



Mr Peter Achterstraat AM
NSW Productivity Commissioner
NSW Treasury
52 Martin Place, Sydney, NSW
GPO Box 5469, Sydney, NSW 2001

14th November 2019

ProductivityFeedback@treasury.nsw.gov.au

Dear Commissioner,

Re: Submission to the Review of the Independent Planning Commission

OzEnvironmental Pty Ltd ('OzEnvironmental') welcomes the opportunity to provide information, for your consideration, as part of the review of the Independent Planning Commission's (IPC's) role and operations.

This Submission provides:

- An introduction to OzEnvironmental and its experience with the IPC and the planning assessment system more broadly;
- General comments regarding the performance of the IPC; and
- Specific comments relating to the Terms of Reference.

1. About OzEnvironmental

OzEnvironmental provides technical and strategic advisory support to rural society – farmers and rural Councils - in their dialogue with proponents of major projects; for instance mining, unconventional gas, wind and solar farms. The engagements also include representations to the DPIE and the IPC.

The client work has involved 16 councils equating to approximately \$45 Bil worth of State Significant Developments ('SSD's') including:

- Shenhua and Vickery Coal Projects (IPC matters)
- Sunrise Mine Project (IPC matter)
- Cobbora Coal Project (PAC matter)
- Maules Creek Coal Mine (PAC matter)
- Liverpool Range Wind Farm
- Tomingley Gold Mine
- Scandium Ore Mine
- Hera Gold Mine

In recent years OzEnvironmental has also liaised closely with the DPIE, briefing members of the Executive with perspectives of what was happening in the field, and making submissions on such matters as:

- How to improve the environmental impact assessment process;
- Reform of the Voluntary Planning Agreement process; and
- How to improve the standard of mine rehabilitation.

2. General Comments

In any deliberations on how decisions are made on SSDs, it is prudent to be mindful of the comments by the then NSW Commissioner of the Independent Commission Against Corruption, The Hon David Ipp AO QC in his October 2013 report entitled ‘Reducing the Opportunities and Incentives for Corruption in the State’s Management of Coal Resources’. In it he stated that *‘an efficient and effective policy and regulatory environment was one where opaqueness, uncertainty and discretion were eliminated from the decision-making framework’*.

OzEnvironmental endorses The Hon David Ipp’s comments and supports any measures designed to add rigour and transparency to how such decisions are made.

OzEnvironmental considers the IPC is performing well in challenging circumstances. The leadership of the IPC and the reforms it has implemented to its operations and processes, post the amendments to the EP&A Act on 1 March 2018, are to be commended. The IPC is now performing in a much more independent, open, transparent and robust manner than before the changes to the Act.

From OzEnvironmental’s perspective this increased independence, transparency and robustness is welcomed and is helping build trust and confidence in the planning assessment system.

3. Specific Comments

OzEnvironmental now makes some specific comments as per the Terms of Reference.

1. Whether it is in the public interest to maintain an IPC, considering, where relevant, the experience with similar bodies in other common law jurisdictions

OzEnvironmental contends that it is certainly ‘in the public interest’ to maintain the IPC, when judged from both the broadest definition of the term and also from the prescribed statutory definition.

Learned scholars suggest the meaning of ‘in the public interest’ is best kept as a broad concept that is flexible enough to respond to the facts and circumstances of any particular case. In essence this means:

- Complying with applicable law (both its letter and spirit);
- Fair procedures (inclusiveness, voices heard and acted upon) and providing natural justice;
- Public servants act honestly, fairly, impartially and apolitically, giving fair hearing to under-represented individuals as well as powerful vested interests;
- Accountability and transparency in the behaviour of all parties involved;
- Conflicts of interest are avoided/properly managed; and
- Resources and the will applied to protect public rights and identify, expose and address corrupt conduct or maladministration.

When considering ‘in the public interest’ from the prism of the environmental planning and assessment statute, the concept is more defined by the subject matter and the scope and purpose of the enactment.

‘The public interest’ is one of a number of mandatory considerations of SSDs as per s 4.15 of the EP&A Act. The term is reasonably held to include the principles of Ecologically Sustainable Development (ESD), for example as in Section 6(2) of the Protection of the Environment Administration Act 1991. ESD considerations typically include:

- The Precautionary Principle;
- Inter-generational Equity;
- Conservation of biological and ecological integrity; and
- Societal environmental, social and economic wellbeing.

It is also worth noting that community expectations of ‘the public interest’ change over time. This is another reason to include a non-exhaustive list of public interest matters for any arbitrator to consider, rather than a tightly defined, prescribed definition.

It also allows the meaning of public interest to develop in line with changing community attitudes and developments in technology. For example, the positive and negative impacts of proposed SSDs in relation to climate change are now critical factors of public interest, whereas say five years ago that was not the case.

A decision ‘in the public interest’ is one that provides the maximum benefits to the community and the general public, but in such a manner that no neighbours or district is worse off environmentally, socially or economically. Or if they are, then those externalised costs are carried by the proponent, to the satisfaction of the impacted party.

2. The IPC’s operations and the mechanisms by which State significant development is assessed and determined

OzEnvironmental is most supportive of the IPC publishing written transcripts of all meetings and public hearings on the Commission's website and publishing its reasons for its decision on projects.

Moving forward, OzEnvironmental recommends the IPC be more inquisitorial, where statements of claim by the various parties are interrogated and cross examined. In the interests of openness and transparency, interested parties ought to be provided the opportunity to examine, challenge or explain the various assertions put before the IPC.

Currently, whilst the IPC listens to all points of view, there is limited open discussion and dialogue about the relative merits or veracity of the evidence presented. I acknowledge this move should only occur after all the different views are tabled.

OzEnvironmental also recommends that standard consent conditions be reformed, collaboratively by both the DPIE and the IPC, particularly to provide fairer, more robust and transparent conditions when operational environmental impacts exceed those predicted during the planning and assessment stages. This is a serious deficiency in many of the current SSD approvals for mining projects, leading to adjoining landholders suffering adverse noise, dust and water impacts, yet the planning system is imposing on them the intolerable burden of proving, first, that the mine has caused the impact and secondly, that the impact is deleterious and warrants the provision of justice and accountability. In my view the current, typical conditions in such circumstances are a significant denial of natural justice and need to be urgently rectified. I would be pleased to assist in framing revised consent conditions.

3. Having regard to the above, identify any proposed changes to the IPC's current functions, processes for making determinations, and resourcing. The issues to be considered include, but are not limited to:

a) Thresholds for the referral of matters to the IPC

OzEnvironmental strongly supports the current thresholds for referral of matters to the IPC, namely:

- when there are 25 or more public objections to the application, or
- the local council has objected, or
- a reportable political donation has been made.

These thresholds are considered fair and reasonable and provide rightful opportunities for both the general public and local councils to participate in the decision-making on major projects.

b) The clarity and certainty of policies and guidelines that inform determinations

Many of the numerous policies and guidelines which inform determinations cascade from the EP&A Act. It would be prudent for the intent and objectives of this Act to remain unchanged and continue to underpin the workings of the IPC. OzEnvironmental considers the IPC's mission, vision and values to be in accord with what the public would require, mindful of Justice Ipp's comments above.

c) The Commissioners' skills, expertise and qualifications

OzEnvironmental considers the Commissioners are performing well under difficult circumstances. They appear to be well qualified and suitably skilled. I consider there is an opportunity to review the appointments of those who were previously appointed as members of the Gateway Panel and, with its abolishment, transferred to the IPC.

d) The adequacy of mechanisms to identify and resolve any conflicts of interest by Commissioners

OzEnvironmental considers the current conflict of interest policy is appropriate and is adequately implemented.

e) The IPC's procedures and guidelines

OzEnvironmental has no concerns regarding the IPC's policies, procedures and guidelines regarding:

- the determination process;
- the public hearing process;
- the multi-stage public hearing process;
- site inspections and locality tours;
- conflict of interest; and
- meeting records and the management of correspondence.

The holding of public hearings removes merit appeal rights to the Land and Environment Court. Yet public hearings are directed at the Minister's discretion and are by no means as rigorous or equitable as a court hearing, where the evidence can be properly tested by both objectors and proponents. Hence OzEnvironmental recommends that a third party merit review process be permitted so parties can challenge the factual basis of decisions in the courts.

f) The extent to which the IPC should rely upon the assessment report prepared by the DPIE, taking into account any additional assessments by other Government agencies

OzEnvironmental refers the Productivity Commissioner to the *Independent Review of Department of Planning and Environment Assessment Reports*, August 2017, prepared by Ms Lisa Corbyn. That review was most comprehensive in its analysis of the DPIE's Assessment Reports. Ms Corbyn recommended a list of reforms to improve their level of thoroughness, impartiality and transparency.

The Productivity Commissioner is encouraged to explore whether those reforms have been implemented. There appears to be room for improvement.

OzEnvironmental is of the view that, as the IPC is at law an independent statutory decision-maker, it is important that the DPIE's Assessment Reports, whilst ought to be duly considered, should not unduly influence or compromise that independence.

Based on 40 years experience in environmental management, across the public and private sectors, including time as a Ministerial Policy Adviser and the last decade working closely with the impact assessment bureaucracy, I would be very concerned for the robustness and fairness of decisions if the IPC was abolished and SSD decisions reverted to being made in-house.

g) Resourcing of the IPC and the mechanism for determining budgetary support

Just like the other independent agency the ICAC, OzEnvironmental endorses the IPC receiving the budgetary support it deems necessary to undertake its functions with impartiality, independence, rigour and timeliness.

In our view the IPC budgetary system requires reform in two aspects. First, its finances ought to be sourced from the Department of Premier and Cabinet, rather than the DPIE. Secondly, that it receives additional financial resources to enable its efficiency to be improved, for example the potential upgrading of back-of-house systems. This reform would conceivably allow delivery of improved timeliness and the essential capacity for the agency to more often engage independent technical experts to more rigorously examine the complexities of projects.

A review of the 30 part time Commissioners should also be undertaken, mindful that some were members of the Gateway Panel that was abolished and the personnel subsequently absorbed into the IPC.

h) Whether the IPC's Secretariat should be employed directly by the IPC or provided by another Government agency, and if so, which agency

The staff of the IPC Secretariat are employed by the DPIE and on secondment. Therefore, at some stage, it is expected they will return to their home agency. However, part of the role of professional staff at the IPC is to critically review the recommendations and reports prepared by the DPIE. This task can put seconded staff at the IPC in a difficult and unfair position, as they may not feel completely comfortable in providing frank and fearless advice to a department from which they are not truly independent, and may have to return in due course.

OzEnvironmental recommends the IPC directly employ its own staff to avoid the governance and integrity risks outlined above.

Given the very public and often controversial work of the IPC, OzEnvironmental suggests governance measures to protect against regulatory capture be strengthened, not only in the IPC but especially in key related instrumentalities including the DPIE and the EPA.

Regulatory capture occurs when regulatory agencies change over time and move from acting in the public interest (their assigned statutory function) to promoting or advancing the interests of industries

they are supposed to be regulating. It is akin to one interest group on the playing field seizing control of (i.e. 'capturing') the umpires, such that the game is no longer taking place on a level playing field.

Recommended internal checks could include:

- Public reporting of the outcome of meetings departments hold with companies, local government, the various industry groups and other key stakeholders;
- Adopting more explicit guidelines for employee conduct to ensure they are acting in the public interest; and
- Ensuring the departments engage equally with a diversity of interests, experts and change agents to avoid insulation.

Recommended external checks could include:

- The Auditor General or an Environmental Ombudsman undertaking annual, independent audits of these three key agencies/departments; and
- Remaking the law so the burden of proof lies with those promoting the development, not those who may query it.

OzEnvironmental thanks you for the opportunity to provide feedback on these important matters. If you felt so inclined, I would be delighted to meet with you to discuss the matters herein.

I can be contacted on email [REDACTED]

Yours sincerely,

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References:

Corbyn, L., *Independent Review of Department of Planning and Environment Assessment Reports*, 25 August 2017, available at <https://www.planning.nsw.gov.au/-/media/Files/DPE/Reports/Departments-response-to-assessment-report-2018-09-12.ashx>

Kaldas, N., APM, *Review of Governance in The NSW Planning System 2018*
<https://www.planning.nsw.gov.au/Assess-and-Regulate/About-compliance/Kaldas-review>