

15 November 2019

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

Peter

Dear Mr Achterstraat,

Re: Review of the Independent Planning Commission

The Urban Taskforce is writing regarding the Productivity Commissioner's review of the Independent Planning Commission. We thank you for the opportunity to provide feedback on this important review, please find our comments for your consideration below.

The Terms of Reference for the Review are listed in order with the Urban Taskforce response to each matter.

- 1. To recommend whether it is in the public interest to maintain an Independent Planning Commission, considering, where relevant, the experience with similar bodies in other common law jurisdictions**

The Urban Taskforce supports the existence of the Independent Planning Commission (IPC) but believes changes must be made to the governance and operation of the IPC for this organisation to be an effective authority. These are outlined below.

- 2. To make recommendations in relation to the Independent Planning Commission's operations and the mechanisms by which State Significant Development is assessed and determined**

The Urban Taskforce notes that the Commission is not subject to any direction or control from or by the Minister for Planning or any government agency, except in relation to procedural matters as set out under the *Environmental Planning and Assessment Act 1979*.

Under the current legislative arrangement, the Department of Planning, Industry and Environment (the Department) separately carries out the assessment of the application and prepares a report with recommendations to approve or refuse. The Department's recommendations are not binding on the IPC. However, Departmental recommendations should be given a degree of primacy by the IPC. Only in the most exceptional circumstances should a recommendation to approve a proposal be

reversed. There is currently no guidance on how much weight the IPC should ascribe to the Department's recommendations.

When the forerunner to the IPC, the Planning Assessment Commission (PAC) was formed, the members were carefully selected and the chair was the former Director General of Planning, Gabrielle Kibble AO. Notwithstanding her eminence, the PAC made recommendations to the Minister for Planning or acted as the delegate of the Minister for Planning.

The very foundation of the EP&A Act in 1979 places consideration of the public interest as a critical feature of consideration of all decisions. Such considerations are best made by elected politicians. It is their job to consider and respond to matters of broad public interest. That is why the Minister should be responsible for taking advice from the community, the Department and other stakeholders, considering that advice and the balancing this in the context of the public interest of the people of NSW.

The PAC was never a development consent authority in its own right. Ultimately, it was the elected representative that bore the burden of decision. The Minister took the political responsibility for the outcome.

It is only since 1 March 2018 that the IPC has become a consent authority in its own right (such that it no longer makes decisions as the delegate of the Minister). This is a recent innovation and does not reflect any longstanding practice. Further, it has brought the integrity of the Commissioners themselves into scrutiny and question. This is not a fair burden for IPC Commissioners, but is an inevitable result of their position as ultimate arbiters of "public interest". Politicians should represent the "public interest". This brings balance and perspective. That is why the Act always had the Minister as the ultimate decision maker (albeit regularly delegated to other officers or authorities, but always able to be called in by the Minister as necessary or required to protect the public interest).

At present, the IPC has no accountability to the Government nor to the voting public. It is an unelected, non-judicial, unaccountable organisation made up of part-time members with widely varying skills and talents. This is not appropriate for making decisions on major planning applications of state significance.

The experience of IPC decision making since those changes has been mixed.

The Urban Taskforce has been publicly highly critical of the IPC's refusals of applications in the St Leonards South precinct, after years of support for the increased height and density in that location from both Council and State Government. An alternative for the IPC in that case could have been a revised planning proposal adjusted to mitigate or manage problems or concerns.

Once a proposal reaches the IPC for assessment, significant time, resources and money have been devoted to the project; not only by the proponent, but by government agencies such as DPIE, Transport for NSW, local councils and infrastructure providers. Consulting reports have been prepared by planners, urban designers, architects, engineers, landscape specialists; studies have been commissioned into shadowing, solar

access, economic and social impact, traffic and transport impact, flora and fauna assessment, heritage impacts etc. For major projects like State Significant Developments and key rezonings, these can take years to prepare and cost millions of dollars. Where there is consistent support from Council and from DPIE, every effort should be made by the IPC to work to address community concerns, but not reject the proposal outright.

Recommendation 1:

The Urban Taskforce believes that it is critical that the IPC returns to its originally envisaged role as an independent advisor to the Minister for Planning, with determination powers handed back to the Minister as the public's elected representative. In appropriate cases (for example where there is a conflict of interest) the Commission could act as delegate of the Minister. However, in a democracy, Ministers should be ultimately accountable for such decisions and not appointed officials.

Recommendation 2:

A degree of primacy should be given to the recommendations made by the Department. Their recommendation to approve or refuse should only be overturned if there is clearly demonstrated evidence of a significant error identified in the assessment process. This should not preclude the IPC from addressing concerns by the proponent or objectors with the details of the Department's recommendations by modifying the proposed conditions of an approval.

Recommendation 3:

The IPC should be directed to be a "problem solving" authority with a greater focus on finding solutions and using conditions of consent to resolve issues, minimise or mitigate impacts or compensate for impacts to allow the project to proceed subject to robust conditions, if required.

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

- **Thresholds for the referrals of matters to the Independent Planning Commission**

The Urban Taskforce considers the thresholds for referral of matters to the IPC to be too low.

Currently, the IPC is the consent authority for State significant development applications (including any modification applications), where:

- There have been 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 too low and risk the IPC being bombarded with matters that trivialise their important role as the leading review authority for significant projects in NSW.

In the modern world of organised social media-based campaigns, massive numbers of objections can be lodged through automated form letter type email campaigns, which allow people to lodge an objection to a rezoning or proposed development with a click of a button. It is questionable as to whether these objectors are actually seriously impacted by the proposal and are making a well-informed, reasonable objection.

Developments which are straight forward, uncontroversial and reasonable can nonetheless easily reach the 25-objection threshold due to these automated objection processes.

Recommendation 4:

The Urban Taskforce recommends that the 25-objection threshold be significantly raised and automated objections with the same wording and format are considered as a single objection. We also recommend that an objection from Council should not be a reason for a proposal to be referred to the IPC, unless there are also significant numbers of objections from members of the public on the same proposal. There should be a triage process coordinated by the Chair of the IPC.

A casual review of matters on the IPC website reveals that they are currently considering matters which range from significant State Significant Development projects to a comparatively trivial Gateway review for a rural sub-division under local planning controls in the Clarence Valley.

The thresholds need to be reviewed to ensure that simple matters which attract self-interested submissions are not sent to a Panel which was initially designed to assess controversial projects of significant public interest. Allow these matters to go to the IPC effectively trivialises the function of this important organisation.

We note that the IPC has, in some instances become a de-factor policy-making authority in areas where the state government has not provided enough policy direction. The IPC does not have the skills, expertise, resources or remit to consider detailed land use planning matters which are actually unresolved matters of policy.

- **The clarity of certainty of policies and guidelines that inform determinations**

As outlined above, the Urban Taskforce recommends that legislation be amended requiring the Commissioners, in their assessment of an application or proposal, to give the recommendations made by the Department primacy when undertaking their assessment and determination of the project. The Department's assessment teams dedicate considerable skill, expertise, resources and understanding of the detail of the EP&A Act to their assessment. This should not be completely overturned without the strongest of reasons for doing so. The IPC appears, at times, to have made up their own criteria for decision making. This was particularly the case in St Leonards South, the Ritz-Carlton Pymont development and the Bylong Valley IPC decisions. These decisions have attracted wide and broad criticism and indeed, threaten the very integrity of the IPC.

- **The Commissioners' skills, expertise and qualifications**

According to the legislation governing the IPC, members of the Commission are appointed by the Minister for Planning based on their qualifications and expertise in a range of planning-related fields.

The Commissioners are not judicial officers. Being a former senior public servant or professional of high standing does not, in itself, ensure that an IPC Commissioner has adequate expertise to completely overturn recommendations made by the Department of Planning.

Under the EP&A Act, the Chairperson of the IPC appoints members to constitute the Commission Panel for any particular matter. When appointing Members to a Panel it often appears that little regard has been given to matching the panel members with the skills appropriate to the project being considered. The process of appointment is opaque. Many commissioners are highly skilled experts in a particular field and should be allocated only to projects where this particular skill is relevant. For example, assigning an architectural expert to assess a mining application does not make best use of their skills and may result in a substandard assessment.

Currently, there are a number of Commissioners employed on a part-time basis. However, more consistent and clear decision-making may result if there are fewer commissioners employed on a full-time basis.

There is a need for greater monitoring and co-ordination by the chairperson of the IPC of the decisions of its members, to promote greater consistency and predictability of IPC decisions.

Recommendation 4:

The Chairperson of the IPC should be a **full-time** position, so as to allow that office-holder to more closely monitor the decision-making process of its members and promote consistency in decision-making by members. The position could be re-styled as either Chief Commissioner or President, to reflect its more substantive role.

Recommendation 5:

Employing a smaller number (2 or 3) commissioners on a full time basis with a small group of part-time commissioners would result in a greater consistency in decision making and more coherent organisation structure.

Recommendation 6:

The Urban Taskforce recommends that either a registered planner or a lawyer who has with a detailed knowledge of the EP&A Act must sit on and chair each Commission panel.

Recommendation 7:

The Chairperson of the IPC should give reasons for the appointment of panel members and detail the relevance of the appointment of panel members to the matter at hand.

- **The adequacy of mechanisms to identify and resolve any conflicts of interest by Commissioners**

The IPC must have clear and adequate guidelines and processes in place to deal with conflicts. If conflicts of interest are causing experts in the relevant field for an IPC matter, a broader range of IPC members should be appointed. Conflicts should be limited to matters of pecuniary interest and not disqualify Commissioners on the basis of their experience or expertise.

The Urban Taskforce believes that there is too much focus on conflict of interest by Commissioners and focus should be on ensuring that all assessment undertaken by the Commission is impartial and merit based.

Applications should be approved or rejected on the basis of consistent interpretations of policy and law, irrespective of the which commissioner makes up the panel. Consistency in decision making, reasoning and rationale is critical to public confidence in the IPC. Consideration should be given to greater training for Commissioners to ensure a basic understanding of the EP&A Act, the concept of a merit-based assessment and the importance of balance between local concerns of the broader interests of the people of NSW.

- **The Independent Planning Commissions procedures and guidelines**

The Urban Taskforce believes that there should be stronger leadership and guidance from the Chair of the IPC to ensure the Commission delivers consistent, logical and appropriate determinations.

As outlined above, primacy should be given to the recommendations made by the Department of Planning when Commissioner are considering an application.

- **The extent to which the Independent Planning Commission should rely upon the assessment report prepared by the Department of Planning, Industry and Environment, taking into account any additional assessments by other Government agencies**

As outlined above, primacy must be given to the recommendations made by the Department when Commissioners are considering an application.

- **Resourcing of the Independent Planning Commission and the mechanism for determining budgetary support**

Urban Taskforce Australia note that the IPC is provided a Secretariat to provide professional and technical support to the IPC and its members.

This Secretariat must be adequately resourced and logically, funding should sit within the Planning budget. Registered planners with appropriate skills, qualifications and experience commensurate to the complexity of a project under assessment should be part of the secretariat and the secretariat must not be reliant solely upon that one planner for advice – the Secretariat should engage independent planners if required, but not simply replicate the work undertaken by the Department.

Funding of quality assessments and taking into account broader economic impact of refusals or delays requires the skills and resources

- **Whether the Independent Planning Commission's Secretariat should be employed directly by the Independent Planning Commission or provided by another Government agency, and if so, which agency**

The Urban Taskforce believes that as long as the Secretariat is appropriately skilled there is no issue as to which agency employs or funds them.

I would be happy to discuss any of these issues and can be contacted on 



Chief Executive Officer
Urban Taskforce Australia