



Australian
National
University

Dr James Prest
LLB(Hons), BA(Hons), GDLP, PhD
Lecturer and Researcher
Centre for Climate Law and Policy
Researcher, Australian Centre for Environmental Law
ANU College of Law
Fellows Road, ANU, Acton, ACT 0200

Ms. Jeanette Radcliffe, Secretary (cc Dr Richard Grant)

Select Committee on Wind Turbines

PO Box 6100

Parliament House

Canberra ACT 2600

windturbines.sen@aph.gov.au

18 May 2015

Dear Senators

Re: Inquiry into Wind Turbines

I wish to make a submission to the Senate Select Committee's *Inquiry into Wind Turbines*. In particular I would like to offer comments on the subject of Term of Reference (b),(d), and (e). In particular I wish to focus on (d) planning processes in relation to wind farms, as this is a matter directly within my professional expertise.

I am a Lecturer in Environmental Law at the Australian Centre for Environmental Law, and the Centre for Climate Law and Policy at the ANU College of Law, Australian National University, a position I have held since January 2006. I have taught many different subjects within environmental and land planning law to postgraduate and undergraduate students every year since 2006.

I previously held an unrestricted solicitor's practising certificate in the ACT for 5 years, and also practised law with a large and small private law firms in the ACT as well as with Commonwealth agencies including Department of Prime Minister and Cabinet and the Law and Bills Digest Group of the Parliamentary Library. I hold an LLB(Hons, 1st) (ANU) and a PhD in environmental and natural resources law from the University of Wollongong and have published a number of book chapters on the subject of climate and energy law, as well as other publications in the field of environmental law.

My book chapter entitled “The Bald Hills Wind Farm Debacle” from Bonyhady & Christoff (eds.) *Climate Law in Australia*, (Federation Press) examined the Commonwealth’s involvement in the approval process for the wind farm of the same name in Victoria. In September 2010 I was invited to give a paper on the topic of wind farms and planning law to the Yale University Law School. The paper was presented to the 2nd UNITAR-Yale Conference on Environmental Governance and Democracy: Strengthening Institutions to Address Climate Change and Advance a Green Economy (17-19 September 2010) on the topic “Fast Tracking versus Public Participation? Planning Law for Wind Energy Development: Weighing Global Benefits against Local Impacts”.

I thank you for the opportunity to make a detailed submission on this important issue.

Yours faithfully

[Signed]

Dr James Prest
Lecturer
Australian Centre for Environmental Law
ANU College of Law

Contents

Introduction.....	1
Should there be an expanded role for the Commonwealth on wind farms?	2
State responsibility for land use planning.....	4
Consistency with Intergovernmental Agreements and Policies on Regulation.....	5
Intergovernmental Agreement on Environment – Roles and Responsibilities	5
National Review of Environmental Regulation (2014).....	6
2012 Excessive Noise Bill.....	7
Overlap with State regulation of noise pollution.....	8
Additional principles to govern federal regulation of wind farms.....	10
National Wind Farm Guidelines.....	11
Risks of the National Wind Farm Development Guidelines	12
Limited circumstances justifying Federal involvement.....	13
The EPBC <i>Act 1999</i> and wind farms.....	14
Options for amending the EPBC Act to Encourage Renewable Energy development.....	14
EPBC regulation of wind farms to date.....	16
Claims for Compensation.....	17

Introduction

This submission focuses on the appropriate allocation of roles and responsibilities between the Commonwealth and the States on wind farms. It advocates a principle-based approach to Federal involvement. If it will assist the Committee, I can provide additional analysis setting out State based regulatory regimes and provide some international comparison with jurisdictions with a high level of electricity generating capacity from onshore wind farms.

Amongst the five top ‘critical challenges’ to wind energy deployment, the issues of “cumbersome and slow planning, siting and permitting procedures that impede wind energy deployment;” have been identified in the Chapter on Wind Energy in the Intergovernmental Panel on Climate Change’s *Special Report on Renewable Energy Sources and Climate Change Mitigation* (SRREN) published in 2011. That report was prepared by an international panel of energy technology and policy experts commissioned by the World Meteorological Organization (WMO) and the United Nations Environment Programme

(UNEP) and the IPCC.¹ The authors drew attention to their “key finding ... that both policy transparency and predictability are important” and that “many countries with sizable wind resources have not deployed significant amounts of wind energy as a result of these factors.”² Such a description is clearly applicable to Australia, with an excellent wind resource but, when viewed by international comparison with China, USA, Germany, Spain and India (the top five nations with installed capacity at the close of 2013), a limited total amount of installed generating capacity to date³ in an industry that grew globally by 11% in 2014, with global investment in that year of USD\$99.5 billion.⁴ In the same year, investment in wind energy in Australia contracted, with an overall decline in investment in the renewable energy sector of 88% in 2014.⁵

The importance of land use planning for wind energy has also been highlighted in the *Global Energy Assessment* (GEA), published in 2012, a massive 1882 page, five kilogram volume by the International Institute for Applied Systems Analysis in Austria. In Chapter 22 on ‘Policies for Energy System Transformations: Objectives and Instruments’, the group of over 300 researchers observe that: “Regional land-use ... planning is important for scale-up of some renewables because of the potential land-use conflicts that renewables introduce” but notes that “land-use zoning and infrastructure planning are critical in removing barriers to decentralized renewables, via solar access rights, wind turbine siting rights, grid connection rights.”⁶

Should there be an expanded role for the Commonwealth on wind farms?

This submission addresses in particular the Select Committee’s term of reference (d), regarding “the implementation of planning processes in relation to wind farms...”

The land use planning laws applicable to onshore wind energy in Australia are a vast subject, spanning the planning and development law of 8 jurisdictions, namely the six states and two self-governing territories, not to mention the occasional overlay of the approvals and statutory Environmental Impact Assessment (EIA) process associated with Federal environmental law relating to threatened species.

¹ http://srren.ipcc-wg3.de/report/IPCC_SRREN_Ch07.pdf

² Wisser, R., Z. Yang, M. Hand, O. Hohmeyer, D. Infield, P. H. Jensen, V. Nikolaev, M. O’Malley, G. Sinden, A. Zervos, 2011: Wind Energy. In IPCC Special Report on Renewable Energy Sources and Climate Change Mitigation [O. Edenhofer, R. Pichs-Madruga, Y. Sokona, K. Seyboth, P. Matschoss, S. Kadner, T. Zwickel, P. Eickemeier, G. Hansen, S. Schlömer, C. von Stechow (eds)], Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA at 559-560.

³ REN 21 (2014), *Renewables Global Status Report 2014*, p.16, <http://www.ren21.net/ren21activities/globalstatusreport.aspx>

⁴ Bloomberg New Energy Finance (2015), “Rebound in clean energy investment in 2014 beats expectations”, *Media Release*, Jan 9, 2015, <http://about.bnef.com/press-releases/rebound-clean-energy-investment-2014-beats-expectations/>

⁵ Andrew Stock, Tim Flannery and Petra Stock (2015) *The Global Renewable Energy Boom: and How Australia is Missing Out*, Climate Council of Australia, ISBN 978-0-9942453-7-3, at p.13.

⁶ Jaccard, M., L. Agbenmabiese, C. Azar, A. de Oliveira, C. Fischer, B. Fisher, A. Hughes, M. Ohadi, Y. Kenji and X. Zhang, 2012: Chapter 22 - Policies for Energy System Transformations: Objectives and Instruments. In *Global Energy Assessment - Toward a Sustainable Future*, Cambridge University Press, Cambridge, UK and New York, NY, USA and the International Institute for Applied Systems Analysis, Laxenburg, Austria, pp. 1549-1602 at 1585.

Although the Senate is at liberty to select whatever focus it chooses for its inquiries, it nevertheless remains important to examine the logic of the Federal Parliament examining land use planning law questions. This is because typically questions of land use planning law concerning almost any type of development are left to the States. Only those matters that are considered truly of national or international significance come within the ambit of the principal Federal environmental law, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

Proposals that the Commonwealth should become significantly involved in wind farm regulation rest on the premise that State and local environment and land use planning regulation of wind energy is (a) insufficient and (b) inadequate. That premise appears to be implicit in the terms of reference of this Inquiry, the second Senate Inquiry into wind energy in the last four years. The factual basis of such a premise is open to question. It is suggested that the Senate focus its deliberations on whether any amendments to Commonwealth legislation are appropriate, necessary or advisable, rather than getting involved in oversight of compliance with State environmental laws.

In June 2011, the Senate Community Affairs Reference Committee made a number of recommendations relating to wind farms and planning approval. Chapter 3 of the Report addressed the planning law issues. The Committee acknowledged that “planning of wind energy facilities is a matter principally for the states and local governments.”⁷ Amongst the recommendations were those relating to noise standards (Recommendation 1), compliance with planning permissions (Recommendation 2) and separation distances from residences (Recommendation 3).

The former Federal government rejected the majority of the recommendations of the previous Senate wind farms inquiry of 2011.⁸ The government response (2012) stated that four out of seven recommendations (aside from some referring to the NHMRC) referred to “areas that lie outside of the [federal] Government’s responsibility and should be considered by relevant state/territory governments, local governments and planning authorities.”⁹ For example in relation to the Committee’s recommendation #3 for the “development of policy on separation criteria between residences and wind farm facilities, the Commonwealth responded that “This is a matter for consideration by state/territory governments, local governments and planning authorities.”¹⁰

⁷Senate Community Affairs References Committee (2011) *The Social and Economic Impact of Rural Wind Farms*, p.29.

⁸ Senate Community Affairs References Committee (2011) *The Social and Economic Impact of Rural Wind Farms*, tabled 23 June 2011.

⁹ Australian Government (2012), *Response to Senate Community Affairs References Report: The Social and Economic Impact of Rural Wind Farms* <http://www.health.gov.au/internet/main/publishing.nsf/Content/rpgd-response-rural-wind-farms-nov11>

¹⁰ Australian Government (2102), p.4.

Australian Centre for Environmental Law (Dr. J.Prest) - Submission to Senate Select Committee Inquiry into Wind Turbines, May 2015

The principal point of this part of the submission is that there is insufficient justification for the enactment of special purpose Commonwealth legislative provisions specifically regarding wind energy, which might be applied in addition to State and Territory approval of wind farms. The proposal implicit in Term of Reference ('b') to this Inquiry (to interpret existing legislation to assume a greater role for the Clean Energy Regulator in wind farm regulation), are both likely to reduce predictability and create barriers, going against the recommendations of the policy and technical experts writing for the *Global Energy Assessment* and the *Special Report on Renewable Energy Sources and Climate Change Mitigation*.

State responsibility for land use planning

Whilst the States and the Federal Parliament have continued to concurrently legislate for the protection of the environment in numerous statutes, the picture with land use planning law is different. Although the Commonwealth Constitution is largely silent on the subject of land use planning law, the Commonwealth Parliament has only made land use planning laws for selected parts of Canberra and the Australian Capital Territory and for the external Territories.¹¹ The generally accepted balance of roles and responsibilities in our federal system is that in day-to-day practice the States and self-governing Territories have assumed the law-making role in terms of land use planning law.

The generally accepted, traditional position is that land use planning is the primary responsibility of the States.¹² On that basis, the States have enacted the majority of land use planning and development control laws.¹³ It is these laws that are applicable to the approval and siting of wind farms in Australia.

Whilst the Commonwealth Parliament theoretically has broader reaching constitutional capacity to legislate with respect to land use throughout Australia regardless of the wishes of the State legislatures, such power is rarely used for land use planning purposes. The Commonwealth Parliament retains the power to legislate, making appropriate use of s.51 heads of legislative power, such as the external affairs power and the corporations power, to regulate land use within the States without the agreement of the State concerned – for example as occurred with the (now repealed) *World Heritage Properties Conservation Act 1983*, the validity of which was largely upheld in the Tasmanian Dams case in the High Court.¹⁴)

¹¹ For example under the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth).

¹² Bates, G., (2010) *Environmental Law in Australia*, Lexis Nexis, 7th edition, p. 105.

¹³ The main planning law statutes are: *Environmental Planning and Assessment Act 1979* (NSW); *Sustainable Planning Act 2009* (Qld); *Mixed Use Development Act 1993* (Qld); *Development Act 1993* (SA); *Environment, Resources and Development Court Act 1993* (SA); *Land Use Planning and Approvals Act 1993* (Tas); *Local Government (Building and Miscellaneous Provisions) Act 1993* (Tas); *State Policies and Projects Act 1993* (Tas); *Resource Management and Planning Appeal Tribunal Act 1993* (Tas); *Tasmanian Planning Commission Act 1997* (Tas); *Planning and Environment Act 1987* (Vic); *Subdivision Act 1988* (Vic); *Victorian Civil and Administrative Tribunal Act 1998* (Vic); *Planning and Development Act 2005* (WA); *Planning and Development Act 2007* (ACT); *Planning Act 1999* (NT).

¹⁴ *Commonwealth v Tasmania* (1983) 46 ALR 625.

Nevertheless, the key point is that – with some very exceptional exceptions – the main task of regulating wind energy in Australia over the past twenty years has fallen to the States to local government. If the Commonwealth were to become further involved in this field as a regulator, it would raise the questions of: (1) duplication with existing State and local planning laws, and (2) the impact on levels of investment in the wind energy industry of an increased Commonwealth involvement.

Consistency with Intergovernmental Agreements and Policies on Regulation

Any proposed legislative changes should be examined closely regarding their compatibility with other Federal and State policy decisions on federalism in the environmental context. Principal amongst these are the *National Review of Environmental Regulation* of 2014 and the *Intergovernmental Agreement on the Environment of 1992*. This submission argues that further federal regulation would be inconsistent with those intergovernmental policy agreements and review exercises.

Intergovernmental Agreement on Environment – Roles and Responsibilities

If the Federal Parliament were to enact legislative provisions that attempted to enter the field of development control and land use planning and EIA of wind energy projects, such a step would directly contradict that approach to division of roles and responsibilities agreed upon by governments in the IGAE, a document that has remained the starting point in any conversation about Federal-State roles and responsibilities for the environment ever since 1992.

The *Intergovernmental Agreement on the Environment* of 1992 stated that the Governments of Australia: “Acknowledge that the efficiency and effectiveness of administrative and political processes and systems for the development and implementation of environmental policy in a Federal system will be a direct function of:- the extent to which roles and responsibilities of the different levels of Government can be clearly and unambiguously defined; and the extent to which duplication of functions between different levels of Government can be avoided.”¹⁵

In that agreement, under the heading ‘Resource Assessment, Land Use Decisions and Approval Processes’ the federal and State governments of Australia agreed that “[t]he development and

¹⁵ IGAE, 1992, <http://www.environment.gov.au/about-us/esd/publications/intergovernmental-agreement>

Australian Centre for Environmental Law (Dr. J.Prest) - Submission to Senate Select Committee Inquiry into Wind Turbines, May 2015

administration of the policy and legislative framework [for land use decisions] will remain the responsibility of the States and Local Government.”¹⁶ In relation to the related topic of responsibility for environmental impact assessment (EIA) of major projects, the governments agreed that: “it is desirable to establish certainty about the application, procedures and function of the environmental impact assessment process, to improve the consistency of the approach applied by all levels of Government, to avoid duplication of process where more than one Government or level of Government is involved and interested in the subject matter of an assessment and to avoid delays in the process.”¹⁷

There is insufficient justification for the enactment of special purpose Commonwealth legislation specifically regarding wind energy, which would be used to intervene in State and Territory regulation of wind farms. Nationally significant matters are adequately addressed by the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). The *EPBC Act* sets out a framework for protection of nationally significant matters such as threatened biodiversity. The only exception is climate change, which is without doubt a matter of international and national concern.

National Review of Environmental Regulation (2014)

The Select Committee should also make consider the wind energy question and devise its recommendations by doing so within the context of the *National Review of Environmental Regulation* being undertaken by the Meeting of Environment Ministers, noted in their *Agreed Statement* of 2014.¹⁸ At that time, Federal and State and Territory Ministers Ministers “supported the Review's focus on identifying unworkable, contradictory or incompatible regulation and seeking opportunities to harmonise and simplify regulations”.¹⁹

The making of further Federal legislative provisions that would be inconsistent with or in contradiction to State laws on wind farms or indeed in conflict with the intent of existing Federal laws, would go against the principles of the *National Review of Environmental Regulation*. The next section examines whether a 2012 Bill on wind farms would have been in conflict with those recommendations.

¹⁶ IGAE 1992, Schedule 2, Point 4.

¹⁷ IGAE 1992, Schedule 3, Point 1.

¹⁸ <http://www.environment.gov.au/node/38549>

¹⁹ Meeting of Environment Ministers (MEM)(2015) *National Review of Environmental Regulation: Interim Report*, February 2015.

2012 Excessive Noise Bill

The Renewable Energy (Electricity) Amendment (Excessive Noise from Wind Farms) Bill 2012, introduced by Senators Xenophon and Madigan is relevant to the discussion regarding a principled approach to the making of Federal legislation affecting wind energy.²⁰ That Bill proposed amendments to the *Renewable Energy (Electricity) Act 2000* (Cth), the law that creates the RET, the Renewable Energy Target. In particular, the Bill proposed placing a legislative obligation on the Renewable Energy Regulator (now the Clean Energy Regulator), to “suspend the accreditation of an accredited power station that is a wind farm if the Regulator believes on reasonable grounds that the wind farm is creating excessive noise” (new Clause 14(6)). The Bill also proposed a definition of ‘excessive noise’ as follows:

“a wind farm **creates excessive noise** if the level of noise that is attributable to the wind farm exceeds background noise by 10 dB(A) or more when measured within 30 metres of any premises:

- (a) that is used for residential purposes; or
- (b) that is a person’s primary place of work; or
- (c) where persons habitually congregate.

Aside from the difficulties that the Bill raises in terms of the operations of farms, as these are obviously a primary place of work for many Australians, and the difficult premise, undocumented in terms of any findings of any Australian court that there might indeed be some widespread problem with ‘excessive noise’ from wind farms, the approach proposed by the Bill remains vulnerable to the criticism of incompatibility with agreed State-Federal division of responsibility for environmental matters.

This 2012 Bill was arguably ‘unworkable’ as well as ‘incompatible’ and certainly not a simplification of laws, when judged against the criteria of the National Review of Environmental Regulation (above).

State level environmental protection/pollution control laws and land use planning and development control laws already have the following three elements:

- i. Dedicated and specialised enforcement agencies with specially trained technical staff with the expertise to assess noise and other pollution issues;
- ii. Specialised offence provisions, revised typically over a 15-20 year period of experience in running environmental prosecutions and other compliance activities;

²⁰ Negatived by the Senate at the Second Reading stage, 28.2.13, by 36 votes to 32.

- iii. Specialised enforcement jurisdictions such as the Land and Environment Court of NSW, where the judicial officers are familiar with environmental issues and the legal questions raised in pollution matters.

The effect of the type of legislative encroachment upon state and territory environmental and planning laws, as proposed in the 2012 *Excessive Noise Bill*, would be to create a climate of uncertainty for investors and another layer of regulation with little environmental protection benefit.

Overlap with State regulation of noise pollution

To enact Federal legislative provisions which attempt to supervise noise limits and State noise pollution laws administered by State governments (see: Table 1) would be to create a layer of federal legislation that would overlap directly with State and Territory laws governing that same subject.

Table 1: Existing State and Territory Law addressing noise pollution

Jurisdiction	Act and relevant Parts, sections	Regulations
NSW	<i>Protection of the Environment Operations Act 1997</i> , Part 5.5, ss. 136-141	<i>Protection of the Environment Operations (Noise Control) Regulation 2008</i>
Victoria	<i>Environment Protection Act 1970</i> , Part VIII, ss.46-48D	<i>Planning Amendment VC124</i>
South Australia	<i>Environment Protection Act 1993</i> , s.25 general environmental duty, Part 9 (offences).	<i>Environment Protection Regulations 2009</i>
Queensland	<i>Environmental Protection Act 1994</i> , Chapter 8, Part 3B ('Offences relating to Noise standards')	(1) <i>Environmental Protection (Noise) Policy 2008</i> ; (2) <i>Wind farm state code Planning guideline - draft, April 2014</i>
Tasmania	<i>Environmental Management and Pollution Control Act 1994</i> , s.53 (offence of causing environmental nuisance)	<i>Environmental Management and Pollution Control (Miscellaneous Noise) Regulations 2014</i>
A.C.T.	<i>Environment Protection Act 1997</i> , Part 3 (general environmental duty), Part 15 (offences)	<i>Environment Protection Regulation 2005</i> , Part 3 (noise)
Northern Territory	<i>Waste Management and Pollution Control Act</i> , Part 3 (general environmental duty), Part 11 (offences); <i>Environmental Offences and Penalties Act</i>	<i>Waste Management and Pollution Control (Administration) Regulations</i>
Western Australia	<i>Environmental Protection Act 1986</i> , Part 5, Division 1, <i>Noise Abatement Act 1972</i> ,	<i>Environmental Protection (Noise) Regulations 1997</i>

Additional principles to govern federal regulation of wind farms

It is submitted that the Committee's deliberations should consider five additional principles to guide a principled approach to federal regulation of wind energy:

- *Duplication*: The Commonwealth Parliament should not be involved in regulating wind farms to the extent that it would duplicate state processes, especially in the areas of land use planning and pollution control laws.
- *Consistency*: To regulate wind energy under federal law without regulating coal or gas-fired electricity generation would be extremely inconsistent. The same point was made by the former Environment Protection and Heritage Council in its 2008 *Report*: "It should be noted that many wind development issues are shared by other types of development and as such, the Working Group recommends against developing dedicated approaches that place additional requirements on wind farm developers relative to the proponents of other development activities."²¹ If we apply a logical principle of consistency with EIA and approval requirements for other industries, then the Commonwealth Parliament should not seek to legislate to create any new or additional one-off regulatory framework specifically to apply just to the wind energy industry. Specific purpose Commonwealth regulation regarding wind farms would violate the principle of consistency of application in environmental regulation. There is no Commonwealth regulation of the environmental impacts of the coal industry or natural gas in terms of a Commonwealth attempt to regulate on the basis of health impacts.²²
- *Barriers*: Commonwealth legislation should not seek to create extra barriers to the expansion of the wind energy industry; rather it should ensure that the environmental and economic benefits of wind energy are taken into account by decision makers.
- *Investor certainty*: Legislation especially enacted by the Commonwealth to regulate wind energy most likely would create additional uncertainty for investors and would dampen economic activity in the sector, on top of the impacts of the Review of the Renewable Energy Target in the *Renewable Energy (Electricity) Act 2000* (Cth).

²¹ *Report on Impediments to Environmentally and Socially Responsible Wind Farm Development*, p.3.

²² There are three exceptions to this observation. The first is approval and EIA of developments with a significant impact on water resources involving coal seam gas extraction or large coal mines under s.24D of the EPBC Act, and the second is pollution control laws applying to the Commonwealth marine zone. For example, *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*. In relation to the petroleum industry, the Commonwealth has regulated in respect to activities in Commonwealth waters – with the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* applying to the offshore areas beyond the outer limits of the coastal waters of each State. Section 8, *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth).

National Wind Farm Guidelines

Steps by the Commonwealth to regulate wind energy projects were first proposed through the idea of a Code of Practice for Wind projects. As the book Chapter “The Bald Hills Debacle” explains, the idea of a national Code for the siting and approval of wind farms was first suggested in 2006 by the former Environment Minister, Senator Ian Campbell to justify intervention in local planning matters in the proposals for wind farms at Denmark (WA) and Bald Hills (Vic).²³

After the change of government in late 2007 the idea of a Code was dropped and Guidelines instead were pursued by the EPHC, the Environment Protection and Heritage Council. (That body was established in 2001, by COAG to address broad national policy issues relating to environmental protection).

Those guidelines were developed in response to recommendations made by the EPHC Standing Committee’s 2008 report, *Impediments to Environmentally and Socially Responsible Wind Farm Development*. That report explained the rationale for developing national guidelines:

“The Working Group agreed that the assessment and approval systems in jurisdictions are generally robust and working well, and that many issues identified in this report are being adequately dealt with through existing processes.” However, the Working Group concluded that there is merit in developing government-endorsed National Wind Farm Development Guidelines to deliver a higher degree of consistency and transparency in the planning, assessment, approval and environmental monitoring of wind farms.”²⁴

The Working Group advocated a set of Development Guidelines rather than a binding or prescriptive Code, as Guidelines would be more readily “endorsed and adopted as a matter of policy by jurisdictions to support their existing planning and environmental approval systems.”²⁵

The EPHC released the public consultation draft of its National Wind Farm Development Guidelines on 27 October 2009. A final draft version was released in July 2010.²⁶ The stated purpose of the Guidelines was to “provide a nationally consistent set of best-practice methods for assessing the impacts that are unique or significant to wind farm developments and operations.” Five topics were

²³ Prest, J. (2006) “The Bald Hills Wind Farm Debacle” in Bonyhady & Christoff (eds.) *Climate Law in Australia*, (Federation Press).

²⁴ EPHC Standing Committee (2008), *Impediments to Environmentally and Socially Responsible Wind Farm Development*, p.5.

²⁵ P.5.

²⁶ Environment Protection and Heritage Council (EPHC) (2010) *Draft National Wind Farm Development Guidelines*, July 2010.

Australian Centre for Environmental Law (Dr. J.Prest) - Submission to Senate Select Committee Inquiry into Wind Turbines, May 2015

listed: Community and stakeholder consultation, wind turbine noise, visual and landscape impacts, birds & bats, shadow flicker, and electromagnetic interference (EMI).

The EPHC was at pains to point out that the Federal Guidelines were not meant to replace State law: “The guidelines are not intended to be mandatory; every jurisdiction has a different statutory process for assessing wind farm proposals and it is not the intention of the Guidelines to change these.”²⁷ They continued: “These Guidelines are intended to be referred to within the planning process of the relevant state or territory. They are intended to inform the considerations of the relevant authority when assessing a proposal for a wind farm. They are also intended to make those considerations more consistent and transparent to those outside of that planning process.”²⁸

However, a decision was made to cease work on the development of these guidelines in July 2013. The Environment Protection and Heritage Standing Committee of COAG decided to cease further development of the Guidelines.²⁹ The reason cited was as follows: “it has become apparent that jurisdictions have developed, or are currently developing planning application, assessment and approval processes within their own planning frameworks to manage community concerns about wind farm developments”.³⁰

Risks of the National Wind Farm Development Guidelines

The development of the draft guidelines did not in itself make out a case for the Commonwealth to “cover the field” in terms of environmental regulation of wind farms, to the exclusion of the States. The aim is merely to create a consistent set of agreed best-practice guidelines for wind farm developers and operators across all jurisdictions, whilst maintaining the bulk of regulatory effort at the level of State and local government.³¹

A loosely drafted national code for wind farm planning decisions could cause significant problems if it increases the level of politicisation of the approval process. It could provide scope for politicians antagonistic to wind power to politicize the land use planning decision making process.

²⁷ Environment Protection and Heritage Council (EPHC) (2010) *Draft National Wind Farm Development Guidelines*, July 2010.

²⁸ Environment Protection and Heritage Council (EPHC) (2010) *Draft National Wind Farm Development Guidelines*, July 2010.

²⁹ COAG’s former Standing Council on Environment and Water (2013), *Future of the National Wind Farm Development Guidelines*, <http://www.scew.gov.au/resource/future-national-wind-farm-development-guidelines> accessed 17.5.15.

³⁰ NEPC, Environment Protection and Heritage Council website archive, ‘Future of the National Wind Farm Development Archives’ at <http://www.nepc.gov.au/resource/ephc-archive-future-national-wind-farm-development-guidelines>, viewed 17.5.15.

³¹ NEPC, Environment Protection and Heritage Council website archive, ‘Future of the National Wind Farm Development Archives’ at <http://www.nepc.gov.au/resource/ephc-archive-future-national-wind-farm-development-guidelines>, viewed 17.5.15.

The Clean Energy Council argued in its submission to the 2011 wind farms Inquiry:

“However the Draft National Wind Farm Development Guidelines as currently proposed only add serious impediments to wind farm development beyond those imposed on other infrastructure investments, reducing certainty for the planning assessment process by introducing additional, often conflicting guidelines. This would add additional costs and delays to wind farm developers without delivering improved outcomes.”³²

Limited circumstances justifying Federal involvement

There are only three circumstances in which further Federal legislation could be justified in this area. Firstly, to address a failure to achieve a uniform regulatory regime through existing processes of cooperative federalism. As we have seen, a limited attempt to achieve some uniformity and consistency was previously in train in the form of Guidelines yet was discontinued by COAG in 2013, the Environment Protection and Heritage Council’s *National Wind Farm Development Guidelines*.

The second possible rationale could be to address State legislation that creates unreasonable and unjustified barriers to renewable energy projects, such as a 2km set-back from residences around all wind energy projects, as was introduced in Victoria in 2011 and only removed in 2015.³³ Such barriers are unjustified because they represent the selection of an arbitrary and non-evidence-based setback distance. It may in fact be possible, on a case-by-case approach applying national noise standards, to meet those standards where wind farms are located closer to dwellings. Prescriptive setback distances will limit wind energy development to a handful of sites with the rare combination of minimal local population combined with a strong electricity network and consistent winds.

The third rationale for federal legislative action would be on the grounds of response to the pressing problem of anthropogenically induced climate disruption.³⁴ There is a justifiable option for federal pre-

³² 2011 Inquiry, *Submission 67*, p. 5.

³³ The setback requirement was reduced from 2km to 1km by planning Amendment VC124, gazetted on 2 April 2015. <http://www.dtpli.vic.gov.au/planning/planning-applications/more-information-on-permits/wind-energy-facilities>

³⁴ The need to address human induced climate change by reducing emissions of greenhouse gases flows logically from the fact that many of the most eminent scientific societies and organizations have endorsed a consensus position that "most of the global warming in recent decades can be attributed to human activities". These bodies include the American Association for the Advancement of Science, American Astronomical Society, American Chemical Society, American Geophysical Union, American Institute of Physics, American Meteorological Society, American Physical Society, Australian Coral Reef Society, Australian Meteorological and Oceanographic Society, Australian Bureau of Meteorology and the CSIRO, British Antarctic Survey, Canadian Foundation for Climate and Atmospheric Sciences, Canadian Meteorological and Oceanographic Society, European Federation of Geologists, European Geosciences Union, European Physical Society, Federation of American Scientists, Federation of Australian Scientific and Technological Societies, Geological Society of America, Geological Society of Australia, International Union for Quaternary Research (INQUA), International Union of Geodesy and Geophysics, National Center for Atmospheric Research, National Oceanic and Atmospheric Administration, the Royal Meteorological Society, the Royal Society of the UK. The consensus of scientific papers from as long ago as 2009 was that governments either instigate an immediate and major reversal in existing emission trends or accept that mean global temperature may rise beyond 4°C to as high as 7°C by 2100. *See*: Susan Solomon, Gian-Kasper Plattner, Reto Knutti, and Pierre Friedlingstein (2009) “Irreversible climate change due to carbon dioxide emissions” 106(6) *Proceedings of the National Academy of Sciences* 1704–1709; Schellnhuber, H. (2009) “Terra Quasi-Incognita:

Australian Centre for Environmental Law (Dr. J.Prest) - Submission to Senate Select Committee Inquiry into Wind Turbines, May 2015

emption of State laws that block pro-renewable energy siting laws at the local level. In a United States, law review article about energy law, Pursley and Wiseman describe “ ‘negative experiments’ in which cities empowered with land-energy rule-making authority respond disproportionately to anti-renewables interests and stifle the adoption of distributed renewables.”³⁵ They suggest that “a federal minimum standard is needed to prevent negative, anti-renewables regulatory variation” at the local or State level.³⁶

The EPBC Act 1999 and wind farms

The fourth rationale for federal legislative action would be to amend the *EPBC Act 1999* (Cth) to list climate change as a matter of national environmental significance under that Act. This would serve to ensure that the climate damaging aspects of fossil fuel energy projects are actually considered by the Federal Minister. This would give some semblance of a level playing field for clean energy projects. Such a step was proposed on an interim basis by the Hawke Review of the *EPBC Act*.³⁷

The Hawke Review and Wind farms

The Hawke Review (2009) was the largest review of the EPBC Act carried out in the past ten years. It was an independent statutory review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), undertaken in accordance with s.522A of the Act. The important point for this Senate Inquiry is that the Hawke Review, as the major and detailed review of the Act, did not recommend Commonwealth regulation of wind energy facilities.³⁸ By way of background, the Review did not involve a former PM; it was undertaken by Dr Allan Hawke with the assistance of an Expert Panel comprising Professor Tim Bonyhady (ANU), Professor Mark Burgman (University of Melbourne), the Hon Paul Stein AM; and Ms Rosemary Warnock.

Options for amending the EPBC Act to Encourage Renewable Energy development

It is recommended that the Committee give attention to amending the national regulatory framework in the *EPBC Act* to enable greater consideration of the environmental benefits of renewable energy in terms of abatement of greenhouse gas emissions and other air pollution. As was recognised by Preston

Beyond the 2°C Line”, *Paper to Four Degrees and Beyond International Climate Conference*, Oxford University and Tyndall Climate Change Center, 28-30 September. <http://www.eci.ox.ac.uk/4degrees/programme.php>; Schneider, S. (2009) “The Worst Case Scenario” 458 *Nature* 1104-1105; Tim Lenton, Hermann Held, Elmar Kriegler, Jim Hall, Wolfgang Lucht, Stefan Rahmstorf, Hans Joachim Schellnhuber (2008) “Tipping elements in the Earth’s climate system” 105(6) *Proceedings of the National Academy of Sciences* 1786-1793.

³⁵ Pursley, G., Wiseman, H. (2010-2011) “Local Energy” 60 *Emory Law Journal* 877 at 935.

³⁶ *Ibid* at 957.

³⁷ Department of the Environment, Water, Heritage and the Arts, 2009, *Australian Environment Act: Report of the Independent review of the Environment Protection and Biodiversity Conservation Act 1999*, at p.113. <http://www.environment.gov.au/legislation/environment-protection-and-biodiversity-conservation-act/epbc-review-2008>

³⁸ Electronic search of full text of Report of the Hawke Review, executed 9.2.11, search term “wind”.

CJ of the Land and Environment Court of NSW in the *Taralga Landscape Guardians* case (2007), in the field of wind farm regulation, there is a risk that local concerns about local environmental impacts can overwhelm consideration of broader national and global benefits flowing from clean energy projects.³⁹

While various Commonwealth governments have sought to present the EPBC Act as a world-class and innovative piece of environmental legislation, a law that has established Australia's place as a world-leader in environmental legislation, etc.,⁴⁰ a more dispassionate analysis suggests that the EPBC Act does very little to directly tackle the question of climate change.

Firstly it does little to ensure environmental impact assessment of proposals which are likely to cause significant amounts of greenhouse gas emissions, either directly or indirectly. Secondly, the EPBC Act does little to promote sustainable development by encouraging renewable energy installations. In terms of greenhouse gas abatement, the Act does nothing to require a decision maker to consider the positive benefits of a development, such as a clean energy development that would reduce emissions when compared to a conventional technology. In fact, at present, in some points in the approval and EIA process it prohibits a decision maker from taking into account positive environmental benefits of a development.

This occurs firstly under s.75(2)(b) when the Minister is making a decision as to whether a proposed action requires an approval under the Act or not, i.e. whether the action is a 'controlled action'. In particular the Minister "must not consider any beneficial impacts the action (i) has or will have; or is likely to have; on the matter protected by each provision of Part 3." Secondly, in deciding whether or not to approve a project that is subject to the Act, the Minister is specifically prohibited from considering any matters other than the controlling provision and the catch-all of "economic and social factors". (see s.136(5)).⁴¹ Thus federal EIA law actually prevents the environmental benefits of renewable energy facilities in terms of greenhouse gas abatement from being taken into account in the approval decision-making process.

Thus nothing in federal law exists to ensure that the benefits of renewable energy facilities in terms of greenhouse gas abatement are taken into account in the approval decision-making process. Surely we must ask whether the EPBC Act is adequate given present scientific information and modelling about the consequences of overly cautious responses to climate change.

³⁹ *Taralga Landscape Guardians Inc. v Minister for Planning and RES Southern Cross Pty Ltd* [2007] NSWLEC 59 (12 February 2007)

⁴⁰ ELHA No.1 2006 Bill Second Reading speech, Santoro, Sen Santo, Hansard, 06 November, 2006 p. 135.

⁴¹ This is a separate point to that raised by s.75(2)(b), namely that the Minister in deciding whether or not an action is a controlled action, cannot take into account any beneficial impacts the action may have on a matter protected."

Australian Centre for Environmental Law (Dr. J.Prest) - Submission to Senate Select Committee Inquiry into Wind Turbines, May 2015

Senators and other law reformers could pay particular attention to emulating the example set by planning law in New Zealand (and previously, the state of Victoria), which requires land use planning decision makers to take account of the environmental benefits of renewable energy. In New Zealand, substantial efforts have been made to date to amend the national land use planning law – the *Resource Management Act* - in order to ensure that the balance in the planning and consenting processes is tipped in favour of renewable energy developments. In 2004, the Act was amended to ensure that the benefits from the development and use of renewable energy resources were considered in consenting processes. In particular, section S.7(j) places an obligation on persons exercising functions to have particular regard to the “benefits to be derived from the use and development of renewable energy”. In 2004, New Zealand’s main land use planning law, the *Resource Management Act* was amended by an *Energy and Climate Change Amendment Act* with the explicit purpose of amending the principal Act to require all persons exercising functions and powers under the RMA to “have particular regard to (i) the efficiency of the end use of energy; and (ii) the effects of climate change; and (iii) the benefits to be derived from the use and development of renewable energy.”

In summary, the Committee should also give some attention to how the national regulatory framework could be amended to provide some greater account of the environmental benefits of renewable energy in terms of abatement of greenhouse gas emissions and other air pollution.

EPBC regulation of wind farms to date

In the past the Commonwealth has not sought to comprehensively regulate all wind farm development across Australia. It has only had selective involvement, through the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

Detailed examination of approvals data shows the approach taken to the Bald Hills and Denmark wind farms was unusual. In relation to wind farms, by May 2007 there had been 74 referrals to the Commonwealth for wind farm proposals for which a decision had been made. Only 10 of these proposals were considered to be a controlled action requiring a Commonwealth decision on approval.⁴² Only one – Bald Hills - was refused.

A similar proportion of concern was evident from a 2011 review conducted by the author of every single wind farm referral since the commencement of the Act, using the online EPBC referrals database, showed that only a small minority of projects referred to the Commonwealth (i.e. 14%) at

⁴² A further 8 avoided approval only by virtue of the the “particular manner” provisions. Statistical analysis by the author from searchable database provided on EPBC Act website of the Department of Environment and Water Resources. Search conducted 6.6.07.

that point had actually been judged to have *even the potential to* cause a significant environmental impact. In other words, the majority of proposals (86%) were not considered to be a controlled action, and approval was not required. As a result of the referral process, only 14 out of 100 wind farms referrals decided upon at 11 February 2011 were considered to require approval under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). Of these, two were dealt with under a bilateral agreement with the States. All of the controlled actions were approved subject to conditions - with the exception of the Bald Hills wind farm, which was eventually approved after an initial rejection in 2006.

Since 2011, some of the wind farms that have required Commonwealth approval under the EPBC Act, as they were considered a 'controlled action', include: Conroy's Gap Stage 2 (NSW), Uungula/Goolma Wind Farm (NSW), Yass Valley Wind Farm (NSW), Bango Wind Farm (NSW), Stony Gap Wind Farm (SA), Dundonnell Wind Farm (Vic), Hornsdale Wind Farm (SA), Low Head Wind Farm (Tas), Crudine Ridge Wind Farm (NSW), Mt Emerald Wind Farm (Qld), Mt Mercer wind farm (Vic.), Sapphire Wind Farm (NSW), Willogoleche Wind Farm (SA), Rugby Wind Farm (NSW), Bango Wind Farm, Milyeannup Wind Farm (WA), and the Boco Rock Wind Farm (NSW).⁴³

In summary, the facts show that Commonwealth has only considered it important to require approval for a small minority of wind projects that have been referred to it to date.

In spite of approval by the Commonwealth, a significant number of wind energy projects have not yet proceeded because the price of Renewable Energy Certificates (REC or LREC) has been too low, and it is likely that this situation will continue with plans to amend the REE Act to reduce the required quantity of extra renewable electricity that must be generated from 41,000 GWh down to 33,000GWh.

Claims for Compensation

Another aspect of the debate over wind farms that is relevant to terms of reference (d) 'the implementation of planning processes in relation to wind farms', is the call by some opponents and objectors to wind farms for the payment of compensation to neighbours of wind farms. This section explains why such calls are mistaken because they are at odds with well-established legal principles regarding developments that are lawful within a zoning and that have received development approval.

Regarding a more recent judicial treatment of arguments claiming compensation for the development of wind farms, I refer Senators to the decision of Chief Justice Brian Preston of the NSW Land &

⁴³ Source: EPBC referrals database at www.environment.gov.au

Australian Centre for Environmental Law (Dr. J.Prest) - Submission to Senate Select Committee Inquiry into Wind Turbines, May 2015

Environment Court in *Taralga Landscape Guardians v Minister for Planning and RES Southern Cross Pty Ltd* [2007] NSWLEC 59 (12 February 2007).

In that case, the Landscape Guardians group unsuccessfully sought a ruling that would establish a regime of financial compensation for “blight” on non-associated properties in the vicinity of the windfarm. The alleged blight involved loss of future property value or from loss of amenity [at 151]. Preston CJ rejected arguments that adjoining landowners be paid compensation for reduced amenity or possible reductions in future property values and in particular rejected their arguments raising a principle of ‘blight’..

Preston CJ held that: “Such a proposition faces a number of insurmountable hurdles”. The first was that a wind farm was a permissible use on the land upon which it was proposed, in the zoning table within the local planning scheme established by the relevant Local Environmental Plan. Second, the claim failed because it sought payment of monetary compensation rather than consideration of remedial measures.

Preston CJ concluded: at [159] “If the concepts of blight and compensation, as pressed by the Guardians, were to be applied to this private project (a proposition which I reject) then any otherwise compliant private project which had some impact in lowering the amenity of another property (although not so great as to warrant refusal on general planning grounds when tested against the criteria in s 79C of the Act) would be exposed to such a claim.”

His Honour reasoned at [160] that “Creating such a right to compensation (for creating such a right it would be) would not merely to create such a right of compensation would “strike at the basis of the conventional framework of landuse planning but would also be contrary to the relevant objective of the Act, in s 5(a)(ii), for “the promotion and co-ordination of the orderly and economic use and development of land”.

In summary, if the Commonwealth Parliament were to consider establishment of a compensation regime, it would have to find arguments to rebut the propositions made by Preston CJ of the NSW Land and Environment Court in *Taralga Landscape Guardians*.

In a submission to 2011 inquiry, the Clean Energy Council made the valid point that “There is no development activity in Australia that is required to compensate neighbours of an infrastructure project.” In relation to impact on a view, this requires elaboration. At common law there is no private

right to a view.⁴⁴ In particular, it is settled law that there is no ‘right’ or proprietary interest in a view from a particular property.⁴⁵ This flows from the fact that property is defined or described as every type of right (that is, a claim recognised by law), interest, or thing which is legally capable of ownership, and which has a value. As a view is not capable of ownership, it does not amount to property.

The nearest option for neighbouring opponents of wind farms would be to attempt to bring an action for the tort of private nuisance. This tort involves a substantial and unreasonable interference with private rights to the use and enjoyment of land. To successfully make out a cause of action in nuisance, a plaintiff must show:

- (1) that he or she has title to sue in respect of the particular nuisance;
- (2) that the defendant has interfered with a property right of the plaintiff; and
- (3) the interference was both substantial and unreasonable.

Whether interference is unreasonable and substantial is a question of fact to be determined in reference to all the circumstances of each particular case. It is also a matter of degree. A court must maintain the balance between the right of an occupier to use his or her land freely with that of neighbours to enjoy the use of their land without interference.

The prospects of success of such arguments in relation to wind farms in Australia were examined by Penelope Crossley, Lecturer in Law at the University of Sydney in an article in the *Torts Law Journal*, and such actions were predicted to be unlikely to succeed.⁴⁶

In the context of a claim for public, as opposed to private, nuisance, the most relevant case concerns the construction of the Black Mountain Tower in Canberra.⁴⁷ In *Kent v Johnson* the alteration of the Canberra skyline by the Black Mountain tower was not held to amount to a public nuisance for which relief could be granted. Smithers J of the ACT Supreme Court described how some witnesses for the plaintiff “claimed no special expertise but merely spoke of the compatibility of the natural beauty of the mountain with the general aspect of Canberra as a city beautifully ringed with such hills and their feeling of dismay that this portion of the skyline should be dramatically changed by the construction of such a large building of technological purpose. But others were persons of town planning and architectural skills and experience, able to speak with expertise....[with] opinion of real value from the point of view of the break in the skyline which the tower will create.” On the other hand, illustrating

⁴⁴ *Campbell v Mayor, Alderman and Councillors of the Metropolitan Borough of Paddington* [1911] 1 KB 869 at 875-6, 879 (public nuisance); *Kent v Minister for Works* (1973) 2 ACTR 1; 21 FLR 177 at 212 per Smithers J, SC(ACT); *Bathurst City Council v Saban* (No 2) (1986) 58 LGRA 201 at 206 per Young J, SC(NSW) (unsightliness alone does not constitute a nuisance).

⁴⁵ *Lardner v Mornington Peninsula SC* [2003] VCAT 238.

⁴⁶ Crossley, P. (2011). Private Nuisance: An ill wind for wind energy projects? *Torts Law Journal*, 19(2), 135-152.

⁴⁷ *Kent v Johnson (Minister of State for Works)* (1973) 2 ACTR 1; (1973) 21 FLR 177.

Australian Centre for Environmental Law (Dr. J.Prest) - Submission to Senate Select Committee Inquiry into Wind Turbines, May 2015

the subjectivity of these questions, another witness, Sir William Dargie, spoke in enthusiastic terms of the design of the tower, speaking as an artist that the tower would be “a monument to our own technological age. It is an expression of the design that is forced on us. The best sort of design that is forced on us by certain technological predicates which have to be met.” This witness summarised the dilemma by stating “He replied: “I think it would depend on the individual convictions and point of view.” Smithers J made it clear that “It was conceded {by the Plaintiffs} that there is no authority supporting the notion that interference with such an amenity is a wrongful act in the nature of a public nuisance.”

A sensible point was been made by the Clean Energy Council in submissions to the 2011 Wind Farms Inquiry, stating:

“Projects with a similar scale and nature of impact should be treated in a consistent manner. There is no development activity in Australia that requires neighbours of an infrastructure project to be paid off. Altering the planning provisions for one type of development will set an unrealistic precedent for all major developments such as future highways, power lines, and fossil fuel generation plants which have amenity impacts to a greater number of neighbours....Certainty is critical for investors in these major projects to have confidence in their decision to invest. Projects with a similar scale and nature of impact should be treated in a consistent manner.