



Submission on the Independent Planning Commission's draft Community Participation Plan

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](#).

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1. Introduction and Summary

EDO NSW welcomes the opportunity to provide comments on the Independent Planning Commission's (IPC) Community Participation Plan (CPP). As a community legal centre specialising in public interest environmental and planning law, a core part of our work is undertaking outreach and legal education to help build the capacity of people to engage in environmental and planning law processes. We therefore strongly support measures designed to improve meaningful public participation.

While we acknowledge that the role of the IPC's CPP is limited in some respects, given that the Department of Planning, Infrastructure and Environment (**the Department**) undertakes a number of community participation requirements on behalf of the IPC,¹ facilitating public participation in IPC processes is critical given the nature of the matters (including major projects) assessed by the IPC and the limited rights of access to the Courts following some IPC decisions, including those that have been subject to a Public Hearing.

We have set out in **Annexure 1** the Core Values of the International Association for Public Participation (IAPP),² which provide an example of best practice principles for public participation. We include additional observations on how these principles can be applied in practice, including how they are reflected in the community participation requirements of the *Environmental Planning and Assessment Act 1979* (EP&A Act).

The extent to which some of these principles will apply to any participation process will depend, to a degree, on where the participation process sits on the Public Participation Spectrum,³ and statutory requirements or limitations, as well as on public participation carried out at other stages in the process by both project proponents and other government agencies. However, we believe that they all provide valuable guidance in the process of developing a CPP.

We make the following comments about the IPC's draft CPP, by reference to best practice public participation principles and the requirements of section 2.23 of the EP&A Act.

2. Readability

In order for a community member to fully understand how they can participate in the IPC's processes, or the planning process for any particular application as a whole, it is necessary for them to refer to the IPC's CPP, the Department's CPP and five other guideline documents issued by the IPC (in relation to public hearings, public hearings in multiple stages, public meetings, site inspections and locality tours and meeting records).

In that regard, it is important that these documents contain links to each other and that those links remain up to date for the life of the document.

¹ Section 4.6(d) *Environmental Planning and Assessment Act 1979*

² https://www.iap2.org.au/Tenant/C0000004/00000001/files/IAP2_Quality_Assurance_Standard_2015.pdf

³ <https://www.iap2.org.au/About-Us/About-IAP2-Australasia-/Spectrum>

The current draft CPP does not include a link to the Department's CPP and the link on page 7 to the Public Hearing Guidelines has been mislabeled.

3. Inclusiveness and representativeness

We support the Objectives the IPC has set for itself on page 5 of the draft CPP, however, we think that the first objective could be expanded to better reflect Principle 4 in Annexure 1.

Principle 4 identifies the need to seek out and facilitate participation by those affected by the decision, but it also involves seeking out views which are representative of the diversity of views within the community.

We **recommend** that this Objective be expanded to acknowledge that the community may have a range of views about any particular issue or project which comes before the IPC and that it is the IPC's role to seek out and consider that diversity of views.

Principle 4 also identifies the value of inclusiveness and of seeking the views of those people or groups who experience barriers to participation. We note that the second Objective on page 5 of the draft CPP reflects this need, as does the specific discussion of the needs of Aboriginal and Torres Strait Islander communities on page 6. We **recommend** that discussion be expanded to articulate how the IPC will deal with information from Aboriginal and Torres Strait Islander communities that is gender sensitive.

The other element of the draft CPP which could better reflect the need for both representativeness and inclusiveness is the process of prioritising requests to speak at hearings and meetings. Both the Public Hearing Guidelines and the Public Meeting Guidelines contain criteria which will be used to select the members of the public who will be given an opportunity to speak at the hearing/meeting. In each case, we **recommend** that those criteria be expanded to specifically include the need to hear a range of views which are representative of the diversity of views in the community, and to facilitate speaking opportunities, particularly for people or groups who may have difficulty communicating in a written submission, or where there are other barriers to other forms of participation. In addition, and given the implications that holding a Public Hearing will have on merit review rights, more general consideration should be had of the appropriateness of holding a hearing in circumstances where the volume of public interest in a particular proposal means that procedural fairness cannot adequately be afforded to all interested parties wishing to speak at the hearing.

We would also **recommend** that the draft CPP be amended to elaborate on the role Counsel Assisting may play in any hearing or meeting. While we can see the value in such a role, it may be an intimidating prospect for some members of the community and should be managed appropriately.

However, the limited role that Counsel Assisting has played in IPC Public Hearings to date has not helped to address the significant concerns that the removal of community merit appeal rights following Public Hearings has created.⁴ In our opinion, where merit review rights in the Court have been removed, the IPC has a responsibility to ensure that the technical information supporting a project proposal is properly tested and scrutinised (as it would be in a merit review in the Court). In this regard, engaging Counsel Assisting provides an opportunity to adopt within a Public Hearing a similar process to the NSW Land and Environment Court expert examination process (commonly referred to as ‘hot tubbing’), whereby experts with different views are brought together and those views are tested under cross examination. In our view, Counsel Assisting should conduct these expert examinations at Public Hearings (and Public Meetings) where appropriate. However, we remain of the view that the IPC Public Hearing process is not an adequate or appropriate replacement for judicial merit review.

4. Access to information - IPC web site

Principle 6 in Annexure 1 is about ensuring that the public have the information they need in order to participate in a meaningful way and the time necessary to properly consider that information.

We acknowledge that the IPC currently has a notification system for when decisions on projects are made. However, there is no notification system for when significant new material on a project is made available on the IPC website. While we recognise that the IPC is attempting to group similar information together on its website, this means new information is not readily apparent, creating a significant burden for community members wishing to identify and review new project information as it becomes available. We **recommend** that the IPC establish an additional notification system that allows people to receive notifications when new information on a specific project is uploaded to the IPC website.

The ongoing lack of integration between the IPC website and the Department’s Major Projects website and other relevant websites, remains a problem for community members wishing to understand the full suite of information that is available on a particular project.

5. Access to information - confidential hearings

In our view, having regard to information not disclosed to the public is inconsistent with a number of the best practice principles we have identified in Annexure 1, in particular Principle 6, which suggests that members of the public should be given the opportunity to challenge, or provide context to, evidence received by the decision maker.

We note that schedule 2, item 5 of the EP&A Act allows the IPC to take evidence in a confidential hearing and to decide not to publish documents lodged with the IPC, if the IPC is satisfied that it is desirable in the public interest.

⁴ These concerns are outlined in EDO NSW’s report *Merits Review in Planning in NSW*, 2016, https://www.edonsw.org.au/merits_review_in_planning_in_nsw

While we acknowledge that there may be circumstances in which evidence should remain confidential, particularly for Traditional Owners, in most situations such a step would be inappropriate and inconsistent with best practice public participation. It would, for example, be very concerning if a project proponent was able to rely on evidence which was not available for scrutiny by the community. Project proponents are too often able to withhold information from the public based on untested claims that the information is commercial in confidence.

Given its implications, it is disappointing that the Public Hearing Guidelines merely note the existence of this power without elaborating on the types of circumstances or factors which may lead the IPC to exercise its power to decide that evidence should remain confidential.

We strongly **recommend** that the Public Hearing Guidelines be updated to outline factors that will, and will not, be relevant to determining that it is in the public interest to hear evidence in a confidential setting. While we acknowledge that 'public interest' is a broad test and that not all factors will be identifiable in advance, we do not think it is unreasonable for the IPC to set some general principles to work towards a consistent approach, which respects the principles of best practice public participation.

6. Real opportunity to provide input and seeing input reflected in decision-making

Principles 2 and 7 in Annexure 1 emphasise that meaningful participation involves firstly, ensuring that the public have the opportunity to influence the decision, and secondly, that the decision-maker must communicate to the public how their input has affected the decision.

If the community does not see how its input and views have influenced a decision, or at least been considered in the decision-making process, this can create the impression that the process was token, that there was no real opportunity to influence the decision, and that efforts to provide input have been wasted.

A key missing element of the draft CPP is clear information about how and when the community should expect to see the IPC's consideration of their input.

We **recommend** that, at the very least, the table on page 8 be amended to add an additional column which describes to the community how, where and when they can expect to see the IPC's consideration of their input.

7. Review and evaluate

We commend the IPC's commitment on page 6 to review the CPP periodically or as required by the EP&A Act.

In order to properly review and evaluate the performance of the CPP, it is important that the criteria for success be described in a specific and measurable way from the

outset, and that data collection which assists in measuring the performance of the policy is then built into the IPC's processes.

We **recommend** that the CPP be expanded to include a brief evaluation plan which sets performance criteria which will demonstrate how the plan is performing against the Objectives the IPC has set for itself on page 5, and that the IPC ensures its processes are able to produce the data necessary to allow the plan to be meaningfully evaluated.

8. Conclusion

In summary, we recommend that the draft CPP be amended as follows:

- to include and/or correct links to other relevant consultation documents and ensure that those links remain up to date for the life of the CPP;
- that the first Objective be expanded to acknowledge that the community may have a range of views about any particular issue or project which comes before the IPC and that it is the IPC's role to seek out and consider that diversity of views;
- that the discussion on dealing with information from Aboriginal and Torres Strait Islander communities be expanded to articulate how the IPC will deal with information that is gender sensitive;
- that the criteria for prioritising speakers set in the Public Meeting and Public Hearing Guidelines be expanded to specifically include the need to hear a range of views which are representative of the diversity of views in the community, and to facilitate speaking opportunities particularly for people or groups who experience barriers to other forms of participation;
- that the draft CPP be amended to elaborate on the role Counsel Assisting may play in any hearing or meeting;
- that the IPC establish an additional notification system that allows people to receive notifications when new information on a specific project is uploaded to the IPC website;
- the Public Hearing Guidelines be updated to outline factors that will, and will not, be relevant to determining that it is in the public interest to hear evidence in a confidential setting;
- that the table on page 8 of the draft CPP be amended to add an additional column which describes to the community how, where and when they can expect to see the IPC's consideration of their input;
- that the CPP be expanded to include a brief evaluation plan which sets performance criteria which will demonstrate how the plan is performing against the Objectives the IPC has set for itself on page 5, and that the IPC ensures its processes are able to produce the data necessary to allow the plan to be meaningfully evaluated.

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.

Annexure 1: Best practice participation principles (Core Values of the International Association for Public Participation)

1. **Public participation is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process.** It could be added that public participation is a two-way process by which the aspirations, concerns, needs and values of citizens and communities are incorporated into government decisions.⁵

This is reflected in s2.23(2)(a) and (b) of the EP&A Act which identify the community's right to be informed about planning matters and the importance of meaningful opportunities to participate in the planning process.

2. **Public participation includes the promise that the public's contribution will influence the decision.** It could be added that the extent of the public's potential to influence has been communicated in advance.⁶

This is reflected in s2.23(2)(b) which emphasises meaningful opportunities for community participation in planning.

3. **Public participation promotes sustainable decisions by recognising the needs and interests of all participants.** This principle is about designing engagement techniques which reflect the values and interests of participants.

This is reflected somewhat in s2.23(2)(h) which emphasises that community participation methods should be appropriate having regard to the significance and likely impact of the proposed development.

4. **Public participation seeks out and facilitates the participation of those potentially affected by or interested in the decision.** This principle includes values of inclusiveness and representation through, for example, reaching out to diverse groups of stakeholders who are representative of the full range of relevant interests and seeking to break down barriers to participation and building the capacity and confidence of all groups to fully participate, particularly poorly resourced and marginal groups.⁷

This is reflected in s2.23(e) which provides that community participation be inclusive and that planning authorities should actively seek views that are representative of the community.

5. **Public participation seeks input from participants in designing how they will participate.**

⁵ United Nations, Brisbane Declaration on Community Engagement:
<https://www.lcsansw.org.au/documents/item/330>

⁶ Auditor-General of British Columbia:
<https://www.bcauditor.com/sites/default/files/publications/2008/report11/report/public-participation-principles-and-best-practices-british-columbia.pdf>

⁷ Auditor-General British Columbia, United Nations Brisbane Declaration and US EPA:
<https://www.epa.gov/international-cooperation/public-participation-guide-introduction-public-participation>

6. **Public participation provides participants with the information they need to participate in a meaningful way.** This principle could be supplemented with the need to allow sufficient time to consider the necessary information in order to participate meaningfully⁸ and the potential need for other support,⁹ including assistance to communities to obtain independent expert advice on technical reports

This is reflected in s2.23(2)(c) which requires planning information to be in plain language, easily accessible and in a form that facilitates community participation in planning.

7. **Public participation communicates to participants how their input affected the decision.** This principle reflects the value of accountability by requiring the decision-maker to demonstrate that the outcome of the process is consistent with the commitment to public participation made at the outset of the process.¹⁰

This is reflected in s2.23(2)(g) which provides that planning decisions should be made in an open and transparent way and the community should be provided with reasons for those decisions (including how community views have been taken into account).

⁸ UN Brisbane Declaration and Auditor-General British Columbia

⁹ Planning Institute of Australia, Public Participation Policy (06/11): <https://www.planning.org.au/policy/public-participation-0611>

¹⁰ Auditor-General of British Columbia