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Legal obligations for environmental impact assessment in coal mining approvals in New South Wales

Supplementary Report

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About this report

The Australian Climate Accountability Project commissioned this supplementary report into the assessment by NSW government agencies of impacts of greenhouse gas emissions in applications to approve new or expanded coal mines in the state. The original report is available [here](#).

About the Australian Climate Accountability Project

The Australian Climate Accountability Project is a world-first research project tackling Australia's fossil fuel exports, our biggest contribution by far to the climate crisis. Housed at the UNSW Australian Human Rights Institute, a global leader in applied human rights research, the Australian Climate Accountability Project has a track record of driving high-impact multidisciplinary research to hold governments and corporations accountable for climate harms.

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The Australian Climate Accountability Project is located on the unceded territory of the traditional owners, the Bidjigal people.

SUPPLEMENT TO
Australian Climate Accountability Project Report:
Legal obligations for environmental impact assessments in coal
mining approvals in New South Wales

11 May 2026

Introduction

Although the State government has now declared that there will be no more greenfield coal mines in New South Wales, there remain several operating coal mines which are seeking to extend their operations, either in time or area or both. Such applications frequently involve conflicting statements from witnesses, particularly expert witnesses, as to the nature, content and effects of the proposals. These cannot presently be explored in the normal way that a public hearing would allow by way of examination, cross-examination and submissions on the evidence. Thus, a question arises as to the validity of the procedures adopted in considering such development applications.

In March 2026, the Australian Climate Accountability Project released a Report discussing the legal obligations of the State of New South Wales in considering such applications. Because those applications are the subject of a subsequently released Government policy statement, “NSW Coal Industry 2026-50” (“new Policy”), which addresses some of the doubts as to the legality of earlier policy statements, a Supplementary Report has been commissioned. This Report also considers a matter not previously addressed, namely the validity of the “public hearings” required to be conducted by the Independent Planning Commission (IPC) and whether they preclude an appeal from the IPC’s determinations.

The New Coal Industry Policy

The new Policy is structured under two headings, the first being “The outlook for coal in NSW”. This acknowledges that 85% of NSW coal is exported and that major destinations (other than the Peoples Republic of China) are committed to heavy reductions in coal for power-generation in the coming years. (Though not stated, the figure is probably 100% of any approved new developments.) For example, the largest overseas buyer, Japan, takes 43% of NSW coal but aims to reduce its reliance on coal power to 19% by 2030. Of total NSW coal exports, 93% is thermal coal: new Policy, p 10.

Under this heading, there is a telling observation:

The reliance on coal for electricity generation is changing both domestically and globally. This change is driven by market demand for low-emission alternatives to thermal coal-fired power as well as the net zero commitments of NSW, Australia, and our trading partners.

The second heading in the new Policy is “A clear direction for the future of coal in NSW”. The one clear change (though probably of little practical significance) is, as noted above, a prohibition on new coal mines, expressed as follows (new Policy, p 14):

The NSW Government will:

- prohibit future greenfield coal development, meaning that coal mining cannot occur on a site that is not adjacent to, and not related to, an existing coal mining authorisation ...

This, the new Policy states, will be effected by amendments to the State Environmental Planning Policy (Resources and Energy) 2021 (NSW) (“Resources SEPP”) and to the *Mining Act 1992* (NSW), details of which have not yet been released.

More importantly, the new Policy gives no clear direction as to how (i) expansion of existing coal mines is to be justified, or (ii) the anticipated reduction in overseas demand is to be managed. Further, the new Policy maintains the position critiqued in the earlier ACAP Report that Australia and NSW have *no legal responsibility* under the Paris Agreement to reduce fossil fuel production. The new Policy contains no reference to the guiding principles under the *Climate Change (Net Zero Future) Act 2023* (NSW), nor the “Coal Emissions Spotlight Report” published by the Net Zero Commission in December 2025. Doubts as to the legal validity of previous policy documents remain in relation to aspects of the new Policy.

Functions of Independent Planning Commission

The IPC is established under Part 2, Div 2.3 of the *Environmental Planning and Assessment Act 1979* (NSW) (“the Act”). It has functions conferred by s 2.9, which relevantly provides:

2.9 Functions of Commission

- (1) The Independent Planning Commission has the following functions—
 - (a) the functions of the consent authority under Part 4 for State significant or other development that are (subject to this Act) conferred on it under this Act,
 - ...
 - (c) to advise the Minister or the Planning Secretary on any matter on which the Minister or the Planning Secretary requests advice from the Commission,

- (d) to hold a public hearing into any matter into which the Minister requests the Commission to hold a public hearing,

...

- (2) The matters on which advice may be provided under subsection (1)(c), or into which a public hearing may be held under subsection (1)(d), include any general or particular planning or development matter, the administration of this Act or any related matter.

One aspect of this provision should be noted immediately. The subject-matter of the function of the IPC as a “consent authority” under par (a) will be a development application under s 4.15 of the Act; the subject-matter of its advisory function under par (c) will be “any matter” as to which the Minister or Planning Secretary requests advice. Echoing the language of par (c), the reference in subs (2) is to “matters” on which advice may be provided under (c) or hearings held under (d), and which are said to include “any general or particular planning or development matter”. It is unclear whether the power to hold a public hearing pursuant to par (d) is intended to cover assessments undertaken as a consent authority under par (a), or is limited to matters the subject of advice sought by the Minister or the Planning Secretary under par (c). The structure and language of the section suggest the latter (limited) construction; however, as noted below, Sch 2, Pt 2 to the Act assumes a broader operation.

The issue is significant because one effect of the Minister requesting a public hearing (a request to which the IPC is obliged to accede) is to preclude an appeal from the IPC’s determination. The very existence of the IPC gives effect to one of the Act’s objects, namely “to provide opportunities for participation in environmental planning and assessment”: s 1.3(h).

Exercise of functions

It is necessary to identify the extent of the IPC’s independence in carrying out its functions. The IPC is constituted as a corporation, described as a “NSW Government agency”, under s 2.7, which also states:

- (2) The Commission is not subject to the direction or control of the Minister (except in relation to the procedure of the Commission and any directions authorised to be given to the Commission under section 9.1 or other provision of this Act).

There is clearly a tension between the negative assertion and the potential scope of the qualification. Further, as noted below, there will be a level of practical control resulting from the IPC’s dependence on the Minister’s Department for assistance and advice. However, to give effect to the purpose of s 2.7, it may be expected that, in the event of a challenge, a court would be diligent to scrutinise the nature and content of material supplied by the Department in relation to the IPC’s functions as a consent authority.

The qualification in s 2.7 identifies three permissible sources of direction or control. First, it expressly refers to directions authorized by s 9.1. That section primarily concerns directions to councils, but so far as it applies to the IPC it states:

9.1 Directions by the Minister

- (1) The Minister may direct a public authority or person having functions under this Act or an environmental planning instrument to exercise those functions at or within such times as are specified in the direction.

...

- (3) A public authority or person to whom a direction is given under subsection (1) or (2) shall comply, and is hereby empowered to comply, with the direction in accordance with the terms of the direction.
- (4) Before giving a direction under subsection (1) or (2), the Minister shall consult with the responsible Minister concerned.

This provision is limited to “times” for exercising functions: it evidently applies to the function of the IPC as a consent authority. However, it should not be read as authorising any temporal constraint which inhibits the IPC from properly exercising its statutory function. It will be necessary to return to this matter below, as real concerns arise as to the practical operation of the Minister’s temporal directions.

Secondly, the qualification permits directions or control in relation to “the procedure of the Commission”. Again, it should not be read as permitting controls which inhibit the proper exercise of the IPC’s functions. However, it is not clear that the Minister does give such directions, except in relation to the holding of a public hearing, which is separately authorised under s 2.9(1)(d).

Thirdly, s 2.7 recognises that authority may be given by other provisions in the Act. As noted above, s 2.9(1)(d) assumes that the Minister has power to “request” the IPC to hold a public hearing. In Sch 2, Pt 2 to the Act, cl 3(1) states that the IPC “must conduct a public hearing if (and only if)” one of two criteria is satisfied. One criterion is the Minister’s request under s 2.9(1)(d) that the IPC conduct a public hearing. The words in parenthesis presumably deny both the obligation and any power to do so otherwise: the “request” is thus a mandatory direction which engages the function.

The critical constraints under which the IPC operates are, therefore, (i) the obligation to hold a public hearing and, (ii) to determine the application within a specified time frame.

Public hearings

Two clauses in Sch 2, Pt 2, allow for the possibility of a public hearing that “relates to” an application for a development consent. Clause 8, dealing with reports of the IPC,

distinguishes cases where the IPC is the consent authority for the development from cases where it is not. Clause 3(2) requires notice of a public hearing; cl 3(3) provides for the contents of the notice, including:

- (d) if the public hearing relates to an application for development consent—a statement of the effect the public hearing will have on any appeal rights in relation to the application.

Rights of review and appeal are provided in Pt 8 of the Act. Relevantly, appeals with respect to development consents are dealt with in Div 8.3, of which s 8.6 provides:

8.6 Decisions subject to appeal to Court under this Division

- (1) A decision of a consent authority under Part 4 in relation to an application for development consent or a development consent is (if this Division so provides) subject to appeal to the Court under this Division.

...

- (3) There is no right of appeal under this Division against the following decisions—
 - (a) a decision of the Independent Planning Commission as consent authority under this Act in relation to the carrying out of any development that is made after a public hearing by the Commission into the carrying out of that development,

....

A right of appeal is conferred on an objector under s 8.8, and falls within the Class 1 jurisdiction of the Land and Environment Court: *Land and Environment Court Act 1979* (NSW), s 17(d). The key provision of the Act for present purposes is s 8.6(3)(a), which denies a right of appeal where there has been a “public hearing”. The fact that appeals would otherwise lie from the IPC to the Land and Environment Court under this Division demonstrates that the purpose of the exclusion is not to avoid challenges to decisions of the IPC, but to avoid two hearings on the merits of a proposal, one conducted by the IPC, a second by the Court. That purpose indicates that the public hearing before the IPC must be of a nature sufficient to justify the removal of appeal rights. A court will usually read grants of jurisdiction to a court without implied limitations, and will, conversely, read exclusions from that jurisdiction strictly.

Nature of public hearing

The phrase “public hearing” is not defined. A purposive reading indicates that the hearing must not be a mere formality, but must provide a sufficient opportunity for an objector to raise evidence, challenge the evidence of the applicant and make submissions as to law and fact. The IPC is not a judicial body and need not conduct a curial hearing. But the

terms of Sch 2 Pt 2 indicate aspects of what is required. Thus, cl 3(1) requires the IPC to “conduct a public hearing” where the Minister so directs; it must give “reasonable notice of the public hearing” (cl 3(2)); provide a time for lodging “submissions” (cl 3(3)(c)); control who may attend if confidentiality is an issue (cl 3(4)); and require a person to attend and give evidence or produce documents (cl 4).

To determine what is encompassed by these powers, and how they may be exercised, requires consideration of the relevant function of the IPC. It is impliedly bound to act reasonably and fairly to the parties before it; accordingly, it should not reject evidence which is both relevant and material to the proper exercise of its function or, in the case of conflicting evidence, deny an applicant or an objector an opportunity to question witnesses whose evidence is adverse to its case. In the case of an application to extend a coal mining operation, the social, economic and environmental issues will be manifold and complex and will likely require careful consideration of conflicting expert opinions, and the making of rational choices as to which opinions to accept and which to reject. Given the few limitations on its procedures, the IPC is well-placed to adopt and adapt its own procedures, such as requiring experts in one field to give evidence jointly; it can employ counsel to assist it; it can require witnesses to put their statements in writing and determine from whom it requires oral assistance. A genuine and realistic consideration of complex and conflicting evidence may take time, and is required by its obligation to consider a plethora of issues, mandated by s 4.15 of the Act and cl 2.20 of the Resources SEPP. The nature of these inquiries should extend to the matters noted in the earlier ACAP Report, and in relation to the new Policy discussed above.

Although determined in 2022, standard current procedure may be illustrated by the Mt Pleasant Optimisation Project Determination, a State significant development seeking the extension of a large open-cut coal mine near Muswellbrook in the Hunter Valley. On 9 September 2021 the Minister requested the IPC to conduct a public hearing. The time fixed for its determination was 12 weeks from the provision to the IPC of the Department’s “whole-of-government assessment report”, which did not occur until 1 June 2022. The proposal attracted 988 submissions, including 251 “unique objections”. The deadline for submissions was 20 July 2022 – that is almost two weeks after the public hearing. At the public hearing, conducted over two days on 7 and 8 July, the IPC heard from 49 speakers. The 12 weeks for it to make its determination would have expired on 24 August, but notification on 12 August of the disclosure of the existence of a new species of legless lizard led to a re-opening of the opportunity for public comment, limited to that further information.

The important time period is the five weeks between the release of the Departmental assessment and the two days of the public hearing, together with the brevity of the hearing itself. The fact that the Minister’s request for a public hearing (thus removing

the right of appeal), prescribed an unreasonably short period for the IPC to conduct its assessment, and the absence of any opportunity for objectors to do more than make brief statements on AVL, ensured that the IPC could do little more than regurgitate and adopt the Department's "whole-of-government assessment".

Conclusions

The position of the IPC generally is further compromised by the obligations under cl 2.20(2) of the Resources SEPP to have regard to "any applicable State or national policies, programs or guidelines concerning greenhouse gas emissions". There will be a natural inclination, (i) to accept the Department's position as to identification of relevant policies, programs or guidelines, (ii) without considering whether they are lawful and valid and, (iii) without statutory assistance as to what it means to have "regard to" them. The context of the obligation to have regard to that material is the obligation under cl 2.20(2) to "consider an assessment of the greenhouse emissions (including downstream emissions) of the development". How is the IPC to weigh the failure of State and national policies to address that matter, the materiality of which the IPC has acknowledged?

A similar set of complex questions might arise in relation to the predictable reduction in demand for thermal coal (recognized in the new Policy) and the economic consequences of such a reduction, both for the viability of a proposed development and the wider public interest in NSW.

A public hearing which did not permit a realistic canvassing of such issues would, arguably, be a legally inadequate process, given that the holding of a "public hearing" is a condition of denial of otherwise available appeal rights. An available implication is that such a hearing would not constitute a "public hearing" for the purposes of s 8.6(3)(a) of the Act. If so, it would not preclude an appeal against an adverse determination.



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