

Draft
**LGNSW Submission to the NSW Productivity
Commissioner on the Review of the
Independent Planning Commission**

November 2019

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1. Opening

Local Government NSW (LGNSW) welcomes the opportunity to make a submission to the NSW Productivity Commissioner regarding the review of the Independent Planning Commission (IPC).

LGNSW is the peak body for local government in NSW, representing NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community-based system of local government in the State.

LGNSW commends the review of the IPC at this time to evaluate the operations and decision making of the Commission during the last 18 months.

LGNSW meets biannually with the IPC Chair and key staff and appreciates this ongoing engagement and consultation.

LGNSW believes that the decision-making authority for state significant development (SSD) should be a truly independent body such as the IPC. Regulatory mechanisms should be in place to ensure it operates in a transparent and independent manner and cannot be subject to potential change through ministerial discretion or as a result of political interference.

The comments in this submission are confined to discussion around the role of and impacts on local government for SSD applications that trigger decision making by the IPC.

This is a draft submission awaiting review by the LGNSW Board. Any revisions made by the Board at that time will be forwarded to the Productivity Commissioner in the form of an updated submission.

2. Introduction

2.1 Review of IPC

The Hon Rob Stokes, Minister for Planning and Public Spaces, has requested the Productivity Commissioner to conduct a review of the IPC and report back to the Minister by mid-December 2019. The review was announced on 4 October 2019. LGNSW notes that some of the issues to be considered in this review were addressed in the 2018 *Review of Governance in the NSW Planning System* by Nick Kaldas.

The IPC is an independent agency established on 1 March 2018 replacing the former Planning Assessment Commission (PAC). The PAC was a statutory body set up in 2008 to introduce more independence and transparency in the decision-making process for major projects (state significant projects) and at that time, Part 3A applications¹.

LGNSW notes that the IPC is a statutory body and has several functions as listed in section 2.9 of the *Environmental Planning and Assessment Act* (EP&A Act) (see Attachment 1). The IPC's primary function is to act as consent authority in relation to SSD that meets the following thresholds:

- that are not supported by relevant council(s), or
- where the Department has received more than 25 public objections, or

¹ Part 3A of the *Environmental Planning and Assessment Act 1979* was repealed on 1 October 2011. It was introduced to the Act in 2005 and provided an assessment and approval regime for major or state significant projects to be determined by the NSW Minister for Planning.

- that has been made by a person who has disclosed a reportable political donation in connection with the development application

These thresholds are outlined in clause 8A, Part 2 of the State Environmental Planning Policy (State and Regional Development) 2011 (SEPP (State and Regional Development) 2011). Certain types of development are deemed to have state significance due to the size, economic value or potential impacts that a development may have.

The Minister for Planning is the consent authority for all other SSD applications. LGNSW notes that the Minister has delegated his power to senior officers of the Department of Planning, Industry and Environment (DPIE) to make a number of decisions. In accordance with the EP&A Act, the IPC is not subject to Ministerial control other than in relation to its procedure.

2.2 Background

Local government in NSW has always recognised the need for a system of development assessment that caters for major developments that clearly are of state or regional significance, including large public sector infrastructure projects. However, in the past many large projects were declared as “state significant” and removed from the local assessment process and put into the hands of the NSW Planning Minister.

A key concern of local government until 2011 was the reliance on and increasing use of Part 3A of the EP&A Act (now repealed) to assess and determine developments that should have been more appropriately dealt with at the local level. The result was that many residential, commercial and coastal projects were declared as ‘state significant’ and ‘called in’ for ministerial determination when some projects were of only a regional or even local scale. Although the original intent may have been to speed up assessments and/or remove blockages to “major” developments, the practice became widespread and subject to ministerial discretion, and only served to alienate local communities and diminish trust.

Many of the procedural issues surrounding the exercise of power involving decisions about regionally or state significant developments were considered in a 2010 report by the Independent Commission Against Corruption (ICAC) on Part 3A and the former SEPP Major Development². LGNSW endorsed the findings of the ICAC report and supported an assessment regime for decisions about genuine state significant developments based on the key recommendations in the report.

A key focus of the ICAC report was on the transparency and discretionary powers associated with the ‘calling in’ and determination of major projects. The ICAC report proposed placing limits on the planning minister’s powers for the listing of sites of state significance.

2.3 Terms of Reference

The Terms of Reference for the review of the IPC include the following key points:

- whether it is in the public interest to maintain the IPC, considering the experience with similar bodies in other common law jurisdictions;
- the operations of the IPC and the mechanisms by which state significant development is assessed and determined; and
- the IPC’s current functions, processes for making determinations, and resourcing.

The full Terms of Reference are included in Attachment 2 to this submission.

² ICAC *The Exercise of Discretion under Part 3A of the Environmental Planning and Assessment Act and the State Environmental Planning Policy (Major Development) 2005*, December 2010

3. Response

In response to the first term of reference, LGNSW advocates an independent and transparent decision making for projects of state significance, within a framework that embodies the following:

- Minimised opportunity for ministerial discretion – in NSW this is achieved to some extent by the IPC determining state significant projects that meet the abovementioned thresholds.
- Powers being given to the determining authority to hold public hearings in certain circumstances.
- A mix of full-time and part-time members on the determining body, and an additional pool of long-term casual members to increase the depth and breadth of experience where necessary.
- Ensuring that ICP members are appropriately qualified and experienced;
- Procedures for transparency and accountability e.g. all significant determinations to be made public.

This is consistent with the views expressed by Nick Kaldas in his *Review of Governance in the NSW Planning System*: “I am of the view that it is critical to ensure the independence of the IPC, both real and perceived”³.

Recommendation 1: The decision-making authority for SSD should be a truly independent body such as the IPC. Regulatory mechanisms must ensure it operates in a transparent and independent manner and cannot be subject to potential change at the discretion of any future minister or government.

In response to the other Terms of Reference, the main issues and concerns for local government with the current processes and operations of the IPC are in the following areas:

- Role of local government in SSD applications
- Local strategic planning and development control plans
- Community participation
- Public hearings and rights of appeal
- Contribution towards local infrastructure
- Assessment reports
- Rigorous development assessment
- Decision making and long-term sustainability

These are discussed below.

3.1 Role of Local Government in SSD Applications

Local government acknowledges there is a need for a development assessment system that caters for major developments that clearly are of state or regional significance. While we maintain that councils are best placed to determine *local* development, we also believe that councils and their communities must be given a significant voice in decisions about major projects and sites of state significance in their local area.

LGNSW supports a system in which councils are responsible for governing all matters that affect local communities that are most appropriately dealt with at a local level. We have always advocated applying the principle of subsidiarity (i.e. a central authority should perform only

³ Kaldas Review, p 49

those tasks that cannot be performed effectively at a more immediate or local level) when considering the most appropriate spheres of government for determining major developments and infrastructure projects. This principle is captured in our position statement on 'planning and local decision-making' which includes the following:

7.3 Local government to retain control over the determination of locally appropriate development – local planning powers must not be overridden by State plans and policies or misuse of state significant development provisions.

Councils must have the opportunity to provide feedback and be involved in the assessment of SSD projects, not simply as another stakeholder through the usual public participation channel, but as an integral player throughout the review process. LGNSW would therefore like to see provisions for consultation specifically with the relevant local councils in relation to assessment processes for SSD applications.

Recommendation 2: Consideration be given to amending the legislation to require DPIE to consult local government more comprehensively during the different phases of the assessment process for state significant development.

3.2 Local Strategic Planning and Development Control Plans

The following clause of the *SEPP (State and Regional Development) 2011* states that development control plans (DCPs) do not apply to state significant development:

11 Exclusion of application of development control plans⁴
Development control plans (whether made before or after the commencement of this Policy) do not apply to –
(a) State significant development,

LGNSW recommends consideration be given to removing this provision in the SEPP to give due regard to the importance of DCPs in the NSW planning framework.

The DCP is the most appropriate instrument for place-based planning in the current NSW planning framework. Place-based planning undertaken by councils in collaboration with their communities provide the necessary detail for the preferred strategic direction for an area which has been outlined in council's local strategic planning statement (LSPS).

The importance of DCPs in the planning framework is reinforced by the following extracts from the State Government's guidelines on preparing LSPSs⁵:

*The statements will be the primary resource to express the desired future for the LGA as a whole and for specific areas. This will guide and indicate what significant changes are planned for the LEP **and DCP to deliver the vision.** (page 5)*

Importantly, the LSPS allows councils to translate their strategic planning work into local priorities and actions. In turn this informs the review and development of future strategic plans at the district and regional level. This feedback cycle from local to regional planning ensures that the line of-sight between the different levels of spatial planning works both ways. (page 5)

⁴ State Environmental Planning Policy (State and Regional Development) 2011, Part 2, Clause 11

⁵ Local Strategic Planning Statements, Guidelines for Councils (Department of Planning and Environment, 2018)

Implementation includes:

1. Implementing priorities and actions – of the LSPS including necessary changes to statutory plans and development controls, council’s infrastructure funding and delivery programs and **finer grained strategic planning (e.g. DCPs, masterplans etc)**. (page 12)

The following diagram, from page 5 of the guidelines, shows the relationship between different planning instruments within the NSW planning framework and highlights the importance of DCPs.



LGNSW maintains that DCPs should be a consideration as part of the assessment of SSD applications. It is recommended that clause 11(a) of the SEPP be amended accordingly.

Recommendation 3: Due to the important role of DCPs in the NSW planning framework, consideration be given to amending the SEPP, in consultation with local government, to ensure that DCPs are given adequate consideration in the assessment of SSD applications.

3.3 Community Participation

A potential delay in the assessment process for state significant development applications is community opposition. Such opposition is commonly associated with mining and other resource proposals, due to the apprehension of the community about the uncertain and unknown social, environmental and other impacts locally. Concerns raised by a community are often only considered at the project approval stage. The inclusion of community concerns at this stage may be far too late; realistically, proponents may have an expectation that they will receive an approval as they have followed the agency requirements.

Community anxiety and resistance could be reduced to a certain degree if early and genuine consultation with communities was undertaken and appropriate consultation frameworks (such as consultative committees) were established in the early stages of a project proposal.

The Department of Planning, Industry and Environment prepared a draft Community Participation Plan during 2018. The DPIE’s website indicates that it is seeking to increase community participation in SSD applications:

The Department is developing a plan to increase community participation in planning, including the assessment of State significant projects.

The draft plan establishes the Department’s community participation objectives and identifies what actions the Department will take to meet these objectives. The objectives for community participation include:

- *Open and inclusive – by keeping the community informed about planning matters and seeking community views on the merits of these matters*
- *Easy for the community – by giving the community information that is easy to understand, making it as easy as possible for the community to engage in planning matters, and taking additional steps to seek input from groups in the community who may find it difficult to participate*
- *Relevant – by ensuring all community engagement undertaken by the Department is tailored to match the context, scale and nature of the activity, level of community interest and community’s preferences about how they would like to participate*
- *Timely – by engaging with the community as early as possible and giving people enough time to provide considered feedback on planning matters*
- *Meaningful – by giving serious consideration to community views in all planning matters and providing regular feedback to the community on how these views were taken into consideration during decision-making.*

The legislation requires that SSD applications be advertised for public consultation for 28 business days. However, the legislation does not require any consultation or engagement with the community or relevant council prior to the formal consultation period towards the end of the assessment process, just prior to the decision being made on the application. It is noted that SSD applications are available on the state government’s website. LGNSW advocates for early engagement in the assessment process. We recommend that additional opportunities for community input and engagement be provided earlier in the process. This is consistent with the objectives of the DPIE’s draft Community Participation Plan.

Recommendation 4: That the Productivity Commissioner consider options to require DPIE to consult local government throughout the development assessment process and to provide additional opportunities to adequately inform the community about SSD applications.

3.4 Public Hearings and Rights of Appeal

Under the EP&A Act, the Minister for Planning and Public Spaces may formally ask the Commission to hold a public hearing in relation to a development application or any other planning matter at any time. If such a request is made, the Commission must hold a public hearing, it is not discretionary. The Commission is expected to give advanced notice of the date, time and location of the public hearing and invite interested people to apply to speak at the public hearing. The Commission also has powers to require certain people to attend the public hearing and to give evidence.

The IPC’s draft Community Participation Plan 2019 outlines how the community can participate in public hearing on SSD applications. The following extract from the draft plan highlights the value of early engagement:

Engagement - We seek to encourage and promote greater community participation early in the planning assessment process. We acknowledge and respect there will be differences of opinion on planning projects and take seriously the concerns expressed to us by individuals and groups in affected communities⁶

However, the opportunity to participate in a public hearing is towards the end of the assessment process just before the decision is made by the IPC.

Following a public hearing, the Commission will prepare and then publish on its website a report containing recommendations to the Minister. If a public hearing is held, merit appeal rights to the NSW Land and Environment Court are extinguished. (Section 8.6 (3)(a) of the

⁶ Independent Planning Commission NSW, *Community Participation Plan, Exhibition Draft*, May 2019

EP&A Act exempts decisions made by the IPC from judicial appeal where the IPC has held a public hearing.⁷) The lack of the right of appeal is a significant concern for local government. Consequently, the 2019 local government annual conference in October, resolved the following:

That Local Government NSW advocates for legislative reform of the Environmental Planning and Assessment Act 1979, including repeal of section 8.6(3)(a) of that Act and related regulations to ensure:

- a) that decisions made by the Independent Planning Commission (IPC) are not exempt from judicial appeal following the IPC's holding of a public hearing; and*
- b) both merits and judicial appeal rights to courts of appropriate jurisdiction are available to parties affected by decisions of the IPC.*

Underpinning this resolution is the view that the IPC is not a judicial body and should not be empowered to perform a quasi-judicial role with no right of appeal. As a non-judicial body, decisions of the IPC should be subject to merits and judicial appeal.

Recommendation 5: The *Environmental Planning and Assessment Act 1979* and related regulations, specifically section 8.6 (3)(a) of that Act, be reviewed and repealed to ensure:

- a) that decisions made by the IPC are not exempt from judicial appeal following the IPC holding of a public hearing; and
- b) both merits and judicial appeal rights to courts of appropriate jurisdiction are available to parties affected by decisions of the IPC.

3.5 Contribution Towards Local Infrastructure

In local government areas (LGAs) where major developments such as mining and resource activity are placing added pressure on local infrastructure, services and housing, local government needs additional financial resources to augment public infrastructure and cater for the increased demands of industry expansion and population increase. As councils are not the consent authority for SSD, they have little control over and cannot rely on the inclusion of developer contributions as a condition of consent for these proposals.

In many cases, councils therefore rely on the goodwill of individual companies and their own capacity to undertake negotiations for contributions towards local infrastructure. In NSW some mining companies have held discussions with councils about possible compensation payments towards their infrastructure and community needs. Mechanisms such as voluntary planning agreements (VPAs) are available to assist in this process. However, VPAs only benefit the LGA within which the development is situated. LGNSW is not aware of any mandatory framework to formalise the requirement for such contributions or to extend such contributions to benefit neighbouring councils that may be also directly affected because of the cumulative impacts of many mines in adjoining LGAs.

The *direct* impacts of SSD are not just inside the LGA boundary within which they are situated. As direct impacts can occur on neighbouring LGAs, this needs to be considered in any assessment. LGNSW has always advocated for mechanisms and processes to ameliorate and compensate for these impacts and additional pressures on neighbouring councils.

⁷ 8.6 Decisions subject to appeal to Court under this Division

- (3) *There is no right of appeal under this Division against the following decisions—*
- (a) a decision of the Independent Planning Commission as consent authority under this Act in relation to the carrying out of any development that is made after a public hearing by the Commission into the carrying out of that development,*

Recommendation 6: Due to the significance of local government’s role in the provision of local infrastructure to support state significant development, the Productivity Commissioner should consider, in consultation with local government, what mechanisms could be put in place to ensure that councils can have genuine input to the conditions of consent for SSD.

3.6 Assessment Reports

The legislation (clause 4.6(b) of the EP&A Act 1979) requires the assessment report on SSD applications to be prepared by the Planning Secretary on behalf of the IPC. LGNSW understands DPIE officers prepare the assessment report, and that while the IPC is separate from the Department, the secretariat staff are nevertheless DPIE employees. The Kaldas Report addressed this issue and recommended that “The Secretary and the Chair should consider a contemporary Memorandum of Understanding to achieve that objective”⁸.

One of the issues to be considered as part of the review of the IPC, is the extent to which the IPC should rely on the assessment report prepared by the DPIE, taking into account any additional assessments by other government agencies.

Where a council does not support the proposal and has lodged an objection under clause 8A (1)(a) of the SEPP, the IPC should be required to further consult council and give council the opportunity to provide additional information, if they have the resources to do so, for the IPC’s consideration. Giving local government the opportunity to provide additional material and evidence at this stage may enhance decision making by the IPC and lead to fewer applications being held up by subsequent lengthy legal proceedings.

Recommendation 7: Where a council has lodged an objection under clause 8A (1)(a) of the SEPP, consideration be given to requiring the IPC to further consult council and give council the opportunity to provide additional information for consideration of the IPC in deciding the application.

3.7 Rigorous Development Assessment

By their nature, the scale and complexity of major development projects necessitate a more complex assessment procedure, which would generally involve longer assessment times than other less complex developments. LGNSW supports calls from all sectors for a reduction in the ‘red tape’ that surrounds current approval processes. However, local government has always maintained that rigorous development assessment should not be sacrificed for the sake of expedience. Shortening average development assessment times for example, must not come at the expense of consistent, transparent and appropriate development assessment.

Recommendation 8: Maintain rigorous, consistent, transparent and appropriate development assessment for SSD applications.

4. Conclusion

Local government has always recognised the need for a development assessment system that caters for large public sector infrastructure projects and major developments that clearly are of state or regional significance. LGNSW supports the important role that the IPC plays in this

⁸ Kaldas Review, Recommendation 14

process and we welcome the review of the operations and processes of the IPC to ensure that it continues to operate in the most effective, independent and transparent way. This submission reaffirms LGNSW's long-held position that the decision-making authority for these SSD applications should be an independent body and that it is in the public interest to maintain an independent body such as the IPC (recommendation 1).

We also advocate for changes to consultation processes to ensure that local government's legitimate interests in decisions about SSD that affect their local areas are factored into the IPC and DPIE's assessment and decision-making processes. The majority of our recommendations (6, 7 and 8) refer to the operations and mechanisms by which SSD is assessed and determined (under term of reference 2). Some recommendations (2 to 5) relate to the 'clarity and certainty of policies and guidelines that inform determinations' (under the third term of reference).

Thank you for considering LGNSW's submission and we look forward to continued engagement with you during the review of the IPC.

For further information in relation to this submission, please contact Jane Partridge, Strategy Manager Planning and Transport, on 02 9242 4093 or jane.partridge@lgnsw.org.au.

Attachment 1

Section 2.9 of the EP&A Act 1979

2.9 Functions of Commission (cf previous s 23D)

(1) The Independent Planning Commission has the following functions—

- (a) the functions of the consent authority under Part 4 for State significant or other development that are (subject to this Act) conferred on it under this Act,
- (b) any functions under this Act that are delegated to the Commission,
- (c) to advise the Minister or the Planning Secretary on any matter on which the Minister or the Planning Secretary requests advice from the Commission,
- (d) to hold a public hearing into any matter into which the Minister requests the Commission to hold a public hearing,
- (e) any function of a Sydney district or regional planning panel or a local planning panel in respect of a particular matter that the Minister requests the Commission to exercise (to the exclusion of the panel),
- (f) if a Sydney district or regional planning panel has not been appointed for any part of the State, any function that is conferred on any such panel under an environmental planning instrument applicable to that part or that is otherwise conferred on any such panel under this Act,
- (g) any other function conferred or imposed on it under this or any other Act.

Note. Division 5 of Part 4AA of *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* provides that a subcommittee appointed by the Independent Planning Commission exercises the gateway functions of the Mining and Petroleum Gateway Panel under that policy.

(2) The matters on which advice may be provided under subsection (1)(c), or into which a public hearing may be held under subsection (1)(d), include any general or particular planning or development matter, the administration of this Act or any related matter.

Attachment 2 Terms of Reference

The Terms of Reference for the Review are:

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;
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; and
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:
 - Thresholds for the referral of matters to the Independent Planning Commission;
 - The clarity and certainty of policies and guidelines that inform determinations;
 - The Commissioners' skills, expertise and qualifications;
 - The adequacy of mechanisms to identify and resolve any conflicts of interest by commissioners;
 - The Independent Planning Commission's procedures and guidelines;
 - 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;
 - Resourcing of the Independent Planning Commission and the mechanism for determining budgetary support; and
 - 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.

Attachment 3

List of Recommendations

Recommendation 1: The decision-making authority for SSD should be a truly independent body such as the IPC. Regulatory mechanisms must ensure it operates in a transparent and independent manner and cannot be subject to potential change at the discretion of any future minister or government.

Recommendation 2: Consideration be given to amending the legislation to require DPIE to consult local government more comprehensively during the different phases of the assessment process for state significant development.

Recommendation 3: Due to the important role of DCPs in the NSW planning framework, consideration be given to amending the SEPP, in consultation with local government, to ensure that DCPs are given adequate consideration in the assessment of SSD applications.

Recommendation 4: That the Productivity Commissioner consider options to require DPIE to consult local government throughout the development assessment process and to provide additional opportunities to adequately inform the community about SSD applications.

Recommendation 5: The *Environmental Planning and Assessment Act 1979* and related regulations, specifically section 8.6 (3)(a) of that Act, be reviewed and repealed to ensure:

- a) that decisions made by the IPC are not exempt from judicial appeal following the IPC holding of a public hearing; and
- b) both merits and judicial appeal rights to courts of appropriate jurisdiction are available to parties affected by decisions of the IPC.

Recommendation 6: Due to the significance of local government's role in the provision of local infrastructure to support state significant development, the Productivity Commissioner should consider, in consultation with local government, what mechanisms could be put in place to ensure that councils can have genuine input to the conditions of consent for SSD.

Recommendation 7: Where a council has lodged an objection under clause 8A (1)(a) of the SEPP, consideration be given to requiring the IPC to further consult council and give council the opportunity to provide additional information for consideration of the IPC in deciding the application.

Recommendation 8: Maintain rigorous, consistent, transparent and appropriate development assessment for SSD applications.