



15 November 2019

Commissioner for Productivity
NSW Productivity Commission
NSW Treasury
52 Martin Place
Sydney NSW 2000

Sent by email to: ProductivityFeedback@treasury.nsw.gov.au

Dear Commissioner:

Re: IPC Review

I write to you on behalf of the Scenic Hills Association ('SHA') and as the co-owner of state heritage listed Varro Ville Homestead. I recently participated in two projects that were conducted by the Independent Planning Commission ('IPC'), both being referrals by Ministers (Planning and Heritage) to the IPC:

1. Varroville: Request for Advice on Proposed Listing on State Heritage Register:
<https://live.ipcn.nsw.gov.au/projects/2018/10/request-to-review-and-report-on-recommendation-to-list-for-varroville>

My husband and I represented ourselves in this review as the owners of the state listed property at the centre of this review (curtilage expansion for the Homestead on the State Heritage Register).

2. Crown Cemetery Development Varroville:
<https://www.ipcn.nsw.gov.au/projects/2018/06/crematoria-development>

I represented the SHA as its convenor and separately as an owner of the property caught in the middle of the proposed development.

Community confidence in the IPC

Media coverage of local community response to the cemetery decision can be found on our website: <http://www.scenic hills.org.au/issues--cemetery.html>. The community response shows that the IPC failed to deliver a critical part of its mission listed on its website:

'We will build the community's confidence and trust in the Commission's independence by ensuring our processes are open and transparent, and encouraging and promoting greater community participation throughout the assessment and determination process.'

The SHA wrote to the Chair of the IPC, Professor Mary O'Kane, on 6 November 2019 raising deep concerns about the IPC's conduct of the Varroville Crown Cemetery development application ('DA') and

seeking her response. We have received no response thus far, and would be happy to provide a copy of this letter to the Productivity Commission if requested.

The following draws on our experience with the two IPC reviews, one of which found in our favour and the other against, but both posing significant problems.

Submission of the SHA

1. We support the concept of an Independent Planning Commission; however it must be truly independent. A key reason for the significant community distrust in planning is the perception of unfair and undue influence by politicians and large vested interests in the process, facilitated by the excessive power of the NSW Department of Planning ('DoP') over the process which appears to act as a channel for this influence (*aka* 'regulatory capture'). The IPC is not perceived as 'independent' of this influence.

By way of example, the DoP conducted its assessment of the Varroville Cemetery DA for the IPC but *before* the IPC panel was appointed to manage the process. This allowed the DoP to set its own rules where it excluded from its assessment an expert report provided with the Varro Ville Homestead submission on the basis that we, the Homestead owners, had refused to provide the report to the proponent when asked. This was a lie; we had not been asked to provide it directly to the proponent by either the proponent or the DoP, but in any case such an event would have been inconsistent with proper process. The IPC Panel, when finally appointed, agreed to consider our report but did not ask the DoP to redo its assessment. The IPC simply stated that it had accepted our report but then accepted the DoP's assessment which had excluded it. The report was essential to the assessment as it updated the proponent's heritage assessment and was endorsed by the Heritage Council which had part-funded it. The DoP was acting outside its remit and the IPC Panel did not correct it. This gave the impression that the IPC was merely a 'front' for the DoP, an issue that we could not challenge due to the nature of the DA as a Crown application precluding a merit appeal.

The following would contribute to greater independence and/or the perception thereof:

- a. The IPC must have its own professional staff independently of the DoP. This would include both the Secretariat and assessment staff.
- b. The assessment staff would have the skill and be provided with the financial resources to engage experts to independently scrutinise the claims made by proponents and investigate issues raised in community submissions.
- c. The DoP's role would be restricted to making submissions on an equal footing with other government agencies that are consulted as part of the assessment process. Other agencies have their own statutory responsibilities which need to be properly taken into account. [Comment: Currently the DoP is able to override other agencies without any checks on its power leading to a common complaint by other parts of government (which I can personally attest to) that the DoP is '*a law unto itself*',

- d. Potential conflicts of interest cannot be merely declared as a way of resolving these. The IPC's policy sets a higher hurdle of 'perceived' conflict. The Chair and commissioners do not appear to understand this. [Comment: the Panel Chair of the Varroville Curtilage Review only stood down following intervention by David Shoebridge MLC on our behalf. The Chair's public statement regarding this showed that she did not agree with the community's view suggesting he only stepped down in an 'abundance of caution'.]
2. The IPC commissioners are not infallible and cannot be a substitute for the Land and Environment Court ('**LEC**') regarding the quality of the decision, including when making decisions for the Crown (as in the Varroville Cemetery). Unless there is redress for the community when a decision appears to be deeply flawed (as the Varroville Cemetery DA was), the IPC cannot be trusted. The Independent Commission against Corruption ('**ICAC**') advised in 2012 (*Anti-corruption Safeguards and the NSW Planning System February 2012*):

'Merit appeals provide a safeguard against biased decision-making by consent authorities and enhance the accountability of these authorities. The extension of third party merit appeals acts as a disincentive for corrupt decision-making by consent authorities.'

We thus recommend the following:

- a. In its written decision, the IPC should be legally obliged to respond to all key issues raised by the community. [Comment: Few of the issues raised by the community were acknowledged or discussed in the IPC 'Direction' of 15 July 2015. This was a significant factor in community loss of confidence and distrust in both the decision, and the IPC.]
- b. Remove/reduce the discretions allowed via the *Environmental Planning & Assessment Act 1979* ('**EPA Act**'). This was the first point in ICAC's 2012 report quoted above.
- c. Institute merit appeals for *all* decisions by the IPC. [Comment: while this may result in increased costs and delays initially, it will eventually result in more care with assessments and decisions thus reducing costs longer term and improving community confidence in planning processes and outcomes.]
- d. To discourage opportunistic schemes lacking integrity, increase the financial burden on proponents and consultants for flawed applications. There must be deterring penalties for applications that, whether by error or intent, supply false information or mislead in ways that can materially affect decisions, sometimes this can be cumulative from a number of different supporting reports. This will encourage better Environmental Impacts Statements ('**EIS**'), and reduce the number of poor or dishonest plans, resulting in lower processing costs to government and the community. Currently the community's only avenue for complaint about dishonest conduct is the DoP (which we do not trust) under Cl 10.6 of the *Environmental Planning & Assessment Act 1979*. The scope needs to be expanded to arrest the burgeoning 'guns for hire' in the consulting industry that are responsible for facilitating poor planning outcomes.

- e. There needs to be an Independent Integrity Commission with powers to investigate, impose penalties and set aside unethically derived decisions – including those of the IPC. [Comment: We understood that the 2018 *Kaldas Review of Governance in the NSW Planning System* intended to recommend this based on a similar body operating at the United Nations. We (along with other community associations) were greatly disappointed in the report that came out of that review (<https://www.planning.nsw.gov.au/Assess-and-Regulate/About-compliance/Kaldas-review>). In our submission to the Kaldas Review we stated that *'We...support the idea of an ethics commission if it has true independence from government, the ability to set aside unethically-derived decisions, adequate resourcing to deal with an expected backlog of complaints, effective penalties, and investigative powers over whole-of-government including public servants, elected local and state representatives, government authorities, Ministers and staff, and all those acting on behalf of the Crown to deliver government projects.'*]
3. The public must be able to understand what exactly is being considered and decided by the IPC. Where there have been many iterations of the DA, revised reports, masterplans etc. a full set of final documents to replace all the prior iterations must be made available on the website and another public hearing and round of submissions conducted (if required) before the IPC makes its decision. Further, no part of a project should be left to a later decision simply by incorporating it into the Schedule of Conditions. [Comment: No one we have spoken to has any certainty about exactly what was approved with the Varroville Cemetery DA, leaving it open to a perversion of process *after the fact*. Based on an IPC Panel conversation with a community member, we believe the IPC is well aware of this deficiency in its processes.]
4. The IPC must operate with complete transparency and be consistent. All meetings and phone calls between commissioners and other parties relating to a project (government agencies, members of the community, consultants, proponents etc.) should be subject to a transcript published on the IPC website; all correspondence should be similarly published. We know for a fact that this does not consistently happen. A decision must be able to be nullified if there is a breach of this. Examples of breaches relating to the Varroville Cemetery DA are:
 - a. Professor O'Kane met 'behind closed doors' some time in June 2019 with the proponent of the Varroville Cemetery DA – the Catholic Metropolitan Cemeteries Trust ('CMCT') CEO Peter O'Meara and Chair Greg Smith – before the IPC made its decision on this matter. We were advised by the Secretariat that although the IPC's legal counsel was present, and that any discussion of the specifics of the projects would be 'discounted', there were NO transcripts or notes available from that meeting.

At the recent ICAC hearings the IPC Chair was quoted in the Sydney Morning Herald 22 October 2019 thus (<https://www.smh.com.au/national/nsw/government-had-negative-reaction-to-transparency-push-nsw-planning-chief-20191022-p5334i.html>):

"I can't think of an instance in which we should hold a private unrecorded meeting".'

- b. The Panel Chair for the Varroville Cemetery, on 19 February and on/around the 21st February 2019 had lengthy phone conversations with two members of the community (separately) for the two CMCT-proposed cemeteries under review by the same panel, one at Wallacia and the other at Varroville. No one else was privy to those conversations (that we know of) and no transcripts or notes were published by the IPC. We do not know whether the Panel Chair had conversations with other parties, but these procedural breaches suggest others were possible. Notably the Wallacia cemetery was refused (consistent with signalling by the Premier in the media in the lead up to the NSW election – see our website) while Varroville was approved - with notable inconsistencies in the IPC's written reasoning for the two projects. This gave the impression that the IPC's decision was politically influenced and we had been 'traded'.
5. We experienced significant problems with the way the Secretariat operates, including that there were ongoing non-compliances with standard government procedures (according to our experience) that undermine the Commission's commitment to transparency, are unprofessional and undermine trust.

An independent IPC Secretariat, with defined rules for operating and redress for affected parties if these are breached would assist in resolving these problems:

- a. The Secretariat has a high staff turnover causing problems with project continuity and exacerbating problems relating to the IPC's independence from the DoP given the interchangeability of the staff.
 - a. The Secretariat does not make allowances for its own errors, loading these back onto the community in unacceptable ways, resulting in unacceptable timeframes for community responses relating to site visits, public hearings, and submissions, and resulting in processes that are open to perceptions of bias.
 - b. Public hearings and site visits on both Varroville projects were poorly organised and subject to bias, with inadequate notice and different communication to opposite parties regarding who could be present - significantly favouring the proponent for the development. Venues and dates were changed at short notice; the Hearing's speaker schedule was reissued after the closure date to accommodate a speaker for the development; no consideration was given to the profile of our community that was compromised by a daytime hearing (Census data records that more than 60% of those who work in the Campbelltown Local Government Area travel *out of the area* for work). The notes from the site visit did not reflect what was discussed or the questions asked and answered, and there was no opportunity for participants to agree the record of the visit either before or after publication of the notes.
 - c. The bona fides of speakers at the Hearing were not established. We received community complaints that some speakers claiming to represent certain religious or ethnic communities did not speak for the community as a whole and were rumoured to

have financial connections to the proponent, including pre-sale of burial plots before the DA was decided. One speaker claiming to be a former owner of Varro Ville was bogus. We noted this every time he appeared throughout the planning process by pointing to our expert study that had traced the land ownership and usage over time; yet the consultants for the CMCT (Urbis) continued to reference him to refute our claims. Some action is required to ensure that there is disclosure of interests and to try to secure truthful statements under force of penalty.

- d. We constantly had to remind the secretariat to publish correspondence from both sides. This was particularly the case with the Varroville Curtilage Review where the publishing was initially biased in favour of the proponent (i.e. publishing our correspondence but not publishing the proponents’).
- e. The Commission does not release its transcripts as ‘uncorrected proof’ to allow speakers to correct their input. At both Varroville Hearings the transcripts were full of errors, were misleading in parts, and open to manipulation or the perception thereof.
- f. The Commission does not abide by the *Government Information (Public Access) Act 2009* (**‘GIPA Act’**) relating to material submitted from another process (and therefore not initially subject to the IPC’s rules). In the Varroville Curtilage Review, the IPC published everything it received from the Heritage Minister and only took it down when I personally complained that much of it was already subject to GIPA applications. The IPC then set about publishing and redacting what it saw fit without allowing affected parties the right of review, cutting across GIPA processes elsewhere, including releasing government legal advice that would not normally be released under the GIPA Act.
- g. The Secretariat makes file notes in phone conversations on which it clearly relies (e.g. in written correspondence) but it does not agree the accuracy of these notes at the time or subsequently with the opposite party in these conversations (with one exception that I can recall).

Should you need further information relating to these issues, or you wish to meet with representatives of the SHA, I can be contacted by email below or on my mobile [REDACTED]

Yours sincerely

[REDACTED]

[REDACTED]

[REDACTED]