



## **Submission to the Review of the NSW Independent Planning Commission**

prepared by

**EDO NSW**

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## About EDO NSW

EDO NSW is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

**Successful environmental outcomes using the law.** With over 25 years' experience in environmental law, EDO NSW has a proven track record in achieving positive environmental outcomes for the community.

**Broad environmental expertise.** EDO NSW is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

**Independent and accessible services.** As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

EDO NSW is part of a national network of centres that help to protect the environment through law in their states.

### Submitted to:

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## Introduction

EDO NSW is an independent community legal centre specialising in public interest environmental law. We have a long history of providing legal advice on environment and planning issues, and on transparent and accountable decision-making in the NSW planning system.

EDO NSW welcomes the opportunity to provide feedback to the Review of the Independent Planning Commission (**the Review**). We support the role that an independent, expert body can play in the planning process including providing independent advice to the Minister and other planning authorities, and in carrying out planning functions including determining development applications. We recognise that independent decision-making bodies can help reduce corruption risks, particularly in the case of significant and controversial projects, or where there is significant discretion in decision-making processes.

While the Independent Planning Commission (**IPC**) has only been in operation since March 2018, there was much scrutiny of its predecessor, the Planning Assessment Commission (**PAC**). The current structure and role of the IPC has no doubt been informed by lessons learnt from the performance of the PAC and the role that it carried out. We recognise that there were attempts to improve the performance and procedures of the PAC during its tenure and that the creation of the IPC was a further step in addressing some of the ongoing concerns.

However some unaddressed concerns and recommendations regarding the PAC remain relevant for the IPC. In some instances, previous reports of the Independent Commission Against Corruption (**ICAC**) and the Audit Office of NSW (**Audit Office**) continue to have relevance when considering the IPC and the functions it carries out under the *Environmental Planning and Assessment Act 1979*.

The recent premature publication of the Rix's Coal Mine approval prior to the closing date for public submissions was a serious error and suggests that a review of the IPC's practice and procedures is warranted. However, dissatisfaction with recent decisions, as signalled by the NSW Minerals Council, particularly when those decisions have been based on independent, expert evidence and following proper process, does not justify abandoning the IPC. The IPC should be supported to continue to its role of independent decision-maker within a transparent and accountable regulatory framework.

This Review also provides a further opportunity to examine ongoing concerns regarding the restriction of merits review rights following a public hearing of the IPC. This restriction was also in place when the PAC was in operation. EDO NSW, and others, have consistently said that IPC public hearings are in no way equivalent to a merit review hearing in the Land & Environment Court and that restrictions on merit appeal rights should be removed. ICAC has also recognised the benefit of merit appeal rights. This particular issue is discussed in more detail in our submission.

Our submission provides:

- A. Overarching comments on the IPC**
- B. Comments on the Terms of Reference**
- C. Discussion on IPC public hearings and merit review rights**

The IPC should be supported and resourced as a key part of the NSW planning system. This Review should recommend that the IPC be retained and make additional recommendations for improving the policies and procedures of the IPC, and for improving transparent and accountable decision-making in the NSW planning system more generally.

## A. Overarching comments on the IPC

The establishment of the IPC in March 2018 was not a new initiative of NSW planning laws. It is an evolution of earlier commissions of inquiry and the former Planning Assessment Commission (**PAC**), who were also tasked with carrying out certain planning functions under the *Environment Planning and Assessment Act 1979* (**EP&A Act**).

In summary, the IPC was established on 1 March 2018 by the insertion of new provisions into the EP&A Act.<sup>1</sup> It replaced the former PAC, which commenced operation on 3 November 2008, following the 2008 planning reforms.<sup>2</sup> Prior to the PAC there were powers under the EP&A Act for the Minister to establish a commission of inquiry to conduct independent public inquiries into planning matters.<sup>3</sup> The functions of commissions of inquiry were superseded by the PAC.

The powers and functions of each of these bodies has been different, but there has been a shared theme of having a body separate to the Minister or Department to inquire into or review planning matters, and/or make planning decisions under the EP&A Act.

In establishing the IPC, there was a deliberate intent to:

- Reinforce its independence from government (the PAC was also intended to be an independent body, but there was a public perception that its independence was curtailed by interactions with the Department<sup>4</sup>);
- Establish its key function as independently determining projects;<sup>5</sup>
- Remove the previous review function (the former PAC had the dual function of reviewing planning matters and determining development applications);<sup>6</sup> and
- Clearly specify which projects will be determined by the IPC (as set out in clause 8A of the *State Environmental Planning Policy (State and Regional Development) 2011*) (**State and Regional Development SEPP**).

Since beginning operations, the IPC itself has undertaken various steps to improve transparency and internal processes, including releasing a number of guidelines and policies to guide IPC operations, including Public Meeting Guidelines, Public Hearing Guidelines, Site Inspection and Locality Tour Guidelines, Policy on Meetings Records and Conflict of Interest Policy.<sup>7</sup>

The evolution of the PAC and the establishment of the IPC has also happened against a backdrop of reports and audits over the past fifteen years that made a series of recommendations for improving planning decision-making. While not directly related to the IPC, these reports do provide useful context within which to consider ways to improve decision-making in the NSW planning system, including decision-making by the IPC. For example:

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<sup>1</sup> See Schedule 2 of the *Environmental Planning and Assessment Amendment Act 2017*, which inserted Part 2, Division 2.3 into the *Environmental Planning and Assessment Act 1979*.

<sup>2</sup> See *Environmental Planning and Assessment Amendment Act 2008*.

<sup>3</sup> See, for example, now repealed sections 18 and 119 of the *Environmental Planning and Assessment Act 1979* (and other related provisions).

<sup>4</sup> See NSW Auditor-General's Report, *Assessing major development applications*, Planning Assessment Commission, January 2019, p 2, available at [https://www.audit.nsw.gov.au/sites/default/files/pdf-downloads/01\\_Assessing\\_major\\_development\\_applications\\_Full\\_Report.pdf](https://www.audit.nsw.gov.au/sites/default/files/pdf-downloads/01_Assessing_major_development_applications_Full_Report.pdf)

<sup>5</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 18 October 2017 (Mr Scot MacDonald), available at <https://www.parliament.nsw.gov.au/bill/files/3456/2R%20Environmental%20Planning.pdf>

<sup>6</sup> Ibid.

<sup>7</sup> For a full list of IPC policies and guidelines, see the IPC website: [ipcn.nsw.gov.au/policies](http://ipcn.nsw.gov.au/policies).

- Between 2005 and 2007, ICAC looked into corruption risks in development approval processes. This followed reporting in 2005/06 that approximately 35% of complaints received by ICAC from members of the public related to local government and development approval processes, and two separate ICAC investigations revealing corrupt conduct aimed at improperly influencing the outcome of development approval processes.<sup>8</sup> Its 2007 report, *Corruption risks in NSW development approval processes* made a series of recommendations, aimed mainly at addressing corruption risks in local council decision making and political donations.
- In 2010, ICAC released its report, *The Exercise of Discretion under Part 3A of the Environmental Planning and Assessment Act 1979 and the State Environmental Planning Policy (Major Development) 2005*.<sup>9</sup> While the report focused specifically on the now repealed Part 3A major projects provisions of the EP&A Act (which provided the Planning Minister significant discretion in determining Part 3A applications), a number of the observations and recommendations relevant to planning decision-making more broadly. ICAC found that one of the key issues is “the adequacy of safeguards when discretions are exercised by elected or unelected officials at any level of government”. The report made a number of recommendations regarding the operations and procedures of the PAC.
- In 2012, in anticipation of a major review of the current planning system, the ICAC released its report, *Anti-Corruption Safeguards in the NSW Planning System*, which made a number of overarching recommendations for addressing corruption risks in planning decision-making.<sup>10</sup>
- In 2018, the Audit Office conducted a performance audit on the PAC assessment of major development applications.<sup>11</sup> The Audit Office made a number of recommendations to ensure the PAC made decisions in a consistent and transparent manner.

This current Review provides an opportunity to examine the operations of the IPC in its first 20 months and consider options for strengthening policies and procedures to ensure that the IPC is exercising its functions in accordance with the relevant legislative requirements.

The recent premature publication of the Rix’s Coal Mine approval prior to the closing date for public submissions was a serious error that suggests that improvements can be made.<sup>12</sup> In particular, the error indicates that the IPC had formed a final view on the project without considering all relevant submissions (because the decision had been published before the submission period had even closed). The fact that the final decision was then published only one day after the extended submission period closed reinforces the perception that the IPC undertakes its assessment and makes a decision without considering relevant submissions.

<sup>8</sup> See Independent Commission Against Corruption, *Corruption Risks in NSW development approval processes*, September 2007, available at <https://www.icac.nsw.gov.au/prevention/corruption-prevention-publications>

<sup>9</sup> Independent Commission Against Corruption, *The Exercise of Discretion Under Part 3A of the Environmental Planning and Assessment Act 1979 and the State Environmental Planning Policy (Major Development) 2005*, December 2010, available at <https://www.icac.nsw.gov.au/prevention/corruption-prevention-publications>

<sup>10</sup> Independent Commission Against Corruption *Anti-Corruption Safeguards in the NSW Planning System*, February 2012, available at <https://www.icac.nsw.gov.au/prevention/corruption-prevention-publications>

<sup>11</sup> Audit Office of NSW, *Assessing major development applications, Planning Assessment Commission*, January 2019, available at [https://www.audit.nsw.gov.au/sites/default/files/pdf-](https://www.audit.nsw.gov.au/sites/default/files/pdf-downloads/01_Assessing_major_development_applications_Full_Report.pdf)

[downloads/01\\_Assessing\\_major\\_development\\_applications\\_Full\\_Report.pdf](https://www.audit.nsw.gov.au/sites/default/files/pdf-downloads/01_Assessing_major_development_applications_Full_Report.pdf)

<sup>12</sup> ABC News, *Rix’s Creek mine lease approval announced in ‘embarrassing’ error by planning commission*, 6 October 2019, <https://www.abc.net.au/news/2019-10-05/rix-creek-mine-approved-before-decision-made/11576662>

This not only undermines the efforts of the IPC and the Department to undertake genuine community engagement, but could in fact be a breach of the EP&A Act.<sup>13</sup>

However, dissatisfaction with recent decisions, as signalled by the NSW Minerals Council,<sup>14</sup> particularly when those decisions have been based on independent, expert evidence and following proper process, does *not* justify abandoning the IPC.

The Review is also an opportunity to consider whether the changes that established the IPC in 2018 did indeed reinforce the independence of the IPC as intended. To this end, we note that the Minister still has the ability to direct the IPC in relation to procedure, including the holding of a public hearing into any matter requested by the Minister (see our comments below about the Minister's discretion to direct a public hearing), and that there remains a perception that the Department of Planning, Infrastructure and Environment (**the Department**) has too much influence on the IPC (see our comments below regarding the interaction between the IPC and the Department). The Minister also has power to make directions regarding the number of members, specific members or specific qualifications or expertise that must constitute the panel for particular matters.<sup>15</sup>

In our view, the IPC should be supported and adequately resourced to continue to its role of independent decision-maker within a transparent and accountable regulatory framework.

## **B. Comments on Terms of Reference**

### **1. 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**

Based on our experience and expertise, EDO NSW is of the view that it is in the public interest to maintain an Independent Planning Commission to carry out certain functions under the EP&A Act. As noted above, we support the role that an independent, expert body can play in the planning process including providing independent advice to the Minister and other planning authorities, and in carrying out planning functions including determining development applications. As noted, this can help reduce corruption risks, particularly in the case of significant and controversial projects, or where there is significant discretion in decision-making processes.

We suggest that the policies and procedures of the IPC can be further improved to ensure that the IPC is exercising its functions in accordance with the relevant legislative requirements and increase transparency and accountability in decision-making (see further comments below). Previous reports from ICAC and the Audit Office, although not directly relevant to IPC, can provide useful context within which to consider ways to improve decision-making in the NSW planning system.

While we haven't examined other jurisdictions in detail, we do note that independent bodies operate in other jurisdictions to carry out a range of planning functions. For example:

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<sup>13</sup> Section 4.15(1)(d) of the *Environmental Planning and Assessment Act 1979* provides that a consent authority is to take into consideration "any submissions made in accordance with this Act or the regulations".

<sup>14</sup> The NSW Minerals Council has said that "*The structure and role of the Independent Planning Commission itself, in our view, creates a level of uncertainty that our members are telling us is holding back and deterring investment in New South Wales, and other industries are saying the same thing too*", Independent Commission Against Corruption, Transcript of Proceedings, Operation Eclipse (Operation E19/0417), Monday 21 October 2019, available at [www.icac.nsw.gov.au/investigations/current-investigations/2019/operation-eclipse](http://www.icac.nsw.gov.au/investigations/current-investigations/2019/operation-eclipse)

<sup>15</sup> *Environmental Planning and Assessment Act 1979*, section 2.10.

- In South Australia, the State Commission Assessment Panel, established under the *Planning, Development and Infrastructure Act 2016* (SA) independently assesses and determines certain development applications including developments of significant regional impact and development in key areas of the State.<sup>16</sup>
- In Western Australia, Development Assessment Panels (**DAPs**) determine applications for development which meet certain monetary value threshold. DAPs are described as existing to “provide additional transparency, consistency and reliability in decision-making on complex and significant development applications”.<sup>17</sup> It is also noted that Western Australia has a separate Western Australia Planning Commission with responsibility for urban, rural and regional strategic land-use planning (rather than determining development applications).
- In Tasmania, the Tasmanian Planning Commission is an independent body that has a range of statutory and advisory functions including considering planning schemes and various local and state planning provisions, and assessing projects of regional and State significance.<sup>18</sup>

These various models show that it is not uncommon for an independent planning body to play a key role in both strategic planning and the assessment of development applications.

## **2. The Independent Planning Commission’s operations and the mechanisms by which State significant development is assessed and determined**

Please see our detailed comments below as they relate to the IPC’s operations and mechanisms for assessing and determining State significant development.

## **3. Proposed changes to the Independent Planning Commission’s current functions, processes for making determinations, and resourcing.**

This part addresses:

- **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**

<sup>16</sup> More information on South Australia’s State Commission Assessment Panel is available on its website, <https://www.saplanningcommission.sa.gov.au/>

<sup>17</sup> Western Australia Department of Planning and Western Australia Planning Commission, *Introduction to the Western Australia Planning System*, 2014, [https://www.dplh.wa.gov.au/getmedia/58e41b53-1db3-4ff4-a5b4-96592cc1fb35/WAPC-intro\\_to\\_planning\\_system](https://www.dplh.wa.gov.au/getmedia/58e41b53-1db3-4ff4-a5b4-96592cc1fb35/WAPC-intro_to_planning_system)

<sup>18</sup> More information is available on the Tasmanian Planning Commission’s website, <https://www.planning.tas.gov.au/home>



- **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.**

### ***Thresholds for the referral of matters to the Independent Planning Commission***

Clause 8A of the State and Regional Development SEPP declares the types of development for which IPC is consent authority, including:

- (a) development in respect of which the council of the area in which the development is to be carried out has duly made a submission by way of objection under the mandatory requirements for community participation in Schedule 1 to the Act;
- (b) development in respect of which at least 25 persons (other than a council) have duly made submissions by way of objection under the mandatory requirements for community participation in Schedule 1 to the Act; and,
- (c) development the subject of a development application made by a person who has disclosed a reportable political donation under section 10.4 to the Act in connection with the development application.

Clause 8A was inserted into the State and Regional Development SEPP at the time the IPC was established.<sup>19</sup> Prior to this, there was broad delegation of Ministerial functions to the PAC,<sup>20</sup> and a general policy outlining when the PAC would determine applications including all applications made by private sector proponents where more than 25 members of the public have made a submission on the application, the council for the area objects in writing to the application or a political donation disclosure statement has been lodged with the application.<sup>21</sup>

We generally support the inclusion of the delegation of matters to the IPC in the State and Regional Development SEPP. This partially addresses one of ICAC recommendations regarding the PAC, namely that delegations be included in the EP&A Act.<sup>22</sup> ICAC advised that this would promote transparency and certainty and reduce actual or perceived corruption risk.<sup>23</sup>

However, the current categories of development do create uncertainty for both proponents and the community. Because of the way the categories are described it is not known until part-way through the development application process (at the time of formal public consultation) whether the IPC will be the consent authority, because it will be dependent on the number of submissions received and the position of the council. In order to provide better certainty regarding the types of development for which the IPC will be consent authority, consideration could be given to identifying specific types of development (e.g. by industry, impact or monetary value).

We also note that ICAC has identified types of development that are more likely to present a corruption risk, including development that:

<sup>19</sup> See State Environmental Planning Policies Amendment (State and Regionally Significant Development and Law Revision) 2018, Schedule 1.

<sup>20</sup> See <https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/general/instrument-of-delegation.pdf?la=en&hash=C263B3B2CC510ABF0EDF2E3C5FADF05B>

<sup>21</sup> See <https://www.planning.nsw.gov.au/-/media/Files/DPE/Circulars/planning-circular-determination-of-state-significant-applications-2011-09-30.pdf?la=en>.

<sup>22</sup> Independent Commission Against Corruption, *The Exercise of Discretion Under Part 3A of the Environmental Planning and Assessment Act 1979 and the State Environmental Planning Policy (Major Development) 2005*, December 2010, above no. 9, Recommendation 5 - “That the NSW Government amends the *Environmental Planning and Assessment Act 1979* to provide that the *Planning and Assessment Commission (PAC)* will be the determining body for the three classes of applications contained in the general delegation to the PAC that was issued by the then NSW Minister for Planning in December 2008”.

<sup>23</sup> *Ibid*, p 20.



- is significant and controversial;
- represents a significant departure from existing development standards; or
- is the subject of a voluntary planning agreement.<sup>24</sup>

The ICAC's recommendation was made in the context of expanding merit review rights, due to the potential corruption risks. We submit that consideration should be given to making the IPC the consent authority for these types of development (particularly if current restrictions on merit review rights remain in place – see comments below).

At this point we also raise concerns regarding the lack of consistency regarding public hearings of the IPC. It is at the discretion of the Minister to direct the IPC to hold a public hearing, and there is no consistent practice or formal policy for doing so. This can have significant implications for the process assessing and determining each project and merit review rights. These issues are discussed in more detail below.

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

In our view, there is clarity and certainty regarding policies and guidelines that inform determinations.

In terms of policies and guidelines that must be considered when assessing and determining applications, the IPC must exercise its legislative functions in accordance with the EP&A Act.

We do not agree with the assessment of the NSW Minerals Council that the IPC has injected inconsistency and uncertainty into the NSW planning system and that the IPC is not required to assess projects consistent with NSW Government policy and can determine projects for their own reasons.<sup>25</sup>

The NSW Mineral Council's inference that the IPC can determine projects for their own reasons is unfounded. The IPC carries out clear legislative functions under the EP&A Act and is required to do so in accordance with legislative requirements. These requirements would be the same for any decision-maker carrying out the same functions. For example, in determining a development application for State significant development under Part 4 of the EP&A Act, a consent authority is required to take into consideration the matters listed in section 4.15 of the EP&A Act. However there remains discretion for any decision-maker as to what weight will be given to each of these various considerations.

A consent authority will be required to consider any Government policy or guidelines when explicitly required to by legislation (for example *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (Mining SEPP)* explicitly requires a development authority to consider any applicable provisions of the *Voluntary Land Acquisition and Mitigation Policy* approved by the Minister and published in the Gazette).<sup>26</sup>

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<sup>24</sup> Independent Commission Against Corruption *Anti-Corruption Safeguards in the NSW Planning System*, February 2012, above no 10, Recommendation 16. This follows an earlier recommendation of ICAC that that the NSW Government expands the availability of third party merit appeals under Part 3A of the *Environmental Planning and Assessment Act 1979* to private sector projects, where the project constitutes a major departure from existing development standards and that controls on the abuse of merit appeals (that is, appeals made for frivolous, obstructive, commercial or coercive reasons) should also be introduced, see *The Exercise of Discretion Under Part 3A of the Environmental Planning and Assessment Act 1979 and the State Environmental Planning Policy (Major Development) 2005*, December 2010, above no. 9, Recommendation 20.

<sup>25</sup> Independent Commission Against Corruption, Transcript of Proceedings, Operation Eclipse (Operation E19/0417), Monday 21 October 2019, p 189T, available at [www.icac.nsw.gov.au/investigations/current-investigations/2019/operation-eclipse](http://www.icac.nsw.gov.au/investigations/current-investigations/2019/operation-eclipse)

<sup>26</sup> See clause 12A of *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*.

In any case, the fact that the IPC is perceived to be determining projects for their own reasons indicates that its independence from Government is functioning. If there are circumstances in which the IPC fails to consider relevant matters (or conversely considers irrelevant matters) then its decision may be invalid.

In contrast, the ability for the NSW Government to simply develop new policies or guidelines in circumstances where it is in disagreement with the approach taken by the IPC is a real risk. For example, the Government has recently proposed new legislation regarding the way in which decision-makers will be required to consider scope 3 greenhouse gas emissions.<sup>27</sup> Following a number of decisions by the IPC earlier this year, the proposed changes appear to respond to a campaign by the NSW Minerals Council to push for changes to the law to prevent mining projects from being rejected on climate grounds.<sup>28</sup> The decision of the Government to change laws and policies in this way is seen as undermining the independence of the IPC's decision-making functions.

In terms of policies and guidelines for IPC procedure, as noted above the IPC itself has undertaken various steps to improve transparency and internal processes and a suite of policies and guidelines are available on its website.

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

The EP&A Act requires that each member appointed to the IPC is to have expertise in at least one area of planning, architecture, heritage, the environment, urban design, land economics, soil or agricultural science, hydro-geology, mining or petroleum development, traffic and transport, law, engineering, tourism or government and public administration.<sup>29</sup>

We generally support the legislative requirement that IPC members have expertise in these areas, however we are concerned that there are no additional requirements that areas of expertise must align directly with the key issues for individual projects (for example, there is no requirement that someone with hydro-geological expertise is a member of a panel assessing a mine with known concerns about groundwater impacts).

Currently the EP&A Act provides that for each particular matter the IPC (otherwise known as the panel for that particular project) is to be constituted by one or more members determined by the chairperson. The Minister also has power to make direction regarding the number of members, specific members or specific qualifications or expertise that must constitute the panel for particular matters.<sup>30</sup>

We suggest that further policies be put in place to require commissioners with expertise directly relevant to the key issues of a project to be appointment to the panel for that project, and to remove any potential corruption risks or bias in terms of the Minister making directions regarding the constitution of panels.

### ***The adequacy of mechanisms to identify and resolve any conflicts of interest by commissioners***

We recognise that there have been genuine efforts to strengthen mechanisms to identify and resolve conflicts of interest by commissioners. The IPC has a Conflict of Interest Policy and

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<sup>27</sup> For example the recently introduced *Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019* and proposed greenhouse gas guidelines.

<sup>28</sup> These decisions include the IPC's refusal of a new open cut coal mine in the Bylong Valley, the IPC's decision to refuse a 5 year extension of the Dartbrook underground coal mine in the Upper Hunter Valley and the IPC's decision to approve the United Wambo mine in the Hunter Valley, with a condition requiring coal from the mine to be sold only to countries that are signatories to the Paris Agreement, or that have equivalent policies in place.

<sup>29</sup> *Environmental Planning and Assessment Act 1979*, section 2.8 (3).

<sup>30</sup> *Environmental Planning and Assessment Act 1979*, section 2.10.

Managing Conflicts of Interest Guide.<sup>31</sup> However conflicts of interest remain problematic, including the fact that a number of commissioners are ex-industry employees and the IPC's management of such conflicts has not met community expectations. It is essential that conflict rules are clear and dealt with at the earliest possible stage to avoid circumstances where a panel member may need to be recused after a process has already commenced.<sup>32</sup>

### ***The Independent Planning Commission's procedures and guidelines***

We welcome efforts by the IPC to create a comprehensive suite of policies and guidelines to improve transparency and internal processes (see comments above).

We note and support the IPC's ongoing process of capturing its current practice, such as allowing seven days for responses to significant new pieces of information on a development application, as formal positions. This process will help to ensure consistency and transparency, as well as setting appropriate expectations for how and when the community can engage in the decision making process. We encourage the IPC to continue this process.

We also note that there has been a significant improvement in the transparency of IPC deliberations, however we note that the following issues remain unresolved:

- There is no notification system that updates people when new information has been added to a website, and documents are not added in a way that makes them easy to find.
- Information is not always available in the same place or is inconsistent (for example, the IPC and DPIE Major Project sites contain different information).

### ***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***

Current processes create a strong perception that the IPC's role as an independent decision-maker is diminished by its reliance on advice from the Department. There are legitimate concerns that other, expert-based agencies have had their views filtered by the requirement to provide advice to the Department rather than directly to the IPC. The IPC has recently sought to address this issue by meeting directly with other agencies, without the Department present. With the recent merger of the former Office of Environment and Heritage into the Department it is unclear how advice from government experts on environmental issues will be obtained in the future. This should be clarified.

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

The IPC should be fully resourced to conduct its own assessments and reviews, or commission their own expert advice when needed. The issue of the reliance on the Department (discussed above) is exacerbated by the fact that, for resourcing reasons, the IPC often needs to rely on 'independent' expert advice obtained via the Department.

### ***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.***

In our view, the IPC's Secretariat should be employed by IPC to avoid potential conflicts of interest with the Department. As noted above, it was previously found that there was a strong

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<sup>31</sup> These are available on the IPC website, <https://www.ipcn.nsw.gov.au/policies>

<sup>32</sup> For example, there have been instances where a panel member had to step aside the day before a public hearing, resulting in hearings being deferred at very short notice to the public participants.

perception that the former PAC was not independent despite the intention of it being an independent body. Despite the change in name, there is still a risk that the IPC is seen as not being independent of the Department or Government.

### **C. Comments on IPC public hearings and merit review rights**

EDO's 2016 report *Merits Review in Planning in NSW* outlines the essential role of merits review in the NSW planning system.<sup>33</sup>

We have ongoing concerns that merit review rights are restricted in instances where there has been a public hearing of the IPC. While these restrictions have been in place since the inception of the PAC,<sup>34</sup> they have operated more frequently since it has become the practice for the Minister to direct a public hearing, particularly for resource projects.

A common reason provided for restricting merit review rights is that public hearings provide a process in which the merits of a project can be considered by an independent body. However, we are strongly of the view that public hearings are in *no way equivalent* to merit reviews conducted by the Land and Environment Court (**LEC**), and that restrictions on merit appeal rights should be removed.

Furthermore, the fact that whether or not a public hearing is conducted is at the discretion of the Minister does not provide procedural fairness and is open to influence.<sup>35</sup> For example, our 2016 report *Merits Review in Planning in NSW* found that in the case of the PAC, a disproportionate number of resource projects had been the subject of a PAC public hearing at the request of the Minister (or Secretary) since the inception of the PAC in 2008 (29 out of the 38 matters).<sup>36</sup> Conversely, on at least one occasion where the Department intended to recommend refusal of a major project - the Rocky Hill coal mine - the Department deliberately chose not to refer the decision to a public hearing in order to ensure the applicant's merit appeal rights were retained.<sup>37</sup> This inconsistent application of the removal of merit review rights to favour applicants works to undermine confidence in the planning system.

EDO submits that significant improvements must be made to the way public meetings and hearings are conducted in terms of procedural fairness, examination of expert evidence, transparency and accountability. While a more robust IPC process would reduce the likelihood of merits reviews (thus making the system more effective and efficient), merits review rights must be retained as an essential accountability mechanism. These issues are discussed in more detail below with respect to the following issues:

- **Procedural fairness**
- **Inquisitorial consideration of issues**
- **Engaging with expert evidence**
- **Transparency**
- **Multi-stage hearings**
- **Accountability**

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<sup>33</sup> EDO NSW, *Merits Review in Planning in NSW*, 2016, available at [https://www.edonsw.org.au/merits\\_review\\_in\\_planning\\_in\\_nsw](https://www.edonsw.org.au/merits_review_in_planning_in_nsw)

<sup>34</sup> See now repealed s23F of the *Environmental Planning and Assessment Act 1979*

<sup>35</sup> Under section 2.9(1)(d) and Schedule 2 of the *Environmental Planning and Assessment Act 1979*, the Minister can direct the IPC to hold a public hearing. The IPC itself has no power to decide to conduct a public hearing under the Act.

<sup>36</sup> *Ibid*, p 6/7.

<sup>37</sup> See, <https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2017/10/rocky-hill-coal-project/department-of-planning-and-environments-assessment-report/referral-letter.pdf>

### ***Procedural fairness***

In order to provide procedural fairness, the IPC has a duty to ensure that everyone who wishes to speak at a public hearing has the opportunity to do so. If this cannot be guaranteed, there will be a denial of procedural fairness. In such circumstances, we consider that a public hearing should not be held. In this way, procedural fairness would be preserved for objectors through their legislatively mandated right to appeal any decision to the LEC on its merits. The IPC can still hear from selected objectors through a public “meeting” as opposed to full “hearing” as had been the practice in the past, before the Minister began the practice of referring all major projects to public “hearings.”

Furthermore, it is incumbent on the IPC to have appropriate procedures and facilities in place to facilitate full access to the public hearing for people who cannot attend in person. Video or phone link up facilities are routinely provided by the LEC in merits review proceedings. Accordingly, we consider that the IPC should provide the same facilities for phone and video link up as would be provided by the LEC.

### ***Inquisitorial consideration of issues***

The IPC has the ability to require attendance and engage Counsel to assist it to have a more inquisitorial role, but this has been unused or ineffective to date. Consideration should be given to how the IPC could undertake more inquisitorial practices.

Additionally, the IPC rarely undertakes research itself prior to making a determination. As noted above, it often relies on additional information being provided by the Department. This has potential to undermine the independence of the IPC. In instances where the Department fails to undertake research or independent reviews recommended by an IPC review (as has been known to occur), there are no obvious ramifications.

### ***Engaging with Expert Evidence***

To improve the quality of assessment and analysis of merits, we consider that the IPC should allow objectors, and their legal representatives, to ask questions of, or cross-examine, the applicant at a public hearing. We consider that this would assist the IPC in assessing the reliability of evidence provided to it, and thereby help in its assessment of an application on the best evidence available.

The IPC does not adequately engage with independent experts to date. That is, they do not routinely interrogate independent experts or seek clarification regarding any issues raised. This undermines the very point of expert evidence – to improve understanding of complex environmental, social and economic issues prior to making a decision.

Independent experts are required to travel to remote locations to attend hearings, often at their own expense. There is often no scope for experts to provide evidence by skype or telephone and there is inconsistent support from IPC panels for holding dedicated expert meetings.

While the IPC can engage its own experts, they tend to be the same experts employed by the Department. To that extent, they are not necessarily independent of the planning system. This undermines the community’s confidence in the overall independence of the IPC.

### ***Multi-stage Hearings***

The utility of multi-stage public hearings remains unclear. We have previously expressed concern regarding the ability to consider projects as a whole if public hearings focus on particular issues.

The Multi-hearing guidelines state “Those people wishing to speak with a direct and immediate interest in the proposed development are likely to be given priority, such as the applicant (or a representative) and those directly affected by the proposed development (for example, an owner or a tenant of a neighbouring property to the proposed development or any person whose consent is required for the application to proceed).” We consider that this ignores the fact that a development is usually referred to the IPC because it is State significant development, and therefore has significance to the entire public on NSW, not just those people with a direct interest in the development. Furthermore, this also ignores that many people wishing to speak to the multi-stage public hearing are likely to be speak to public interest issues (such as, environmental, social, health or economic impacts), and therefore would not have a direct interest in the development. Accordingly, we consider that the prioritisation of those with a direct interest at a multi-stage public hearing is another potential denial of procedural fairness and should be avoided.

### ***Accountability***

Removing merits review rights to the LEC removes a layer of accountability. Merits review provides a level of accountability for decision-makers who are aware that decisions may be open to review, and therefore the very existence of those rights – even when rarely used by third parties - promotes robust decision-making. Removing merit review rights in instances where there has been a public hearing, ultimately makes the IPC both decision-maker and reviewer. Providing for equitable merits review rights is an essential accountability mechanism in the NSW planning system.

*Thank you for considering our submission and recommendations. Please do not hesitate to contact Cerin Loane, Senior Policy and Law Reform Solicitor, on (02) 9262 6989 should you require any further information.*