



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: EPD:EEIb1795574

15 November 2019

Mr Peter Achterstraat AM
Commissioner for Productivity

By email: ProductivityFeedback@treasury.nsw.gov.au

Dear Mr Achterstraat,

Review of the Independent Planning Commission

The Law Society of NSW appreciates the opportunity to provide input into a Review of the Independent Planning Commission ("IPC"). The Law Society's Environmental Planning and Development Committee contributed to this submission.

Overview

In our view, the effectiveness of the IPC as a consent authority must be measured by its alignment with the objectives of the legislation which established it, that is, the objects set out in section 1.3 of the *Environmental Planning and Assessment Act 1979*. This is the overarching standard by which its performance must be measured.

The IPC's mission is

to deliver a high level of independence, expertise and transparency to the assessment and determination of State Significant Development applications in NSW.

Undertaking this mission is informed by its values of independence, expertise and engagement.

We consider that it is in the public interest for the IPC to continue in its role of assessing and determining state significant development ("SSD") and carrying out the other functions prescribed under s 2.9 of the *Environmental Planning and Assessment Act 1979* ("Act").

We consider that the IPC has carried out its statutory functions satisfactorily since its establishment. On this basis, we see no cogent reason to radically change its functions or processes.

Terms of Reference

Our comments on the Terms of Reference for the Review are set out below.

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;

The Law Society considers that it is in the public interest for the IPC to maintain an Independent Planning Commission, which continues, in general terms, the work carried out by its predecessor, the Planning Assessment Commission ("PAC"), which in turn replaced the Commissioners of Inquiry set up in 1980.

The IPC assesses SSD independently of other NSW government agencies and we consider that independent evaluation of such major development is an important part of the planning system.

We consider that the IPC has carried out its statutory functions satisfactorily since its establishment, as did the PAC. On this basis, we see no cogent reason for radical change to its functions or processes.

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

We refer to our response to item 1 above. Although we have not identified the need for specific changes to the current operations and mechanisms of the IPC at the present time, we support, in principle, the regular review of its operations and procedures to build public confidence and ensure that it continues to operate efficiently. Such reviews should include regular consultations and engagement with key stakeholders, including state and local government, industry bodies and environmental organisations, to seek their input on how to improve its processes. It appears that the IPC has taken note of the performance audit conducted by the NSW Audit Office in 2017 in relation to its predecessor, the PAC¹, in relation to recommended improvements to its processes.²

As a general comment, we would encourage both the applicant and the Department to brief the IPC at an early stage. This allows the IPC to provide early feedback which can save all parties valuable time.

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 thresholds for referral are appropriate.

• **The clarity and certainty of policies and guidelines that inform determinations;**

It is unclear what is meant by the "policies and guidelines that inform determination". If the reference is to the processes adopted by the IPC, they are appropriate.

¹ New South Wales, Audit Office of NSW, *Assessing major development applications, Planning Assessment Commission*, 2017.

² New South Wales Government, Independent Planning Commission NSW, *Annual Report 2018-2019*, see, for example, ii, iii.

- **The Commissioners' skills, expertise and qualifications;**

Section 2.8 of the Act provides for a very wide range of appropriate skills and expertise for members appointed to the Commission, collectively, to have. We note that it is important to ensure that the allocation of Commissioners to particular cases aligns the skills sets of Commissioners with the principal issues raised by the instant case eg urban design rather than hydro-geology.

It is also very important that the members appointed to the Commission are perceived to be independent of the political process.

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

The mechanisms for the identification and resolution of conflicts of interest are appropriate and consistent with those in other statutory and government institutions.

- **The Independent Planning Commission's procedures and guidelines;**

The policies and guidelines of the IPC are clear and certain and do not appear to require any radical overhaul.

- **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;**

We do not believe it is appropriate to prescribe the extent to which the IPC takes any specific matter into account. The IPC was established to provide independent and transparent assessment and determination of SSD. That cannot occur if limits are placed on the weight it must give to particular information that informs its decisions.

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

The IPC needs to be demonstrably independent and its decisions robust in order to build public confidence.

We note that the Department of Planning, Industry and Environment determines the IPC's budget and manages its finances. We suggest that this does not align with the need to emphasise its independence from the Department, from the perspective of the public's perception.³ We recommend that budget allocation function be could be transferred to Treasury or another department in order to maintain the independence of the IPC. Similarly, the Department should not manage the IPC's finances.

- **Whether the Independent Planning Commission's Secretariat should be employed directly by the Independent Planning Commission or provided by another agency, and if so, which agency.**

³ See for example, above n 2, where the report notes that there was a perception by some stakeholders that the PAC was not independent of the Department.

We understand that the members of the Secretariat are employees of the Department of Planning, Industry and Environment. It would be preferable, in our view for the Secretariat members to be employed directly by the IPC and not by any potential stakeholder.

If you have any questions about this submission, please contact Liza Booth, Principal Policy Lawyer, at liza.booth@lawsociety.com.au or on (02) 9926 0202.

Yours sincerely,



Elizabeth Espinosa
President