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NSW Commissioner for Productivity

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## IPC Review

### *Introduction*

I am a planning and environmental management professional who has operated within the NSW planning administration system for almost 40 years with experience in designated developments and major projects (now State Significant development) as a regulator, proponent and consultant. My experience has focused on resource projects (mining and energy) and the following submission relates primarily to these.

The NSW planning system since its introduction in 1980 has undergone several transformations since 1980 however the principles of environmental assessment and public participation remain. I have participated in commissions of inquiry and observed regional planning panels and recently observed and followed IPC hearings and procedures. I make this submission on the basis of concerns over what I consider to be flawed decision making and processes for State Significant development (SSD.)

### *Thresholds for the referral of matters to the Independent Planning Commission;*

The arbitrary entry criteria for the IPC to take over the SSD determination is very low where 25 objections can effectively delay the determination of an SSD. I have experienced special interest groups circulating emails in an attempt to encourage the minimum 25 objections simply to see a project enter the IPC process and associated delays to determination. As an SSD relates to State matters it is incongruous that a small group of people can determine the process. The submissions on the public exhibition of an SSD project is being used in social media as a straw poll of public acceptance of an SSD project. My case is illustrated in the following current news feed:

<https://www.abc.net.au/news/2019-11-14/mcphillamys-gold-mine-proposal-divides-locals/11702370>

Further analysis of that Project indicates that about 100 of these objections are from the Blayney Shire, being the most affected with more submissions from Blayney actually being in support. It simply becomes a challenge to generate support or opposition irrespective of the environmental issues.

The IPC review should consider the alternative of returning SSD decisions to the Minister's discretion for referral to the IPC for analysis and advice.

### *Independent Planning Commission's operations and the mechanisms by which State significant development is assessed and determined*

The IPC is a form of public administration and as such should be considered within the principles of good government. Traditionally, the principles of public policy and administration comprised

efficiency, effectiveness and equity. These principles have been expanded upon and distilled to include accountability and transparency. While the IPC has met in part the principles of equity and associated transparency in promoting engagement around major projects the inordinate delays and inconsistency of decisions severely limits its ability to meet the principles of efficiency and effectiveness.

Public hearings (or meetings) allow for participation objectives by meeting procedural fairness consistent with equity principles however the system is being manipulated by opponents of significant developments particularly mining projects with groups ideologically opposed to mining and particularly coal mining where multiple opportunities to make submissions in association with public meetings/hearings achieve significant delays to the process. The result has been increasing assessment times and inconsistent decisions which affect both the efficiency and effectiveness principles of good administration. Delay to determinations is inefficient and proponents are incurring unreasonable delays and significant costs, in some cases, hundreds of millions of dollars.

“Regulatory creep” has affected the planning process with pre-lodgement requirements of site verification certificates and gateway panel assessments (of which the IPC has responsibilities) and increased requirements for the preparation of Environmental Impact Statements. The introduction of new guidelines and requirements appear to have been made without rigorous regulatory impact assessments.

By “Regulatory Creep” I refer to increasing requirements being imposed on proponents of significant projects. By way of example, the \$2B Cadia East Project application for a significant underground mine seeking approval for a processing rate of 27MTpa and mine life of 21 years included an EIS of approximately 1400 pages and was determined in 7 months in 2009-10. The \$400M McPhillamys Project for a processing rate of 7MTpa and operational mine life of 10 years near Blayney includes an EIS of 6600 pages in response to planning requirements and guidelines and has only reached a stage of responding to submissions after 4 months elapsing since lodgement of the application. Both projects compared above received more than 25 objections. It is conceivable from the experience of other mining projects recently navigating the IPC process that the determination of the McPhillamys Project could take some years to reach a determination.

The current process may involve exhibitions, response to submissions, DPIE assessment reporting, and IPC procedures allowing for multiple requests for information, in-camera meetings with the proponent, agencies and some cases special interest groups. This process can assist in gathering information however it is unnecessarily time consuming and outcomes not necessarily improved. Opponents are kept at arms length with requests for information formalised which adds additional time in requests and responses. There is no opportunity for cross examination as in the Land and Environment Court or debate as was provided for in Commissions of Inquiry in the 1990s which can encourage misinformation that can influence the IPC decisions.

By its defined scale or characteristics, an SSD has benefits and potential environmental impacts that may accrue beyond a locality and in the case of mining affects the State’s valuable mineral resources however people in the vicinity of the project obviously have the greatest interest.

The process can result in a panel giving considerable consideration to submissions from a wide range and which can result in questionable outcomes. The Kepco Bylong Coal project was rejected by the IPC despite strong support from the Local Council in which the development was situated (Mid Western Council:

<https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/general/transcripts/bylong-ipc-council-meeting-20181106.pdf?la=en&hash=A95000008481B74C2E9066FDCF4ED12E>

Because an SSD has Statewide effects it is appropriate that the Minister as a democratically elected member of the Executive has responsibility for making decisions in respect of SSDs on behalf of the State of NSW. The IPC members are appointed and don't necessarily represent the values or aspirations of communities. Members do however have a range of expertise which is appropriate for pre determination analysis and thus should have an advisory role. The abrogation of responsibility by a Minister of the Government to an appointed "expert" panel is not justified, particularly where principles of efficiency and effectiveness are not achieved.

Once an SSD enters the IPC responsibility then any changes are also subject to IPC determination. Modification applications which attract at least 25 objections are also subject to the increased determination timeframes resulting through hearings, meetings and multiple submissions. Under the former Part 3A planning regime opportunities for considerable variation to the originally approved project was available. Under Part 4 of the EP&A Act SSD modifications must comply with the "substantially the same" test (ie that the project as modified is substantially the same as the originally approved development.) Notwithstanding that an SSD Project can meet the substantially the same test it can become subject to considerable delays as multiple hearings and submission opportunities may still occur. The hearing/meeting process should not apply to modifications which demonstrate consistency with the "substantially the same" test.

*The Commissioners' skills, expertise and qualifications;*

The range of developments and rezonings that the IPC is called upon to consider together with gateway panel functions require a significant range of expertise. Returning to the Kepco Bylong project the panel in that case involved two "generalist" planners and an architect. I acknowledge that the planners in that panel have had broad experience in mining projects however "regulatory creep" is placing increasing demands on mining applicants and more diverse complex considerations over time which would benefit from having panel input from a member with more direct and extensive mining expertise. Panelists must be able to understand and home in on the material issues.

Recommendations to the Commissioner

1. The IPC should function as an expert advisory panel to the Minister
2. Assuming the IPC determination function is retained then proponents should have the ability to seek a review by the Minister or Panel of Ministers of an IPC determination.
3. The arbitrary threshold of 25 objections and Council objections be replaced with Ministerial referral powers based on case specific issues of a Project.
4. Modification applications that pass a test that demonstrates that they are substantially the same as the approved project should not be subject to further IPC hearings, since procedural fairness has been provided for the originally approved project.
5. The IPC process should involve a single hearing and have performance targets set around reasonable time frames.
6. The increasing complexity and demands on complex SSD projects, particularly mining projects requires commensurate expertise in their assessment.

In addition to a review of the IPC in accordance with the Commissioner's terms of reference a rigorous review of the performance of the planning process for SSD projects in NSW should be undertaken to determine improvements in the efficiency and effectiveness of the determination of SSD projects. This current review has the potential to provide a rigorous assessment of the IPC according to the principles of public administration. In my view the IPC has strayed too much into focussing on the equity principle without considering sufficiently the implications on the other principles around efficiency and effectiveness. This may result in unintended consequences of unreasonable assessment and determination timeframes and inconsistent decision making.

#### Final Thoughts

If a CEO or Board Member of a mining company sought my advice today in investing in NSW or in another jurisdiction to commence comparable mining operations I would have to recommend putting their energies in a project in the other jurisdiction due to the current unacceptable timeframes, complexity and uncertainty evident in the planning and IPC process. NSW has become a "sovereign risk" for greenfields mining projects and accordingly is at risk of not reaping the benefits of its mineral endowment. This view does not imply that environmental and social issues or significance of community participation are not appropriate. The need is for a reasonable approach in the decision making in weighing up the issues.

Thank you for the opportunity to make a submission on the IPC Review

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