

15 November 2019

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YANCOAL SUBMISSION TO THE REVIEW OF THE NSW INDEPENDENT PLANNING COMMISSION

Yancoal Australia Limited (Yancoal) has reviewed the submission made by the NSW Minerals Council on the review of the NSW Independent Planning Commission and endorses that submission.

The function and performance of the state's planning assessment and determination framework is of such fundamental importance to the mining sector in this state that Yancoal has elected to make its own submission to this review.

Yancoal supports a robust and transparent planning assessment framework for state significant developments, such as coal mining operations. The application of this framework, however, must work in a way that supports business investment and have consistent rules so what is expected by the consent authority is clear and known from the outset.

Inconsistency in decisions from the IPC, and inconsistency between the IPC and expert Government departments, in how they assess, determine and subsequently regulate developments frustrates our ability to operate and threatens business confidence in the state.

The current framework of the NSW Independent Planning Commission permits inconsistent outcomes. Determinations are made in the absence of clear policy guidelines and IPC panels, with a revolving panel membership, are not required to consider written instructions from the Minister or delegate on appropriate policy considerations.

It has created a situation where inconsistent outcomes contradicting government's own position are allowed to occur with an absence of accountability.

Our company has significant reservations about the current state of the NSW planning assessment framework to deliver fair, consistent determinations.

Yancoal's strong view is that the Minister, either directly or by delegation, should be accountable for decision-making on state significant developments.

However, Yancoal submits that, if the NSW government intends to retain the Independent Planning Commission it should:

1. **Place greater value on government submissions and assessment reports; and**
2. **Require greater accountability from the determining body**

History

For the sake of context, we set out hereunder a high-level history in respect of the Commission:

- *Environmental Planning and Assessment Amendment Act 2008* – introduced the Planning Assessment Commission (PAC) in place of Commissioners of Inquiry
- *Environmental Planning and Assessment Amendment (Part 3A Repeal) Act 2011* – Repealed part 3A and expanded the scope of ministerial delegation to the PAC
- *Environmental Planning and Assessment Amendment Act 2017* – changed PAC to Independent Planning Commission (IPC) and repealed the final remnants of Part 3A

The introduction of the PAC in **2008** was, at first, proposed to introduce a more "expert" body to assist in the assessment and review of State Significant Development.

The repeal of Part 3A in **2011** resulted from the O'Farrell campaign that focused heavily on possible corruption under Part 3A. Subsequently, the then-Minister for Planning, the Hon. Brad Hazzard, delegated the majority of decision making for State Significant Development to the PAC. The Minister commenced a process of delegating decisions to the PAC for determination as his delegate. In doing so, no guidance was provided as to how PAC's role should be exercised when it was, in essence, acting as the Minister for Planning.

In **2017** the name of the PAC was changed to the Independent Planning Commission, but this was in essence the same body. **In addition**, clause 8A of the *State Environmental Planning Policy (State and Regional Development) 2011* was amended to designate the Independent Planning Commission as consent authority for certain State Significant Development.

This amendment and the introduction of clause 8A permanently replaced a democratically elected decision maker with an unelected "expert" panel. Again, in doing so, no guidance was provided as to how the Commission's role should be exercised when it was, in essence, acting as the Minister for Planning. In this regard it is worth noting why the Minister was (previously) the consent authority for State Significant Development. Generally it is accepted that this was because:

- the development declared to be State Significant Development has a broader impact on the State's economy than run-of-the-mill development through job creation, investment, royalties, etc; and
- a Minister with full understanding of the government's priorities and policies was considered best placed to make a determination on such an application and could be held to account.

Generally, the Minister was:

- considered to have a broader view of government priorities, especially as it relates to the need for State Significant Development; and
- able to take expert advice from his/her Department.

An important shortcoming with the Commission performing the role of the Minister is that no additional policy guidance has been given to the Commission in respect of issues that the Minister, by being a member of Cabinet, would be aware of. An example is the need for jobs in regional areas. There is no planning policy on this of any detail that the Commission could refer to in order to determine which projects should be given priority. A Minister, as a Cabinet member, would have such knowledge available to him or her.

Another shortcoming is that the Commission considers itself as completely independent from government, which while desirable from a probity point of view does not assist in delivering government policy. This is especially difficult in areas with low levels of policy direction. In respect of taking expert opinion, while it is true that the Commission is comprised of Commissioners with expertise in certain issues, it is never comprised of a Commission panel with expertise in all issues, even with peer review assistance.

All of the above has led to the Commission being a body that has made inconsistent decisions, which are not in accordance with government department recommendations, and which sometimes ignores the advice of the government's technical experts. This is a particular issue for high investment projects such as mines, where many hundreds of millions of dollars need to be invested prior to a development application being lodged. Such spending should not in itself guarantee a planning outcome; however, the planning system should work in such a way that the policy settings send the correct signals as to whether to proceed with such investment early in the process. The current planning system does not do this, as demonstrated starkly by the Bylong Coal Project decision.

1. Place greater value on government submissions and assessment reports

An IPC panel is formed to make a determination on a project following the issuing of the Secretary's assessment report from the Department of Planning, Industry and Environment.

This follows a public exhibition process and extensive consultation with Government agencies and the community.

The Secretary's reports are the result of extensive work by the technical experts employed within numerous government agencies charged with the assessment and subsequent regulation of this sector. It essentially consolidates these views and applies the NSW Government policy in respect of the assessment report and recommendations.

The current process does not require IPC panelists to give regard or weight to the Planning Secretary's Report, or to any proposed draft conditions. Essentially the IPC appears to treat the Secretary's assessment report as any other submission, and the lack of policy guidance permits this.

The IPC as independent consent authority is afforded a wide discretion in reaching its determination. However, independence in decision making should not mean independence from applying Government policy.

As such in exercising this discretion it should assign the appropriate value to the Planning Secretary's report. Government reports form the basis of findings that are consistent with policy.. Draft conditions provided by the Planning Secretary should be seen as indicative of government policy – besides the Planning Minister, the Planning Secretary is best placed to represent the view of government in regards to what is, and what is not, Government policy.

Recent IPC panels have treated the assessment reports of government, as well as guidance from the Planning Secretary, with apparent indifference.

The recent determination by the IPC regarding the Bylong Coal Project saw a refusal of a project, contradicting the government's Final Assessment Report – which found that the project could be approved.

The IPC's imposition of an 'export management plan' as a consent condition for the United Wambo Open Cut Coal Mine Project was in direct contradiction to correspondence from Planning Secretary Jim Betts, who advised the chair of that panel, 'it is not this State government's policy that greenhouse gas policies, or planning conditions, should seek to regulate, directly or indirectly, matters of international trade.'

The availability of a discretion to a consent authority should not exempt it from giving appropriate consideration to relevant submissions. It is our view that IPC Panels should be required to give appropriate value to government submissions and demonstrate sufficient justification should they choose to move beyond the scope of, or in contradiction to, government's recommendations.

This could be achieved by relying on the principal in *Zhang v. Canterbury City Council* [2001] NSWCA 167 at [75]; (2001) 115 LGERA 373:

'The consent authority has a wide ranging discretion - one of the matters required to be taken into account is `the public interest' - but the discretion is not at large and is not unfettered. DCP 23 had to be considered as a "fundamental element" in or a "focal point" of the decision making process. A provision so directly pertinent to the application for consent before the Council as was cl 4.0 of DCP 23 was entitled to significant weight in the decision making process but was not, of course, determinative.'

The following conclusions can be derived from *Zhang*:

- The test for compliance with the requirement to consider a Development Control Plan (DCP) is whether the consent authority gave proper, genuine and realistic consideration to the provisions of the DCP.
- To give proper, genuine and realistic consideration to a DCP, the consent authority has to consider the DCP as a fundamental element in, or a focal point of, the decision-making process. Where a provision of a DCP is directly relevant to a DA, the DCP is entitled to be given significant, but not determinative, weight.

An amendment could be made to codify the Planning Secretary's report, to ensure it is taken account of (like a DCP).

Section 4.6 of the EPA Act could be amended as follows:

4.6 Provisions relating to Independent Planning Commission

(1) The following consent authority functions of the Independent Planning Commission are to be exercised by the Planning Secretary on behalf of the Commission:

- (a) receiving development applications and determining and receiving fees for the applications,*
- (b) undertaking assessments of the proposed development and providing them to the Commission (but without limiting the assessments that the Commission may undertake),*
- (c) obtaining any concurrence, and undertaking any consultation, that the consent authority is required to obtain or undertake,*
- (d) carrying out the community participation requirements of Division 2.6,*

- (e) notifying or registering the determinations of the Commission,*
- (f) the functions under section 4.17 in relation to the provision of security,*
- (g) the determination of applications to extend the period before consents lapse,*
- (h) any other function prescribed by the regulations.*

(2) The Commission, when determining any application for State Significant Development, is to make the following a focal point and fundamental element in its decision making process:

- (a) the Planning Secretary's report on the development application and the reports, advice and recommendations (and the statement relating to compliance with environmental assessment requirements) contained in the report; and***
- (b) any draft conditions of consent prepared by the Planning Secretary.***

2. Require greater accountability from the determining body

The role of determining State significant developments historically rested with the Minister for Planning. Whether it was through Ministerial discretion, or through delegation, final accountability for the decisions was with the elected official. The introduction of the Independent Planning Commission, superseding the Planning Assessment Commission, removed government from the determination process, with the Commission not subject to the direction or control of the Minister.

Checks and balances must exist to safeguard against corrupt practice, however there must also be accountability for the determinations made to ensure consistency with government policy and regulatory standards.

The Planning Assessment Commission (PAC) provided an independent, transparent process of determination while remaining an instrument of ministerial delegation and thus allowing for government to retain an overall role, albeit removed, to ensure such adherence if necessary.

The current construction of the IPC has removed any element of government accountability or oversight to guide IPC panels with regards to government policy.

This is a role that could be assumed by the Chair of the IPC – we see it as sensible that this role would be in a position to provide instruction to a panel on questions of policy.

The current chair has indicated that this is beyond her purview, commenting that 'when I appoint a panel, that panel must operate totally independently, I have no say in what it does.' And that she is 'not allowed' to know the decision of a panel before it is finalised.

If the Chair of the Independent Planning Commission has no ability to guide IPC panels, and thus no ability to justify their determinations, we would suggest that this is a redundant role.

The current construction of the planning framework is one that, by design or oversight, allows government to absolve itself of State Significant Developments, provides no consistency and guidance to panels adjudicating these applications, and provides no mechanism to ensure appropriate weighting is given to government findings and policy instructions.

Determinations are as varied as the personalities appointed to each panel.

If it is the intent of government to retain the IPC as an entity that operates outside Ministerial delegation, the role of the chair of the Commission must be more appropriately equipped to ensure consistency and provide clarity to panels throughout the determination process.

Yours faithfully,

