Submission No 37

INQUIRY INTO PLANNING SYSTEM AND THE IMPACTS OF CLIMATE CHANGE ON THE ENVIRONMENT AND COMMUNITIES

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Inquiry into the planning system & the impacts of climate change on the environment & communities

Submission by

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1. **Comments on the Scope of this Submission**

Thank you for the opportunity to table a submission on how the planning system might be improved to ensure people, the natural and the built environment are best protected from climate change impacts and changing landscapes.

The focus of this submission is on the following aspects of the Terms of Reference (ToR):

(b) the **adequacy of planning powers and planning bodies**, particularly for local councils, to review or amend development approvals, and consider the costs, that are identified as placing people or the environment at risk as a consequence of climate change and natural disasters, and rapidly changing social, economic and environmental circumstances; and

(c) **planning reforms** necessary to ensure that communities are able to mitigate and adapt to conditions caused by changing environmental and climatic conditions, as well as the community's expectation and need for homes, schools, hospitals and infrastructure.

2. Submission Lodgement

I request that the submission and my name be published on the website.

3. Author's Bona Fides

A summary of my credentials in relation to this matter are listed below:

- More than forty years executive level experience in Government and corporations in the assessment and determination of state significant developments across rural NSW. My experience has focussed on the practical applications of the EP&A Act and the POEO Act;

- Over the past 12 years my clients on energy projects have included the following NSW rural Councils:
  - Warrumbungle Council: ten proposed generation/transmission projects in the Central West Orana REZ
  - Wellington Council: Bodangora WF
  - Bland Council: Wyalong SF, West Wyalong SF
  - Carrathool Council: Daisy Hill SF
  - Forbes Council: Daroobalgie SF, Jemalong SF
  - Upper Hunter Council: Liverpool Range WF
  - Bogan Council: Nyngan Town SF, Yarren Hut SF
  - Narrandera Council: Avonlie SF, Yarrabee SF

- Since 2011 I have assessed numerous mining proposals, including McPhillamys Gold, Tomingley Gold, Dargues Reef Gold, Federation (Trundle), New Cobar, Cowal Underground and Open Cut (West Wyalong), Scandium Ore (Nyngan). And multiple coal projects including Shenhua Watermark and Vickery;

- Since 2011 I have liaised closely with the heads of the DPE and the IPC on major project planning and assessment matters, including Carolyn McNally and Professor Mary O'Kane. I briefed Lisa Corbyn, Nick Kaldis and the Productivity Commission during their reviews of the performance of the DPE and IPC in relation to mining and governance matters;

- Was adviser to the NSW Association of Mining & Energy Related Councils on planning and assessment matters for six years;

- 1989: appointed the Founding President of Environment Institute of Australia and New Zealand, the association for professional environmental practitioners. Now a Fellow;

- An Adjunct Professor, Faculty of Science, Agriculture, Business & Law, University of New England, appointed in recognition of my environmental and social advocacy for rural society.

4. **ToR Item (b):** ***the adequacy of planning powers and planning bodies, particularly for local councils, to review or amend development approvals, and consider the costs, that are identified as placing people or the environment at risk as a consequence of climate change and natural disasters, and rapidly changing social, economic and environmental circumstances;***

a) The following comment is offered in relation to rural councils.

Most councils west of the Great Dividing Range - aside from the few Regional councils – have very limited resources to address proposed state significant developments. This means either additional resources need to be engaged or DAs can receive a less than thorough merit-based evaluation and assessment. If rural society is to mitigate or adapt to the pending climate catastrophe, then small rural councils require an urgent injection of funding to resource the engagement or employment of appropriate expertise.

b) The following comments are offered in relation to the State-based planning authorities.

Based on my operational experience over decades, the level of openness and transparency could be significantly improved. In turn, this would help increase the level of public confidence in the system.

At its core, society needs to have confidence that the planning system clearly identifies the environmental, social and economic costs and benefits. And equally critically, who bears the costs and who reaps the benefits?

I address each of the key government departments/entities in turn.

The Department of Planning & Environment (DPE)

How the advice provided by various statutory bodies to the DPE (for example from the EPA, DPE Water, Local Councils, etc.) is acted upon by the DPE is generally quite opaque.

DPE appears to have the final say, yet the other departments, such as the EPA and Councils, have their own statutory responsibilities which need to be properly taken into account. In my experience of dealing with both the DPE and the EPA, the EPA has not been treated equitably by the DPE, with the latter making the final decision.

The DPE is also under-resourced when it comes to assessing highly technical water, noise and economic and social assessments, thus there is an inherent tendency to accept the proponent's assertions.

I recommend the DPE and the EPA be required to apply far more technical and scientific rigour and discipline to scrutinising the complex models and reports tabled by proponents.

Interestingly, it was the voluntary and independent groundwater monitoring data and modelling effort provided by Emeritus Professor Ian Acworth that finally persuaded the then NSW State Government of the significance of the likely groundwater impacts from the Shenhua Watermark Coal Mine. Why was it left to the pro bono efforts by Professor Acworth? Where was the DPE and related government entities?

The DPE has a standard 'base' template that it adopts when it comes to issuing conditions of consent. The Developer always has a 'right of reply' to the draft conditions being contemplated by the DPE. Local communities are not provided with the same opportunity. There is an inherent bias at play here and consideration should be given to placing draft conditions on exhibition, just like draft Planning Agreements must be exhibited for 28 days by law.

I also recommend the DPE's starting point for issuing SSD consent conditions be reviewed and overhauled to fit contemporary standards. Including far more robust provisions regarding greenhouse gas emissions/carbon foot printing, building location in relation to fire prone and flood

prone land, building design to be more resilient in fire and flood, social impacts and the provision of tangible social and economic community benefits.

The Environment Protection Authority (EPA)

Over the past decade or so, it is my experience that the EPA has tended to play 'second fiddle' to the DPE in relation to developments such as mining approvals and compliance management.

In reality, the Government of the day has typically 'muzzled' the effectiveness of the EPA's work in relation to mining performance and compliance and leaving it as a regulator in name only.

The Independent Planning Commission (IPC)

Currently, whilst the IPC may listen to all points of view, there is very limited open discussion and dialogue about the relative merits or veracity of the evidence/assertions presented.

After the last review by the Government of the IPC, the IPC committed to being more inquisitorial. However, based my experience, this has not materialised. For instance, at the McPhillamy's hearing the three Commissioners were swamped with three intense days listening to people making verbal presentations. There was no substantive examination or dialogue on points raised. Simply, there was no time for that.

The general public yearns for greater insight into how the Commissioners are undertaking their work. As things stand, society is not gaining confidence in how the IPC is addressing, for instance, completing claims or testing the veracity of complex models. The IPC requires more resources so is has the unfettered capacity to engage the specialist technical expert services it requires to address key scientific matters.

In determining contentious projects, I recommend that the IPC be replaced by a Development Assessment Commission (DAC) chaired by a judge or pre-eminent lawyer. Parties would be able to be self-represented and the legal rules of evidence would not apply. Cross examination of evidence would be a key aspect of DAC's work. Members of the DAC would be appointed via an independent, transparent process, say on the recommendation of relevant professional bodies.

A comparable process that worked very well in the 1980's and 1990's was that of the NSW Office of the Commissioners of Inquiry for Environment and Planning chaired by Dr John Woodward. Evidence was tested in the public arena and was there for all to see. I recommend the Government re-activate this approach.

c) In the face of climate catastrophe – we are locked on the horns of a dilemma

The EP&A Act and the DPE waxes lyrical about how fundamentally important community and stakeholder consultation is. Yet, as I argue in points 5c and 5d below, this phase is more tokenistic than material and generally raises false hope.

Thus, given the climate crisis that is upon us, and the need for society to act promptly to shift to a low carbon economy, should we not simply mandate/prescribe low carbon/renewable energy developments and cut the pretence about engaging with communities? I acknowledge it is a provocative suggestion however it would 'call out' the farcical 'community consultation' phase for what it is and save time in the decision-making process.

5. **ToR Item (c):** ***planning reforms necessary to ensure that communities are able to mitigate and adapt to conditions caused by changing environmental and climatic conditions, as well as the community's expectation and need for homes, schools, hospitals and infrastructure.***

The following observations relate to the planning reforms I recommend in relation to the assessment and determination of major developments:

a) That the EP&A Act undergo root and branch reform to place the environmental, social and economic consequences of climate catastrophe at the very centre of its purpose (the phrase

'climate change' understates the magnitude and severity of what is bearing down on humanity). Starting with a reworking of the objectives of the Act.

b) That the application of the EP&A Act explicitly require application of the precautionary principle in a more detailed and granular fashion. At present there appears to be little attention given to defining and applying this principle.

c) Given the way the EP&A Act has been administered by the DPE, communities, be they urban or rural, tend to have limited scope to gain traction and influence regarding what decisions are made in relation to proposed significant developments.

Thus, the administration of the EP&A Act ought to be reformed to allow members of our society to be heard and their views acted upon. At present, the so-called 'community engagement' process is misleading and deceptive, raising false hope that ordinary folk have a chance to change the outcome of a DA for a major project.

The community engagement phase also occurs way too late in the assessment process, only happening AFTER the project has, in effect, been designed behind closed doors by the developer's engineers and the accountants. After that, the developer tends to adopt an 'announce and defend' mentality, often fracturing the harmony in local communities.

I recommend the community be consulted during the conceptual design stage when input is more likely to be accommodated.

d) Following on from c) above, it is recommended that the EP&A Act define in greater clarity the 'performance hurdles' or 'gates' that a developer must satisfy, not just quantification of the number of meetings held with interested parties. It is what is done with the feedback gleaned that counts.

e) That the DPE prepare more robust Regional Environmental, Social and Economic Plans across the State, starting with the five Renewable Energy Zones. Such REPs ought place the consequences of climate catastrophe at their centre.

f) That a third-party merit review process be allowed for all SSD/SSI/CSSI projects so parties can challenge the factual basis of any development decisions in the courts. In Australia's democratic society this provision is vitally important and will reduce the scope for opaque deals between proponents and government and catch inappropriate decisions.

g) That processes and procedures be introduced to prevent/minimise regulatory capture across the DPE and the EPA. Regulatory capture occurs when regulatory agencies change over time and move from acting in the public interest (their assigned statutory function) to promoting or advancing the interests of industries or developments they are supposed to be regulating. It is akin to one interest group on the playing field seizing control of (ie 'capturing') the umpires, such that the game is no longer taking place on a level playing field.

The possibility of regulatory capture is a risk to which the DPE and the EPA are exposed by the very nature of their functions. There are many and varied interest groups that lobby vociferously to influence planning and assessment policies and procedures related to mining, for example.

Possible internal and external measures that could be introduced to protect against regulatory capture and to help reinforce transparency and accountability and to improve public confidence in the system include.

i. internal checks:
    - Public reporting of the outcome of meetings between government agencies and developers, local government, the various industry groups and other key stakeholders;

- Adopting more explicit guidelines for employee conduct; and
- Ensuring the DPE and EPA engage with a diversity of interests, experts and change agents to avoid insulation.

ii. external checks:

- That the Auditor General or an Environmental Ombudsman undertake annual, independent performance audits of the DPE and the EPA in relation to decisions on mining and renewable energy projects; and
- Remaking the law so the burden of proof lies with those promoting development, not those who may wish to query it, as is currently the case.

6. Other

Documents I recommend the Portfolio Committee consider as part of this Inquiry include:

a) 2018: Nick Kaldas' review of governance in the NSW planning system;

b) 2017: Lisa Corbyn's (former head of the EPA) review of the DPE's Major Project Assessment Reports and recommendations to improve said reports;

c) 2017: NSW Auditor-General's Report to Parliament -Performance Audit -Assessing major development applications; and

d) 2013: The report by then NSW Commissioner of the Independent Commission Against Corruption The Hon David Ipp AO QC entitled 'Reducing the Opportunities and Incentives for Corruption in the State's Management of Coal Resources'

7. Giving Evidence at a Hearing of the Inquiry

I would be willing to give evidence at a hearing of the Inquiry.

Thank you for the opportunity to table this Submission.

If you have any queries, please don't hesitate to contact the undersigned on

Yours sincerely

Warwick Giblin

http://www.ozenvironmental.com.au