumed the existing Mining and Petroleum Gateway Panel, which included 8 members with specialist technical experience focussed on soils, geology and hydrogeology.

Stakeholders have raised some concerns relating to the expertise of the current IPC Commissioner cohort, including that Commissioners may:

1. not sufficiently understand the planning system and legislation
2. not sufficiently recognise the key issues or understand the assessment approach adopted by DPIE
3. focus too heavily on their particular area of expertise, or
4. lack the relevant technical expertise for certain projects.

Whether or not these concerns reflect actual shortcomings in the expertise of IPC Commissioners, stakeholder concerns on the first three aspects signal that it would be beneficial for Commissioners to possess a generalist skillset, based around a core ability to balance up competing interests (i.e. environmental, social and economic considerations) within the statutory framework and make decisions in a highly contested space.

While it is not necessary or appropriate for all Commissioners to be planners, it would be appropriate for Commissioners to have a strong understanding of the NSW planning

framework. A move toward this type of expertise and skillset is supported by both the Chair of the IPC and DPIE.

The fourth concern raised (above) – that IPC Commissioners may lack technical expertise – appears to be particularly focused on mining and resource projects that involve matters that span a range of difficult and highly technical areas of expertise (e.g. mining engineering, hydrogeology, subsidence, rock mechanics, air quality and noise).

In this regard, section 2.11 of the EP&A Act expressly provides that the IPC can “engage such consultants as it requires to exercise its functions”. This Review notes that the IPC can also procure any necessary additional technical advice through other means, including from existing committees such as the Gateway Panel or the Independent Expert Panel on Mining in the Catchment. It concludes, therefore, that it is unnecessary for the IPC Commissioner cohort to cover each and every one of the specified disciplines.

### 3.4.3. Adequacy of methods to identify and resolve conflicts of interest

The need for the IPC to effectively manage potential Commissioner conflicts of interest is imperative, given the significance of the projects it is involved in, the history and purpose of its establishment, and public expectations and scrutiny around impartiality.

The IPC has three policy documents covering conflicts of interest:

- the *IPC Conflict of Interest Policy*<sup>14</sup>, which identifies different types of potential conflicts and how the IPC identifies and resolves conflicts of interest
- the *Managing Conflict of Interest Guide*<sup>15</sup>, which provides more detailed guidance on how to manage specific conflicts, including a matrix outlining a number of potential conflicts, the nature of the conflict, and an exclusion timeframe, and
- the *Code of Conduct*<sup>16</sup>, which outlines expected standards of conduct, and contains a section on conflicts of interest.

These three documents outline a robust framework in which to handle conflicts of interest. Key aspects of this framework include:

- Commissioners must declare their personal interests when first appointed, including:
  - Income sources (including shares, property and superannuation)
  - Board and Committee membership
  - Corporation interests and positions
  - Trade union, professional and business association interests and positions
  - Personal and business relationships relevant to the IPC work.

<sup>14</sup> [https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/general/whats-new/new-policies-and-guidelines/180808/ipc\\_conflictinterestpolicy\\_v4.pdf?la=en&hash=06F405D86856EA4D80EF6198D34AD907](https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/general/whats-new/new-policies-and-guidelines/180808/ipc_conflictinterestpolicy_v4.pdf?la=en&hash=06F405D86856EA4D80EF6198D34AD907)

<sup>15</sup> [https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/general/whats-new/new-policies-and-guidelines/180808/ipc\\_managingconflictinterestguide\\_v4.pdf?la=en&hash=85E05367EC64F1423E1195B6CCFBDE99](https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/general/whats-new/new-policies-and-guidelines/180808/ipc_managingconflictinterestguide_v4.pdf?la=en&hash=85E05367EC64F1423E1195B6CCFBDE99)

<sup>16</sup> [https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/general/whats-new/new-policies-and-guidelines/ipc\\_codeofconduct\\_v3.pdf?la=en&hash=F0701A7068895B2A48ACA7BBDEFD826A](https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/general/whats-new/new-policies-and-guidelines/ipc_codeofconduct_v3.pdf?la=en&hash=F0701A7068895B2A48ACA7BBDEFD826A)

- Commissioners must resubmit information annually, or as their situation changes.
- A register of declarations is kept at the IPC's office, and is available for public inspection during office hours.
- The Chair must consider any conflicts of interest when appointing members to a determination or hearing.
- The Chair is then required to:
  - Appoint a different member if an actual conflict of interest arises
  - Decide whether a member is appointed, in the case of potential and perceived conflicts of interest.

A conflict of interest register form is completed for every project and posted to the project web page on the IPC website. The form may be updated if actual, potential, or perceived conflicts surface during the process.

The *Managing Conflict of Interest Guide* acknowledges that there is always a possibility of previously unidentified conflicts arising. In circumstances where a conflict of interest is identified after a member has been appointed, the IPC discloses the conflict and takes prompt, appropriate action. This may include removing the member from the determination or hearing.

This Review finds that the rigour around the implementation and operation of these policies could be improved by ongoing Commissioner training and improving internal checks and systems. It makes this finding based on evidence about the late exclusion of Commissioners from certain panels, due to a mix of insufficient understanding of the IPC's conflict of interest framework on the part of the Commissioners, and an inadequate system for checking and identifying conflicts.

- In December 2018 a Commissioner was appointed to the United Wambo project. Two days prior to the public meeting it was established that the Commissioner had an undeclared conflict of interest by way of their partner. The Commissioner was removed from the project and another Commissioner was appointed. The newly appointed Commissioner had a conflict of interest and disclosed it on the morning of a public meeting. This prompted the cancellation of the public meeting and resulted in a two-month delay to the rescheduled public meeting.
- In relation to the Vickery Extension Project in December 2018, two Commissioners removed themselves from the Panel in the space of a week due to potential or perceived conflicts, impacting planned public hearing timeframes.

This Review notes that in most of these cases, the actual issue relates to perceived or potential as opposed to actual conflicts of interest. Whether real or not, potential or perceived conflicts of interest can be enough to undermine public confidence in the operations of the IPC and the impartiality of their decision making.



## Findings: Commissioners

- The IPC's primary function involves making independent planning decisions.
- Much of the "value add" of the Commissioners is in their capacity to apply sound judgement. This suggests that the IPC's decision-making function should be undertaken by people with deep experience in decision making across a range of areas – with advice from technical experts where required (noting that this advice could be outsourced).
- All of the IPC's Commissioners have experience that fits the requirements of section 2.8 of the EP&A Act.
- Some of the Commissioners' experience is, however, highly specialised and may not be well-suited to the core decision-making function of the IPC.
- This Review has compiled an indicative list of 'ideal' skills and experience for a Commissioner:
  - a solid understanding of planning legislation and policies
  - a strong understanding of what constitutes the 'public interest' and frameworks for decision making in the context of competing interests
  - an ability to read and understand large volumes of technical information quickly
  - an ability to identify the key issues and efficiently, ethically and pragmatically decide whether further advice is required
  - an ability to effectively manage public hearings with a broad range of stakeholders
  - substantial experience in weighing up complex technical issues that are often highly contested, and
  - experience and expertise in making (and explaining) difficult decisions.
- IPC Panels should ideally be constituted by Commissioners with the skills listed above.
- The large number of Commissioners increases the risk of different approaches being applied to similar projects. This risk can be mitigated by reducing the number of Commissioners (subject to workload) and developing a strong governance framework and supporting systems (see Recommendations 4 and 9).
- Consideration should be given to alternative Commissioner remuneration options and how these may affect the availability of Commissioners. This could include options such as fixed fees or an agreed remuneration cap per determination (with a sliding scale with higher remuneration for more complex matters), or a salary for being available for an agreed number of days each month.
- The IPC has strong policies and procedures relating to the management of conflicts of interest. These mechanisms are generally fit for purpose, noting that potential and perceived conflicts of interest are complex and dynamic concepts, which are inherently difficult to manage.

### Recommendation 5: Commissioners

Continue to enhance the IPC's efficiency and effectiveness by:

- a. Transitioning to a smaller pool of Commissioners, with a stronger focus on decision-making skills rather than technical expertise (expert advice can be commissioned separately);
- b. Undertaking a review of the appropriateness of the remuneration model for Commissioners; and
- c. Managing conflicts of interests in accordance with the existing IPC framework:
  - i. Continue ongoing training of Commissioners and publishing conflict of interest policies; and
  - ii. Review the conflict of interest checking process to minimise the risk of disruption to panels.

## 3.5. IPC Secretariat

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The IPC's Secretariat has until recently consisted of 13 staff. The Executive Director is the Head of Agency and reports directly to the Secretary of DPIE. The Secretariat otherwise operates independently from DPIE and is accommodated in a separate office.

The Secretariat relies on DPIE for many of its corporate services, including HR and IT. While the IPC uses DPIE's HR services, the staff are separately recruited by the IPC without intervention from DPIE. The IPC also draws its budget from DPIE, however its relationship is now directly with the Chief Financial Officer (within the finance division) of DPIE to avoid any potential conflicts of interest with the planning-related divisions within DPIE.

The Secretariat staff play a crucial role in assisting Commissioners and managing the IPC's workload. While the word 'Secretariat' might imply that the work is purely administrative in nature, this is not the case. The Secretariat must have a strong understanding of the legislative and policy framework and provide meaningful contributions to the preparation of the IPC's correspondence and reports.

Given the nature of its work, the Secretariat should have access to the best available planning, environmental assessment, legal and community engagement practitioners with a strong understanding of the policy environment and substantial experience in managing high-profile projects. Secretariat staff should also be comfortable working in a contested space and dealing with passionate stakeholders with differing perspectives. In particular, the staff should be able to develop professional working relationships with key stakeholders, while maintaining the independence and transparency of the IPC.

The IPC has reported difficulties in recruiting (and retaining) the highest calibre staff and acknowledges that the Secretariat has been understaffed for some time. These staffing difficulties appear to have had a negative effect on the relationship between the IPC and DPIE and contributed to some of the IPC's delays and process errors.

The IPC has commenced a process of restructuring the Secretariat to better meet its needs. This includes a focus on building a more agile workforce with capabilities that directly reflect the IPC's workload. In the meantime, the Secretariat is currently lacking in experienced staff members and relies heavily on external contractors to fill the gaps. This is clearly not ideal, and the IPC's restructure and recruitment should be addressed as a matter of urgency.

The IPC has generally drawn its staff from DPIE or other agencies. However, this Review has found that throughout the history of the IPC and its predecessor bodies, both DPIE and other agencies have been reluctant to let their best staff move to the IPC, even if only temporarily. More recently, cultural and reputational issues around the Secretariat have likely diminished the available pool of potential high-quality employees.

There have been some general concerns raised by community stakeholders about the reliance on former or seconded DPIE staff, given that the Secretariat assists Commissioners in assessing DPIE's reports.<sup>17</sup> Stakeholders noted a risk that Secretariat staff may align with DPIE to preserve their own career options. This potential conflict was also noted in the Kaldas Review.<sup>18</sup> The Productivity Commission has heard that the independence of the Secretariat staff is more formally addressed, either by moving the agency to another cluster or through administrative arrangements.

### Findings: IPC Secretariat

- Given the importance of the Secretariat to the effective functioning of the IPC, it should be strengthened and appropriately resourced as a matter of priority.
- This Review has not found any evidence suggesting that there are substantive issues with the IPC Secretariat's independence from DPIE. The existing arrangements between the IPC and DPIE (albeit informal and based on historical practice) appear to have been effective in preventing any conflicts of interest.
- Nevertheless, the independence of the IPC should be established as a separate agency, which would allow it to directly recruit staff (see Recommendation 2).
- A clear vision for the future state of the Secretariat should be developed and a change management plan put in place to assist in managing the transition.
- Staff IPC's Secretariat need to have a sound understanding of the NSW planning system, and preferably direct experience within that system.
- Staff also need to be supported by appropriate systems and procedures (see Recommendation 9).

### Recommendation 6: IPC Secretariat

Strengthen the IPC Secretariat and enhance its culture and reputation as a matter of high priority by:

- a. Developing and implementing arrangements to formalise the independence of the IPC and Secretariat from DPIE (see Recommendations 2, 3, 4 and 7);
- b. Improving internal systems and procedures (including improving access to data);
- c. Building a culture of excellence, including through recruiting high-calibre staff with appropriate capabilities; and
- d. Renaming the Secretariat to the Office of the IPC to better reflect the functions undertaken.

<sup>17</sup> For example, submissions from Don White and Co Pty Ltd, Law Society of NSW, Independent Commission Against Corruption.

<sup>18</sup> Nick Kaldas APM Review of Governance in the NSW Planning System, November 2018, p 49.

### 3.6. Budget and support services

The IPC is currently funded through the 'Cluster Corporate Services' (CCS) component of the DPIE budget. In the financial year 2018-19, \$131 million was allocated for the CCS component of the DPIE budget, of which \$5.84 million was allocated as the IPC budget. This comprised \$2.18 million for staffing and \$3.66 million for other operating expenses. **Table 2** shows the IPC budget over the last five financial years.

**Table 2 – IPC Budget over the last five financial years**

Financial Year	Labour Expense Cap (\$m)	Operating Expenses (\$m)	Total Budget Allocation (\$m)	Actual Budget (\$m)
2019-20	2.18	3.66	5.84	N/A
2018-19	2.06	2.42	4.49	6.46
2017-18	1.89	3.00	4.89	4.14
2016-17	1.90	3.00	4.90	4.14
2015-16	2.05	2.59	4.64	4.57

Based on the information provided to this Review, the IPC appears to have limited involvement or control over the allocation and adjustment of its budget as the CCS component of the DPIE budget serves various objectives and is not specifically targeted towards funding the IPC.

This Review recognises that there is a need for a clearer process for assessing and determining the IPC's budget, which allows the IPC an appropriate level of operational flexibility and autonomy.

Earlier in this Review, the Productivity Commission recommended that the IPC be established as a 'separate agency' under the GSE Act in order to strengthen the IPC's independent status (see Recommendation 2). Consistent with this recommendation, consideration should also be given to establishing the IPC as a 'separate GSF agency' under the *Government Sector Finance Act 2018* (GSF Act).

The budget framework under the GSF Act facilitates the operational independence of 'separate GSF agencies' by specifically exempting these agencies from the scope of the Treasurer's Direction. Those separate and independent agencies are not required to comply with Treasurer's Directions if they believe those directions are inconsistent with their statutory functions. However, those agencies must report any non-compliance to Parliament to maintain accountability and transparency.

In addition, the IPC relies on DPIE for the provision of support services, including recruitment, payroll, ICT support and financial accounting functions. This shared service model offers many benefits, such as the potential reduction in operating costs through

efficiencies and avoiding duplication. However, the IPC identified a need for better certainty and consistency in the standards and extent of support services provided by DPIE.

There is currently no formal agreement between the IPC and DPIE that sets out the accountability and performance expectations for the provision of corporate services. While there is a Memorandum of Understanding that governs the overall relationship between DPIE and IPC, it expressly states that it is not intended to “cover the shared services provided by DPIE Cluster”.

As a separate agency under the GSE Act and GSF Act, the IPC would have its own budget and thereby the operational flexibility to choose its own preferred corporate service provider, which may include DPIE or third-party service providers.

An assessment of the adequacy of the IPC’s budget should be undertaken having regard to the role and functions of the IPC under the operating model recommended by this Review. The Productivity Commission notes that there is a risk of increased costs associated with the IPC being established as a ‘separate agency’, particularly in relation to ICT and HR services. However, these costs may also be offset by this Review’s recommendation to reduce various aspects of the workload of the IPC.

#### Findings: Budget and support services

- The IPC appears to have limited control over the allocation and adjustment of its budget, which subsequently restricts its operational flexibility and autonomy.
- Consistent with Recommendation 2 (establish the IPC as a ‘separate agency’ under the GSE Act), consideration should be given to establishing the IPC as a ‘separate GSF agency’ under the Government Sector Finance Act 2018 (GSF Act) in order to facilitate the operational independence of the IPC.
- There is no formal agreement between the IPC and DPIE that sets out the performance expectations for the provision of corporate services to the IPC. This should be addressed in the context of the other recommendations of this Review which, if implemented, would allow the IPC greater freedom in sourcing its corporate services.
- An assessment of the adequacy of the IPC’s budget should be undertaken after the completion of this Review, having regard to the role and functions of the IPC under the operating model recommended by this Review.

#### Recommendation 7: Budget and support services

Ensure the IPC’s financial arrangements support its independent role and functions:

- a. Consistent with Recommendation 2, establish the IPC as a ‘separate GSF agency’ under the *Government Sector Finance Act 2018*; and
- b. Review and revise the IPC’s budget in consideration of the other recommendations of this Review to ensure it is appropriately resourced.

## 4. Improving performance

4.1. Workload optimisation

4.2. Systems and processes

4.3. DPIE assessment services

4.4. Public hearings

4.5. Decision-making

## 4.1. Workload optimisation

### 4.1.1. Thresholds for IPC determination

Development which is subject to determination by the IPC is identified in clause 8A of the *State Environmental Planning Policy (State and Regional Development) 2011* (SRD SEPP):

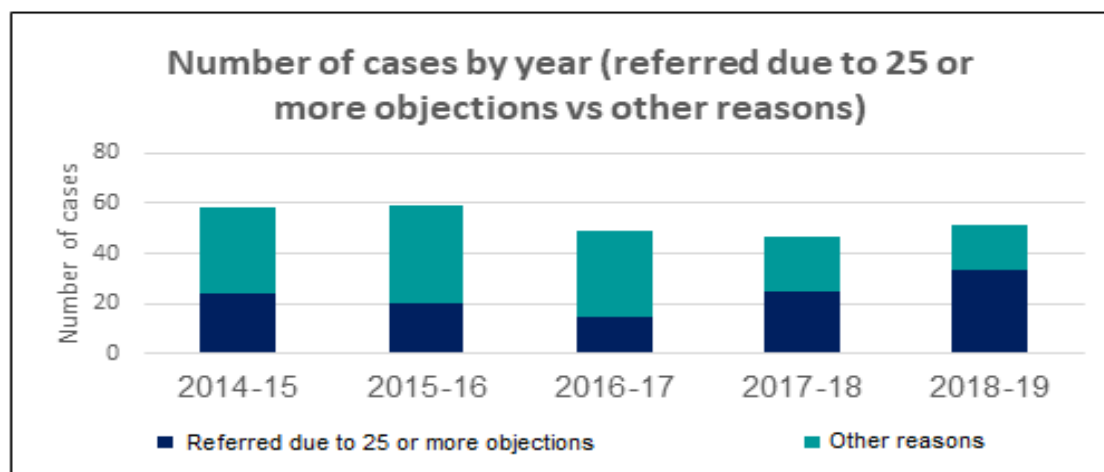
*8A Designation of Independent Planning Commission as consent authority for certain State significant development*

- (1) *The Independent Planning Commission is declared, under section 4.5(a) of the Act, to be the consent authority for any of the following development that is State significant development unless the application to carry out the development is made by or on behalf of a public authority or unless the development is declared to be State significant infrastructure related development under subclause (1A) —*
- (a) *development in respect of which the council of the area in which the development is to be carried out has duly made a submission by way of objection under the mandatory requirements for community participation in Schedule 1 to the Act,*
  - (b) *development in respect of which at least 25 persons (other than a council) have duly made submissions by way of objection under the mandatory requirements for community participation in Schedule 1 to the Act,*
  - (c) *development the subject of a development application made by a person who has disclosed a reportable political donation under section 10.4 to the Act in connection with the development application.*

These thresholds have been broadly consistent across both the IPC and its predecessor the PAC (with the main difference being that the PAC was a delegated, as opposed to a statutory consent authority).

Between 2016-17 and 2018-19, there was a notable increase in the number of cases which triggered the 25 or more public objections threshold. Over the same period, the number of cases referred due to other reasons, e.g. council objections, political donations and Ministerial referrals, decreased – see **Chart 2** below.

**Chart 2 – Number of cases referred to IPC/PAC for determination with >25 objections**



Most development applications referred to the IPC for determination received between 25 and 100 objections. If the referral threshold was increased from 25 to 50, Table 3 shows there would have been 11 fewer referrals to the IPC in 2018-19 (a reduction of 22 per cent on the total of 51 development applications) and 12 fewer referrals in the preceding year (a reduction of 26 per cent on the total of 47 development assessment referrals).

**Table 3 – Number of objections for cases referred to IPC/PAC for determination**

	2014-15	2015-16 <sup>19</sup>	2016-17	2017-18	2018-19	Total
Number of applications referred (public objections)	24	19	15	25	33	116
25 – 49 objections	10	7	5	12	11	45
50 – 99 objections	3	6	3	2	10	24
100 or more objections	11	6	7	11	12	47
Average number of objections	171	87	190	215	149	160
Total determination applications referred <sup>20</sup>	61	59	49	47	51	267
% reduction in total determination applications <sup>21</sup> if public objection threshold is increased to 50	16%	11%	10%	26%	22%	17%
% reduction in total determination applications <sup>22</sup> if public objection threshold is increased to 100	23%	22%	16%	30%	41%	26%

Stakeholders identified several issues with the thresholds for referral to the IPC, particularly with the 25 objections threshold. Most of these issues relate to the potential for additional costs and delays involved in referral to the IPC. One position presented to this Review is that it is increasingly easy to ‘game’ the system and ‘drum up’ more than 25 objections through automated online systems that generate ‘form letters’ of petitions (e.g. dogooder.co), or through the circulation of form letters among a special interest’s organisation’s mailing list.

Some submissions to this Review questioned whether objections to development applications reflect genuine local public interest in a project when these are prepared in a

<sup>19</sup> A number of objections for ‘Mackas Sand Project Modification 2’ case was not available, and thus excluded for the purpose of this data analysis.

<sup>20</sup> The term ‘total determination applications’ refers to all applications referred to the IPC/PAC for determination, including those referred to the IPC/PAC due to political donation and council objection.

<sup>21</sup> *ibid.*

<sup>22</sup> *ibid.*



form letter style. It was noted that Local Planning Panels (LPP) treat petitions and form letters as a single objection for the purposes of LPP referral thresholds.

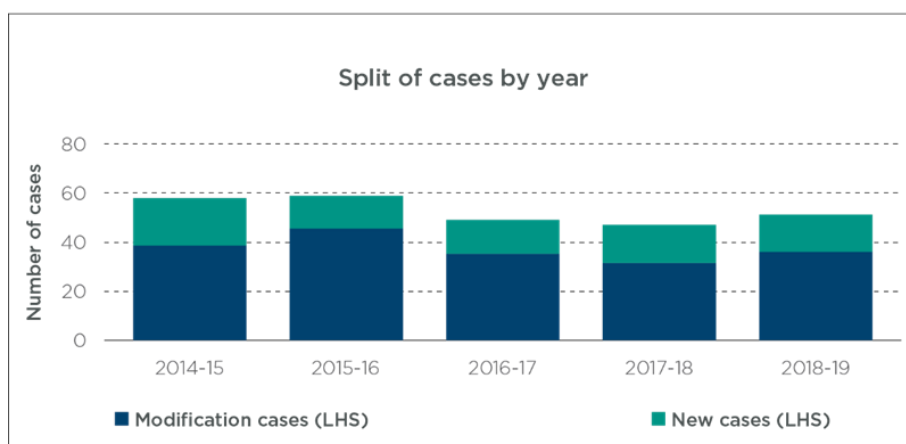
Stakeholders also noted that many objection letters come from objectors who do not live within or near the affected area to which the development application relates. For one project, there was a 50/50 split of total submitters for and against the proposal, despite majority support at the local level.

With respect to reportable political donations, ICAC has previously identified the potential for political donations to undermine the integrity of ministerial decision-making on planning matters. The Productivity Commission understands that this was the primary reason for referring these developments to the IPC and has not identified any reason to amend clause 8A(1)(b) of the SRD SEPP.

#### 4.1.2. Modifications

The IPC determines modifications to SSDs if the above thresholds are met. This Review has identified that 70 per cent of the cases determined by the IPC/PAC over the last 5 years are for modifications to existing consents (see **Chart 3**).

**Chart 3 – Number of modifications vs new cases referred to the IPC/PAC**



The EP&A Act includes several categories for modification to a consent, including:

- **4.55(1) - Those involving minor error, misdescription or miscalculation:** correction of administrative errors that have no substantive impact on the consent or its consequential impacts;
- **4.55(1A) - Those involving minimal environmental impact:** modifications that are substantially the same the original consented development; and
- **4.55(2) - Other modifications:** modifications which are substantially the same as the consented development but could have more than minimal environmental impact.

A strong argument has been made by many stakeholders that modification applications should not be referred to the IPC, for the following reasons:

- An approved State significant project has already been subject to a comprehensive assessment process under the EP&A Act

- The scope of modifications and their potential impacts is far more constrained (as it must be “substantially the same” as the original development) under section 4.55 of the EP&A Act than the former section 75W
- Procedural fairness has been provided for the originally approved project
- The IPC determination process inevitably results in delays yet provides little benefit given the minor nature of modifications under section 4.55 of the EP&A Act.

### Findings: Workload optimisation

This Review has found that the efficiency and effectiveness of the IPC in determining State significant developments within its existing resources is potentially diluted by:

- Applications being referred because they meet a quantitative threshold for objections, with no consideration as to the nature of those objections and the relationship between the objector and the area impacted by the development.
- The IPC being the consent authority for any modification to an approved development regardless of the consequences of that modification (some classes of modifications are essentially administrative changes and have minimal environmental impacts, and all must now be ‘substantially the same’ as the existing approved development in contrast to former section 75W modifications).
- The need to provide advice on development applications risks distracting from the IPC’s core function, which is to act as a consent authority for contentious State significant development applications.

### Recommendation 8: Workload optimisation

The role of the IPC should be more clearly focused on the determination of contentious State significant developments, allowing it to more effectively manage its workload by:

- a. Ensuring only projects that are sufficiently contentious or complex are referred to the IPC for determination by making the following amendments to clause 8A(1) of the *State Environmental Planning Policy (State and Regional Development) 2011* (or alternatively delegating those projects to DPIE to meet the same intent):
  - i. allowing councils to rescind their objections after a development has been exhibited (clause 8A(1)(a));
  - ii. changing the threshold for community objections (clause 8A(1)(b)) by, for example, a combination of:
    - (i) increasing the threshold for community objections (e.g. from 25 to 50);
    - (ii) requiring objections to be unique; and
    - (iii) requiring objectors to reside within a certain distance (e.g. 100km radius) of the development.
- b. Delegating modification applications to DPIE, other than those subject to reportable political donations (cf section 4.55 EP&A Act); and
- c. Discontinuing referrals to the IPC for advice (cf section 2.9(1)(c) EP&A Act) on the assessment of State significant development applications other than those related to functions of the Mining and Petroleum Gateway Panel.

## 4.2. Systems and processes

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The Secretariat plays a crucial role in assisting Commissioners and managing the IPC's workload. As acknowledged in section 3.5 of this report, the Secretariat is transitioning from the former PAC Secretariat. While most of the core policies and procedures for the IPC have been formalised and are available on the IPC's website<sup>23</sup>, there is still scope for further work in documenting internal operational procedures and establishing supporting ITC systems.

Much of the work on internal procedures is already underway, however the IPC is currently subject to an increased risk of procedural errors and delays. This risk is exacerbated by an almost complete turnover of staff, with the resulting lack of knowledge impacting on business continuity. These issues contributed to a procedural oversight in relation to the Rix's Creek South Continuation of Mining Project<sup>24</sup>, which resulted in the determination being withdrawn and then reissued.

During the course of this Review, the Productivity Commission has obtained data from the IPC and DPIE to evaluate the timeliness of decision-making and assessment of the State significant development applications. DPIE has recently implemented a cutting-edge project management and data records system known as the Planning Services Information Management System (PSIMS).

While the data from both the IPC and DPIE has provided valuable evidence, some areas for improvement have been identified to support more systemic and effective performance monitoring, evaluation and corporate planning. For example, once an application is sent to the IPC, the DPIE data management system calculates the application timeframes based on the stage of the project only and does not recognise a difference between DPIE or IPC timeframes.

The Review has been informed that the IPC has not been able to sufficiently invest in data curation, quality control and system development and maintenance. This means that the collection and analysis of the performance data relies on needs-based, ad hoc arrangements, which can be labour-intensive and susceptible to administrative errors.

### Findings: Systems and processes

The operations of the IPC could be improved by:

- Continuing the development of improved and more comprehensive internal IPC operational policies and procedures, prioritised according to business risk.
- The development of robust ITC systems to support the management of workloads and workflows, and performance reporting - preferably in the form of systems which leverage existing DPIE ITC infrastructure (i.e. PSIMS).
- IPC and DPIE continuing to develop a consistent approach to collecting, monitoring and interpreting performance data, which enables the evaluation of individual actors as well as the planning system as a whole.

<sup>23</sup> <https://www.ipcn.nsw.gov.au/policies>

<sup>24</sup> <https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2019/06/rixs-creek-south-continuation-of-mining-project-ssd-6300/statement-from-commission/191004statement-re-rixs-creek-south.pdf>

## Recommendation 9: Systems and processes

Support the efficient management of State significant development applications by:

- a. Continuing the development of more comprehensive internal policies and procedures, prioritised according to business risk;
- b. Developing robust ITC systems to support the management of workloads and workflows by the IPC (including building on and leveraging the existing DPIE Planning Services Information Management System (PSIMS)); and
- c. IPC and DPIE developing a consistent approach to collecting, monitoring and reporting of performance data.

### 4.3. DPIE assessment services

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Section 4.6 of the EP&A Act specifies that DPIE is to undertake a number of consent authority functions on behalf of the IPC:

*The following consent authority functions of the Independent Planning Commission are to be exercised by the Planning Secretary on behalf of the Commission—*

- (a) receiving development applications and determining and receiving fees for the applications,*
- (b) undertaking assessments of the proposed development and providing them to the Commission (but without limiting the assessments that the Commission may undertake),*
- (c) obtaining any concurrence, and undertaking any consultation, that the consent authority is required to obtain or undertake,*
- (d) carrying out the community participation requirements of Division 2.6,*
- (e) notifying or registering the determinations of the Commission,*
- (f) the functions under section 4.17 in relation to the provision of security,*
- (g) the determination of applications to extend the period before consents lapse,*
- (h) any other function prescribed by the regulations.*

The IPC and DPIE have a Memorandum of Understanding (MoU) which outlines how the parties will work together to fulfil their respective functions. This was most recently revised in September 2019.

Section 4.6(b) of the EP&A Act stipulates that DPIE is to undertake assessments of development applications on behalf of the IPC, without limiting any assessment that the IPC may undertake. As reflected within the MoU and the IPC's Statements of Reasons, it is not uncommon that the IPC undertakes its own detailed assessment of particular matters.

The Productivity Commission understands that the IPC generally uses DPIE's Assessment Reports as a starting point, and only undertakes further assessment where the Panel has identified a deficiency in the Assessment Report. To this end, the IPC has raised concerns about the level of detail and explanation underlying some of DPIE's findings. Several environmental groups have expressed concerns that DPIE's assessments are, in their view,

typically weighted in support of mining projects or overstate economic benefits, and a more detailed assessment by the IPC is appreciated in these instances.

In 2017, DPIE commissioned Lisa Corbyn to undertake a review of DPIE's Assessment Reports<sup>25</sup> (the 'Corbyn Report'). This Review has found that the main conclusions of the Corbyn Report still stand, i.e. that:

- *The overall approach needs to:*
  - *provide an evaluative report that quickly identifies priority issues and clearly lays out the logic and rationale for conclusions, including drawing clear linkages between the rationale and any proposed draft conditions;*
  - *value the input from communities, agencies and councils, based on genuine engagement with them, as well as with industry, business and proponents; and*
  - *achieve improved consistency in the approach across the different assessment teams, while recognising the diversity in scale and scope of the projects being assessed, with an emphasis on insights being provided from thorough and balanced analysis and evaluation.*
- *Providing the Department's conclusions improves transparency and need not unduly influence the independence of decision-makers.*

Preparing Assessment Reports for SSD projects is difficult as they must cover a wide range of issues and stakeholder views and distil a large volume of technical data into clear findings and recommendations. In general, DPIE Assessment Reports are well-structured, understandable and cover the statutory requirements. However, it is inevitable that questions will be asked about the findings of these reports. Certain issues are often highly contestable, and care is needed to identify the areas of uncertainty or potential debate.

Development applications and requests for advice are often referred to the IPC because of their inherent complexity. These cases are generally assessed, and often reassessed, by a range of experts, firstly as inputs to the proponent's EIS, then through DPIE's Assessment Report, community submissions, and finally the IPC's Statement of Reasons.

The IPC appears to seek further expert advice in situations where there is doubt – i.e. where a matter has either not been sufficiently examined to the satisfaction of the Panel, or where experts have divergent views.

Procurement of expert input must be managed carefully to avoid blowouts in assessment times. However, there is evidence that this is not always perceived to be being managed efficiently. A recent example occurred in the assessment of the Bylong Coal Project. A stakeholder noted in submissions to this review that the IPC sought third party reviews on groundwater and economics, despite reviews having been completed for DPIE as part of its assessment process. The IPC requested the independent groundwater advice in November 2018 and economics advice in December 2018. Following this, the IPC then sought

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<sup>25</sup> Corbyn, L. (2017) [NSW Department of Planning and Environment Assessment Reports: Independent Review – Final Report](#).

independent heritage advice on the revised project in May 2019, which was received in June of that year, some six months after the first set of independent advice was first requested.

Another example is the recent application for the Star Casino Modification, in which the IPC commissioned an expert to undertake a peer review of the view impact analysis prepared for DPIE, which in itself was an expert peer review of documentation provided by the Applicant. The advice commissioned by the IPC was opened to public comment, which led to the provision of further analysis and advice on this matter by the Applicant.

Some stakeholders have also noted that consultation undertaken by the IPC often appears to duplicate engagement undertaken by DPIE, and that this may cause unnecessary delays.

Stakeholders also suggested that timeframe benchmarks should be set for various stages and steps of IPC processes including the engagement of experts and that the IPC be held to these timeframes (see Recommendation 3).

While there is criticism that the IPC duplicates the DPIE's assessment and that this unduly impacts timeframes, the EP&A Act expressly allows for the IPC to undertake assessments. This is considered an appropriate safeguard which is essential to ensure that the IPC retains its intended independence and that its decisions appropriately consider all relevant matters.

#### Findings: DPIE assessment services

- Some stakeholders have suggested that the IPC duplicates aspects of DPIE's assessment function resulting in additional costs and delays.
- While this Review has found many examples where additional assessment has been undertaken by the IPC, section 4.6(b) of the EP&A Act expressly provides that the IPC can undertake further assessments.
- The IPC states that it only seeks further assessment in situations where there is doubt, i.e. where a matter has either not been sufficiently examined (to the satisfaction of the Panel), or where critical new information emerges.
- It is debatable as to whether the IPC's additional assessments should be construed as duplication and it is a matter of fact and degree depending on the project. In general, the IPC's ability to undertake further assessment should be seen as a reserve power for use by exception only, noting that this is dependent on the quality of DPIE's Assessment Report.
- The procurement of expert advice is expensive and can cause delays in the process. Where external expert advice is required, it would ideally be commissioned through DPIE (noting that there may be circumstances where this is inconsistent with the IPC's mission). To this end, it is important that the IPC has faith in the experts being commissioned to do this work.
- The risk of unnecessary duplication in assessment and resulting impacts on determination times needs to be carefully managed by the IPC (and DPIE as the service provider).
- The current IPC/DPIE Memorandum of Understanding is lacking in detail with respect to administrative arrangements and should be updated.

### Recommendation 10: DPIE assessment services

Minimise the need for further IPC assessment and potential delays by:

- a. DPIE adopting a service delivery approach when undertaking assessments and other consent authority functions for the IPC ('assessment as a service');
- b. Revising the IPC/DPIE Memorandum of Understanding to:
  - i. more explicitly set out how both parties will procedurally go about the execution of their respective functions; and
  - ii. set out key performance indicators for timing of DPIE's response to IPC requests for further information.
- c. Identifying and agreeing on independent experts to be drawn on by DPIE in undertaking assessments.

## 4.4. Public hearings

The IPC must hold a public hearing in relation to a State significant development application or any other planning matter when requested by the Minister for Planning and Public Spaces or, in limited circumstances, the Greater Sydney Commission. Unlike a public meeting, the Commission has no power to decide to conduct a public hearing under the EP&A Act, even when it is the consent authority.

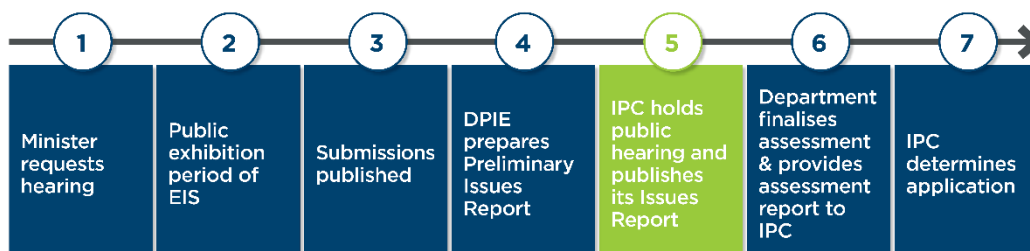
From a statutory perspective, the effects of the IPC holding a public hearing are:

- where the IPC is the consent authority, a merit appeal cannot be made to the Land and Environment Court
- where the application is designated development, the consent for that application (by the IPC or any other consent authority) will take effect immediately, rather than 28 days after determination.

Part 2 of Schedule 2 of the EP&A Act sets out the procedures for public hearings undertaken by the IPC. The IPC has also published two documents relating to the process - *Public Hearing Guidelines* (for single stage public hearings) and *Guidelines for a Public Hearing Held in Multiple Stages*.

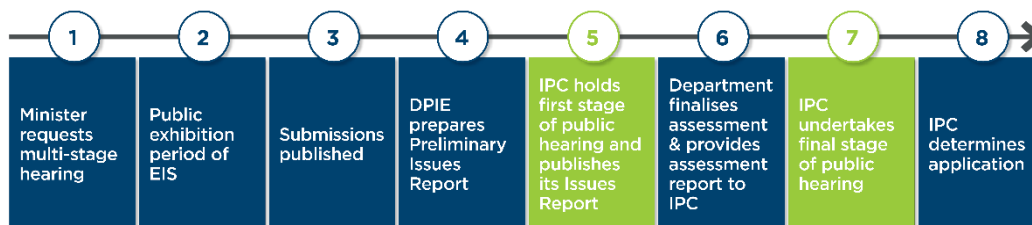
Single stage public hearings typically take place during the assessment stage of a project, when the project is still under the administration of DPIE (see **Figure 1**).

**Figure 1 – Single stage public hearing process**



A multiple stage public hearing will only be held if the IPC is requested to do so by the Minister and is a type of public hearing that is held in more than one stage. Each 'stage' involves a 'town hall' style forum, which is directed to particular aspects of the application under consideration. Together, these stages form one public hearing (see **Figure 2**).

**Figure 2 – Multiple stage public hearing process**



The initial stage centres around DPIE's Preliminary Issues Report, based on DPIE's preliminary review of the application and submissions following public exhibition. It presents an opportunity for the applicant, DPIE, and the public to present views to the IPC on the application as exhibited.

The final hearing stage centres around how the key issues are being addressed through changes to the proposal or draft conditions of consent. Consideration of the final stage of the public hearing is captured in IPC's final Statement of Reasons for Decision.

The IPC has completed one multiple stage public hearing for the Vickery Extension Project and has referred one multiple stage public hearing back to DPIE (Tahmoor South Coal Project). While their usage has so far been limited, issues have already been expressed with respect to multiple stage hearings to this Review. These concerns relate to inefficient duplication of processes, and consequent delays.

A number of submissions have been provided to this Review which relate to general concerns about the effectiveness of current public hearing processes, including:

- that the amount of time given to individuals to speak is not always commensurate with the gravity of the information being presented or the potential impact suffered
- that the IPC simply receives information as opposed to examining issues in detail, limiting open discussion about the merits of the information being presented - i.e. there is no cross-examination
- in addition to the above point, that given the extinguishment of appeal rights as a result of holding a public hearing, the process should be more inquisitive as it does not currently offer an appropriate substitute to a court process
- inconsistency with the operation or administration of public hearings, for example the use of legal counsel in certain cases but not in others
- poor administration processes such as inconsistent communication, changes in dates and times at short-notice, inappropriate meeting times, and insufficient facilities to assist those who cannot attend in person
- that the system is being manipulated by opponents of development who leverage the process to delay decisions (particularly where there are multiple opportunities for public comment – potentially resulting in endless feedback loops).



Despite these stakeholder concerns with specific process issues, there is broader public support for holding public hearings. This has been reflected in submissions which positively note the opportunity that public hearings provide with respect to procedural fairness and encouragement of community feedback.

These concerns have been considered by this Review against the practices of several other national and international jurisdictions to identify whether an accepted best practice exists for holding public hearings<sup>26</sup>. While this review identified very different approaches, several overlapping themes prevailed:

- the importance of public hearings is recognised internationally and is related to procedural fairness and due process
- early and comprehensive notice of a public hearing is vital
- it is important to appropriately allocate time to speakers to avoid more minor issues taking time away from more significant issues
- there is a general intent to structure discussions around relevant themes
- questions to speakers are mostly provided by or through a panel, Chair, or similar.

Of note, there are some standout contrasts to IPC practices in relation to stricter allocation of time for speakers, and the rigour and interrogation of information being presented in a hearing. For example, the Greater London Authority allocates equal time to both supporters and objectors of a proposal. It is then expected that these groups coordinate amongst themselves to determine how this time is used most effectively. This avoids issues being repeated by multiple speakers and provides even weighting to the presentation of issues for and against a proposal. The Greater London Authority also restricts the scope of what witnesses can speak to and states that speakers are not to refer to non-planning matters. Planning Panels Victoria (PPV) and the State of New York<sup>27</sup> also allow for more interrogative questioning, moderated by a Chair (or similar).

### Findings: Public hearings

- Public hearings increase transparency, allow the community to participate in the decision-making process and present the IPC with an opportunity to understand stakeholder issues.
- The process could be further improved with respect to:
  - strict provision of time to both proponents and submitters
  - ensuring that trivial matters are not given undue time
  - greater interrogation of the evidence presented
- The multi-stage hearing process has not demonstrably added value to the assessment process and further complicates and delays the assessment process.

### Recommendation 11: Public hearings

Improve public hearings by reverting to a single stage hearing process only and facilitating a more interrogative hearing process.

<sup>26</sup> The Productivity Commission undertook a review of public hearing processes in New Zealand, California, British Columbia, Greater London, New York, and Victoria.

<sup>27</sup> [https://www.dos.ny.gov/lg/publications/conducting\\_public\\_meetings\\_and\\_public\\_hearings.pdf](https://www.dos.ny.gov/lg/publications/conducting_public_meetings_and_public_hearings.pdf)

## 4.5. Decision-making

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### 4.5.1. Clarity and certainty of policies and guidelines for decision-making

While most IPC determinations do not attract much attention, there has been high-profile criticism about the IPC in relation to its interpretation and application of Government policies and perceived inconsistency in decision-making.

Most of the criticisms of the IPC's interpretation of policy relate to certain policy areas where there are gaps or lack of clarity. Examples include the treatment of greenhouse gas emissions, agricultural land and groundwater impacts for mining projects.

In particular, there have been several recent coal mining determinations where the IPC has addressed greenhouse gas emissions following the Land and Environment Court's 'Rocky Hill' decision<sup>28</sup> in February 2019. The Court's decision established a model for the consideration of greenhouse gas emissions and impacts on climate change under the EP&A Act. While not a legal precedent, this decision resulted in substantially increased scrutiny on subsequent IPC coal mining determinations.

The United Wambo Open Cut Coal Mine Project<sup>29</sup> was approved by the IPC in August 2019, subject to conditions which related to the management of 'Scope 3' greenhouse gas emissions – *“As identified by the Applicant, Scope 3 GHGs would also be minimised as far as practicable, as the most likely export destinations for the Project's coal will be to countries that are a party to the Paris Agreement or that otherwise have equivalent domestic policies for reducing GHGs. Accordingly, the proposed Scope 3 Conditions are imposed to implement this, as set out in paragraph 306.”*<sup>30</sup> Notably, these conditions were imposed despite advice from the Secretary of DPIE which indicated *“There is no policy at either the State or Commonwealth level that would support the imposition of conditions on an applicant to minimise the scope 3 emissions of its development proposal.”*<sup>31</sup>

A proposed 5-year extension as part of a modification to an existing approval for the Dartbrook Coal Mine was refused by the IPC in August 2019. Three of 15 reasons provided by the Panel for the refusal<sup>32</sup> related to *“the information provided up to this point regarding greenhouse-emissions-related impacts and the appropriateness of the methodology for estimating the social and economic costs of the projected emissions is unsatisfactory”*<sup>33</sup>.

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<sup>28</sup> Gloucester Resources Limited v Minister for Planning [2019] NSWLEC 7

<sup>29</sup> United Wambo Open Cut Coal Mine Project SSD 7142 and MOD3 & MOD16.

<sup>30</sup> <https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2018/11/united-wambo-open-cut-coal-mine-project-ssd-7142/determination/uwjv--sor--final.pdf>

<sup>31</sup> <https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2018/11/united-wambo-open-cut-coal-mine-project-ssd-7142/correspondence-between-dpie-and-the-Chairperson-of-the-commission/198015inmarcus-raydpie-re-united-wambo.pdf>

<sup>32</sup> <https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2019/02/dartbrook-coal-mine-modification-7/determination/dartbrook-coal-mine-mod-7--statement-of-reasons-for-decision.pdf>

<sup>33</sup> <https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2019/02/dartbrook-coal-mine-modification-7/determination/190809dartbrook.pdf>

The IPC subsequently refused the Bylong Coal Project in September 2019. The IPC set out a number of reasons for this decision<sup>34</sup>, including that the applicant had “*not minimised greenhouse gas emissions to the greatest extent practicable*”, referencing clause 14 of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*.

Finally, Rix’s Creek South Mine was approved in October 2019 with no conditions on Scope 3 emissions. The IPC’s Statement of Reasons noted that “*The Commission accepts the Applicant’s view on assigning responsibility for Scope 1, 2 and 3 emissions with the Applicant undertaking to do all it can to minimise Scope 1 and relevant Scope 2 emissions and with Scope 3 emissions being the responsibility of the end customer for coal export. As noted in paragraph 330, the consumption of coal in countries that are signatories to the Paris Agreement or have other GHG reduction targets in the export countries should lead to minimised Scope 3 emissions from the Project to the greatest extent practicable.*”<sup>35</sup>

While these decisions led to different outcomes, and signalled a new approach to Scope 3 emissions, they were not in breach of any statutory or government policy framework. This Review notes that the policy uncertainty highlighted by the Land and Environment Court and IPC decisions triggered the introduction of a Bill to the NSW Parliament in October 2019 to “*prohibit the imposition of conditions of a development consent that purport to regulate any impact of the development occurring outside Australia or any impact of development carried out outside Australia.*”<sup>36</sup>

However, greenhouse gas emissions appear to be just one area where policy uncertainty or claims of inconsistency in decision making are causing uncertainty in the mining industry. The Productivity Commission was also advised of issues with respect to the treatment of Biophysical Strategic Agricultural Land through engagement on this Review.

#### **4.5.2. Achieving a common interpretation of the law**

The Productivity Commission notes a number of instances where the IPC and DPIE have applied different legal interpretations.

As an independent entity, the IPC seeks its own legal advice on matters relevant to the execution of its functions. However, in situations where advice is required on matters such as interpretation of legislation or application of government policy, it would generally be preferable for this advice to be sought jointly with DPIE. This would allow the parties to:

- a) avoid duplication;
- b) discuss the resulting advice without waiving privilege; and
- c) maintain consistency in interpretation.

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<sup>34</sup> <https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2018/10/bylong-coal-project/determination/bylong-coal-project-ssd-6367--statement-of-reasons-for-decision.pdf>

<sup>35</sup> <https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2019/06/rixs-creek-south-continuation-of-mining-project-ssd-6300/determination/191012-rixs-creek-ssd-6300-sor.pdf>

<sup>36</sup> <https://www.legislation.nsw.gov.au/bills/f83226b3-493b-444d-b370-c83197ac7fa7>

Procuring separate advice has the potential to result in communication gaps, inconsistent practices as well as undermining the cooperation that is required to effectively and efficiently determine development applications.

### 4.5.3. Timeliness

A range of stakeholders have raised concerns about a lack of responsiveness and overall delays in IPC processes. Key industry bodies (such as the Property Council of Australia, NSW Minerals Council and Urban Taskforce) highlighted that delays in IPC processes can increase overall development costs and deter investment.

The IPC has acknowledged that timeliness is a major concern, and notes that timeframes have been affected by high workloads, a lack of appropriate skills and resources, and workplace culture issues. The IPC Secretariat is currently being restructured to bring in appropriate capabilities and develop a focus on high performance.

There have been various issues raised during consultation as contributing to delays in IPC processes, including:

- problems with organisation of public hearings and public meetings (and associated notification)
- requests for clarification on DPIE's assessment reports
- requests for additional information from the proponent
- requests for additional advice from independent experts or other agencies
- regular seeking of legal advice (both internally and from external counsel)
- re-exhibition of additional documents and further community consultation on those documents, and
- preparation of long, detailed Statements of Reasons.

Given the multitude of factors that affect IPC timeframes, it is difficult to quantify and attribute delays to specific causes with the available statistical data. However, DPIE has collected and recorded a reliable set of data about assessment timeframes over the past five years that allows a high-level analysis of timeframes.

Based on DPIE's data, it is clear that commission timeframes (both the PAC and IPC) have substantially increased over the past five years. The timeframes have also noticeably increased since the establishment of the IPC.<sup>37</sup>

The data shows that the average number of days for the NSW government (both DPIE and IPC) to make a decision (i.e. 'end-to-end timeframes') has increased by 105 days (from 449 to 554 days) over the last 5 years. DPIE has reduced its average time by 60 days (from 182

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<sup>37</sup> The IPC has noted that some of the increase in timeframes could be attributed to DPIE, for example, when the IPC has requested clarification on DPIE's assessment reports. The DPIE data does not differentiate time spent with the IPC versus DPIE after an application has been referred to the IPC. It does, however, differentiate between time spent with the IPC versus the proponent.

to 122 days) during that period, while the IPC has increased its average time by 28 days (from 45 to 73 days).

The majority of the increase in the overall end-to-end timeframes is accounted for by the time that the application is back with the proponent for additional information. This has ranged from 223 days to 439 days over the past 5 years. This represents a significant proportion of the end-to-end timeframes, ranging from 49 per cent to 71 per cent over the past five years.

Importantly, there was a marked increase in commission timeframes after the establishment of the IPC – the commission's time increased by 35 days (from 38 to 73 days) from 2017-18 to 2018-19. That represents a substantial proportional increase (16 per cent) in the number of IPC days compared to the overall government days – in 2017-18 the commission's time was 21 per cent of the total government days, while in 2018-19 the IPC's time was 37 per cent of the total.

DPIE's reduction in its timeframes over the past five years has been attributed to a concerted effort to achieve a commitment under the NSW Government State Priorities to halve assessment timeframes for State significant development applications. During this period, DPIE has strived to establish a culture of delivery that is heavily focussed on achieving key performance indicators (KPIs). As part of this process, DPIE has developed software (PSIMS) to track performance (with 'traffic light' dashboards) and is required to report regularly on its performance against KPIs.

The IPC would benefit from adopting a similar approach to timeliness that is based on setting clear KPIs, closely tracking its timeframes, and regularly reporting on its performance against KPIs. In order to achieve this, the IPC should adopt a risk-based, proportional approach that is focussed on the key determinative issues. It should focus any requests for further information on issues that are material to the decision and avoid unnecessary rounds of investigation in response to additional information.

While it is important that the IPC maintains its independence and is not unduly rushed in performing its functions, the IPC should still be required to commit to reasonable timeframes and report on its performance. That is important for providing certainty to investors and generally improving confidence in the planning system. There will inevitably be exceptional circumstances where delays cannot be avoided, and these should be explained through a regular reporting mechanism.

#### **4.5.4. Statement of Reasons**

Since its establishment, the IPC has taken steps to adopt a more legally robust approach. For example, the IPC engaged a barrister to prepare a template report for its determinations (now known as a 'Statement of Reasons') and regularly seeks external legal advice on various issues.

Some of these changes have been beneficial in terms of promoting openness, transparency and independence. However, the Statement of Reasons has become increasingly legalistic in style and it can be difficult for members of the community to understand the planning

merits of decisions. This is concerning given that the statutory basis for “giving reasons” is under the Community Participation schedule of the EP&A Act.

For example, the structure of these reports largely reflects the order of statutory considerations, which means the issues are generally not listed in order of priority. Further, the Statements of Reasons do not have an Executive Summary or contents page and the accompanying media release may not provide enough information to clearly outline the IPC’s reasons for its determination.

## Findings: Decision-making

### *Clarity and certainty of policies and guidelines that inform determinations*

- Policies and guidelines will never be perfect or complete. The decision-making process needs to accommodate this imperfection while recognising the clear separation of parliamentary versus executive functions in our democracy (the Minister sets the rules and the IPC applies the rules).
- Most of the criticisms of the IPC’s interpretation and application of policy relate to difficult policy areas where there are gaps or uncertainties.
- The IPC needs a clear mechanism through which it can seek clarification of the Government’s policy intent, with an option to escalate issues to the Minister, through the IPC Chair.

### *Achieving a common interpretation of the law*

- As an independent entity, the IPC needs to seek its own legal advice on matters relevant to the execution of its functions. However, where advice is required on matters such as interpretation of legislation or application of government policy it would be preferable for this advice to be sought jointly with DPIE. This would allow the parties to:
  - avoid duplication;
  - discuss the resulting advice without waiving privilege; and
  - maintain consistency in interpretation.
- Procuring separate advice has the potential to result in communication gaps, and divergent practises which could erode the cooperation that is required to effectively and efficiently determine State significant development applications.

### *Inconsistency and Uncertainty*

- Some stakeholders have raised concerns about a perceived inconsistency in the IPC’s decision-making, which potentially increases uncertainty and discourages investment. This criticism is difficult to substantiate given that IPC decisions relate to the merits of an individual development and the particular circumstances of those developments are inherently different.

- The risk of inconsistency can be mitigated by:
  - careful selection and training of Commissioners (Recommendation 5);
  - good policies and procedures (Recommendation 9);
  - consistent and high quality DPIE assessment reports (Recommendation 10);
  - high quality Secretariat support (Recommendation 6);
  - oversight by the Chair (Recommendation 4); and
  - feedback loops and continuous improvement mechanisms (Recommendation 12).

#### *Timeliness*

- There are significant concerns that the IPC's timeframes have increased in recent years, which can cause uncertainty for investors and undermine the integrity of the planning system.
- The data shows that the commission (both PAC and IPC) timeframes have increased over the past five years, with a noticeable step change since the establishment of the IPC in 2018.
- DPIE has improved its timeliness over recent years through the development of a delivery culture with clear performance measures and improved systems.
- The IPC should adopt a similar approach that is based on setting clear KPIs, closely tracking its timeframes, and regularly reporting on its performance.

#### *Statement of Reasons*

- The IPC's Statement of Reasons has become an increasingly legalistic and lengthy document. This can make it difficult for stakeholders to understand the IPC's decisions.
- Stakeholders are likely to be more confident in the processes and decisions of the IPC if Statements of Reasons are clear, readable, and the considerations and reasons for decisions can be interpreted by a member of the general public.
- For example, the structure of these reports largely reflects the order of statutory considerations, which means the issues are generally not listed in order of priority.
- Further, the Statements of Reasons do not have an Executive Summary or contents page and the accompanying media release may not provide enough information.
- Long, legalistic determinations are potentially more open to legal challenge and could therefore undermine the IPC's objectives.

## Recommendation 12: Decision-making

The following improvements should be made to assist in the rigour and timeliness of decision-making:

- a. Establish a protocol to ensure significant questions of policy uncertainty can be raised and resolved effectively, while ensuring the transparency of the process and the separate roles of the IPC, DPIE and the Minister are respected.
- b. Where appropriate, the IPC should obtain legal advice jointly with DPIE to facilitate consistency in interpretation (particularly in regard to statutory interpretation).
- c. Promote a culture focussed on quality and timeliness, including:
  - i. Adopting a risk-based approach;
  - ii. Setting clear performance measures (see Recommendation 3);
  - iii. Closely tracking timeframes (see Recommendation 9); and
  - iv. Regularly reporting on performance and identifying opportunities for improvement.
- d. The IPC should consider simplifying and shortening its Statements of Reasons, including:
  - i. focusing on the key issues on which the determination was based.
  - ii. clearer communication (plain English), minimising legal jargon.
  - iii. avoiding reproduction of the assessment report and other material.
- e. Implement feedback loops and continuous improvement mechanisms, including:
  - i. oversight by the Chair (see Recommendation 4), including the opportunity for the Chair to comment on, but not over-rule IPC Panel decisions.
  - ii. in-camera post-determination debrief meetings between Commissioners, the Secretariat and DPIE and reflecting any learnings in revised policies, procedures and training (as appropriate).



# Appendices

Appendix A: History of the IPC

Appendix B: Previous Reviews

Appendix C: Cross-jurisdictional research

Appendix D: Terms of Reference

## Appendix A: History of the IPC

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Since the EP&A Act commenced in 1980, there has always been an independent body established under the legislation with comparable functions to the IPC. The role of these independent bodies has evolved over time from the Commissioners of Inquiry, to the Planning and Assessment Commission (PAC), to the current IPC.

The Commissioners of Inquiry was an advisory body with no decision-making powers. The Minister was the consent authority for all SSD-equivalent applications, and public hearings were held in conjunction with the independent review of some SSD-equivalent projects.

The PAC was a statutory body that commenced operation on 3 November 2008 as part of a response to an ICAC report entitled *Corruption Risks in NSW Development Approval Processes*. The NSW Government described the PAC as “a new decision-making body which will provide an independent, alternative determination authority for applications of state significance”.

In June 2008, the NSW Government advised that “the Minister will delegate the majority of ministerial-level determinations to the PAC, excluding applications for critical infrastructure and other key projects of State significance”. It was observed that this proposal “is consistent with the ICAC’s recommendation, which calls for greater transparency in relation to developments for which the Minister is the consent authority”. The then Minister for Planning Frank Sartor also publicly stated that he expected that 80 per cent of Part 3A projects would be referred to the PAC for determination.

In December 2008, Kristina Keneally, then Minister for Planning, issued a general delegation to the PAC that provided for the determination of the following classes of application:

- in relation to which a statement has been made disclosing a reportable political donation;
- in relation to the carrying out of development within the boundaries of the State electoral district represented by the Minister (where the Minister is a member of the Legislative Assembly); or
- in relation to the carrying out of development in which the Minister has a pecuniary interest.

In 2011, there was a ‘step-change’ in the role and purpose of the PAC as it was given the power to determine certain SSD projects (under delegation from the Minister).

While the number of reviews (and public hearings) has remained relatively steady since 2008, the volume of work that the PAC undertook increased dramatically after 2011 due to the determination delegation for certain SSD projects.

This change also created a tension between the two roles of the PAC resulting in changes to the nature of reviews. To avoid being accused of prejudging the final decision on applications, the PAC gradually moved away from making any findings on the merits of projects during reviews and concentrated primarily on identifying matters requiring further

information or assessment. The 2012 review of the planning system<sup>38</sup> proposed that an independent body should determine whether or not approval should be given to State significant/major development proposals. It suggested that the former PAC should be renamed as the Planning Commission and that there should be separate legislation to establish it, to be known as the Planning Commission Act. This legislation would set out the membership, functions, structure and processes for this body.

The 2017 planning reforms proposed the following:

***'Independent Planning Commission***

*The name of the Planning and Assessment Commission will be changed to the Independent Planning Commission (see Schedule 2.1[1], clause 2.7 on page 9 of the Bill). This reflects the independent, expert nature of the Commission and the fact that its role is primarily one of determining State significant proposals, rather than providing advice.*

*To support this, the Commission will no longer have a statutory function to review development proposals. As the determining authority, it will guide assessments undertaken by the Department, to ensure that these assessments take into account all issues the Commission wishes to consider. This will result in resource and time savings, with no reduction in assessment rigour.*

*An initial assessment of the effect of the proposed changes indicates potential savings of between 70 and 160 days per proposal, depending the proposal's complexity.*

*To emphasise the independent and determinative role of the Commission, and provide greater certainty to industry and the community, the State Environmental Planning Policy (State and Regional Development) 2011 will prescribe the types of State significant proposals that are to be determined by the Commission.<sup>39</sup>*

The NSW Government ultimately undertook to establish the IPC in place of the PAC as part of the 2017 planning reforms and the *Environmental Planning and Assessment Amendment Bill 2017*.

A key objective of the 2017 Bill was to build community confidence in the planning system by enhancing the probity and accountability of decision-making. This was intended to occur through improving transparency and balance in assessment and determination processes, and the independence and expertise of the decision-makers. The Government's intent has not changed.

In 2018, the EP&A Act was amended to:

- establish the IPC;
- make it a consent authority in its own right for certain SSD applications; and
- remove reviews from the list of functions of the IPC.

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<sup>38</sup> The Way Ahead for Planning in NSW | Recommendations of the NSW Planning System Review | Volume 2 – Other Issues | June 2012

<sup>39</sup> <https://www.planning.nsw.gov.au/-/media/Files/DPE/Other/summary-of-proposals-2017-01-09.pdf?la=en>

Consequently, the IPC is now formally recognised as a decision-making body. While this is different to the advisory focus of the Commissioners of Inquiry and the original PAC, in practice the focus on determinations had already occurred at the PAC since 2011.

The IPC currently comprises the Chair and 29 Commissioners. The Commission is supported by a Secretariat, which is led by an Executive Director and 13 support staff. At the time of this review, the Secretariat was undergoing an organisational restructure.

## Appendix B: Previous Reviews

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### 2010 ICAC Report

In 2010, ICAC published a report titled '*The Exercise of Discretion Under Part 3A of the Environmental Planning and Assessment Act 1979 and the State Environmental Planning Policy (Major Development) 2005*'.

This report acknowledged the then Planning Assessment Commission (PAC) played an important role in the NSW Planning System to safeguard against potential corrupt conduct. ICAC found that the opportunity for a person to approach PAC members corruptly is comparatively limited as it is generally not known far in advance which PAC members will be allocated to a given matter. However, ICAC formed a view that the opportunity to 'groom' PAC members would increase over a long period of time, and the pool of PAC panel members would become well known. For these reasons, ICAC recommended:

- That the tenure of members of the PAC, including opportunities for reappointment, be limited to two terms, and that PAC members be prohibited from reappointment to the PAC after this period has expired (Recommendation 2); and
- That the ability of the NSW Minister for Planning to appoint and dismiss members of the PAC be subject to Parliamentary scrutiny or other independent scrutiny (Recommendation 3).

Further, ICAC also found that the delegation of power to determine applications was reliant on the Minister's discretion, which could be removed at any time. The discretion of the Minister to remove a particular development or class of development from the jurisdiction of the PAC was deemed undesirable, as such an act could give rise to a perception of corrupt conduct. Accordingly, ICAC recommended:

- That the NSW Government amends the *Environmental Planning and Assessment Act 1979* to provide that the Planning and Assessment Commission (PAC) will be the determining body for the three classes of applications contained in the general delegation to the PAC that was issued by the then NSW Minister for Planning in December 2008 (Recommendation 5).

Finally, ICAC anticipated that a more fundamental review of the PAC's governance arrangements would be required if the role of the PAC is enhanced in accordance with the ICAC's recommendations. In line with this view, ICAC recommended:

- That the NSW Government undertakes a fundamental review of the Planning and Assessment Commission's (PAC) governance arrangements. The review should include, but not be limited to, the possibility of giving the PAC quasi-judicial status and appointing its members on a full-time basis.

### 2012 ICAC Report

In 2012, ICAC published another report titled '*Anti-Corruption Safeguards and the NSW Planning System*'. This report has considered the corruption risks throughout the NSW Planning System as a whole, rather than focusing specifically on the PAC. However, this report has made a number of findings and recommendations that are important in the

context of this Review. In particular, the report identified six key corruption prevention safeguards, including:

1. Providing certainty;
2. Balancing competing public interests;
3. Ensuring transparency;
4. Reducing complexity;
5. Meaningful community participation and consultation; and
6. Expanding the scope of third-party merit appeals.

The Productivity Commission has considered that these are still relevant guiding principles for the IPC, although it has limited capacity to influence safeguards 1, 4 or 6 given its role as a consent authority. Further, the Productivity Commission has found the following recommendations of the ICAC report are relevant to the current Review:

- That the NSW Government ensures discretionary planning decisions are made subject to mandated sets of criteria that are robust and objective (Recommendation 1);
- That the NSW Government continues to ensure that adequate oversight safeguards are in place for the assessment and determination of development applications that propose prohibited uses (Recommendation 3);
- That the NSW Government ensures that its system for assessing and approving developments of state significance provides adequate opportunities for competing public interests to be considered (Recommendation 7);
- That the NSW Minister for Planning and Infrastructure considers adopting a protocol to deal with situations where the minister disagrees with a departmental recommendation concerning a planning matter. The protocol should ensure that any decision by the minister to adopt an alternative approach, and the reasons for such a decision, are clearly documented and made publicly available (Recommendation 8); and
- That the NSW Government ensures that planning authorities are required to provide regular information and updates to the public about development applications under assessment, including any significant changes made to an application (Recommendation 15).

## **2017 Auditor-General's Report**

In 2017, the NSW Auditor-General undertook a performance audit into the PAC to assess the extent to which the PAC's decisions on State significant development applications were made in a consistent and transparent manner. In particular, the Auditor-General considered whether the PAC:

- had sound processes in place to help it make decisions on State significant development applications that are informed and made in a consistent manner; and
- had sufficient mechanisms to ensure its decisions are free from bias and transparent to stakeholders and the public.

The Auditor-General found that the PAC had improved its decision-making process. It had also improved how it consulted the public and managed conflicts of interest and started to publishing records of its meetings with applicants and stakeholders.

However, the Auditor-General identified there were still some vital issues to be addressed to ensure it makes decisions in a consistent and transparent manner. Most importantly, the PAC was not able to show in every decision the Auditor-General reviewed how it met its statutory obligation to consider the matters in section 79C of the EP&A Act.

Further, despite improved probity measures put in place by the PAC, there was a perception among some stakeholders that it was not independent of the then Department of Planning and Environment (DPE). The reasons for some of these concerns were outside of the PAC's control. For example, the PAC became involved after the DPE had prepared an assessment report which recommended whether a development should proceed. This had created the perception that the Commission was acting on the recommendation of the DPE. The Auditor-General expressed a view that DPE's assessment report should state whether an application meets relevant legislative and policy requirements, but not recommend whether a development should be approved or not.

The Auditor-General concluded that more could be done to improve transparency in decision-making and the public's perception of the independence of Commissioners. The Auditor-General recommended that the PAC should:

- improve transparency by publishing on its website a summary of the Commissioners' conflict of interest declarations for each development application referred to the Commission for determination, and how any conflicts were handled;
- keep better records of how it considers each matter under section 79C of the EP&A Act for all decisions it makes on major development applications;
- improve the public's involvement in public meetings by:
  - a) identifying and implementing additional mechanisms to notify the community of public meetings to ensure as many interested parties are advised as possible; and
  - b) allowing the chair of decision-making panels discretion to extend the time allowed for individual speakers beyond five minutes.
- improve how it communicates the reasons for its decisions to the public by:
  - a) including a summary in its reports of the issues raised during the consultation process and how they were considered by the PAC;
  - b) clearly outlining in its reports how any conditions placed on a development will address the issues raised;
  - c) detailing in its reports how section 79C of the EP&A Act has been addressed; and
  - d) issuing fact sheets to accompany its reports for all decisions where public meetings were held.

- work with the DPE to:
  - a) develop an agreed approach to presenting the DPE’s views in its assessment reports on whether the project meets relevant legislative and policy requirements, reflecting the PAC’s status as an independent decision-maker; and
  - b) refer applications to the PAC earlier in the process to ensure the DPE’s assessment report covers matters that Commissioners consider important when assessing projects under section 79C of the EP&A Act.

## 2017 Corbyn Review

The Department of Planning and Environment commissioned Lisa Corbyn - former head of the Environment Protection Authority and the Department of Environment, Climate Change and Water - to conduct an independent review of the Department’s assessment reports for State Significant projects. Ms Corbyn made 15 recommendations to strengthen and improve the Department’s assessment reports.

## 2018 Kaldas Review

In 2018, Nick Kaldas APM delivered a final report on the ‘Review of Governance in the NSW Planning System’ (Kaldas Review). While this was a broad review of the NSW Planning System as a whole, Kaldas Review has identified two key issues that are relevant to the current Productivity Commission’s Review of the IPC, namely the IPC’s public hearing and secretariat support.

Firstly, Kaldas Review considered an issue of the extinguishment of merit appeal rights when a public hearing is held in respect of a State significant development application referred to the IPC. Kaldas Review has acknowledged stakeholder concerns that extinguishing third party appeal rights “disempowers disaffected community groups and expresses the view that it deprives the public of the benefit of good decision-making in environmental matters and consequently serves to undermine the integrity of the planning system”. Further, Kaldas Review has noted that the ICAC has recommended on several occasions that third party appeal rights should be expanded to improve transparency and accountability of planning decisions.

However, Kaldas Review has also identified important benefits provided by the IPC’s public hearing, as opposed to a court hearing, including:

- significantly reduced costs with an IPC hearing, particularly for the community, when compared to the cost of court litigation;
- a greater opportunity for community participation at an IPC hearing, as more people have face to face contact with the IPC than would be available in a merit appeal;
- The IPC hearing process results in an independent, publicly-available report from the IPC. Unlike the court, IPC can recommend further investigation and assessment of matters before a proposal is determined; and
- The IPC hearing also provides a quicker process and outcome.

On balance, Kaldas Review concluded that it may not be inappropriate to extinguish the merits review process if an issue has already been before an IPC public hearing. Kaldas



Review further noted it would seem a waste of public resources to have a matter also reviewed by the courts once the IPC has decided on it. Further, Kaldas Review has found that the decision to direct the IPC to hold a public hearing properly resides with the Minister and is determined on a case-by-case basis, having regard to the complexity of a matter and the level of public interest.

Secondly, Kaldas Review has considered whether the IPC has been provided with the right level of support from its secretariat. Kaldas Review has noted a fact that the secretariat staff are employed by DPE, rather than the IPC, and therefore, at some stage, may be expected to return to their home agency. Kaldas Review has identified that this has raised as an issue that impacts on the independence, both real and perceived, of the IPC.

In light of its finding, Kaldas Review recommended the Chair of the IPC to liaise with the Secretary of the DPE to enshrine and clarify the independence of the IPC and its staff. Kaldas Review further recommended that the Secretary and the Chair should consider a contemporary Memorandum of Understanding to achieve that objective.

## Appendix C: Cross-jurisdictional research

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### Australian jurisdictions

The majority of states across Australia operate under a planning system in which separate bodies, agencies, or departments each undertake differing levels of assessment of development applications and planning scheme amendments. However, the mechanics of each of these bodies is quite different. A comparison of the states' planning commissions/authorities, separate to the core government planning department, is shown in **Table 4**, which appears on the last page of this section.

As demonstrated in **Table 4**, there is no one model that is followed exactly by any two states. Considering the core aspect of development or planning scheme assessment, whilst most of the bodies investigated play an advisory role to government, determination powers vary. Those states whose planning commissions have a determining role, similar to the IPC, include:

- South Australia, in which the State Commission Assessment Panel (SCAP) can assess and determine applications as prescribed under the relevant Act, such as those with a significant regional impact;
- The Western Australia Planning Commission (WAPC) which has technical determination powers for a range of large application types, as well as an advisory role to government on a number of land use planning and land development matters.

The WAPC nevertheless typically delegates its determination roles to other agencies, such as independent Development Assessment Panels (DAP), particularly for lower scale development. Such panels have a determination role, report directly to the Minister, and are made up of a range of specialist members with expertise across several fields.

The independent bodies in Victoria, Northern Territory and Tasmania do not make decisions on planning matters, and provide an advisory role instead, similar to the original operation of the PAC. Further, in the case of Planning Panels Victoria (PPV), recommendations are more commonly related to planning scheme amendments as opposed to assessment of development applications, which are typically determined by the Minister. Nevertheless, PPV also review the equivalent of state significant developments prior to assessment and determination by others.

Despite nuanced differences, there is general similarity in the scale and quantity of matters managed by each state's independent bodies. Assessment or review is generally for projects above a certain monetary threshold, of a significant or contentious nature, or where there are potential conflicts.

Common to all states other than the ACT, is that a review of either the planning system or the independent planning bodies more specifically has recently taken place. Some key themes have emerged regarding issues across the planning systems, common to all jurisdictions, that the reviews have intended to address:

- increasing accountability and transparency;
- improving efficiency, streamlining processes, reducing delays;

- better coordination of various bodies involved in planning systems;
- making planning systems easier to understand;
- creating a system that is more strategic/ forward looking;
- increased community engagement in planning system; and
- balancing commercial and community interests.

These matters are all linked to issues and concerns also expressed by stakeholders within the NSW planning system, and it is notable that the establishment and operations of the IPC is one measure implemented in NSW in order to respond to some of these issues.

In summary, the existence of an independent body providing advice on or determinations of planning matters is not unique to NSW, when looking elsewhere in Australia. However, the exact combination relating to core role, thresholds for referral, determination powers, and number of commissioners or members make the IPC distinctive.

### **Other common law jurisdictions**

As part of this review, a desktop analysis of Canada, New Zealand, and United Kingdom planning processes was undertaken to understand whether comparable bodies to the IPC exist in these common law jurisdictions.

The planning system of these jurisdictions generally includes local plan-making and development determination as a local authority responsibility, with determination of significant developments by higher officials, which is broadly similar to NSW. However, limited evidence of a standalone agency, established to independently make or review planning decisions on a regular basis separate to the bureaucracy, other than certain cases in New Zealand.

In New Zealand, there are two cases where an independent determination body becomes involved in decision making on development matters. The first is where the decision related to a resource (i.e. land use) consent is delegated to an independent commission or commissioners. This occurs when:

- an applicant or submitter to a notified consent formally requests that the determination be delegated to an independent commission or commissioner, in which case this must occur;
- an applicant or submitter formally requests that a decision by council be reviewed, in which case this must be undertaken by an independent commission or commissioner; and
- at the discretion of council, it is decided that the determination and assessment should be undertaken by a commissioner (for example, for perceived conflicts of interest or the need for special expertise not available within council).

The other situation occurs when the relevant Minister deems an application to be of national significance. In these instances, the Minister can refer the application to a board of inquiry or the Court. If referred to a board of inquiry, a new board is constituted for that specific case to deal with the matter and make a final decision. The board includes 3 - 5 members appointed by the Minister who, in determining the members, must consider suggestions from the

relevant council and the skills and expertise represented on the board. Therefore, this is not strictly independent from government, but nevertheless removes the ultimate decision from the bureaucracy. Since the board of inquiry system went into effect in 2010, 16 applications have been assessed through it, generally consisting of plan changes and various infrastructure projects.

The main difference in the New Zealand system comparative to NSW is that the process to involve an independent commissioner or body must be instigated by a relevant party such as by applicant request or Minister call-in, whereas the IPC has a legislated trigger which results in an automatic referral of applications.

There is some similarity in the other jurisdictions investigated, but not to the extent of New Zealand. For example, in Canada<sup>40</sup>, the province of Ontario maintains a Local Planning Appeal Tribunal which hears and adjudicates conflicts in land use planning, typically being changes to a land use plan. Most councils also maintain a Planning Advisory Committee, the functions of which differ by council. An example is Toronto's Local Planning Panel which comprises 32 randomly selected city residents and provides advisory input during various plan-making functions. The Local Planning Panel is not involved in development assessment.

In the UK, the majority of planning decisions are made by the local council, however some councils have aggregated their powers, such as Greater London whereby larger development is referred to the Mayor of London for a final decision. No independent body exists for assessment at this level, although some applications may be delegated by the mayor to other staff within the Greater London Authority.

The UK does also have a separate body that provides oversight on several planning matters known as the Planning Inspectorate. This is a national agency under a Minister which handles most appeals to development refusals by way of considering written representations or holding a hearing or inquiry.

Overall, while there are some similarities amongst the jurisdictions' use of independent bodies, particularly with New Zealand, the IPC appears unique from an international perspective in that it has enabling legislation which results in a constant flow of applications being referred to it for assessment and determination.

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<sup>40</sup> The province of Ontario was reviewed in detail. Other provinces may have somewhat different arrangements.

Table 4 – Summary of cross-jurisdictional research

<b>Symbols</b>  YES  No  Not Applicable	NSW	VIC	QLD	WA	SA	TAS	ACT	NT
Is there a Planning Commission or Authority?								
Is it independent?								
Can it make decisions on State significant development?								
Does it make recommendations on State significant development?				 <sup>41</sup>	 <sup>42</sup>			
Does the Planning Commission play an advisory role?								
Has the Commission itself recently been reviewed?								
Has the planning system recently been reviewed?								

<sup>41</sup> Development Assessment Panels. Mix of independent members and local government councillors

<sup>42</sup> The State Commission Assessment Panel

## Appendix D: Terms of Reference

Terms of Reference	Relevant section(s) in this report	Relevant recommendations
1. To recommend whether it is in the public interest to maintain an Independent Planning Commission, considering, where relevant, the experience with similar bodies in other common law jurisdictions;	Chapter 2: Is an IPC in the public interest? (i.e. from Section 2.1 to Section 2.5)	Recommendation 1
2. To make recommendations in relation to the Independent Planning Commission's operations and the mechanisms by which State significant development is assessed and determined; and	Section 4.2: Systems and processes	Recommendation 9
	Section 4.3: DPIE assessment services	Recommendation 10
	Section 4.4: Public hearing	Recommendation 11
	Section 4.5: Decision-making	Recommendation 12
3. Having regard to the above, identify any proposed changes to the Independent Planning Commission's current functions, processes for making determinations, and resourcing. The issues to be considered include but are not limited to: <ul style="list-style-type: none"> <li>• Thresholds for the referral of matters to the Independent Planning Commission;</li> </ul>	Section 4.1: Workload optimisation	Recommendation 8
<ul style="list-style-type: none"> <li>• The clarity and certainty of policies and guidelines that inform determinations;</li> </ul>	Section 4.5: Decision-making	Recommendation 12

<ul style="list-style-type: none"> <li>The Commissioners' skills, expertise and qualifications;</li> </ul>	Section 3.4: Commissioners	Recommendation 5
<ul style="list-style-type: none"> <li>The adequacy of mechanisms to identify and resolve any conflicts of interest by commissioners;</li> </ul>	Section 3.4: Commissioners	Recommendation 5
<ul style="list-style-type: none"> <li>The Independent Planning Commission's procedures and guidelines;</li> </ul>	Section 4.2: Systems and processes	Recommendation 9
	Section 4.4: Public hearing	Recommendation 11
<ul style="list-style-type: none"> <li>The extent to which the Independent Planning Commission should rely upon the assessment report prepared by the Department of Planning, Industry and Environment, taking into account any additional assessments by other Government agencies;</li> </ul>	Section 3.2: Bringing clarity to the role and purpose of the IPC	Recommendation 3
	Section 4.3: DPIE assessment services	Recommendation 10
	Section 4.5: Decision-making	Recommendation 12
<ul style="list-style-type: none"> <li>Resourcing of the Independent Planning Commission and the mechanism for determining budgetary support; and</li> </ul>	Section 3.6: Budget and support services	Recommendation 7
<ul style="list-style-type: none"> <li>Whether the Independent Planning Commission's Secretariat should be employed directly by the Independent Planning Commission or provided by another Government agency, and if so, which agency.</li> </ul>	Section 3.1: Independence of the IPC and its agency status	Recommendation 2
	Section 3.5: IPC Secretariat	Recommendation 6
	Section 3.7: Budget and support services	Recommendation 7

