



**MINING &
ENERGY**
RELATED COUNCILS NSW

Mr Peter Achterstraat, AM
NSW Productivity Commissioner
C/- NSW Treasury
52 Martin Place, Sydney, NSW
GPO Box 5469, Sydney, NSW 2001

PO Box 871
TAMWORTH
NSW, 2340
14th November 2019

ProductivityFeedback@treasury.nsw.gov.au

Dear Commissioner,

Re: MERC Submission to the Review of the Independent Planning Commission

The Association of Mining & Energy Related Councils in NSW Incorporated ('MERC') welcomes the opportunity to provide information, for your consideration, as part of the review of the Independent Planning Commission's role and operations.

This Submission provides:

- An introduction to MERC and its relationship with the IPC and the planning system more broadly;
- General comments regarding the performance of the IPC; and
- Specific comments relating to the Terms of Reference.

1. About MERC and its Members

MERC was founded in 1978 with several councils recognising that Local Government Areas associated with coal developments would benefit from a co-ordinated approach when liaising with proponents and the NSW State Government. In 1993 the scope broadened to include metalliferous mines. In 1999 it expanded further to represent Local Government on all extractive industries, including unconventional gas and in 2017 added renewable energy projects to its remit. Currently there are 21 member councils of MERC, who are located in rural and regional areas of NSW.

MERC actively contributes to NSW Government policy formulation in the business sectors of mining and energy, and in the related technical aspects of environmental planning and impact assessment. This work involves liaison with the Department of Planning, Infrastructure & Environment ('DPIE'), relevant government agencies and the IPC.

In recent years MERC has worked closely with the DPIE in particular making submissions and liaising on such matters as:

- How to improve the environmental impact assessment process;
- How the mining sector could better support businesses in regional economies;
- How to improve the standard of mine rehabilitation;
- Reform of the Voluntary Planning Agreement process (in collaboration with the NSW Minerals Council);
- Planning for large scale solar projects;
- Resources for Regions policy; and
- The Resources Advisory Forum.

MERC member councils are responsible for the day to day governance of their Local Government Areas and as such provide the leadership necessary to deliver the required services and facilities across their communities. They therefore have an intimate understanding of the direct and indirect benefits and costs of State Significant Developments on their communities, including on hard and soft infrastructure and the environmental, social and economic wellbeing of residents and ratepayers.

Aside from the requirements under the Local Government Act 1993, the Environmental Planning & Assessment Act ('EP&A Act') also imposes obligations on Councils to participate in the assessment of State Significant Developments, be they considered by the IPC or the DPIE. MERC members commit significant time and other resources to the decision-making process for State Significant Developments ('SSDs').

2. General Comments

In any deliberations on how decisions are made on State Significant Developments, it is prudent to be mindful of the comments by the then NSW Commissioner of the Independent Commission Against Corruption, The Hon David Ipp AO QC in his October 2013 report entitled 'Reducing the Opportunities and Incentives for Corruption in the State's Management of Coal Resources'. In it he stated that *'an efficient and effective policy and regulatory environment was one where opaqueness, uncertainty and discretion were eliminated from the decision-making framework'*.

MERC endorses The Hon David Ipp's comments and supports any measures designed to add rigour and transparency to how such decisions are made. MERC considers the IPC is performing well in challenging circumstances. The leadership of the IPC and the reforms it has implemented to its operations and processes post the amendments to the EP&A Act on 1 March 2018 are to be commended.

The IPC is now performing in a much more independent, open, transparent and robust manner than before the changes to the Act. From MERC's perspective this increased independence, transparency and robustness is welcomed and is helping build increased trust and confidence in the planning system.

3. Specific Comments

MERC now makes some specific comments as per the Terms of Reference.

1. Whether it is in the public interest to maintain an IPC, considering, where relevant, the experience with similar bodies in other common law jurisdictions

MERC contends that it is certainly 'in the public interest' to maintain the IPC, when judged from both the broadest definition of the term, and also from the prescribed statutory definition.

Learned scholars suggest the meaning of 'in the public interest' is best kept as a broad concept that is flexible enough to respond to the facts and circumstances of any particular case. In essence, this means:

- complying with applicable law (both its letter and spirit);
- carrying out functions impartially, giving fair hearing to under - represented individuals as well as powerful vested interests;
- complying with the principles of procedural fairness/natural justice;
- acting truthfully and with integrity;
- ensuring accountability and transparency;

- exposing corrupt conduct or serious maladministration;
- avoiding or properly managing private interests conflicting with official duties; and
- acting apolitically in the performance of official functions.

When considering 'in the public interest' from the prism of the environmental planning and assessment statute, the concept is more defined by the subject matter and the scope and purpose of the enactment.

'The public interest' is one of a number of mandatory considerations of SSDs, as per s 4.15 of the EP&A Act. The term is reasonably held to include the principles of Ecologically Sustainable Development (ESD), for example as in Section 6(2) of the Protection of the Environment Administration Act 1991. ESD considerations typically include:

- The Precautionary Principle;
- Inter-generational Equity;
- Conservation of biological and ecological integrity; and
- Societal environmental, social and economic wellbeing.

It is also worth noting that community expectations of the public interest change over time. This is another reason to include a non-exhaustive list of public interest matters for any arbitrator to consider, rather than a tightly defined, prescribed definition of public interest.

It also allows the meaning of public interest to develop in line with changing community attitudes and developments in technology. For example, the positive and negative impacts of proposed SSDs in relation to climate change are now critical factors of public interest, whereas say five years ago that was not the case.

2. The IPC's operations and the mechanisms by which State significant development is assessed and determined

MERC is most supportive of the IPC publishing written transcripts of all meetings and public hearings on the Commission's website and publishing its reasons for its decision on projects.

Moving forward, MERC recommends the IPC be more inquisitorial, where statements of claim by the various parties can be interrogated and cross examined. In the interests of openness and transparency, interested parties ought to be provided the opportunity to examine, challenge or explain the various assertions put before the IPC.

Currently, whilst the IPC listens to all points of view, there is limited open discussion and dialogue about the relative merits or veracity of the evidence presented. Interested parties yearn for greater clarity in those forums as to which of all the often competing claims the IPC gives credence to.

3. Having regard to the above, identify any proposed changes to the IPC's current functions, processes for making determinations, and resourcing. The issues to be considered include, but are not limited to:

a) Thresholds for the referral of matters to the IPC

MERC strongly supports the current thresholds for referral of matters to the IPC, namely:

- there have been 25 or more public objections to the application, or
- the local council has objected, or
- a reportable political donation has been made.

These thresholds are considered fair and reasonable and provide rightful opportunities for both the general public and local councils to participate in the decision-making on major projects.

b) *The clarity and certainty of policies and guidelines that inform determinations*

Many of the numerous policies and guidelines which inform determinations cascade from the EP&A Act. It would be prudent for the intent and objectives of this Act to remain front and centre and underpin the workings of the IPC. MERC considers the IPC's mission, vision and values to be in accord with what the public would require, mindful of Justice Ipp's comments above.

c) *The Commissioners' skills, expertise and qualifications*

MERC considers the Commissioners are performing well under difficult circumstances. They are well qualified and suitably skilled. Perhaps there is an opportunity to review the appointments of those who were previously appointed as members of the Gateway Panel and, with its abolishment, transferred to the IPC.

d) *The adequacy of mechanisms to identify and resolve any conflicts of interest by Commissioners*

MERC considers the current conflict of interest policy is appropriate and is adequately implemented.

e) *The IPC's procedures and guidelines*

MERC has no concerns regarding the IPC's policies, procedures and guidelines regarding:

- the determination process;
- the public hearing process;
- the multi-stage public hearing process;
- site inspections and locality tours;
- conflict of interest; and
- meeting records and the management of correspondence.

A suggested improvement is for those parties who make a Submission on an EIS ought to have a right of reply to the Response to Submissions document prepared by the proponent. It is important there is a balanced assessment of all points of view expressed.

f) *The extent to which the IPC should rely upon the assessment report prepared by the DPIE, taking into account, any additional assessments by other Government agencies*

MERC refers the Productivity Commissioner to the *Independent Review of Department of Planning and Environment Assessment Reports*, August 2017, prepared by Ms Lisa Corbyn. That review was most comprehensive in its analysis of the DPIE's Assessment Reports. Ms Corbyn recommended a list of reforms to improve their level of thoroughness, impartiality and transparency. The Productivity Commissioner may wish to explore whether those reforms have been implemented.

MERC is of the view that, as the IPC is at law an independent decision-maker, it is important that the DPIE's Assessment Reports, whilst ought to be duly considered, should not unduly influence or compromise that independence.

g) *Resourcing of the IPC and the mechanism for determining budgetary support*

MERC supports the IPC receiving budgetary support it deems necessary to undertake its functions with impartiality, independence, rigour and timeliness. In our view the IPC requires additional

budgetary support to engage independent technical experts to rigorously examine the complexities of many projects.

A review of the 30 part time Commissioners could be undertaken, mindful that some were members of the Gateway Panel that was abolished and the personnel were absorbed by the IPC.

h) Whether the IPC's Secretariat should be employed directly by the IPC or provided by another Government agency, and if so, which agency

The staff of the IPC Secretariat are employed by the DPIE and on secondment. Therefore, at some stage, it is expected they will return to their home agency. This may create issues for staff, for example, in situations where the IPC is critical of the DPIE. For instance, part of the role of professional staff at the IPC is to critically review the recommendations and reports prepared by the DPIE. This can put staff at the IPC in a difficult position, as they may not feel completely comfortable in providing frank and fearless advice to a department which they may not feel they are completely independent from.

MERC recommends the IPC directly employ its own staff to avoid the governance and integrity risks outlined above.

Given the very public and often controversial work of the IPC, MERC suggests governance measures to protect against regulatory capture be strengthened, not only in the IPC but also in key related instrumentalities including the DPIE and the EPA.

Regulatory capture occurs when regulatory agencies change over time and move from acting in the public interest (their assigned statutory function) to promoting or advancing the interests of industries they are supposed to be regulating. It is akin to one interest group on the playing field seizing control of (i.e. 'capturing') the umpires, such that the game is no longer taking place on a level playing field.

In conclusion, I would like to summarise the key issues to note and consider which were gleaned from the experience of our Association members in making this submission for your attention. They are:

- MERC members are pivotal players in the decision-making process regarding State Significant Developments. We have excellent insight into the system & how it works, hence it is prudent for MERC to share with the Productivity Commissioner what is working well and suggestions for improvement;
- The future of the IPC is under serious threat from the mining industry, it would be a backward step if the IPC was abolished or watered down. The consequence of abolishment would be the DPIE would be making all the decisions in-house, an alarming prospect;
- Therefore it is also prudent for MERC to provide a substantive submission that addresses each of the items listed in Terms of Reference - see above & the key points on them below :-
 - Is it in the public interest to retain the IPC? Yes! (At our quarterly meeting held on Gloucester on 8th November 2019, delegates unanimously agreed that the IPC should be retained as they value transparency and robustness);
 - Thresholds for the referral of matters to the IPC - currently includes when a council objects to a project. Surely the Commissioner would want that safeguard to remain;

- The extent to which the IPC should rely upon the assessment report prepared by the DPIE - that would be a backward step as MERC has real concerns about DPIE positioning on projects;
- Resourcing of the IPC needs to be improved with its own staff and a decision made on whether the IPC technical & admin staff should be employed directly by the agency or seconded from DPIE as is currently the case;
- It would be more prudent for IPC to have its own staff because at some stage, it is expected they will return to their home agency. This may create issues for staff, for example, in situations where the IPC has to critically review the recommendations and reports prepared by the DPIE. This can put staff at the IPC in a difficult position, as they may not feel completely comfortable in providing frank and fearless advice to a Department which they may not feel they are completely independent from;
- Hence as practitioners in the planning system we have great opportunity - dare we say a responsibility - to share considered thoughts with the Productivity Commissioner.

MERC thanks you very much for the opportunity to provide feedback on these important matters and would welcome the opportunity to meet and further discuss the details herein when convenient.

If you have any queries regarding the above please don't hesitate to contact the Executive Officer of MERC Mr Greg Lamont on phone 0407 937 636 or email greg@yourexecutiveservice.com.au or info@miningrelatedcouncils.asn.au

Yours sincerely,

Peter Shinton
Chair

Association of Mining & Energy Related Councils (NSW) Incorporated

References

Corbyn, L., *Independent Review of Department of Planning and Environment Assessment Reports*, - 25 Aug 2017, available at <https://www.planning.nsw.gov.au/-/media/Files/DPE/Reports/Departments-response-to-assessment-report-2018-09-12.ashx>;

Kaldas, N., APM, *Review of Governance in The NSW Planning System* 2018

<https://www.planning.nsw.gov.au/Assess-and-Regulate/About-compliance/Kaldas-review>