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Submission:

Nick Kaldas Planning Review,
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Thank you for the opportunity to meet with you about the inquiry you are conducting into corruption in the NSW planning system.

Following our meeting, we've had an opportunity to canvass our members and affiliates about their experience to date with the IHAPs and other areas in the planning system where they see examples of possible corruption.

While we appreciate that your initial brief is to look at corruption risks in the structure and operation of the IHAPs, we were pleased to hear that your terms of reference will likely be expanded to include other aspects of the system that are vulnerable to corruption.

The Better Planning Network (BPN) believes that the planning system does not have sufficient safeguards in place to minimise the risk of corruption. In this submission, we have taken the liberty of including a number of examples of planning policies and decisions that appear to be contradictory to the public interest. Whether these decisions were made with corrupt intent is, of course, open to debate. Nevertheless, the risk of perceived corruption is high because, as these cases highlight, the Government has either chosen to ignore the advice of its own departments and statutory authorities, refused to make its decision-making processes transparent and open to public scrutiny, and/or taken steps to curb community opposition.

The 2012 ICAC report, [Anti-Corruption Safeguards and the NSW Planning System](#) (ICAC Report), discussed how successive governments have contributed to a perception of corrupt decision making because typically they put economic priorities

ahead of others, while at the same time claiming that the system is designed to balance competing interests. The desire to focus almost exclusively on the economic benefits of a development project often looks like soft corruption because of the appearance, at least, that the interests of business have been prioritised over community concerns. Rightly or wrongly, communities often believe that the government's primary interest is promoting economic growth and pleasing big business in order to bolster their re-election prospects.

Decisions around property development can cause great emotional anguish in the community because they affect homes, neighbourhood character and natural environments. The scale of the investment also makes the prospect of reversing poor planning decisions highly unlikely. Consequently, considerable care needs to be taken to safeguard against corruption and adverse planning outcomes. For trust to be restored in the planning system, the public must have confidence that their best interests are being served.

Corruption Risks

The ICAC Report advocated six key “corruption prevention safeguards” to promote confidence in the NSW planning system:

- Providing certainty
- Balancing competing public interests
- Insuring transparency
- Reducing complexity
- Meaningful community participation and consultation
- Expanding the scope of third-party merit appeals

Below are examples of elements in the planning system where we believe safeguards against corruption are still needed.

Independent Hearing and Assessment Panels (IHAPs)

When the Minister for Planning, the Hon Anthony Roberts MP, announced that Independent Hearing and Assessment Panels (IHAPs) would be mandatory for Sydney and Wollongong councils, he said that the purpose of the panels was to “bring expertise, transparency and integrity” to the assessment of Development Applications (DAs) at the local level.

The use of mandatory IHAPs took effect in March of this year. To date, we have received the following feedback from BPN members and affiliates regarding their operation:

Representation of and Accountability to the Local Community

- Several councillors who got in touch with us questioned whether IHAPs are properly accountable to the community. One councillor commented: “My biggest takeout so far is the zero accountability of the IHAP to the community. They can do whatever they like and they still retain their job and get paid. As a councillor, I have to face the electorate every three years and explain my decisions.”
- Councillors have also complained about the unwillingness of the IHAPs to meet with councillors about residents’ concerns regarding development applications. Traditionally, residents are most likely to get in touch with their councillor about problematic developments as they see their elected representative as the most logical conduit between the council and the community.
- IHAPs should be comprised of more than one community member so community representatives don’t feel intimidated or outgunned by the “professionals” on the panel.

Transparency

- IHAP public meetings are not always conducted outside business hours, making it difficult for community members to attend.
- Deliberations should take place in open sessions rather behind closed doors, as was the case when councillors approved and/or objected to DAs.

Expertise

- The establishment of an independent panel creates the expectation that issues will be heard and understood and the principles of fairness will be applied. In practice, however, this is not always the case, because:
 - Panel members have not been able to get across key issues in the time available;
 - The Chair’s time is spread too thin across too many panels;
 - Panel members are not as abreast of local issues as are councillors, re: precedents, streetscapes, traffic congestion and liveability, especially since the majority of the panel members live outside of the area.

Integrity

- The Minister for Planning has too much discretion in the appointment of the chair of the IHAP and the composition of the pool of expert members from which councils must choose their IHAP members. The role of the Planning Minister, especially in relation to the appointment of the IHAP chair, can create the perception that the IHAPs are working on behalf of the state government and therefore perhaps less inclined to take the interests of the local council and community into account.
- Selection criteria and probity checks for panel members need to be strengthened to avoid the appearance any conflict of interest.

Corruption risk in other areas of the planning system

State Significant Projects

Infrastructure Australia recently released a report entitled [Infrastructure Decision Making Principles](#). It highlighted major problems in the planning of major infrastructure projects. Specifically, it noted that:

- Across all stages of many projects' lifecycles, decisions should be more transparent, with an enhanced focus on the public release of analysis and processes that form the basis of infrastructure decisions.
- Projects are often developed without fully considering all available options to solve an identified problem, including potential solutions that make better use of existing infrastructure through technology and data. Too often we see commitment to projects before a business case has been prepared, a full set of options have been considered, and rigorous analysis of a potential project's benefits and costs has been undertaken.
- Governments could generally do better at engaging with communities, both in communicating the long-term plan, the benefits and risks of public infrastructure priorities, and by incorporating community input in a meaningful way in project processes.
- Despite broad agreement on the merits of undertaking post-completion reviews of projects, including the application of lessons and feedback for future investments, these reviews are rarely undertaken and published.

These criticisms with respect to infrastructure planning and delivery are reinforced by an independent review of the [NSW Planning System by NSW public service bureaucrat Lisa Corbyn](#). It examined the assessment reports prepared by

departmental staff for 19 projects across five sectors, including mining, infrastructure and renewable energy.

The report found that:

- Some of the state's largest and most complex development proposals are being assessed in a manner which is "opaque" in both logic and rationale.
- There was "considerable variation in the tone and analytical approach" in the reports and "a significant variance in whether [the reports] presented clear analysis and explanation of the logic for their conclusions or not".

Example: Sydney Light Rail Project

The Sydney Light Rail project is perhaps the most egregious example of a major project that has been criticised for being poorly conceived and implemented. To paraphrase Philip Davies, the former CEO of Infrastructure Australia, it was approved **before a proper business case had been prepared, a full set of options have been considered, and rigorous analysis of a potential project's benefits and costs had been undertaken.**

A recently leaked ["cabinet in confidence"](#) document, for example, prepared by consultants for the NSW Government in 2012, just prior to the release of the final route, found that the project had a Benefit to Cost (BCR) ratio of less than one. It warned that none of the routes would deliver any real savings in travel time to users, or significantly reduce urban congestion. It then recommended that "non-conventional benefits" should be added to future reports to boost the light rail's viability. As a consequence, a second report was commissioned in 2013, which added "non-conventional" benefits such as \$160 million in "pedestrian benefits" from the closure to cars of 40% of George Street and \$50 million of unorthodox "non-user" benefits. Disruption costs, such as the pricing of delays and impacts on businesses and commuters during construction, were excluded from the second report in order to boost the BCR.

To date, the cost of this project has blown out by \$1 billion to \$2.2 billion, and the Government is currently being sued by the contractor for an additional \$1 billion+ on the grounds that it was not properly informed about utility issues around trackworks.

A subsequent report, [Anzac Parade Corridor future Light Rail station and System capacity analysis](#) (20 January 2017, updated 2 March 2018), prepared by EMM Consultants for Randwick Council, also contradicted the original studies that were used in the business case to justify the commencement of the project, noting that:

It is a significant concern that the proposed Light Rail system capacity will actually be lower than the capacity of the existing peak hour bus services which are currently using Anzac Parade and Todman Avenue and the future corridor public transport system will effectively be operating at full capacity from the commencement of operations in 2019. This will require a significant number of existing peak hourly bus services (mainly the existing express bus service) to be retained if the system is to provide adequate public transport capacity for all the relevant areas of Randwick LGA in the future.

(The Addendum Report was commissioned by Randwick Council in response to a Department of Planning and Environment (DPE) request that 600 more dwelling be considered in Council's proposed amendment to the Randwick LEP 2012 (RLEP 2012) for the Kingsford and Kensington (K2K) town centres coming to a total of 5,500 new dwellings within the K2K Anzac Parade corridor by 2031. These would be part of 15,750 new dwellings proposed for development within the Randwick LGA as a whole by 2031.

Another recently leaked 2013 report from Infrastructure Australia also questioned the BCR for Sydney's light rail. It warned that the appraisal was not robust, had significant problems and had failed to account for the inevitable disturbance caused by the project. ([Leaked documents reveal major doubts about Sydney light rail](#) by Matt O'Sullivan, Sydney Morning Herald, 18 September 2018)

Little wonder that affected community residents now believe that the Government used Sydney Light Rail project as a way to justify even more development in the area, as well as to cater for transportation needs of patrons to the Sydney Cricket Ground Trust and the Royal Randwick Racecourse, which both lobbied hard for the project.

Respect for Independent Statutory Authorities like the NSW Heritage Council

The Government has often ignored the advice of its own statutory independent bodies.

The ICAC Report recommended that "the NSW Minister for Planning and Infrastructure considers adopting a protocol to deal with situations where the minister disagrees with a departmental recommendation concerning a planning matter. The protocol should ensure that any decision by the minister to adopt an alternative approach, and the reasons for such a decision, are clearly documented and made publicly available."

Example: Decision not to add the Sirius building at Millers Point to the Heritage Register.

Save Our Sirius spokesman Ben Peake said that the NSW Heritage Council, the NSW chapter of the Australian Institute of Architects, the National Trust and others believe the Sirius building should be added to the State Heritage register: "Minister Upton has ignored the advice of these independent groups and has taken the advice of a private consultant instead" Mr Peake said. "This is why we have independent bodies to give advice that goes beyond political cycles of one government to the next. "What use is there in having a heritage council if the government ignores the advice of its own experts?" ([Sirius building in The Rocks will not be listed on State Heritage register](#), The Daily Telegraph, 25 October 2017)

Other examples of how too much discretion in the planning system creates corruption risks

The ICAC Report noted that excessive discretion in the planning system creates uncertainty about planning rules and how decision-makers apply such rules when determining development and planning proposals, and that this lack of certainty surrounding planning rules and planning decisions can lead the community to believe that controversial decisions have been corruptly made: "A system that is, or is widely perceived to be, conducive to corrupt conduct can reduce public confidence in the integrity of state and local government."

It went on to observe that the discretionary nature of planning decisions means that a corrupt decision may appear to be valid on its face. "It also means that it may not be easy to detect when government staff have been subject to inappropriate pressure over the content of planning advice or a recommendation, as contrary views can still be contained within the spectrum of what is "reasonable".

In this context, the practice of professional government planners being directed to change the content of advice or a recommendation by decision-makers creates a corruption risk. This is because it blurs the decision-making process and makes it difficult for a third party to identify the source of a particular decision. It also creates the false impression that a decision-maker is merely acting on advice. Consequently, a corrupt decision-maker may feel a level of comfort in that the extent of their influence and involvement in a decision is hidden.

Ministerial discretion recently expanded

Contrary to this advice, recent amendments to the Environmental Planning and Assessment Act 1979 (EP&A Act) granted the Planning Minister and or the Secretary of Planning even more discretion over planning powers:

- The Secretary of Planning now has reserve powers to prevent delays and resolve conflicts between agencies for developments for which the council is the consent authority;
- The Minister now has the power to appoint a local planning panel (IHAPs), approve its membership and set out the circumstances in which the panel is to exercise the determination function;
- The Minister is now able to direct councils to delegate more development approval decisions to council staff.

Abuse of Clause 4.6 Exception to development standards (compulsory).

Clause 4.6 is another example of how the planning system's desire for flexibility and discretion can create a corruption risk. Clause 4.6 states:

That developments deviate from local standards is not unusual; planning laws allow variations to permit flexibility. But those laws also provide that councils are required to consider whether the variations are reasonable, necessary, and whether the public interest is served. More onerous processes are required if the development variation is greater than 10 per cent from what would otherwise be allowed.

In 2016, the Department undertook an [audit](#) of the Clause 4.6 variations, which included 12 randomly selected councils (only two of which were in the Sydney area).

The audit found that the planning outcomes being delivered by council's use of clause 4.6 and SEPP 1 are generally appropriate.

Yet the Sydney region has been subject to an unprecedented scale of development in the last few years, with the planning process giving little regard to issues like aesthetics, heritage and provision of amenities like green space, schools, community centres, parking and transport. As the Sydney Morning Herald noted in a recent [editorial](#):

Sydneysiders are neither stupid nor intolerant. They understand that growth has to happen and that growth will change the city they love. What riles them is that the character of their suburbs and their communities – of their places – is changing so rapidly and in ways they never approved. Peaceful, green suburbs are overtaken by soulless and unsightly apartment towers. Beauty and amenity both are compromised.

The DPE audit also seems to contradict the ongoing [ICAC investigation](#) of the former Canterbury Council's abuse of Clause 4.6 in order to allow projects through that vastly exceeded existing development controls.

According to the DPE, mandatory IHAPs for Sydney and Wollongong Councils were introduced in response to a yet [undisclosed audit](#) it conducted for ICAC's investigation into the former Canterbury Council.

Voluntary Planning Agreements (VPAs)

VPAs are another example of an area of the planning system that provides too much discretion and is vulnerable to corruption and abuse. Recent changes to the biodiversity offset scheme for mining projects also fall into the same category. Both schemes allow for one-off cash contributions instead of genuine, permanent benefits to offset any loss from a decision to allow a project to deviate from local development controls and/or have a detrimental environmental impact.

Feedback from BPN members and affiliates highlight the following concerns about VPAs:

- Councils tend to see VPAs as potential honeypots;
- Policy framework provides too much discretion and flexibility for planning authorities;
- VPAs should not be used to contribute money to fund a public authority's recurrent expenditure for public amenities.

The ICAC Report identified many problems with VPAs. It said that:

The EP&A Act and its regulation are silent on the need for a public authority to consider public submissions made during the draft VPA inspection period. The legislation's silence creates a risk that it will be interpreted in practice by planning authorities as granting power to ignore public submissions.

The ICAC Report also noted that the policy framework for VPAs provides wide discretion and flexibility to planning authorities. A public authority does not need to comply with *normal developer contribution practices of ensuring a connection or nexus between the development and the public purpose*. Unlike normal developer contribution practices, VPAs can also be used to contribute money to fund a public authority's recurrent expenditure for public amenities.

It recommended that NSW Government mandates that public submissions are to be considered by a planning authority following the exhibition of a draft voluntary planning agreement.

Example: The community upset with Waverley Council over its use of VPAs that allowed for developer contributions to the council in return for additional stories on buildings in contradiction to local planning controls.

The excessive height of the new buildings and the overcrowding of skyscrapers at the eastern end of Oxford Street have created a wind tunnel effect in Bondi Junction and resulted in the loss of precious light and district views for both residents and shopping precinct users. Many people were critical of the previous council because they believed it was putting its own financial interests ahead of the interests of local residents. (see [Sally Betts: the Waverley mayor who rules Sydney's east](#) by Anne Davies, Sydney Morning Herald 18 March 2016)

Third Party Merit Appeals

The ICAC report recommended that the NSW Government ensures that its system for assessing and approving developments of state significance provides adequate opportunities for competing public interests to be considered.

It recommended expanding the categories of development subject to third party merit appeals to include private sector development that:

- is significant and controversial;
- represents a significant departure from existing development standards;
- is the subject of a voluntary planning agreement.

The ICAC Report highlighted that “merit appeals provide a safeguard against biased decision-making by consent authorities and enhance the accountability of these authorities. The extension of third-party merit appeals also acts as a disincentive for corrupt decision-making by consent authorities.”

Independent Planning Commission

Unfortunately, the amendments to the EP&A Act also did not reinstate third party merit appeals if a ‘public hearing’ is held by the Independent Planning Commission (IPC). In fact, the amendments expanded developers’ rights to seek internal reviews of decisions about complex ‘integrated’ developments or major projects, but this same right was not afforded to community objectors.

The amendments also eliminated the IPC's statutory authority to “review” planning decisions. The Government argued that this proposed change was necessary to avoid duplication and that it will help it to meet its priority to “halve the time taken to approve developments.” Eliminating the review function of the IPC makes it too reliant on the DPE for advice, especially about the environmental and community consequences of controversial development.

To be truly 'independent' the IPC's right to review and challenge opinions must be reinstated.

The amendments to the EP&A Act did include regulations to improve the IPC's public hearing process so that they become more interrogative and probing. They also made it a requirement for applicants of state significant development to demonstrate how they consulted with the community prior to the lodgement of their plans. Community consultation is also required for the applicant's environmental impact statement.

Feedback from BPN members and affiliates suggest that these regulations don't go far enough. To restore community confidence in the workings of the IPC, it should be compulsory for developers to obtain 'independent' advice about the environmental and community impacts of their developments, and that preferably the cost of such impact statements should be paid from the public purse in order to avoid any perception of conflict of interest on the part of the consultants conducting these reviews.

Extension of Complying Development to Medium Density Housing

In the amendments to the EP&A Act steps were taken to improve the processes for complying development, including consultation with neighbours, enforcement actions and improved governance of private certifiers.

Feedback from BPN members and affiliates was critical of the idea of making "this pathway a key mechanism for ensuring that housing supply meets demand created by population growth and demographic changes," as advocated by the Government. The BPN also notes the concerns of stakeholders, as discussed in the DPE's [Planning Legislation Updates: Stakeholder Feedback 2017](#) document, who agreed that "only minor impact developments should be able to go through as complying."

The extension of complying development to medium density housing carries huge corruption risks. Most medium density development is taken up by developers, because typically the cost of subdividing properties and building strata townhouses or duplexes are too expensive for owner/occupiers. Unfortunately, neighbours and other ordinary residents are not well equipped to understand the cumulative impacts of medium density housing developments in their area and their potential to affect street amenities like parking, traffic congestion, tree coverage and open space.

Councils must retain their role as vital intermediaries in the navigation of development approvals for these complex developments in order to avoid the risk of corruption and adverse community outcomes.

Value Capture

Chris Johnson, the chief executive of Urban Taskforce, described Parramatta Council's value-capture scheme as "worrying" because it appeared to treat the planning system as an "income generator." According to Johnson, "Parramatta is misusing the planning system to generate funds for infrastructure, and basically the rules are being manipulated to sell floor space." ([Parramatta Council proposes pushing ahead with value-capture scheme](#) by Jacob Saulwick, Sydney Morning Herald, 10 March 2017).

While Johnson is obviously looking at the scheme from the perspective of developers who don't want to be saddled with extra costs, his comments nevertheless highlight the corruption risk of value capture schemes.

The sell-off of development rights to fund the new metros is another example of how value capture schemes can lead to less than desirable outcomes. A clear set of criteria must be put in place to ensure that the short-term benefits of raising money through value capture schemes for transport infrastructure projects are not outweighed by undesirable potential long effects of higher density development like congestion, loss of light, access to green space, views and overcrowding of community amenities.

Example: Interestingly, Hong Kong is now rethinking its model of allowing the privately held Hong Kong MTR to secure development rights in exchange for building new metro networks and stations. A pattern of chronic overdevelopment around metro stations is destroying the character of Hong Kong's neighbourhoods.

[Hong Kong's former railway boss](#) Michael Tien Puk-sun has gone so far as to suggest that the Hong Kong government purchase all of the MTR shares and turn it into a statutory body so profit maximisation would not be its business goal. He argues that such a move could ensure better scrutiny of railway projects and reduce the inherent conflict between the MTR's role as a transport provider and property developer.

Objects in the EP&A Act should be prioritised and include an overarching objective

The ICAC Report noted that "over recent years a perception has been created that economic considerations, such as job creation, have dominated state government planning decisions. This perception has in part been created by the government's

publishing of comparison data concerning local council development assessment processing times. Similarly, with the introduction of the now former Part 3A, ministerial media releases announcing project approvals predominantly focused on the delivery of jobs and investment in NSW. There was less focus and discussion on environmental and social outcomes."

The ICAC Report cited Government commission 2011 report, [The way ahead for planning in NSW? Issues Paper of the NSW Planning System Review](#), which noted that community forums had recommended for there to be one overarching objective that would take precedence over all others: ie. ecologically sustainable development. The ICAC Report also recommended that the NSW Government ensure that the new planning legislation clearly articulates its objectives and provides guidance on the priority (if any) to be given to competing objectives. Unfortunately, these recommendations weren't taken up in the recent amendments to the EP&A Act.