



The Henry Halloran Trust

Research Report



THE UNIVERSITY OF
SYDNEY

Council Decision Making and Independent Panels

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A Practitioner-in-Residence Project

A review of the Evolution of Panels and their
Contribution to Improving Development
Assessment in NSW

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The University of Sydney, through the generous gift of Warren Halloran, has established the Henry Halloran Trust in honour of Henry Halloran, who was an active advocate for town planning in the first half of the twentieth century. He introduced and implemented new concepts of town planning in the many settlements he established, as part of his contribution to nation building.

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Glossary

ADR	Alternative Dispute Resolution
ALGA	Australian Local Government Association
BA	Building Approval (now equivalent to a Construction Certificate)
CIV	Capital Investment Value
CSPC	Central Sydney Planning Committee
DA	Development Application
DAF	Development Assessment Forum
DAP	Development Assessment Panel
DAU	Development Assessment Unit
DCP	Development Control Plan
DP&I	Department of Planning and Infrastructure
EP&A Act	Environmental Planning and Assessment Act
ICAC	Independent Commission Against Corruption
IHAC	Independent Hearing and Assessment Committee
IHAP	Independent Hearing and Assessment Panel
IPP	Independent Planning Panel
JRPP	Joint Regional Planning Panel
LEP	Local Environmental Plan
LGSA	Local Government and Shires Association (now Local Government Association)
MIAP	Manly Independent Assessment Panel
PAC	Planning Assessment Commission
PIA	Planning Institute of Australia
REP	Regional Environment Plan (now a "deemed" SEPP)
SEPP	State Environmental Planning Policy
UNSW	University of New South Wales

Executive Summary

There has been a recognition nationally of the importance of planning to the economy in general, and particularly to housing supply, and hence the importance of improving the efficiency of the development application process. Over the last 15 years, there has been an increasing use of panels by NSW councils in the development application (DA) process – both “internal” panels staffed by officers and or councillors, and independent panels comprising of external experts and community representatives.

These collaborative approaches have provided increased transparency, integrity and rigour in the development assessment process. The panels can be used to provide advice to the applicants, objectors, council officers and councillors on individual DAs at various stages during the assessment process and or to determine the development application. For example, panels can be established:

- To provide advice to the applicant at the pre-lodgement stage including on design matters
- To provide advice upon lodgement or once the submissions have been received
- To provide advice on the design of the development at the pre-lodgement stage or during the assessment process
- To peer review the officers’ assessment and recommendations
- To make the determination or to provide advice to those making the determination
- To review decisions as part of the post determination mediation/conciliation stage
- To provide advice to the councillors or senior officers on policy and practice matters.

Currently 6 councils -Canterbury, Fairfield, Liverpool, Sutherland, Wollongong and Shellharbour - have established independent hearing and assessment panels, which provide advice on development applications to council decision makers. Another 7 councils – Holroyd, Lane Cove, North Sydney, Manly, Mosman, Waverley and Warringah - have independent development assessment panels with responsibility for determining DAs. Blacktown Council is in the process of setting up an independent panel. Each of these councils’ independent panels has been established under the provisions of the Local Government Act 1993, with the council responsible for their procedures.

Other types of panels have also been established by the NSW State Government to determine regional and state significant developments as well as to deal with certain planning matters. The State Government in South Australia, Victoria and Western Australian Governments has also established similar panels. Local councils in South Australia are required to establish panels and delegate all development applications to either a panel or staff for determination.

The cumulative impact of a number of factors has led to the establishment of the independent panels in NSW. Population pressures with increased densification in brownfield areas and the spread of land releases in Greenfield areas have resulted in increased numbers of controversial developments and increased pressure on councils. Regulatory pressure from the both Federal and State governments has placed a focus on the efficiency and effectiveness of councils’ development approval processes with strong endorsement for the establishment of independent panels. Panels have also been recommended by ICAC and the NSW Land and Environment Court to reduce corruption risks and the costs associated with legal challenges.

Where the independent panels are considered to be a council’s body, they can be seen as a partner in the council’s processes. This partnership can assist in removing the conflicts associated with the multiple roles of councillors as decision maker and advocate, and eliminate some of the corruption risks, particularly when the panel takes over the decision making role. This partnership can also take some of the pressure off assessment officers and can contribute to performance development for these officers. The threat from the planning reforms interfering with this partnership has led to some councils bringing forward the establishment of their panels so that they can operate under the Local Government Act 1993 rather than the provisions in the planning act.

The research examined the procedures and processes applied by different councils and the implications. Typically the panels are made up of a chair, 2 experts and a community representative. The panel members are rotated to avoid regulatory capture. There is a high level

of discretion as to what DAs are referred to the panels, but the criteria tend to be based on scale, the number of “unresolved objections”, if there is the potential for conflict of interest or if significant variation from standards. The panel procedures include a review of the assessment report and recommendations, a site visit followed by a public hearing and then in a closed meeting, to arrive at a recommendation or decision. The public hearing tends to be informal with discussion with objectors and applicants as to options to reduce conflict. An outline of sound practice is included in the report.

While the panels have cost implications depending on the number of matters dealt with, there are also savings from the use of independent panels associated with reduced council meeting times, reduced DA processing timeframes and reduced risk of court challenges. The use of independent panels also has a number of performance benefits in terms of strengthening the assessment process, providing for additional community engagement and reinforcing the integrity of the decision making process. Importantly the panels provide an additional opportunity in the assessment process for the community and applicants to engage and allow for their views to be considered, increasing procedural fairness. Surveys of stakeholders indicated strong support for this additional engagement. These benefits are maximised where the panel also makes the determination.

There are also other opportunities to improve the planning process through the use of panels. Independent panels could be used earlier in the DA process at the pre-lodgement stage as well as in the strategic planning process rather than just at the end of the DA process – effectively at the end of the pipeline. This would have the potential to improve the effectiveness of community participation upfront and lead to better outcomes for all participants. In addition, the use of panels as part of the strategic planning process could reduce the need for panels at the DA stage as there would be less need for variations from the planning controls and the community would have a better understanding as to what can be expected to be developed in their area with fewer unresolvable objections.

To some, the DA process is currently seen to be planning policy on the run. In a way, the need for panels as an independent arbitrator at the DA stage is a barometer on the issues with the strategic planning. While independent panels can't fix the problems of poor strategic planning, in the short term these panels can help facilitate the resolution of issues arising from uncertainty as to what can be developed in the area. The feedback from independent panels can also play an important role in improving the strategic planning framework for local councils. In this way, they can assist in the move towards more transparent, efficient and effective planning in NSW.

1. Introduction

Significant population growth in NSW during the last 40 years has led to stress on the planning system with the need to plan for new communities as well as the increased densification of existing communities with the associated provision of infrastructure and social services. At the same time, emerging or evolving complex issues, including housing affordability, traffic congestion, rising building and design standards, increasing conservation demands, climate change and sea level rise have presented additional challenges to the planning and development approvals systems.

As a result, intensifying planning and development assessment requirements have been increasingly “getting in the way” of politicians trying to please their constituents, land owners trying to exercise their “rights” to use their land, developers trying to make a profit and the community trying to input into the evolution of their local area¹. There is unanimous agreement that the local development application (DA) process has become overburdened resulting in delays and increased costs with a general lack of confidence in the system.

A number of factors have been identified as contributing to this situation:

- The internal resources, expertise and procedures in many local councils can affect the quality and timeliness of the assessment and decision-making processes
- Councillors and officers can face conflicting roles in dealing with local opposition to controversial developments
- Delegation arrangements are not readily accessible and so there is no transparency as to who is to determine the application and why
- Weaknesses in strategic planning leads to increased burden being carried at the DA stage with the need to develop policies on the run.

Development applications (DAs) should be processed and determined on their merits in a transparent, consistent and impartial way. Mechanisms should be in place to minimise the risk of corruption or undue influence on both assessment officers and decision makers. There should be policies and procedures to manage conflicts of interest at all stages of the process. The role of elected representatives should be transparent, preferably focused on developing and keeping up to date the strategic planning framework to deliver on their commitments in their area.

As one of the responses to deal with these issues, a panel in the form of the Commission of Inquiry were first introduced under the Environmental Planning and Assessment (EP&A) Act in 1981. The Minister for Planning could also establish panels on an adhoc basis to deal with particular planning issues. In 1988, the State Government imposed the Central Sydney Planning Committee (CSPC) on the City of Sydney Council.

Increasingly, both state government and local councils began to rely on panels to provide expert advice to assist in development assessment and at times, to assume the decision-making role. This “panelisation” of assessment and decision-making can also be seen in South Australia, Western Australia and Victoria in addition to NSW².

Depending on the particular NSW council, panel members may include council senior assessment officers or councillors, or independent experts and community representatives. They can be used to provide advice to the applicants, objectors, council officers and councillors on individual DAs at various stages during the assessment process and or to make the determination on the development application.

¹Stein, P. (1998) ‘21st Century challenges for urban planning – the demise of environmental planning in New South Wales’ in B. Gleeson and P. Hanley (Eds.) *Renewing Australian Planning? New Challenges, New Agendas*, pp: 71-82, Canberra: Urban Research Program, Research School of Social Sciences, Australian National University.

²Williams P and Maginn P (2012) *Planning and Governance in Thompson S and Maginn P (2012) Planning Australia: An Overview of Urban and Regional Planning* Cambridge University Press

Liverpool Council was the first NSW council to establish its own form of independent expert panel - an Independent Planning and Assessment Panel (IHAP) in 1997, in response to massive growth in the area. Eleven other councils have now also formed their own independent panels to strengthen their development assessment processes.

The objectives of the research is to obtain an understanding of the motivators for the evolution of panels in the development assessment process in NSW and to form a view as to how these panels have assisted in delivering an improved system.

The research methodology included:

- Analysis of information and data on the relevant council websites
- Analysis of recent reviews and inquiries into the planning system and local councils
- Analysis of submissions to the White and Green Papers as part of the current review of the NSW planning system
- Analysis of monitoring information on local council performance including the Local Development Performance Monitoring Reports
- Observation of panel hearing and examination of the outcomes as reported in minutes of meetings
- Discussions with officers and councillors from representative councils and with panel members and other experts.

The aims of the research are to:

- Provide a comprehensive view of the use of panels – council staffed and independent- at various stages of the development application process
- Understand the likely reasons leading to the establishment of independent panels in certain councils and not in others
- Understand the structural issues for which panels can be the answer
- Examine the implications of councils handing over the decision making to an independent panel for controversial developments
- Understand the view of councils, applicants and the community on the use of panels
- Understand whether the panels are meeting the objectives for which they were established and adding other benefits to the assessment process
- Identify sound practices for the establishment and operation of independent panels.

Defining panels:

A panel is a small group of people with specialist knowledge, skills, or experience who provide advice or make decisions and who may hold hearing, answer questions or take part in a discussion with an audience.

A current trend with councils has seen the establishment of panels made up of councillors or council officers (internal panels) or independent experts and community representatives (independent panels) or a combination of the two, to advise on development application matters including decision making. The benefits of panels are seen to include:

- collective decision making compared to individual
- mix of technical expertise compared to individual experts
- mix of council and external experts rather than just council experts
- Technical expertise informing decisions making rather than political decision-making.

PART A: THE PANELISATION OF THE DA PROCESS

This part looks at the range of panels operating in local councils as part of the development assessment and determination process in NSW and other states. It also provides an outline of NSW council independent panels procedures and practices.



Sutherland IHAP Hearing

2. NSW Councils Internal and Independent Panels

While the focus of this research is on independent panels, the use of these panels needs to be seen in the context of councils' broader use of "panel" type approaches at various stages of the DA process. Table 1 and Figure 1 provide a summary of the panels based on information on the councils' websites. These panels undertake a variety of roles in providing collaborative expert advice during the development assessment and determination process. Many of these approaches are recommended in a guideline issued in 2005 by Lancôme and the Planning Institute of Australia (PIA) based on research by the UNSW.³

Table 1: Summary of Council Panels used in the assessment / determination processes

Int = Internal panel with councillors or council staff-Ext = External panel with independent experts and community representatives

Panel, Unit or Committee	Ext or Int	Examples of Councils ⁴	Role of the Panel, Unit or Committee
PRE DA LODGEMENT STAGE			
Pre- Lodgement Panel	Int	Ashfield, Bankstown, Bega Valley, Blacktown, Canada Bay, Fairfield, Gosford, Holroyd, Liverpool, Penrith, Singleton, Tamworth, Tweed	Pre-DA meeting <ul style="list-style-type: none"> Advice on permissibility Advice on assessment requirements and BCA issues Issues and possible solutions (e.g. traffic, bushfire, flooding, heritage, biodiversity) Assessment process /timeframes/ other approvals -referrals
Pre Lodgement Design Panel	Ext	Hurstville, Kogarah, Rockdale, North Sydney, Parramatta	Pre-DA Design meeting <ul style="list-style-type: none"> Urban and architectural design advice on commercial and other major development SEPP 65 advice and compliance for residential flats
DA ASSESSMENT STAGE			
Lodgement Review Panels	Int	Auburn, Hurstville, Willoughby, Tamworth	Review for adequacy of information, referral requirements, notification requirements and allocation to staff for assessment
Submission Review Panel	Int	Sutherland	Review submission and assign whether to be determined under delegation or referred to IHAP and determined by council
Consultation Mediation Panels	Int & Ext	Botany, The Hills, Warringah, Wyong	Community consultation with applicant & objectors <ul style="list-style-type: none"> Review of proposal and assessment to resolve issues Mediation/conciliation
Design Review Panels	Ext	Botany, Hurstville, Lake Macquarie, North Sydney, Kogarah, Randwick, Rockdale, Sutherland, Waverley	Design assessment <ul style="list-style-type: none"> Urban and architectural design on commercial and other major development SEPP 65 compliance for multi-dwelling residential development
Development Assessment Panel	Int	Ku-ring-gai, Liverpool, Randwick, Woollahra	Assessment review <ul style="list-style-type: none"> Peer review of assessment; - sometimes with hearing Make recommendations to Council.
Independent Hearing & Assessment Panel – eg IHAP, IDAC	Ext	Canterbury, Fairfield, Liverpool, Sutherland, Wollongong, Shellharbour	Independent assessment, hearing and review <ul style="list-style-type: none"> Peer review of officers assessment & recommendations Conduct hearings with applicants and objectors Make recommendations to Council.
DA DETERMINATION STAGE			
Council Development Assessment & Determination Panel	Int	Botany, Canterbury, Hills, Liverpool, Manly, Port Macquarie Hastings, Pittwater, Sutherland, Waverley, Warringah, Woollahra	Assess and determine – for “locally significant” DAs <ul style="list-style-type: none"> Review development application reports and conditions; May hold hearings Determine development applications May make recommendations on policies DA Referred to full council if no consensus
Development Assessment & Determination Panel – e.g. DAP, IPP, DIAP, IHAP	Ext	Holroyd, Lane Cove, North Sydney, Manly, Mosman, Waverley, Warringah	Assess and determine – for “locally significant” DAs <ul style="list-style-type: none"> Peer review development application reports and conditions; Conduct hearings with applicants and objectors Determine development applications Make recommendations on policies
POST DETERMINATION STAGE			
Mediation Panels	Ext	Hurstville, Manly, Mosman, Lane Cove, Warringah	S82A review of determination <ul style="list-style-type: none"> Review and make new determination May conduct hearings and negotiate with parties

³Landcom (2005) Best Practice in Development Assessment for Local Government Second Edition May 2005

⁴Note: The information in this table was obtained from councils websites

2.1 Pre Lodgement Panels

Two major causes of delays in the DA process are applicants not fully appreciating the complex array of planning and other controls which may apply to their proposed development and not providing appropriate information with their DA. Ashfield Council has reported that it has to request additional information for more than 70% of all applications.⁵ Newcastle Council indicated that 44% of applications submitted needed to be amended or required additional information to be provided⁶.

Councils have developed a number of pre-lodgement initiatives to assist applicants including providing DA kits and having pre-DA consultation to give specific advice for applicants⁷. The objective of the pre-DA process is to reduce the need for requests for additional information or require amendments to proposals during the development assessment process. This ensures that the DA can be dealt with quickly with sound environmental, planning and design outcomes. There are no statutory provisions requiring pre-DA consultation (except if designated development). A recent survey indicated that the majority of councils offered pre-DA meetings with 4% of councils saying these meetings were compulsory for larger scale development, despite there being no legal capacity to require them⁸. Most councils charge a fee for the pre-DA advisory service. Others such as Blacktown do not, to encourage proponents to use the service as these meetings can result in significant savings in reduced time and conflict later in the assessment process.

The pre-DA consultation may be with a single officer. While this approach has some benefits, it also carries significant risks for the applicant, as the officer may not have the technical competency to advise on all aspects of the development. Further this individual officer's views may not align with those of the officers responsible for assessing the DA or other technical experts in the council or in relevant agencies involved in the assessment process.

In addition, there are also regulatory capture risks when only a single officer is involved. Following a series of investigations, the Independent Commission Against Corruption (ICAC) produced a report *Corruption Risks in NSW Development Approval Process* in 2007⁹ which stated that a number of councils had indicated that they considered that formal pre-application meetings involving more than one officer lessen the scope for inappropriate dealings, regulatory capture or, in the worst case, corruption.

35% of councils (including 70% of metropolitan councils) have formalised the process through the establishment of pre-lodgement panels, units or committees run by senior council assessment officers along with other technical staff. These councils encourage prospective applicants of complex developments to request a pre-DA panel meeting to present their concept plans and preliminary drawings to obtain the panel's professional advice. Following the meeting, the advice is provided in writing to give the applicant certainty. In some councils, a follow-up pre DA panel meeting may be held if considered beneficial prior to the lodgement of the DA.

Applicants of more complex DAs are encouraged to use these services. They are found to be most useful when seeking information that goes beyond that contained in a council's strategic plan or requires interpretation or variation to the planning controls.¹⁰ Many consultants have indicated their support for the use of pre-DA meeting particularly when the advice is given in writing. They consider that it gives the process greater certainty and strengthens their hand when dealing with the client in ensuring the design or environmental performance or other outcomes are achieved.

⁵ Ashfield Council website: http://www.ashfield.nsw.gov.au/page/how_to_avoid_delays.html

⁶ Newcastle City Council: http://www.newcastle.nsw.gov.au/building_and_planning/plan_your_application/lodgement

⁷ Landcom (2005) Best Practice in Development Assessment for Local Government Second Edition May 2005

⁸ Ruming K (2011) Early engagement and development assessment: public and private reflections on the value of pre-application meetings in NSW Australian Planner 48:3

⁹ ICAC (2007) Corruption Risks in NSW Development Approval Process: Position Paper September 2007

¹⁰ DIPNR (2003) Improving Local Development Assessment in NSW Report by the Regulation Review - Local Development Taskforce October 2003

2.2 Design Advisory Panels

Design Panels are typically made up of 3 - 4 experts in architecture, urban design, landscape design, heritage or planning and may be established by a single council or group of neighbouring councils (Table 2). Since 2002, *State Environmental Planning Policy 65 - Design Quality of Residential Flat Buildings (SEPP 65)* and the *Residential Flat Design Code* have encouraged the use of design panels to assist in delivering design excellence for residential flat buildings. Similar design excellence approaches have also been introduced by a number of councils to also improve the design quality of commercial and other buildings in their area. Bankstown, Botany, Hurstville, Kogarah, Lake Macquarie, Liverpool, North Sydney, Parramatta, Penrith, Randwick, Rockdale, Ryde, Sutherland, Sydney and Waverley Council have design review panels. This is consistent with an international trend with design review panels being established by local planning authorities¹¹.

Table 2: Examples of council's design panels

Council	Panels	Type of DAs and other matters	Fees
Randwick Waverley	SEPP 65 Design Review Panel	residential flats - buildings, master plans and new plans or policies	\$600 fee each time application referred to the panel for review
Hurstville, Kogarah and Rockdale	St George Design Review Panel	residential flat buildings and any retail or commercial development of three or more storeys	\$1,200 and \$3,000 with 50% of fee or each subsequent referral to the Panel
Botany	Design Review Panel	commercial, industrial, multi-unit housing and residential flat buildings	\$2500 to \$4000 depending on the development

The panel may meet and provide advice at the pre-development application stage and or during the assessment of an application. At the pre-DA stage, applicants submit their preliminary designs and associated documentation and are invited to attend the meeting to discuss the design of the proposed development with the panel. These meetings provide feedback and highlight issues, which need to be addressed prior to lodgement of the DA. The panel may suggest alternative solutions for the applicant to consider. The recommendations of the panel are provided to applicants and council staff. Applicants are expected to consider these recommendations when finalising their proposal. The design panel may request to see the amended plans prior to lodgement of the DA. The recommendations of the design panel and the response to those recommendations by the applicant are included in the assessment report and considered in the recommendations for determining the DA.

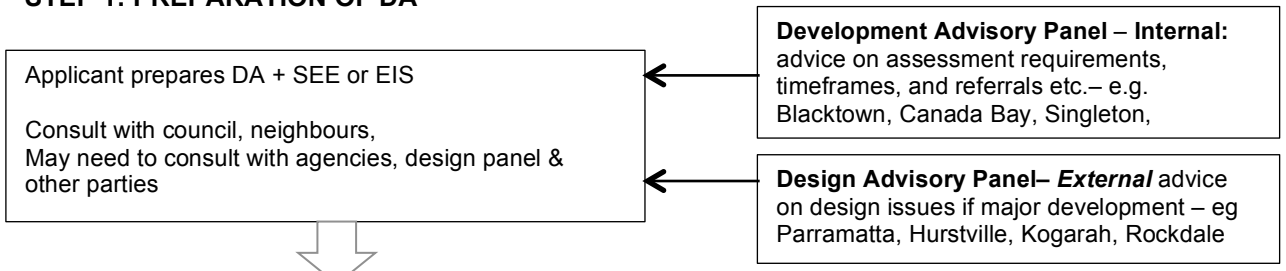
Liverpool, North Sydney, Sutherland, Waverley and North Sydney Councils have both independent assessment panels and design panels. The design panels have a different role to that of the assessment panel, focusing on design and not on the merits of the development as a whole. The optimum timing for the panel meetings is also different. Generally there is support for the design panel providing advice early in the process rather than later when the assessment panel meets. This avoids the need for the applicant to re-work final plans and documents during the assessment phase. The result is faster assessment of applications and better design outcomes with cost savings for the applicant. The assessment panel then also has the benefit of being provided with expert advice on design aspects of the development for their consideration. Following its review of the IHAPs operation in July 2013, Sutherland Council decided that for better interaction between their two panels, the chair of the Architectural Review Advisory Panel would be an additional member of the IHAP when considering an application that has previously been dealt with by the design panel.

Design panels can also play a constructive role in the development of planning policies for an area. For example, Randwick Council consults with the Design Panel during the development or review of its Local Environment Plan (LEP) and Development Control Plan (DCP) resulting in constructive discussions and assistance in establishing appropriate design related controls.

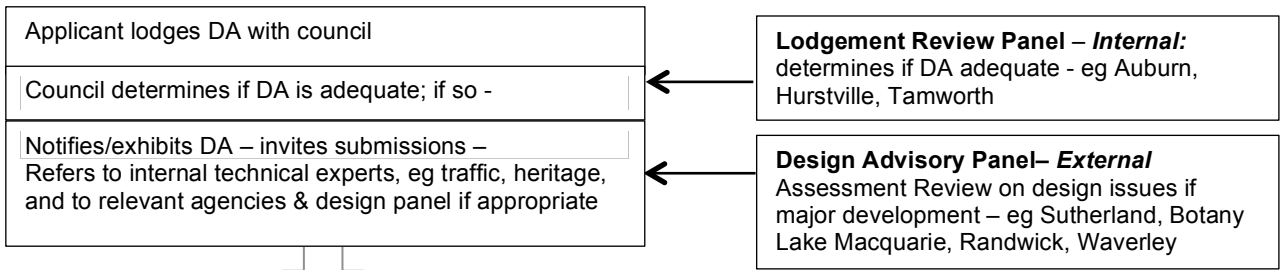
¹¹ UK Commission for Architecture and the Built Environment. (2009) Survey of local and regional design review panels, their location, type and impact <http://www.designcouncil.org.uk/Documents/Documents/Publications/CABE/design-review-panels-survey.pdf>

Figure 1 Various Roles of Council Panels

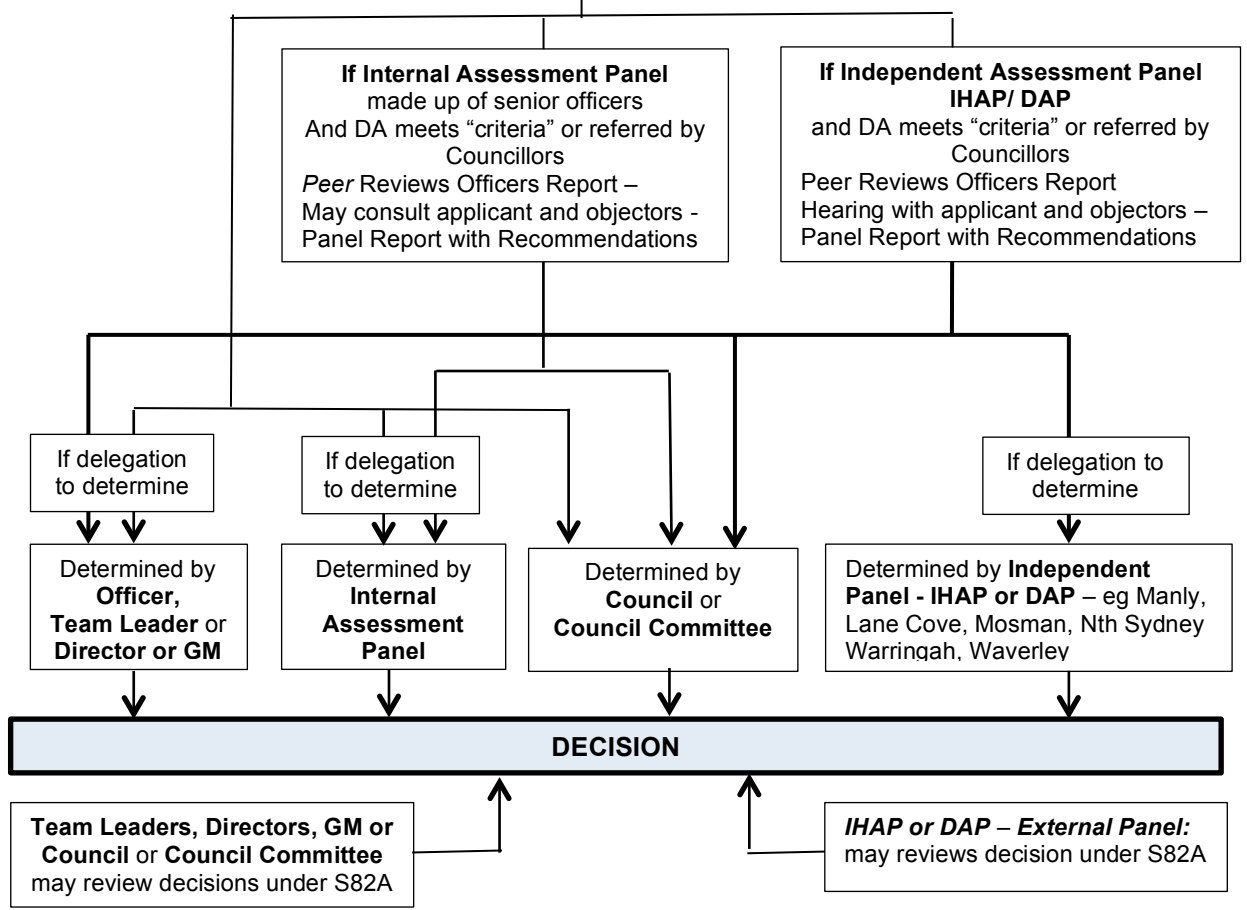
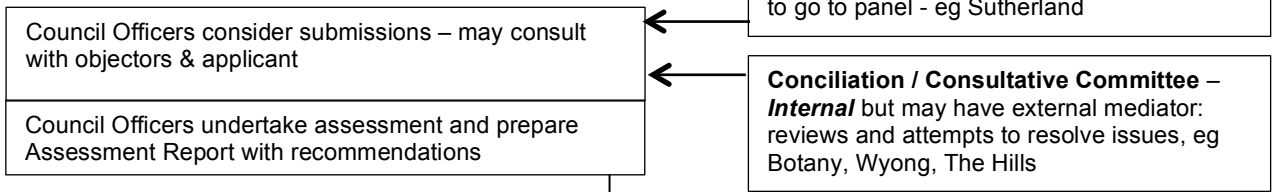
STEP 1: PREPARATION OF DA



STEP 2: CONSULTATION



STEP 3: ASSESSMENT AND DETERMINATION



Defining “peer review”

The Macquarie Dictionary defines peer review as the assessment of one's work by one's peer group, or by others of similar standing and qualifications. The *peer review* in the DA process is intended to provide an independent, unbiased evaluation of any assessment or recommendations by people in the similar fields. The approach is based on the concept that a more diverse group of experts will be able to make a more impartial evaluation to maintain quality, improve performance and provide credibility. Peer reviews are intended to help enhance quality both directly by detecting weaknesses and indirectly by providing a powerful incentive for the assessment officers to achieve excellence. The expert advice approach can also be used in circumstances where there is a diverse range of technical issues to consider and it is not reasonable to expect that the decision maker will be an expert in all relevant fields.

2.3 Assessment Advisory Panels

2.3.1 Preliminary Application Review Panel - Internal

Hurstville, Willoughby, Tamworth and Auburn Councils have established panels (committees or teams) staffed by senior council assessment officers and other council technical experts (such as engineers, tree officers, building surveyor and health officers) to review the DA documentation prior to accepting the application. The panel may meet once or twice a week to review DAs lodged and to determine if there are any obvious deficiencies in the information. The Panel may determine to reject incomplete applications or to request additional information. If the application is accepted, the panel may also determine what referrals and concurrences are required, what notification and exhibition is required and allocate the application to an assessment officer and other internal experts.

In some councils, a single officer undertakes this task. This provides a single person's view and is more likely to lead to the need for further requests for additional information later in the process. As a result, applicants are often issued with multiple ad hoc requests for additional information well after the lodgement period, leading to delays and frustration¹².

2.3.2 Submission Review Panel - Internal

Sutherland Council has established a panel to review submissions received in response to exhibition of the DA to determine what key issues need to be reviewed, whether experts need to be engaged, whether the application needs to be referred to the IHAP for advice and whether the matter can be determined under delegation or needs to be referred to council for determination. The panel is made up of senior officers and meets weekly to review the submissions.

2.3.3 Consultation, Facilitation and Conciliation Panels - Internal

A number of councils offer dispute resolution approaches to assist in resolving disputes during the DA process to avoid costly court proceedings at the end of the process. These are voluntary where applicants and objectors agree to meet and attempt to find a solution with the help of an impartial, independent council appointed mediator along with council officers.

The Hills Council has established a **Conciliation Conference** process chaired by the Mayor's nominee, which applies if more than ten submissions are received opposing the development. The conference provides an opportunity for frank and open discussion on applications before finalisation of the assessment report and the DA being submitted for determination by the Council or Development Assessment Unit. This provides an opportunity for each party to explain and respond to concerns, participate in resolving issues and where possible reach an agreement.

Where there are outstanding objections relating to major commercial, mixed use and industrial development or licenced premises, the Botany Council establishes a **Residents Consultative Committee** that brings together the community, the applicant and senior council officers with the aim of clarifying and resolving issues in an open forum. The committee continues to meet until

¹²Planning Institute of Australia (NSW Division) (2011) Submission on Draft Environmental Planning and Assessment Regulation 2010 November 2011

the issues are resolved or the development is determined or with some types of development, during the initial operational phase to ensure outcomes are being achieved.

2.3.4 Assessment Peer Review - Internal

Randwick, Leichhardt and Ku-ring-gai Councils have established internal staff peer review processes to ensure transparency and consistency in the recommendations made by council officers. All recommendations made by the assessment officer must be reviewed by a team leader and, where required, by the Manager or Director.

2.3.5 Independent Assessment Advisory Panels –the IHAP Model

In March 1997, Liverpool Council was the first council to establish an Independent Hearing and Assessment Panel (IHAP). The IHAP provided an independent specialist peer review of the officers' assessment and recommendations to the Council on DAs that were significant in size or complexity or had unresolved objections. This provided councillors with the opportunity to move away from "micro-management" of the determination of individual DAs, and to allow time to focus on strategic planning, policy development and infrastructure delivery in response to the significant growth occurring at the time. A number of councils followed Liverpool's model and established an IHAP with similar functions and objectives:

- Fairfield in 1999
- Sutherland in 2003
- Warringah in 2003
- Waverley in 2006
- Canterbury in 2006
- Wollongong in 2008, and
- Shellharbour in 2010.

In November 2013, Blacktown Council resolved to establish an independent panel commencing in 1 July 2014.

These types of panels, along with independent decision-making panels, are the focus of this research. IHAPs are made up of professionals who can assist Council in determining DAs by providing independent expert advice on DAs referred to it. All IHAPs except Canterbury's IHAP include a community representative. The Panel reviews the council officer's assessment report, undertakes a site inspection and invites residents and the applicant to address the panel hearing. This hearing provides an opportunity for objectors and applicants to present their views or concerns about the DA and the council officers' recommendations. The panel then goes into a closed meeting and makes its recommendation to council on the determination of that DA.

The IHAP is intended to improve transparency, integrity, and confidence in the development assessment process. By having contentious and difficult DAs considered by independent experts, applicants and residents can be assured that their particular issues are fully considered and that the process has been thorough and rigorous.

2.4 Determination Panels

The decision making process varies greatly from one council to another. On average, the council officers or officer panels/ committees/ units determine 96% of all DAs¹³. Depending on the Councils' delegations and the type of development and level of community concern, local DAs may be determined by:

- Officers who undertook the assessment
- Team leaders or managers or directors or general managers
- Internal panels or units made up of council staff or councillors
- Full council
- Independent experts panel (DAP/IHAP model)

Regionally significant developments are assessed by council officers and determined by the Joint Regional Planning Panel (JRPP). State significant developments are assessed by the

¹³Department of Planning and Infrastructure (2013) Local Development Performance Monitoring: 2011-12 March 2013

Department of Planning and Infrastructure officers and determined by the Planning Assessment Commission.

2.4.1 Determination Panels - Internal

Some council have established determination panels made up of senior staff members or councillors to provide greater transparency in the determination of more complex development applications. This approach strengthens the integrity of decisions making and lessens potential corruption risks. There are a number of approaches.

Closed-door models:

Warringah Council established an Application Determination Panel (ADP) in July 2005. It is an internal panel with the delegation to determine minor applications where there is a high level of public interest and other larger DAs where there is minimal public interest and the DA is not required to be referred to the independent Development Assessment Panel (DAP). There is no public or applicant attendance at ADP meetings. The ADP process requires a site visit and the checking of the assessment officers report by team leaders, through to two directors and a manager. Items are referred to DAP where a unanimous decision cannot be achieved.

Manly has a similar panel called a Development Assessment Unit (DAU), which meets twice a week. Waverley has a Development and Building Unit (DBU) and Canterbury and Liverpool have Development Assessment Panels (DAPs) with similar roles. The Hills Council DAU is a staff panel, which is delegated responsibility to review major applications and to make determinations. Their weekly meetings are closed to be public but the DAU notifies Councillors of the agenda prior to the meeting. A matter is referred to Council for determination if three or more Councillors give notice on the day after the DAU meeting. The DAU decisions are void if this occurs.

Open door models:

The Port Macquarie Hastings Council has established a Panel, which is made up of an independent chair and council senior staff (Group Manager Development Assessment, Building Surveyor Coordinator and Senior Engineer). The Panel meetings are open and applicants and objectors or their representatives can address the panel. Where considered necessary, the Panel conducts site inspections, which are open to the public. The panel reviews the officer's assessment reports and recommendations and makes a determination or refers the application of Council along with recommendations for determination. The Panel also makes recommendations to Council in relation to development policies.

Pittwater Council has a Development Unit (DU), a committee made up of senior staff, which meets weekly, and considers applications in an open forum and invites applicants and objectors to discuss and resolve issues prior to determining the applications.

Table 3 Woollahra Council's Delegation of determination of DA 2012¹⁴

Quarter	Staff		Councillors		TOTAL
	Individual officers or Managers	Application Assessment Panel	Development Control Committee	Council	
Jan-Mar 2012	99	15	9	4	129
Apr-Jun 2012	95	13	15	5	128
Jul-Sep 2012	80	7	7	4	98
Oct-Dec 2012	99	19	11	4	133
Total for 2012	373	54	42	17	488
Percentage	77%	11%	8%	3%	

Woollahra Council delegates decision-making responsibility for applications of a more complex nature to the Application Assessment Panel (made up of senior staff) or where "greater safeguards" are required, to the Development Control Committee (made up of councillors). The Development Control Committee holds open sessions where applicants or objectors may present to the Committee. After considering all submissions and staff comments, the panel will discuss

¹⁴Woollahra Council website http://www.woollahra.nsw.gov.au/building_and_development/

the matter in public and make a determination. Members of the public are not to enter into the debate of the matter, unless invited by the Chairperson to provide further comment.

2.4.2 Independent Determination Panels – DAP Model

Warringah Council established an IHAP in 2003 prior to the dismissal of the council¹⁵. The council's administrator then established an internal decision making panel in 2005, but more controversial or major developments continued to be referred to the IHAP and then to council, which tended to extend the determination times. Following a review of the IHAP and consideration of the provisions introduced in 2006 in South Australia requiring all determinations to be delegated to staff or a Development Assessment Panel (DAP), Warringah Council decided in 2008 to convert their IHAP into a DAP.¹⁶

Similar independent decision making panels were introduced into other councils:

- Manly Independent Assessment Panel (MIAP) in 2008,
- Mosman Development Assessment Panel (MDAP) in 2011,
- Lane Cove Independent Hearing and Assessment Panel (LC IHAP) in 2012,
- North Sydney Independent Planning Panel (NSIPP) in 2013¹⁷
- Waverley Development Assessment Panel (WDAP) in 2013 (after removing their IHAP).
- Holroyd Independent Hearing and Assessment Panel (HIHAP) in February 2014

These types of panel are also the focus of this research. The independent determination panels have similar membership, procedures and processes to that of the independent advisory panel but transparency, integrity and efficiency gains are maximised when the panels also get to make the decisions. Determinations are made by a majority of votes with the chair having a casting vote if the votes are tied. Voting is recorded in the minutes. The panel may decide to approve or refuse the application or defer making a decision subject to receiving addition information. The panel must give reasons and conclusions for decisions that are contrary to the officer's recommendations. Table 4 provides an indication of the number and types of developments determined by these panels in 2013.

Table 4 DA Matters dealt with in 2013 by Decision Making Independent Panels¹⁸

	Lane Cove	Manly	Mosman	Nth Sydney	Warringah	Waverley
No of Panel Meetings in 2013	5	10	11	4	8	6
Developments						
- Residential	5	54	83	12	11	23
- Infrastructure/Seniors Housing	4	5	2	2	9	5
- Commercial, Mixed Use, Ind		12	12	10	3	7
- Subdivision			2		2	
- S82A & other reviews	2	7	9			1
TOTAL	10	78	108	24	25	36

While the number of matters dealt by the panels may not be large in some councils, these DAs represent the more controversial ones. The Manly Independent Assessment Panel (MIAP) has experienced very positive feedback, enabling the decision making process to gain credible recognition amongst the community and developers who DAs are referred to the panel. Typically the panel changes the assessment recommendations in 27-29% of the time and refuses 13-27% of the DAs considered (Table 5).¹⁹

Table 5 Manly Independent Assessment Panel

Matters considered by MIAP	2009	2010	2011	2012
Total number of DA	468	396	408	335
Number of DAs determined by MIAP	71	62	67	70
DAs approved	59	49	50	51
DAs refused	9 (13%)	10 (16%)	14 (21%)	19 (27%)
DAs deferred/withdrawn	3	3	3	0
Number of speakers at hearings	154	154	143	177

¹⁵ NSW Government (2003) Warringah Council Public Inquiry Report, Report by Prof Maurice Daly, Volume 1 Report, July 2003

¹⁶ Warringah Council (2008) Review of Development Application Process, Item 9.2 Report of Warringah Council Meeting 8 April 2008

¹⁷ North Sydney Council (2013) North Sydney Independent Planning Panel Report to General Manager DPS01 22 July 2013

¹⁸ Note: Data from Minutes of panel meetings on councils' websites. Nth Sydney and Waverley panels only commenced in July.

¹⁹ Data sourced from Website: <http://www.manly.nsw.gov.au/planning-and-development/miap-manly-independent-assessment-panel/>

2.5 Independent Post Determination Review Panels

A number of councils have adopted alternative dispute resolution approaches to improve their decision-making processes and to reduce the number of planning appeals. Mechanisms include mediation and conciliation during the DA process as well as formal review of decisions following the determination under provisions of the EP&A Act.

Under the EP&A Act, there are three classes of review with the potential for mediation:

- reviews of DAs rejected due to inadequate information when lodged with council (s82B);
- reviews of DA determinations (s82A) except for deemed refusal, integrated development, Crown DA, designated development and determinations by a JRPP, and
- reviews of modification determinations (s96AB).

With councils, which do not have independent panels, the review is usually undertaken by a more senior officer or by full council. Appendix 3 provides a summary of the use of panels in reviews by 10 of the councils with independent panels. There is a range of approaches:

- Manly MIAP, Mosman DAP and Waverley DAP undertake reviews of development or modification applications. Where the Panel previously made the determination, panel members who had not previously been involved in the determination of the applications including an alternate chairperson must undertake the review.
- North Sydney IPP only reviews matters where the original application had been determined by the panel. Senior officers or council undertakes other reviews.
- Liverpool and Sutherland Councils IHAPs examine and provides advice to Council on any review applications, which then makes the determination on the review.
- Wollongong IHAP reviews determinations where the original application had been considered by the IHAP or determined by full Council, or if refused by staff under delegated authority and the S82A review recommendation is also for refusal.

To deal with the reviews, the Lane Cove Independent Hearing and Assessment Panel consist of two separate but related bodies, being: -

- (a) A Determining Body, with delegated authority to consider and determine development applications, s96 modifications and s82A reviews of applications or any other matters referred to it by the General Manager, and
- (b) A Review Body, with delegated authority to consider and determine S82A or s96AB reviews of determinations made by the Determining Body. The Review Body is to: -
 - Provide an independent and open forum for interested persons and groups to hear and make submissions about reviews of determinations made by the Determining Body;
 - Provide increased transparency of process and expert assessment of reviews of determinations made by the Determining Body; and
 - Consider and determine reviews of determinations made by the Determining Body.
 - Achieve development outcomes consistent with the relevant legislation and the Lane Cove LEP and DCP planning controls.

Warringah Council has established a separate Development Review Panel (WDRP) to review determinations of matters, providing an independent and open forum for interested persons and the community to make submissions relevant to the review. This panel has an independent panel chaired by an environmental law expert, with members with urban design and environmental expertise and community representatives. The Panel has delegated authority to review any decisions made by Warringah Development Assessment Panel (WDAP) or the General Manager.

3. Procedures and Practices of Council Independent Expert Panels

This section examines the procedures of independent expert panels often councils in the Sydney metropolitan region – four with advisory panels and six with decision making panels. This includes consideration of the membership of these panels, the matters considered by these panels, the procedures and practices and the monitoring and review of the outcomes of the panels' performance.

Currently NSW councils have established their independent expert panels under Section 355 of the Local Government Act 1993. Under the Local Government Act, councils have total discretion on the membership, charter and code of practice of their panels. Where they are decision-making panels, councils have delegated their authority to determine applications under Section 377 or 378 of the Local Government Act to the panel.



Waverley Development Assessment Panel Hearing

3.1 Membership of Independent Panels

The Panels are typically made up of four members – a chair, two experts and one community member. As can be seen from Table 6, the membership characteristics are similar across councils with no difference based on whether the panel is advisory or decision-making. A legal expert – a lawyer or a person who has served in the Land and Environment Court - is usually selected as a permanent chairperson along with an alternative chair in case the chair is not available. A “pool” of technical experts is selected from a range of disciplines relevant to planning in that council's area such as town planning, architecture, urban design, engineering, transport, heritage, environmental science and social science. Panel members are usually rotated. Members of the panel must be independent and not conflicted. With most councils, there is a requirement that the independent experts (excluding community members) must not live or work in the council area.

Wollongong Council's selection criteria below provide an example of the types of people selected as community representatives on the panels. It reinforces the importance of selecting people with commitment to integrity and constructive approaches for the future of the community.

Selection criteria for Community Representatives for Wollongong IHAP²⁰

1. Demonstrated commitment to the City and the future needs of the community.
2. Demonstrated commitment to procedural fairness in decision-making.
3. Demonstrated capacity to remain objective and consider all sides of an argument.
4. Demonstrated capacity to employ constructive approaches towards problem solving.
5. Strong written and oral communication skills and the ability to work effectively in a team environment.
6. Ability to act appropriately in situations, which may involve a conflict of interest.

North Sydney required that their pool of three community representatives need to demonstrate an understanding and experience in similar or related fields to those of the professional experts. Warringah Council consider the selection of community members is a function best undertaken independently of the elected Council. This approach avoids both the perception and reality of political interference in the appointment process. Canterbury Council does not have a community

²⁰<http://reformwcc.info/2008/10/02/wcc-call-for-community-representatives-ihap-by-monday-27-oct/>

member as this council considered that the councillors would represent community interests when they consider the panel's recommendations as part of the council's decision-making role.

Table 6 Independent Expert Panel membership

	Member ship	Quorum	Appoint ment period	Fields of expertise	Community member	Who appoints
INDEPENDENT ADVISORY PANELS						
Canterbury	5	3	Not set	Chair – legal practitioner + 4 professional expert from pool representing each of the following areas <ul style="list-style-type: none"> • Architecture /urban design, • Town planning, • Environmental science and • Social planning. 	Nil	Council
Fairfield	4	2	3 yr.	Chair - Lawyer +3 other experts from pool <ul style="list-style-type: none"> • Architecture / urban design • Environment scientists 	1 from pool of 5	GM
Liverpool	4	3	2 + 2 years	Chair - professional discipline - rotated + 2 other experts from pool <ul style="list-style-type: none"> • Law, urban design, planning or architecture • Environment, engineering and transport 	1 from pool of 3	Council
Sutherland	4	3	4yrs	Chair – Lawyer/legal expert+ 2 members from pool <ul style="list-style-type: none"> • Planning /Architecture / Urban Design/ • Land Economics/ Engineering/ Environment science/ Social Planning experts 	1 from pool of 4	Council
INDEPENDENT DECISION MAKING PANELS						
Holroyd	4	3	2 years	Chair – Lawyer/legal expert+ 2 members from pool <ul style="list-style-type: none"> • Architecture / Planning • Environmental Experts 	1 from pool of 2	GM
Lane Cove	4	3	2 + 2 years	Chair – Lawyer/legal expert+ 2 members from pool of 7 <ul style="list-style-type: none"> • Architecture / Planning / Urban Design Experts • Environmental Experts 	1 from pool of 3 + alternates	GM
Manly	4	3	2 years	Chair – Lawyer/legal expert+ 2 members from pool <ul style="list-style-type: none"> • Architecture / Planning • Environmental Experts 	1 from pool of 4	GM
Mosman	4	3	2 + 2 years	Chair – Lawyer/legal expert+ 2 members from pool of 7 <ul style="list-style-type: none"> • Architecture / Planning / Urban Design Experts • Environmental Experts 	1 from pool of 5	GM
North Sydney	4	3	2 + 2 years	Chair – Lawyer/legal expert - Minimum of one from each group in the pool of members <ul style="list-style-type: none"> • 2 lawyers or legal experts • 2 urban design, planning or architecture • 2 environmental science 	1 from pool of 3	GM
Warringah	4	3	2 + 2 years	Chair – Lawyer/legal expert+ 2 members from pool of 7 <ul style="list-style-type: none"> • Urban design, planning, or architecture Experts • Environmental Experts 	1 from pool of 3	GM
Waverley	4	3	2 + 2 years	Chair – Lawyer/legal expert+ 2 members from pool of 10 <ul style="list-style-type: none"> • Urban design, planning, heritage or architecture • Environmental science, Aboriginal archaeology, disability and access and other relevant fields 	1 from pool of 3	GM

Potential issues with panel membership

At the beginning of the hearing, panel members have to declare whether they have a conflict of interest with regard to any matter as defined in the Panel's Code of Practice. The Codes and panel procedures have built in practices that are intended to make the panel members resistant to improper influence, such as:

- Limiting the tenure of panel members to 2 years with an extension for another 2 years only
- Drawing panel members from the “pool of experts” on a random basis for each meeting or at least in a manner which makes their appointment difficult to predict.²¹
- Specifying that the members must not live or do business in the council area (with the exception of community members).

Most panel members are selected and appointed by the General Manager following an expression of interest process. This may include an advertisement in the local paper calling for people to nominate or may be a targeted process with the General Manager only inviting certain individuals to nominate. The Property Council has expressed concerns that political interference

²¹ ICAC 2008 Report on an investigation into corruption allegations affecting Wollongong City Council

is being exercised in the selection of members of the panels in South Australia²². They consider that councils tend to stack panels with experts that they expect will vote along a particular line, and that local political interests can still percolate through the system as a result. It was considered preferable that an “independent body” be established to select the “panellists, rather than leaving it up to an individual – such as the general manager or mayor.

The Percy Allan Inquiry pointed out that if independent panels are to be used in NSW, they should be truly independent of both councils and the state government, consisting of external experts and not current or retired politicians or public servants²³. Issues have also been raised regarding the relationship of panel members with the development industry as many panel members also work as consultants.

Although the panel members are experts in their fields, the primary task is to read the application documents and the staff assessment, listen to what is said by objectors and applicants and make a recommendation. It is not considered appropriate for the members of the panel to become *expert witnesses* and involved as advocates. While the councillors and their staff must be accountable to their communities, issues have also been raised regarding the lack of accountability of panel members to the public²⁴.

In addition, some “assessment experts” have commented that while the panel members may be expert in their particular field, they may not be experienced in the “assessment process”. Some councils considered that their experienced senior assessment officers were probably better equipped to provide expert advice as they have done many assessments previously and have a sound understanding of the local issues and the provisions in the DCP and other policies.

It is also been commented that there is an emerging trend of “panelisation” of senior members of the profession, with many of them serving on a number of council independent panels as well as joint regional planning panels and the planning assessment commission. While this could be seen as positive in terms of broadening their exposure to the assessment or determination of difficult development applications, some consider that this practice is resulting in an “oligarchy of experts”. It was considered preferable if the number of independent panels that an “expert” can serve on at one time was limited.

Nonetheless, there are still seen to be significant benefits from having the assessments by the councils’ internal experts reviewed by independent experts because of the regulatory capture factors as will be discussed in later sections of this paper.

Defining “regulatory capture”

Regulatory capture is a form of political corruption that occurs when the regulator acts in the best interests of those being regulated to the detriment of the general public. It also is used to describe successful efforts by applicants to influence or dominate regulators to weaken regulation or to promote or sway outcomes for their advantage.

3.2 Policies, Guidelines, Charters and Codes

Councils with independent advisory panels have Charters and Operational Rules documents setting out processes and procedures. These documents tend to cover matters including:

- The purpose of the panel and the panels’ functions and responsibilities
- Panel members – qualifications, composition and quorum, appointment and termination, conflict of interest prevention and panel member remunerations
- Meetings, site inspections and public hearing procedures - notification, meeting procedures, information required for each meeting, staff and councillor attendance
- Relationship of panel with the assessment processes and with relevant policies

²²Stephanie McDonald (2010) Taking the politics out of planning 06 Dec 2010 Property Australia

²³Allan P (2006) Are Councils Sustainable? Final Report: Findings and Recommendations Independent Inquiry into the Financial Sustainability of NSW Local Government May 2006 page 183

²⁴ICAC (2007) Corruption risks in NSW Development Approval Processes: Position Paper in 2007

- Councils decision making responsibilities and process for DAs to be called up by councillors
- Administration of the panel.

Councils with independent decision making panels have tended to develop a larger suite of documents to provide greater detail on the establishment, processes and procedures for their panels. These may include a charter, guidelines, and a code of practice and memorandum of understanding for panel members:

- The **Panel Charter** sets out the functions of the panel, its membership and roles, meeting and site inspection procedures and timetables, classes of DAs, s96 modifications and s82A and other review matters referred to the panel and the decision making process, members obligations, and any review of the panel or feedback processes to council.
- The **Panel Operational Guidelines** sets out additional details regarding site inspections, hearings procedures and other panel procedures.
- The **Code of Conduct** is intended to ensure the highest ethical standards in the exercise of duties and responsibilities, to maintain the integrity of the panel and provide for fair dealings in reaching findings and making decisions. Mosman and Manly Councils require panel members to comply with the council's code of conduct, which applies to councillors and council staff. Waverley Warringah, North Sydney and Lane Cove Councils have developed Codes specifically for their panel members covering issues such as contact with councillors, officers, applicants, objectors and others panel members, conflict of interest, pecuniary and non-pecuniary interest, public comment, gifts and benefits, use of information and breach of the code.
- The **Memorandum of Understanding** needs to be signed by all panel members when accepting an appointment to the panel. It indicates agreement to operating according to the charter, guidelines and code of conduct and not to unlawfully disclose or misuse any information.

The councils' codes of conduct for panel members usually mandate that councillors, applicants and the community cannot approach panel members to discuss particular development applications outside the panel hearing. This minimises the risk of political influence by restricting discussions and interference that could occur outside the formal process.²⁵

Ideally the hearings are conducted with as little formality and technicality as possible so all issues can be understood from the different parties point of view and where possible issues in dispute can be resolved. Such proceedings are not governed by the rules of evidence, although some of the underlying principles are nevertheless relevant.

3.3 Locally significant matters considered by Independent Panels

Councils have developed their own criteria for referral of DAs to their panels based on the types of locally significant development in their area. There is no pattern of criteria based on whether the panel is advisory or decision making as can be seen in Table 7 and Table 8.

"Major" developments including residential flat, commercial, mixed use and industrial development are referred to the panel. In some council "major" is not defined and is up to the discretion of the officers. In other councils, major may be defined by a dollar value, number of units or storeys or by square metres. However major developments with a capital investment value (CIV) of more than \$20 Million are referred to the JRPP for determination. As well, applicants of development with a CIV between \$10 million and \$20 million, which have not been determined within 120 days, can also refer their development to the JRPP.

Another key criteria for referral to the panel are development with a high level of variations from the standards (under SEPP 1 or Clause 4.6 of the LEP). In Mosman Council, these criteria generated approximately 40% of the matters dealt with by the panel in 2010/2011.

²⁵P.Booth (2003) *Planning by Consent: The Origins and Nature of British Development Control*, London: Routledge, 2003,p.7

Development applications where the council, councillors, staff or state or federal politicians are the applicants tend to be referred to the panels. However council projects with a capital investment value (CIV) of more than \$5 million are referred to the JRPP for determination.

In most councils, the General Manager or Manager of assessments can refer any DA to the panel for its consideration, particularly when there are unresolved objections. In Fairfield, Canterbury and Sutherland, the Council itself can refer a DA to the panel for advice prior to the Council making a determination.

Table 7 Summary of Criteria for matters referred to Independent Advisory Panels

UO = Unresolved Objections Grey = high level of discretion

Criteria	Canterbury	Fairfield	Liverpool	Sutherland
Any DA with UO	✓ + more than 6 UO	✓ - unless frivolous		✓ other than single storey dwellings
Any DA referred by GM or Director of Planning	✓ if complex, contentious, or in public interest		✓ if complex, contentious, or in public interest	✓ if significant or UO – but not single storey houses
Any DA referred by council or Council Committee	✓	✓		✓
Applicant is council	✓	✓ -if >\$500,000 or UO	✓ + if commercial interest	✓ if significant or UO
Applicant is staff or councillors	✓			
Class 1 buildings	✓ -if UO			✓ if significant other than single storey
Class 2-9 buildings	✓ If major or If > 4 storeys	✓ -if UO	✓ where 3+ UO	✓ if significant
	✓ If >20units		✓ If 3+ storeys in CBD	
	✓ If industrial > 5000 sqm		✓ residential if >20 allotments and 3+ UO	
New group home, brothel, place of worship	✓			
SEPP1/Clause 4.6 variation of standards & significant impacts		✓	✓	
Alter existing heritage listed item	✓			
Subdivision			✓ if 20+ lots & 3+UO	

Table 8 Summary of Criteria for matters referred to Independent Decision Making Panels

UO = Unresolved Objections Blue = high level of discretion

Criteria	Lane Cove	Manly	Mosman ²⁶	North Sydney	Warringah	Waverley
Any DA with UO			✓ 3+ or 1+ if views issues			
Any DA referred by GM or Director if complex, contentious or in public interest	✓		✓	✓	✓	✓
Applicant is council	✓ if >\$100,000		✓	✓ if >\$250,000	✓	✓
Applicant is staff or councillors	✓ + politicians		✓	✓ + politicians	✓	✓
Class 1 buildings		✓ where 3+ UO			✓ 3+ UO – also Class 10	✓
Class 2-9 buildings		✓ 3+ UO			✓ 6+ UO	✓ 6+ UO
		✓ If \$3M+			✓ If \$>3M	✓ If \$>3M
Significant SEPP1/Clause 4.6 variation & significant	✓ if >10%		✓ if >10%	✓ if >10%	✓ if >10%	✓ if >10%
Where VPA and variation of standards					✓	✓
Subdivision		✓ if 5+ lots				
Works on foreshore/ foreshore building line or UO view loss			✓			
S96 modifications of previous panel decision	✓		✓		✓	✓

²⁶ Note: Mosman provisions do not apply if the development is on public or Crown land where Council is trust manager or on unmade roads zoned RE1 or E2

The criteria being trialled in Holroyd Council are DAs for places of public worship, brothels or tattoo parlours with unresolved objections. The IHAP was only established in February 2014 and so far have not had any matters referred to the panel

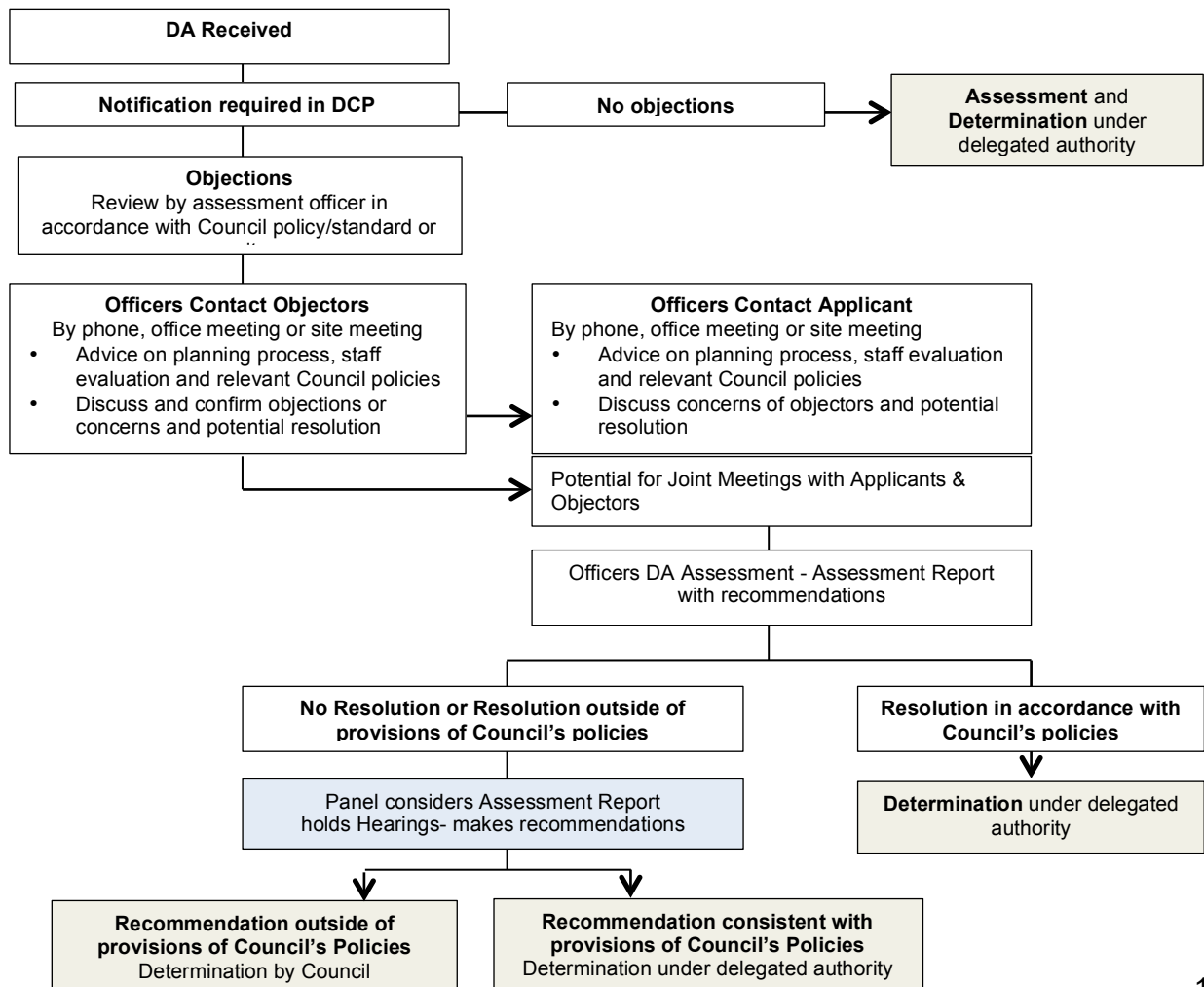
Potential issues with criteria

One of the issues raised by industry is the different criteria used by each council, leading to complexity when dealing with development across a number of council areas, which have independent panels. Councils consider this is justified because different council areas have different development patterns and different “key” planning issues. Another issue is that many of the criteria tend to be very discretionary and are based on whether the development is complex, contentious or in public interest. In all councils, the key criteria for referral of DAs to the panel relates to whether there are “unresolved objections”.

Defining “Unresolved Objections”
 In Canterbury, “unresolved objections” are defined as issues that *cannot be resolved by conditions of consent or outside the terms of the council policies or DCP controls.*
 In Warringah and Waverley “unresolved objections” are defined as an *objection that is considered by the Director of Planning or delegate to have planning merit, relevance, substance, reasonableness and validity, and which has not been addressed by the imposition of conditions of consent.*
 In Manly, a “resolved objection” occurs when the applicant agrees to amendments to a proposal that address the objection and the objector withdraws the objection in writing. If an applicant declines to make any amendments or amendments have made but objections remain, it is an “unresolved” objection.

Sutherland Council has established a Submission Review Panel so that this panel makes the decision as to whether objections are considered to be resolved and the interpretation of other discretionary criteria. Fairfield Council has developed a clear process for dealing with unresolved issues. (Figure 2) Both these processes reduce uncertainty.

Figure 2 Fairfield Council Process for dealing with unresolved objections



3.4 Procedures and processes

The independent panel's procedures vary slightly from council to council (Table 9).

Table 9 Independent Panel Hearing processes

Council	Typical monthly meeting time	Agenda available	Register to speak	Time to present	Comment on interaction with objectors and applications
INDEPENDENT ADVISORY PANELS					
Canterbury	6pm – 1 st Monday of Month	8 days	Previous Friday	Flexible	May need to nominate spokesperson if number of people
Fairfield	6pm – 2 nd Thursday of month	10 days	No requirement	Flexible	Relaxed re timeframes to present
Liverpool	6pm – 1 st Thursday of month	7 days	Previous Thursday	3 minutes – but no clock	Relaxed approach with providing additional time and discussing issues
Sutherland	6.00pm -Wednesday after council meeting	5 days	Day of meeting	Flexible	Encourages open discussions and resolution of issues
INDEPENDENT DECISION MAKING PANELS					
Lane Cove	5pm – 1 st Monday of month	7 days	Previous Friday	3 minutes	Must give outline of issues prior to meeting
Manly	11am – 2 nd /3 rd Thursday of month	7 days	Day prior	3 minutes	May need to nominate spokesperson if number of people
Mosman	11am – 3 rd Wednesday	7 days	Day prior	3 minutes	May need to nominate spokesperson if number of people
North Sydney	2pm 2 nd Wed of Month	4 days	2 Days prior	3 minutes – but may extend time	May need to nominate spokesperson if number of people - 10 minutes if community groups spokesperson
Warringah	6pm 2 nd Wednesday of Month	6 days	Prior to meeting	3 minutes	Relaxed approach providing additional time and discussing issues
Waverley	11am – 3 rd Wednesday of Month	6 days	Day prior	3 minutes – prominent clock	If there is more than one person addressing on the same item, the 3 minutes must be shared

Typical steps in panel hearing and meeting process include:

Notification of when a matter will be considered by the panel

- The agenda for the panel meeting including the council officers' assessment reports and recommendations are placed on the Council's website a number of days before the meeting. This means that the applicant and objectors can review the officers' assessment report and recommendations prior to the meeting.
- The applicant and objectors to a DA are usually notified by mail or email that the panel is to consider the particular DA at their next meeting. In addition, with some councils such as Warringah, a notice is placed on the Council Notice Board and in the local newspaper, with a notice as to the date and time of the meeting, and where they can view the assessment report and information relating to addressing the Panel.
- Members of the public wishing to address the panel usually have to register prior to the meeting by submitting a form to the panel coordinator. In some councils, registered speakers must have already lodged a written submission on the DA or must provide to the panel coordinator prior to the meeting, a written summary outlining the issues they wish to raise.

Site Visit

- The panel members undertake a site visit usually on the morning of the meeting. Senior council officers usually accompany the panel to answer questions and clarify issues.
- The usual procedure is that no discussions occur with the applicant or objectors on the site. However with some panels, applicants or objectors are given the opportunity to draw the panels' attention to particular site characteristics. This is in contrast with Land and Environment Court proceeding where applicants and objectors can address the Judge or Commission on site and in some cases, hearings are held on site.

Pre-Hearing Briefing

- With most councils, managers and /or assessment officers give the panel members a briefing and answer any questions the panel members may have following the site visit.

Hearings

- The chairperson opens the meeting and introduces the panel members, and asks if there are any conflicts of interest regarding any items on the agenda.
- The chairperson then introduces each item on the agenda.
- Typically the panel procedures state that the hearings must be run “with as little formality as circumstances of the case permit and according to equity, good conscience and the merits of the case”. However, with some panels, the hearings are “formal” with very limited interaction between the panellists and speakers. With other panels such as Sutherland and Liverpool, there is a more informal approach with constructive discussion and exchange between parties.
- In some panels, speakers (objector, applicant or supporter) addressing the panel can only speak for the designated time, usually 3 minutes, unless the chairperson permits otherwise. In North Sydney, the community group representative can speak for 10 minutes. With panels such as in Sutherland and Liverpool, there is a more informal approach with no set timeframes or clocks ticking.
- Speaker names are included in the minutes unless otherwise requested.
- Objectors are invited to speak first. If there are a number of objectors with similar concerns the chairperson may require that a spokesperson be nominated to speak on behalf of the group. This has been found to be frustrating for some members of the community as their issues may not have been included or given sufficient emphasis by the “spokesperson”. Some chairpersons allow other objectors to speak if they indicate that their issues have not been appropriately covered in the spokesperson’s presentation.
- The panel members may ask questions of the speakers regarding their concerns. With some panels, the panel members may go further and explore options to modify the assessment officer’s recommendations to address the objectors concerns.
- The applicant, their technical experts or other supporters are then invited to respond. Some panels specifically raise the issues identified by the objectors and discuss with the applicant and their experts options to address those concerns. In other cases, this phase may move towards being a mediation process. However with some other panels this phase tends to be “formal” with no attempt to explore solutions.
- These discussions may also expose the need for additional expert information in order to proceed with determining the application. This may lead to deferral of the matter until the applicant has provided the additional information. The panel may set a timeframe for the provision of this additional information.
- Once all speakers have addressed the panel on the item, the panel will move to the next item on the agenda until all items on the agenda have been considered.
- Lane Cove IHAP hearings are held in the council chambers and are webcast. Webcasting allows the community to view proceedings from a computer without the need to attend the meeting. The webcast will include vision and audio of members of the public that speak during the public hearing.

Closed determination process

- Once the hearing part of the meeting has been completed, the panel will move to a closed session to deliberate and make recommendations or determination on each item. Members of the public are not able to participate in the closed session, though members of council staff may attend to answer any additional questions the panel may have.
- The panel arrives at a position, which may include formal voting by the panel members. A report is prepared including the justification for the panel’s recommendation if at variance to the council officers.
- With most councils, the panel recommendations are placed on the council website a few days after the meeting. Lane Cove IHAP, when they only have one or two items, may deal with each item individually going into closed session after each item and then returning to the public hearing and announcing the decision, giving justifications.

Communication of outcomes

- *With advisory panels:* The recommendations of the panel meeting are usually posted on the councils' website on the following week. The recommendations go to the councillors for consideration at their next Council meeting. There is usually no opportunity for objectors to address the council meeting.
- *With decision-making panels:* The panel determines the DA. The decisions of the panel meeting are usually posted on the council's website in the following few days. Where the decision is different to that of the council officer's recommendations, justification for the difference is given. A summary of the matters determined by the panel and the outcomes are sent to the next council meeting for their information.

Potential issues with panel procedures and practices

There are concerns in some councils that having an advisory panel process would add an additional layer to the system with the potential to impact adversely on processing times particularly if Council defers the application in order to undertake a site inspection. However councils with advisory panels tend to co-ordinate the meeting times of the panel and councils to minimise delays.

Recently Wollongong Council has delegated to senior officers the determination of applications where the panel's recommendation aligns with the officers' assessment report recommendation and there is no significant variation from the relevant standards. This approach allows for both increased transparency and technical review by the panel but also ensures a reduction in processing time. With decision-making panels, this is not an issue and the timeframes are usually reduced.

An issue has been raised regarding the level of justification given by panels when determining a DA or making a recommendation to council for determination, particular where that decision is at variance to the recommendations in the council officers' assessment report. With Sutherland, Warringah and Manly councils, there tends to be strong justification provided in the panel meeting minutes particularly when refusing or recommending refusal of the DA. With Waverley, Lane Cove, Mosman and North Sydney less justification is provided in the minutes. With Fairfield, Canterbury and Liverpool councils, the panel minutes are not available on the council's website.

3.5 Monitoring and review of panels' practices and procedures

Most of the panels have reporting and review mechanisms to provide feedback to council. With advisory panels, their recommendations go to council for consideration in making a determination. With decision-making panels such as North Sydney IPP, the panel may send a report to council following each of its meetings indicating the matters considered and the outcomes.

The panel may meet quarterly or annually with the senior council staff and or councillors to review the panel processes and outcomes and to identify any improvements to procedures. In addition, the panel may make recommendation on provisions in the council's DCP, LEP or other policies that would benefit from a review.

Wollongong Council has an annually meeting between the Panel members and the Manager City Planning to review the meeting procedures, past recommendations and Council decisions to identify any improvements to procedures or decision-making. A report is then produced for Council with an assessment of the operation of the Panel and any suggestions for improvement.

Waverley Council has an extensive feedback loop to council from its new decision making panel which commenced in July 2013. A monthly report is sent to councillors on the Panel operations, which include the matters considered, the Panel decisions, any issues identified by the Panel with the DCP/LEP, and any other issues considered relevant by the Panel or the Director of Planning & Environmental Services. In addition, a quarterly report is prepared with the outcomes

of the Panel meetings, known time and cost savings to Council, and outcomes from any appeals from Panel determinations, and in particular any reduction of appeals.

In addition, some of the councils with panels have undertaken surveys to determine the community's view of the panels operation. Mosman Council recently undertook a survey of applicants, landowners, objectors and councillors to gauge their response to the MDAP's procedures and outcomes²⁷. Generally it was considered beneficial those experts undertook the peer review of officer's assessments and that the determination process was devoid of politics. However there were a number of suggestions to provide for better community engagement. As a result, Mosman Council has modified some of the procedures of the panel to take into consideration issues raised. For example, the notification time for panel meetings has been increased, more discussions are had between the panel members and objectors and the applicant regarding potential options to meet community concerns during the hearing session, and councillors may address the panel on behalf of residents to reinforce the importance of their concerns.

²⁷ Mosman Council (2013) Mosman Development Assessment Review prepared by Cardno (NSW/ACT)

4. Other assessment and determination panels

The panels discussed so far are NSW “council owned” panels, appointed by them and undertaking tasks delegated to them by the council. However, there are a number of other models in NSW and other states, where there is less ownership and control over the panels’ roles and responsibilities by councils.

Table 10 State Regulated Panels in NSW and other jurisdictions

	When	Membership	Are councillors panellists	Who decides what matters	What DAs considered
NSW					
Commission of Inquiry	1981-2008	2 commissioners + experts as required	No	EP&A Act	Determined by Minister, DG or council – contentious major developments
NSW appointed local panels	After 2006	Varies - Appointed by Minister	Not usually	EP&A Act	Depends why panel set up
Planning Assessment Commission	2008	2 members nominated by the Chair (from 8 members + 9 alternates)	No	EP&A Act	State Significant development – if private proponent and 25 or more objections or local council has objected or reportable political donations
Joint Regional Planning Panels – 6 JRPP in NSW	2008	5 members – 2 by State 2 by councils – Chair by State agreed by LGA	Can be – if council nominates them	EP&A Act	>\$20M + >\$5M if infrastructure or certain designated development or coastal subdivisions + opt-in provisions if DA >\$10M & slow
CSPC – Central Sydney Planning Committee	1988	7 members – 3 by council Others by State	Yes –up to 3	City of Sydney Act 1988	>\$50M + if on Crown & council land + certain planning matters
OTHER STATES					
SA Development Assessment Panels	2001	7 members - appointed by council - fewer with agreement of State	Yes – up to 50%	Council	Council can determine - Varies but all DAs must be delegated either to the panel or to officers to determine
WA Development Assessment Panels Perth Local DAP 5 Metro Joint DAPs 9 Regional Joint DAPS	2008	5 members – 2 by council and 3 specialist by State – including chair	Yes – up to 2	Planning Development Act & Regs	<i>Mandatory</i> > \$7M or \$15M with Perth LDAP <i>“Opt-in” option</i> if \$3-\$7M or if \$10-\$15M in Perth LDAP <i>Delegation option</i> : Council can delegate anything to its DAP
Vic Planning Assessment Committee	2013	5 members – by State – with chair agreed by Municipal Assoc of Vic	no	To be determined	To be determined

4.1 Commission of Inquiry for Environment and Planning

There have precedents under the EP&A Act and before, for the use of independent experts to hold hearings, provide advice and to resolve issues. Prior to the EP&A Act, ad hoc “committees of inquiry” were appointed on a needs basis to provide advice into particular planning or development matters.

The Commission of Inquiry for Environment and Planning was established in 1980 under the EP&A Act as a “permanent” independent expert panel to provide advice on a range of planning, development and environmental issues under that Act²⁸. The Commission had 2 full-time commissioners appointed by the Governor supported by technical experts specifically appointed to assist the commissioners with particular inquiries. Inquiries could be held into:

- Draft REPs or LEPs or proposed amendments to these plans
- Development or redevelopment areas
- DAs for local, state or regional significance development, prohibited development or infrastructure proposals being assessed under Part 5
- Conservation matters under the Heritage Act 1977.

²⁸ NSW Commissioners of Inquiry for Environment and Planning (2003) How They Work - A Handbook for Citizens, Resident, Environment Groups, Councils, Developers and Government Agencies

Normally inquiries were at the instigation of the Minister for Planning. In addition, at the request of councils, public hearings and assessments regarding LEPs or DAs were also conducted where the council wanted independent advice or had a potential conflict of interest. Examples of council initiated hearings include:

- Statutory and strategic planning in Wyong
- Draft LEPs in North Sydney, Ballina, Nambucca, Byron, Ashfield and Rockdale
- Amendments to the Mosman LEP for the Spit Junction Shopping Centre, North Sydney LEP to rezone St Leonards and Leichhardt LEP to rezone 5 Balmain sites
- Reclassification of public land at Mudgee and Bathurst
- Rural provisions in Hornsby, Coffs Harbour and Shoalhaven
- Conservation matters in Mosman and Great Lakes
- Controversial development applications – Leura tourist hotel, Raymond Terrace retail centre, Summerhill waste facility, and Fullerton Cove sand extraction, Hawkesbury mushroom substrate facility and Botany Greek Orthodox Church.

The terms of reference for council the council determined initiated inquiries. Hearings were conducted in the local council area in an informal manner with public engagement encouraged so that anyone who wants to be involved had a chance to express their views. The commissioner would usually take an active part at the hearings and ask the parties questions. Parties could seek clarification of matters through written questions, or by requests for additional information. Parties had the opportunity to lodge a second submission or submission in reply. The commissioner remained at arm's length from the council and presented it with a report with recommendations, which was made publically available. Council then made its decision.

The commission reported in its 2003-04 Annual Report that a council inquiry usually cost between \$10,000 to \$40,000 depending on the complexity and level of public interest in the matters. The costs provide for background research, the public hearing, and a comprehensive report which assesses the relevant environmental planning issues. The commission also reported that local communities supported having inquiries because of the opportunity to make submissions to the independent public hearings. For councils, the independent hearings provided for additional public engagement and overcame criticisms of conflict of interest.

The Commission reported that 185 minister instigated inquiries and 62 council instigated hearings were held between 1981 and 2004.²⁹ After 2005, the Commission of Inquiry was rarely used and was disbanded in 2008.

4.2 NSW State appointed planning assessment panels

In 2006, the EP&A Act was amended so the Minister for Planning could appoint planning assessment panels to undertake a council's consent authority role or to prepare environmental planning instruments.³⁰ These provisions are to ensure satisfactory performance by local councils in relation to planning and development matters. Under section 118 of the Act, a planning administrator or panel, or both, may be appointed for any of the following reasons:

- The council's failure to comply with its obligations under the planning legislation
- ICAC, the NSW Ombudsman or the Minister for Local Government recommendation because of serious corrupt conduct by any councillors or other similar issues.
- Performance in dealing with planning and development matters was unsatisfactory or the council was too slow in processing DAs or in developing or amending LEPs
- Council agreed to the appointment to examine a range of strategic and statutory planning issues.

In addition, panels have been appointed to consider broader planning issues which may affect a number of councils, such as cumulative impacts of coal mining, use of E zones and zoning of rural lands.

²⁹ NSW Commissioners of Inquiry for Environment and Planning (2004) Annual Report 2003-2004

³⁰ NSW Department of Planning (2007) Heads of consideration for the Minister to appoint a planning administrator or panel for unsatisfactory performance - Planning Circular PS 07-010

Table 11 lists recent panels. These panels are of a temporary duration and in many ways, are similar to the committee of inquiries operating prior to the introduction of the EP&A Act. Under section 118, a panel may not exercise a council's functions for more than five years continuously, and its operation is to be reviewed if it has been in place for more than two years. Section 118AA provides that planning assessment panels should consist of members with relevant skills and knowledge in planning and development matters.

Table 11 Other NSW Government appointed panels

Issues	Date	Panellists	Issue
Sutherland LEP	2013/14	2 independent experts	Review of the LEP
Review of the E Zones	2012-2013	Byron, Ballina, Kyogle, Tweed & Lismore councils & DP&I	Application of E zones and environmental overlays on the Far North Coast
Oxford Falls Valley and Belrose North, Warringah	2012	Warringah Council & DP&I	Urban development review and LEP amendments
Warriewood Valley Strategic Review	2011-2013	Pittwater Council & DP&I	Development options in the Valley
Mowbray Road Strategic Review, Lane Cove	2011	Lane Cove Council & DP&I	Identify opportunities for residential in the precinct and infrastructure works – LEP amendments
Cessnock	2010	3 independent panellists	Undertake council roles under Part 3 & Part 4
Coogee Bay Hotel site	2010	Government Architect	Review planning proposal and develop planning principles
Central Sydney Planning Committee Review	2010	3 panellists – 2 appointed by Govt and 1 by council	Review operation and administration of the CSPC
Burwood town centre	2007-2009	3 panellists & administrator	Develop new LEP and development controls
Camberwell village - review of cumulative impacts of coal mining	2008	3 + independent experts	Three expert reports on air quality (dust), noise, and drinking water associated with coal mines near Camberwell
Landfill capacity and demand for the Sydney region	2008 - 2010	Independent expert	Independent public assessment of landfill capacity and demand report
Ku-ring-gai - planning panel	2008 - 2010	3 independent experts	Review of estimated dwelling yield and development of town centres LEP
Wagga Wagga - planning panel	2007	3 independent experts	Undertake council roles under Part 3 & Part 4
Central West rural lands	2007	4 panellists -	Identify key agricultural lands and identify threats and opportunities
Coal mining impacts in the Wyong LGA	2007 - 2010	4 panellists	Impacts of underground mining in Wyong
Underground coal mining in the Southern Coalfield	2006 - 2008	5 panellists	Impacts of underground mining in Wyong especially on water systems and swamps
Warnervale town centre	2006	Independent expert	Options for growth
Sensitive urban lands on South Coast - review	2006	3 panellists	Impact of development on sensitive South coast natural systems
Queanbeyan land releases	2006	3 panellists	Review current rezoning proposals for residential land
Cowra Shire planning matters	2005 - 2006	Independent expert	Review actions for sustainable development of the Cowra area & develop LEP

Most of the panels were appointed to consider strategic planning issues such as Cowra LEP, Queanbeyan land release areas, Warnervale town centre, Mowbray Road LEP amendment and Sutherland LEP.

The Burwood Town Centre Planning Panel was appointed to oversee the finalisation of the Burwood Town Centre LEP. This was an example of an independent planning panel contributing at the strategic planning stage, which worked well, albeit at significant cost to Council. Given the current strategic planning focus, Burwood Council considered in their submission to the White Paper, that it would be more reasonable to have the independent panel involved at the strategic planning and policy development phase, rather than at the DA level.

4.3 Planning Assessment Commission

The EP&A Act was amended in 2008 to replace the Commission of Inquiry for Environment and Planning and to provide for the Minister for Planning and Infrastructure to establish a Planning Assessment Commission (PAC) consisting of a chair with up to eight members plus additional casual members.

The Minister has delegated responsibility to the PAC to determine state significant development (SSD) and state significant infrastructure (SSI) applications submitted by private proponents, where there are less than 25 objections and local council support. The PAC also can be required to make 'Gateway' decisions on local environmental plans (LEPs) and to approve or refuse certain classes of LEPs. The Minister or the Director General can request the Commission hold a public hearing into any planning or development matters and provide advice on that matter.

The *State Environmental Planning Policy (State and Regional Development) 2011* (SRD SEPP) identifies particular classes of development to be SSD, which are assessed and determined under Part 4.1 of the Act. In addition, a call-in power operates giving the Minister the power to call in any development considered to be of state significance for determination under the SSD provisions. Public infrastructure projects, which are likely to significantly impact the environment, are considered to be SSI and are assessed under Part 5.1 and determined by the Minister.

The PAC may determine the application with or without holding a public meeting. The Department undertakes an assessment and prepares a report with recommendations. If a hearing is to be held, the PAC will usually give two weeks notice, inviting participants to register to speak. After the hearing and consideration of the Department's report, the PAC then provides a report with recommendations to the Minister or Director General or determines the application under delegation. The PAC's report is published on its website within two weeks of its submission to the Minister/Director General.

In 2012-2013, 430 projects were determined under the Part 3A, SSD and SSI provisions – 141 new applications and 289 modifications to existing approvals. The PAC determined 19% of these applications, with the Minister determining 3% and the Department determining 78%. Sixty percent of the applications determined in 2012-2013 was located in the Sydney metropolitan area.³¹

4.4 Joint Regional Planning Panels

Joint regional planning panels (JRPPs) were also introduced in 2008. There are currently JRPPs in each of six regions across NSW. A local council officers with recommendations made to the JRPP assesses dAs for regional development. The relevant JRPP determines the DA after a public hearing, having considered the council's assessment report. These panels play a similar role to that of a council's independent decision-making panels. The two key differences are the membership of the panels and the scale of development being determined.

The JRPPs have 5 members - 3 states appointed independent experts and 2 appointed by the council where the DA is located. The local council can nominate councillors, council staff or independent experts. This is in contrast to councils' independent panels where councils choose not to appoint staff and councillors on these panels. Councillors on the JRPP are seen to have the potential to introduce political risks into the process.

The other difference relates to the scale of the development. Regional development is currently defined in Schedule 4A of the EP&A Act and includes development with a capital investment value (CIV) over \$20 million plus certain council and infrastructure development with a CIV over \$5 million, plus extractive industries, waste facilities and marinas that are designated development and certain larger scale coastal subdivisions. In addition, there are "opt-in" provisions where the applicant can refer DAs with a CIV between \$10 million and \$20 million to the JRPP if not determined in 120 days. The Minister may, by order, designate additional classes of development in a particular council area to be regional development if the council's

³¹ NSW Department of Planning and Infrastructure Annual Report 2012-13

performance has not met applicable performance criteria. These provisions do not apply in the City of Sydney Council area.

Table 12 Regional Panels' Decisions and Determination Times in 2012-2013³²

	Sydney East	Sydney West	Northern	Hunter& Central Coast	Southern	Western
No of Councils in Region	24	16	25	14	29	44
No of DAs determined	90	82	18	20	21	14
% refused	8%	5%	0	15%	10%	7%
Av Determination time- days	179	295	173	310	214	142
Average Value \$	\$28M	\$24M	\$15	\$16M	\$15M	\$13M

Regional panels also have a role in planning proposals such rezoning, where the Minister has appointed the panel as the relevant planning authority. The Minister may also ask the JRPP to provide advice on other planning proposals as well as undertaking reviews of “gateway” determinations when requested. For example in 2012-13, the JRPPs provide advice on 4 “gateway” recommendations, agreeing with the “gateway” recommendations in 3 of the cases.

Views on Regional Planning Panels and their relationship with council independent panels

A broad diversity of views was expressed in submissions to the White Paper regarding the current and potential future role of JRPP.

The Planning Institute of Australia (PIA) applauded the proposal to increase the use of JRPPs in the DA and spot rezoning processes. Wollongong and Cessnock Councils also supported the retention of the JRPP with the existing classes for regionally significant development but recommended greater delegation of more straightforward applications for quicker determination by the Council. Cessnock Council reported that with the Hunter and Central Coast JRPP, delays were being experienced in obtaining briefing dates because of the volume of DAs and scheduling issues.

The NSW Local Government Associations in their submission to the White Paper considered that JRPPs are an additional unnecessary body exercising a role that could be performed by a council IHAP or by the PAC. Shellharbour Council established an IHAP in 2010 but it has not met since mid-2012 because the JRPP deals with the controversial developments, which would otherwise be dealt with by the IHAP.

The Hills Council in their submission to the White Paper has called for the abolition of JRPP and considers that it is a waste of time, money and adds another layer of bureaucracy in the planning system. This council considers that the JRPP takes planning powers away from Councils who have consistently done the right thing. Where the council has not performed, they consider the NSW Government should have every right to step in and hand powers to a panel. But they shouldn't punish Councils that are doing the right thing.

North Sydney Council which has recently established an independent decision making panel does not support the continued role of the Planning Assessment Commission (PAC) or the JRPPs as they undermine the council's strategic planning. North Sydney Council considered that if the council establishes an independent decision making panel, then the JRPPs should not have a role in that council area. Warringah Council also shares this view. Shore Regional Organisation of Councils also considers that any duplication of responsibilities in the role of IHAPs and JRPPs as currently occurs should be removed with powers handed to council's decision-making panels.

The Department of Infrastructure and Planning's argument for not exempting councils that have a decision making panel from the JRPP process, was that the council panel would not have an obligation to consider the “regional significance” of the developments in the same manner as the JRPP does, as the JRPP membership is broader and it is not just focused on the interests of an individual council.

³² NSW Department of Planning and Infrastructure Annual Report 2012-13

4.5 City of Sydney Planning Committee

During the 1980s, the City experienced a building boom with the redevelopment of older commercial, industrial and waterfront areas including Darling Harbour³³. The City of Sydney Council was disbanded in 1986 following an inquiry (Goran Report)³⁴. In 1988, the Central Sydney Planning Committee (CSPC) was established by the NSW Government under the provisions of the City of Sydney Act 1988. A new council was also established and the Central Sydney Strategy was released with a new framework for the development of the city as a global financial, commercial and tourist centre.

The CSPC has 7 members including the Lord Mayor, 2 Councillors and 4 members appointed by the Minister for Planning with expertise in architecture, building, civic design, construction, engineering, transport, tourism, the arts, planning or heritage (including 2 senior state employees). The CSPC is responsible for determining DAs over \$50 million or involving Crown or Council land, removing significant decisions from the Sydney City Council. The CSPC may also approve planning proposals or direct the council to prepare a planning proposal to change the LEP. The Act makes the Committee a corporation not subject to the control or direction of the Council, although the Council must provide staff and facilities for the Committee. Decisions of the CSPC are deemed to be decisions of the Council³⁵.

An independent review into the role and performance of the CSPC was undertaken in 2010. The CSPC determined 180 'major development' applications worth approximately \$24 billion in total up to July 2010, on average 8 DAs per annum. It was considered that the CSPC appropriately balanced State and local objectives, and played an important role in ensuring that the design quality and amenity in major urban renewal areas and in relation to planning for Sydney as a global city. The review made a series of recommendations aimed at improving the efficiency and effectiveness of the CSPC.³⁶

4.6 South Australia Development Assessment Panels

The principle planning legislation in South Australia is the *Development Act 1993*. Under Part 2 of *Development Act*, a Development Assessment Commission (DAC) which is appointed by the Minister for Planning independently assesses and determines specified types of major development applications listed in Schedule 10 in the *Development Regulations 2008*. It also acts as the lodgement authority for all land division applications and as the concurring authority for non-complying applications approved by a council or assessment panels.

The *Development Act* was amended in July 2001 to require all Councils to establish a Council Development Assessment Panel (CDAP) or to participate in a Regional Development Assessment Panels (RDAPs) instead of or in addition to a CDAP³⁷. Initially Councils had discretion to delegate to the CDAP any functions in the development assessment process. In 2006, the *Development Act* was again amended to make it mandatory for councils to delegate all development applications decision-making responsibilities to either a council officer, a CDAP or a RDAP. The council must have a publically available delegation policy. Currently, the majority of applications are assessed and determined by council officers with only a small percentage referred to a CDAP or RDAP for a decision.

A CDAP is made up of maximum of seven members appointed by the council (unless otherwise authorised by the Minister). Only half can be councillors or council officers, with the other members being independent experts from relevant fields. The chair must not be a councillor or council officer. At its discretion, the Panel may call for and hear specialist technical/professional advice related to assessment matters.

³³ Paul Ashton and Robert Freestone (2008) *Planning UTS* E Press

³⁴ Paul Ashton, *The Accidental City: Planning Sydney Since 1788*, Hale and Iremonger, Sydney 1993

³⁵ City of Sydney Council (2010) *Submission to the Central Sydney Planning Committee Review*

³⁶ City of Sydney 2010 *Central Sydney Planning Committee Review –Submission – July 2010*

³⁷ South Australian Local Government Association (2006) *Council Development Assessment Panel Guide 2006*

In February 2013, Minister for Planning announced the Planning Improvement Project - a review into the operation of South Australia's planning regime. A panel of independent experts has been commissioned to review the planning system and provide advice to the Government regarding potential reforms. Whilst their final report is not due until December 2014, it is expected that there will be a number of incremental changes as the review progresses.³⁸ For example, on 28 November 2013, the *Development Regulations 2008* were amended establishing the Inner Metropolitan Development Assessment Committee (IM DAC) as a sub-committee of the DAC to determine applications in the City of Adelaide and 5 other council areas for which DAC was the relevant authority, such as development exceeding \$10M.³⁹ As the Minister appoints the IM DAC, these councils are concerned by this move by the State to erode their decision-making authority.

4.7 Western Australia Development Assessment Panels

In Western Australia, Development Assessment Panels (DAPs) evolved out of the 2009 *Planning Makes it Happen - a Blueprint for Planning Reform Review*⁴⁰. This led to amendments in 2011 to the Planning and Development (PD) Act 2005 to introduce two types of panels⁴¹. Local Development Assessment Panels (LDAPs) are intended to service a single high-growth local council area. There is currently only one LDAP in the City of Perth. Joint Development Assessment Panels (JDAPs) were established to service two or more local council areas. There are currently 14 JDAPs – 9 Regional DAPs and 5 Metropolitan DAPs.⁴²

The DAPs determine all major infrastructure and development proposals instead of local councils or the Western Australian Planning Commission (WAPC). The DAPs are not involved with the preparation of planning schemes or planning policy. The matters which the DAPs may determine are set out in the PD Act and the *Planning and Development (Development Assessment Panels) Regulations 2011*. There are three types of DAP applications: mandatory, optional "Opt-in" and delegated applications (by the local government or WAPC). The mandatory threshold for DAP applications is \$7 million (City of Perth – \$15 million), and the optional threshold where the applicant or councils can refer an application be determined by the DAP is between \$3-7 million (City of Perth – \$10-15 million). Some stakeholders consider that the thresholds for the "opt-in" should be broadened. The DAP is precluded from determining development in an "improvement scheme area" or development by a local council or the WAPC. All development applications are first lodged with the local council and are notified and assessed as per standard practice.

Each DAP is made up of five members; three specialist members, one of which is the chair, and two local councillors nominated by the relevant council where the DA is located. The involvement of independent experts in DAPs, in addition to local government councillors, is intended to strike an appropriate balance between local representation and professional advice in decision making and ensuring that decisions made by the panel are based on the planning merits. The chair must represent the DAP as the respondent in the event of any appeal. The DAPs report directly to the Minister for Planning and are administered by officers of the Department of Planning, similar to the JRPPs in NSW.

The WA Department of Planning recently undertook a review of the first two years of the fifteen DAPs' operation, based on analysis of statistics and outcomes of forums and surveys.⁴³ As a result, it has been suggested to introduce other thresholds in addition to \$ value to identify regionally significant development such as quarries. It has also been suggested that local councils be able to delegate other applications to the DAP for determination. The review indicated the objectives of providing a greater measure of transparency and reliability in decision-

³⁸ South Australia Department of Planning Transport and Infrastructure (2013) Think, Design, Deliver: Expert Panel on Planning Reform Terms of Reference 2013

³⁹ South Australia Development (Inner Metropolitan Area Development) Variation Regulations 2013 Gazetted 28.11.2013

⁴⁰ Western Australia Planning Commission (2009) Planning Makes It Happen - a Blueprint for Planning Reform

⁴¹ Western Australia Planning Commission (2013) Planning Makes It Happen: a Report Card on Planning Reform

⁴² Western Australian Planning Assessment Panel Website: <http://daps.planning.wa.gov.au/>

⁴³ Western Australia Department of Planning (2013) Planning makes it happen: phase two Review of the Development Assessment Panels September 2013

making on complex development applications was mostly being met. In particular, it was considered that the DAPs provided consistency in relation to the conditions imposed on the approval of development applications. It also was considered that the expert advice from DAP members while ensuring consideration of more technical matters, also appropriately considered local planning scheme, policies and principles.

4.8 Victoria Planning Assessment Committees

Development Assessment Committees (DACs) were introduced by the former Labor Government in 2009. Consisting of both state and local government nominees, DACs were established to address the then-government's commitment to partnering with local councils to make decisions on planning permit applications in relation to areas and matters of metropolitan, regional or state significance.

In July 2013, the Planning and Environment Act 1987 was amended to abolish the Development Assessment Committees and introduce a new opt-in Planning Application Committee (PAC).⁴⁴ The PAC system is optional for councils. The PAC is proposed to be an independent panel appointed by the Minister that will be available to provide advice to councils on specific kinds of permit applications. There is no obligation for a council to obtain the advice of the PAC, however if a council wants their advice, the Minister can make the PAC available. In addition, council can also choose to delegate responsibility for determining the application to the PAC.

The PAC will consist of a chairperson and at least four other members. The members must be appointed by the Minister, and the chairperson must be appointed from a list of nominees prepared in consultation with the Municipal Association of Victoria, the Victorian Local Governance Association, and two planning and development industry bodies. The PAC can set up subcommittees to deal with a specific application or class of applications, and it may delegate matters to the subcommittees.

The PAC is yet to commence operation. Victorian Department of Planning and Community Development is managing the appointment and administration of the PAC. Criteria for the types of permit applications that can be referred to the PAC are also under preparation. The Minister will fix the fees and allowances for the PAC. The Minister may ask the responsible authority to contribute towards the costs of the PAC or a PAC sub-committee.

⁴⁴Victorian Department of Planning and Community Development A guide to the Planning and Environment Amendment (General) Act 2013 April 2013

PART B: THE EVOLUTION OF PANELS IN NSW

This part looks at the range of factors leading to the evolution of panels to address pressures and problems arising in the development assessment process. It also looks at structural and performance factors and how independent panels can assist councils in addressing these issues.



Manly Independent Assessment Panel

5. The issues leading to the emergence of panels

The evolution of panels in NSW as well as other states can be attributed to a number of local, state and national factors. The catalyst for a particular council introducing a panel into their development assessment process has varied depending on the particular circumstances of that council and whether there are individual advocates within council willing to push for change.

5.1 Population Growth Pressure

Over the last 15 to 20 years, there have been three cycles of population and dwelling production growth in the Sydney Metropolitan area. In the first cycle in the late 1990s, there was high annual population growth with high levels of dwelling production with stocks increasing by 2% representing the highest level of growth since the early 1970s. In the second cycle post Olympics, there was a decline in population growth rates and dwelling production levels. The third cycle commencing in 2006, has seen an upturn in population growth with a gradual increasing of dwelling production rates⁴⁵.

Table 13 Population Growth Figures and Projections⁴⁶

	Liverpool	Canterbury	Fairfield	Sutherland	Warringah	Waverley	Metro Region
1996	124,300	138,700	189,100	203,800	131,100	65,900	3,610,700
2001	159,000	137,500	189,000	213,800	136,200	63,200	3,832,000
2006	170,900	135,600	187,300	212,500	139,200	64,700	3,977,200
2011	188,100	144,800	196,600	219,800	147,600	68,600	4,286,511
2016	209,900	151,400	206,300	228,600	155,700	70,700	4,655,216
2021	232,700	158,700	215,200	238,000	163,000	75,300	5,056,321

⁴⁵ Department of Planning (2008) *MDP 2008-09: Section 4 Population Growth and Housing Market Activity*

⁴⁶ Department of Planning and Infrastructure (DP&I) (2008) *New South Wales Statistical Local Area Population Projections, 2006-2036* and DP&I (2013) *New South Wales State and Local Government Area Population Projections: 2013 preliminary revision*

These growth cycles put significant pressure on the planning system, particularly in Greenfield areas and brownfield areas close to key transport nodes. With increased density comes conflict, between the existing residents who perceive a right to maintain existing land use patterns and the need to deliver housing and jobs to meet the growing demand.

In the Liverpool Council area, there was continuous significant population growth across the three cycles (Table 13). Liverpool's population grew from 30,000 in 1960, to 98,000 in 1991 and to 124,300 in 1996. The population continued to grow more than anywhere else in NSW, with more than 13% of Sydney's growth between 1991 and 2001. The population in some areas, for example West Hoxton, increased by more than six fold between 1996 to 2001 with associated demand for land and housing.

Liverpool Council established an Independent Hearing and Assessment Panel (IHAP) in 1997 in response to these significant growth pressures on the planning system. The panel by taking over the review of DAs, was able to assist in freeing up councillors so that they could focus more on strategic planning to accommodate the incredible level of growth occurring in their area.

The independent panel provided independent technical advice and assisted in the resolution of issues so that the council's decision making could be more efficient with greater transparency and integrity in the process. This set a role model for other NSW councils.

5.2 Community involvement pressures

In the 1960s and 1970s "community development" had a political action orientation associated with "movements," personified by Kelly Bush and the "green bans". There were calls for direct participation in planning leading to the introduction of consultation provisions in the EP&A Act in 1979.⁴⁷ However, with the rise of economic rationalism in the 1980s, there was reduced government support for "community involvement".⁴⁸ The 1990s saw a rediscovery of the 'community' as both a resource and a focus for empowerment leading to calls for the opening up of decision-making processes to more direct public involvement⁴⁹. Local Government was encouraged to introduce additional community participation measures to ensure impartiality in assessing issues and decision-making.⁵⁰

Community consultation and participation was also seen to be a key component of the rising sustainability movement in the 1990 with the underlying principles of social equity and more interactive participation from all sectors of the community.⁵¹ It was recognised that more effective community engagement was required during all stages in the development application and approval process. Council's practices changed with increased access to information on DAs on council's websites and additional notification of neighbours of DAs in their vicinity with invitation to make submissions.

The issue remained – should the applicant be required to engage with the "community" upfront in the DA process and to what extent should the council's assessment take the community issues into consideration in determining DAs?

⁴⁷ Lipman A & Stokes R (2008) *The Technocrat is back: Environmental land-use planning reform in NSW* EPLJ 25 3005

⁴⁸ Bullen P (2007) *Community development models and language* DRAFT March 2007 <http://www.mapl.com.au/ideas/>

⁴⁹ Barnes, M (1999) *Users as Citizens: Collective Action and the Local Governance of Welfare*, Social Policy and Administration March3(1):73–90.d

⁵⁰ Rentschler R (1997) *Community and Cultural Participation*, in *Australian Local Government: Reform and Renewal* Ed by Dollery B and Marshall N Macmillan Education Australia Pty Ltd

⁵¹ Cuthill M. (2001) *Developing local government policy and processes for community consultation and participations*, Urban Policy and Research 19:2 183

5.3 Regulatory Pressure: need to strengthen local assessments

The need for greater attention to be given to the DA assessment at the local level was acknowledged by the Federal Government as part of the Local Approvals Review Program (LARP) established in 1988 by the National Office of Local Government⁵². The LARP reinforced the importance of delegation of regulatory decision making to staff, and depending on the complexity, to the lowest competent level of staff to reduce delays and undue political influence in decision making⁵³. The LARP was widely acknowledged for improvements to the development approval practices.⁵⁴

In a review of regulatory processes as part of microeconomic reforms in 1990, the Commonwealth Government reported that existing planning and other regulatory systems were still “unwieldy, complex and difficult to use”.⁵⁵ The review argued for radical reforms including separation of administrative and political decision-making and national benchmarking of regulatory systems.⁵⁶ In response, the Australian Local Government Association (ALGA) developed the Integrated Local Area Planning (ILAP) approach in 1993 which emphasised the importance of local councils having a suitable decision making process to provide for adequate community consultation and with greater delegation of decision making to committees, staff or a combination.⁵⁷

The increasing role of local government as partners in economic development was acknowledged nationally in 1995 when local governments, represented by the ALGA signed an Accord with the Commonwealth, which secured local government representation in the Council of Australian Governments (COAG). In return, local governments agreed to support national policies on microeconomic reform.⁵⁸ Increasing focus on the need for improvements in the planning and development approval processes resulted in the formation of the Development Assessment Forum (DAF) in 1998. The DAF *Leading Practice Model for Development Assessment* 2005 advocated that determination of DAs should be by professional staff or private sector experts.⁵⁹

At the State level, in 2003, the Regulation Review - Local Development Taskforce⁶⁰ concurred with the recommendations of both the Land and Environment Court Working Party (2001) and ICAC (2001) that councils should be encouraged to establish independent panels to strengthen and improve their assessment and decision making processes.

In 2007, the Productivity Commission again identified the development approval process as a ‘major area of regulatory concern’ and subsequently, a priority area for benchmarking the quality, quantity and compliance costs of regulation to identify unnecessary regulatory burdens⁶¹. Further the Commission considered that because some important policy issues are not fully resolved at the strategic planning stage, de-facto policy-making occurred during the development application process with significant discretion exercised. This means that decision-making processes should be strengthened with greater use of independent expertise.

⁵² Commonwealth of Australia (1992) *A Manual for reforming Local Government Approvals Systems (LARP)* Canberra Office of Local Government

⁵³ Sproats K and Crichton R (1997) *Regulatory reforms: Balancing interests*, in Dollery B and Marshall N *Australian Local Government: Reform and Renewal* Macmillan Education Australia

⁵⁴ Bruce Moon (1998) *Reforming The Queensland Land-Use Planning Legislation*, Australian Planner Vol 15 No 1 1998

⁵⁵ Department of Immigration, Local Government and Ethnic Affairs (1990) *Local Government Regulation of Land and Building Development*, Australian Government

⁵⁶ England P, (2010) *From revolution to evolution: Two decades of planning in Queensland* 27 EPLJ 53

⁵⁷ ALGA (1993) *A Guide to Integrated Local Area Planning* by Graham Sansom Pty Ltd

⁵⁸ Chapman R, *Intergovernmental Relations*, in Dollery B and Marshall N, *Australian Local Government: Reform and Renewal* (MacMillan Education Australia, 1997)

⁵⁹ Development Assessment Forum (2005) *A Leading Practice Model For Development Assessment In Australia*

⁶⁰ DIPNR (2003) *Improving Local Development Assessment in NSW*, Report by the Regulation Review - Local Development Taskforce

⁶¹ Productivity Commission (2007) *Final Report Performance Benchmarking of Australian Business Regulation*

5.4 Pressure from performance monitoring and benchmarking

The *Local Government Act 1993* introduced a number of reforms to increase the transparency and accountability of local government, and to encourage efficiency and effectiveness in service delivery. The Commonwealth Government, as a provider of significant funding to local government, started to take an increased interest in local council performance with the introduction of the *Local Government (Financial Assistance) Act 1995* which required the Commonwealth Minister for Local Government to report annually to Parliament on the performance of local government nationally. From 1995, all councils in NSW were required to report against 26 key performance efficiency indicators. These indicators cover 11 functional areas, including development application services.

The NSW Department of Local Government in Comparative Information on Local Government Councils reported the monitoring information on DAs annually up to 2006. The Department of Planning then took over reporting on the DA processes, reporting annually in *NSW Local Development Performance Monitoring Report*. The access to comparative performance data has provided information for the council itself, as well as the State and Federal government to compare the efficiency of development application processes within councils. It has also given critics the information to place political pressure on councils and the State government to improve the system. In particular, the monitoring information exposes the long timeframes associated with the determination of major developments and developments where there is community opposition. This identified the need for system changes to improved community engagement and the resolution of complex technical issues as part of the DA process.

5.5 Pressure arising from the short comings in strategic planning

One of the key weaknesses identified in the review of the planning system in NSW is its focus on the assessment of individual developments with less emphasis for long-term strategic planning, leaving builders, developers and home renovators frustrated by delays and uncertainties.⁶² Planning instruments are often out of date, reflecting the aspirations of the past rather than providing for the current and future needs of the community. As a result, part of the complications associated with the NSW planning is that the DA process becomes a surrogate for strategic planning.

In many circumstances, landowners or developers propose developments that do not fit the planning controls in the relevant LEP applying to that land. Residents and communities then have to engage with the shaping of their area in a reactive way through the DA process, usually as objectors to unpredicted or unwelcome proposals.

Dealing with out of date planning instruments and development controls

When the local environmental plan (LEP) provisions were introduced in 1979 under the EP&A Act, they were intended to replace the Town and Country Planning Schemes and Interim Development Orders made under previous planning legislation. A number of those old schemes still survive today for example in Gosford, Ku-ring-gai and Campbelltown. Under the EP&A Act, the LEP making process became cumbersome with a comprehensive LEP taking on average five years to complete, and simple amendments taking an average of 196 days.⁶³ As a result, LEPs tended not to be kept up to date, and were constantly amended in response to “pressure” through the spot rezoning process. Currently there are still 18 councils with LEPs, which were initially made in the 1980s. Some councils still have a combination of old and new LEPs, for example Penrith has 14 instruments, Campbelltown has 8 and Canterbury has 6.

The Standard Instrument (SI) LEP was introduced in 2005 to provide a standard format for the LEPs. Prior to the introduction of the Standard Instrument (SI), there were approximately 5,500 local planning instruments across the State, containing some 3,100 different land use zones and 1,700 land use definitions. It was intended that councils undertake strategic planning as a

⁶² Moore T and Dyer R (2012) *The Way Ahead for Planning in NSW: Recommendations of the NSW Planning System Review*

⁶³ Smith, S. 2008. *The NSW planning system: Proposed reforms, Briefing Paper No 1/2008*, Sydney: NSW Parliamentary Library Research Service

precursor to introducing their SI LEP. However because it was taking too long, they have been allowed to convert their old out of date LEPs into a single SI format LEP. By the end of 2013, 135 of the 152 councils have SI LEPs, many still reflecting the aspirations of the past. The use of the SI LEP is intended to simplify and make the land use provisions easier to use. It is also intended that councils should regularly and systematically review their LEPs and keep them up to date. However because so many of the councils have been allowed to convert their old LEPs into the new format, without undertaking strategic planning, in many cases, they do not provide an appropriate framework for the current and future land uses in their area.

The outcomes: the need to do spot rezonings to permit the use...

Planning proposals/spot rezoning amend the LEP and may change the use permitted on specified land, the building standards and or other specific provisions which may have limited the proposed use of the land. There have been 350 planning proposals for spot rezonings in 95 councils during 2013. Table 14 lists the councils with the most spot rezonings proposals lodged in 2013. Most of the spot rezoning proposals relate to individual sites or cluster of sites where the zoning or other provisions do not permit the proposed use for the site. The proposals took between 2 and 10 months to process, on average about 5 months.

Table 14 Top 10 Councils with the highest number of Planning Proposals in 2013⁶⁴

Council	Age of the LEPs	No of Proposals lodged in 2013	Action in 2013 on proposed LEP amendments		
			Approved	Refused	In progress
The Hills Shire	2012 & 2005	16	1		15
Lake Macquarie	2004 & 2000	15	2		13
Wollondilly	2011	14	0		14
Wingecarribee	2010	14	1		13
Wyong	1991	12	4	2	6
Newcastle	2012	11	1		10
Ballina	2011 & 1987	11	1		10
Parramatta	2011 & 2007	10	0	1	9
Camden	2010	10	2		8
Maitland	2011	10	1		9

Or to use SEPP 1/Clause 4.6 to vary the standards

Instead of attempting to amend the LEP to permit a proposed development on a site, *State Environmental Planning Policy No.1 – Development Standards* (SEPP 1) or Clause 4.6 in a Standard Instrument LEP allows an applicant to lodge an objection to development standards in the LEP such as minimum lot sizes, height and floor space ratio. The consent authority, prior to approving such a variation, is to be satisfied that compliance with the standard is “unreasonable” or “unnecessary” or tends to hinder the attainment of the objectives specified in the EP&A Act. SEPP 1 is used to allow the applicants to go beyond the scope for which it was originally intended. This has resulted in development standard creep and the use of SEPP 1 as a defacto plan-amending device. Where planning instruments and associated standards are up to date and based on sound strategic assessment, there is little demand for the use of SEPP 1.

In planning, there has long been a conflict between legal certainty and a desire for flexibility to allow land uses to adapt to evolving development patterns. Flexibility has typically been delivered by giving discretionary powers to decision-makers. Such discretion is often not subject to a clear set of criteria. As a result, the inappropriate use of SEPP 1 has been a feature of past ICAC investigations involving corrupt conduct, for example in Wollongong⁶⁵ and Rockdale Councils.^{66,67} This is partly because of developers putting pressure on councillors or council’s staff to gain the significant windfall profits that can result from being able to change the planning provisions. In both of these cases, ICAC recommended that council should establish an IHAP as part of the safeguards to managing the risks associated with the exercising of discretion.

⁶⁴Note – Data from the Department of Planning and Infrastructure LEP Tracking System <http://leptracking.planning.nsw.gov.au/Default.aspx>

⁶⁵ICAC, *Report on an investigation into corruption allegations affecting Wollongong City Council - Part Three* (October 2008).

⁶⁶ICAC, *Report into corrupt conduct associated with development proposals at Rockdale City Council* (July 2002).

⁶⁷ICAC (2012) *Anti-corruption safeguards and the NSW planning system in 2012*

As a result of ICAC recommendations, instead of DAs with variations from standards of more than 10% being determined by officers, all development applications must now be referred to the council for determination (unless the Department of Planning and Infrastructure has granted an exemption from this requirement).⁶⁸ With councils with independent panels, the DAs are referred to the panel for advice or for determination. In Mosman Councils, it is a key criteria for DAs to be referred to Development Assessment Panel (DAP) – for example in relation to variations in heights of buildings (Table 15).

Table 15 Matters referred to Mosman DAP because of the use of SEPP 1 in 2011-2012

Based on data from Mosman Council's website

2011-12	Total No. of DAs or s96 Mods referred to MDAP	No. Of single dwelling/ Semis	No. Of Alteration or Addition to existing building	No. Of DAs using SEPP 1 – CI 4.6>10%	No. When MDAP modified council recommendation
July 2011	6	5	4	3 (50%)	1 (17%)
Aug 2011	9	8	6	6 (55%)	3 (27%)
Sept 2011	15	10	10	8 (53%)	7 (47%)
Oct 2011	9	7	7	1 (11%)	4 (44%)
Nov 2011	10	5	6	5 (50%)	6 (60%)
Dec 2011	14	12	5	8 (57%)	7 (50%)
Feb 2012	9	9	6	4 (36%)	5 (45%)
March 2012	7	6	4	5 (71%)	5 (71%)
April 2012	7	6	4	5 (71%)	3 (43%)
May 2012	8	6	7	1 (11%)	7 (78%)
June 2012	9	9	8	5 (56%)	4 (44%)
Total	101	83 (77%)	67	51 (50%)	52 (48%)

5.6 Pressure from councils' legal costs

In the 1970's, there was a renewed focus on the use of alternative dispute resolution (ADR) processes.⁶⁹ A range of ADR practices and institutions were established including the Australian Commercial Disputes Centre (1986).⁷⁰ The Land and Environment Court Act (1980) had conciliation provisions included at the outset (s34 conferences) with mediation provisions added in 1991.

In 1991 the Public Accounts Committee of the NSW Parliament tabled a report entitled *Legal Services provided to Local Government*⁷¹, which reported that many councils were spending extensive resources defending their decisions in the Land and Environment Court. The report suggested that mediation could be considered at three stages during the DA process to prevent or de-escalate disputes. In 1992, Newcastle Council introduced mediation with external experts to resolve disputes and to reduce the long council meeting times and delays in decisions.⁷²

The Public Accounts Committee undertook a survey of NSW councils in 1997 that found that despite extensive conferences, seminars and training sessions on facilitation, mediation and conflict resolution, only 16 per cent of councils had formally incorporated ADR procedures into their practices⁷³. It found that councils with strong development pressures still used a significant proportion of their planning and regulatory costs for legal expenses.⁷⁴ Another Public Accounts Committee Report in June 1998 "*Changing the Culture: Dispute Management in Local Councils*", again reported that councils legal expenditures remained high.⁷⁵ The Committee considered that if councils could better manage their development approvals systems by using alternative dispute

⁶⁸ NSW Department of Planning and Infrastructure (2011) *Monitoring and reporting variations to development standards*, Planning Circular PS 11-018

⁶⁹ Condliffe P (2000) 'A short history of alternative dispute resolution in Australia: 1975-2000' vol 19(2) *The Arbitrator and Mediator*.

⁷⁰ Buck, T (2005) *Administrative justice and alternative dispute resolutions: the Australian Experience* UK DCA Research Series 8/05 November 2005

⁷¹ NSW Public Accounts Committee (1991) *Inquiry pursuant to s57(1) of the Public Finance and Audit Act 1983 concerning the Legal Services provided to Local Government Fifty-Seventh Report of the Public Accounts Committee, Parliament of NSW.*

⁷² Rollinson D H, 2008 *Alternative Dispute Resolution in Local Government Planning in NSW: Understanding the Gap between Rhetoric and Practice* – submitted to fulfil requirements for the PHD, UNSW

⁷³ Parliament of NSW Public Accounts Committee (1997) *Legal Services to Local Government: Minimising Costs Through Alternative Dispute Resolution*, Discussion Paper, November 1997.

⁷⁴ Condliffe, P (1998) "Saving the ADR way: the case of local government," *ADR Bulletin*: Vol. 1: No. 2, Article 6.

⁷⁵ Parliament of NSW Public Accounts Committee (1998) *Changing the Culture: Dispute Management in Local Councils*.

resolution at various stages in the application process, not just at the end of the process, it could prevent potential disputes. A number of councils experimented with ADR approaches such as Ashfield with a Mediation Policy in 1997, Gosford with a Facilitation Committee program in 1998, Hornsby with a Facilitation and Mediation Code in 1998.

By the end of the 1990s, interest in ADR approaches in local councils had peaked⁷⁶. Suspicion had been developing regarding the use of ADR approaches as being mechanisms to “talk people around” and to deliver additional concessions for developers. There was more interest in councils moving towards an approach which not only provided for ADR but also could be an advisory body on broader planning matters to strengthen decision making, as had been established by 2003 in the IHAPs in Liverpool, Fairfield, Sutherland and Warringah.

The Land and Environment Working Party considered that the IHAP model could provide a means of reducing the number of planning appeals and reducing legal costs⁷⁷. The Chair of the Liverpool City Council IHAP reported to the Working Party that the Council adopted the majority of the IHAP’s recommendations, and that the Council has been involved in fewer planning appeals since its establishment. Liverpool Council reported that, in 2000, its IHAP dealt with 71 applications. Four of these determinations were appealed. None of those four appeals were successful.

In October 1999, the Fairfield City Council established its IHAP. The Fairfield City Council reported that, it’s IHAP dealt with 64 applications in its first year and that none of these were the subject of an appeal. In 2011-12, there were only 5 appeals (representing 0.6% of DAs determined) of which 3 were upheld. Sutherland Council indicated a 50% reduction in the number of appeals and associated costs since the introduction of their panel. In 2011-12, there were 10 appeals (representing 1% of DAs determined) of which none were upheld.

It is difficult to quantify the extent of any reduction in LEC cases and associated costs as a result of independent panels due to the many variables involved. Table 16, along with Appendix 2, 3 and 4 provides information on council decision makers, court appeals and s82A reviews for councils with panels.

Table 16 Class 1 Appeals in councils with independent panels - 2011-12 and 2012-13⁷⁸

Councils Panels	No. Of DAs		No. Of Class 1 appeals		% Of DAs with Class 1 appeals		% of Class 1 appeals upheld	
	2011/12	2012/13	2011/12	2012/13	2011/12	2012/13	2011/12	2012/13
Advisory Independent panels – as of July 2013								
Canterbury	472	471	2	3	0.4%	0.6%	50%	33%
Fairfield	849	772	5	5	0.6%	0.6%	60%	20%
Liverpool	1,151	1,204	1	4	0.1%	0.3%	0%	25%
Sutherland	1,042	1,117	10	6	1.0%	0.5%	0%	0%
Waverley	546	553	32	26	5.9%	4.7%	75%	81%
Decision making Independent panels – as of July 2013								
Lane Cove	214	224	7	2	3.3%	0.9%	86%	50%
Manly	312	267	14	12	4.5%	4.5%	71%	67%
Mosman	261	235	3	8	1.2%	3.4%	0%	50%
Warringah	1,402	1,312	11	11	0.8%	0.8%	73%	73%
All Metropolitan councils								
Average	672	667	8	7	1.3%	1.1%	40%	48%

Data reported up to 2006 in the Department of Local Government Comparative Information Annual Reports indicate that in Liverpool, Sutherland, Warringah and Canterbury Councils, there was a significant drop in legal costs as a percentage of planning and building controls costs in the first few years after their IHAPs was introduced (Appendix 2). However other factors such as major court cases complicated this data. For example Liverpool Council’s legal costs while initially dropping, rose again because of a series of court and ICAC matters unrelated to the IHAP operations.

⁷⁶Rollinson D H, 2008 Alternative Dispute Resolution in Local Government Planning in NSW: Understanding the Gap between Rhetoric and Practice – submitted to fulfil requirements for the PHD, UNSW

⁷⁷Land and Environment Court (2001) Report of the Land and Environment Working Party

⁷⁸Based on Data on NSW Department of Planning Local Development Performance Monitoring Report 2011-12 and 2012-13

In the NSW Department of Planning Local Development Performance Monitoring Report 2005–06, Councils reported that their legal costs amounted to \$14.27 million with 11 councils with legal costs over \$500,000, with highest reported legal costs incurred in Ku-ring-gai (\$1m), Baulkham Hills (\$989,994), North Sydney (\$893,838), Pittwater (\$875,446) and Leichhardt (\$751,605). The legal cost data was not reported after 2006, so information in the subsequent years is not readily available.

Canterbury, Fairfield, Liverpool, Sutherland, Mosman, North Sydney and Warringah all have less than the average number of Class 1 appeals for Sydney Metropolitan Councils⁷⁹. Waverley, Manly and Lane Cove have more appeals than the average. With Manly Council, in 2011–2012, only 5 of the 14 Class 1 appeals matters related to decisions by the Manly Independent Assessment Panel (MIAP) - 2 appeals against refusals were dismissed and 3 appeals against consent conditions as part of the approvals were upheld with consent conditions being modified by the Court. The remaining 9 appeals were against determinations by council officers, of which 7 were upheld.⁸⁰ This pattern of appeals indicates that the panel is assisting in reducing court costs with those matters referred to it.

5.7 Pressure from corruption risk issues

The Independent Commission Against Corruption (ICAC) was established under the Independent Commission Against Corruption Act 1988 to examine practices, policies and systems of public authorities including local councils that may be “conducive” to corrupt conduct. From the outset, local government was a major source of complaints and investigations principally associated with conflicts of interest of staff and councillors. In 2011–2012, 45% of public complaints to ICAC were about councils. The most frequent complaints were associated with “development applications and land rezoning”, accounting for 26% of allegations.⁸¹

ICAC has undertaken extensive research in an attempt to development approaches to minimise the risks of corruption in the development approval processes including:

- *Local Government: Public Duties and Conflicting Interests* (1992)
- *Corruption Resistance Strategies: Researching risk in local government* (2001)
- *Taking the Devil out of Development Discussion Paper* (2001)
- *Taking the Devil out of Development: Recommendations for Statutory Reform* (2002)
- *Corruption risks in NSW Development Approval Processes: Discussion Paper* (2005)
- *Corruption risks in NSW Development Approval Processes: Position Paper* (2007)
- *Anti-corruption safeguards and the NSW planning system* (2012)

Following an ICAC investigation into Randwick Council in 1995, recommendations were made to reduce opportunities for corruption by increasing transparency and accountability and reducing conflicts of interest risks relating to conduct by councillors and staff in the exercise of their functions. In 1999, ICAC ran a series of workshops for councils to reduce opportunities for corruption in the use of delegated authority and to prevent regulatory capture⁸².

During 2000–2001, ICAC conducted extensive research into corruption risks in local government in NSW with a particular focus on the discretionary powers within local council decision-making⁸³. The research found that the corruption risk profiles varied greatly from council to council depending on factors such as the number of council staff and the development patterns in the area, with the risk more prevalent in coastal and metropolitan councils. The recommendations included having a clear demarcation between councils’ consent role and their other functions⁸⁴.

⁷⁹Data from NSW Department of Planning Local Development Performance Monitoring Report

⁸⁰Note: information on the Land and Environment Court Online Judgement data base http://www.lec.lawlink.nsw.gov.au/lec/judgments.html#Online_judgments_

⁸¹ICAC (2012) Annual Report 2011–2012

⁸²ICAC (1999) Strategies for preventing Corruption in Government Regulatory Functions

⁸³ICAC (2001) Taking the devil out of development: exploring corruption risks in administration of development applications by local councils: Discussion Paper.

⁸⁴ICAC (2002) Taking the devil out of development: recommendations for statutory reform: Position Paper.

As a result of the Rockdale inquiry (2002), ICAC recommended that IHAPs be established in councils on a voluntary basis to help defuse the level of influence by an individual councillor in the assessment process and to assist councillors in finding the appropriate balance, of their fundamentally, at times, incompatible roles – as community advocate and determining authority.

The ICAC, when commenting in 2005 on corruption risks in the DA process, noted that a system whereby council officers rather than councillors decide on DAs does not solve the problem, but merely transfers the risk of corruption from one group to another.

Over the last 18 years, officers and councillors from 20 council have been “ICAC-ed” and six councils have been sacked (Table 17). Though not all these incidents related to development approval processes, it does demonstrate the difficulty in minimising or avoiding corruption risks at the individual level as well as more broadly across councils’ systems. There are a range of potential risks of conflict of interest and corruption for councils in their “management”, “consent authority” and “community advocate” roles.

Corruption risks associated with planning matters identified by ICAC included:⁸⁵⁸⁶

1. *The different and conflicting roles of Councillors:* Under the Local Government Act 1993 and EP&A Act, councillors have different and often times conflicting roles, including responsibility for approving strategies and policies, setting budgets, deciding whether to grant development consent, and being a constituent representative.
2. *Councillors and non-pecuniary conflicts of interest:* Councillors as community representatives will inevitably experience non-pecuniary conflicts of interest, which can undermine the integrity of the planning and development approval system.
3. *Council officers and regulatory capture:* Council officers can have recurring dealings with professional developers and architects, which can create the risk of regulatory capture. Regulatory capture is a form of political corruption when an officer acts in a manner to advantage a person or group (usually with whom they have form a social or other relationship). Problems arise when the regulator acts in the best interests of those being regulated to the detriment of the general public.
4. *Consultants:* Many councils engage consultants on a regular basis to assist in planning matters. Consultants can also experience personal conflicts of interest that undermine their impartiality and the integrity of the council.
5. *Development standards:* The departures from development standards can be necessary in some circumstances with the potential to create probity considerations regarding the perception of, or actual misuse of planning discretions.
6. *Planning agreements:* These may result in public benefits that do not relate to the subject development with the potential to create probity considerations including the perception of, or actual misuse of planning discretions. The developer gets an approval for a development inconsistent with the relevant planning controls if as part of a planning agreement or developer contributions, finance or works are provided for the provision of much needed roads, parks or other services beyond what would normally be required under s94
7. *Political donations:* Political donations from parties with an interest in a development outcome have the potential to impact on the integrity of the planning system
8. *Conflicting roles as landowner:* Councils as the consent authority for the majority of development applications can have conflicting roles in situations where they are landowners and applicant or where they are dealing with DAs involving the purchase of council-owned land. The council in a partnership with the private developer, may up zone its land to develop in joint partnership or to sell to the developers, to strengthen the council finances

⁸⁵ ICAC (2005) Corruption Risks in New South Wales Discussion Paper

⁸⁶ Allan P (2006) Are Councils Sustainable? Final Report: Findings and Recommendations Independent Inquiry into the Financial Sustainability of NSW Local Government May 2006

Table 17 Competency and Corruption Risks - ICAC and DLG Investigations⁸⁷

Date	Council		Investigations and Allegations
2013	Ryde	Councillors & Officers	Alleged release of confidential council information in an attempt to undermine council employees
2012	Ballina, Bathurst, Burwood, Byron, Botany, Sydney, Lithgow, Liverpool, Narrandera, Orange, Walgett, Waverley, Yass	Officers	Corrupt conduct by receiving gifts and benefits from supplier companies, as an inducement to continue placing orders with these companies or as a reward for placing orders with these companies:
2012	Auburn	Councillor	Accepted a cash payment from developer to expedite approval for a development application.
2012	Willoughby	Officer	Acted in favour of business owners in return for financial and other benefits.
2011	Strathfield	Manager	Solicited a payment for his own benefit
2011	Burwood	GM & Officers	Corrupt conduct in the course of their administration of staff and use of resources at the Council
2010	Canada Bay	Manager	Payments from contractors engaged to conduct work for the Council, in return for showing favour to those contractors in the course of his work with Council.
2010	Woollahra	Officer	Corrupt conduct by offering a payment to secure employment at Council.
2010	Strathfield	Officer	Corrupt conduct by giving a benefit to a Council employee as an inducement for facilitating negotiations for a licence agreement for a Council property.
2009	Warringah	Officers	Corrupt conduct by offering cash payments to two Council employees in order to facilitate council building inspection approval of their business premises.
2009	Ku-ring-gai	Officer	Corrupt conduct by giving benefits to a Council officer.
2008	Wollongong	Councillors, Managers & Officers	Allegations that former and current Council officials and two developers engaged in corrupt conduct in relation to the assessment of development applications and a range of other matters. - Council sacked
2008	Shell harbour	Councillors	Incompetence, incidents of disorder amongst councillors - sacked
2008	Port Macquarie-Hastings	Councillors And Officers	Misleading the public, Bankruptcy - "incompetent" in handling development - sacked
2007	Wollongong	Manager	Bribe to favourably treat the developer's proposal to purchase and develop a Council property.
2007	Bankstown & Strathfield	Officer	The conduct of a former council officer at Bankstown and Strathfield councils, and a contractor
2007	Burwood	Mayor & Former Mayor	A bribed to approve development applications and had failed to properly disclose pecuniary interests relating to Council business
2007	Parramatta	Officers	Corrupt conduct and brothel operators
2005	Strathfield	Mayor Councillors	Payment of money and relationships between mayor, councillors, developers and others in relation to property developments
2005	Tweed	Councillors	Corruption, election funding irregularities, significant breaches of planning laws, developer-controlled group of councillors - sacked
2005	Liverpool	Councillors Officers	Investigated the original development consent for the Orange Grove warehouse clearance outlet
2004	Liverpool	Councillors & Officers	Financial mismanagement and bungling Oasis development - sacked
2004	Walgett	Councillors & Officers	Poor performance - sacked
2004	Rylstone.	Councillors & Officers	Integrity failure - prudent financial managers - sacked
2003	Liverpool	Officers	The involvement of officers in the development Bulldogs Leagues Club at Woodward Park, and whether they acted corruptly
2003	Warringah	Councillors	Claims of corruption, development fraud and conflicts of interest and inappropriate use of ratepayers money - discrepancies in council planning decisions- third time the Council was sacked - 1967 and 1985 previously
2002	Rockdale	Councillors	Soliciting, receiving and offering bribes
1999	Liverpool	Officers	Corrupt conduct by Manager in his dealings with contractors
1998	Fairfield	Councillor	Corrupt conduct findings against a councillor and five other persons
1997	Lane Cove, Holroyd, Fairfield	Councillors Officers	Corrupt conduct of officers and others in relation to property developments
1995	Randwick	Councillors Officers	Corrupt conduct of officers and others in relation to property developments

Having a conflict of interest does not necessarily lead to corrupt practices, but there are greater risks in these circumstances. The ICAC has made a number of recommendations to address corruption risks. For example, the *Local Government (Discipline) Regulation 2004* now requires all councils to adopt formal systems for the management of conflicts of interest with councillors having a duty to disclose conflicts.

⁸⁷ Note: Information from ICAC website <http://www.icac.nsw.gov.au/investigations/past-investigations>

The ICAC recommendations also include utilizing independent panels in the determination of significant developments. To avoid corruption risks associated with an independent panel, a number of safeguards can be built into the process. For example:

- The members of the panel can be rotated so that the applicant and the public does not know until the day of the panel hearing which members will be on that panel. This reduces the chance to lobby or exercise any influence on panel members
- The independent expert panel members should not work or live in the council area
- The panel members at the beginning of each hearing should declare whether have a conflict of interest with any matter on the agenda and withdraw if that is the case
- There is a public hearing by independent panel members and not by staff, who might have been too involved in getting an application to this point
- There is a public report with a recommendation or decision with reasons justifying the approach.

The positive consequence of an independent expert panel is that the council can regard the panel as its body that can strengthen its assessment processes and give more confidence to its community and investors in the integrity of its decision-making.

5.8 Pressure from planning reforms

1997: Increased load as a result of the integrating the BA with the DA

The major amendments to the EP&A Act in 1997 introduced a number of changes in response to the Federal and State pressures for a more efficient system with integration of building and planning approvals and with the introduction of private certifiers (responding to competition policy) who, in addition to council officers, could issue complying development and construction certificates.

Prior to 1997, houses and many types of minor works in most council areas did not need a development approval (DA) and only a building approval (BA) by a council building officer, with no consultation requirements. After 1997, these developments all required a DA with notification as well as a construction certificate. Complying and exempt development provisions were introduced supposedly to streamline the approvals of minor works and houses with complied with the council's controls. However this did not initially happen and the number of DAs needing to be processed significantly escalated. (Table 18)

Table 18 Number of development applications processed by councils⁸⁸

	Liverpool	Canterbury	Fairfield	Sutherland	Warringah
1995/1996	948	493	702	1,424	663
1996/1997	812	413	765	1,266	534
1997/1998	841	466	686	1,426	549
1998/1999	3,812	1,908	4,153	3,461	3,901
1999/2000	3,842	2,049	2,992	2,762	2,399
2000/2001	2,934	1,058	1,962	2,704	1,792
2001/2002	2,799	1,038	2,343	2,102	2,092
2002/2003	2,581	1,469	2,118	2,555	2,081
2003/2004	2,469	1,349	2,343	2,099	1,956

This, along with the increase in population and demand for housing, led to a major increase in work load for council planners, particularly in growth areas, often with reduced peer review and supervision of the assessment process. It also escalated the number of developments being considered by councils leading to an increase in the number of council meetings and meeting times.

2008: Attempt to regulate council panels

The Local Government Act 1993 gives power to council (elected councillors) to delegate most of its responsibilities to the General Manager and other bodies, for example, a panel. A panel can be established under Section 355 of the Local Government Act. It can be delegated authority by

⁸⁸Note: Data from Department of Local Government Comparative Information Annual Reports

the Council under Section 377 to provide advice on, or to determine DAs or by the General Manager as a sub-delegation under section 378 of the Act⁸⁹. Currently all independent assessment panels have been established by councils under the provisions of the Local Government Act. This has given councils ownership of the membership and operation of their panels.

One of the NSW Government's goals of the 2008 reforms was to encourage councils to strengthen their development assessment processes by establishing independent panels. Part 2A Division 4 "Independent Hearing and Assessment Panels" was introduced into the EP&A Act to give the Minister the ability to standardise council independent panels. Section 231 provides that a council may constitute a panel of experts to assess a DA (if not regional development) or any planning matter referred to the panel by the Council. The current provisions only relate to "advisory" panels.⁹⁰

While there are no explicit requirements for council to establish a panel, the Minister for Planning may make an environmental planning instrument, which requires a council to do so. The provisions mandate expertise requirements for members of panels, and do not allow for community representatives. The provisions provide the Minister with the ability to set panellists pay rates and procedures and to require councils to submit a report on the panels' activities within a specified timeframe. These provisions have been seen as providing the State government with the ability to interfere in councils' operations.⁹¹

Fairfield Council wanted to continue to operate their IHAP under the Local Government Act and hence changed the name of their panel to Independent Development Assessment Committee in 2009.⁹²

2013: Threat of State interference as a motivator for establishing panels

A key focus of the current planning reforms has been to strengthen public confidence in the planning system. The Green Paper indicated strong support for the use of independent expert panels. It was initially proposed that local "decision making" panels be mandated for all Councils.⁹³ The White Paper stepped back from a mandated regime but encouraged councils to follow the lead of a quarter of Sydney councils to establish independent expert assessment panels⁹⁴. These papers advocated that panels should be given the authority to determine locally significant development applications freeing up elected councillors to deal with strategic decisions for their areas and removing the DA decision making from the political process.

Part 7 in the *Planning Administration Bill 2013* expands on the IHAP provisions in the Part 2A Division 4 of the EP&A Act and Regulation to include panels that are constituted by a council to exercise the consent authority functions. The provisions state that:

- A council may constitute a "panel of experts" to exercise the consent authority functions of council or to assess DAs and any other planning matter.
- The council's local plan can require that a panel be established to undertake certain functions
- The types of "experts" are nominated and exclude community representatives.
- The panel may receive or hear submissions from interested persons and must submit a report to the council within the time required by the council.
- The council must provide an annual report on the panels operations to the Director-General.
- Regulations may set out procedures for the operation of IHAPs.

⁸⁹ Smyth P, Reddel T and Jones A (2005) *Communities and local governance in Australia* UNSW Press

⁹⁰ Linda Pearson and Peter Williams* (2009) The New South Wales planning reforms: Undermining external merits review of land-use decision-making? 26 EPLJ 19

⁹¹ Lipman A & Stokes R (2008) The Technocrat is back: Environmental land-use planning reform in NSW EPLJ 25 3005

⁹² Fairfield Council (2009) Review of the Independent Hearing and Assessment (IHAP) Process Item No 223 - G14-02-038(3) Services Committee meeting 8 September 2009

⁹³ Department of Planning and Infrastructure (2011) The Green Paper

⁹⁴ Department of Planning and Infrastructure (2011) The White Paper and Planning Administration Bill 2013 - Exposure Draft

While the majority of applications would continue to be determined by council officers under delegation, it was proposed that the NSW Government would work with councils to provide incentives to move towards an independent decision making model. More detailed performance monitoring of decisions would be undertaken with benchmarks for timeliness. If councils consistently failed to meet benchmarks, they would be required to establish a decision making independent panel to replace councilors.

At this stage, the councils with independent panels consider it prudent not to establish their panels under the EP&A Act provisions but maintain them under the provisions of the Local Government Act as this provides them with “ownership” of the operation of their panels. One of the justifications for North Sydney and Waverley Councils introducing their decision making panels in mid-2013 was so they could do so under the Local Government Act and not be blocked by the new planning legislation. Holroyd and Blacktown Councils have also now resolved to establish independent panels under the LG Act. Councils are also now choosing not to call their panels IHAPs, but instead a variety of names such as Development Assessment Panels, Independent Planning Panels and Independent Development Assessment Committees, to ensure the Planning Bill do not apply and they maintain ownership of their panels.

6. Structural Factors and Independent Panels

Currently there are 13 NSW Councils with independent panels with another council in the process of setting a panel up. A number of surveys show a high level of acceptance and support from applicants, consultants and the community for local independent assessment panels. Key issues in relation to the establishment of these independent panels and their operation within these councils are looked at in this and the next section which discuss panels in the context of structural and performance factors.



Mosman Development Assessment Panel

6.1 Role of councillors and council officers

The determination of a development application can require a balancing of short and long term, private and public, as well as social, economic and environmental interests. This balancing act must be undertaken with each development application, whether an amendment to a house or a highly controversial development with major implications for the region. One question is what type of process is best suited to making such decisions? Another is, who should make the decision?⁹⁵

The way in which elected councillors and council staff share responsibilities and decision-making roles is often not transparent or well understood by the community. ⁹⁶The extent of officer's involvement in the DA process is dependent on the level of delegation granted by the councillors and the general manager⁹⁷. It can be anything from 60% of the applications being determined by officers to 100%. (See Table 19)⁹⁸

The role of councillors

The Local Government Association considers that councillors should have the lead role in development decisions that affect local communities as they are best placed to inform the planning process of the needs and expectations of their local community. They consider the principles of local democracy should be respected, by maintaining councillors' role in DA decision-making.

However other observers consider that there can be a range of issues with the operation of different councils and a number of problems with councillors being the decision maker including:

⁹⁵Carson L (1995) Perspectives on Community Consultation Australian Planner Vol 32 No 4 p217 1995

⁹⁶Sproats K and Crichton R Regulatory reforms: Balancing interests (1997) in Dollery B and Marshall N Australian Local Government : Reform and Renewal Macmillan Education Australia

⁹⁷Local Government and Shires Associations of NSW (2006) Independent Inquiry into the Financial Sustainability of NSW Local Government - Final Report: Findings and Recommendations May 2006

⁹⁸Department of Planning (2012) Local Development Performance Monitor Report 2011-12

- “Iron triangles” where councillors, officers and private contractors develop informal collusive arrangements and decisions are made based on these arrangements rather than merit
- “Asymmetric information and councillor capture” where part time elected councillors are dominated by better informed senior council officers
- “Political entrepreneurship” where councillors intent on political office in higher tiers of government use council activities to advance their careers.⁹⁹

The wording of the section 232 of the Local Government Act 1993 provides for tensions in the councillor’s roles, which are divided into three parts:¹⁰⁰

1. As legislators— responsible for the planning framework and policies applying to development, e.g. approving local strategies, LEPs (for ministerial approval) and DCPs and other policies
2. As judiciary/determining authority – responsible for control of the affairs of the council including determining development applications
3. As advocate- an elected person responsible for representing the communities:
 - To provide leadership and guidance to the community
 - To ensure their views are considered as the residents and ratepayers
 - To represent the interest of an applicant and/or objector in the DA process, and
 - To facilitate communication between the community and the council.

The ICAC’s *Taking the Devil Out of Development* paper in 2003 acknowledged these differing roles and associated tension-facing councillors because of the lack of separation of these conflicting roles.¹⁰¹ ICAC’s criticism of councillors’ involvement in the DA process has ranged from allegations of *conflict of interest, corruption, bias, being philosophically pro-development or anti-development, political point scoring, deal making with support given for a certain application if another is supported, ignoring of officers recommendations, unlawful decision-making, lack of transparency and denial of natural justice*. The ICAC considered that one of the fundamental benefits of an independent panel is to assist councillors in finding the right balance between these roles.

Many inquiries into the behaviour of councillors have emphasised the currency and scope of the conflicting roles of councillors.¹⁰² Table 17 provides a list of councils with mayors and councillors, which have been “ICAC-ed” in the last 18 years.

Decisions about individual development proposals need to be made in the context of the strategic and policy planning framework rather than on a purely political basis.¹⁰³ However many councillors are not familiar with the planning controls and the application of these controls in the DA process. ICAC considers that where councillors do not have an appropriate appreciation of these controls, there is the potential for significant negative outcomes:

- *More noisy negative opponents:* A culture becomes established that decisions will be made in response to community “noise” rather than on a proper planning basis
- *Discourages professional assessments:* Council officers may feel a sense of frustration when their professional recommendations are rejected or not understood. This encourages them to write assessment reports to justify the anticipated desired political outcome, rather than take a proper merit based approach
- *Encourages shifting decision making to the court:* More matters end up in court with blame shifting to the Court on decision making on controversial matters.

The ICAC considered that to minimise corruption risks, it was essential that councillors received training so that they had a proper understanding of the planning system and understood the appropriate planning grounds on which they were entitled to make decisions and not as a result

⁹⁹Byrnes, J.L. and B.E. Dollery (2002) Local Government Failure in Australia: an Empirical analysis of New South Wales Australian Journal of Public Administration 61(3) 54-64

¹⁰⁰Independent Local Government Review Panel (2013): Future Directions for NSW Local Government Twenty Essential Steps

¹⁰¹ICAC (2003) Taking the Devil Out of Development position paper (2003)

¹⁰²Stokes, R(2004) Councillors’ conflicts of interest in Development Assessment: Lessons from Warringah Local Government Law Journal Vol9 Part 4

¹⁰³Mant J (2011) A reformed local government Local Government Law Journal Volume 16Part 3

of short-term political expediency.¹⁰⁴ It was also acknowledged by the LGSA that the councillor decision-making process could be strengthened through having an expert panel providing independent advice.¹⁰⁵

This approach is consistent with the DAF Leading Practice Model¹⁰⁶ that recommends a separation of roles of those responsible for the development of planning policies, and those responsible for assessing applications against these policies. The independent panels would have the potential to remove the political influence from the development approval process and give councillors more time to work on the development of policies and local strategies. It would also provide a separation between the policy maker and the implementation of policies.

The role of council officers

Council officers also play many roles as:

- Advisor to applicants ensuring they understand the DA process and the local planning rules
- Advisor to the community members who may object to a development or want to better understand the process, and
- A fair and balanced assessor and in many cases, also the decision-maker.

They may also be under pressure to assess and approve development in statutory timeframes, as well as to manage and negotiate through the process so as to limit appeal costs. As a result, officers can also be “captured”. ICAC considers that it is not an answer to the problem of councillors’ conflict of roles to say that more DAs should be delegated to staff for determination.

The investigation by the ICAC into Willoughby Council illustrates that corruption can also arise when officers are given wide discretionary powers with little effective supervision on the exercise of those powers¹⁰⁷. They recommended measures such as regular reviewing and auditing of work, staff rotations, limiting the role of specialist staff, having meeting protocols to record discussions with more than one staff member present and reducing end-to-end control of regulatory approvals so that the assessment officer is not also responsible for making the determination.

However the Planning Institute of Australia (PIA) pointed out that there can be difficulty for Council officers in maintaining or being seen to maintain an appropriate distance from applicants and their consultants. Council officers may be regularly dealing with the same builders, developers, architects, lawyers and other consultants. There may be insufficient staff resources to ensure that these applicants and their consultants get to deal with different Council officers. Council staff (especially in councils where there is a real desire to see economic development) may also be encouraged to be “customer friendly” in their work. There is certainly a clear need to separate those responsible for encouraging economic development in Councils from those responsible for the assessment and determination of resulting developments.

Although the use of panels is seen to have advantages, it has also engenders unease among some local council planners. The trend towards “panelisation” can be considered to represent a lack of confidence in advice provided by planning staff.¹⁰⁸ This lack of confidence can be seen in the 2011 Auspoll Survey (of homeowners who had recently lodged a DA) where only 38% considered that the council officers were experts in what they were assessing and only 26% agreed that the experience they had in the assessment of their DA gave them confidence in the ability of the local council officers to assess significant developments¹⁰⁹.

¹⁰⁴ Local Government and Shires Associations of NSW (2006) Independent Inquiry into the Financial Sustainability of NSW Local Government - Final Report: Findings and Recommendations May 2006

¹⁰⁵ LGSA Submission on the *Review Of NSW Planning System Issues Paper March 2012*

¹⁰⁶ Development Assessment Forum (2005) *Leading Practice Model for Development Assessment*

¹⁰⁷ ICAC REPORT Investigation into the corrupt conduct of a Willoughby City Council officer 2011

¹⁰⁸ Williams P and Maginn P.J. (2012) Planning and Governance in *Planning Australia: An overview of Urban and Regional Planning* Thompson S and Maginn P Cambridge Books Online

¹⁰⁹ Homeowner attitudes to local councils, the planning process and NSW Joint Regional Planning Panels - Auspoll Research Report commissioned by the Property Council of Australia 12 October 2011

On the other hand, an independent panel can support staff in being more open about their concerns with an application¹¹⁰. It can be seen to empower council officers to consistently implement planning controls, without having to be concerned that political pressure will be imposed on them. In councils with panels, it has been noted that the quality of assessment has improved because of the panel's peer review role. The panels can also play a role in professional staff development, particularly if assessment officers are required to be present at panel meetings and hear the panel's feedback on the assessment and recommendations.

Having a panel can also reduce the "bullying" of officers by applicants and objectors when trying to get the outcome they want. This allows for officers to give frank and fearless advice based on their merit assessment and the relevant planning controls. Where there is discretion to be exercised by the panel, the justification for the recommended approach can be given transparently.

6.2 The Question of Delegation

The delegation of responsibilities for determination of DAs under s377 or s378 of the Local Government Act 1993 can have major implications as to the efficiency and transparency of the DA process. The council's delegations "schedule" sets out what types of development applications the council will determine and what applications are to be determined by internal committees, staff and the independent panel. Some councils make the delegation schedules available on their website with positive transparency implications, but many do not.

Delegation patterns and panels

Most councils have a number of delegation levels based on the complexity of the development, the public interest and development patterns in the area. The trend has been towards delegation of most DAs to staff, often to officers with the "lowest competent level of staff"¹¹¹. This allows less complex applications with a low or no community interest to be assessed and determined by the assessment officers. This can result in reduced delays with not having to wait for the next council or panel meeting.

Based on the 2011-12 council monitoring data¹¹² in Table 19, there were 14 councils including 3 metropolitan councils, which delegated all DA determinations to staff while 76% of councils delegating 90% or more of all DAs to staff.

Table 19 Delegation of determination to Staff 2011-2012

% Delegation to Staff	No of Councils:		Councils with Advisory Panels	Councils with Decision Making Panels
	Sydney	Regional		
< 60%	0	1		
60 - 70%	3	2		North Sydney
70 - 80%	2	3		Mosman
80 - 90%	8	17		Waverley, Manly
90 - 98%	22	50	Canterbury, Fairfield, Liverpool, Sutherland	Lane Cove, Holroyd
98 - 99.9%	4	26	Wollongong	Warringah
100%	3	11		

Councils with independent decision making panels tend to have a lower level of delegation to staff then compared to councils with advisory panels. While on average across the State, only 3.9% of DAs are determined by councillors, in 36 councils that councillors determine more than 10% of DAs. This is demonstrated in Figure 3, which shows the level of delegation in the DLG Group 2 councils in 2011-12¹¹³.

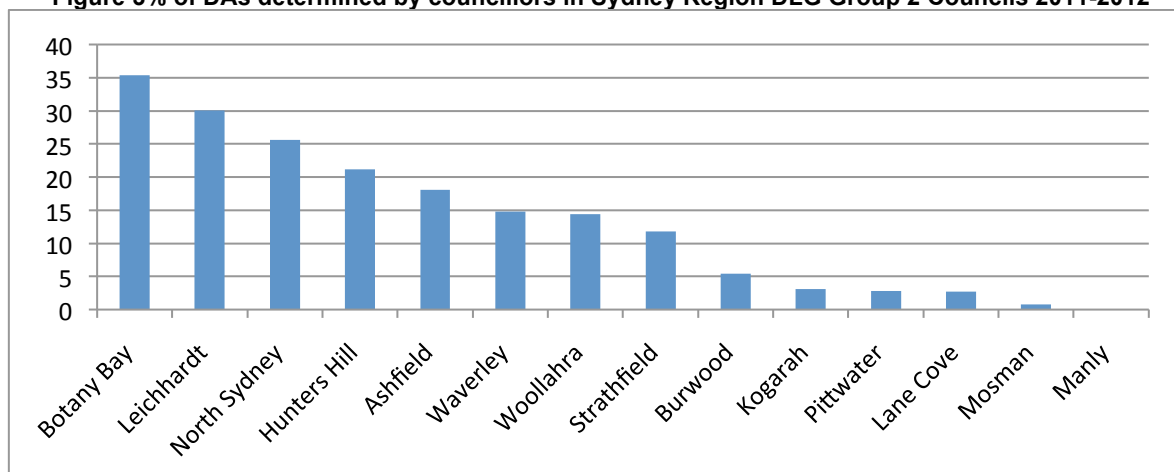
¹¹⁰Mant J (2007) Submission to ICAC Corruption Risks In NSW Development Approval Processes 2007

¹¹¹Dollery, B E and Marshall, N A (1997) *Australian Local Government – Reform and Renewal* MacMillan Melbourne

¹¹²Department of Planning (2013) Local Development Performance Monitoring 2011-12

¹¹³Note: DLG Group refers to the Australian Classification of Local Government (ACLG) and the NSW Division of Local Government classification of NSW councils in accordance to their socio-economic characteristics and location. NSW 152 Councils are grouped into 11 groups. There are 14 councils in Group 2.

Figure 3% of DAs determined by councillors in Sydney Region DLG Group 2 Councils 2011-2012



Panels and delegations

The question as to who decides who is to be responsible for determining the DA can involve a varying level of discretion, depending on the delegation criteria. An individual duty officer, by a manager or team leader or by an internal panel, can exercise this discretion. The criteria for delegation of DAs to the independent panels are in Table 6 and Table 7. With many of the criteria that refer to “unresolved objections”, there is discretion to be exercised to determine if the matter should be referred to the panel.

Different councils have different approaches. In Canterbury Council, a Lodgement Review Panel reviews DAs when they are lodged and decides whether the DA is “adequate” and who is to assess the DA and who is to determine it.

In Sutherland Council, following the notification phase, the Submission Review Panel considers the submissions received along with the DA and makes a decision on the appropriate determination body based on the delegation criteria. In Sutherland Council, of the 1112 DAs determined in 2011/2012, 1071 (97%) were determined by staff, and Council determined 30 or Council Committee based on advice from the IHAP and 30 by the JRPP.¹¹⁴

Waverley Council has delegated responsibility of determination of all DAs to:

- *Assessment Officers* who assess and determine the applications where there are no objections and the applications do not depart (other than in a minor degree) from statutory provisions. Approximately 50% of DAs are determined this way.
- *Development and Building Unit (DBU)* made up of senior council staff has delegation to determine development applications where objections are received and/or applications depart from statutory provisions unless a Councillor or the General Manager has requested the DA be referred to WDAP. The DBU also refers applications to the WDAP where there are significant public interest or policy issues.
- *Waverley Development Assessment Panel (WDAP)* has delegation to determine significant DA's and DAs referred to it by the DBU. This includes DA's where there are numerous objections, a conflict of interest or the development has a construction cost of \$3 million or more.

Woollahra Council has delegated decision-making responsibility to officers when there are 3 or less unresolved objections, with the assessment report being referred to another staff member for review and determination. Applications of a more complex nature are referred to the Application Assessment Panel (made up of senior staff) or where “greater safeguards” are required; the DA is determined by the Development Control Committee (made up of councillors). About 3% of the most complex or controversial applications are determined by full Council (See Table 3).

¹¹⁴Ian Reynolds & Associates (2013) *Review of Sutherland Shire Council's Development Application Process* May 2013

In Manly, all determinations made by an assessment officer must be referred to the Manager Development Control for endorsement prior to finalisation. In Randwick Council, once the Assessment Officer has assessed the application, the report is reviewed by a Senior Planning Officer, and then determined by another Senior Planning Officer, the Planning Committee (made up of councillors) or Council. Most DAs (up to a value of \$2 million) are determined by a Senior Planning Officer. However, prior to the determination of an application, any person is entitled to contact a Councillor to request that the application be referred to a meeting of Council for determination. The referral of an application to a meeting of Council must be made by three Councillors and must be in writing.

The delegation of planning decisions varies considerably between local councils in other states as well as NSW. In Western Australia, consideration is currently being given to developing a Model Delegation Schedule, setting out the types of development applications that are appropriate to be determined by officers and councils.¹¹⁵

6.3 Resourcing and cost considerations with panels

In their response to the White Paper, Burwood, Hunters Hill, Marrickville, Cessnock, Oberon and Bathurst Councils raised issues regarding the cost of setting up and operating an independent panel. These councils considered that there could be significant resource implications for councils. It was considered that the NSW Government would need to provide financial or other suitable resourcing incentives for Council to move towards establishing an independent panel.

Potential cost considerations

Panel related costs include:

- Cost associated with establishing the panel, including advertising for expressions of interest, selecting panellists and appointing a panel co-ordinator
- Sitting costs for the members of the panel
- Administrative and secretarial costs of hearings and meetings, typically monthly
- Indirect costs associated with more rigorous assessment by officers due to the public nature of panel hearing process and the peer review scrutiny by experts.

The operating cost will vary from council to council depending on factors such as the number of matters dealt with by the panel, pay rate for panel members and any travel costs. The panels with the highest budgets generally have a larger number of applications. The payment of panel members varies from council to council – for example it is understood that at:

- Lane Cove Council, the Chairperson receives \$450 per hour and other panel members receive \$1,363 per meeting
- Canterbury Council, the Chairperson receives \$1,500 per meeting and other panel members receive \$1,000 per meeting
- Fairfield Council, the Chairperson receives \$950 per meeting and other panel members receive \$636 per meeting
- Sutherland Council, the Chairperson receives \$1,570 per meeting and other panel members receive \$1,120 per meeting
- Waverley Council, the Chairperson receives \$3,500 per meeting and other panel members receive \$2,250 per meeting.

Oberon and Bathurst Councils raised concerns in their responses to the White Paper that appropriate independent experts may not be available in their regions and hence, councils may be reliant upon practitioners from the Sydney region. As a result, additional travel and accommodation costs would also need to be considered.

Canterbury Council estimates the cost for the panel to be \$60,000 per annum with additional support costs of \$70,000 per annum including administrative support. Warringah estimated the

¹¹⁵Western Australia Department of Planning (2013) *Planning makes it happen: phase two Planning Reform Discussion Paper* September 2013

operational costs of their panel to be \$100,000 per annum. Waverley Council estimated the annual cost to be in the order of \$80,000-100,000 per annum, depending on the number of meetings per month.

Sutherland Shire Council has had an IHAP operating since 2003. In 2011/12 Sutherland Shire Council's IHAP considered 62 matters over 19 meetings. In that financial year, the direct cost of Sutherland IHAP was \$93,898¹¹⁶. This included payment to panellists, administrative and sundry cost. The indirect costs included an officer with responsibility as IHAP Coordinator and the extra time taken by assessment officers in writing the assessment report. As a result, the average cost per item was in the vicinity of \$4,100 including indirect costs.

The DA fees may not cover any additional expense of operating the panels. It is understood that Warringah Council introduced a fee of \$3,000 per application referred to their Development Assessment Panel but they withdrew this because they were informed that they did not have the legal right to recoup these costs. Sutherland Council also investigated the option of charging a fee for matters referred to their panel and considered setting a fee of \$4,100 for applications over \$1 million if referred to the IHAP at an applicant's request. The Council has not proceeded with this approach¹¹⁷.

Potential savings

In considering the cost implications of panels, regard needs to be also given to the likely savings implications for not just the council, but also for applicants and the community. For example:

- a) **Council Meeting implications:** With panels, there is likely to be a reduction in council meetings with savings, particularly if council officers are no longer needed to be paid overtime to attend council meetings in the evenings.
 - With “advisory panels”, there is still likely to be reduced council meeting times because of the “expert advice” from the panel tends to be adopted without the need for extended debates by councillors. Also objectors and applicants are no longer invited to address the council meetings as they have already had the opportunity to address the panel hearing.
 - With “decision-making panels”, councils have been able to reduce the number of Council meetings and or the length of meetings as a result of fewer or no DAs being considered at council meeting. For example, Lane Cove, which has a “decision making panel”, was able to reduce the number of meetings per month from two to one.
- b) **DA assessment efficiency:** Reducing the DA timeframes can have significant cost benefits to both applicants and the councils. Councils have reported that on one hand the “assessment time” may be lengthened because council officers tend to take more time preparing the assessment report because the report is to be made public and peer reviewed by experts. On the other hand, they tend to take less time trying to negotiate outcomes with applicants and objectors because ultimately the matter is to be dealt with by the panel:
 - With “advisory panels”, there could be extra time in the determination of the DA because it needs to be referred to both the panel meeting as well as the council meeting. The extent of this additional time would depend on the coordination of the meetings and the protocols regarding the notification of the council meeting agendas.
 - With “decision making panels”, there tends to be a speeding up in determination times, as the DAs only needs to be referred to the one meeting for determination.Councils and applicants have commented that any extra time was considered worthwhile as it improved the quality of the decision. In an examination of assessment times, there tends to be a reduction or only small increases in assessment times (See Table 19).
- c) **Reduced likelihood of legal action:** The panels are intended to provide Council and the community with added confidence that development decisions, which have been reviewed or determined by a panel, would be legally and technically robust if an appeal was to be lodged

¹¹⁶Sutherland Shire Council (2013) Setting a fee for calling up an application to the Independent Hearing and Assessment Panel at an applicant's request File Number: GO/06B/365813 EHR059-13 Director: Environmental Services 11/03/2013

¹¹⁷Sutherland Shire Council (2013) Setting a fee for calling up an application to the Independent Hearing and Assessment Panel at an applicant's request File Number: GO/06B/365813 EHR059-13 Director: Environmental Services 11/03/2013

against a determination. Further, it is intended that the panel would reduce the likelihood that a decision would be challenged in court, resulting in a reduction in court costs.

A court case could cost anything from \$20,000 to \$200,000, but typically around \$100,000 for a controversial development. In 7 of the 10 Sydney councils currently with independent panels, the number of legal challenges was less than the average for the region. However, in the 3 councils with independent panels with a higher number of legal challenges than the average, it appears that a range of factors unrelated to the panels has caused this increase. This issue is considered in more detail in Section 5.6.

7. Performance Factors and independent panels

7.1 Improving the assessment and decision making process

The DA assessment process has become more complex with increasing diversity of technical and design matters to be taken into consideration with snowballing requirements in legislation, planning instruments and policies. This growing complexity has led to the need for additional technical expertise to input into the assessment of the issues. The Productivity Commission reported that over half of all respondents to a business association questionnaire indicated that a lack of competency of council staff and the inability of staff to understand the commercial implications of decisions was the greatest hindrances to efficient DA processes¹¹⁸.

Panels and quality of assessment

Councils have responded in various ways. One response has been the development of checklists and guidance for applicants to better understand the complexity of issues that they must consider in the formulation of their development and in the preparation of the DA. Another response has been referrals to experts within councils and to state government agencies for their advice (or approval). This can lead to a fragmentation of the consideration of the DA with a move away from a more holistic approach¹¹⁹.

Some councils have introduced internal panels, bringing together council's professionals (such as engineers, surveyors, and traffic, environmental, heritage and health officers) to provide a co-ordinated forum to consider the development at both the pre-DA stage as well as during the assessment process. This approach works best in councils where they have ready access to relevant information and have a range of in-house experts or can use contractors who work regularly for that council.

Another consideration affecting the quality of assessment and decision-making is who in Council has the assessment responsibilities, who has responsibility for the peer reviewing of that assessment and who has decision-making responsibilities. Some councils do not separate these roles leading to the potential for regulatory capture. Other councils have protocols, which separate the assessment, the review signing-off as well as the decision-making. Having separate internal peer reviewing is considered sound practice. However with complex or controversial DAs, for quality assurance, it is considered preferable, rather than individuals undertaking this role, that the peer reviewing should be undertaken by a "mix of experts" whether as an internal or external panel¹²⁰.

In addition, a peer review panel approach can play an important role in professional staff development, particularly if assessment officers are required to be present at panel meetings and hear the panel's feedback on the assessment and recommendations. With the introduction of panels, councils have reported that the quality of assessment improved because officers knew that their report was to be reviewed by experts. This improved practice tended to flow across all assessments, not just those being referred to the panel.

Panels and the subjective nature of assessment and decision-making

Parts of the development assessment task can be highly subjective with the need to predict the likely impacts of a development and whether the impacts are likely to be "acceptable". If the impacts are not likely to be acceptable, the next task is to predict whether the impacts can be mitigated or managed to the extent that they will be regarded as acceptable. This reliance on predictions of acceptability means that the outcomes of the assessment will be a matter of judgment depending on the reliability of prediction methodology, experience and any underlying bias. Each player has their own "crystal ball" and their predictions are likely to be influenced by their perceptions.

¹¹⁸ Productivity Commission 2011, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessment*, Research Report, Canberra.

¹¹⁹ Dollery, B E and Marshall, N A (1997) *Australian Local Government – Reform and Renewal* MacMillan Melbourne

¹²⁰ Landcom Best Practice in Development Assessment for Local Government Second Edition May 2005

With some types of impacts, the subjective nature of the assessment can be reduced through the use of well-tested methodology and quantitative and/or prescriptive standards. But with other issues, for example relating to amenity, social impacts or the public interest, which can be considered to be “multidimensional” concepts, they cannot be easily quantitatively assessed.

S79C of the EP&A Act sets out the very broad factors that the decision-makers are to consider which involves discretionary judgment. There is no hierarchy or priority between the various considerations and the weight given to the different factors is a matter for the decision-maker. As a result, the development assessment and decision making process can be considered to be polycentric with many issues and layers to be considered including matters raised in submissions which may represent a broader range of disparate interests.¹²¹

With controversial or complex developments with multiple layers of discretionary issues, it is preferable that a number of experts be involved in the assessment and decision-making process, rather than an individual. These types of development are more likely to be referred to councillors or independent panels and are more likely to refuse development consent than those developments determined by council officers. In 2012-13, councillors refused 8.9% of DAs, council independent panels (IHAPs or DAPs) refused 14% and JRPPs refused 6.9% of developments determined. This suggests a higher level of scrutiny by the “collaborative” decision makers in considering the obligations under s79C.

Table 20 Percentage of refusals by consent authorities¹²²

Consent authorities	2011-12		2012-13	
	No of DAs determined	% Refused	No of DAs determined	% Refused
Council staff	61,259	2.2%	59,293	1.9%
Councillors	2,309	10.3%	2,217	8.9%
Council independent panel/IHAP	156	12.2%	172	14.0%
JRPP or other	390	11.3%	269	9.3%

Panels and efficiency

Issues have been raised regarding the impact of panels on processing timeframes. Development applications timeframes can vary from council to council depending on their internal processes, local planning controls, the mix of development types and community expectations. Based on an analysis of data from 2011-12 and 2012-13 for councils in the Sydney region in Table 21, it would appear that timeframes do increase slightly where there is an advisory panel – presumably because there are two meetings (the panel hearing and the council meeting) to co-ordinate. However with decision-making panels, there is a reduction in the average determination.

Table 21 Timeframes for Development Application for Councils in Sydney Region

Sydney Region Councils with:	Average number of DA per council			Mean gross days To determine DAs based on Value		
	Value \$0-\$1M	Value \$1M-\$5M	Value \$5M-\$20M	Value \$0-\$1M	Value \$1M-\$5M	Value \$5M-\$20M
2011-2012						
No panel	651	23	7	81	174	210
Advisory panels	815	25	6	82	202	201
Decision making panel	530	33	5	72	147	206
2012-2013						
No panel	630	25	3	76	184	193
Advisory panels	781	31	7	82	226	314
Decision making panel	475	30	4	65	126	160

While it would appear that council independent decision making panels have the potential to reduce timeframes, the individual council procedures and practices generally will have a greater impact on those timeframes. None the less, the use of decision-making panels does have a very positive impact on efficiency in those councils.

¹²¹ Andrew Edgar (2010) Participation and responsiveness in merits review of polycentric decisions: A comparison of development assessment appeals 27 EPLJ 36

¹²² NSW Department of Planning and Infrastructure Local Development Monitoring Report 2011-2012 and 2012-2013.

It is also noted that the determination times for DAs determined in councils with independent decision making panels are significantly better than for determination times for DAs determined by joint regional planning panels (JRPPs) for comparable sized developments.¹²³ It could be concluded that council independent panels could significantly improve efficiency in determining regionally significant development if given this responsibility.

Table 22 Timeframes for Development Application determined by JRPPs

Joint Regional Planning Panel determinations	Number of DAs determined by JRPPs – excluding Crown referrals and 120 day referrals			Mean gross days for JRPPs To determine DAs based on Value		
	Value <\$5M	Value \$5M-\$20M	Value >\$20M	Value <\$5M	Value \$5M-\$20M	Value >\$20M
2011-2012	34	148	124	198	211	241
2012-2013	25	87	133	306	241	216

7.2 Improving community engagement with panels

While there is a general recognition that planning processes needs to be made more efficient, the efficacy of the system should not be judged solely on its ability to achieve assessment processing timeframes or approval rates. More fundamental to the planning system's effectiveness is its ability to engage meaningfully with communities so that they feel confident that natural justice has been exercised. While longer development approval times can be considered to be less efficient, if they reflect more effective community engagement and resolution of some or all of their issues, the end result should be considered to be better overall planning outcomes¹²⁴.

Not all DAs generate community opposition. For example, in Sutherland Council, where there were 1,112 DAs in 2011/12, there were written objections to only 29% of the DAs:

- 789 DAs had no objections (71%)
- 211 DAs had 1 objection (18%)
- 92 DAs had 2 to 5 objections (9%)
- 20 DAs had 6 or more objections (2%)¹²⁵.

There may be a range of different views across a council area regarding a particular development application. As a result, there needs to be a process, which provides for objectors to make representations so that the full scope of their issues and the public interest are appropriately understood.¹²⁶ However in many situations, objectors can feel marginalised, with less influence than the developer. Unless the development is "designated development" (very few - about 150 -200 DAs/year across NSW), there are no third party rights of appeal and all the consent authority needs to do, is demonstrate that it has taken all submissions "into consideration".

In different councils, different processes are followed. The unfortunate thing is that these processes all too often result in "going through the motions" style of engagement¹²⁷. Generally there could be four opportunities for community engagement, depending on the council's processes:

- At the pre-DA stage,
- In the notification stage,
- During assessment, and
- As part of the determination process.

¹²³ NSW Department of Planning and Infrastructure Annual Reports 2011-2012 and 2012-2013.

¹²⁴ Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* (April 2011), Vol. 1,

¹²⁵ Ian Reynolds & Associates (2013) Review of Sutherland Shire Council's Development Application Process May 2013

¹²⁶ Booth P (2009) Managing Land-use change - Land Use Policy 26S (2009) s154-159 Published by Elsevier

¹²⁷ Klein, W. R. (1994) Citizen Participation: Whose Vision is it? In Planning and Community Equity American Planning Association.

Pre DA Stage

Currently there is limited opportunity to engage at the pre-DA stage though a number of councils recommend to applicants that they should consult with the neighbours and others likely to be affected by their development. If it happens at all, it tends to be fairly adhoc. A number of suggestions have been made that there would be benefit in a more formalised community engagement process at the pre-DA phase for potentially controversial developments.

The consultation with independent design panels at the pre-DA stage has proved to be very effective in ensuring appropriate urban and architectural design matters are considered upfront. It has been suggested that engagement with the community using an independent panel could also ensure that broader planning issues are appropriately considered at the pre-DA stage, reducing conflict and time later in the process.

Notification stage

Once the development application is lodged with councils, neighbours are usually notified and a notice is placed on the property. An advertisement may also be placed in the local newspaper inviting submissions usually within 2 weeks.

During assessment

Assessment officers need to read submissions and consider the issues raised as part of their assessment of the merits of the application. There are however ongoing questions about how effectively the information generated through submissions and any associated discussions with objectors is considered in the assessment and decision making process¹²⁸. Sutherland Council has established an internal Submission Review Panel specifically to consider the matters raised in submission and to ensure these matters are appropriately considered in the assessment process (section 2.3.2).

Some councils tend not to engage with objectors or the applicants and the application lodged is the one on which a determination is made. Though this minimises corruption risks and may shortens timeframes, it tends to disregard community issues and may result in a higher level of court cases. In other councils, extensive discussions may be held during the assessment phase, between the assessment officers and the applicant in an attempt to resolve the issues of concern to the assessment officer or raised in community submissions. Objectors may also be invited to be involved in these negotiations. Individual officers may undertake this engagement or to minimise corruption risks and regulatory capture, more than one officer may be involved.

This engagement may also be undertaken in a more formal context with a panel or committee approach. With the Hills Council, a Conciliation Conference chaired by the Mayor's delegate may be established to bring applicants and other parties together to resolve issues. With Botany Council, a Residents Consultative Committee may be established where there are outstanding objections for a major development with the aim of resolving issues in an open forum. These processes may result in agreement to modify the development proposal or to accept conditions of consent to address the issues of community concern (see section 2.3.3).



Liverpool IHAP – Discussions with objectors and applicant

¹²⁸Herriman, J. 2011. Local Government and Community Engagement in Australia. Working Paper No 5. Australian Centre of Excellence for Local Government, University of Technology Sydney.

Assessment and determination

The assessment officer must consider matters in s79C of the EP&A Act including the relevant planning controls, the likely impacts of the development, the suitability of the site, the public interest and the issues raised in public submissions and must document the outcomes of this assessment in a report with recommendations.

In councils with independent panels, the assessment report with recommendations (along with the submissions or a summary of their issues) is forwarded to the panel for its consideration at their next panel meeting. The assessment report is placed on the council's website as part of the agenda for the next panel meeting. This gives the community an opportunity to consider the report and recommendations before the decision is made and if there are further concerns to raise them at the panel hearing. This provides the community with an additional opportunity to discuss options with the panel and ensure they are aware of the community issues prior to making their determination or recommendation to council. This is not the case when a council officer or internal determination panel (closed door model) are the decision makers (section 2.4.1). Providing the community with an additional opportunity to input through the panel hearing process has the potential to assist in providing more meaningful participation.¹²⁹

However, even though an independent panel is involved and the principles of procedural fairness are followed, the objectors may still consider that their issues and values have not been appropriately considered. This may be partly attributed to a different understanding of the technical aspects of some complex issue and different mode of reasoning between technical experts and the community in arriving at their conclusions¹³⁰. It may also result from the fact that there are likely to be a range of different interests in the community and the resolution of an issue raised by some objectors may result in additional issues for others. A measure to mitigate a particular impact (e.g. by a change to the design) may make the development acceptable from one objectors viewpoint but may make it worse from another, for example with view sharing.¹³¹ Having experts involved is likely to result in better-informed outcomes but there will still be circumstances when participants will not find the outcome acceptable. However, they are likely to have a better understanding of the issues as a result of the panel process.

The importance of community participation as an educative function is often overlooked. It allows residents to develop a fuller understanding of their local area as well as the local council policies and strategies, giving them insights into the interests of their fellow residents as well as the community as a whole, and in the process allowing them to contribute to decision making and so fulfil the obligations which, along with rights, are associated with citizenship.¹³²

7.3 Ensuring fairness with the assessment panel process

The principles of natural justice, also known as procedural fairness, have been developed by the NSW Ombudsman to ensure that decision-making is fair and reasonable¹³³. Procedural fairness involves decision-makers:

- Informing people whose interests are likely to be adversely affected by a decision
- Giving them a right to be heard, whether in writing, at a hearing or otherwise
- Acting fairly, impartially and without bias, not having a personal interest in the outcome
- Making a decision based upon findings of fact that are in turn based upon sound reasoning and relevant evidence, and
- Having transparency in the various steps in the process.

¹²⁹ Nature Conservation Council of NSW, Total Environment Centre and EDO NSW (2012) *Our Environment, Our Communities: Integrating environmental outcomes and community engagement in the NSW planning system*.

¹³⁰ Frank Fischer (2009) *Democracy and Expertise: Reorienting Policy Inquiry* Published to Oxford Scholarship Online

¹³¹ Andrew Edgar (2010) *Participation and responsiveness in merits review of polycentric decisions: A comparison of development assessment appeals* 27 EPLJ 3

¹³² Ciaran O'Faircheallaigh (2010) *Public participation and environmental impact assessment: Purposes, implications, and lessons for public policy making - Review Volume*, January 2010, Pages 19–27

¹³³ NSW Ombudsman (2010) *Natural justice/procedural fairness What is natural justice/procedural fairness?* November 2010, Reprinted March 2012

Procedural fairness issues when councillors are the decision maker

The ICAC in 2005 *Corruption risks in NSW Development Approval Processes* pointed out issues associated with some council meeting decision making processes and that the structure and nature of council meetings can prevent procedural fairness rules from being applied.¹³⁴ There are a number of factors.

The style of council meetings can vary greatly depending on the internal politics and traditions – from open and informal to being highly political, adversarial and hostile to community participants. While members of the public may be entitled to speak at council meetings on a limited basis, the meeting process is designed for councillors to debate whether to approve the proposed development or not.

Councillors are often lobbied directly prior to the meeting, which raises the risk of procedural unfairness. Procedural fairness requires that a party (applicant or community opponent) be given the opportunity to respond to the issues raised by other parties, and vice versa. However, they will usually have no way of knowing what has been said to individual councillors when lobbied in private, and even if they do become aware, are unlikely to be given an opportunity to respond. This is another justification for having panels responsible for development decisions as they provide a better process for making such decisions.

Councillors wearing three hats can have a conflict of interest between their roles as policy maker, as determining body and as a representative of electors keen to be re-elected¹³⁵. Some consider that councillors are the last hope for objectors to a proposed development to have their views considered and acted on. In some councils, there can be a tendency for councillors to favour the objectors. In other councils, applicants may consider it worth going to considerable trouble to influence councillors’ decisions with communities feeling that developers have “captured” the councillors and will have a free for all.

At times the different conflicting roles of councillors are not clearly distinguishable. Being a local resident and dealing daily with members of the community can increase the non-pecuniary conflicts of interest councillors’ experience. This will always place councillor in a difficult position – between the governing body role with an obligation to determine matters on their “merit” and the advocacy role in representing constituents particularly when they are their neighbours or old friends. Both roles are legitimate in a democratic society, but the conflict remains.¹³⁶

Procedural fairness issues when officers are the decision maker

Table 23 compares the opportunities for the community to be aware of the views of the council officers as a result of the assessment process and to have the ability to comment prior to or during the assessment process.

Table 23 Comparison of engagement & transparency with different decision makers

Opportunities for Community engagement	Decision Makers		
	Officers /GM	Councillors	Panels with hearings
Is the assessment report available to objectors and applicants prior to making a determination?	No	Yes	Yes
Can applicants and objectors raise issues with those responsible for making a determination during the decision making process?	No	Possibly	Yes
Can objectors and applicants respond to recommendations in the assessment report prior to the determination?	No	Possibly	Yes

When the officer is the decision maker, there is no transparency or opportunity to review the officer’s opinion prior to a decision being made. With routine DAs which comply with the planning standards and there are no unresolved objections, this may not be an issue. However with developments which do not comply or which have community objections, having officers

¹³⁴ ICAC (2005) *Corruption risks in NSW Development Approval Processes*

¹³⁵ Mant J (2007) *Submission to ICAC Corruption Risks In NSW Development Approval Processes 2007*

¹³⁶ Mant J (2011) *Corruption risks with the development approval process* [Local Government Law Journal](#)>Volume 16>Part 2

determine these development in a non-transparent process, is inconsistent with the rules of procedural fairness.

The role of panels in procedural fairness

As the independent assessment panels provide an open forum for the applicant and objectors to state their views, having a panel is seen to make a significant contribution to procedural fairness in the assessment process.¹³⁷ For example, objectors are able to put forwards arguments to show cause why proposed actions should not be taken and to suggest mitigating measures, and the applicant is then able to respond. It is noted that internal council decision making panels in Port Macquarie –Hasting, Pittwater and Pittwater Councils, which are open to the public, also provide these opportunities.

For a panel, which includes a hearing in its deliberative process, community engagement and natural justice approaches serve a number of important functions:

- It is an important means of checking facts and of identifying issues
- It may expose any weaknesses in an assessment, which avoids later embarrassment, and
- It also provides advance warning of decisions likely to be challenged.

7.4 Providing for greater integrity of decision making

For the system to have integrity it must have the quality of being honest with strong moral principles, internal consistency and lack of corruption.

One of the mantras of the current NSW planning reforms is to shift the focus from the DA stage to the strategic planning phases to build confidence in the planning system. As a result, it is suggested that in the future, the development decision-making can be depoliticised, as it would be based on strengthened strategic frameworks whether at the regional, local or precinct level. As a result, it is considered that a role for local councillors in development assessment decision-making can be removed in favour of independent expert panels because the councillors would be responsible for the relevant strategic framework.

The institution of independent panels will provide both objectors and applicants with a fair hearing and proper transparent consideration of their issues outside of the political agenda. Independent panels also can make it easier to expose when there have been undue influences on the assessment staff and a scrupulous “merit” approach is not being taken in the assessment process particularly where there are significant variations from standards.

Panels are considered to provide greater integrity and depoliticise decision making by:

- Peer reviewing the assessments
- Reducing the ability of “politics” being able to played a role in the determination of applications
- Increasing the probity in decision making on DAs particularly when:
 - Council has a financial interest in a development
 - Council or individual Councillors have publically expressed views for or against a particular development proposal based on “politics” rather than “merit”
 - Development proposals involve significant departures from development standards.

¹³⁷ Planning Institute of Australia (NSW Division) (2011). Supplementary Submission to the NSW Planning Review, November 2011

PART C THE FUTURE OF INDEPENDENT PANELS

This part considers the view of councils, applicants and the community on the use of panels and considers the potential future role of panels for NSW councils.



Warringah Development Assessment Panel

8. Views about NSW Council's independent panels

The views of councils and various stakeholders regarding the role of council independent panels have been expressed in a number of council and industry surveys as well during the consultation on the planning reforms over the last few years.

8.1 Views of Australian Local Government Association

The Australian Local Government Association (ALGA) supports elected councillors being responsible for both setting policy standards as well as determining DAs applying these policies. ALGA considers that planning and development assessment processing must be seen in the context of a community partnership in which the community, elected councillors and professional staff work together to identify and achieve community goals.¹³⁸

ALGA does not agree with the proposition that the use of development assessment panels is either a leading practice or desirable alternative assessment pathway. They consider that panels simply add a further layer in the process. They consider the primary aim of the planning system is to deliver tangible benefits to the broader community, within an efficient and accountable system, not to simply rubber stamp as quickly as possible all development proposals, regardless of the wider and longer-term implications for the community. Further, if councillors are involved in making the final decision, they then can become aware when the controls are not achieving their desired solutions from a strategic planning point of view.

8.2 Council views expressed in response to the White Paper

In a review of submissions from councils in response to the White Paper available on the Department of Infrastructure and Planning's website, a diversity of views was expressed by councils regarding panels.¹³⁹

¹³⁸ ALGA (2012) The Role of Local Government as Regulator Performance Benchmarking of Australian Business Regulation Final Submission Productivity Commission's 29 May 2012 Planning and development for the betterment of local communities

¹³⁹ Department of Planning and Infrastructure White Paper - A new planning system for NSW View Submissions: http://planspolicies.planning.nsw.gov.au/index.pl?action=list_submissions&job_id=5927

Some councils considered that IHAPs are more effective if granted delegation by Council to determine applications, not just provide advice. Manly, Mosman and Warringah Councils supported panels having the decision making role as this contributed to depoliticise decision-making by no longer having politicians involved. These councils all have independent panels with decision-making roles. Their local communities and councillors are generally supportive of their panels.

Liverpool and Fairfield Councils that have “advisory” IHAPs opposed mandating that panels have determination powers and consider that such an approach was an attack on local democracy. They considered that if a Council had efficient DA systems with an independent panel to advise on contentious applications, there was no need for councillors to delegate their decision-making powers. Eurobodalla Council was also concerned about the lack of details as to the benchmarks to be achieved so that councils are not required to establish a “decision making” IHAP as suggested in the White Paper.

Wollongong City Council supported in-principle the establishment of IHAPs across all councils. However, they noted that there are a number of different successful panel models and hence, recommended that each Council retain its ability to determine how their panel will run, rather than be subject to a state - wide mandated approach.

Rockdale City Council has not yet established an independent panel despite ICAC recommending that it did so in 2002. However, the Council indicated that it now generally supports the use of independent expert panels. Cessnock Council supports the use of independent panels as DA's often take up a lot of time in Council meetings as staffs does not have extensive delegations to vary the council standards. Councillors make the final decision in these situations, often with accusation of bias. IHAPs could depoliticise these issue.

Bankstown, Burwood, Eurobodalla, Hornsby, Hunters Hill, Oberon, Shoalhaven and Wyong, Councils consider the current planning system provides an appropriate balance between maintaining local democracy and ensuring timely, cost-effective and appropriate development assessment and decision-making and do not support IHAPs. In addition, these councils consider that IHAPs are likely to be expensive and lengthen the DA process. Additionally, there are concerns that so called independent experts could assess applications for people they have worked for or with, which raises the potential for conflict of interest issues.

In addition, a number of councils considered that as Councillors are involved with the community in the development of strategic plans, the councillors would be in a far better placed to determine applications than an independent panel that may have no understanding of the intended objectives of the plans. Hunter Hill and Leichhardt Councils considered that locally elected representatives could be included on panels.

Bankstown Council indicated that consideration could be given to the use of panels at the pre-DA meeting stages of the development process rather than just at the end of the process. Burwood Council suggested that consideration should also be given to the use of independent panels at the strategic planning stage, rather than just at the DA stage, to strengthen process for developing the planning controls.

8.3 Council surveys and views on their panels

As part of the introduction of independent panels, the councils undertook to review their panel processes over time to ensure they were effective and had the confidence of the community.

Liverpool Council survey

In 2001 the Liverpool City Council surveyed participants' views regarding the IHAP with the general response being that it gave them a fair hearing and fulfilled their expectations. 74% of

those surveyed considered that, in dealing with particularly contentious issues, the IHAP's attitude to objectors and applicants is satisfactory.¹⁴⁰

Canterbury Council Survey

In 2007, the Canterbury Council undertook a survey of applicants and objectors following the IHAP first year of operation to evaluate the satisfaction or otherwise of stakeholders of the IHAP process.¹⁴¹ The survey was sent to 63 people that were involved in the IHAP process as either an applicant and/or objector regarding a development application. In total, 24 surveys were completed either in part or in full. Nine survey responses were received from applicants, and 15 from objectors. The information showed that the participants have a high level of confidence in the panel's ability to provide them with a fair hearing and with the transparency of IHAP's operations. In addition, a vast majority of participants were very satisfied with IHAP's ability to formulate recommendations to the City Development Committee that were fair and in accordance with Council's policies and codes.

Mosman Council Survey

In April 2013, Mosman Council undertook a review of the first 2 years of the operation of the Mosman Development Assessment Plan (MDAP) including a survey of applicants, landowners, objectors and consultants.¹⁴² Comments were made in relation to the DA process generally including in relation to dealing with DAs where there were variations in standards. Most respondents acknowledged that some form of independent panel should be part of the DA decision-making but considered that changes should be made to the MDAP process. Outcomes included:

- 75% of applicants thought that the panel lead to fairer planning outcomes than if the councillor were determining the DA
- 55% of objectors thought the councillors would have dealt with the DA differently to the panel giving greater weight to community views and values.
- 63% considered that the expertise on the panel was beneficial in making the determination
- 25% considered the officer's assessment reports did not provide appropriate information.

As a result of the review, the Council amended some of the MDAPs procedures to ensure greater transparency and fairness for objectors.

8.4 Property Council surveys

Research conducted in 2007 by UMR Research for the Property Council identified broad community support for the establishment of independent planning panels¹⁴³. The research highlighted that the community considered that the DA system was not working well and the DA processing was seen as the overall worst performance of a service provided by local councils. There was strong support summarised in Table 24 for independent expert panels with 58% supporting local independent planning panels determining all DAs except simple projects, which could be determined by staff. Only 8% opposed panels.

Table 24 UMR Research 2007 Survey on Community Views on Panels

Strongest arguments in support of panels		Strongest arguments against panels	
Having independent experts is better than politicians making the decision	75%	Panel members who are consultants could have a conflict of interest	58%
Panels would give reasons for decisions	74%	You can't trust bureaucrats	44%
Less local political meddling means faster decisions	73%	Panel members would be political appointments anyway	41%
Transparency would be increased due to a strict probity code of conduct	72%	You need a democratically elected councillor if you have a problem DA	37%
Panels would take the politics out of planning decisions	71%	It would just be another layer of bureaucracy	36%.

¹⁴⁰ Land and Environment Court (2001) Report of the Land and Environment Working Party

¹⁴¹ Canterbury City Council (2008) Independent Hearing and Assessment Panel Review - Canterbury City Development Committee 14 February 2008

¹⁴² Mosman Council (2013) Mosman Development Assessment Panel Review prepared by Cardno (NSW/ACT)

¹⁴³ Property Council of Australia (NSW) (2007) Community Survey Independent Planning Panels UMR Research

Research conducted in 2011 into homeowners' attitudes to local councils and the development application and Auspoll Research for the Property Council of Australia undertook approval process including JRPPs¹⁴⁴. The findings are based on a series of discussion groups with homeowners in the Sydney region (Marrickville, Warringah, Hurstville and Blacktown) and a quantitative survey of 1010 NSW homeowners in major cities. This research revealed that the community preferred independent experts, not local councillors, making decisions on significant development projects.

- 88% agree that independent panels made decisions consistent, transparent and honest
- 83% thought independent panels keep politics and self-interest out of planning
- 78% wanted independent experts making decisions and only 22% want local councillors
- 38% considered that the council assessors were experts in what they were assessing
- 27% consider councils are doing a good or excellent job in the processing DAs
- 26% have confidence that council can properly assess big projects.
- 20% agree councillors have expertise in planning for the needs of local communities
- 17% considered councillors make decisions independently and free of vested interests

Results indicated that attitudes towards council performance were mixed, with council's priorities often seen as being out of step with community concerns. In particular:

- Councils were seen as performing particularly poorly in processing development applications compared to other aspects of their service provision
- Councillors and mayors were typically seen as being motivated by personal or political agendas and lacking in expertise to make good planning decisions for the community.
- Only a minority of respondents agree that local politicians were experts in planning for the needs of the local community or that the decisions they make were independent and free of vested interests.

8.5 Views of the Allan Financial Sustainability Inquiry

The Independent Inquiry chaired by Professor Percy Allan AM into the Financial Sustainability of Local Government in NSW was commissioned by Local Government and Shires Association (LGSA) in September 2005 in response to concerns about council's financial capacity to meet the growing demand for infrastructure and services. The report addressed the critical challenges for local government, including issues such as the need for development controls reforms, improved strategic planning and strengthen governance structures and procedures.¹⁴⁵

The Inquiry acknowledged that there were problems with the processing of DAs including efficiency, corruption and conflict of interest issues with no clear separation of powers within councils. Transparency in making local planning decisions was weak. There was a risk of corruption or undue influence as a result of the unclear separation between councils' legislative, executive and judicial powers. Surveys undertaken by Iris Research in 2005 as part of the Inquiry process showed a public preference for councillors not determining DAs or to do so only after advice from an independent panel. Almost 36% of respondents supported having independent expert panels while 26% supported the option of councillors performing the task following advice from an independent panel. While 22% of respondents supported professional council staff undertaking the approval task, the survey found that only 9% cent supported the existing arrangement in most councils. 43% of metropolitan respondents stating that there local council did not appropriately consult them before making decisions. An independent panel of professionals was the most strongly supported option to improve DA determination processes.

The Inquiry considered the implications of councils using independent panels (decision making or advisory). It noted that panel systems appeared to be working well in Liverpool, Fairfield, Warringah and Sutherland Councils and in South Australian councils. The Inquiry considered that panels made up of independent experts, would be in a better position to make sound decisions

¹⁴⁴Homeowner attitudes to local councils, the planning process and NSW Joint Regional Planning Panels Research Report 2011 Auspoll commissioned by the Property Council of Australia

¹⁴⁵Allan P (2006) Are Councils Sustainable: Independent Inquiry into the Financial Sustainability of NSW Local Government - Final Report: Findings and Recommendations May 2006

than councillors who may not be familiar with the details of planning controls. Panel hearings could be less adversarial than politically charged council chambers. The chances of conflicts of interest would be significantly reduced. It was considered however that whoever chose the panel members would exercise influence - if councillors, then the separation of powers could be lost, if the state, then centralisation of planning would increase. In addition, establishing panels for each council could increase cost and there may be insufficient 'independent experts', especially as consultants who work in the area should be excluded. To overcome this, the Inquiry considered that a panel could serve more than one council.

Where the panel was the decision maker, the Inquiry noted that the approach could be seen to weaken local democratic accountability since the involvement of councillors would be removed with the perception that community input into local planning decisions being reduced. However there would be a clear separation between councillors who set the policies, and the panel, who implement these policies.

The other option considered was independent advisory panels to *advise* councils on disputed DAs. Responsibility and accountability for decision-making would remain with the elected council, but councillors would have to consider expert advice from the panel and justification would need to be provided if varying from the panel's recommendation. This was considered as likely to increase public confidence, as there would be fewer grounds for suspecting councillors of acting improperly. *The Inquiry Final Report Recommendation 18* endorsed the establishment of independent advisory panels to consider and *advise* councils on disputed DAs. They considered that this would address community concerns, still leave councillors with the final say and pre-empt moves by the State Government to impose its own panels. It would also free up council meetings to deal with other council services that the Inquiry's opinion poll found were of greater importance to residents.



North Sydney Independent Planning Panel

9. The future roles for independent panels

Currently 6 councils (Canterbury, Fairfield, Liverpool, Shellharbour, Sutherland and Wollongong) have independent advisory panels and 7 councils (Holroyd, Lane Cove, Manly, Mosman, North Sydney, Waverley and Warringah) have independent decision making panels. The panels deal with between 10 and 110 DAs per year. There is a growing interest in establishing panels in other councils with a high number of locally significant DAs as a result of substantial growth pressures or where there are controversial planning issues. Blacktown Council is currently in the process of establishing an advisory panel and Leichhardt Council is considering whether to take the step. Ryde and Randwick Councils considered and rejected the approach despite recommendations from ICAC.

9.1 The positives and negatives of independent panels

As summarised in Table 25, the potential positive and negative attributes of independent panels for the DA system, for applicants, objectors and the community and for councillors and staff is considered in this section. This summary suggests that there is the potential for significant benefits for councils in having an independent panel to consider controversial or complex development applications.

Table 25 Summary of potential positive and negative attributes of independent panels

	Independent Advisory panel	Decision making panels
POSITIVE		
For the assessment system	<ul style="list-style-type: none"> - Reinforces merit based approach - Introduced additional transparency - Peer reviews assessment – adding integrity - Reduces potential for controversial DAs being bogged down or deferred - Reduces politicisation of decision making - Provides a balance of expert views - Dove tails with design panels - Potentially reduces court cases and costs 	Same as for advisory panel plus: <ul style="list-style-type: none"> - Further depoliticise decision making with panel making the decision - Potentially reduces timeframes - Reduces corruption risks
For Applicants, objectors and the community	<ul style="list-style-type: none"> - Provides for a better understanding of the issues - Opportunity to present case – procedural fairness - Can review and comment on assessment officers recommendations prior to decision - Provide opportunity to improve relationship between applicant & objectors – and resolve issues - Build community satisfaction that fair process 	Same as for advisory panel plus: <ul style="list-style-type: none"> - Confidence that decision made on merit, not political influence
For Councillors	<ul style="list-style-type: none"> - More time to focus on strategy and policy issues - Removes pressure from inappropriate lobbying - Reduces meetings and times - Independent expert advice - Strengthens integrity when council is the applicant - Positive budget outcomes if reduced court cases - Provides independent feedback on strategic planning and policies 	Same as for advisory panel plus: <ul style="list-style-type: none"> - Avoids conflicting roles of decision maker & community advocate - Removes corruption risks - Takes the politics out of decision making
For Council officers	<ul style="list-style-type: none"> - Staff development - Removes pressure on staff - Reduce corruption and regulatory capture risks 	Same as for advisory panel
NEGATIVE		
For The assessment system	<ul style="list-style-type: none"> - Cost of running panel - May increase time - Potential to duplicate internal panel processes - Perception that panel may not understand importance of certain local planning controls - Runs risk of making planning “technocratic” and undemocratic 	Same as for advisory panel <ul style="list-style-type: none"> - Except likely to reduce, not increase times
For applicants, objectors and the community	<ul style="list-style-type: none"> - Adds complexity - Suspicion of bias – depends on who appoints panel – who is on panel 	Same as for advisory panel plus <ul style="list-style-type: none"> - No point in lobbying councillors to influence decision
For councillors		- Perception of erosion of power
For council officers	<ul style="list-style-type: none"> - Perception of erosion of officers power & slur on professionalism 	Same as for advisory panel

Potential positive implications

For major or controversial DAs, independent panels provide a peer review of the technical assessment along with increased opportunities for applicants and objectors to input into the assessment process, increasing transparency and strengthening the integrity of decision-making.

Where council officers are the determining authority for controversial DAs, there is no opportunity for an expert peer review or for objectors. Also applicants or objectors have no opportunity to address those responsible for making the determination. When the decision is made at council meetings, there tends to be more formality and less opportunity for the community to be “heard”. In addition, the process can shift to a political decision making mode with councillors aligned on allegiances rather than taking a merit based approach.

The delegation of responsibilities to an independent panel for the peer review of the assessment or the determination of DAs can have major implications to the efficiency, quality and transparency of the process.¹⁴⁶¹⁴⁷ The nature and scale of these benefits will vary from council to council, depending on their processes, the type of development patterns in the area and the culture of the community. The positive implications of independent panels include:

(a) For the integrity and efficiency of the assessment system

- Strengthening the assessment processes with independent peer review of the officers’ reports with professional expert advice on the officer’s recommendations – adding integrity to the process
- Providing a greater level of transparency with the officers assessment report and recommendations made public with a hearing process, so objectors and applicants can provide comments on the recommendations prior to a decision being made
- Increasing the efficiency of processing of DAs particularly with controversial developments which often become stalled and bogged down as officers try to negotiate acceptable outcomes
- Reducing the number of applications deferred for decisions, as the panel process provides for a transparent resolution of issues or just gets on and makes a decision
- Providing for the efficient dovetailing with design review panels’ recommendations with the potential for more efficient delivery of better designed developments
- *If decision making:*
 - Providing a more balanced and expert view, because of the depth of experience within the panel members that is not typically present among elected councillors or council officers
 - Reducing the politicisation of the process and reinforces that the assessment and determination of DAs is to be based on a merit based approach.

(b) For applicants, objectors and the community

- Providing the community with a better understanding of the issues – an educative role
- Providing an opportunity to present their case to an impartial and independent panel that follows the rules of procedural fairness – with the right to raise their concerns and have their voice properly heard
- Providing an opportunity to review the officer’s assessment report and recommendations prior to the hearing with the right to comment on those recommendations at the hearing
- Providing an independent forum for open discussion of unresolved issues among panel members, applicants, their consultants and objectors with the potential for a non-adversarial resolution of disputes without legal expense or formalities – avoiding appeals against council decisions on DAs
- Providing a better opportunity to build or maintain a positive relationship between applicants and neighbours
- Increasing community satisfaction with the fairness of the assessment process and the impartiality of decisions made.

¹⁴⁶ ICAC (2005) Corruption risks in NSW development approval processes Dec 2005

¹⁴⁷ DIPNR (2003) Report by the Regulation Review - Local Development Taskforce

(c) *For councillors*

- Delivering positive budget implications with the potential to reduce Land & Environment Court appeals and associated costs as well as council meeting costs
- Providing greater integrity to the process where council or councillors are the applicants
- *If advisory:*
 - Providing independent specialist advice and expertise to assist in determining DAs
- *If decision making:*
 - Reducing or avoiding councillor conflict of interests as the “decision maker” and “community advocate” or ‘applicant advocate’
 - Allowing councillors to concentrate on strategic and policy matters at council meetings
 - Reducing the number of council meetings and meeting times with associated cost savings
 - Reducing corruption risks faced by councillors when determining DAs

(d) *For assessment officers*

- Providing a staff development/educative role with officers having to ensure the quality of their reports and recommendations, as experts will expose them to review, particularly if officers attend the panel meeting.
- Removing pressure and potential “bullying” from councillors, applicants and objectors in attempting to obtain the outcome they want from the process
- Reducing regulatory capture and corruption risks faced by officers when assessing or determining DAs.

Potential negative implications

The potential negative concerns with having an independent panel include:

(a) *For the efficiency of the assessment process*

- Costs and time of establishing and running the panel, particularly given the low number of major or controversial DAs in some council’s area. For some regional councils with low number of controversial DAs, it could be considered to be a waste of resources, as the independent panel would be infrequently used particularly as the JRPPs determine all the larger developments. Councils could simply be permitted to refer controversial DAs to the JRPP instead of setting up their own separate panel.
- Duplication of the internal peer review processes in some councils (if they exist). In councils with an “open door” development committee (made up of senior staff), an independent panel would merely duplicate the existing system where applicants and objectors already have the right to review the officer’s report and address the committee.
- Potential for the panel members not to fully understand or value local planning controls or objectives in their peer review of the assessment or in decision making
- Inadequacy of the panel processes to resolve clashes in professional judgement between the assessment officers, those appearing before a panel and members of the panel
- *With advisory panels:* potential increase in DA processing times depending on internal assessment processes, frequency of meetings and volume of DAs. It is seen to introduce a further step and therefore delay the process

(b) *For applicants, objectors and the community*

- Adds complexity with another layer or step in the DA process.
- Community’s suspicion of bias is not fully removed by the introduction of panel, - particularly if appointed by the GM or Mayor.

(c) *For councillors*

- *If decision making panel:* perception of reduced power of councillors with reduced ability to advocate on behalf of applicants or community members

(d) *For assessment officers*

- Perception of erosion of council officers power and removal of sense of responsibility
- To some, the panels are an insult to their professionalism

9.2 Sound practice for independent panels

From a review of existing independent panels and consideration of the views of stakeholders, there appear to be a number of key practices, which would assist in ensuring that an independent panel could maximise the delivery of the desired outcomes. It is recognised that no one approach will suit all councils. However the following is recommended for considered when establishing panels.

Membership of Independent Panels

The panel membership should have built in practices that make the panel members resistant to improper influence and to strengthen the quality of decision-making.

- The panel should consist of at least 4 people, an independent chair, 2 independent experts and a community representative and no councillors. A quorum should be 3 members. An alternative chair should also be appointed.
- The chairperson should be a renowned expert in one of the expert fields or with experience in the Land and Environment Court. The Chairperson will have the following roles:
 - Chair hearings and panel meetings and ensure principles of natural justice are observed
 - Facilitate an atmosphere where applicants and objectors are at ease during presentation of their submissions to the panel
 - Be responsible for minutes of panel meetings and for producing quarterly or half yearly reports to council on the operation of the panel.
- A “pool” of at least 7 independent experts and 4 community members should be established so that panel members can be drawn from the “pool” on a random basis, or at least in a manner which makes their appointment difficult for applicants to predict
- The panel members should be selected based on qualifications and experience in the designated fields. The fields of expertise required on each council panel may vary depending on the characteristics of the council area and the type of “controversial” development likely to occur in the area. Generally the pool should include experts in the field of planning, design, law and environmental science but may also need to include experts in traffic/engineering, heritage, land economics, social planning and tourism.
- A “selection panel” –rather than an individual in the council should undertake the selection of panellists. The selection panel could include a councillor, senior staff member responsible for the assessment of DAs and at least two distinguished independent people with depth of knowledge of the development assessment system. The general manager should appoint the “selected” panellists after consultation with the councillors.
- Panel members’ tenure should be limited to 2 years with an extension for another 2 years only, to avoid regulatory capture.
- Importantly the “expert” independent members must not live or do business in the council area. Community representatives on the panel must live in the area but not do business in the area.
- The number of panels (including the PAC, JRPPs and other council panels) that a “panel member” can serve on at one time should be limited to 3 panels– to prevent the development of oligarchies.
- If a matter has been considered by a council’s design/architectural panel (if the council has one), then the chair of this panel should be invited to sit on the assessment panel when considering that matters.

Criteria for referral of assessment matters to the Independent Panel

- Where possible, the criteria for referral of development to the independent panel should be predictable and have a low level of discretion. This will add greater certainty to the community and applicants as to what matters are to be dealt with by the panel.
- In councils which have an internal panel made up of senior council staff (e.g. Lodgement Review Panel, Submission Review Panel or Development Assessment Panel) these panels could be given the responsibly to exercise discretion to determine which DAs should be referred to the Independent Panel for advice or determination.
- Modifications to a development previously determined by the panel should also be referred to the panel for determination – this will deal with development creep.

- The criteria should include DAs:
 - Where the council staff, councillors or the council are the applicants or the DA applies to development on council land
 - Where the variation from the development standards is more than 10%
 - Where a voluntary planning agreement is proposed.

Panel Meetings

- Typically panel meetings will be held once a month depending on the number of items for consideration. It is preferable if the meetings are held at a similar time each month.
- The number of items scheduled to be considered at a panel meeting should be limited to ensure time for appropriate consideration of the matters –including for site inspections, hearings and the panel's deliberation on the matter. Consideration should be given to holding a second hearing meeting that month, rather than limit the time available for site inspections, interaction with objectors and applicants or appropriate deliberation of the matters.
- With advisory panels, the panel meeting timing should be co-ordinated with council meetings to minimise delays in determination of DAs.
- A Code of Conduct should be developed consistent with ICAC recommendations to ensure the highest ethical standards in the exercise of duties and responsibilities, to maintain the integrity of the panel and to provide for fair dealings in making decisions.
- Procedures should have built in practices that make the panel members resistant to improper influence – such as rotating panel membership and not allowing contact with councillors, applicants or the community or with council officers except in briefings or site visits when all panellists are present.

Notification of the independent panel meeting

- The agenda along with council's assessment reports and recommendations should be placed on the council's website at least 7 days prior to the meeting.
- A notice should be placed on the Council Notice Board and in the local newspaper at least 7 days before the meeting, informing the community of the date and time of the meeting, where they can view the assessment reports and information relating to addressing the panel.
- The applicant and objectors should be notified by mail or email of the panel meeting.
- While it is preferable that people register to speak prior to the meeting, they should still be able to address the panel, with the discretion of the chair, even though they have not registered beforehand.

Site visit

- The panel members should undertake a site visit, usually on the day of the meeting, with transport organized by the panel coordinator. The assessment officers should accompany the panel to answer questions and clarify issues.
- While the hearing proceeding should not be held on the site, applicants or objectors should be given the opportunity to draw the panels' attention to particular site characteristics and issues.

Pre-Hearing Briefing

- The manager and the assessment officers should be available to give the panellists a briefing and answer any questions the panellist may have following the site visit.

Hearing proceedings of Independent Panels

- Panel hearings should be open to the public. The hearing room/space should be set up so that there is an "informal" atmosphere with proceedings run in a relaxed manner with as little formality as circumstances of the case permit and consistent with the principles of procedural fairness. Panellist should be encouraged to engage with presenters.
- The Chair should introduce the panel members, asks if there are any pecuniary or conflicts of interest regarding any items on the agenda. The Chair then should introduce each item on the agenda.

- The assessment officer for each DA should be present at the panel hearings to explain the recommendations. Where there are complex issues, it would be beneficial for the assessment officer to explain the recommendation and the implications at the beginning of the hearing, or alternatively following presentations from objectors and the applicant. This could play an education and communication role for the community.
- The objectors should be invited to present their issues, followed by the applicant, their technical experts or other supporters. Speaker names should be included in the minutes unless otherwise requested.
- Councillors may attend panel hearings and if appropriate, speak on the matter under consideration from a personal point of view or as an advocate of the applicant or objectors. Councillors should not speak with panel members outside the hearing.
- Time limits on making presentations should be flexible so that the speakers feel they can make their points. When feasible, the number of people who want to make a statement on a particular DA should not be limited as each person may have a different issue or point of view, and a single spokesperson may not cover all the points. However speakers can be asked not to repeat the points made by others, and to be as succinct as possible.
- The Panel members should ask questions of the speakers regarding their issues and if appropriate, explore options to modify the assessment officer's recommendations to address the objectors concerns. The panels should specifically raise the issues identified by the objectors with the applicant and their technical advisors and discuss options to address those concerns. With some DAs, this phase could move towards being a mediation process.
- The panel should not be bound by the rules of evidence and may inquire into and inform itself on any matter relevant to the DA, subject to the rules of procedural fairness.
- The panel should be allowed to call for specialist advice, if there is uncertainty with regard to the technical aspects of key issues in the assessment report or recommendations.

Closed determination process of independent panels

- Once the hearing part of the meeting has ended, the Panel will move into a closed session to deliberate and make recommendations or determination on each item. Members of the public should not be able to participate in the closed session, though council officers may be invited to attend to answer any additional questions the panel may have.
- The decision of the panel – whether advice to council or a determination - should be by vote in the closed session. The voting should be recorded in the minutes of the meeting along with the full reasons and conclusions for the decision, particularly when contrary to the officers' assessment and or recommendations.
- The decision may be a recommendation for approval, refusal or deferment of the matter subject to receiving additional information.

Communication of outcomes

- The panel recommendations or notice of determination should be placed on the council website a few days after the meeting. A summary of the matters considered by the panel and the outcomes should be sent to the next council meeting.
 - *With advisory panels:* The recommendations go to the councillors for consideration at their next council meeting. There are usually no opportunities given to objectors or applicants to address the council meeting. Where the council disagrees with the panel's recommendation, consideration could be given to referring the matter back to the panel to reconsider the additional matters of concern to the councillors.
 - *With decision-making panels:* The panel determines the DA. The panel minutes should include justification for the panel's decision particularly if different to the officer's recommendation.

Maximising the benefits of having an independent panel

- The panel should meet with the councillors and senior managers at least twice a year on policy matters and more regularly with the manager of the assessment team to provide feedback on more detail assessment procedures and practices. As a group of independent observers of a council strategic planning and DA processes, the panel can assist council by giving regular candid feedback on their policies and procedures including feedback to:

- Councillors – on the planning controls especially in relation to SEPP 1 issues
- Assessment teams – on assessment approaches, use of conditions for approval and related issues.
- Strategic planners – regarding the nexus between the DA issues and strategic planning. This can assist in focusing planning reviews and updating policies.

9.3 Potential Additional Role for Independent Panels

One of the questions that have been raised during this review is whether the independent panels are being used at the “right end of the pipe”.

If the pipeline was the DA process

If the “pipe” comprises the steps in the DA process, currently the independent panels only operate at the end of the pipe. In many cases, this stage is considered to be too late in two aspects –

- To assist in the DA process meeting its designated performance criteria, and
- To constructively contribute to achieving sound planning outcomes.

Many councils provide pre-lodgement advice on a voluntary basis, which is seen to be very beneficial in identifying key issues for consideration in the design of the proposed development as well as in the assessment of the potential impacts of the development. A third of NSW councils have internal pre-lodgement panels made up of senior staff to provide advice for major or controversial development applications, usually with a fee charged for this service (section 2.1).

Given that additional information is required with a high proportion of complex DAs following lodgement, there would be benefits in having independent experts assist in identifying matters to be addressed in the application upfront. The independent panel would need to engage with senior council planners, engineers and other relevant council experts plus representatives from relevant government agencies. The process could play a similar role to the scoping process for developing “Director General’s requirements” for designated development or the pre-lodgement process with independent design panels.

In addition, the holding of a hearing with interested parties at this early stage would further assist in identifying issues likely to lead to disputes along with potential alternatives. This could assist in getting early resolution of issues. Public input at this early stage could assist in ensuring that important issues are not overlooked with the potential to reduce conflicts and improve timeframes as well as the quality of outcomes.

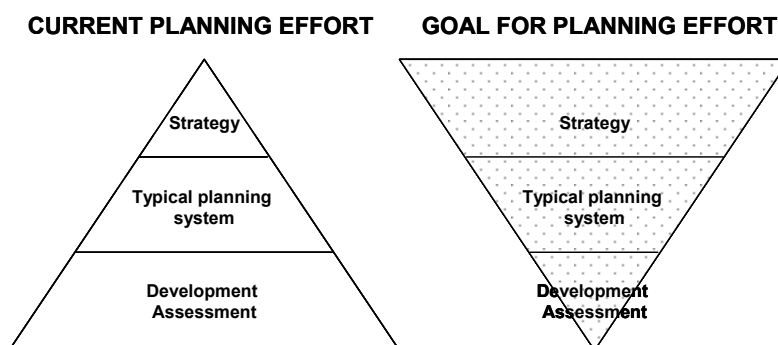
As with DG requirements or pre-lodgement design panels’ advice, the outcomes of this process would need to be in writing to provide certainty to the applicant, community and assessment officers. With the DG requirements, they are given legal status in the EP&A Act and Regulations, while the design panels advice is given status under *SEPP 65 -Design Quality of Residential Flat Development* if it relates to residential flat buildings. If it relates to other types of development, then the advice does not carry the same status. However, like the advice from independent panels, it would become a relevant consideration under s79C of the Act, under the broader “public interest”, “suitability of the site” and “likely impacts of the development” considerations.

Criteria would need to be established to identify the classes of development that would justify the independent panel involvement at the pre-DA stage. However, given the key criteria for referral of matters to the independent panel related to “unresolved objections”, it could be beneficial for the panel to be involved upfront in a broad range of potential controversial developments so the unresolved objections do not occur. Then fewer matters would need to be referred to the panel at the end of the process.

If the pipeline was the strategic planning process

The other pipe identified as part of this review contains the route connecting the strategic planning and the DA process. It has been suggested that there would be significant benefits if independent panels were involved at the strategic planning stage – the real beginning of the planning/DA pipeline – rather than at the end of the DA process. This is consistent with recommendations of the Productivity Commission, which considers greater focus, and effort should be at the strategic planning phase when development controls are being considered so that the development assessment phase can be streamlined as proposed in Figure 4¹⁴⁸. Greater attention needs to be given to the quality, transparency and integrity of the process leading to the development of local strategies, plans or development controls.

Figure 4 Changing the focus of planning effort



These strategic planning phases often lead to micro-management tools, which are complex, overlapping, or backward looking. Too often these controls have developed without appropriate consideration of alternatives, strategic assessment or meaningful community input. As a result of this “good-idea approach”, applicants need to constantly use spot rezoning or SEPP 1/Clause 4.6 in order to achieve reasonable outcomes.

Burwood Council pointed out the benefits in having an independent panel involved in the development of their city plan and has suggested that this approach should be applied more widely. It was noted in Section 4.1 the Commission of Inquiry used to undertake hearings at the request of local councils into strategic and statutory planning matters to provide independent advice to the relevant councils including draft LEPs or proposed spot rezonings.

It is also noted into Section 4.2, that the State Government previously appointed a number of independent panels under s118 (3) of the EP&A Act to specifically examine complex strategic planning issues and to make recommendations: These include:

- Review of the Sutherland LEP
- Review of estimated dwelling yield and development of Ku-ring-gai town centres LEP
- Review of options for growth in Warnervale town centre
- Review of rezoning proposals for Queanbeyan residential land releases.

The independent council appointed panels could provide input at various aspects of the strategic planning for the particular council. In the immediate context, the panel could play a valuable role in undertaking hearings and reviewing various council development standards or policies associated with contentious DAs, which are currently referred to that panel. The panel could also assist in reviewing proposed spot zonings and development controls proposed for major sites or precincts. It is recognised that the development of these types of planning controls would benefit from more effective community engagement and independent peer review than they currently receive. It is noted that increasing these types of LEP amendments are being referred to the JRPP for consideration.

¹⁴⁸Productivity Commission (2011), *Performance Benchmarking of Australian Business Regulation Planning, Zoning and Development Assessment*, Research Report, Canberra. (Figure 4)

10. Observations and Conclusions

It is widely recognised that the planning and development approval processes play a critical part in the delivery of social, economic and environmental outcomes for the local community, the region and the State. Within each council, the efficiency and integrity of these systems can vary greatly over time, depending on the council procedures along with professionalism and performance of individual councillors and council staff. It is considered that in some councils, transparency in development application decision-making is weak and hence there are significant risks of corruption and undue influence¹⁴⁹.

Endorsement for the establishment of panels in the development assessment process has come from a number of directions over the last 25 years:

- The Federal Government's Local Approvals Review Program (LARP) in 1988 recommended the delegation of decision making to reduce delays and undue political influence in the determination of DAs. In 1995, Federal legislation required annual reporting of the performance of local councils including the development application process – providing critics with access to information to benchmark council DA processing performance.
- The NSW Parliament Public Accounts Committee Reports in 1991, 1997 and 1998 all identified the significant resources spent by local councils in defending development decisions in the Land and Environment Court and recommended councils introduce measures into the DA process to reduce conflicts and associated costs.
- The 1990s saw significant population growth in a number of council areas such as Liverpool, putting enormous pressure on councillors needing to focus on the strategic planning for the area rather than being bogged down with a flood of individual DAs. This coincided with the 1997 amendments to the EP&A Act, which made all developments, which previously only needed a BA to now require a DA significantly doubling or tripling the workload of councils.
- The ICAC's investigation into Randwick Council in 1995, Lane Cove, Holroyd and Fairfield Councils in 1997 and Fairfield Council again in 1998 led to recommendations to improve the DA systems to prevent conflict of interest, regulatory capture and corruption. After the Rockdale Council inquiry in 2002, ICAC recommended that panels be delegated assessment and determination roles to reduce these risks. The ICAC as a result of the Rockdale inquiry in 2002 and Wollongong inquiry in 2008 recommended that panels should be used to deal with SEPP 1/Clause 4.6 variations as part of safeguards with the exercising of discretion on varying standards.
- The late 1990s saw increased emphasis being placed on the need for effective community engagement in the planning system. In 2003, the *Integrated Local Area Planning* initiative reinforced the importance of strengthening public participation and increasing the delegation of decision making to committees or staff.
- In 2005, DAF Leading Practice Model of Development Assessment highlighted the benefits of determination of DAs by profession staff or private sector expert panels rather than councillors
- In 2007, the Productivity Commission considered that because policy issues often needed to be resolved during the development assessment process where significant discretion is exercised, decision-making processes should be strengthened with the use of independent experts.
- In 2008, the EP&A Act was amended to recognise the potential role of IHAPs in the planning system and to provide a State framework for their establishment and operation.

These factors have contributed to the rise of collaborative approaches being introduced by a number of councils into their DA processes over the last 15 years. An additional motivator for these approaches has been the increasing complexity in the planning and development application processes with increasing layers of technical matters and associated “red tape” to be considered at each step in the process. This calls for a broader range of technical competency and recognition of the benefits of collective consideration of complex issues by a range of experts rather than individual officers.

¹⁴⁹ Allan P (2006) Are Councils Sustainable? Final Report: Findings and Recommendations Independent Inquiry into the Financial Sustainability of NSW Local Government May 2006

Along with this, there is the continuing problem arising from a weak tradition in strategic planning in NSW, which often moves the resolution of the more complex issues into the DA process, rather than dealing with them upfront. In a way, the emergence of panels and the panelisation of the DA process has been one way of helping to untangle some of this strategic planning maze.

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Council Internal or Independent Panels

From a review of councils' practices in Section 2 of this paper, it can be seen that there are a range of approaches taken by councils in the use of both internal and independent panels to strengthen the various steps in their DA processes. All have strengths influenced by the particular types of development, the area characteristics and the context in which decisions are being made. Both internal and independent panels are seen to improve the development assessment process, potentially reducing timeframes and resulting in better outcomes through shared evaluation and resolution of issues.

There are significant opportunities for panels to improve the assessment and decision making processes due to the role that a group of technical experts can play. Currently no one approach is considered preferable over any other.

In this review of council DA procedures, it is clear that some of the benefits from having an independent panel could also be achieved through the use of internal panels or an internal panel with an independent chair as in Port Macquarie Hastings.

- At the pre-DA stage, an internal panel can help to scope the issues that are likely to be controversial along with design considerations and improve the advice given to applicants' upfront, potentially reducing delays in the future.
- Also having internal panels involved during the assessment process means there is shared wisdom, often finding better approaches not available when a single officer is responsible. Importantly, the requirement for an officer to refer the DA assessment recommendations to more senior officers for review along with a requirement to refer more complex or controversial DAs to a panel for determination is seen to have significant benefits.
- By having an internal assessment panel which also undertakes site visits and provides a forum for applicants and objectors to present their issues in an open manner, transparency significantly increases, corruption risk reduces and a collaborative decision making process is provided.

In councils where their internal collaborative systems are working well with corruption risk minimisation safeguards built in at both the officer and councillor level, it has been argued there is no need for independent panels. However with council internal panels, councillors or officers still have to deal with the ongoing planning outcomes of any decision, whereas with independent panels, experts can walk away from the outcomes at the end of the process. This has positive and negative implications for the integrity of decision-making particularly on controversial developments. With internal panels there are risks that the ongoing implications of decision-making, being likely to erode the merit based approach.

But independent panels are more likely to stick with a merit-based approach. With independent panels, collaboration between the independent experts in the peer review of the officer's assessment report and recommendations can provide a more robust and transparent process, particularly if the panel then has authority to determine the DA. Further, there are opportunities, as discussed earlier, for the independent panel to play a role with potentially controversial development proposals to assist in scoping of the contentious issues and to resolve these matters upfront.

Council Independent advisory or decision making panels

Independent panels can add significant value to the integrity and procedural fairness of the process where the panel members can engage with the objectors and the applicant, and the

¹⁵⁰Freestone R (2000) Planning Sydney: Historical Trajectories and Contemporary Debates in Sydney in The emergence of a World City ed J Connell Oxford University Press

panel's decision or advice is not just rubber-stamping the recommendations of the council officers.

With advisory panels, the matter still has to be referred to the decision making body, usually the council. The council in a way becomes a "political panel" in the next step of the decision making process at the council meeting. This adds time and leaves open the opportunity for political and other factors to override the merit-based approach recommended by the panel. While having the councillors involved in making the decision is considered to be more "democratic", it hands over the decision making to those who are often amateurs in the very technical sphere of planning and development assessment.

However simply removing councillors from the role and moving the responsibility to council officers to determine the DAs, does not solve the problem but merely transfers the risks from one group to another¹⁵¹. ICAC came to the conclusion as a result of the inquiry into Wollongong Council officers and councillors in 2008 that external oversight was a key line of defence in preventing and detecting corruption within a council. When corruption is widespread and affects the highest levels of management, then external bodies are often the only realistic hope for limiting its effect.

The decision-making panels can have significant advantages, in terms of more timely and independent decisions making. However this panelisation of the process can also engender unease in some quarters with the transference of power from a "political panel" to technocrats. However, increasingly this approach is being seen to have positive implications, as can be seen by Warringah and Waverley Councils switching from advisory to decision making panel models, and North Sydney, Lane Cove, Mosman and Manly all choosing to establish the decision making panel option.

Challenges to council ownership of their panels in the future

Increasingly, councils are considering the option of establishing panels – internal and independent – to strengthen their assessment processes. However the desire of the NSW Government to impose uniformity on council independent panels is not seen by councils to be beneficial. NSW local councils currently retain the option whether or not to constitute an independent panel, unlike in South Australia. However if their panel is established under the current EP&A Act provisions or in the future, under the Planning Administration Bill provisions, councils could lose their discretion to determine the manner in which panels operate. Consequently, all councils have currently established their panels under the Local Government Act.

The Local Government Association has criticised the regulation of independent panels under both the EP&A Act and the Planning Administration Bill as a "vehicle for Ministerial intervention in council's operations"¹⁵². Councils are more supportive of having panels they can control.

With each council having their own type of independent panel, there can be confusion in the industry with applicants having to deal with advisory and decision making panels in different councils with no consistency as to the criteria that trigger the panels having a role. Because of the extensive discretionary criteria for the matters to be referred to the panel, there tends not to be certainty as to whether a particular DA will go to the panel or not.

The proposed provisions in the Planning Administration Bill would give the Department of Planning and Infrastructure the power to establish procedures and criteria to apply to all independent panels established under the Bill's provisions. While this could give more consistency and benefit industry, it would certainly undermine the councils' autonomy in how their panels would operate. This has the potential to erode council's support for having an independent panel.

¹⁵¹ ICAC 2005

¹⁵² Local Government and Shires Association of NSW in their submission, *Draft Planning Exposure Bill* (2008)

In addition, under the proposals in the Planning Administration Bill, if the council does not meet performance criteria, then they could be required to establish an independent panel. This also would erode the councils support for having panels as the panel would not be seen as their partner but as a State “penalty” imposed on their DA process.

While having a panel can be a significant benefit in improving the decision making process, the reasons for councils not meeting the performance criteria may result from procedures earlier in the DA process or be associated with weaknesses in the strategic planning and development controls. Having a decision making panel may only assist but not fix the source of many of the current problems in council’s DA processes. There would be benefits in the independent panel being involved earlier in the DA processes as well as part of the strategic planning process.

Council Independent Panel instead of the JRPP

The JRPPs currently take over local council decision making for “regionally significant” development with a CIV of over \$20 million and infrastructure development with a CIV of over \$5 million along with certain other designated developments and coastal subdivisions. As there is a commitment to hand decision making back to local councils, consideration could be given to exempting from the JRPPs consideration, “regionally significant” DAs in council areas with independent decision making panels.

This would provide an incentive to councils to establish independent decision-making panels, with broader positive implications for the DA process. Provisions could be included in legislation to ensure the council’s independent panels took into consideration “regional” factors when making a determination.

Conclusion

In addition to local factors such as changing development patterns in the area, there have been a number of significant external pressures on the councils’ development assessment systems since the 1990s, which contributed to the evolution of panels including:

- A recognition nationally of the importance of planning to the economy in general, and particularly to housing supply and hence the importance of monitoring and improving the efficiency of the development application process
- The increased pressure on all local council services and systems in response to significant growth
- An acknowledgement of the need to strengthen the integrity of the local council development application process as well as having checks and balances which can help avoid or minimise corruption risks
- An appreciation of the importance of effective engagement with the applicant and the community in DA matters to reduce council’s high legal costs by avoiding or minimising court challenges.

Where the independent panel is considered to be a council’s body, it can be seen as a partner in the council’s processes. This partnership can assist in removing the conflicts associated with the multiple roles of councillors as decision maker and advocate, and eliminate some of the corruption risks, particular when the panel takes over the decision making role. The partnership can also take some of the pressure off assessment officers along with playing a performance development role for these officers.

While the panels have cost implications depending on the number of matters dealt with, there are also savings from the use of independent panels associated with reduced council meetings, reduced processing timeframes and reduced risk of court challenges. This review has found that with councils with decision making panels timeframes were reduced for developments with a value of less than \$5 million, while there was a small increase for council with advisory panels. The review also suggested that there could be a reduction in court costs as a result of having independent panels.

The use of independent panels also has a number of performance benefits in terms of strengthening the assessment process, providing for additional community engagement and

reinforcing the integrity of the decision making process. Importantly the panels provide an additional opportunity in the assessment process for the community and applicants to engage and allow for their views to be considered, increasing procedural fairness. Surveys of stakeholders indicated strong support for this additional engagement. These benefits are maximised where the panel also makes the determination.

A number of councils have established internal panels, which also contribute to the integrity and efficiency at different stage of the DA process, importantly at the pre-lodgement stage. These panels also contribute to strengthening and providing greater community satisfaction with the process.

In summary, internal and external panels can contribute to the improving the quality and efficiency of assessment and decision-making and serve several important roles:

- In providing a separation between the assessment officer and the determination role
- In peer reviewing the officer's assessment report and recommendation
- In strengthening the design of the development – in the streetscape, external and internal
- In providing a co-ordinated input from a range of expertise
- In staff development, by exposing assessment officers to internal and external experts
- In providing for collaborative decision making instead of the view of an individual, and
- In providing expert feedback on council planning controls and processes.

As with internal and design panels, independent panels could also constructively contribute at other stages of the DA process, in particular upfront at the pre-lodgement stage, when the issues and options are being identified and evaluated. The use of independent panels throughout the DA process as well as in strategic planning pipeline would have the potential to improve the effectiveness of community participation and the relevance and quality of the planning outcomes.

Better strategic planning could lessen the need for panels at the DA stage as there would be less need for variations from the planning controls and the community would have a better understanding as to what can be expected to be developed in their area with fewer unresolvable objections.

To some, the DA process is seen to be planning policy on the run. In a way, the need for panels as an independent arbitrator at the DA stage is a barometer on the weaknesses in the strategic planning process. While independent panels can't fix the problems of poor strategic planning, in the short term, these panels can help facilitate the resolution of issues arising from conflict or uncertainty as to what can be developed in the area. The feedback from independent panels can also play an important role in improving the strategic planning framework for local councils. In this way, they can assist in the move towards more transparent, efficient and effective planning in NSW.

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Appendix 1: Council Panels on the Internet

The following is a list of council websites with information accessed on their DA processes and panels.

Ashfield	<p>General DA information – and how to avoid delays http://www.ashfield.nsw.gov.au/page/how_to_avoid_delays.html</p>
Auburn	<p>General DA information http://www.auburn.nsw.gov.au/Develop/Development%20Assessment/Pages/DevelopmentApplicationProcess.aspx</p>
Blacktown	<p>General DA information http://www.blacktown.nsw.gov.au/Planning_and_Development</p> <p>Pre-Lodgement Meetings: http://www.blacktown.nsw.gov.au/Planning_and_Development/Planning_Building_Information/Pre_Lodgement_Meetings</p> <p>Council Resolution (6 November 2013) by the Policy and Strategy Committee to establish an IHAP by July 2014 Item: PO1647 Subject: SD330085 - Consideration of the Appointment of an Independent Hearing and Assessment Panel File Number: 145-224-2 http://bcc.yarratech.com/EBP%20BlackTown/bccwebpapr.nsf/Public?OpenFrameSet</p>
Botany	<p>General DA information http://www.botanybay.nsw.gov.au/index.php/council-services/services/development-assessment</p>
Canterbury	<p>General DA information http://www.canterbury.nsw.gov.au/Building/Development-Application-Process</p> <p>Independent Development Assessment Panel (IHAP) General IHAP information: http://www.canterbury.nsw.gov.au/Council/Council-Meetings/Independent-Hearing-and-Assessment-Panel-IHAP</p> <p>IHAP meetings: http://www.canterbury.nsw.gov.au/Discover/Events-in-Our-City/IHAP-Meeting</p> <p>Independent Hearing and Assessment Panel Review - Canterbury City Development Committee 14 February 2008</p> <p>IHAP Policy: Amended by Council 12 December 2013 Council Minute No. 477 www.canterbury.nsw.gov.au/files/6c0be5ef-bebc-4a79.../23-381-3.pdf</p> <p>St George Design Review Panel http://www.canterbury.nsw.gov.au/files/62ebe845-2343-4b7d-870c-a28800b64fcf/CDC51213Item3.pdf?streamFile=true</p>
Fairfield	<p>General DA information http://www.fairfieldcity.nsw.gov.au/default.asp?iNavCatId=7&iSubCatId=84</p> <p>Independent Development Assessment Committee (IDAC) General information: http://www.fairfieldcity.nsw.gov.au/default.asp?iNavCatId=4&iSubCatId=61</p>
The Hills	<p>General DA information http://www.thehills.nsw.gov.au/Planning-and-Development.html#.UtXaLc_xvIX</p> <p>Conciliation Conferences http://www.thehills.nsw.gov.au/IgnitionSuite/uploads/docs/Fact%20Sheet%20-%20Conciliation%20Conference%20Procedures.pdf</p> <p>You're your Say http://www.thehills.nsw.gov.au/IgnitionSuite/uploads/docs/Have%20Your%20Say.pdf</p>
Holroyd	<p>General DA information http://www.holroyd.nsw.gov.au/your-development/development-applications/</p> <p>Council Meeting Motion to establish a IHAP based on Manly model for 6 months trial: 20 August 2013. http://125.255.86.103/ebp/Open/2013/08/CCL_20082013_AGN.PDF</p> <p>DCS028-13 Subject: Independent Hearing and Assessment Panel (IHAP) BP13/933 http://125.255.86.103/ebp/Open/2013/08/CCL_20082013_MIN.htm</p> <p>Press release: http://www.holroyd.nsw.gov.au/politics-taken-out-of-controversial-development-applications/</p>

Hurstville	<p>General DA information http://www.hurstville.nsw.gov.au/Development-Application-Assessment.html</p> <p>Development Application Review Committee (DARC) http://www.hurstville.nsw.gov.au/Initial-Review.html</p>
Lane Cove	<p>General DA Information http://www.lanecove.nsw.gov.au/Council%20Services/Development%20Control/Development%20Application%20Approval%20Processes/Flowchart/Flowchart.htm</p> <p>Independent Development Assessment Panel (IHAP) http://www.lanecove.nsw.gov.au/Council%20Services/Development%20Control/Lane%20Cove%20Hap/LaneCoveIHAP.htm</p> <p>IHAP Meeting Webcast http://lanecove.nsw.gov.au/Your%20Council/Meetings%20and%20Reports/Meeting%20Webcast/Meetingwebcast.htm</p>
Leichhardt	<p>General DA Information http://www.leichhardt.nsw.gov.au/Planning---Development</p> <p>Council Meeting 5 December 2012 Item G2 Independent Hearing and Assessment Panels www.leichhardt.nsw.gov.au/.../1446/itemg02-dec2012-ord.pdf.aspx</p> <p>Council Meeting 26 November 2013 Item E7 Independent Hearing and Assessment Panels www.leichhardt.nsw.gov.au/.../1563/iteme07-nov2013-ord.pdf.aspx</p>
Liverpool	<p>General DA Information http://www.liverpool.nsw.gov.au/planninganddevelopment</p> <p>Development Assessment Panel (Internal) http://www.liverpool.nsw.gov.au/planninganddevelopment/assessment-panels/development-assessment-panel</p> <p>Independent Development Assessment Panel (IHAP) http://www.liverpool.nsw.gov.au/planninganddevelopment/assessment-panels/independent-hearing-and-assessment-panel</p> <p>Pre-Development Application and Design Review Panel http://www.liverpool.nsw.gov.au/planninganddevelopment/the-development-and-building-process/pre-development-applications</p>
Manly	<p>General DA Information http://www.manly.nsw.gov.au/planning-and-development/miap-manly-independent-assessment-panel/</p> <p>Independent Assessment Panel http://www.manly.nsw.gov.au/planning-and-development/miap-manly-independent-assessment-panel/</p>
Mosman	<p>General DA Information http://www.mosman.nsw.gov.au/development/applications/</p> <p>Mosman Development Assessment Panel http://www.mosman.nsw.gov.au/development/MDAP</p>
Newcastle	<p>General DA information http://www.newcastle.nsw.gov.au/building_and_planning/plan_your_application/lodgement</p>
North Sydney	<p>General DA Information http://www.northsydney.nsw.gov.au/Building_Development/DA_Process</p> <p>Independent Planning Panel (IPP) http://www.northsydney.nsw.gov.au/Council_Meetings/Meetings/NSIPP</p> <p>Establishing the panel: Council Item PD06 Planning & Development Committee 5/11/12 http://www.northsydney.nsw.gov.au/resources/documents/PD06_Independent_Hearing_and_Assessment_Panel_IHAP_RPT_tc.pdf</p> <p>Design Excellence Panel http://www.northsydney.nsw.gov.au/Building_Development/Strategic_Planning/Design_Excellence_Panel</p>

Pittwater	<p>General DA Information http://www.pittwater.nsw.gov.au/building_and_development/Development_Application_Guide</p>
Port Macquarie - Hastings	<p>General DA Information http://www.hastings.nsw.gov.au/www/html/4750-development.asp</p> <p>Development Assessment Panel (Internal) http://www.hastings.nsw.gov.au/www/html/5470-development-assessment-panel.asp?intSiteID=1</p>
Randwick	<p>General DA Information http://www.randwick.nsw.gov.au/Places_for_people/Building_and_development/Development_applications/The_DA_process/index.aspx</p> <p>Resolution not to proceed with establishing an IHAP: Independent Hearing Assessment Panel (F2004/07960) 25 March 2008 http://businesspapers.randwick.nsw.gov.au/Open/2008/OC_25032008_MIN.PDF</p> <p>Joint Randwick and Waverley Design Review Panel http://www.randwick.nsw.gov.au/Places_for_people/Building_and_development/Development_applications/The_DA_process/index.aspx</p>
Ryde	<p>General DA Information http://www.ryde.nsw.gov.au/Development/Development+Applications</p> <p>Report on Independent Hearing and Assessment Panel Workshop Council Meeting No. 24/13, dated Tuesday 26 November 2013. Page 88 File No.: GRP/09/6/5 - BP13/1607 http://www.ryde.nsw.gov.au/_Documents/Mtg-Council2013/gm2413_261113a_P1.pdf</p> <p>Pre-lodgement Meetings and Urban Design Review Panel http://www.ryde.nsw.gov.au/_Documents/Dev-Helpsheets/HS+-+Prelodgement.pdf http://www.ryde.nsw.gov.au/Development/Development+Applications/Advisory+Service</p>
Sutherland	<p>General Information: http://www.sutherlandshire.nsw.gov.au/Building_Development/Development_Applications/Current_Applications/Independent_Hearing_and_Assessment_Panel_-_IHAP</p> <p>Independent Development Assessment Panel (IHAP) Process and Rules for the operation of the Independent Hearing and Assessment Panel: http://www.sutherlandshire.nsw.gov.au/Council_The_Shire/Policies_Forms/IL/Independent_Hearing_and_Assessment_Panel</p> <p>Operation and relationship between Council's Independent Hearing & Assessment Panel and Architectural Review Advisory Panel –</p> <ul style="list-style-type: none"> • Council Meeting 10/12/12 Minute Number 485 • Council Meeting 15/07/13 Minuter Number 021 <p>Setting a fee for calling up an application to the Independent Hearing and Assessment Panel at an applicant's request File Number: GO/06B/365813 EHR059-13 Director: Environmental Services 11/03/2013</p> <p>Architectural Review Advisory Panel http://www.sutherlandshire.nsw.gov.au/Building_Development/Development_Applications/Current_Applications/Architectural_Review_Advisory_Panel</p>
Warringah	<p>General DA Information http://www.warringah.nsw.gov.au/planning-and-development</p> <p>Development Assessment Panel (DAP) General Information: http://www.warringah.nsw.gov.au/your-council/meetings/committees/warringah-development-assessment-panel</p> <p>Application Determination Panel (Internal) http://www.warringah.nsw.gov.au/your-council/meetings/committees/application-determination-panel</p> <p>Development Review Panel: http://www.warringah.nsw.gov.au/your-council/meetings/committees/warringah-development-review-panel</p> <p>Development determination panels charters: http://www.warringah.nsw.gov.au/your-council/meetings/development-determination-panels/development-determination-panels</p> <p>Mediation process: http://www.warringah.nsw.gov.au/planning-and-development/application-process/mediation</p>

	<p>Change from IHAP to DAP: Review of Development Application Processes: Report to Council Meeting Item 9.2 April 2008http://www.warringah.nsw.gov.au/sites/default/files/documents/meetings/archived/2008040892.pdf</p>
Waverley	<p>General DA information http://www.waverley.nsw.gov.au/building/development_applications</p> <p>Development Assessment Panel http://www.waverley.nsw.gov.au/building/waverley_development_assessment_panel</p> <p>Conversion of IHAP to DAP: Council Meeting 18 June 2013 - 1306.12.7 - PAGE 331 http://www.waverley.nsw.gov.au/___data/assets/pdf_file/0020/53237/Council_Agenda_-_18_June_2013.pdf</p> <p>http://www.waverley.nsw.gov.au/top_link_pages/news_and_media/council_news/council_news/first_meeting_of_the_waverley_development_assessment_panel_wdap</p> <p>Joint Randwick and Waverley Design Review Panel http://www.randwick.nsw.gov.au/library/scripts/objectifyMedia.aspx?file=pdf/15/13.pdf&siteID=1&str_title=Joint Randwick & Waverley Council Design Review Panel.pdf</p>
Willoughby	<p>General DA Information http://www.willoughby.nsw.gov.au/Development/DAPProcess/</p> <p>Role of the Development Assessment Review Committee http://www.willoughby.nsw.gov.au/Development/DAPProcess/34/</p>
Wollongong	<p>General DA information http://www.wollongong.nsw.gov.au/development/da/Pages/default.aspx</p> <p>Independent Development Assessment Panel (IHAP) http://www.wollongong.nsw.gov.au/development/ihap/Pages/default.aspx</p> <p>Charter and Code of Conduct: http://www.wollongong.nsw.gov.au/development/ihap/Documents/Independent%20Hearing%20and%20Assessment%20-%20IHAP%20-%20Committee%20Charter%20Feb%202012.pdf</p> <p>Community Representatives on Panel: http://reformwcc.info/2008/10/02/wcc-call-for-community-representatives-ihap-by-monday-27-oct/</p> <p>Independent Hearing & Assessment Panel (IHAP) Review - Report of Manager City Planning (MR) 9/11/10 CP-911.02 23 November 2010 http://www.wollongong.nsw.gov.au/council/meetings/BusinessPapers/Independent%20Hearing%20and%20Assessment%20Panel%20IHAP%20Review.pdf</p>
Woollahra	<p>General DA information http://www.woollahra.nsw.gov.au/building_and_development</p> <p>How are DAs assessed http://www.woollahra.nsw.gov.au/building_and_development/how_we_assess_your_da</p> <p>Delegation of determination of DAs Woollahra Council website http://www.woollahra.nsw.gov.au/building_and_development/</p> <p>Application Assessment Panel (Internal) http://www.woollahra.nsw.gov.au/council/meetings_and_committees/committees/aap</p>

Appendix 2: Panels and Legal Costs as Proportion of Total Planning & Building Costs

This data was provided by councils to the Department of Local Government for inclusion in the Comparative Information Annual Reports, available on the Department's website. After 2006, the Department of Planning was responsible for preparing the annual reports on development application data and the data sets on development applicant related legal costs were no longer collected.

	Number of DAs determined	Average calendar days taken to determine DAs	Total planning and building control costs	Average Costs per DA	Legal expenses (planning and development)	Legal cost as % of total planning and building costs
Liverpool – IHAP commenced in 1997						
1994/1995	1,023	53.00	3,107,000	3037.14	84,000	2.70%
1995/1996	948	45.90	2,891,000	3049.57	101,103	3.50%
1996/1997	812	71.01	4,221,000	5198.27	180,000	4.26%
1997/1998	841	70.00	3,559,000	4231.86	61,974	1.74%
1998/1999	3,812	42.41	4,420,000	1159.49	58,473	1.32%
1999/2000	3,842	60.00	4,678,000	1217.59	69,000	1.47%
2000/2001	2,934	54.32	4,763,000	1623.38	¹ 198,000	¹ 4.16%
2001/2002	2,799	57.35	4,799,000	1714.54	202,000	4.21%
2002/2003	2,581	36.49	4,310,000	1669.89	248,000	5.75%
2003/2004	2,469	58.26	4,580,000	1855.00	513,000	11.20%
2004/2005	2,156	66.18	4,317,000	2002.31	274,000	6.35%
2005/2006	2,040	83.28	4,696,000	2301.96	313,000	6.67%
Fairfield –IHAP commenced in 1999						
1995/1996	702	65.00	2,071,104	2950.29	153,320	7.40%
1996/1997	765	63.42	1,646,635	2152.46	12,010	1.86%
1997/1998	686	45.87	3,101,000	4520.40	99,000	3.19%
1998/1999	4,153	33.49	3,155,000	759.69	² 265,245	² 8.41%
1999/2000	2,992	51.94	3,430,000	1146.39	140,000	4.08%
2000/2001	1,962	43.20	2,626,000	1338.43	141,000	5.37%
2001/2002	2,343	40.04	3,448,000	1471.61	145,000	4.21%
2002/2003	2,118	40.27	1,981,000	935.31	169,000	8.53%
2003/2004	2,343	40.04	3,448,000	1471.61	145,000	4.21%
2004/2005	1,970	48.75	3,887,000	1973.09	237,000	6.10%
2005/2006	1,859	49.42	3,936,000	2117.26	180,000	4.57%
Sutherland– IHAP commenced in 2003						
1999/2000	2,762	77.98	5,959,000	2157.49	1,017,000	17.07%
2000/2001	2,704	115.77	6,351,000	2348.74	1,359,000	21.40%
2001/2002	2,102	92.70	7,430,000	3534.72	1,005,000	13.53%
2002/2003	2,555	102.49	7,495,000	2933.46	1,941,000	25.90%
2003/2004	2,099	92.26	9,433,000	4494.04	2,758,000	29.24%
2004/2005	1,809	85.08	8,572,000	4738.53	592,000	6.91%
2005/2006	1,613	96.27	9,509,000	5895.22	881,000	9.26%
Warringah– IHAP commenced in 2003						
1999/2000	2,399	50.00	2,787,000	1161.73	1,462,000	52.46%
2000/2001	1,792	88.00	3,163,000	1765.06	857,000	27.09%
2001/2002	2,092	88.00	4,292,000	2051.62	1,607,000	37.44%
2002/2003	2,081	96.00	2,854,000	1371.45	1,507,000	52.80%
2003/2004	1,956	92.02	³ 6,904,000	3529.65	1,725,000	24.99%
2004/2005	1,866	123.86	6,886,000	3690.24	1,255,000	18.23%
2005/2006	1,703	64.19	6,597,000	3873.75	709,000	10.75%
Canterbury– IHAP commenced in 2006						
1998/1999	1,908	64.70	2,329,150	1220.72	167,612	7.20%
1999/2000	2,049	70.61	1,647,000	803.80	231,000	14.03%
2000/2001	1,058	54.09	2,263,000	2138.94	176,000	7.78%
2001/2002	1,038	52.44	2,106,000	2028.90	138,000	6.55%
2002/2003	1,469	71.11	2,127,000	1447.92	198,000	9.31%
2003/2004	1,349	72.32	2,361,000	1750.18	297,000	12.58%
2004/2005	1,289	65.65	2,772,000	2150.50	365,000	13.17%
2005/2006	1,293	80.20	3,076,000	2378.96	181,000	5.88%

Notes:

¹ Liverpool Council had a number of major court and ICAC issues unrelated to IHAPs responsibilities including Bulldogs Leagues Club, Oasis Development and Orange Grove Development which distorted the legal costs

² In 1998 a Fairfield Councillor and 5 others were ICAC-ed and found to have acted corruptly in respect of two development applications considered by the Council

³ In 2003, an inquiry found that confidence in the Warringah Council councillors' ability to fulfil their role had been lost and the council was dismissed. A major restructure was undertaken with a significant change in the planning and building control costs unrelated to the IHAP costs.

Appendix 3: Trends in refusals, reviews and legal challenge in councils with independent panels

The following information was sourced from the annual NSW Local Development Performance Monitoring Reports and the spreadsheets compiled by the NSW Department of Planning and Infrastructure based on the department's analysis of data supplied by local councils. The data is available on the Department's website.

	DA			DA determined by			SB2A reviews			Class1 legal appeals		
	Total Number	Refused	% refused	councillors	IHAP/ Panel	JRPP	Total Reviews	% of DAs Review	approved	Total Appeals	% of DAs Appealed	upheld
ADVISORY PANELS												
Canterbury	IHAP – commenced advisory role in September 2006											
2012-13	471	32	6.7%	25	0	8	11	2.3%	5	3	0.6%	1
2011-12	495	23	4.6%	4	0	36	7	1.4%	4	2	0.4%	1
2010-11	595	22	3.7%	2	0	37	5	0.8%	4	1	0.2%	0
2009-10	655	25	3.8%	48	0	0	0	0.0%	0	1	0.2%	1
2008-09	627	33	5.3%	35	0	0	4	0.6%	4	5	0.8%	1
2007-08	696	34	4.9%	31	0	0	3	0.4%	3	0	0.0%	0
Fairfield	IHAP – commenced advisory role in 1999											
2012-13	772	33	4.2%	16	0	4	20	2.6%	10	5	0.6%	1
2011-12	889	40	4.5%	27	0	13	8	0.9%	6	5	0.6%	3
2010-11	1,129	34	3.0%	16	0	2	16	1.4%	14	2	0.2%	2
2009-10	1,416	76	5.4%	20	0	10	30	2.1%	21	4	0.3%	0
2008-09	1,237	82	6.6%	11	0	84	31	2.5%	22	2	0.2%	0
2007-08	1,204	54	4.5%	20	0	7	8	0.7%	1	1	0.1%	1
Liverpool	IHAP – commenced advisory role in 1997											
2012-13	1,204	8	0.6%	29	0	9	1	0.1%	0	4	0.3%	1
2011-12	1,151	14	1.2%	18	0	8	2	0.2%	2	1	0.1%	0
2010-11	1,232	7	0.6%	19	0	3	0	0.0%	0	0	0.0%	0
2009-10	1,383	6	0.4%	15	0	3	0	0.0%	0	3	0.2%	1
2008-09	1,193	15	1.3%	22	0	0	0	0.0%	0	3	0.3%	1
2007-08	1,323	12	0.9%	30	0	2	0	0.0%	0	3	0.2%	2
Sutherland	IHAP – commenced advisory role in 2003											
2012-13	1,117	39	3.5%	25	0	10	22	2.0%	14	6	0.5%	0
2011-12	1,111	69	6.2%	30	0	10	31	2.8%	24	10	0.9%	0
2010-11	1,219	80	6.6%	13	0	11	32	2.6%	20	12	1.0%	6
2009-10	1,281	74	5.8%	28	0	7	36	2.8%	29	7	0.5%	5
2008-09	1,226	75	6.1%	23	0	9	21	1.7%	18	12	1.0%	7
2007-08	1,407	80	5.7%	35	0	0	34	2.4%	7	22	1.6%	17
Waverley	Advisory IHAP since 2006 – changed to Development Assessment Panel determining DA from June 2013											
2012-13	533	35	6.6%	68	0	8	10	1.9%	6	26	4.5%	21
2011-12	593	47	7.9%	88	0	0	20	3.4%	13	32	5.4%	24
2010-11	675	38	5.6%	77	0	0	17	2.5%	12	21	3.1%	17
2009-10	640	44	6.9%	81	0	0	16	2.5%	11	29	4.5%	18
2008-09	737	62	8.4%	103	0	7	18	2.4%	9	28	3.8%	21
2007-08	653	72	11.0%	80	0	2	0	0.0%	0	35	5.4%	23
DECISION MAKING PANELS												
Lane Cove	IHAP – commenced determining DAs in October 2012											
2012-13	224	10	4.5%	0	4	4	4	1.8%	2	2	0.9%	1
2011-12	223	9	4.0%	6	0	3	0	0.0%	0	7	3.1%	6
2010-11	293	13	4.4%	9	0	8	7	2.4%	4	5	1.7%	4
2009-10	305	4	1.3%	11	0	0	2	0.7%	1	3	1.0%	1
2008-09	315	5	1.6%	11	0	0	1	0.3%	1	2	0.6%	1
2007-08	436	8	1.8%	19	0	0	8	1.8%	3	4	0.9%	1
Manly	Independent Assessment Panel – Commenced determining DAs in 2008											
2012-13	267	19	7.1%	0	52	0	10	3.7%	7	12	4.5%	8
2011-12	335	23	6.9%	0	53	1	11	3.3%	6	14	4.2%	10
2010-11	408	23	5.6%	0	49	2	7	1.7%	7	5	1.2%	0
2009-10	396	21	5.3%	0	39	0	2	0.5%	1	8	2.0%	0
2008-09	468	28	6.0%	15	0	0	8	1.7%	3	3	0.6%	3
2007-08	486	35	7.2%	50	0	0	14	2.9%	2	4	0.8%	4
Mosman	Development Approval Panel – Commenced determining DAs in May 2011											
2012-13	235	23	9.8%	1	73	0	8	2.6%	6	8	3.4%	4
2011-12	274	13	4.7%	2	78	2	8	2.9%	5	3	1.1%	0
2010-11	258	17	6.6%	74	11	3	9	3.5%	6	9	3.5%	1
2009-10	285	26	9.1%	62	0	7	6	2.1%	5	9	3.2%	1
2008-09	243	14	5.8%	58	0	1	8	3.3%	6	7	2.9%	5
2007-08	382	32	8.4%	64	0	0	2	0.5%	0	13	3.4%	5
Warringah	Advisory IHAP since 2003 – changed to Development Assessment Panel determining DA from July 2008											
2012-13	1,312	14	1.0%	0	11	5	56	4.2%	49	11	-8%	8
2011-12	1,444	42	2.9%	0	14	8	78	5.4%	71	11	0.8%	8
2010-11	1,849	116	6.3%	0	10	12	60	3.2%	49	18	1.0%	9
2009-10	1,804	112	6.2%	0	25	0	18	1.0%	10	7	0.4%	4
2008-09	1,685	87	5.2%	3	15	5	33	2.0%	27	13	0.8%	9

Appendix 4: Metropolitan Councils' Class 1 Appeals - 2011-12 and 2012-13

The following information was sourced from the NSW Local Development Performance Monitoring Report 2011-2012 and 2012-2013 along with the spreadsheets compiled by the NSW Department of Planning and Infrastructure based on the Dh23epartment's analysis of data supplied by local councils.

Metropolitan Councils	No. of DAs		No. of Class 1 appeals		% of DAs with Class 1 appeals		% of Class 1 appeals upheld	
	2011/12	2012/13	2011/12	2012/13	2011/12	2012/13	2011/12	2012/13
DLG 1 COUNCILS								
Sydney	1,926	1,840	44	44	2.3%	2.4%	45.5%	59.1%
DLG 2 COUNCILS								
Ashfield	232	248	8	0	3.4%	0.0%	75.0%	-
Botany Bay	180	138	0	1	0.0%	0.7%	-	100.0%
Burwood	181	158	1	1	0.6%	0.6%	0.0%	100.0%
Hunters Hill	103	93	5	0	4.9%	0.0%	0.0%	-
Kogarah	316	277	0	0	0.0%	0.0%	-	-
Lane Cove*	214	224	7	2	3.3%	0.9%	85.7%	50.0%
Leichhardt	448	472	25	15	5.6%	3.2%	28.0%	80.0%
Manly*	312	267	14	12	4.5%	4.5%	71.4%	66.7%
Mosman*	261	235	3	8	1.2%	3.4%	0.0%	50.0%
North Sydney*	409	395	5	15	1.2%	3.8%	80.0%	66.7%
Pittwater	378	635	6	6	1.6%	0.9%	16.7%	50.0%
Strathfield	131	125	3	2	2.3%	1.6%	0.0%	100.0%
Waverley*	546	553	32	26	5.9%	4.7%	75.0%	80.8%
Woollahra	523	512	9	20	1.7%	3.9%	44.4%	30.0%
DLG 2 Average	302	309	8.4	7.7	2.6%	2.0%	39.7%	70.4%
DLG 3 COUNCILS								
Auburn	307	245	4	0	1.3%	0.0%	50.0%	-
Bankstown	992	958	3	8	0.3%	0.8%	33.3%	37.5%
Blacktown	2,128	1,892	0	0	0.0%	0.0%	-	-
Canterbury*	472	471	2	3	0.4%	0.6%	50.0%	33.3%
Canada Bay	479	464	7	3	1.5%	0.6%	0.0%	0.0%
Fairfield*	849	772	5	5	0.6%	0.6%	60.0%	20.0%
Holroyd	494	454	0	4	0.0%	0.9%	-	50.0%
Hurstville	360	328	15	13	4.2%	4.0%	60.0%	23.1%
Ku-ring-gai	529	503	36	31	6.8%	6.2%	33.3%	19.4%
Marrickville	442	578	11	13	2.5%	2.2%	54.5%	23.1%
Parramatta	690	657	14	9	2.0%	1.4%	28.6%	22.2%
Randwick	813	721	14	14	1.7%	1.9%	42.9%	57.1%
Rockdale	362	361	1	0	0.3%	0.0%	100.0%	-
Ryde	589	451	0	1	0.0%	0.2%	-	100.0%
Sutherland*	1,042	1,117	10	6	1.0%	0.5%	0.0%	0.0%
Warringah*	1,402	1,312	11	11	0.8%	0.8%	72.7%	72.7%
Willoughby	513	474	4	11	0.8%	2.3%	25.0%	54.5%
DLG 3 Average	733	692	8.1	7.8	1.4%	1.4%	43.6%	36.6%
DLG 6 COUNCILS								
Camden	1,361	1,102	2	0	0.1%	0.0%	100.0%	-
Hawkesbury	182	594	0	5	0.0%	0.8%	-	20.0%
Wollondilly	709	653	2	2	0.3%	0.3%	0.0%	0.0%
DLG 6 Average	750	783	1.3	2.3	0.1%	0.4%	50.0%	10.0%
DLG 7 COUNCILS								
Blue Mountains	707	644	2	1	0.3%	0.2%	50.0%	100.0%
Campbelltown	626	679	5	1	0.8%	0.1%	80.0%	0.0%
Gosford	1,174	1,160	7	1	0.6%	0.1%	100.0%	100.0%
Hornsby	820	766	8	6	1.0%	0.8%	25.0%	0.0%
Liverpool*	1,151	1,204	1	4	0.1%	0.3%	0.0%	25.0%
Penrith	1,208	1,326	3	1	0.2%	0.1%	33.3%	0.0%
The Hills	1,318	1,214	7	5	0.5%	0.4%	100.0%	100.0%
Wyong	1,015	1,429	5	4	0.5%	0.3%	80.0%	50.0%
DLG 7 Average	1002	1053	4.8	2.9	0.5%	0.3%	58.5%	46.9%