GUNLAKE QUARRIES

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Mr Peter Achterstraat
Productivity Commissioner
NSW Productivity Commission
Level 4/255 George St
SYDNEY NSW 2000

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By E-mail: ProductivityFeedback@treasury.nsw.gov.au

Dear Sir,

Review of Independent Planning Commission (IPC)

Gunlake Quarries (***Gunlake***) is an Australian family-owned construction materials group with a long history of developing quarries and concrete plants in NSW, including a recent experience in 2017 with the Planning Assessment Commission, now known as the IPC.

In 2008, Gunlake developed a quarry at Marulan NSW and opened its first concrete batching plant. It now has four batching plants with the fifth under construction. It has approximately 200 full time employees. It competes against an oligopoly of four multinational companies (Holcim, Hanson, Adelaide Brighton and Boral), which supply over 90% of the Sydney construction materials market.

Gunlake welcomes the opportunity to make a submission to the Productivity Commission about the role of the IPC in the NSW planning system, and its future.

Executive Summary

Gunlake considers that the IPC is the main reason that the NSW planning system is cumbersome and inefficient and a drag on the NSW economy.

The IPC has become an unaccountable group of part-time members mainly comprising former bureaucrats, academics and semi-retired consultants not one of whom has ever managed a substantial commercial business. There is an inherent conflict of interest between the members' roles and their needs for income supplementation and duties to their other commercial clients or favours for fellow members. Moreover, the IPC engages in political activities by serving as a vehicle for its members to pursue their personal agendas which is unacceptable for a body expected to be objective and independent.

The IPC acts as the second of three layers of the State Significant development process. The Department of Planning, Industry and Environment's professional staff (the ***Department***) undertakes the first layer of assessment, reviewing environmental impacts and conducting public and regulatory consultation. It prepares an assessment report which makes recommendations on approval or refusal to the IPC. The IPC has the ability to investigate new or different environmental impacts or substitute its views for those of the Department in making its determination whether to approve or refuse a State Significant Development Application (***SSDA***) The IPC's refusal of SSDA's results in expensive delays and costs in the third layer of assessment by the Land & Environment Court.

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Based on Gunlake's experience with the IPC, it is not in the public interest that a body such as this continues to have any role in the development approval process. It adds an extra layer of duplication in the development assessment process, with adverse implications for developers and the community. Its removal provides an opportunity to simplify, repeal and reform the regulatory framework in the Environmental Planning and Assessment (***EP&A***) Act. Attempting to reform the IPC's role without massive reforms to the entire planning system will just add to the regulatory complexity and ensure that the system continues to provide well-paying jobs and consulting roles for the IPC members.

Gunlake's Experience with the IPC

Gunlake's experience in SSDA #7090 highlights the problems with the current planning system caused by the IPC through the various layers of the SSDA process. What should have been a simple modification of its existing approval turned into a nightmare through all 3 layers of the approval process.

Layer 1-The Department's Assessment Process

In 2015, Gunlake sought to increase production from its existing quarry near Marulan from 750,000 to 2,000,000 tonnes per annum as SSDA #7090. The only significant change to environmental impacts was the proposed increase in truck movements on an 8 km low traffic Council road passing only 8 residences, 3 of which were owned by Gunlake, before joining the Hume Highway for transport to customers and Gunlake's batching plants in Sydney.
As more than 25 objections were received, the IPC became the consent authority. In its assessment report to the IPC dated December 2016,[1] the Department recommended that the quarry expansion SSDA be approved.

Layer 2-The IPC Assessment as Consent Authority

Five months after the IPC commenced its assessment process, Gunlake's SSDA was refused by the IPC on the basis that:

a. Gunlake had not given sufficient consideration to the upgrading of the local road network to Austroad standards to cater for the increased traffic, and had provided insufficient information to establish that this would not create a road safety risk; and
b. Gunlake has provided insufficient information to allow for an accurate and genuine consideration of road versus rail haulage[2];

As Gunlake had detailed traffic studies and committed to road upgrades to Austroad standards, it is difficult to understand how the IPC could arrive at the first conclusion, particularly when none of the panel members were traffic engineers with any expertise in road design/safety. Moreover, this matter could have easily been addressed in any conditions of approval to the extent that there was any uncertainty. Indeed, it had already been covered in the Department's recommended conditions.

The second conclusion was even more absurd, as would be evident to any commercial person with the detailed information available to the IPC, in that the transport of quarry materials by rail to Sydney would have required a 7km rail spur across land it did not own or have access to, loading and unloading facilities at the quarry, a new unloading site in Sydney at a cost estimated at $148m in addition to a massive increase in materials handling and unloading costs over the life of the quarry. This demonstrated that rail transport would have prevented any quarry expansion with the loss of 80 new full-time regional jobs.

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1 https://majorprojects.accelo.com/public/fcc61f6c7be20d0734c15ca4d3e34f5b/Gunlake%20Quarry%20Extension%20-%20Assessment%20Report.pdf

2 PAC Determination Report-pages 25-26 https://majorprojects.accelo.com/public/7dbb9d86c9a708b9032267bda74a4047/Gunlake%20Quarry%20Extension%20-%20PAC%20Determination%20Report.pdf

Layer 3-The Land & Environment Court as Consent Authority

Following the IPC determination, Gunlake immediately commenced Class 1 appeal proceedings in the Land & Environment Court. In the NSW planning system, the Court effectively becomes the consent authority and the whole SSDA assessment process effectively starts afresh, allowing new issues to be raised by the parties in their evidence, or by objectors and even the Court.

When the IPC put on its response to Gunlake's appeal points, it abandoned rail vs road haulage in its defence. In other words, approximately 6 weeks after it said Gunlake lacked sufficient information to determine the viability of rail haulage, it was not prepared to support this ground for refusal in Court. Presumably, this was because either:

a. the absurdity was obvious to its legal counsel; or
b. none of the panel members nor IPC's expert witness (also a part-time member if the IPC) were willing to give evidence in Court to support this absurd position when testifying under oath, particularly when it was contrary to the current NSW Transport policy.

That should have been the end of the proceedings. However, perhaps as a face-saving exercise, the IPC raised a new issue in its defence, proposing a requirement that the number of truck movements be reduced by requiring Gunlake to use some larger capacity vehicles than initially proposed. This matter had not previously been a concern for either the Department or the IPC.

The Court process ended at a Section 34 conference and the Court ordered that Gunlake's appeal be upheld and approved the DA on terms virtually identical to the Department's recommended conditions except in relation to the two matters subsequently agreed.

Following the Court orders, the IPC descended into the political arena using media releases to respond to criticism in the local media about its capitulation, painting the overturning of its decision without defending it at a Court hearing as a 'win' for the local community.

Outcome for Gunlake

For Gunlake, as a result of the IPC's involvement, what should have been a straightforward uncontroversial expansion of an existing State Significant Quarry, a simple development application took more than three years before Gunlake could get through the three-layer process. The direct compliance costs to Gunlake have been more than $1M for extra consultant and legal costs. This does not include:

a. the significant additional capital and operating costs attributable to the IPC with no added community benefit, which will affect its investment returns;
b. the indirect costs including the effects of delay in starting the expansion as well as the disruption to Gunlake's small management team,
c. the adverse impact on Gunlake's competitive position in the construction materials market, which will also indirectly flow through to prices in the Sydney construction materials market; and
d. the increased difficulties which Gunlake now faces in dealing with local council and the community.

Nor does it consider the costs to the taxpayer associated with the IPC's costs in defending its decision through the Court.

Terms of Reference 1- Is it in the Public Interest to Maintain an IPC?

In a word, the answer is "no". Gunlake's experience with the IPC highlights the reasons why, as discussed below.

The IPC Duplicates Existing Regulatory Processes

With the Minister, Department and Land & Environment Court already involved in the SSDA process under the EP&A Act, the system was already complex and cumbersome before the IPC was established.

The *NSW Government Guide to Better Regulation* acknowledges that opportunities to simplify, repeal, reform or consolidate existing regulation should be considered by government.
It would be in the public interest to remove the IPC from the planning system. It duplicates the work done during the Department's assessment process before the Land & Environment Court starts a whole new process from scratch. At least the Court provides independent judicial scrutiny.

Why Can't the Minister be Trusted to Decide SSDAs?

The Minister has a range of powers to scrutinise major developments, including appointing independent experts if required, establishing a Commission of Inquiry or referring matters to the Land & Environment Court. SSDA approvals should also be capable of delegation to the Secretary of the Department if the Minister considers that he or she is compromised in making a determination.

Establishment of the IPC appears to have been an attempt by the NSW government and to wash its hands of responsibility for controversial developments. The Minister responsible to Parliament for planning decisions is accountable to Parliament and the electorate. He or she is subject to 'property developer" donations laws, oversight by the Land & Environment Court and operates under ICAC's watchful eye. If these protections are insufficient to ensure the integrity of major development applications, delegation of responsibility to a less accountable body like the IPC will hardly solve the problem.

The public, including businesses, expects the politicians like the Minister to act properly and not delegate their job to yet another statutory body under their control.

It is in the public interest that the buck stops with the Minister for major projects, not the IPC. Its removal from the process will also avoid the need for the Minister and government to introduce new legislation to correct or override the decisions of the IPC which are either unlawful or not in the public interest.

Why isn't the Department's SSDA Assessment Sufficient?

The Department has highly qualified professional staff who are very capable of performing their roles, and the SSDA processes they follow involves a high level of scrutiny from other government departments, the public and the developers. There is no reason why the Department needs the IPC to review its work.

Apart from the Land & Environment Court, the Department's professional staff are the least likely group to lack independence or be hostage to personal political agendas or corrupt influences. The main criticism with the Department's performance on SSDA matters is not staff competence but rather, slowness and delay. This is presumably attributable to the fact that they are generally overworked by the complex processes they must follow, including the need to deal with the IPC.

It is not in the public interest to have the professional staff in the Department second-guessed by members of the IPC, as that reduces public confidence in the Department's ability to do things right.

Role of Land & Environment Court in SSDA Process

The Land & Environment Court also plays an assessment role for SSDA's when the consent authority is not up to the task. Although Court proceedings have the disadvantage of adding cost,

further delays and the ability to raise new issues, it is the only truly independent body operating in the planning system.

In circumstances when the Minister can't be trusted to make an objective and unbiased decision, the Court has always been available to step in. It is not in the public interest to have the IPC usurp any functions of the Court if it is intended to provide objectivity and independence in determining SSDA applications and avoid further duplication of processes.

The IPC Increases Regulatory Uncertainty with its Arbitrary Processes

Having a regulatory body like the IPC, which can completely override the Department's assessment on scientific or technical matters at a late stage in the approval process, creates significant regulatory uncertainty.

Until the IPC became involved, Gunlake's SSDA involved a straightforward modification which raised few environmental issues. It had no reason to expect that there were any outstanding issues that had not been properly addressed by the time the Department's assessment was complete.

The IPC then stepped in and made it immediately clear that it had a problem with the SSDA. Its members then embarked on a process to find new reasons for refusal. To do so, the IPC:

a. obtained secret, extraneous information on rail economics which had not been a part of the Department's assessment;
b. effectively forced Gunlake into undertaking another detailed study of road vs rail haulage costs when sufficient work had already been done to the satisfaction of the Department;
c. invented an issue on road design/safety which had already been addressed; and
d. introduced a new issue in relation to the capacity and size of vehicles at the Land & Environment Court stage.

The IPC used these issues to refuse approval initially, and then imposed significant additional and unnecessary road and trucking compliance costs on Gunlake as part of its face-saving exercise in having its determination overturned by the Land & Environment Court.

Gunlake's case provides a particularly appalling example of how the IPC's process creates regulatory uncertainty, bias and unfairness. The IPC members considered that it was completely appropriate to go on its own fact-finding mission to support the outcome it intended to achieve. This included a private meeting with Gunlake's competitor about the economics of road vs rail haulage, a matter unrelated to its submission.

Gunlake had no advance notice of this meeting and was only told about it by the IPC's chairman as she was about to attend the meeting. When Gunlake objected, it was told in no uncertain terms that this was IPC's standard protocol and refused Gunlake's opportunity to attend.

This meeting was not recorded. Some information submitted by the competitor was suppressed as being confidential, and the scant minutes of the meeting prepared by the IPC were provided to them to vet and amend before they were sanitised by the IPC.

Business requires regulatory certainty to be able to make investment decisions. It is also entitled to have its approvals assessed free of the arbitrary and secretive processes employed by the IPC. It is not in the public interest to have the IPC as part of the SSDA process when its presence and duplicated processes can lead to new issues constantly being raised and different outcomes at each stage of the process. This increases regulatory uncertainty.

The IPC Lacks Accountability, Independence and Expertise

If the Department and Minister cannot be trusted to make decisions on SSDA projects, it does not make any sense to delegate that power to a large part-time group of semi-retired consultants, ex-bureaucrats and academics whose interests appear to include income supplementation, the pursuit of personal and political agendas and expanding their academic or commercial profiles to get more consultant work as members of the panel. Many IPC members will be expected to have

worked for or dealt with project developers over the course of their careers making it difficult to escape conflicts of interest.

The nature of the IPC avoids any accountability for IPC panels or their members. Unlike the Minister, they cannot be voted from office. Unlike the Department, the members are not employees who can lose their jobs and professional reputations. Unlike other consultants, they cannot be sued for performing their role incompetently because they have immunity under the EP&A Act.

Noticeably absent from the IPC selection criteria are any significant industry or commercial expertise (beyond consulting) or ordinary members of the public whose input would be necessary for such a body to function effectively.

Gunlake's case illustrates the apparent pursuit of personal political agendas. The only plausible explanation for the IPC's refusal of SSDA 7090 was the members desire to change NSW Transport policy rather than apply it. Such agendas also seem to have played a role in other SSDA's where the IPC unlawfully decided that environmental impacts of burning coal in other countries was unacceptable.

The IPC as a consent authority supposedly includes members with a broad range of expertise which helps them to understand issues before them. However, the chairman appoints members to particular panels without any requirement that the members have any particular expertise on the matter before it.

Gunlake's experience also demonstrates how the IPC creates jobs for other members of the panel and creates conflicts of interest. Although another part-time IPC member was not appointed to the IPC panel assessing Gunlake's SSDA, he was appointed as one of the IPC's expert witnesses to defend the Gunlake Land & Environment Court appeal. In those circumstances, an expert witness has an independent duty to the Court and should not be acting in the interests of a party to the proceedings. That creates the perception of a conflict of interest.

When Gunlake tried to explore, by freedom of information requests, how the IPC could give one of its members a paying job as an expert witness, it discovered that IPC panel members regularly used private e-mail servers and relied on legal-professional privilege to resist disclosure of its communications. It is difficult to have confidence in a public process which potentially allows a statutory decision-making body like the IPC to prevent proper scrutiny of its actions under the GIPA Act.

It is a misnomer to call this statutory authority "Independent" when it lacks accountability, expertise, and an ability to operate in accordance with proper and transparent processes. It is not in the public interest that the IPC continues to play any role in the planning system.

Why are Government Projects Exempt from IPC Review?

If the NSW Government considers that the IPC is an essential feature of the planning system, why does the EP&A Act exempt NSW government projects from its scrutiny? If it was a truly independent and expert body, government SSDA projects should be the most important candidates for IPC assessment as consent authority.

Presumably, the reason for this anomaly is that the NSW government appreciates that this would not be in the public interest to use the IPC in this role because of the unwelcome delays, uncertainties and compliance costs for major projects. It is in the public interest that private sector projects be treated in the same way as NSW government projects.

Adverse Economic Impacts of the IPC

The Productivity Commission's publications recognise the adverse impact of excessive regulation on the economy. Nowhere is this more evident than in the NSW planning system for

major developments. Development is the cornerstone of the modern economy and the cumbersome system in NSW:

a. acts as a deterrent on productive investment with the costs, delays and regulatory uncertainties associated with approval of major projects;
b. imposes excessive compliance costs which ultimately are passed onto consumers; and
c. reduces economic competitiveness by making it difficult for small business to compete against big companies and industry oligopolies on a playing field which is not level.

The existence of the IPC is an example of ill-considered regulation which has all of these consequences, The IPC's refusal of Gunlake's SSDA and other recent projects highlights this risk.

Before investing in a new project, companies must have reasonable certainty that their project will be approved, and that the capital and operating costs will leave room to achieve a return on its investment. With the IPC role adding delay and uncertainty on virtually all major project approvals, there are very large hidden costs imposed on developers and the economy. With its bad track record, there are no apparent public benefits attributable to the IPC which justifies the costs.

For project developers faced with the uncertainty created by the IPC, they only proceed if they are satisfied that the compliance costs can be passed onto customers. Not only does this increase the cost of construction materials for housing and infrastructure, it also reduces the number or size of new projects which can go ahead, as it is difficult for small players to get access to capital.

As any purchaser of construction materials will know, prices have skyrocketed during the ongoing housing and infrastructure boom. The difficulty in obtaining development approvals and the costs imposed by the inefficient planning system are one of the major reasons. As a major contributor to that inefficiency, the IPC has run its course and should be disbanded. It is not in the public interest for its unlawful decisions to jeopardise royalties, jobs and small business when the planning system already protects the community and environment effectively without it.

Terms of Reference 2 and 3-Changes to State Significant Development Approval Process

If NSW is serious about reforms to the SSDA process, the starting point is to disband the IPC.

In its place, any new SSDA process should have strict timelines imposed on the Department to assess or respond to information provided to it as part of the assessment process. This would include information from the public (including objectors), other government authorities and the project developer or its consultants.

Instead of using the IPC, the Minister could initiate public meetings as part of the assessment process for developments considered to raise critical scientific issues or matters of serious public concern. This way, the assessment process would be crystallised in a single hearing where all sides could be heard, rather than the rolling assessment process that goes on and on, with different outcomes possible at each layer.

Within the approved timeframes, the Department would then make a recommendation to the Minister who would have to accept it or reject it within a specified timeframe, rather than send it back to the drawing board for further assessment.

As recognised in the Productivity Commission guidelines, good regulation is essential to enabling effective competition, and enhanced choice, quality, innovation, flexibility and responsiveness. It enables healthy and dynamic private and public sectors and improves the wellbeing of consumers and the wider community. The process suggested above, combined with a full-scale review of the burgeoning EP&A Act, would restore NSW's reputation as a good place to do business.

Conclusion

If required by the Productivity Commission, Gunlake would be happy to provide references and supporting information for the matters raised in this submission. The submission has not gone into detail about various aspects on the IPC's process or participants. However, Gunlake believes that further scrutiny of the SSDA #7090 process would further highlight the IPC's shortcomings. Gunlake would be happy to meet with the Productivity Commissioner on a confidential basis to shed more light on the IPCs behaviour.

Yours faithfully,

Managing Director