

Mr Peter Achterstraat  
NSW Productivity Commissioner  
NSW Treasury

By email: ProductivityFeedback@treasury.nsw.gov.au

Our Ref: AD19/0150

Dear Mr Achterstraat

**Review of the Independent Planning Commission**

Please find attached the Commission's submission to the review of the Independent Planning Commission. Thank you for providing the Commission with an opportunity to make a submission. We are happy for this submission to be published on your website or otherwise made public.

Should you or your staff require any further information, please contact [REDACTED]

Yours sincerely,

11 November 2019

**INDEPENDENT COMMISSION AGAINST CORRUPTION**

**REVIEW OF THE INDEPENDENT PLANNING COMMISSION**

**SUBMISSION  
TO THE  
NSW PRODUCTIVITY COMMISSIONER**

**November 2019**

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## Introduction

1. The Hon. Robert Stokes, Minister for Planning and Public Spaces, has requested the Productivity Commissioner to conduct a review of the Independent Planning Commission ("IPC"). This submission is provided by the Independent Commission Against Corruption ("the Commission") in response to the announcement of the review.

## Perceptions of corruption in the planning system

2. The Commission has long held an interest in environmental planning issues as a particular area of perceived corruption risk. This interest is based on a number of factors, which are outlined below.
3. The Commission receives a high volume of complaints about planning issues. For example, 21% of all complaints received under s 10 of the *Independent Commission Against Corruption Act 1988* for the 2018/19 year involved development applications and land rezonings. During the same period, 14% of the total workplace functions complained about involved development applications and land rezonings.
4. The Commission has conducted numerous high profile investigations involving environmental planning decisions and has made various corruption prevention recommendations as a result. These matters have involved 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). The recent investigation and inquiry into the former Canterbury City Council, which included environmental planning matters, remains unreported at this time.
5. The Commission has issued multiple publications concerning environmental planning since 2000. Publications in 2010<sup>1</sup> and 2012<sup>2</sup> may be of relevance to the current review given they discuss or make recommendations in respect of the IPC's forerunner, the Planning Assessment Commission ("PAC").
6. Planning decisions are particularly vulnerable to corruption due to the availability of multiple pathways in which a development approval can be obtained and the complexity that this creates. The less transparency and consistent the system, the more likely there are to be perceptions of undue influence.
7. Some categories of State significant development are associated with substantial economic and non-financial implications, such as mining and extraction operations. These types of developments are contentious due to their ability to enliven strong community support and

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<sup>1</sup> ICAC, *The exercise of discretion under Part 3A of the Environmental Planning and Assessment Act 1979 and the State Environmental Planning Policy (Major Development) 2005*, Dec 2010

<sup>2</sup> ICAC, *Anti-Corruption safeguards and the NSW planning system*, Feb 2012

opposition. The high level of public attention and engagement surrounding these applications can create perceptions of one community interest being favoured over another.

8. The discretionary nature of some planning rules creates a perception of corruption. This is reflective of concerns that the exercise of discretion can deliver significant financial benefits to a development applicant beyond what appear to be the rules. In the case of State significant developments, it is possible to obtain an approval for a proposal outside of established development controls and for aspects of a project that are prohibited in a zone. Similarly, while modification proposals can no longer be lodged under the repealed Part 3A of the *Environmental Planning and Assessment Act 1979* ("EP&A Act"), the approval pathway applying to existing modification applications is characterised by broad discretion.
9. Approvals provided under the State significant development and Part 3A pathways can allow developments that substantially exceed density, height, floor space and other limits set out in local environmental plans. This scope to grant approvals for projects that are contrary to local plans creates a perception of corruption that undermines confidence in public administration. The Commission's experience is that the possibility of concessions not permitted by local plans can encourage lobbying and influence peddling activities that are unconnected with the merits of the development. This can include cultivating personal relationships with decision-makers and providing inappropriate gifts and hospitality.
10. State significant development applications and modification proposals lodged under the repealed Part 3A create 'winners and losers'. In the case of residential developments, surrounding property owners, who have made decisions based on current zonings and development controls, are often left disadvantaged. By contrast, the degree of flexibility and subjectivity in the planning system allows proponents to make large windfall gains. As the Commission has previously observed, the attendant corruption risk arising from this scenario is obvious<sup>3</sup> and is a key driver of corrupt practices.
11. Despite the above perceptions of corruption, it should be noted that since the IPC's inception the Commission has not made any findings of serious corrupt conduct involving members of the IPC, nor has it received any complaints that indicate a likelihood that corrupt conduct has occurred.

### **Commission support for an independent decision-making body**

12. The Commission supports the granting of consent powers to a body that is operationally independent from government. The IPC's existing determination powers include particular developments that are controversial and associated with high corruption risks. 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.

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<sup>3</sup> ICAC, *The exercise of discretion under Part 3A of the Environmental Planning and Assessment Act 1979 and the State Environmental Planning Policy (Major Development) 2005*, December 2010, p.6

13. To be clear, the Commission considers operational independence does not necessarily mean the IPC requires its own legislation.
14. The Commission's support for an independent planning body does not signify any lack of trust in a particular public official or position. Rather, the key issue is the need to ensure that there are adequate safeguards in place to address corruption risks and to enhance the integrity and good repute of planning decisions.
15. The IPC operates with a high degree of transparency in relation to its interactions with stakeholders, helping to minimise perceptions of avoided scrutiny. As a planning body, the IPC is required under the EP&A Act to record meetings held in public and these records are made publicly available. The IPC has also chosen to record and publish the transcripts of its private meetings. Additionally, the IPC provides stakeholders a period of seven days to comment on material raised at any public hearing or public meeting as well as providing opportunities for all stakeholders to comment on new information received while it considers an application. These requirements contrast with other disclosure regimes currently operating in NSW, which are less informative.
16. Political donations have a long history of featuring in inquiries involving local council planning decisions.<sup>4</sup> As the IPC operates independently of Government, it is not influenced by political donations. While certain corporations, individuals and their close associates, including developers, are banned from making political donations in NSW, it is still possible for these groups to take advantage of differences in rules between jurisdictions in Australia, or to simply break the law. For example, political donations made to the federal arm of a political party can still create perceptions of bias for NSW elected officials because of cross-jurisdictional discrepancies and the structure of political parties.

### **The IPC's jurisdiction**

17. In its 2010 publication concerning the repealed Part 3A of the EP&A Act, the Commission argued for an expanded role for the PAC. At the time, the then Minister for Planning's general delegation to the PAC fell far short of the previous advice received by the Commission that the majority of ministerial-level determinations will be delegated to the PAC.
18. The IPC is now the consent authority for particular State significant developments where there are 25 or more submissions by way of objection from the community, a reportable political donation in relation to an application, or an objection from the local council.<sup>5</sup> As these categories of development are controversial, the Commission believes that the IPC's jurisdiction in this respect should remain.

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<sup>4</sup> Examples include the Tweed Shire Council and the Commission's investigation into North Coast land developments.

<sup>5</sup> Clause 8A of the *State Environmental Planning Policy (State and Regional Development) 2011*

19. Unlike the former PAC, the IPC is a consent authority in its own right as it is designated this role via a statutory instrument. Consequently, the IPC is not reliant on the delegation of power to determine the above categories of development. The Commission believes that it is important that the IPC maintain its role as a standalone consent authority. A reliance on Ministerial delegations provides a lack of certainty to the community as the delegation can be withdrawn or amended at any time. Furthermore, instruments of delegation can be difficult to access and accordingly reduce transparency to the community.
20. The Commission understands, however, that the Ministerial delegation dated 14 September 2011 has remained in place. Ideally, any matters covered by Ministerial delegations should be included in the EP&A Act or a relevant State Environmental Planning Policy.

### **Appointment and removal of IPC Commissioners**

21. The Minister for Planning and Public Spaces appoints members of the IPC. While the current practice concerning the appointment of Commissioners includes some safeguards such as the formation of a panel to select preferred candidates and Cabinet consideration of appointments, these processes are not mandatory. Nor does the NSW Governor make these appointments, including the position of Chair of the IPC.
22. The Commission has previously argued in relation to the former PAC that the appointment and removal of its members should be open to proper scrutiny, in order to reduce their actual or perceived vulnerability to undue influence. Options include Parliamentary scrutiny or prescribed limitations on how or why a member's term may be terminated. The adoption of such safeguards in relation to the tenure of members of the IPC would help strengthen their perceived independence from Government and would protect against the threat of removal being used to influence their decisions.
23. IPC members are appointed for terms of up to three years and cannot serve more than six years in total. The Commission supports the current limit on the tenure of IPC members. As the Chair appoints members to constitute the IPC for any given matter, the members who will be assigned to a matter are not always predictable or known far in advance. This reduces the possibility of corrupt conduct by making it more difficult for an improper relationship to form between a decision-maker and a proponent or objector. In the absence of a limit on the tenure of members, it may become possible that members will be subject to inappropriate advances.

### **Resources**

24. The IPC's funding must be sufficient for it to remain operationally independent from Government.
25. The IPC has limited permanent staff and is reliant on staff from other government agencies such as the Department of Planning, Industry and Environment ("the Department").

26. Reliance on Departmental staff can be problematic as it puts the IPC's perceived independence at risk in an environment where it is already dependent on the Department to carry out a range of administrative and more significant functions that would ordinarily be conducted by a consent authority.
27. Furthermore, the Department's involvement in the preparation of assessment reports, which recommend whether a development should proceed, has the potential to create perceptions amongst stakeholders of a lack of independence. A performance audit of the former PAC, released by the NSW Auditor-General in January 2017, acknowledged that the Department's role in preparing assessment reports impacted on the PAC's perceived independence.<sup>6</sup> Consequently, it is important that the IPC has sufficient permanent planning staff, or at least staff under its direction, that are available to scrutinise Departmental reports to counter perceptions of a lack of independence. Where necessary, the IPC should also have sufficient funding to obtain alternative points of view or opinions from subject matter experts.
28. The Environmental Planning & Assessment Regulation 2000 provides for the payment of fees for State significant development. Additional fees are also payable when the IPC conducts a public hearing. The Commission is unaware of the arrangements that exist between the Department and the IPC in relation to the provisions of fees paid by applicants.

### **Third party objector merit appeal rights**

29. Third party objector appeal rights are limited under the planning system and only apply to State significant development if the project meets the relevant criteria for designated development. Currently, if the IPC holds a public hearing, merit appeal rights to the Land and Environment Court for such projects are extinguished. This is concerning given that designated development involves high impact projects that are likely to generate pollution or are located in or near environmentally sensitive areas.
30. In addition, The Commission has previously recommended that the general availability of third-party objector merit appeal rights should be extended to include certain significant and controversial developments that do not fit the criteria for designated development.<sup>7</sup> These types of developments include high corruption risk developments, such as residential apartments that represent a major departure from development standards and zonings contained in local environmental plans.
31. The idea of providing an avenue of redress for planning decisions enhances accountability for decisions. The extension of objector appeal rights would also be consistent with the approach

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<sup>6</sup> Audit Office of NSW, *Assessing major development applications – Planning Assessment Commission*, Jan 2017, p.15

<sup>7</sup> See the following Commission reports: *Report on investigation into Randwick City Council* (Feb 1995); *Corruption risks in NSW development approval processes* (Sept 2007); *The exercise of discretion under Part 3A of the Environmental Planning and Assessment Act 1979 and the State Environmental Planning Policy (Major Development) 2005* (Dec 2010); *Anti-corruption safeguards and the NSW planning system* (Feb 2012)

of providing additional safeguards for developments that are associated with corruption risk. If such rights were to be created, it would be necessary to consider measures to prevent parties from simply using the IPC as a stepping stone to reach the court. Options include short time frames for lodging an appeal, restricting appeals to original objectors, restricting appeals to those objectors with leave and awarding costs against unsuccessful parties.