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NSW Legislative Council
Macquarie St
SYDNEY NSW 2000

Mr Peter Achterstraat AM
NSW Productivity Commissioner
Via: ProductivityFeedback@treasury.nsw.gov.au

Dear Mr Achterstraat,

Please accept this submission to the review of the Independent Planning Commission (IPC) that you are currently conducting.

The IPC's current role is to operate independently of other government agencies to build 'community confidence in the decision-making processes for major development and land-use planning state-wide'.¹

The history of major planning decisions in NSW has shown that proposals are often hotly contested within the community, those contests are inherently political and subject to significant efforts from vested interests to influence outcomes, including corrupt behaviour. One of the most effective ways to give the community confidence in processes and outcomes is to maintain and empower an independent planning decision making body.

The fact that the IPC is now under public attack by a vested interest in the Minerals Council because of an unfavourable decision and that this attack has led to a review, stands as strong evidence for the need to maintain an independent planning decision making body.

Much of the conflict around the planning system and in particular the influence of industry interests has related mining and gas development proposals. The NSW Minerals Council and the mining and gas industry has significant influence over the major political parties in NSW including as major donors. There is also a significant cross-over in staffing as the revolving door sees politicians, political advisors or bureaucrats transitioning to work in the mining sector or as lobbyists. There have been calls from many groups and individuals to add the mining industry to the prohibited donor list because of the degree to which their interests can be advanced or limited by political decisions.

It is unsurprising in this regard that it has been a campaign by the NSW Minerals Council that has led to the call for this review. There is a growing public recognition of the need to transition away from fossil fuel mining because to reduce carbon emissions. There is also increasing

¹ <https://www.ipcn.nsw.gov.au/about-us>

concern about the impact of mining on water supply and agricultural land and a growing land-use conflict between these different interests. The mining industry has been strongly reacting against this shift and with significant resources available to it to influence this public debate the future of coal and gas mining, particularly as it relates to greenfield developments has become one of the most politically contested issues in Australia at this time. Significant pressure is being brought to bare on political parties to accommodate the interests of the fossil fuel industry. These circumstances only adds weight to the argument for an independent decision making body when it comes to planning decisions as it relates to fossil fuel developments.

I provide the following submission to put on record the reality of the IPC's role in our planning system when it comes to determining major coal mining projects in particular, to illustrate the need to uphold the independence of the IPC and to make adjustments to the process which, as it is presently conducted, I see as strongly favouring mining applicants over communities.

Historical context of the IPC

In 2008, NSW Labor set up the Planning Assessment Commission (PAC) in response to notorious planning scandals involving Ministers that were later referred to the Independent Commissioner Against Corruption (ICAC). However, the Planning Minister retained the role of approving a project and as a result, incidents of ICAC referrals and allegations of political interference remained.

In 2011, when the Coalition came to power, the planning system was further improved by ensuring development approvals for contentious major projects were in the hands of the independent body. In 2018, the Coalition made reforms to the remit of the PAC as consent authority and renamed it the IPC.

The changes over time have demonstrated a recognition of both major parties of the need to move to independent advice and independent decision making in the planning system, informed by lessons drawn from ICAC findings and recommendations. Any changes that reduce independent decision making risks failing to learn these lessons of the past.

Decisions of the IPC on major coal mining projects

Recent criticism of the IPC has been around the IPC's role in creating uncertainty for investors, particularly as they relate to coal. The NSW Deputy Premier, John Barilaro, stated that:

"Uncertainty around the IPC's decision-making process is creating a sovereign risk for mining investment in NSW. "There is a lack of consistency, a lack of certainty, and the length of time taken to reach some of these decisions is unacceptable."²

This criticism of the IPC does not stack up. It is clear from the IPC website³ and the Department of Planning, Industry and Environment (DPIE) Major Projects Assessment website⁴ that the IPC performs its functions in a timely and efficient manner, with much of the delay being caused by the proponent and/or DPIE.

When the IPC has been asked to determine a coal mining project, this determination is regularly made within 3 months of the initial referral, with many decisions being made in less than 1 month. In cases where the IPC took longer than 3 months to reach a determination, this was when the IPC had requested additional information from the applicant and DPIE.

The following is a brief snapshot of IPC decisions on major coal mining projects:

- Since it began, the IPC has refused only 2 out of 21 coal projects and modifications referred for determination. These include:
 - Rocky Hill Coal Project - Refusal on the grounds of unacceptable impacts on the township of Gloucester.
 - Bylong Coal Mine - Refusal on the grounds of unacceptable impacts on groundwater and strategic agricultural land in the Bylong Valley.
- 10 out of these 21 determination decisions by the IPC took three months or less.
- Five of the 21 determination decisions took between three and five months.
- The remaining six determination decisions that took longer than five months included:
 - the Bylong mine refusal which was subject to legal uncertainties associated with the projects gateway certificate during the assessment period.
 - Another three were associated proposals for a new United Wambo mine and modifications where the Commission requested additional information from the proponent during the assessment period.
 - The final project, the Dartbrook Coal Mine Mod 7 saw additional information being provided by the DPIE during the assessment period which was then commented upon by a variety of stakeholders.

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<https://www.abc.net.au/news/2019-10-01/nationals-want-overhaul-of-independent-planning-commission/11560304>

³ <https://www.ipcn.nsw.gov.au/projects>

⁴ <http://www.majorprojects.planning.nsw.gov.au/page/>

- When the IPC was requested to hold public hearings, the process of review, public hearing and publication of findings took an average of 6 months.⁵

See Appendix for list of considered projects.

Applicants most served by the current process

Despite moving towards an independent decision making authority in the IPC, and the clear evidence that the determination process is relatively streamlined and efficient, NSW planning laws as they relate to major projects still largely favours applicants and lacks accountability. There is an opportunity to address these issues as part of the IPC review:

1. According to Part 8, Division 8.3, section 8.6 of the *Environmental Planning and Assessment Act 1979*, merits appeal rights are not available if the Minister directs the IPC to hold a public hearing. As the vast majority of mining projects that have required a public hearing have been approved by the IPC, the lack of merits appeal rights disproportionately impacts on communities and other impacted third parties.
2. Currently, the proponent of a major project is most likely to employ a consultant to complete an Environmental Impact Statement (EIS) in support of their application. A proponent is unlikely engage a consultant if their assessment is not favourable to the project and it is in the interest of the consultants future business to produce an assessment favourable to the project. Given DPIE and the community rely on the EIS presented by the proponent to inform them of the impacts of the project, there is a bias in the EIS process in favour of the proponent. A more appropriate process would be for a consultant to be appointed from an approved pool maintained by DPIE or the IPC and for their work to be funded by the proponent. This would create a more independent environmental assessment process to support the independent decision making process involving the IPC. If an approach like this is not established, consideration should be given to ensuring the IPC has the resources to carefully scrutinise EIS' and the DPIE's recommendations to ensure assessments are sufficient in detail to adequately consider and address impacts.
3. The current planning system puts very clear and limited timelines on public submission processes but very few limits on response timelines for proponents. This has led to many communities facing long and drawn out application and assessment processes, and this seems to be particularly a concern for major coal mining projects (this is quite separate to the actual determination timeline). Where this happens for coal mining projects, these lengthy processes have serious impacts on surrounding land values, and the wellbeing of the community well before any decision on the project has been made. This is an unfair burden on communities, especially when it is often the applicant that causes a

⁵ Ibid.

delay in the assessment process either by failing to provide adequate information in the first instance requiring more information to be sought or in being slow to respond to submissions or requests from the Department.

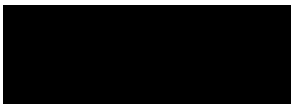
Recommendations

I ask that you consider the following recommendations to address the issues I have raised in this submission:

1. That as a minimum the IPC retain its current form and level of independence and that the threshold for referral of matters be maintained. The evidence demonstrates both that the role of the IPC as an independent decision making body is crucial for our planning system and that it is performing its function in a timely and effective manner.
2. That merits appeal rights are reinstated when a matter is referred to a public hearing to ensure fairness and oversight in the planning system
3. That the process for appointing consultants to undertake an EIS be taken out of applicants' hands with an independent appointment process established. This will ensure communities, applicants and the assessment and decision making bodies have access to independent information on environmental assessments.
4. That the IPC have increased resources directed to its administration and review functions to build on its work and ensure confidence in its processes.
5. That statutory limitation periods be introduced for major project applications to ensure sufficient burden is placed on proponents to be timely in applications and responding to issues that arise in the planning process and to limit the long-term uncertainty faced by communities from drawn out planning processes.

Thank you for your consideration of this submission.

Regards,



Justin Field MLC

Appendix: list of coal mining applications considered by the IPC

Rocky Hill Coal Project
Wambo Mine - MOD 17 - South Bates Extension
Wallarah 2 Coal Project
Invincible Coal Mine - Southern Extension Modification
HVO South - Modification 5 - Progression of Mining
Integra Underground Project - MOD 8
Mt Pleasant Coal Mine - MOD 3 Extension
Modification to Ashton Mine South East Open Cut Project
Tahmoor Colliery MOD 4
Liddell Mine MOD 7
Boggabri Mine MOD 7
Rix's Creek South - Modification 10 - Extension of time
Moolarben Coal 2 - MOD 3
Moolarben Coal 1 - MOD 14
Ulan Coal MOD 4
Dartbrook Coal Mine MOD 7
Wambo Rail - MOD 3 - United Wambo
Wambo Mine - MOD 16 - United Wambo
United Wambo Open Cut Coal Mine
Bylong Coal Mine
Rix's Creek Coal Mine - continuation of project