

NSW Productivity Commissioner

Review of the NSW Independent Planning Commission

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SUBMISSION

Muswellbrook Shire Council

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1. RECOMMENDATIONS

Council makes the following recommendations for the reasons set out in the Submission:

That the NSW Productivity Commissioner make the following findings and recommendations to the Minister:

- **The processes of the IPC can be improved with enhanced resourcing.**
- **The public statements by the Minerals Council in which were made personal attacks about members of the IPC are without any foundation and serve only to highlight the importance of independence in the approvals process.**
- **The IPC processes may be improved by appointing additional members with environmental law or administrative law backgrounds.**
- **The IPC should adopt a practice of distributing draft decisions to statutory authorities (including the relevant local government authority or authorities) for final fact checking prior to publication.**
- **Improvements to the processes of the IPC will not, however, significantly improve productivity in the NSW mining industry. Improvements to the underlying planning instruments, resource assessments and State resource planning, however, may yield considerable improvement – particularly the early identification of valuable economic deposits that present with low land use conflict and which have been supported by local communities in local strategic plans.**
- **That, in addition to applicant mining company appeals, merit appeals be open to New South Wales councils in the Land and Environment Court to challenge the merit of a planning approval made by the IPC.**

2. ABBREVIATIONS

In this Submission:

Act means the Environmental Planning and Assessment Act, 1979;

Council means Muswellbrook Shire Council;

Department means the New South Wales Department of Planning or its successor departments;

IPC means the Independent Planning Commission of New South Wales;

Minerals Council means the New South Wales Minerals Council;

5. COUNCIL

Council:

- makes between four and 14 submissions concerning State Significant development applications each year; and
- is the planning consent authority for two coal mines and power stations.

6. BENEFITS FLOW TO THE STATE AND REGION BUT IMPACTS ARE MORE LOCALISED – A STATE POLITICAL DETERMINATION PROCESS IS NOT A BEST PRACTICE GOVERNANCE MODEL IN THE CIRCUMSTANCES

Where benefits and impacts flow disparately, it is unwise from a governance point of view, to adopt an approvals process which places determinations in the hand of beneficiaries and not the recipient of the impacts.

Whilst royalty, employment and supply chain benefits flow principally to State and Regional beneficiaries, other impacts such as dust, noise and vibration, water quality, ecology and habitat, heritage (particularly landscape heritage and Aboriginal heritage), visual amenity, economic diversity and resilience, housing, odour (spontaneous combustion), for example, are much more localised to the communities where the mining activity takes place. Benefits also flow to present generations whilst many of the impacts flow to future generations.

For instance, in all of New South Wales, Muswellbrook and Singleton local government areas have the highest rates of cardiovascular disease hospital separations. The Muswellbrook postcode 0-35 years cohort presents with the highest rates of emergency department visits for both asthma and all other respiratory illness for all of the Hunter and Sydney regions¹.

Much is made of the local benefit derived from employment from State Significant development approvals, but that benefit has not often flowed more widely to other sectors of the local economy. Despite six operating coal mines, for example, 17.5% of persons in Muswellbrook were found to be living in economic disadvantage compared with the rest of New South Wales². This has been exacerbated by the recent proportional increase in drive-in-drive out workforce arrangements, contractualisation and casualisation of the workforce and, increasingly, automation.

The Deputy Premier was quoted recently as saying that without mining approvals the Government would have to “tax the hell out of people”. The Deputy Premier only confirmed publically what successive governments have said privately for years. The community has long suspected that the primary motivation of approving mining development was the royalties generated for the State Government and not, as previously publically stated, because of the job opportunity that the developments provided to the local community.

¹ NSW Health (2010) *Respiratory and Cardiovascular Diseases and Cancer Among Residents in the Hunter New England Area Health Service*, <https://www.health.nsw.gov.au/environment/Pages/hne-respi-cardio.aspx>

² 2016 ABS Population and Housing Census and 2015/16 ABS Survey of Income and Housing – compiled by the NSW Council of Social Service.

The logical extension of that statement is that ministers, as consent authority, will be prepared, or perceived to be prepared, to take into account matters, such as taxation and royalties, which are not primary considerations under the Mining SEPP. There would be immediate fear in the local community that evidence-based approvals would be abolished, in practice, replaced with lobby groups seeking influence and approvals in return for unlawful outcomes.

7. IMPACTS FROM MINING ARE ALMOST ALWAYS EXTERNALITIES TO THE BUSINESS PROCESS AND REQUIRE A ROBUST AND INDEPENDENT ASSESSMENT AND APPROVALS REGIME

Secondly, and building on the argument in 6., externalities to the business process such as environmental and ecological harm, health impacts and emergency service provision are significant issues that, if lobbying by business is to be elevated and evidence-based assessment consequentially diminished in the assessment process, will risk being undervalued or forgotten entirely.

Muswellbrook's local orchids, for example, are apparent for only short periods each year and are particularly vulnerable to extinction. The *Prasophilum Wybong* (a local orchid) was only discovered and protected as critically endangered after a mine's own ecological study failed to detect it and approval had been given for the Mangoola Mine (then Anvill Hill Project) by the then Minister for Planning on the advice of his Department prior to the establishment of the then PAC. The orchid is only found on the Mangoola lease area. Only good luck combined with the rapid deployment of Federal protections prevented its extinction.

8. PRODUCTIVITY IMPROVEMENTS NOT SIGNIFICANTLY FOUND IN THE APPROVALS STAGE BUT IN THE PLANNING STAGE

The New South Wales planning system has, for the vast majority of the State's developable landmass (land excluding National Park and State Reserves), only one substantial land use zone – RU1 Primary Production Zone. Mining is permitted within it. Unlike other land uses, there is no logical, orderly and planned system for the State's mining industry. Housing development, for example, is carefully planned ensuring that urban release areas for the expansion of residential housing is in areas supported by existing infrastructure, services and which present with low land use conflict with other land uses such as riparian flood plains, valuable agricultural soil, and native vegetation corridors and bush fire prone land. Such planning builds productivity (and consequently affordability) into the housing construction industry. No such up front planning is done in the New South Wales mining industry with essentially all the decision-making left until the approvals stage.

The IPC is unfairly blamed for refusals of mines which should never have been signalled for development in the first place.

An orderly and logical planning system should be developed for the extension of mining in New South Wales. Some of the decision-making should be brought forward through careful resource assessments and local strategic planning. Identifying the most economic deposits located close to existing transport and export infrastructure and which presents with low levels of land use conflict should be confirmed before more speculative or marginal mining proposals with higher land use conflict.

It is critical in circumstances where mining competitiveness is driven by international considerations, that New South Wales develops mining activity with low land use conflict capable of operating competitively. That cannot and will not happen if the planning system in New South Wales is deaf to productivity and potential land-use conflicts. It is not good enough to leave these important considerations to the approvals stage. Doing so exposes the New South Wales mining industry, and other industries competing for the land, water and other resources in areas in which a mining project is proposed, to considerable investment uncertainty and risk which damages international capital investment in New South Wales.

9. **CORRUPTION RISKS**

The relationship between business and political decision-making has been fraught with difficulties in the determination of State Significant Development in the past. The Independent Commission Against Corruption noted that weighing up competing interests in the assessment and determination of State Significant Development to avoid perceptions of, or actual bias and corruption was critical to maintain the integrity of the State's planning system³.

It will be necessary for the Commission to carefully consider the corruption risks in all of the planning approvals systems it considers but, particularly, in an approvals system where the Government, as an approvals authority, is capable of being lobbied directly by the beneficiaries of particular developments. In Council's submission, the corruption risk is better managed if the Government's function is confined to the broader policy setting process and not the approvals process. In Council's view there is some force in the argument that dividing the policy setting power from the approvals power is a strengthening or an advancing of the Westminster principles that underpin our democracy.

10. **GREATER RESOURCING FOR THE IPC THE REAL ISSUE**

The Dartbrook error

In its recent determination in relation to the Dartbrook Coal Mine (DA 231-7-2000 Dartbrook Mod 7 - Bord and Pillar Mining and 5 Year Extension), the IPC annexed to the determination, the incorrect version of a document purporting to relate to a

³ Independent Commission Against Corruption (2012) *Anti-corruption safeguards and the NSW planning system*

Voluntary Planning Agreement struck between the proponent and Council. This has the highly unsatisfactory effect of rendering the agreement between the two parties unenforceable, and will require a costly and time consuming modification application by the proponent to correct this simple administrative error, that could easily be avoided. In the past, the consent authority has circulated a confidential copy of the draft determination to statutory agencies, which would provide a short opportunity to correct any minor errors prior to publication. There is no reason that that practice could not be adopted by the IPC. This is also the practice adopted by many other State commissioners including the Independent Pricing and Regulatory Tribunal.

The Mt Arthur error

In *Muswellbrook Shire Council v Hunter Valley Energy Coal Pty Ltd*⁴ Basten JA noted that the development consent document had been “shoddily prepared”. His Honour was, in Council’s view, deliberately vague as to whether the blame was to be apportioned to the Department or to the then PAC or both. It is clear, however, that the passages “shoddily prepared” were prepared by the Department and adopted by the PAC. His Honour noted that the then PAC relied upon officers of the Department for advice, the preparation of draft conditions of consent and other resources, and that the quality of the consent conditions prepared for the then PAC for the Mt Arthur Mining Complex Modification 1 approval produced uncertainty in the interpretation of its meaning.

The Rix’s Creek error

In Rix’s Creek South Continuation of Mining Project SSD 6300, the IPC prematurely announced a conditional approval prior to the close of submissions. The IPC, identically constituted, then reissued a conditional approval ten days later. Council has no reason to doubt that an “administrative error” occurred as contended by the IPC. In Council’s view, it was not appropriate for the IPC to be identically constituted. The interests of administrative fairness and perception were better served by the IPC being reconstituted and the matter heard afresh. It looked, to the casual observer, that the IPC had reached a concluded view prior to hearing all of the evidence and submissions.

Resourcing

These were not errors of the type that could properly and fairly support the contentions of the Minerals Council with respect to the IPC. The IPC has in Council’s view, vastly improved the transparency, the perception of independence and fairness, and quality of planning outcomes in New South Wales. Particularly, Council notes that the IPC (and PAC) has improved environmental mining outcomes by:

1. minimising final land form voids;
2. improving conditions for cumulative air quality monitoring; and

⁴ [2019] NSWCA 216

3. introducing final landform micro-relief as part of overburden rehabilitation.

These outcomes have now been embraced by industry and embedded as industry best practice in New South Wales. They were imposed after a careful consideration of the evidence and science although not initially supported by the Department.

In Council's submission, the above errors are evidence only of a poorly resourced IPC dependent on the Department for advice and support. In that sense, it is not truly independent. The IPC's resources should be substantially increased, and the addition of more members with environmental law or administrative law expertise would greatly assist the constitution of IPC panels.

It is finally noted that it is only applicants that are entitled to merit appeals in certain circumstances in the Land and Environment Court, whereas objectors have no such entitlement. Mining applicants also have administrative appeals rights available to exercise. This does not represent equitable access to justice for all citizens and it is submitted that councils on behalf of their communities be granted the entitlement to merit appeals in mining matters.

Mining Activity and Ownership in Muswellbrook Shire Council

