Submission No 124

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

Organisation: Wando Conservation and Cultural Centre

Date Received: 3 November 2023

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

Portfolio Committee No 7 – Planning and Environment
Submissions due Friday 3rd November, 2023
Submission of the Wando Conservation and Cultural Centre Inc

Introduction

Wando CCC wishes to address Terms of Reference (a)(iii) and (b))i)-(iii):

- How the planning system and best ensure that people and the natural and built environment are protected from climate change impacts, and **in particular in areas that are threatened ecological communities or habitat for threatened species**.

And

- The adequacy of planning bodies to review, amend, revoke development approvals, and consider the costs, that are identified as placing people or the environment at risk as a consequence of (i) the cumulative impacts of development, (ii) climate change and natural disasters, and (iii) biodiversity loss.

As our examples, we refer to the Leard State Forest, and Pilliga Forest, Narrabri, NSW both examples of planning gone badly wrong and continuing to suffer from the inadequacy of the so-called "whole-of-government" scheme of assessment and regulation. This is "whole-of-government" in name alone, as the primacy of the Planning

Department leaves other agencies powerless to influence planning decisions. A most compelling example, which even the uninformed bystander can comprehend, is the decision of the NSW Planning Department to formalise a tacit *status quo* in which coal mines are given permission to seek and implement modifications, on occasions even retrospectively. We witnessed a round of mine modifications at five Namoi Valley open cut mines that occurred in the past few years, in which the EPA provided agency advice which contradicts its own statutory objectives. We refer to the whole-of-government decision to approve the use of mine voids as *de facto* landfills, with no requirement for a full EIS to inform decision-makers about the potential leaching of chemicals into the Maules Creek aquifer, and no requirement to pay the landfill levy. This is one of the examples we will provide below, where the adequacy of planning bodies to review and amend development approvals is seriously in question.

The whole-of-government approach, while in theory having merit in aiming to avoid an uncoordinated silo approach to large-scale planning inherent in resource developments, in practice has some serious failings which include:

1. Ignoring the science – IESC is given lip-service, DPE Biodiversity and Science Directorate are sidelined
2. IESC advice is relegated to post-approval conditioning, precautionary advice is ignored
3. Developments proceed with no assurance that biodiversity offsets schemes are achievable (backloading)
4. Diminished role of EPA in which the pollution regulator is unable to impose licensing conditions that reflect the available science/absence of science to support their decisions[1].
5. Proponents provide false and misleading information during assessment process, but the statutory burden of proof is too high for the regulator to succeed in charges as it requires proof of intent on the part of the proponent information-provider.
6. Model validation, where it occurs, if often couched in opaque language to disguise the extent to which the project proceeded under erroneous predictive modelling[2]
7. Overall there is no quality valuation of EIS's nor the planning decisions.

These and other symptoms have resulted in a planning scheme out of control and unable to achieve the statutory objectives of the relevant agencies.

Our submission provides a perspective using real-life examples we are familiar with through our ongoing conservation efforts, participation as members in the Community Consultative Committee meetings of local coal mines and community monitoring of the Leard Forest coal mine precinct and the Pilliga gas exploration area.

[1] For example, we would like to offer detailed testimony in relation to the EPA's approval of mass tyre landfilling at the Leard Forest, under Modifications to the Maules Creek and Boggabri Mine approvals; inadequate conditions relating to blasting impacts from the Maules Creek mine onto the Leard State Forest and EPBC-protected Biodiversity Corridor.

[2] We provide an example of the Maules Creek groundwater model below.

We also are of the view that not all State Significant Developments should be treated in the same manner. SSD's which pose the risk of irreversible or catastrophic impacts on the environment demand close controls over initial plans and any changes to the approval. Projects like a large open cut mine or a gasfield pose such impacts on groundwater systems and biodiversity in particular.

The following are matters of concern that relate to subjects of our direct knowledge, which are in two main categories: matters of a procedural and process nature, and matters of a substantive nature including the lack of science considerations and validation in the assessment and ongoing regulation of major projects in our region

1. Relationship of the responsible government agencies

Although management plans and consent conditions are supposedly the responsibility of the Department of Planning, from the minute of approval the majority of compliance responsibility for resource extractive projects falls to the New South Wales Environment Protection Authority. Therefore, the EPA is central to any enquiry into the planning system and the impacts of climate change on the environment and community; to make significant changes to the accountable obligations of resource developments with very little and in many cases no consultation, exhibition or obligations other than to satisfy the requirements of s 45 of the POEO Act is demonstrably inadequate.

S 45 sets out the **"Matters to be taken into consideration in licensing functions";** this section needs a major overhaul. Apart from changes environmental protection licences happen without any notification to the public, so they cannot make submissions and contribute to decision making and the EPA does not feel under any obligation to publish a formal section 45 report although they do in some cases.

One of these cases concerns changes made to the Narrabri Gas Project groundwater monitoring conditions soon after the project was approved. These poorly explained changes were recommended by a former EPA officer based in the Narrabri branch, who soon after departed the regulator to work for the proponent Santos. The changes to the groundwater monitoring plan effectively changed the obligations of Santos but not by any action of the Department of planning.

Another case, where our researchers gathered information via Government Information Public Access, the section 45 report concerned very troubling changes to the Narrabri Gas Project EPL which dispensed with the need for the proponent to acquire **environmental liability insurance**. This critical requirement, which formed part of the New South Wales Chief Scientist recommendations on coal seam gas regulation, was dispensed with by the EPA apparently without section 45 report. This lack of a systematic approach to governance and the changing of important compliance responsibilities is unacceptable.

In our observations, the EPA is not sufficiently resourced to undertake the onerous duties of inspecting, monitoring and regulating coal and gas projects in our region.

While there are EPA representatives in Narrabri, for some unfathomable reason the people who are supposed to be regulating several Namoi Valley mines are located hours away in Armidale. They report high turnover of staff.

Another agency which has been integral in the ongoing oversight of these resource projects is the Natural Resource Access Regulator (NRAR). Although it was a condition of the Maules Creek coal mine and the Boggabri coal mine that they must construct "high wall dams" to capture rainfall from the surrounding of their open cut pit and to ensure that this rainfall was fed back to the local environment via the water catchment, both mines failed to do so over a number of years. Finally, NRAR prosecuted Maules Creek mine with modest success and, given the wilful and prolonged duration of the offences, an unsatisfactory (low) penalty was imposed. Furthermore, when faced with Boggabri coal also taking surface water from the environment, NRAR refused to prosecute the company (Idemitsu Resources). Instead, the regulator came to an arrangement, the result of which was to abandon the requirement for the mine to comply with its condition of consent.

We would also like to point out that monitoring these industries is a heavy burden, frequently born by the local community. This is made worse when the regulators have an acceptably close and warm relationships with mine managers. We would like the enquiry to consider recommending some guidelines as to the recruitment of environmental compliance officers, to ensure preference be given (as the NSW Resources regulator does) to people with a background in policing. We especially deplore the revolving door which sees mining and gas executives and workers come and go into the Department of Planning and the EPA, spreading a culture which is against the public interest and is unacceptably lenient towards resources companies. We believe that recruiting people with a policing background will introduce investigators with an appetite to see law enforcement/compliance undertaken.

2. Ignoring the science – the Namoi mines tyre scandal

Central to the problem has been the dominance of the NSW Planning Department, currently known as DPE, during the assessment process, followed by the abandonment by the Department of any attempt to ensure compliance with conditions of consent. We observe that the quality of assessment has declined dramatically, based on over 8 years of community monitoring of the Leard and Pilliga Forests, and the waterways of the Namoi valley catchment. Planners admit to community members that they accept at face value the assertions made by proponents.

Lack of decision-making integrity caused by this box ticking approach is couched in language such as "streamlining", "rapid assessment" and is touted as a means of improving environmental impact assessment. It does not. Examples show that box ticking diminishes science-based decision-making. We sincerely hope that the imminent restructure of the DPE will strengthen science-based decision-making which is evidently lacking in resource approvals to date, and also to ensure that adaptive management is carried out by people who understand the principles of the practice and can regulate a major resource industry according to its principles. The fast-tracking approach was used in the case of Maules Creek mine Modification 8 which sought retrospective approval of a practice which on its face seems inimical to the stated policy of the NSW Government and specifically the very statutory objectives of the NSW EPA.

When we speak of ignoring the science, it is important to also reflect on the reverse side of the coin, which is making decisions in the face of scientific ignorance. Such has been the case in relation to the mass landfilling of tyres in coal mines. We also note anecdotal evidence that a multitude of other wastes, including wastes that would be classified as "special waste" are routinely disposed of in the mines without specific approval, and yet without any prohibition as far as the regulators are concerned.

Concerns about leaching from tyres, and the potential destabilisation of rehabilitated landforms when thousands of off the road tyres are disposed of under overburden mountains, were responded to particularly in the case of the Maules Creek mine modification 8. The proponent did not provide any evidence that this practice would be safe- rather they used laboratory-based leachate tests conducted over 20 years ago, which have not been updated, let alone in field conditions

Ignoring its powers to impose a landfill levy on the tyres or impose a phased ban, the EPA provided favourable advice to the Planning Department which paved the way for a rapid approval. We would request that the Committee consider using this example as an illustration of many of the things that are wrong with the land use planning system today. Specifically, will the Committee seek evidence on:

- How our government gave consent to the mass landfilling of off-the-road tyres in defiance of well-known waste avoidance principles which encourage economic measures to be introduced which disfavour landfilling, and favour materials reprocessing;

- An explanation from the EPA about its advice to the Gomeroi Red Chief Local Aboriginal Land Service that the traditional owners had no alternative other than to give landowner's consent for Whitehaven to landfill tyres at a travelling stock route it had a contractual arrangement for access to with the Gomeroi.
- the extent to which the decision to approve was agreed by the DPE's Biodiversity and Science Directorate.

3. Adaptive management – in name only

Adaptive management is seen as a panacea whenever there are uncertainties about predicted impacts. It is an approach to post-approval regulation under which a cascading nest of management plans and trigger action response plans (TARPs) theoretically provide feedback over time to allow for correction if impacts of a project exceed those predicted. The body of obligations under this system are contained in management plans, which may refer to particular industry Australian standards, industry guidelines *et cetera*. However, the precautionary spirit that is embodied aims of adaptive management, is not reflected in practice.

Management plans may be approved upon delegation of the Minister. The problem is, although the Dept of Planning is supposed to administer the compliance with these obligations, and indeed has compliance personnel in its Resource branch, they appear almost never in the lifetimes of these projects ever to penalise them for breaches of the management plans.

Questioned about what would happen if groundwater drawdown impacts from the Narrabri gas Project exceed predictions, Dept of Planning (Mr David Kitto, at Narrabri Gas Project interviews) told the Independent Planning Commission that you would *dig a deeper hole*, which is a fundamental misunderstanding of the constuct of adaptive management. Mr Kitto's statements appeared to be persuasive to the members of the Independent Planning Commission, who subsequently approved the Narrabri Gas Project.

We recommend that the Committee consider interviewing Mr Kitto himself so that he may explain to the members of this committee his approach to "adaptive management" as put to the IPC.

Example: dismantling of Santos shallow bore groundwater monitoring scheme

Santos seek permission from EPA to discontinue water monitoring at Bibblewindi (9 Aug 2020)

This concerns the dismantling of Santos' groundwater monitoring requirements on the assurances of Santos, the licence-holder itself, without independent verification of Santos' claims. The importance of monitoring groundwater in a region hosting coal seam gas activities cannot be underestimated. The fact that this occurred so soon after the approval

of the NGP, and despite the advice of the Independent Expert Scientific Committee (IESC), raises concerns about the practice of **"approval creep".** This is where, soon after a project approval often involving lengthy and public assessment processes, proponents seek modification to their consent conditions which diminish their obligations, using fast-tracked or less transparent mechanisms such as changes to EPL licences sometimes labelled as "minor modifications". Here is a link to the IESC advice to decision-maker for NGP.

https://www.iesc.gov.au/sites/default/files/2022-07/iesc-advice-narrabri-2017-086.pdf

Ignoring the advice of the IESC, the EPA relied on internal staff and did not seek to verify the science claims of Santos. The IESC advice was:

"9. The IESC agree with DPI Water that further field hydrogeological information should be obtained for the purpose of constraining model parameterisation. This groundwater monitoring network should be installed as soon as possible, prior to production, to further validate current baseline groundwater level, pressure and quality conditions and add to the existing baseline dataset for impact assessment."

Nowhere did the IESC recommend removing groundwater monitoring requirements. And yet this is exactly what happened.

A community group in our region published these accounts of the EPA's approach, which is representative of widely observed EPA standard practice of not independently verifying licence-holder science claims:

See **Santos seek permission from EPA to discontinue water monitoring at Bibblewindi (ie Pilliga Forest)**

https://nwprotectionadvocacy.com/santos-seek-permission-from-epa-to-discontinue-water-monitoring-at-bibblewindi/

See also **Groundwater Q&A with the EPA (30 Jan 2023)**

https://nwprotectionadvocacy.com/groundwater-qa-with-the-epa/

"On 03.04.20 Santos applied to vary their Environmental Protection Licence (EPL20350) to all but decommission several water monitoring bores in their network, removing their 'requirement to monitor' and provide those results to the EPA and the public.

This variation application went unnoticed for several weeks and is still pending. It concerns monitoring bore(s) that have demonstrated levels of methane, in at least one of the bores the raised methane levels are claimed to have been caused by termites (see excerpt from Santos Ground Water Monitoring Report, Annual Return 2017/2018 dated June 2018 below).

Elevated methane results occurred for monitoring point 34 (BWDMW15D) during routine grab sampling in September 2017. An investigation found the presence of termites in the water column which caused discolouring of the water and was assessed as the likely cause of these results. A bailing program was put in place to remove the discoloured waters over time. It was determined that resampling for laboratory testing would be conducted once in situ results reached normal established baseline levels. Further laboratory testing in November 2017 showed a decline in the presence of methane and results in March 2018 confirmed that methane results had returned to normal.

North West Protection Advocacy have applied via GIPA for the information around this variation. At a time when transparency is essential from Government and Santos it is shocking to see Santos attempting to near decommission water monitoring bores, especially ones that have an unverified source of methane in them (see letter below).

The EPA did not check and verify the Santos report with its own analysis of the monitoring bore which concluded that methane in the bore is because of termites. With such a contentious issue (methane in a bore) why was there no investigation and no proof provided?"

Example: Maules Creek Coal mine dodgy groundwater modelling

In this example, we show that model validation is inadequate to support adaptive management.

We demonstrate that the so-called Annual "independent environmental audits" are a carefully-worded, crafted account of this regulatory requirement and with no good reflection on adaptive management. In the Maules Creek mine annual review 2022, the auditors undertook a validation of the mine's groundwater model[3], concluding (our comments in red):

"The groundwater model was updated and recalibrated in 2018 (AGE, 2018) and again in 2020 (AGE, 2022). Yes, the model had to be recalibrated after a disastrous drought. The original model for the Maules Creek mine did not take into account potential climate change impacts and as based on the popular "steady state" assumption which holds sway in NSW Government circles. Behind this statement is the fact that the model upon which approval was granted was wrong. This came to light when the Maules Creek mine ran out of water during the drought in 2018 commenced buying up water licences at prices unaffordable to farmers in the area.

Modelled water levels for the AGE (2022) model are provided in Appendix E for comparison with monitoring observations. The AGE (2022) groundwater model contains observed rainfall data to June 2019. This is another way of saying they included lack of

[3] 7.3.4 Validation of Groundwater Model (https://whitehavencoal.com.au/Documentations/Maules%20Creek%20Mine/Environmental%20Management,%20Monitoring%20&%20Compliance/Annual%20Reviews/MCC-Annual%20Review%202022.pdf)

rainfall and substantiates our observation that potential drought had not been considered in the original model. the AGE model took into account and uses a synthetic average rainfall dataset after that time. Therefore, the AGE (2022) model more accurately accounts for the period of drought that occurred between 2017 and 2020 compared to the AGE (2018) model, where only 2017 conditions were captured (calibration dataset to December 2017).

Overall, the trends observed in the standpipe monitoring bores are comparable, even if the matches to absolute water level elevations are variable. Modelled groundwater level predictions at VWPs are generally similar to observed trends, although absolute water level elevations are again variable. "generally similar" – how is this defined?

Numerical modelling for the BTM Complex has always struggled to accurately match the trends and absolute levels observed in VWPs, including vertical hydraulic gradients. VWP simulations of the AGE (2022) model are a significant improvement relative to previous modelling in this regard, although matching observations in VWPs that are not yet depressurised by mining (REG02, REG07, REG09) is still problematic." In other words, the "previous modelling" that gained approval was very badly wrong.

To conclude on the point of adaptive management: the Maules Creek consent was originally formulated on the principle that, if the mine ran out of water, it was required to cease production. This would have been adaptive management but the condition was completely ignored as though it did not exist. We recommend that the Committee interrogate this history, asking the DPE:

- Why did they ignore a lawful condition of approval? Did they receive formal approval of the Planning Secretary, or some other office holder, to ignore that condition?
- How did the Resource Assessment branch misunderstand the requirements of the Mining SEPP and wave through the construction of a water pipeline network outside of the approved footprint of the mine?

Some sources for the Committee's attention:

Whitehaven Coal pipelines to Maules Creek approved by state government in just days

https://www.nvi.com.au/story/6558612/mines-late-application-for-water-pipelines-approved-in-just-days/

This is not an isolated example of unreliable modelling being used to gain approval without proper scrutiny or challenge by consent authorities. A similar situation is playing out at the Narrabri underground mine where Whitehaven seeks to expand despite fears to the groundwater.

https://www.abc.net.au/news/2021-05-24/whitehaven-coal-water-modelling-for-narrabri-mine-questioned/100159836

4. Leard State Forest offsets and the Maules Creek coal mine

"Backloading to extinction"- This expression has its origins in a publication by Dr Megan Evans. https://research.unsw.edu.au/people/dr-megan-evans We commend Dr Evans' scholarship and recommend that this committee should extend an invitation to her to elaborate on her observations on the functioning of biodiversity offsets. Some of the key messages from her research article in the Australian Journal of Public Administration (2023) are applicable to our situation at the Leard State Forest where Whitehaven has cleared significant EPBC-protected bushland without having secured adequate biodiversity offsets for the critically endangered woodland.

Dr Evans points out the practice of deferring complex and potentially contentious offset assessments until after development impacts are approved. Dr Evans stated "backloading appears to be an entrenched practice under Australia's EPBC Act". This has proven calamitous in the case of the Leard State Forest. The Australian National audit office in 2020 noted that "the Department lacks assurance that offsets are assessed consistently, in line with the offset policy and in a way that achieves the objectives of the EPBC Act". Furthermore, the Samuel Review (2020) also found offsetting to be ineffective and requiring of fundamental change. We believe we have some contributions to make in telling the committee about our experience with the functioning of the Commonwealth – State bilateral agreement. The State has never undertaken its compliance of the EPBC conditions seriously and we question how it can claim it is applying the bilateral agreement. Attached is the submission Wando made to the Review of the EPBC Act in April 2020 which addresses this issue.

This system enables Matters of National Environmental Significance to be harmed and even destroyed with impunity by a proponent whose monitoring and reporting requirements are minimal, do not reflect known science about the impacts on their science. In addition to the lack of offsets, the Whitehaven Coal and Idemitsu companies are daily harming the Leard State Forest through poorly regulated mining activities which are inadequately conditioned either by the DPE or the EPA.

The committee's attention is drawn to a current series of prosecutions underway, all based on blasting violations. These prosecutions brought by the EPA highlight the lack of monitoring protections for blasting impacts, noise and/or dust either to the east (the Leard State Forest) or to the 500 m biodiversity corridor which follows the Lemon Tree Ridge and separates the Boggabri and Maules Creek coal mines. The figure below demonstrates that the monitoring locations for the Maules Creek mine specifically avoid the east and south where it is considered that there is only bushland and workers from the other mine.

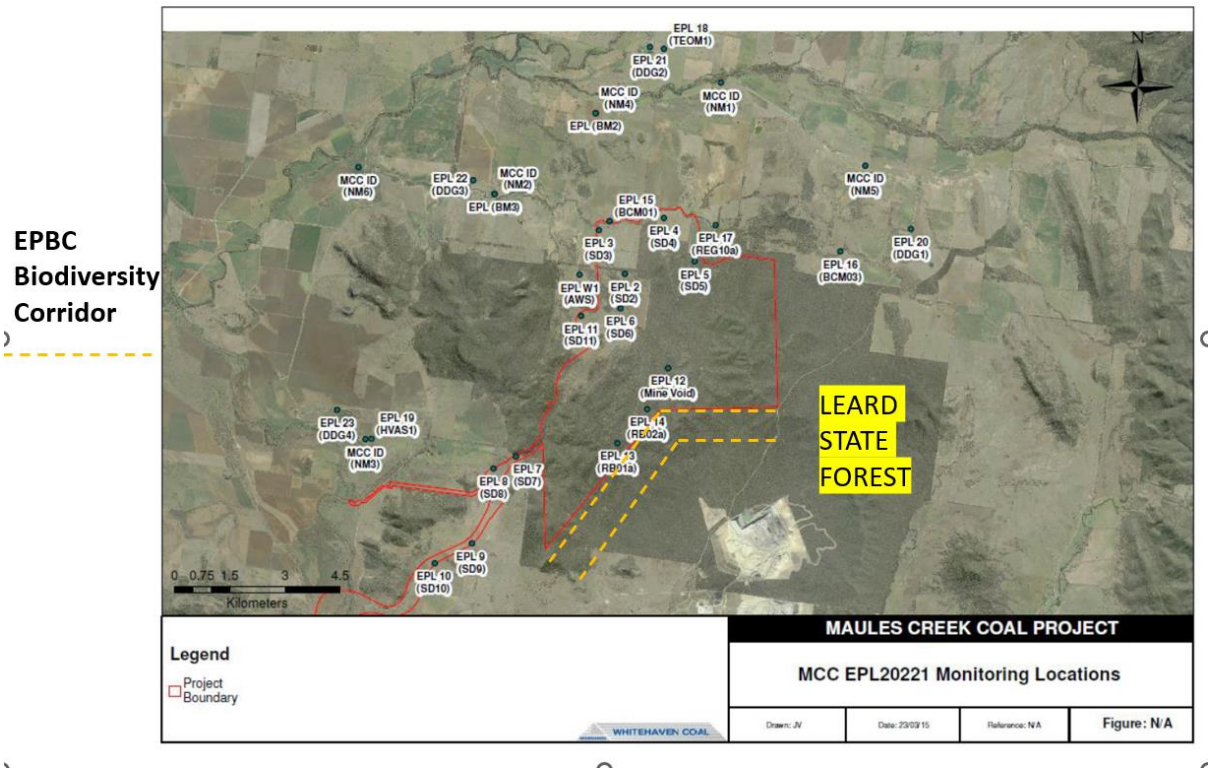
We draw the committee's attention to these cases currently underway in the Land and Environment Court, where it is argued that neither the forest, nor the workers at the Boggabri mine are "sensitive receivers". Note the distribution of noise monitors (NM) and blast monitors (BM), along with high-volume air samplers (HVAS) etc. In Environment Protection Authority v Maules Creek Coal (currently around 20 instances in various stages of pre-hearing and hearing), evidence reveals an ugly truth about the

neglect, principally by the lead agency DPE and also by the EPA: the critically endangered woodland is given no protection at all.

Please see the image below. Notice how the monitoring locations are all to the north and west of the Maules Creek mine (red line). The designers of this monitoring scheme need to be called to account over this serious oversight. **Critically endangered woodland, is a sensitive receiver.** It deserves to be protected as befits a Matter of National Environmental Significance. However, it is treated as dispensable, a forgotten place which the coal company can freely pollute. Additionally, the Biodiversity Corridor is supposed to be EPBC-protected under the terms of the Commonwealth approval. The DPE and EPA flagrantly ignore the Leard State Forest. We ask the Committee to review the definition of what constitutes a **sensitive receiver**. Root and branch reform is required to recognise the ecological values of our wild places so they may be afforded the protection they deserve. They must be reassigned the identity of sensitive receivers

Figure

Figure 1 – EPL 20221 Monitoring Locations



5. Maules Creek Extension scoping paper- advertisement or planning document?

A topical and relevant consideration is the Scoping Paper for Maules Creek Extension (see also attached). This glossy two-page advertisement demonstrates many of our concerns;

i. It is not signed or verified by any individual who might be accountable for or take responsibility for its content;
ii. The deficiency of the Regulatory Environmental Assessment Practitioners Scheme is highlighted in that this body is not engaged in the process until 'further down the track' yet the scoping that informs the SEARs is critical to the Secretary's environmental requirements. The Department of Planning cannot be relied upon to rectify information missing or inadequately presented in the Scoping Paper;
iii. The table which constitutes the second page of 'key benefits' demonstrates the 'advertising' nature of the entire document in its selection of material; in acknowledgement of the climate catastrophe in which we find ourselves many 'key benefits' would accrue from the project NOT proceeding:
    i. The increased possibility of reaching the emissions targets which are agreed upon as crucial
    ii. Protection of species and habitat (and associated carbon sequestration); including endangered species and habitat
    iii. Fewer imposts on the community which is responsible for monitoring the project and fewer prosecutions.

6. New mines posing as 'extensions'

Boggabri Coal Mine is an example of another mine with which we are familiar and which is seeking a modification that is, in our considered opinion, a new project rather than an extension.

Due to be shut down in 2033, Idemitsu plans to extend the life of its Boggabri open-cut coal mine in New South Wales' Leard State Forest by an extra six years to 2039. This project was part of the Living Wonders appeal on the part of the Environment Council of Central Queensland. The ECoEeQ's concerns can be found at ECoCeQ's reconsideration request for this project

We appeal to the inquiry, as a matter of urgency, to investigate this practice of using the 'modification' system to foster new fossil fuel projects and, in doing so, jeopardise attempts to secure intergenerational equity in the face of catastrophic climate change.

Conclusions:

Wando thanks the Committee for this opportunity to contribute to a planning system which genuinely considers the impacts of climate change on the environment and on communities. We look forward to any future opportunity to contribute to the Committee's deliberations.