IR Wiskin

15th November 2019

SUBMISSION TO THE NSW PRODUCTIVITY COMMISSION REVIEW OF THE INDEPENDENT PLANING COMMISSION

INTRODUCTION

On 22 October 2019 I made an initial submission to the NSW Productivity Commission Review. This was in the form of a letter to the Deputy Premier, other Ministers and the Chair, Independent Planning Commission (IPC), dated 25 September 2019, following an IPC determination on the Bylong Mine project.

Key features of that letter were:

- Lack of clarity and leadership on key considerations of policy and guidelines, or lack thereof, having ramifications for regional employment and highlighting the influence of non-merit assessments from government agencies to planning authorities.
- The IPC was not wholly to blame for the Bylong mine determination as both State and Commonwealth governments needed to share the blame for failing to provide clear policy direction to planning authorities on critical issues, including GHG and water policy.
- The Courts and planning authorities, such as the IPC, have been in a quandary over exactly what government policies and guidelines they are required to consider in interpreting the Mining SEPP, GHG policy, Aquifer Interference Policy (AIP) et al.

Having had extensive experience major project approvals in six Australian States and one Territory, as well as international project approvals, I wish to expand matters raised in my initial submission, and other issues pertinent to the terms of reference for the IPC review.

Private sector project management skills, if appropriately applied to the public sector, offer substantial advantages to improving major project approval efficiencies, meeting State and regional development objectives and improving NSW productivity that would flow from streamlining IPC processes, but, more importantly, the efficiencies and transparency of government agency interaction with a co-ordinated major development regime. Without the latter, any IPC review will not deliver improved outcomes.

OVERVIEW

There have been several reviews of the major project approval development assessment process at State and Commonwealth level that should inform this review.

Commonwealth:

- *Major Project Development Assessment Processes*, Australian Productivity Commission Report (Nov 2013)
- *Building Australia's Future: A Review of Approval Processes for Major Infrastructure* Australia (2009)
- *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments*, Australian Productivity Commission (2011)
- *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999,* Hawke Review (2009)

NSW:

- Report into the Operation of the NSW Planning Assessment Commission (PAC), NSW Audit Office (January 2017)
- Report into the Department of Planning's Assessment of State Significant Development (SSD), Corbyn Review (Aug 2017)

There is no merit in addressing other jurisdictional regimes for major project approval in this submission as this will be better examined by reviewing the Commonwealth Productivity Commission report of November 2013. The NSW Productivity Commission also has the appropriate expertise to analyse cross jurisdictional matters.

TERMS OF REFERENCE

Let me comment on each of the Terms of Reference for the IPC review.

TOR 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.***

In order to address the requirement for the IPC to exist, it is incumbent on executive government to examine three elements:

1. Whether political intervention in the planning process serves the public interest, and/or;
2. What is the jurisdictional public interest, and does it require independent assessment of planning merits or intervention? and/or;
3. Does an independent merit-based assessment require transparency for public interest integrity and a clear balancing of public and private interests in planning decisions?

'Public interest' is one of the misused terms in the lexicon of planning law, particularly by the Department of Planning, Industry and Environment (DPIE), and its predecessors, in making recommendations in major project assessment reports, particularly where it is used as a 'catch all' to justify recommending against a project approval.

Prior to granting independent planning determination powers to the IPC, its predecessors, the PAC and Commissions of Inquiry made recommendations to the Minister for Planning to approve or reject development applications. The general process of assessment, where the claims of various parties, including government agencies, received a level of scrutiny not available in an arena where the public interest equates with political interest.

Executive government, in its wisdom, and after serious issues of conflict of public interest being raised, decided that the public interest is best served by an independent merit-based assessment process for major projects. Further, executive government has removed development determination by local councils and

replaced it with Joint Planning Panels.

The issue for the IPC review, is not whether the IPC should exist but how to its processes and procedures can be improved to better serve the public interest, considering similar major project approval systems in other jurisdictions.

In addressing (1) to (3) above, it is important to note:

(a) Public officials, whether elected officials, public officials or members of the IPC have an overarching obligation to act in the public interest and that their primary purpose is to serve in accordance with:

(i) The jurisdiction of the decision-maker. In the case of the IPC, being a statutory independent decisionmaker;

(ii) The process required to deal with the merit issues of the decision to be made;

(iii) Balancing the respective public interest considerations regardless of the needs of respective interest groups. In this regard, other than public officials, all other interest groups should be treated as representatives of private interest groups, including NGO's, environmental collectives and project proponents.

(b) 'Public Interest' can be described as affecting the good order and functioning of the community for the economic and social well-being of the public using the widest definition of respective interests.

(c) 'Public Interest' does not mean that what is in the interest of executive government should automatically be considered to be in the public interest.[i] Such intervention in the planning process is subjective, potentially conflicting and imposes pressures on public officials to interpret public interest inappropriately.

(d) Independence in the balancing of public interest requires a disciplined staged process:

(i) Identification of the relevant 'public' whose interests are to be considered as being in the public interest. In the planning system this rests on submissions, either individually or collectively.

Weighing the relative interests of private and public parties to a decision and being clear about merit or 'manufactured' interests to the planning decision.

Making assessments and decisions about public interest on perceptions of majority public opinion, in a social media world, is not a workable option and leads to a corruption of the public interest leading to a bias in favour of some public interests against others.

Often the public does not have all the facts or maybe misinformed. There is also undue pressure on public officials to act in less than a fearless manner or to 'second guess' the wishes of executive government.

(ii) Clear enunciation of the public interest through considered statutory regimes, policies and guidelines for decisionmakers.

The role of public officials and agencies representing and advocating a specific statutory regime, policy or guideline needs to be independent of the decisionmaker who is required to make a merit assessment and final determination. There needs to be a separation of decision-making between executive government and the IPC, statutorily required to make an independent decision.

Ideally, it is the IPC that is required balance the public interest, not the role of government agencies to make those determinations on behalf of the IPC. Such intervention could be considered as fettering the discretion of the IPC.

Should it be the wish of executive government to intervene in the discretion of the IPC then it should change the law and explain how the public interest is being progressed by such a change.

(iii) A merit assessment of the issues, including a balancing of competing public interests.

This is achieved by a transparent and public debate of the merit issues through an integrated process of testing expert advice from government agencies and independent experts.

Public officials representing executive government have limited resources and don't necessarily encompass the wider range of academic and non-government expertise available to the decisionmaker.

A clear distinction needs to be drawn between whether a decision was made in the public interest, based on the desire of executive government, or whether it was made on the merits of the assessment.

Merit based assessments, taking account of criteria from statutes, policies or guidelines are likely to have a greater rigour. For this reason alone, it is incumbent on executive government to present clear directions to decisionmakers, such as the IPC.

The final relevant criteria should be whether the determination was the 'right' decision backed by evidence and a well-documented determination, taking account of all the public interests – private and public.

Where a decision is properly documented it supports the credibility of the decision, the decisionmakers and the ultimate guardians of the public interest – executive government. This focuses attention on the merits of the decision and not the conduct of the decisionmaker.

TOR 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.*

In order to make recommendations with respect to IPC operations, and the mechanisms of by which State Significant Development (SSD), is assessed there is a distinction between:

(i) IPC processes, and

(ii) The way executive government, in the form of government agencies, deals with and assesses SSD projects.

In the first instance, IPC processes are only as good as the level of technical competence possessed by the Commissioners and support staff.

In the second instance, there is a conflict with government agencies making recommendations or, through submissions, seeking to unduly influence the IPC's merit-based assessment, rather than provide dispassionate technical advice.

These matters are dealt with in the following comments on the terms of reference.

TOR 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 include but are not limited to:*

TOR3 (a) Thresholds for the referral of matters to the Independent Planning Commission.

Traditionally NSW , and in many other jurisdictions, criteria exist for referral to a central planning body, based on project capital size and with a discretion to refer any project, that executive government, wishes to refer for greater scrutiny, based on the extent of environment impact, public concern or complexity of the issues.

In Queensland, the Co-ordinator General may elect to determine any project, irrespective of the desire of the proponent and acts as a central co-ordination authority, but in the absence of an independent planning decisionmaker.

There is no merit in addressing other jurisdictions as the NSW Productivity Commission is far better qualified to assess major project approval in other jurisdictions.

More recently in NSW, executive government mandated that any project with twenty-five objections, or local government objection, or where a proponent has made political donations be automatically referred to the IPC for determination.

This threshold is ludicrously low, given that anyone with a twitter account can easily engineer twenty-five objections to a development application.

The threshold should be return to those applying under the Major Projects SEPP. In addition, there is merit in retaining the option of automatic referral for political donations but removing the threshold of local government objections. Local government should be considered as being no more important than any other party, including government agencies, to a merit-based IPC assessment.

TOR 3 (b) The clarity and certainty of policies and guidelines that inform determinations.

I refer to my previous submission of 22 October 2019 (Letter to Deputy Premier et al of 25 sept 2019). That submission dealt with two areas of lack of policy clarity; namely GHG Scope 3 policy and 'Make Good' water policy.

Policy Example 1: Greenhouse Gas (GHG) Policy

In the IPC Bylong mine determination reference was made to the Gloucester Coal case in the Land and Environment Court (LEC). In making its determination the IPC was required to apply the Mining SEPP which, inter alia, states:

> "to consider an assessment of greenhouse gas emissions (including downstream emissions) …. having regard to any applicable State or national policies, programs or guideline".

Both the LEC and the IPC had difficulty in determining what State and national policies applied and how the Mining SEPP should be interpreted.

In the Gloucester case the LEC Chief Justice Preston lamented about what GHG policies applied with respect to GHG. An extract from the Gloucester case can be found as ***Attachment A*** and highlights the policy vacuum prevailing before the LEC.

Attachment A also highlights other policy vacuums identified by the IPC.

Notwithstanding the Gloucester Coal case and GHG, the IPC in its Bylong determination referred to the NSW Climate Change Policy Framework (Office of Environment and Heritage 2016).

The policy framework states:

- *"defines the NSW Government's role in reducing carbon emissions and adapting to the impacts of climate change;*
- *sets policy directions to guide implementation of the framework;*
- *commits NSW to achieving aspirational long-term objectives of net-zero emissions by 2050 and help NSW become more resilient to a changing climate;*
- *sets out the next sets for implementation".*

It the absence of any other policy of guideline on GHG and/or Scope 3 emissions, it is not unreasonable for the IPC to presume the above policy was an official direction of the executive government. It was therefore mandated to consider it as an 'applicable State policy'.

Equally, the IPC, in the United Wambo Coal determination, imposed a condition of consent limiting the sale of coal to only nations that had signed the Paris Agreement. Again, in the absence of any other policy or guideline, it is not unreasonable to assume the Australian Government commitment to the Paris Agreement is an expression of national policy and a guideline.

Since the LEC and IPC determinations the NSW government has moved to limit imposition of GHG conditions; however, this is yet to receive parliamentary approval. Irrespective, the legislative amendments do not remove the requirement for the IPC to consider GHG as required by the Mining SEPP.

It is understood the NSW Government is moving to provided concise and clear policy direction to the IPC on GHG

Scope 3 emissions. This highlights the dangers of executive government agreeing to 'aspirational' political statements that later impact on investor confidence in the NSW planning system.

Whilst there are issues with both the United Wambo and Bylong mine decisions on other grounds, the matters raised by both the LEC and IPC on policy vacuums should drive home the need for more rigour in arriving at policy pronouncements and providing clear guidance to both the Courts and planning authorities.

Policy Example 2: Aquifer Interference Policy (AIP)

Another example of poor policy guidance was highlighted in the IPC Bylong Coal determination. The Commission wrongly interpreted the provisions of the AIOP as it applied to drawdown of the groundwater source resulting from coal extraction, citing that any drawdown of 2m was applied as an absolute threshold never to be exceeded. Rather, those with experience with groundwater assessment correctly interpret the threshold of 2m being an arbitrary level beyond which compensatory water or 'make good' applies.

In the absence of statutory certainty over drawdown impacts under the AIP and the absence of clear guidelines, excepting some generic fact sheets, there is no clear and concise direction on the application of the AIP to development projects.

In addition, despite the IPC's AIP's misinterpretation, there are no guidelines or policies relating to water 'make good'.

However, this policy vacuum is compounded when every other mining decision involving water impacts provides for a standard water compensation condition of consent. There are at least fourteen approved coal and non-coal projects with standard water compensation conditions.

Policy direction on water compensation and conditions of consent have been recommended by the Department of Planning in numerous development consents and accepted by the Minister, the PAC and IPC. This policy uncertainty is now at risk with the application of water 'make good' arrangements where no guideline of policy exists yet it is being imposed by government agencies in a complete policy vacuum.

Policy Example 3: Economic Assessment of Mining and Coal Seam Gas Proposals

In December 2015 the then Department of Planning and Environment mandated that all mining and coal seam gas projects conduct an economic assessment in accordance with:

> *Guidelines for Economic Assessment of Mining and Coal Seam Gas Proposals, Department of Planning and Environment (December 2015)*

The guideline has been used for the assessment of all mining projects since that date.

The guideline states:

> *"The Environmental Planning and Assessment Regulation 2000 requires a proponent to request any requirements for the EIS from the secretary of the Department of Planning and Environment. These requirements are referred to as the Secretary's Environmental Assessment Requirements (SEARS) To support the triple bottom line assessment,* ***the standard SEARS require an economic assessment of the project in accordance with <u>these</u> guidelines".***

However, despite this clear guidance, DPIE in the Hume Coal application, currently before the IPC for determination, directed its own economic expert to apply the Treasury Guidelines for Cost Benefit Assessment. The latter are specifically designed and directed to government projects and programmes only.

DIPE's assessment report removes all labour and associated tax contributions as a benefit to the community, contrary to the December 2015 guidelines for mining projects. This tactic is aimed at deliberating downgrading the public benefit of the project, where DIPE has a predetermined position on the assessment. Treasury's website makes it abundantly clear those guidelines are only to be used by public authorities and local government.

No other mining proposal, before or since, has been assessed against a policy DPIE does not require off any other project, and which is contrary to DPIE's own policy guideline.

Even where a clear guideline exists, DPIE dictates a completely different guideline, not made transparent, not included in the SEARS. Accordingly, the proponent had no prior knowledge and could not address the inappropriate use of the Treasury CBA guideline in the EIS.

In the absence of policy or guideline certainty, project proponents lose faith in the integrity of DPIE and other agencies providing clear direction to the IPC on major projects.

There are a number of reasons why DPIE's assessment report should be granted no more weight in the assessment report than any other agency. The process if interaction between DPIE and other agencies is opaque, secretive and limits opportunities for direct contact between the proponent and agencies. Agencies regularly avoid discussions with the proponent, except through the 'mesh' of DPIE. If the transparency and integrity if the IPC is central to decision making, then transparency needs to extend to the DPIE assessment regime, and the IPC should be given the resources to deal directly with all agencies on an equal footing. At present, DIPE's so-called 'co-ordinating role' is unhelpful and creates a perception of the IPC being beholden to DIPE.

TOR 3 (c) The Commissioners' skills, expertise and qualifications

Given the ever-increasing complexity of major project approvals, the need for Commissioners with appropriate technical expertise is self-evident.

The IPC did inherit Commissioners from the PAC. The PAC organisation had a bias towards social assessment and a more academic approach to project determination. Some IPC panels have a high level of technical expertise to deal with engineering, hydrogeological and environmental assessment will others do not have the breadth of experience to conduct a proper assessment.

Notwithstanding, no one Commissioner can deal with the complexity of issues, understanding of the law, policies and guidelines without the support of appropriately qualified staff. It takes time to build a competent team; however, more use should be made of contracted experts or part-time Commissioners.

For the IPC to be a fully functioning independent determining authority, it requires additional resources. It already has the power to independently engage experts, but this must be done so as not to duplicate the role of government agencies. However, government agencies must be more accountable and transparent in the way major development projects are assessed.

Further comments can be found in Items (f) and (g) below.

TOR 3 (d) The adequacy of mechanisms to identify and resolve any conflicts of interest by commissioners.

There is an inherent problem dealing with conflicts of interests where many experts have experience in both industry and government, particularly on areas of esoteric technical matters where there are few experts.

Private industry engages with number of experts who advise competitors on areas of similar scientific engagement. There are proven means of integrity maintenance and, in my view, there have been no issues with managing both interests and conflicts.

The issue for the IPC is that project opponents reject the expertise of Commissioners who have had the slightest involvement with private sector organisations. Accordingly, several people, I am aware, have refused to consider submitting their names for consideration by the IPC, this limiting the 'gene' pool for suitable candidates.

Claims of conflicts of interest only have credibility where Commissioners and IPC staff fail to:

- understand and comply with applicable law;
- conduct assessments with fairness and impartiality
- show integrity, professionalism and polite engagement with all parties;
- apply the principles of natural justice and procedural fairness;

- ensure accountability and transparency;
- avoid and/or manage where private interests conflict, or are perceived to conflict or are reasonably seen by others to impair the integrity of the office;
- act apolitically;
- expose potential corruption or perversions of good governance with the private or public sector; and
- at all times, act reasonably.

The real test of a Commissioner is about management of all parties to an application on a fair, transparent and rigorous basis and being seen to be free of personal direction by executive government.

Decisions must be seen to have been made on reasonable terms, addressing all the mandatory considerations, and giving reasons for the weight given to specific criteria. The focus needs to be on the merits of the decision and not the conduct of the decisionmaker.

It is recommended that any claims of conflict are immediately addressed by referral to an IPC Commissioner responsible for Integrity Guidance, if necessary, with the assistance of ICAC. However, attention needs to be given to vexatious claims by certain parties to remove Commissioners from panels for other than proper reasons. Hence the need for a robust and timely integrity determination.

TOR 3 (e) The Independent Planning Commission's procedures and guidelines

The IPC has adopted the need for transparency in dealing with all parties. This is to be commended, particularly through the transcribing and posting of meetings on the IPC website.

This principle should be applied to meetings with all relevant government agencies, who should report directly to the IPC, rather than through the conduit of DPIE.

It is noted that the IPC Chair, Professor O'Kane in evidence to the ICAC inquiring into lobbying was reported to have said that the relationship of the IPC and DPIE changed after meeting transcripts were made publicly available on the IPC website. This is a welcome development as the role of DPIE and other agencies is not as transparent as could be the case.

Generally, where there is a difference of opinion, policy or guidelines between DPIE and other government agencies, those matters need to be referred to IPC for resolution in a timely manner, not after the lodging the DPIE preliminary or final assessment reports.

DPIE should still act as a co-ordinating agency for the lodgement, management and collation of DA applications and public responses to EIS display.

DPIE, along with other government agencies, should make submissions to the IPC on merit issues alone and not make recommendations as to whether a project proceed or not, or is capable of approval. This is a matter for the IPC alone if it retains its statutory independence role.

In order to streamline the approval pathway, DPIE should present a Preliminary Assessment Report to the IPC; however, the need for a Final Assessment Report becomes redundant, should the IPC take control of the determination pathway in accordance with the independent powers conferred by legislation.

TOR 3 (f) 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

See (e) above for recommendations regarding the role of DPIE.

Institutional Collusion

In view of the NSW Government's objective to improve transparency around major project approval there are improvements that could be made in the way DPIE and other government agencies interact.

Currently, DPIE acts as a co-ordination and clearing house for responses EIS display and responses from government agencies. This has resulted in a reluctance from relevant government agencies dealing directly with project proponents, unless directed by DPIE. Equally, DPIE jealously guards its role in direct discussions with agencies and, in many cases, the first a proponent is apprised of agency comments is after the publication of the DPIE Preliminary Assessment Report.

There is no transparency around the proponent's materials being communicated to other agencies, the context of the data provided and no real meaningful opportunity for proponents to interact with those government agencies.

Unfortunately, in some assessments, this has led to institutional collusion over the terms of the final input into the DPIE assessment reports.

In some cases, DPIE and government agencies readily hold meetings and engage with project opponents, but the same opportunity is not afforded to the proponent.

Any review of the IPC should examine how transparency of the DPIE and other government agencies in the major development assessment process can be improved.

It is also unfortunate that correspondence to DPIE and other government agencies fails to extract a response, let alone an acknowledgement.

Secretary's Environmental Assessment Requirements (SEARS)

In addition to the IPC review, the modus of DPIE and other relevant government agencies interacting on major projects requires examination, given the independent assessment role of the IPC, the need for administrative efficiencies and the objective to improve NSW productivity.

It is usual to DPIE to seek the advice of other agencies for input to the issue of the Secretary's Environmental Assessment Requirements (SEARS). SEARS are issued informing the preparation of the Environmental Impact Statement (EIS).

Unfortunately, over time SEARS have become increasingly more generic and, despite input from other agencies, SEARS fail to encompass the full range of matters, policies and guidelines later required by government agencies. This requires proponents to factor in extensive delays meeting agency requirements not notified at the time SEARS are issued.

The value of seeking SEARS is now redundant with new matters requiring extensive expenditure of time and money later in the assessment process. Given IPC procedures and more involvement in project assessment there is merit in either removing the requirement for SEARS or tailoring them to be 'fit for purpose' and encompassing all the government agency requirements.

It is open for debate, whether any administrative efficiencies are achieved by removing the requirement for SEARS or handing the responsibility to the IPC, in view of the IPC being required to assess matters addressed in the SEARS.

DPIE Appointed Independent Experts

In addition, where DPIE engages independent experts to assess a proponent's environmental assessment, the scope of works of the proposed engagement by DPIE should be made publicly available, assisting the

proponent, the community and IPC to focus on matters of substance earlier in the assessment process.

To Recommend or Not to Recommend?

In order to clarify the role of DPIE and its relationship with the IPC, it is worth noting several past developments.

On 19 Jan 2017 the NSW Audit Office released a report into the operation of the then Planning Assessment Commission (PAC).

The Auditor-General made specific findings regarding the role of the Department of Planning.

Specifically, it recommended:

> *"To minimise the perception that the Commission is simply 'rubber stamping' the department's recommendations, assessment reports should not recommend whether or not a project be approved. Instead, they should provide the Department's views on whether or not a project meets relevant legislative and policy requirements[ii]".*

The Auditor-General, in a media release, dated 19 Jan 2017, stated:

> *"It is pleasing to see that the Commission has accepted all my recommendations."*

In a separate report in August 2017, to the Department of Planning on a review of the internal assessment of State Significant Development (SSD) (Corbyn Report), it was noted that the Department had already changed its policy on recommendations for approval or refusal:

> "*Where the Independent Planning Assessment Commission is the determining authority, I support the recent change in the approach from making an explicit recommendation for approval or refusal to providing the Department's conclusions on whether a proposal is approvable or not. Although a small change, it provides more clarity on who is the decisionmaker, while at the same time, being transparent and clear on the Department's view about the merit of a proposal[iii]."*

Notwithstanding the above, DPIE continues to make recommendations for either project approval or rejection for major projects that are before the IPC for assessment and determination or were due to be assessed by the IPC.

Either the IPC is truly independent, or just an arm of executive government doing the bidding of government agencies legislation granting. This in contrary to the full discretion granted to the IPC for major project determination by legislation.

TOR 3 (g) Resourcing of the Independent Planning Commission and the mechanism for determining budgetary support.

Consistent with the recommendations in this submission, the resourcing of the IPC needs to be considerably enhanced.

Substantial savings can be made by transferring many project assessments functions of DPIE to the IPC.

The IPC should be separately funded by Treasury in accordance with the guidelines applicable to independent statutory bodies. The Minister for Planning continues to be the responsible Minister; however, staffing and resources are the sole prerogative of the IPC.

TOR 3 (h) 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.

Consistent with the views and recommendations in this submission, the Commission's Secretariat should be employed directly by the IPC and enough provision made for the IPC to engage independent experts and remove duplication with DPIE.

Better Co-ordination of Government Submissions to the IPC

In order to improve internal co-ordination for major projects within government, it is recommended that a Major Projects Co-ordination Branch be established with the Department of Premier and Cabinet to streamline government agency advice and policy guidance on behalf of executive government to the IPC.

In accordance with past practice for major projects during the early 1980's through to 2010, it is recommended that the Secretary, Department of Premier and Cabinet reassume the role of NSW Co-ordinator General to manage intragovernmental responses to major projects, both public and private. This seamless arrangement removed institutional silos, regulatory barriers and facilitated a 'whole of government' approach to major investment and job creation projects. Such an approach is essential for NSW to lift its productivity rate.

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[i] Mason J, *Commonwealth of Australia v John Fairfax and Sons Ltd & ors* (1981) ALJR 45 (at p49)

[ii] https://www.audit.nsw.gov.au/publications/latest-reports/assessing-major-development-applications

[iii] https://www.planning.nsw.nsw.gov.au/-/media/Files/DPE/Reports/Assessment-report-independent-review-2018-09-12.ashx page 5

ATTACHMENT A

Discussion on Policy Vacuum Confronting the Land and Environment Court and the Independent Planning Commission

GHG Policy vacuum

Mining SEPP mandates having regard to State or national GHG policies

Mining SEPP cl 14(2) states:

“(2) Without limiting subclause (1), in determining a development application for development for the purposes of mining, petroleum production or extractive industry, the consent authority must consider an assessment of the greenhouse gas emissions (including downstream emissions) of the development, and must do so having regard to any applicable State or national policies, programs or guidelines concerning greenhouse gas emissions.”

There is no clear policy statement, either Fed or NSW, that states either that new coal mines are allowed or banned.

Accordingly, in the policy vacuum the IPC and the LEC was left to interpret their own version of what the GHG policy was, in light of the Paris Agreement.

Practical examples of policy vacuum

Example 1 – *Gloucester Resources Limited v Minister for Planning [2019] NSWLEC 7* (Rocky Hill)

In the Rocky Hill decision, because there’s no clear policy on permissibility of new coal mines regarding GHG, the LEC judge was in a desperate position of working out the policy by himself, second guessing the national policy by looking at other source documents like the Paris Agreement, which isn’t even Australian law. [In international law, ratification does not mean the treaty is domestic law. Only if the treaty is passed as domestic legislation, does the treaty become domestic law]. And because the Paris Agreement was silent on *how* the GHG reductions were to occur, including being silent on position of new coal mines, Preston CJ was in a policy vacuum.

Below are examples of the policy vacuum causing difficulties for the Preston CJ from the trial transcripts.

Day 5, 21/8/2018, at page 398 of the transcript:

"WITNESS FISHER: Well, we have some practical examples under the Commonwealth Government's emissions reduction fund which is a fund that's operating today that encourages projects to come forward and bid for the cheapest abatement that's available. The most recent prices in those bids are around $13 a ton of CO2 abated. Most of those projects to date are terrestrial sequestration projects but anybody can bid in these things so, for example--

HIS HONOUR: Is this the Direct Action Policy?

WITNESS FISHER: Sorry?

HIS HONOUR: Is this the Direct Action one?

WITNESS FISHER: Yes, yes. Emissions reduction fund direct action.

HIS HONOUR: Is that still going?

WITNESS FISHER: Yes.

HIS HONOUR: It changes so much each day, I don't know what's going on with the Commonwealth."

Day 9 of the hearing, 27/8/19, from page 831 of the transcript:

"HIS HONOUR: Insofar as it refers to national policies, I mean it's pretty hard working out what the nation is doing at the moment—

GALASSO Senior Counsel: That's the problem. I say we can all do that, I mean for example, and if you want me I can tender the news feed over the last two weeks that we 45 have been sitting in this Court, but we've had the NEG, we've had a change in prime minister, we've had potentially a change in policy. There was a news report yesterday that spoke about the new minister for energy being "Someone that knows the importance of coal". Now, are they policies? I doubt it. What are they? Who knows.

HIS HONOUR: What about the NDC of Australia, would that be a policy? So when Australia, pursuant to the Paris Agreement, put forward its nationally determined contribution, 26 or 28 or whatever it is, would that fall within the national policy there?

GALASSO: Arguably not for as long as there's also contemplation of Australia not abiding by Paris. Now, what does it mean? I can say to your Honour I don't know. If your Honour said "Is Paris part of the national law", the answer is no. It's certainly not part of the State law and if we pause there, whatever is 10 said is going on the back of Paris is fundamentally inconsistent with this SEPP that we're reading as part of the domestic State law, but what it is that is a national policy that is engaged in your Honour's consideration in 14.2 is unclear except that your Honour's observance of the NDC to the extent that it maybe thought to be reflective of a national policy under the Paris Agreement 15 of course, does not amount to the sort of things that are advanced by the second respondent in terms of no new mines.
…

There's also the aspect that there seems to be an interspersing of policies under the Paris Agreement with the scientific position relevant to global warming. That is the position expressed by Professor Steffen is one that's 35 directed globally, but even to the extent that one goes in search of what we saw previously under the SEPP as a national policy, there's a disconnect between that and things such as the Paris Agreement. Whatever it is that maybe said, and we've dealt with aspects of the Paris Agreement in the written submissions, the sort of approach of Professor Steffen as a scientist is not 40 reflected in anything in the Paris Agreement and we reiterate your Honour's observation about not even the NDC is concerned with the sort of approach that is advanced against us in this case, that is—

HIS HONOUR: It's silent as is the Paris Agreement on how you achieve the reductions, and even though NDC is silent, so we say we will achieve this reduction but it doesn't promise to the world how we're going to do it.

…

GALASSO: No, but even if that point, if you wished to import a judicial awareness of how one can do it, …

So unlike aspects of thermal coal where we do have other means of generating electricity as being the major requirement for it in other means, and even in terms of a base load as Mr Manley educates us about the more contemporary ways of creating a base load in terms of the efficiency of new 10 power plants, your Honour doesn't have that in the circumstances of the present case and the attempts by Mr Buckley to do so fall well short of even an inventive exercise in the realm of how do we do that, we don't get there.

HIS HONOUR: It may happen, the question is will it happen within the life of this mine?

GALASSO: The evidence before you is that that is unlikely, even on Mr Buckley's formulation…"

If the Chief Justice of the NSW Land and Environment Court cannot discern the National and state policy on GHG in order to fulfil his role, there is a policy vacuum.

Above transcript also shows how, due to the policy vacuum, Preston CJ was even forced to predict whether, within the mine life, steel can be made without coking coal or majority of electricity can be generated from non-coal sources. It is unfair and inappropriate to require IPC and the judges to make such predictions. It is the Government's role to determine whether such issue should be determined, and if so, how the decision maker should take it into account.

Scope 3 emission policy vacuum

Similarly, the Mining SEPP states that Scope 3 emission must be considered. But there is a policy vacuum as to how it is to be considered, leaving decision makers without any guidance. In the Rocky Hill case, the learned Preston CJ said on day 9 of the hearing:

"Preston CJ: It always is the tricky one, scope 3. It's no doubt, and the SEPP makes it clear, you've got to take it into account. The question is, how do you do it? It's is an enormously difficult question as to how. You know it's 45 going to have an effect, you've read it, but how do you input that into the decision-making as to whether you approve a project?

GALASSO: One instance of doing it, and it's not just done in this appeal but in other appeals, there's the submission made about substitution and to that extent I made that submission a few moments ago about substitution of this product that's coming from further afar. Other instances of substitution is substitution of particular product for more greenhouse emitting product from other mines and to a certain extent that's touched upon…."

Examples IPC and judicial policy making in the absence of Parliamentary policy

Because of the policy vacuum as to what the national policy is and how scope 3 emission to be taken into consideration, Preston CJ had no choice but to make up a policy himself.

Paragraph 441 of the Rocky Hill judgment:

"[526] The approval of the Project (which will be a new source of GHG emissions) is also likely to run counter to the actions that are required to achieve peaking of global GHG emissions as soon as possible and to undertake rapid reductions thereafter in order to achieve net zero emissions (a balance between anthropogenic emissions by sources and removals by sinks) in the second half of this century. This is the globally agreed goal of the Paris Agreement (in Article 4(1)). The NSW government has endorsed the Paris Agreement and set itself the goal of achieving net zero emissions by 2050. It is true that the Paris Agreement, Australia's NDC of reducing GHG emissions in Australia by 26 to 28% below 2005 levels by 2030 or NSW's Climate Change Policy Framework do not prescribe the mechanisms by which these reductions in GHG emissions to achieve zero net emissions by 2050 are to occur. In particular, there is no proscription on approval of new sources of GHG emissions, such as new coal mines.

527 Nevertheless, the exploitation and burning of a new fossil fuel reserve, which will increase GHG emissions, cannot assist in achieving the rapid and deep reductions in GHG emissions that are necessary in order to achieve "a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century" (Article 4(1) of the Paris Agreement) or the long term temperature goal of limiting the increase in global average temperature to between 1.5ºC and 2ºC above pre-industrial levels (Article 2 of the Paris Agreement).). As Professor Steffen explained, achieving these goals implies phasing out fossil fuel use within that time frame. He contended that one of the implications of the carbon budget approach is that most fossil fuel reserves will need to be left in the ground, unburned, to remain within the carbon budget and achieve the long-term temperature goal. The phase out of fossil fuel use by the second half of this century might permit a minority of fossil fuel reserves to be burned in the short term. From a scientific perspective, it matters not which fossil fuel reserves are burned or not burned, only that, in total, most of the fossil fuel reserves are not burned. Professor Steffen explained, however, that the existing and already approved but not yet operational mines/wells will more than account for the fossil fuel reserves that can be exploited and burned and still remain within the carbon budget. This is the reason he considered that no new fossil fuel developments should be allowed.

556 … As I have found elsewhere in the judgment, the Project will have significant and unacceptable planning, visual and social impacts, which cannot be satisfactorily mitigated. The Project should be refused for these reasons alone. The GHG emissions of the Project and their likely contribution to adverse impacts on the climate system, environment and people adds a further reason for refusal…."

The judgment excerpt above shows that, because of the policy vacuum, Preston CJ concluded that "most of the fossil fuel reserve will need to be left in the ground". This is despite admitting that he Paris Agreement deliberately is silent on banning new coal mines.

This type of judicial policy making is a form of judicial activism that is not appropriate. It is inappropriate because NSW IPC panel members and the LEC judges are not qualified to pronounce national and state policies. That role should be performed by democratically elected government.

IPC example – Rocky Hill

In the Rocky Hill Bylong Coal State Significant Development application (SSD 6367), the Independent Planning Commission also stated the policy vacuum left by the National and the state government.

Make Good policy vacuum

The IPC statement of reasons dated 18 September 2019 (SOR) states at paragraph 296 that:

"The Commission notes that … The AIP 'make good' provisions apply as set out in paragraph 255. The Commission notes that the AIP Does not define or identify what 'make good provisions' are."

Because there is a policy vacuum as to what 'make good' is, the IPC simply stated that "there is insufficient information" as to whether the 'make good' requirements are satisfied:

> *"The Commission finds that the groundwater impacts on the Project are unacceptable for the reasons set out below: … there is uncertainty and insufficient information before it as to whether the 'make good' requirements… are met…"*

GHG policy vacuum

The GHG policy vacuum was also identified in the Rocky Hill decision, where the IPC rejected NSW DPE's submission on what is and is not NSW policy on GHG.

NSW State Government's own Department of Planning said the NSW Climate Change Policy Framework of "aspirational emission saving objective" is not a development control policy". However, the IPC, which is bound to have regard to state GHG policy, overrode the NSW government and ruled that the NSW Climate Change Policy was a state policy that the IPC must follow.

with section 4.15(1)(a) of the EP&A Act.

655. The Mining SEPP's reference to "*State…policies*" includes the NSW Climate Change Policy Framework, which states: "*The NSW Government endorses the Paris Agreement and will take action that is consistent with the level of effort to achieve Australia's commitments to the Paris Agreement*". Under the Paris Agreement, Australia has committed to limit the increase in global temperature to below 2 degrees. The NSW Climate Change Policy Framework says that its "*aspirational emissions savings objective is to achieve net-zero emissions by 2050*".

679. The Department considered that the NSW Climate Change Policy Framework is a "*framework to guide Government in its own operations, rather than a development control policy as such*" and concluded that "*the policy's content has no direct bearing on either the project or its determination by the Commission.*" (p.86)

6.14.9 The Commission's consideration of the climate change impacts

687. Under clause 14(2) the Mining SEPP the Commission as the consent authority is required to consider greenhouse gas emissions including downstream emissions in its assessment as set out in paragraph 106 and 107. Clause 14(2) also states that in considering GHG emissions, the Commission must "*have regard to any applicable State or national policies, programs or guidelines concerning greenhouse gas emissions*". The NSW Climate Change Policy Framework outlines the States long-term objectives to achieve net-zero emissions by 2050 and to make NSW more resilient to a changing climate. The Commission is therefore of the view that the NSW Climate Change Policy is applicable and must be considered by the Commission.

695. In addition, the Commission does not accept the Department's statement in paragraph 679 that the NSW Climate Change Policy Framework has no direct bearing on the determination of the Project or the Recommended Revised Project. Clause 14(2) of the Mining SEPP requires the consent authority to have regard to that Framework as set out in paragraph 687. Likewise, the Commission does not accept that this Policy only applies to government projects as narrowly interpreted by the Department as there is no evidence to support this statement. The Commission considers that on the proper construction of the Mining SEPP, the NSW Climate Change Policy is applicable and must be considered by the Commission.

It is a glaring example of a policy vacuum when the IPC, establisehd by the NSW Government, disagrees with NSW DPE as to what is and is not a GHG policy.

The IPC states the GHG policy vacuum in paragraph 697, saying that "there is no policy guidance on what constitutes an acceptable, unacceptable … GHG emissions."

Recommended Revised Project from the Applicant.

697. The Commission accepts that there is no policy guidance on what constitutes an acceptable, unacceptable or substantial amount of GHG emissions. Nonetheless, the Commission concludes that based on the evidence in paragraph 688 there will be a contribution to global GHG emissions that needs to be considered by the Commission.

So the IPC just applied the Paris Agreement, which doesn't provide any guidance since, as the IPC

acknowledges, t is silent on *how* the GHG emissions are to be reduced.

689. The Commission notes that the NSW government has endorsed the Paris Agreement and set the goal of achieving net zero emissions by 2050. Neither the Paris Agreement, Australia's Nationally Determined Contributions (NDCs) of reducing GHG emissions in Australia by 26% to 28% below 2005 levels by 2030 nor NSW's Climate Change Policy Framework prescribe the mechanisms by which these reductions in GHG emissions to transition to zero net emissions are to be achieved. In particular, there is no prohibition on approval of new sources of GHG emissions, such as new coal mines.

GHG policy vacuum in relation to economic assessment

The GHG policy vacuum impacts the economic assessment of major projects, since the IPC, in applying the Paris Agreement, held that the thermal coal would have to "plummet by 59% by 2040". And since the Applicant didn't factor this into the coal demand assumption, the whole economic assessment was held to be too "uncertain" to base the approval on.

777. The presentation that accompanied the meeting with the BVPA, prepared by Tim Buckley and Simon Nicholas, included, among other things, the IEA's Current Policies Scenarios that was referenced by the Applicant. The BVPA outlined that the IEA's World Energy Outlook 2017 presented three main scenarios: the Current Policy, the New Policy and the Sustainable Development Scenario (**SDS**). The presentation stated that the Applicant's table did not include the projections from this third scenario – the SDS – in which the BVPA claimed "*global trade in thermal (steam) coal plummets 59% by 2040*".

778. The SDS was described in the presentation as an "*integrated approach to achieving internationally agreed objective on climate change, air quality and universal access to modern energy*". This description is consistent with the IEA's website which said of the three scenarios "all are possible". It describes the SDS as "*ambitious but pragmatic*" and states that "*under the SDS, energy-related GHG emissions peak around 2020 and then decline rapidly. By 2040, they are at around half of today's level and on course toward net-zero emissions by 2070, in line with the goals of the Paris Agreement.*"[1]

6.16.9 Commission's consideration of the economic impacts

779. The Commission agrees with the findings in the Applicant's Economic Impact Assessment, the Department's Final Assessment Report in paragraphs 759 and 766 that the Project and the Recommended Revised Project would result in a net economic benefit to NSW during the operation of the mine.

780. The Commission notes the Applicant's comments that the IEA's SDS for coal demand is highly speculative in nature and should therefore not be considered, as set out in paragraph 760. The Commission does not accept this for the following reasons:

- The IEA is a reputable international organisation of which Australia is a signatory member. The SDS therefore can be taken as one possible outcome of the expected level of disruption to energy resources markets from the pursuit of stated GHG emissions, air quality and energy access goals, as set out in paragraph 778.
- The SDS presents the changes to the energy sector that would be needed to deliver the internationally agreed objectives of the Paris Agreement on climate change. The Paris Agreement is referred to in the NSW Climate Change Policy, which is a relevant policy consideration for this Project, as set out in paragraph 689.
- The Commission considers that the introduction of an open cut and underground coal mine in a greenfield site that will impact on agricultural and heritage values into the long-term warrants, the consideration of as many reasonable market scenarios as are available. In paragraph 778 the IEA describes their SDS scenario as "*ambitious but pragmatic*" and the Commission therefore considers that the SDS represents a market scenario which should have been considered.
- The Commission accepts that as set out in the Economic Assessment Guidelines, the CBA is "*intended to allow decision-makers to consider trade-offs and decide whether the community as a whole is better or worse off as a result of the proposal*". Based on the Economic Guidelines which state that "*[p]roponents are encouraged to test scenarios using multiple sensitivities*" the Commission considers that the Applicant should have tested the SDS.

784. Based on the Material, the Commission finds that there is a reasonable level of uncertainty in the estimation of the economic benefits of the Project and Recommended Revised Project, and that this is exacerbated by the intergenerational inequity of costs and benefits. The Commission also notes that scenarios under the SDS have not been considered by the Applicant. The Commission therefore finds that the economic benefits of the Project and the Recommended Revised Project are uncertain.

This policy vacuum leads to a bizarre outcome where the IPC makes its own policy that the world coal demand may plummet by 59% by 2040, which is not a policy the Commonwealth or the NSW State government has formulated. The 59% coal demand reduction isn't even a projection, but a reverse engineered goal.

Heritage policy vacuum

The IPC also identified heritage assessment policy vacuum, but nevertheless holding that the Bylong Coal project had unacceptable heritage impacts.

485. The Commission notes that there is no agreed methodology for assessing the heritage and aesthetic significance of landscapes as stated by the Heritage Council in paragraph 452 and that without a '*substantive and holistic*' framework to assess the heritage value of landscapes, the Heritage Council cannot confirm the likely State significance of the landscape in the vicinity of the Project Site.

487. In relation to mine rehabilitation, the Commission agrees with the conclusion of GML Heritage in paragraph 472 that "[*r*]*econstruction is not a conservation outcome, rather it is a mitigative measure when damage or change has impacted the heritage significance of a place to such a degree that other alternatives are not available*", because the significant landscape values are currently undisturbed. The Commission accepts that the Project Site's landform can be reinstated as stated by the Applicant in paragraph 437. However, due to the level of disturbance and the fact that the current landscape is undisturbed, the Commission does not consider that a recreated landscape will retain the aesthetic, scenic, heritage and natural values of the current landscape.

488. For the reasons set out in paragraphs 481, 482 and 487 above, the Commission considers that:

- the Project would have unacceptable impacts on the heritage values and visual amenity of the Tarwyn Park and Iron Tank properties;
- the Project and Recommended Revised Project would have negative impacts on the aesthetic, scenic, heritage and natural beauty characteristics of the vicinity and landscape both during operation and post-mine; and
- there remains uncertainty regarding the risk of impact to the heritage values of natural sequence farming from the Recommended Revised Project.

Social Impact assessment policy vacuum

The IPC also identified social impact assessment vacuum.

6.15.9 Commission's consideration of social impacts

730. The Commission notes that the Applicant's SIA and Revised SIA were prepared prior to the release of the SIA Guideline. The Commission notes that the Applicant's SIMP was prepared in January 2018 and although the SIA Guideline does not specify the requirement for a SIMP, the Applicant has prepared the SIMP having regard to the SIA Guideline in accordance with the relevant considerations as stated by the Department in paragraph 722. The Commission has had regard to the Guideline in its consideration of social impacts.