

15 November 2019

Peter Achterstraat AM
NSW Productivity Commissioner
GPO Box 5469
Sydney NSW 2001

By e-mail: ProductivityFeedback@treasury.nsw.gov.au

Dear Commissioner

RE: Review of the Independent Planning Commission

Whitehaven Coal welcomes the NSW Productivity Commissioner's Review of the Independent Planning Commission (IPC), which we consider to be necessary and timely.

It is imperative all stakeholders have confidence in how State Significant Developments (SSD) are assessed and determined and, critically, that a clear relationship exists between determinations and the applicable policy and planning context in which they are made.

Whitehaven's proposed Vickery Extension Project, a SSD, is currently before the IPC for evaluation and determination and, as such, we have recent, relevant first-hand experience that has informed this submission.

In our view, maintaining the IPC is in the public interest to the extent it can provide important checks and balances in the planning approvals process, but meaningful changes are required to ensure it can deliver outcomes that are in the best interests of the State.

Chief among these is the need to return authority for determining SSDs to the Minister for Planning and Public Spaces and reorient the IPC's functions to providing support to the discharge of this executive function.

Given the Government is wholly accountable to the people of NSW through the Parliament, it is appropriate that a Minister be the final decision makers on these projects of State significance.

In this context, the role of the IPC would not be to perform a determinative function as a consent authority, but to:

1. provide additional checks and balances (particularly where there has been a reportable political donation);
2. continue to administer public meetings and gather feedback from the community; and
3. further inform the process of Ministerial decision-making that is a central and well-understood feature of our parliamentary democracy.

These changes would bring New South Wales into line with other States and Territories in Australia, where major projects are determined by elected representatives of Government.

Our submission also provides additional recommendations for changes to the IPC, including:

- Amending the public interest thresholds for the IPC to consider a proposal;
- Ensuring the IPC operates within a better-defined policy framework that delivers outcomes that are consistent with advice from the Department of Planning, Industry and the Environment;

Whitehaven Coal Limited ABN 68 124 425 396

Level 28, 259 George Street, Sydney NSW 2000 | PO Box R1113, Royal Exchange NSW 1225
02 8222 1100 | info@whitehavencoal.com.au | www.whitehavencoal.com.au

- Reconsidering meeting procedures while maintaining transparency;
- Clarifying the process of public hearings to ensure relevance; and
- Developing better policies for the identification and management of conflicts of interest.

Finally, I note that Whitehaven is a member of the NSW Minerals Council. The Minerals Council has also lodged a submission to this Review, which we endorse.

Should you require any further information or clarification, please do not hesitate to contact me.

Yours sincerely



**Executive General Manager
Corporate and External Affairs**

Submission to the Independent Planning Commission Review

Whitehaven Coal welcomes the NSW Productivity Commissioner's Review of the Independent Planning Commission.

This submission provides relevant information about Whitehaven Coal, before addressing the core questions outlined in the Review's Terms of Reference.

About Whitehaven Coal

Whitehaven Coal is proud to be the leading Australian producer of premium-quality coal, and the dominant player in Australia's only emerging high-quality coal basin.

We help power developed and emerging economies in Asia where there is strong and growing demand for our product, particularly for use in high-efficiency, low-emissions (HELE) coal fired power stations. We are driving prosperity and economic growth in regional Australia, particularly in North West NSW, which is the focus of our capital investment and workforce presence.

We operate four mines (three open cut and one large underground mine) in the Gunnedah Basin of NSW. Our operating assets are complemented by two high-quality, near-term development assets: the Vickery Extension Project, in the Gunnedah Basin, and Winchester South Project, in Queensland's Bowen Basin. Over our almost 20-year history, including 12 years as a publicly listed entity on the Australian Securities Exchange, we have developed a reputation for excellence in project delivery and safe, efficient and environmentally responsible operations.

We are proudly local, and around 75% of our 2,400-strong workforce live in the local communities around our mine sites. We believe in helping communities grow, ensuring benefits flowing from our operations accrue locally.

Whitehaven Coal's Vickery Extension Project is currently being considered by the IPC. This means the company has recent, relevant first-hand experience that has informed this submission. Indeed, it is worth noting Whitehaven successfully developed the last major greenfields mine in NSW in Maules Creek and that Vickery, subject to determination by the IPC, could be the next significant greenfield coal development in NSW.

Is it in the public interest to maintain an Independent Planning Commission?

We believe there is a role for the IPC to play in future SSD determinations.

The IPC provides an important check and balance in the project assessment process. It helps ensure decisions are based on a strong and independent evidence base and are free from political interference, particularly when a reportable political donation has been made. We also accept the IPC has the capacity to play an important role in providing an additional review of a project at the Minister's direction.

The IPC also facilitates worthwhile community feedback mechanisms, allowing additional opportunity for the community to have its say and ensuring these views are considered in the decision-making process via public hearings, public meetings and other channels.

Finally, the removal of merit appeal rights (where a public hearing has been held) provides much needed certainty for proponents as they navigate the already lengthy, complex and costly project approvals process.

However, the role of the IPC should be more clearly defined and further adjusted to deliver better outcomes for the State, communities and proponents.

Namely, it is our view that SSD determinations (on both new projects and modifications to existing projects) should be the purview of Ministers, except where a reportable political donation has been made.

As noted in our cover letter, it is the Government – not the IPC – that ought to be wholly accountable to the people of NSW for SSD decisions through the transparent and well-understood processes of the NSW Parliament. We therefore believe it is appropriate to return authority for the determination of SSDs to the Minister for Planning and Public Spaces.

Evaluating SSDs requires the careful balancing of a broad range of considerations that have impacts across the State and over a number of years.

For mining projects this means considering significant long-term economic benefits (be that via royalties, export income or long-term job creation) alongside environmental considerations, within the framework of broader Government objectives, policies and feedback from the community and constituents.

Ministers are experienced in identifying the real issues that individual projects raise and balancing the, often competing, priorities to deliver the best possible outcome for the State.

It is appropriate that elected representatives make the final decisions on project approvals that have the potential to shape the State for years to come, given the wide range of mechanisms that exist to transparently hold Ministers and Governments to account for these decisions.

This change would bring New South Wales back into line with other States and Territories and help to ensure that decisions better reflect the Government's stated policy priorities.

However, should the Review determine the IPC retain its powers and functions in their current format, we have provided a number of recommendations below that we believe would improve the processes for making determinations.

Recommended changes to the Independent Planning Commission's current functions, processes for making determinations and resources

We believe the IPC would deliver better outcomes for the State and for business if the following recommendations were adopted.

1. The thresholds for the IPC to consider a proposal should be amended

Currently, the IPC will consider a SSD Application if there are more than 25 objections, an objection from Council, or where a reportable political donation has been made.

Whitehaven accepts the need for the independent review of projects where there has been a reportable political donation, but we do not believe that the objection thresholds necessarily reflect genuine opposition to a project.

It is our experience that this small number of objections can easily be met using form letters which are often submitted by people who do not live close to (or in many cases, anywhere near) our operations.

It is unreasonable that this small number of submissions from community members who will not be in any way impacted by these projects should have such a disproportionate influence over the planning process. Moreover, in a resources context, this mechanism is exploited by those with ideological objections to certain types of development that can become an inappropriate and disproportionate feature of an assessment process.

In our view, the public interest test under which proposals are referred to the IPC for review should be solely at the Minister's discretion, not a quantitative threshold, which reduces the process to a numbers game and does not reflect the true level of public interest or concern in relation to a proposal. It should also be noted that the ease with which this threshold can be met has substantially added to the assessment burden of the IPC and its review of projects which arguably have no credible justification to be evaluated and determined in this manner.

In addition, we do not believe that project modifications should be determined by the IPC.

Under the NSW *Environmental Planning and Assessment Act, 1979* (EP&A Act), modifications to SSDs are required to have either "minimal environmental harm" and / or be "substantially the same" as the approved development.

Given an approved SSD has already been the subject of a full merit assessment, determination of a modification application by the IPC is superfluous, and an inappropriate use of public and proponent resources, leading to unnecessary delays.

2. The IPC should operate within a better-defined policy framework and should not set approval conditions contrary to policy or advice from the Department

The IPC has recently rejected proposals that were supported by the Department of Planning Industry and the Environment (DPIE) and other Government Departments.

In a number of these cases the IPC has deviated from the expert advice at its disposal and introduced entirely novel policy justifications to underpin adverse determinations.

The DPIE has the benefit of many decades of mining-specific assessment and decision-making experience. The Department's assessment process is transparent and robust. It includes a detailed review of the Proponent's Environmental Impact Statement, public submissions, Federal, State and local agency input and responses to submissions, all of which are publicly available.

Further, its Assessment Report and Draft Conditions are reflective of Government policy.

The rejection of the advice of the Department appears at odds with the IPC's original purpose to "no longer perform duplicative review functions", as outlined in the EP&A Act.

This approach has led to the approval of a range of projects that have unique conditions that are out of step with broader policy. For example, despite advice to the contrary from the Department, the PAC (now IPC) issued a 35 'A' weighted decibel (dBA) acquisition criteria for Whitehaven's Maules Creek Coal Mine (where precedent and convention was 40 dBA). This resulted in the Maules Creek Coal Mine being uniquely burdened with significant additional operational expense and land acquisition liabilities, in a manner inconsistent with the NSW Government's own relevant policies. More recently the IPC issued an unprecedented condition for the development an Export Management Plan for the United Wambo Open Cut Coal Mine Project.

3. IPC meeting procedures should balance the free exchange of ideas while maintaining transparency

It is our experience that the free exchange of ideas and the frank discussion of the merits of different approaches is the key to effective decision-making.

The practice of transcribing meetings – and publishing these on the IPC's website before a determination has been made – has contributed to an environment where planning experts within the Department, proponents, and other stakeholders feel less able to undertake the type of open exchange that, perversely, the process seeks to encourage.

We are aware of numerous circumstances where subtle or perceived deviations from a particular position expressed by a proponent or technical advisor become the subject of real time interventions where citizen science and public relations combine to discredit certain aspects of project proposals. We consider this is a dysfunctional aspect of the current system that not only prejudices proponents but distracts assessment authorities from the legitimate merits assessment process the community expects them to conduct. Put another way, it stifles any free flowing, frank discussions of key issues by all parties, with the result being that the IPC is less informed.

Rather than transcribing meetings where individuals' comments are identified, we recommend that the IPC publish meeting minutes, as is common practice.

4. The process of public hearings should be clarified and refined

Where SSDs are referred to the IPC, we support maintaining the requirement to hold public hearings. However, we recommend that Ministerial directions clearly state the parameters of the public hearing and the IPC report to ensure the purpose and process of the hearings is clarified.

In addition to this, we recommend that the process for determining who speaks at a public hearing and when should be made clearer.

In the case of the Vickery Extension Project, over multiple days, various special interest groups with similar submissions repeated the same arguments and mistruths.

While we welcome and acknowledge the need for legitimate feedback, the Chair must take a more active guiding role to ensure hearings are focused, relevant and applicable to the matter under consideration.

5. Conflicts of interest should be better identified and resolved early in determination processes

The panel set to review Whitehaven's proposed Vickery Extension Project was announced on 16 November 2018. On 6 December 2018, we provided an initial briefing to the panel. The following day, the Chair resigned due to a perceived conflict of interest, and the IPC advised Whitehaven of the members of the reconstituted panel. On 13 December 2018, the new Chair resigned, again due to a perceived conflict of interest, and the IPC again advised us of the members of the reconstituted panel – almost one month after the initial panel announcement, and two months after the Minister's initial request for the IPC to review our proposal on 15 October 2018.

It is clear that processes to identify and, where possible resolve, conflicts of interest should be improved. This issue is dealt with in more detail as a case study in the NSW Minerals Council submission.

6. Duplication in the assessment process should be removed

The current volume of additional assessments and peer reviews is generating duplication that could be removed, thereby making the assessment process more efficient. For example, some impact assessments for the Vickery Extension Project have been peer reviewed twice, and as the proposal is still before the IPC, it is possible that the IPC could commission further peer reviews. The shortage of recognised expertise, particularly in specialised areas, means often the same expert consultants are undertaking both assessments for proponents and peer reviews for Government – raising the question of why multiple peer reviews of work undertaken by those whose expertise has been recognised by Government is necessary.

7. Timeframes should be set in advance and the IPC resourced appropriately to meet them

Where SSDs are referred to the IPC, the steps in the process and accompanying timeframes should be set soon after referral. The IPC should be resourced to meet those timeframes. Extensions should be granted only in extraordinary circumstances. This approach would provide greater certainty for the community and the proponent.