

13 November 2019

Productivity Commissioner
NSW Productivity Commission
Via email: ProductivityFeedback@treasury.nsw.gov.au

Dear Commissioner,

Thank you for the opportunity to provide a submission to the review of the Independent Planning Commission (IPC). The Planning Institute of Australia (PIA) represents planners from across the industry including local government, state government and consulting firms and has used the deep knowledge of our membership base to inform this submission.

This submission outlines PIA's position on the IPC and its operation and responds to the terms of reference for the review.

The maintenance of the IPC is in the public interest

PIA recognises the critical role of the IPC in the planning system as:

- An **independent adjudicator** of major development, activity and planning proposals which is separate from the Minister;
- A **neutral body for public hearings**, offering a trusted environment in which community and stakeholder representations can be heard; and
- An **expert planning body able to add value** to the assessment process by interrogating and weighing up planning evidence and arguments and making determinations and finessing conditions accordingly.

PIA therefore supports the ongoing operation of IPC and recognises the unique value it brings to planning processes in New South Wales. PIA also acknowledges that some modifications to operation may be required to assist the IPC in achieving its intended function.

PIA maintains that the operation of the IPC is firmly in the public interest and accords with the strategic direction set for the planning system by state government in recent years. PIA believes that an independent body, removed from the perceived biases that can arise from political processes, is critical to maintaining and enhancing community trust in the planning system.

An independent panel capable of considering planning matters accords with the emphasis that has been placed on the operation of Local Planning Panels (formerly IHAPS) across Greater Sydney, Wollongong and the Central Coast. Nick Kaldas APM wrote in his recent review: "I am of the firm view they reduce the potential for corruption, and ensure more consistent, rigorous and merit-based decision-making".ⁱ

The implementation of Local (and Regional) Planning Panels has set a welcome direction which has produced greater trust in the political independence of the planning system. Removing a body which deals with matters of State significance would be a poor outcome and would likely raise concern amongst the community especially if the determination of politically sensitive major development proposals defaulted to the Minister.

With appropriate operational modifications, the IPC has the ability to function with the rigour and effectiveness Kaldas found in the operation of IHAPs.

The objectives of the IPC can be clarified

Having determined that the maintenance of the IPC is in the public interest, it is necessary to determine whether the function of the body requires reassessment. The next section of this submission responds to the second term of reference in relation to the modification of IPC operations for State significant development assessment. .

PIA believes that the IPC should function so as to achieve the following:

1. **Robust planning decisions:** This requires a body of highly competent and experienced planners with the staffing capacity and access to expertise and resources needed to make sound land use allocation and development decisions which reflect prevailing planning and assessment policy .
2. **Trusted decisions seen as free of political interference:** This requires a truly independent commission with appropriate levels of both legal protection and support from unwarranted attack.
3. **Insight to add additional value:** The requires the ability to interrogate pivotal issues, weigh up competing considerations to condition development to achieve better environmental, social and economic outcomes.

The following section responds to the third term of reference and proposes operational changes which best achieve the above objectives.

The operation of the IPC can be enhanced

PIA has developed a number of recommendations which respond to the issues raised in the third term of reference, most crucially the maintenance of independence.

a. Commissioners

PIA acknowledges that a diversity of expertise is important in making sound planning decisions, however PIA argues that planners with significant experience (including experts in environmental and planning law) should be the preference for membership. Planners are uniquely positioned to balance competing land use agendas in the context of adopted policy and are experienced in the integration of specialised and technical scientific, engineering, economic and social arguments.

PIA believes all sittings of the IPC should comprise no less than three members, at least one of whom is a Registered Planner (or Fellow). Registered Planners have proven experience, skills and competencies accredited by PIA. Having an expert planner on every panel is critical to ensuring sound planning decisions are made.

While PIA holds no particular view on Commissioner tenure, it is noted that the Kaldas Review made a number of recommendations regarding panel membership across all NSW jurisdictions, these recommendations should be reviewed and actioned where appropriate to the context of the IPC.

b. Assessment Process

PIA does not believe the IPC should duplicate the assessment process undertaken by the Department of Planning, Industry and Environment (DPIE). Projects the size and complexity to be subject to IPC referral would likely have had the benefit of an experienced, senior Assessment Officer at DPIE and the technical assessment of that experienced practitioner can reasonably be relied upon.

The value added by the IPC is the ability to interrogate complex technical matters and weigh up competing considerations and to determine and draft insightful conditions accordingly. To this end, a panel should be able to meet with the Assessing Officer at DPIE to discuss technical issues, request further technical input from the proponent or an independent expert and utilise the Secretariat staff for research on pivotal issues. The necessary improvements to culture between DPIE, IPC and the Secretariat should be actioned to ensure this fact-finding and assessment phase occurs efficiently, transparently and to the satisfaction of the panel members.

Further, the IPC must have the confidence to develop conditions which result in an improved development on environmental, social and economic grounds. While many of the standard conditions can be readily recommended by the Assessing Officer at DPIE, the development of specialised conditions should be in the remit of the IPC. These conditions do not need to be developed during any meeting but should be deliberated upon by the IPC with expert input and legal review where required. PIA has no view on who should provide this legal review and such a service could be within the Secretariat or external. PIA also notes the preparation of conditions requires strong knowledge of the project development and delivery process post determination and that better access to this expertise and additional training in this area would be valuable for Commissioners.

c. Staffing

PIA believes that the IPC Secretariat should be staffed by planners rather than case managers. Planners have the technical expertise, industry knowledge and professional capability to provide the IPC with high quality secretariat support. PIA believes that recent staffing and budget cuts should be reversed and senior planners reinstated on staff.

The Kaldas Review raised a number of issues regarding the independence of IPC Secretariat staff who were technically employees of DPIE. The report specifically noted that staff may feel conflicted when the IPC was critical of DPIE, given they may return to work as departmental staff. The report recommended that a Memorandum of Understanding be signed to ensure the independence and protection of IPC Secretariat staff. If this has not already occurred, such a process should be considered for the operation of the IPC after this review period.

d. Public Hearings

At present, should the Minister request a public hearing for an IPC matter then the merit appeal rights of the proponent are extinguished. This policy should be re-considered and the criteria and basis for calling a public hearing be carefully scrutinised. While an IPC public hearing offers numerous benefits, it may not sufficiently satisfy the rights afforded to the proponent in the courts and may not be an appropriate substitute. This matter should be scrutinised in the review to ensure that no perception exists that the Minister can call a public hearing to extinguish the appeal rights of a proponent or avoid calling a public meeting for the opposite reason.

e. Independence

The framework for the operation of the IPC is limited to Part 2 Division 2.3 of the *Environmental Planning and Assessment Act 1979*. This section does not set out specific protections from interference except for noting that the IPC is not subject to the control of the Minister.

PIA believes that greater protections should be afforded to the IPC and its panel members to ensure that they are not subject to media attack or political commentary. Such protections should go some way in guaranteeing that decisions and panel members cannot be subject to attack from any party. Such protections may be formalised in statute, undertaken via a memorandum of understanding or established through the operational policies of the IPC. These protections should serve to protect the IPC and its decisions in a similar manner to the judiciary, as much as is appropriate given the special stature of the judiciary in the Australian Constitution.

Mechanisms to review the membership of panel members by the Minister should be maintained and expectations for performance set out in the Code of Conduct. However, processes to review performance should be formalised to ensure no abuse of process.

Conclusion

PIA appreciates the opportunity to provide a submission for the review into the IPC. PIA's key issues are summarised as follows:

- Maintaining the IPC is in the public interest, it bolsters community trust in planning processes.
- The foundation objectives of the IPC must be clarified to ensure adequate expertise and resourcing, guarantee independence and clarify functions to improve project outcomes without duplicating work.
- Preference should be given to Commissioners with planning expertise with each panel comprising no less than three people, one of whom is a Registered Planner.
- Commissioners should not duplicate DPIE technical assessment, but should draw on experts, DPIE staff and legal expertise to interrogate issues and draft creative conditions.
- The Secretariat should be staffed by planners with the independence to work with confidence.
- Consideration should be given in the review to the breadth of the discretion of the Minister when calling for a public hearing - and whether a public meeting should not extinguish the proponent's right to appeal.
- The Commissioners and their decisions should be afforded greater protection.

Thank you again for the opportunity to provide this submission. If you wish to discuss any of the above further, please contact [REDACTED] National Policy Manager by email at [REDACTED] or by phone on [REDACTED].

Yours sincerely

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PIA NSW President

ⁱ Nick Kaldas APM 2017, *Review of governance in the NSW Planning system*, pg. 4