VALUE DESTROYING CONTRIBUTION OF IPC AND DEPARTMENT OF PLANNING TO PROJECT ASSESSMENT AND CONSENT DECISIONS

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The current IPC arrangement for major project evaluation and consent is a defective, and in some respects fraudulent, mechanism which results in planning decisions which are frequently poor, frequently unfair to parts of the community, frequently sub-optimum for the State in terms of overall economic and social benefit, and for which no one can be held accountable. It regularly fails in relation to the key conditions for genuinely valid consents, i.e. well informed; unbiased; considered; and transparent. It is in fact a systematically corrupt process. The defects are not due solely to the IPC but to the combination of the way the IPC works in conjunction with the Department of Planning (DP). There is extensive documentation on numerous instances of malfeasance by both the IPC and DP officials in relation to SSD consent decisions. That material is available to the parties undertaking this review should they be conducting a fair dinkum review and genuinely want to see and use it. Achieving a value creating process for major project assessment and consent requires four things: 1) restriction of the role of DP officials, to limit their conflicts; 2) greater resourcing of the IPC to allow it to thoroughly review proposals and to make determinations on a well-informed and independent basis; 3) appointment of a community counsel for each SSD, funded by the proponent but commissioned by and working to adversely affected members of the local community and sufficiently resourced to bring independent data to the process and to rigorously challenge submissions by the proponent and the DP; and 4) honest vetting of the veracity of statements made by proponents and active prosecution of breaches of the law covering false and misleading statements.

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The current IPC[1] arrangement for major project evaluation and consent is a defective, and in some respects fraudulent, mechanism which results in planning decisions which are frequently poor, frequently unfair to parts of the community, frequently sub-optimum for the State in terms of overall economic and social benefit, and for which no one can be held accountable.

The mechanism produces decisions which are commonly not well informed, not transparent, and not conducted in a genuinely impartial manner. The notional independence of the IPC becomes a means of shielding the IPC commissioners and Department of Planning (DP)[2] officials from any real accountability while providing each of them with a smoke screen to hide their respective biases and failures to properly evaluate matters on which they opine as part of the major projects consent process.

The mechanism does not assess projects in a manner which properly balances government policy against potential adverse impacts in specific projects and set conditions which deal fairly with the impacts of projects.

Consent considerations

Consent decisions involve two main considerations:

- legality of the proposal
- conflicts of interest and equity

The first of these, legality of the proposed project, is relatively straightforward. It is a matter of whether or not the project is precluded under law and regulation and is usually not difficult to determine.

The second matter is commonly far more complex. Virtually all proposed projects involve conflict between the interests of various parties; and often also conflicts between various government policies (e.g. industrial development and jobs vs environmental protection); as well as conflict between government policy and equitable interests of some parties.

If someone wants to undertake a development which is legal and which does not conflict with government policy and does not adversely affect anyone, then there is an inherent expectation under planning legislation that they will be authorised to proceed with the development – as they should be.

It is precisely because most major projects involve potential harm to some other parties, and/or conflict with some government policies, that the consent decision becomes significant and that consent authorities are required to make a judgement taking into account the combination of benefits and harms, and imposing appropriate mitigation and management conditions to the consent.

[1] In general, reference here to the Independent Planning Commission also include the Planning Assessment Commission which preceded it, before that was rebranded.

[2] Over the years the name of the State department responsible has had a variety of names and generally has had multiple functions beyond formal planning. Since this discussion relates only to the planning process, for simplicity the department is here referred to as the Department of Planning (DP).

If the consent decision-making is done well and thoroughly, then the result is a net benefit for the State and its citizen both economically and socially. If decisions are defective, then there is a net cost to the State and its citizens, which may involve a net benefit to the proponent with externalised costs on other parties.

Conditions necessary for genuinely valid consents

There are several critical conditions in order that consents are proper, specifically that the process of determining a consent, and its conditions, be:

- well informed
- unbiased
- considered (i.e. a thoughtful weighing of the evidence presented and of the interests and actions of the various parties affected by the decision); and
- transparent

The last of these is not inherently required in good consent decisions, but is an essential part of the public process. Transparency is a check to reveal, and potentially discourage, failures in the other three elements, all of which are essential for any consent decision to be sound.

Lack of transparency by parties exercising government power affecting the interests of citizens leads to disrespect for and opposition to the form of government, which ultimately contributes to social division and unrest. Conversely, transparency of process (assuming transparency shows decisions to be made in a way that is informed, unbiased and considered) encourages support for the process of government, and that support is a public good.

Systematic failures to meet conditions essential to make valid consent decisions

The current process leading to IPC consent decisions is riddled with failures against all of the conditions necessary to reach valid consents. It is in fact a systematically corrupt process[3]. The Department of Planning is an integral part of the process. The defects are not due solely to the IPC but to the combination of the way the IPC works in conjunction with the Department of Planning.

For reasons of resourcing and required time to make consent decisions, the IPC relies heavily on the advice of the DP. It also relies on the DP to manage the process of eliciting information which is input to consent decisions and vetting its quality and veracity. As will be discussed, the DP fails on both these aspects, leading to advice which is both biased and not well informed. In addition, the DP fails its obligation to properly vet claims from proponents and its obligation to ensure proponents are properly motivated to be honest and complete in their submissions. Consequently, it allows, indeed encourages, proponents to systematically provide dishonest and misleading information to consent authorities, including the IPC.

[3] Note, this is a statement that the ***process*** is corrupt, not that any officials are necessarily procuring benefits to produce particular decisions.

Bias and failure to be well informed

The IPC commissioners do not ensure they are well informed, so they cannot make well informed decisions. They add their own biases to those of DP officials. There is evidence that, in contravention of the *Environmental Planning & Assessment Act, 1979*, decisions are made in advance of commissioners receiving all the information provided in submissions on projects, so those decisions cannot be well considered (a number of cases are known to me – how many others are there in projects I have not followed?).

Lack of transparency

The overall process is less than transparent, that defect lying with the combination of the IPC and DP and the way they operate in tandem.

DP culture – inappropriate contact between officials and proponents

I have also seen the transcripts of one court case involving a DP official who, in court, concealed his inappropriate interaction with a project proponent to the benefit of the proponent and disadvantage of affected local citizens, until confronted in court with subpoenaed documents proving that interaction, which he then admitted. When I subsequently wrote to the DP Secretary about this, and the fact that in his court testimony he contradicted claims she had made to local citizens, she and the department refused to take any action – indicating this malfeasance is actually part of the DP culture.

DP use of "independent advisors" who are actually associated with proponent

I have documented evidence of DP commissioning a supposedly independent consultant who was actually inextricably associated with the project proponent. The consultant had previously consulted as an advocate for the same proponent on other projects and went on to subsequently consult for the same proponent as advocate on another project. In all projects, the consultant offered heavily subjective advice which was beneficial to the proponent whether the consultant was paid by the proponent or by DP.

DP wilful refusal to vet for material false or misleading statements by proponents

I have multiple departmental documents showing that despite it being an offence under NSW law[4] for proponents to make statements in planning matters which they ***ought reasonably to know*** are materially false or misleading, and despite many reasonably grounded complaints by multiple parties to DP of proponents doing just that, DP has systematically avoided examining whether any of those proponent claims were actually materially false or misleading. Those documents show systematic behaviour by DP which encourages proponents to make false and misleading statements with impunity, which then affects the integrity of project information provided to the IPC and consequently the integrity of IPC decision making.

[4] Section 10.6 of the *Environmental Planning and Assessment Act 1979* and sections 192G, 307A, 307B and 307C of the *Crimes Act 1900*.

DP presenting unverified and false proponent statements to IPC as fact

I can show you multiple instances of DP officials taking as gospel claims made by proponents and DP repeating those statements to the IPC as fact, without doing any independent checking – statements which the IPC then accepted as fact. Not only does the evidence show that was what DP did, subsequent and/or contemporaneous evidence shows the claims were indeed false. In some instances DP had been provided with strong contrary evidence and yet still accepted proponent's claims without itself checking and presented them as fact to the IPC.

DP and IPC acceptance of subjective claims on critical matters from officials and consultants for whom no evidence held of expertise relevant to the claims

I have documented evidence, via GIPA, of DP officials making key technical and complex judgements on matters for which DP has no evidence of their expertise (expertise they are unlikely to have), and of IPC commissioners making decisions involving key technical and complex matters for which the IPC has no evidence of expertise on the part of those commissioners ***or on the part of the departmental officials and consultants upon whom the commissioners appeared to rely***. Likewise, evidence of DP officials making policies on critical technical matters affecting a large category of project assessments, without any evidence being held by DP that either those officials or the external advisors they used had the requisite expertise, and despite those policy rules being contrary to all existing scientific studies. In these instances, the rules conveniently supported DP bias in downplaying adverse impacts on local communities.

IPC meetings with proponents and DP officials and improper reliance on vague statements

One of the good things done by the IPC has been to publish transcripts of commissioners' meetings with proponents and DP officials. I certainly hope you have read a number of them. If you have done so, you should understand why I consider those transcripts a plus.

Those I have read are generally waffly conversations particularly distinguished by the vague and imprecise statements and answers from proponents and DP officials, the very people one would expect to have precise and accurate knowledge of the subject matter. Even more important is that, from the transcripts, commissioners accept these vague and imprecise statements without demanding precision and certainty and accept as fact, assertions qualified with "I think . . ." and suchlike. This would be totally unacceptable in a court of law. In addition, some of those transcripts reveal proponents and/or DP officials making statements which are demonstrably false, without the commissioners having the knowledge or the methodology to check the veracity of those statements and take that into consideration in making their decisions.

While those meetings are a mechanism for allowing proponents and DP officials to provide false and misleading information to commissioners, they also establish some degree of personal relationship between the commissioners and the proponent and DP officials, a soft benefit for the proponent seeking approval, and DP officials putting their usually slanted case. Members of the affected community have no opportunity to establish any personal relationship with commissioners. At best they get to make a 5 or 10 minute presentation under pressure in a public meeting, with no relationship with commissioners whose decisions will often seriously impact their assets and long-term quality of life.

Note, I am not recommending commissioners should attempt to establish personal relationships with members of an affected community, any more than a judge should do so with either party in a dispute. I am pointing to the wholly unnecessary and one-sided nature of meetings conducted by IPC commissioners.

There is value in community members being able to make their case verbally at a public meeting, since many community members find it even more difficult to document their interests and concerns and, unlike major project proponents, cannot afford to hire consultants to do so.

Everything a proponent or DP officials have to convey to the IPC should be done in writing, to ensure it is all considered comments and all transparently available to anyone interested. If the commissioners find anything confusing, imprecise or suspect, they should direct questions in writing back to the authors for response in writing. The usual specious objection to this is that doing it in writing slows the process – but it only slows the process if the original authors have been vague, misleading, confusing or imprecise in what they submitted. Discipline in writing concisely and exactly is a positive to encourage in proponents and DP officials. If they can't do that, delays are due to them, not to the process.

Conflicted and damaging roles of the DP and IPC

The IPC, in its current form, is an active contributor to bad government. That is primarily because it is under-resourced to be a genuinely independent assessor and the process is setup to diminish the weight attributed to scrutiny and challenges to the agendas and claims of the proponent and the DP, and the IPC itself has no resources to rigorously conduct that scrutiny.

It is dependent on the DP which itself has multiple conflicted roles and is over-resourced for the limited but critical roles it should perform, which are:

- advise proponents on the process (which it does but in a manner which frequently gets it entangled with the proponent as an ally to some degree);
- evaluate the legality of the proposal and advise the consent authority on that point;
- coordinate the evaluation of the degree to which the proposal supports or conflicts with government policies and present that case to the consent authority;
- rigorously police compliance with the Act, in particular detecting materially false and misleading statements and initiating prosecution; and
- rigorously police compliance with consent conditions.

Note. Responsibility for these policing functions (statement honesty and compliance with conditions) should be in a unit wholly separate in its reporting line from planning advice and arguments (e.g. reporting direct to DP General Counsel) and have an obligation to carefully evaluate all reasonably credible claims of breach reported to it as well as conducting its own independent checks.

DP should make no recommendations

As the NSW Auditor-General previously recommended, DP should not recommend an outcome to the consent authority[5]. DP should also not recommend consent conditions. Consent conditions should be framed by the consent authority with assistance by staff not connected or affiliated with DP.

Proper DP role arguing government policy to IPC

DP has a proper function in arguing government policy to the consent authority and arguing the consistency, or not, of a project with government policy. However, at present DP does that in an inappropriate manner. It frequently provides weak evidence and faulty arguments which the IPC is not resourced to have effectively challenged. Importantly, it also "puts its thumb on the scale" to downplay adverse impacts on various parties, particularly the local community, when doing so supports projects which are in line with DP policy. By doing this, DP hides the full external costs of favoured projects and thus induces the IPC to make suboptimal consents.

Internalise external costs for socially optimum project decisions

Economically value-creating decisions identify all potential external costs and apply means to force those costs to be internalised by the proponent, or alternatively to be covered by visible government subsidies if government has a policy in favour of the particular class of development. DP has a strong tendency to support proponents in hiding externalities for projects which accord with DP preferences and thus misinform consent authorities about the extent of hidden costs, leading to value-destroying projects and to unjust harm to citizens not in DP's favoured ambit.

Institutional arrangements

The IPC in its current form is useless and damaging and the conflicted role played by DP is major planning matters is harmful to the State and its citizens.

The IPC needs to be properly staffed to fully investigate and impartially assess proposals – and the adequacy of doing so should be subject to frequent ad hoc review by the Auditor-General with input by other parties.

In addition, a genuinely independent mechanism needs to be instituted to properly represent the interests of adversely affected parties and to ensure that proponent and DP claims are rigorously challenged in evidence to the IPC (see below for details).

The alternative to the IPC is that the Minister nominally make consent decisions. Of course no minister has the time to actually read and understand all material and submissions relating to multiple SSDs. So, *de facto*, ministerial consent actually means consent determined by DP officials, who are already conflicted in multiple ways and have a long history of malfeasance.

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[5] "The Department'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.", *NSW Auditor-General's Report to Parliament | Assesing major development applications | Executive Summary*, January 2017, p. 2.

Whether the minister or IPC is the consent authority, for each SSD a wholly independent advocate should be appointed for the affected community – representing those in the local community harmed by the project (not those benefitting, for whom the developer is the advocate) and not for interests (e.g. indigeous and environment) for which there is already a government advocate.

After decision, the community advocate should publish a review of the decision in the light of the evidence presented and the decision made. That may be relevant input for community members then considering a legal challenge.

Community counsel

For every SSD (and every SSD modification), a community counsel should be appointed to represent the interests of the affected community. The position would be funded by the proponent but employed by the adversely affected local community. The process of appointing the community counsel and managing payment to them should be done by the Attorney-General's (AG) department – not the Department of Planning, with which department the counsel may have an adversarial relationship.

Role

To represent the interests of the elements of the local community potentially adversely affected by a proposed SSD. In that role, the counsel would:

- make submissions to the consent authority including rebuttals to proponent and DP documentation;
- commission expert advice for use in representing its clients;
- release a public commentary after publication of the consent decision, critiquing any apparent defects in that decision, which may assist the local community in deciding whether to pursue a legal challenge to the consent.

Appointment

A community counsel would be appointed after the release of public submissions in response to the exhibition of a proponent's environmental assessment. The AG would organise a public meeting of objectors (i.e. those who lodged an objection to the proposal[6]) living within a defined range of the proposed project (15 kms for rural, 5kms for urban) where the purpose of the meeting would be to outline the process of retaining and managing a community counsel, and to elect a community committee to conduct that process.

Objectors would elect a committee of up to 7 members, with at least 5 of them required to live within the defined range of the proposed project. The community counsel would be commissioned by and report to the community committee. The AG would provide a list of suggested possible counsel but ultimately the choice of who to employ would rest with the community committee which would not be restricted to the AG's suggestions.

[6] Those lodging an objection should be required to sign the equivalent of a statutory declaration that they are indeed opposed to the project, to avoid supporters gaming the process.

The appointment would be from as soon as possible after release of public submissions in response to public exhibition of the environmental assessment up until the consent decision is made and released and the community counsel has issued a public commentary on the consent.

In the event a proponent chooses to appeal the consent decision, the community committee may retain the community counsel to represent its interests during the legal action and the proponent would provide funds via the AG for that purpose, equal to 25% of the amount the proponent spends on contesting the consent.

Note, I do not recommend proponent-sourced funding for appeals initiated by local opponents, since that would guarantee appeals against virtually all approvals. If the community counsel publishes a thoughtful critique of a consent approval, that should provide a basis for adversely affected members of a local community to decide whether there would be reasonable grounds for them to spend the money to mount an appeal or whether they would likely be wasting their funds.

Funding

Funding would be provided by the proponent, on the "user pays" principle, to ensure robust evaluation of the full impact of the proposed project. Proponents would be required to provide, for this purpose, an amount equal to 25% of what the proponent spends on developing their project proposal, including all legal, consultant and internal resources. Thus community defence funds would amount to 20% of the proponent's total project assessment budget. The funds would be provided to the Attorney-General to be held in trust in relation to the project and used to pay the community counsel and any advisors commissioned by that counsel.

The community counsel would be authorised to use up to 50% of the funds for their own fees, with the balance being used to purchase professional advice.

Improved decisions

This proposal would change the dynamics of consent decisions, encourage more honesty and good data in the process, and motivate proponents to only advance projects which are both value creating and which do not impose uncompensated harm on other parties.

Advocates of the current, defective system, would claim this proposal would add time and cost to project assessments and consent decisions. In fact it will change the dynamics of project assessments in ways that contribute to speed and quality decisions, while discouraging the initiation of value-destroying projects.

Once proponents know that their assessments will be scrutinised by competent, adequately funded counsel, using professional advisers, and who will put well informed and well substantiated submissions to the consent authority, which is truly independent, they will be motivated to propose projects which are defensible in that situation. Having your consultants put forward deceptive advice which is then shredded by credentialed professionals, and shown by them to be dishonest, would not be conducive to project approval – nor beneficial to the reputations of proponents' consultants. So the dynamic would encourage good data and honesty and, consequently, reduce bad decisions and value-destroying projects.

The process here proposed would reduce the role of the DP and thereby reduce costs incurred by DP, including the commissioning of consultants who are better commissioned by community counsel. Consultants commissioned by DP are nominally supposed to be independent but they always know the views and leaning of their paymaster (just as DP knows their's when it decides who to commission), and "he who pays the piper calls the tune". DP has a history of commissioning "independent" advisors who have reasons to favour developer interests. It is one way of DP putting "a thumb on the scale" while feigning impartiality.

Basis for assessment and recommendations

My assessment of the dysfunctional nature of the current major projects planning process and my recommendations draw on two things:

- the extensive range of evidence I have mentioned; and
- my professional career of close to forty years researching organisational behaviour and consulting to numerous large organisations on how to improve their performance (summary CV attached)

The comments are based on five years of dealing with the DP and IPC (and PAC) over multiple projects. During that time I have also communicated with and gained information from other citizens dealing with those bodies on multiple projects, and seen the detail of their correspondence and relevant actions by the agencies. I have also lodged multiple GIPA requests with both agencies and thereby accumulated extensive documentation on what can accurately be described as their malfeasance.

I have not included all the material mentioned in this submission because I am not going to waste weeks on meticulously assembling from my files the evidence for a "review" which almost certainly has a pre-determined outcome. However, if you are attempting to conduct a *fair dinkum* review, by all means contact me for this evidence and I will provide it.