

## The Bald Hills wind farm debacle

*James Prest*

If you genuinely tell people that building a wind farm here will save the planet from climate change, you are doing a massive disservice to the environment. It is an atrocious misleading of the Australian community.

Senator Ian Campbell, Senate Estimates,  
ECITA Committee, 25 May 2006, p 116.

### Introduction

In early April 2006 environmentalists were surprised to hear that the Commonwealth Environment Minister, Senator Ian Campbell, had refused an application for approval of a development under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). This news became even more intriguing when it was learned that the offending proposal was for a wind farm on cleared land, not for oil drilling on a coral reef, nor clearing remnant vegetation.

The application was for a large 52-turbine wind farm at the Bald Hills in South Gippsland region of Victoria. The project would have been Victoria's second largest wind farm – second only to a 120 turbine farm at Portland. Up to that time, refusals had not been a regular feature of the ordinary administration of the *EPBC Act*. Only three projects had been refused since the Act commenced in July 2000.<sup>1</sup> These involved a housing subdivision on Kangaroo Island (SA), construction of a house on Norfolk Island, and the use of an electric grid to protect a lychee orchard in Queensland from flying foxes.<sup>2</sup>

The rejection of the Bald Hills wind farm was remarkable because the reason given for this decision to veto a renewable energy project promising considerable abatement of greenhouse emissions was to avoid the threat it was said to pose to the critically endangered orange-bellied parrot. The decision took participants in the wind energy industry by surprise. Other

wind farms, which had been subject to Commonwealth approval requirements, had met little delay or obstruction.

What does the Bald Hills story say about the Australian response to climate change? It provides a case study of Commonwealth decision-making about a project with potential to reduce significant amounts of greenhouse gas emissions, in a situation where these benefits were juxtaposed with potential impacts on threatened biodiversity. It prompts many questions about the Howard Government's legal and policy approach towards the energy supply challenges posed by climate change.

The Bald Hills story is best understood if we look beyond detailed scrutiny of the assessment process under Victorian and Commonwealth law, to review it in the broader landscape of recent decisions and policy regarding renewable energy. Crucial aspects of this context include the Commonwealth government's decision not to expand the Mandatory Renewable Energy Target, as well as Ministerial attempts to block the Denmark community wind farm in Western Australia, and the proposal for a National Code for Wind Farms which would have introduced additional scope for the Commonwealth to scrutinise wind energy because of local opposition. This context gives a more complete picture of recent Commonwealth decision-making on renewable energy.

### The proposal

The Bald Hills wind farm proposal originally involved construction of 80 wind turbines across three adjoining parcels of land near Cape Liptrapp in South Gippsland, 170kms South-East of Melbourne. When built the project would annually prevent the emission of 414,523 tonnes of greenhouse gases, equivalent to removing 95,733 cars from the roads.<sup>3</sup> With an estimated capital cost of \$220 million, the project would create 50 to 80 jobs during construction and eight ongoing jobs.

At the centre of the controversy was the orange-bellied parrot or OBP, *Neophema chrysogaster*. It was no stranger to politics, having been pilloried by former Victorian Premier, Jeff Kennett, as a 'trumped up corella', when the Kennett Government had considered moving Melbourne's Coode Island chemical storage depot to Ramsar listed wetland habitats at Point Lillias near Geelong. Those plans were abandoned for other reasons in 1997.

The OBP breeds in South West Tasmania in summer where its habitat is fully protected within the Western Tasmania Wilderness world heritage area. For the winter it migrates across Bass Strait to coastal Victoria and South Australia where it inhabits salt marshes and dune vegetation near the coast from Port Philip Bay westwards to the northern end of the Coorong.<sup>4</sup> The OBP is listed as *critically endangered* under the EPBC Act. Scientific advice to the Minister on upgrading its listing in 2006 stated:

Whilst Orange-bellied Parrot habitat has been degraded and lost throughout the species' range, the majority of this impact has occurred within the species' non-breeding range (ie, migratory corridors and wintering areas). The major threats to its overwintering habitat arise from drainage of wetlands, alteration and destruction of saltmarsh vegetation by development and vegetation clearance for agricultural purposes.

Senator Campbell held a media conference in his home town of Perth to publicly announce the refusal of the Bald Hills wind farm. This was an unusual step in decision-making under the EPBC Act. The maximum publicity most EPBC decisions receive is a silent announcement on the departmental website. Campbell said:

I've announced this morning that I have decided not to approve the Bald Hills wind farm in Victoria.. I have done so on the basis that the report commissioned by my department has said that the Orange-bellied Parrot, which is threatened and is in a very precarious situation as a species, can't really stand any further potential impacts. The wind farm proposed could have such an impact and hasten the extinction of that species.<sup>5</sup>

The decision was front-page news. A frenzy of media comment and analysis ensued for weeks.

### *The wind energy boom*

The application for approval of Bald Hills was a small part of a massive boom in wind farm investment across Australia. Within less than a decade, installed capacity grew over 200 times from a puny 1998 baseline of 4 megawatts (MW) to 817 MW in 2007.<sup>6</sup> At the time of writing, there were a further 6785 MW of projects proposed or under construction. There has been a similarly rapid growth in wind-installed capacity worldwide, with annual growth rate of 41 per cent in 2005, and 32 per cent in 2006. Total global installed wind energy capacity stood at 74,223 MW in January 2007.<sup>7</sup>

With this massive expansion in the wind farm sector, there have been many instances of opposition to windfarm development. These have come on the grounds of aesthetic, visual and landscape amenity impacts, alleged reductions in local property values, noise impacts, as well as claimed or possible impact on birdlife. In some European countries, this local opposition and difficulties in obtaining planning permits to erect wind turbines have made the construction of offshore wind farms a competitive option. In the UK, up to 40 per cent of onshore applications in 2005-2006 were refused, predominantly by local authorities.<sup>8</sup> In fact, in the four months immediately following the release of the Stern Review, UK planning approval rates for onshore wind farms fell to their lowest level ever – only 33 per cent.<sup>9</sup>

In Australia, there has not been a shift to construction of offshore wind farms. Yet there has been a significant amount of litigation launched by third party objectors to the grant of planning approval to onshore wind

projects – particularly in Victoria<sup>10</sup> and more recently, in New South Wales.<sup>11</sup> Litigation by opponents has included objection to the erection of wind monitoring equipment<sup>12</sup> and to the grant of planning permits for the construction of transmission lines.<sup>13</sup> Following amendment of legislation in New South Wales and Victoria to provide for ‘call-in’ of major wind farm approval decisions away from local government by State Ministers, objectors moved to more creative arguments. These included claiming that the timetabling of hearings before an inquiry panel did not provide objectors with a ‘reasonable opportunity to be heard’.<sup>14</sup> On the other side of the fence, there has been litigation by wind farm developers to challenge refusals to grant planning permission<sup>15</sup> or to challenge the imposition of conditions on permissions.<sup>16</sup> Less commonly there has been litigation by developers to prevent competing land uses on or adjacent to land proposed for a wind farm.<sup>17</sup> The majority of litigation has been brought in State courts and tribunals around questions of State planning law. The Bald Hills was different, involving Commonwealth environmental law.

Meanwhile, there has been a steadily rising tide of public concern over the likely impacts of climate change and the Commonwealth government’s inaction, and its obstructionist approach at international climate negotiations. A significant section of the Australian public have taken matters into their own hands, indicating their own awareness of the need to introduce emissions reductions, particularly from the electricity generation sector. There has been a rapid increase in consumer demand for ‘green power’ from 100,000 customers in June 2004 to 370,000 by December 2006.<sup>18</sup>

### *The EPBC decision-making process*

Not all wind farm projects are assessed under Commonwealth environmental law. Most are only assessed under State planning laws. Nevertheless, by May 2007, 74 wind projects had been referred to the Commonwealth for review under the EPBC Act, where scrutiny is only required if the project is likely to have a significant impact on a ‘matter of national environmental significance’. Typically, for wind farms, this relates to listed threatened species or migratory species.

Wind Power Pty Ltd, proponents of the Bald Hills wind farm, first referred the project to the Commonwealth Department of Environment and Heritage on 23 July 2002. They asserted that it should not require Commonwealth approval as the research carried out by their ecological consultants suggested that the project was not likely to have a significant impact on listed threatened species or other matters of national environmental significance.<sup>19</sup>

However, on 21 August 2002, the Minister’s delegate decided that approval was required, as it was ‘a controlled action’ under the parlance of that Act. The controlling provisions were s 18 (listed threatened species) and s.20 (listed migratory species). Of concern were the orange-bellied

parrot, the swift parrot, as well as listed migratory birds (principally the white throated needletail and Latham's snipe) using the Bald Hills wetland reserve, adjacent to the northern end of the proposed windfarm site.

One goal of the EPBC Act was to reduce duplication of Commonwealth and State requirements for environmental impact assessment (EIA) and approval. The Act consequently provides for the requirements of Commonwealth law to be met through 'accredited' State processes. These mechanisms provide either for one-off accreditation of state approvals for a given project or a standing arrangement under a bilateral agreement for general accreditation of an entire assessment regime.

As there was no bilateral agreement in place between Victoria and the Commonwealth regarding EIA, on 28 October 2002 the Minister opted for one-off accreditation of the Victorian EIA process.<sup>20</sup> The assessment was to proceed by means of an Environment Effects Statement (EES) under the Victorian *Environment Effects Act 1978*. No additional formal Commonwealth EIA documents such as a Public Environment Report or an Environmental Impact Statement were required.

### *Victorian assessment*

The Victorian approvals process for the Bald Hills wind farm was complex and thorough. As the plan involved a wind farm larger than 30 MW, the application for planning permission went automatically to the State Minister for Planning rather than to the South Gippsland Council. This flowed from the *Planning Guidelines for Wind Energy Facilities in Victoria*, incorporated into local planning schemes. The guidelines were designed to prevent large wind farms from being blocked by councils swayed by local opposition. They require the decision-maker to give considerable weight to the contribution made by the development of renewable energy.

In Victoria the environmental impacts of development are usually considered through the planning approval process rather than by means of formal environmental impact assessment. However, a small number of major projects are subject to detailed assessment by an EES. This can be required in addition to planning permission at the discretion of the Minister for Planning under the *Environment Effects Act 1978*. EES tend to be required where routine planning approval processes are considered to be inadequate given the potential for significant adverse effects and/or major public concern regarding a proposal. Over 180 EES have been completed for major infrastructure projects such as freeways, mines and power stations.

EES are usually comprehensive and rigorous, especially if broad terms of reference are set. This was the case for Bald Hills – by contrast with the assessment of the Hazelwood coal-fired power station, where the likely impacts of greenhouse emissions were excluded from the scope of inquiry.<sup>21</sup> The Victorian Minister decided on 21 March 2002 that an EES – as

well as planning approval – was required for the Bald Hills wind farm. The Bald Hills project was subject to the most thorough form of environmental assessment under Victorian law where a requirement for an EES is complemented by an additional requirement for a panel inquiry. In fact, the Bald Hills proposal successfully navigated this level of assessment twice.

To comply with the *Environmental Effects Act*, Wind Power Pty Ltd prepared a detailed EES, which was examined by an independent panel with public comment. The EES summarised the project, alternatives to it, and examined its possible environmental effects. When the EES and planning permit application was initially placed on public exhibition in June-July 2003, 274 submissions were received. In response, the proponent altered its proposal to diminish its impacts, reducing the number of turbines from 80 to 52, cutting the height of the turbines from 125 metres to 110 metres, and increasing the distance between turbines and residences.<sup>22</sup>

The Minister required the proponents to re-apply for planning permission and to exhibit a supplement to the EES in the wake of these changes to ensure a fair process, giving 'potential submitters the chance to change their submissions or objections, after viewing the new plans'.<sup>23</sup> The new documents drew more than 1100 submissions, mainly raising possible impacts on birds, noise and aesthetic impacts.<sup>24</sup>

The lodgement of the second planning application led the Minister for Planning to appoint a second panel inquiry to consider submissions and to conduct public hearings. That panel held 17 days of hearings in March and April 2004. This included nine days on which site inspections were held. On 24 June 2004, the panel submitted a 310-page report headed *Panel Report: Bald Hills Wind Farm Project EES, EES Supplement and Called-In Planning Permits*. The report included 29 recommendations; chief among these was the view that planning permission should be granted subject to conditions.

Other aspects of the Victorian assessment process for Bald Hills indicate its thoroughness. First, the preparation of the EES was not just left to the developer but was guided during 2003 by Assessment Guidelines developed by the Department of Sustainability and Environment (DSE) and refined with public comments and input from a Technical Reference Group comprising staff of local and State government agencies. Secondly, following the submission of the inquiry panel's report to the Minister for Planning, the Minister required further reports from the developer's consultants prior to releasing her assessment report on the proposal. Brett Lane and Associates were asked to compile the results of five bird survey reports already prepared for the EPBC Act referral process, the EES and the supplementary EES processes, in response to questions from the panel. On 25 August 2004 the then Minister, Mary Delahunty, published her Assessment and granted planning approval to the project, subject to the condition that a comprehensive environmental management plan be put in place. Even though the project had been reduced to 52 turbines, the approval was for the second biggest wind farm in Victoria at that time.

The Victorian Planning Panel Report found that 'there is no significant likelihood of harm to the Orange-bellied Parrot'.<sup>25</sup> This led the Victorian Planning Minister to conclude:

It is my assessment that there are unlikely to be significant impacts on any threatened or migratory species listed under the EPBC Act.<sup>26</sup>

The planning panel had raised some questions about the adequacy of existing survey work, but these issues were addressed by the report produced by Lane & Associates to produce a further report before the grant of the planning permit in August 2004. In relation to this, the Victorian Planning Minister said:

It is my assessment that the bird survey methodology used for the Bald Hills Wind Farm is adequate for the purpose of assessing the bird mortality and avoidance impacts arising from the proposal. While there is likely to be some bird mortality from the operation of the wind farm, there is unlikely to be a significant threat to any listed threatened or migratory species.<sup>27</sup>

Another issue was raised by the panel:

The Panel recognises DSE [Victorian Department of Sustainability & Environment] concerns regarding the cumulative effect of wind farms on the species but does not agree that the Bald Hills site will quantifiably add to that cumulative effect to an extent that would justify the provision of anything more than the most negligible amount of additional off site habitat, to proportionately address the very remote potential for harm.<sup>28</sup>

The panel went as far as asking one of the expert witnesses to quantify the risks to the OBP posed by this wind farm. The panel recounted:

In response to a question from the panel, Dr Meredith rated likely impacts on the OBP at three windfarm sites on a scale of 1 to 10 with 10 being the highest likely impact. His view can be summarised in the following terms: Yambuk 10; Woolnorth 4; and Bald Hills 1. Noting that the Minister's Assessment in the Portland case had found the level of potential impact at Yambuk to be acceptable, Dr Meredith had no hesitation in suggesting that the levels of potential impact posed by this site were of a very small order indeed.<sup>29</sup>

The Victorian Assessment Report concluded that use of the Bald Hills site by OBP was very low or non-existent. It stated:

The potential impact on the Orange-bellied Parrot (OBP) has been given careful consideration in the EES investigations. There are no records of the species in near [sic] the site. The closest records are at Andersons Inlet to the west and Corner Inlet to the east. Existing records suggest that the saltmarsh habitat in these areas have been supporting only low numbers of OBPs in recent years. No OBPs were recorded during the EES investigations and only 6 Blue-winged Parrots (same genus as the OBP). This suggests that use of the site by OBPs would be occasional if at all; hence the risk to the species is very low.<sup>30</sup>

The Victorian Minister's report was drafted on the basis of review of the evidence by the planning panel which had reported that:

Mr Lane [ecological consultant for the developer] was clear that there are no such habitats in or near the wind farm site. Dr Meredith agreed with Mr Lane and concluded in his peer review that impacts on the OBP were very unlikely.<sup>31</sup>

The panel continued:

The panel accepts the evidence of Mr Lane and Dr Meredith regarding this species, to the extent that utilisation will be negligible and harm effectively unmeasurable. In coming to this conclusion the Panel acknowledges that the Parrot may fly over the site from time to time and it may even alight on occasions. It acknowledges the possibility that the bird has been locally sighted by Mr Don Fairbrother. It also acknowledges that the species has very low population numbers. However, given the basic condition and location of the site, paucity of sightings in the region and the lack of desirable habitat for the bird, the Panel considers that the frequency of OBP utilisation is likely to be so low that the risk to the species is in the Panel's view negligible.<sup>32</sup>

This conclusion was corroborated by other work. A Victorian Parks and Wildlife ranger, Mr Nigel Burgess, a member of the cross-border orange-bellied parrot recovery team, based on King Island was interviewed by *The Age*. He offered the opinion that:

[T]he Bald Hills proposed wind farm is about 30 km from the nearest place where the (parrots) are likely to be in Gippsland. It is highly unlikely that any of them go up there. There are just about no orange-bellied parrots in the area.<sup>33</sup>

### *Campbell stops the clock*

Having selected the accreditation of the Victorian environmental assessment of Bald Hills as the appropriate approach for assessment of the project under Commonwealth law, Senator Campbell waited for the results of that process. On 19 August 2004, Ms Delahunty wrote to Senator Campbell, providing the Victorian assessment report, the basis for a decision under the EPBC Act's accredited assessment provisions.

The EPBC Act provides as a general rule that the Minister must decide whether or not to approve the taking of a controlled action within 30 days of receiving an assessment report. For the Bald Hills, the clock started to run on 27 August 2004, with the s 30(1B) notice from Victoria regarding assessment of the proposal. However, the Act also provides that the Minister can stop the decision-making clock by seeking further information. This step must be based on a *reasonably grounded* belief that there is insufficient information to make an informed decision (s 132).

The Minister stopped the clock three times. The first occasion was in October 2004, just two days after John Howard's victory in the 'Tampa'

election, when Senator Campbell deferred the Bald Hills approval decision, pending the company's response to a request for further information regarding impacts of the 35km power line connecting the wind farm to the grid.<sup>34</sup> He issued a media release headed 'Wind Farm in the Balance', saying 'The Bald Hills wind farm project in South Gippsland has been put on hold until more information is supplied by the project operator.'<sup>35</sup>

Next, in November 2004, the Department engaged Dr Penny Olsen of Latitude 42 Environmental Consultants Pty Ltd to review the Victorian assessment documentation. She was asked to consider the adequacy of the assessment of the impacts of the wind farm on listed threatened species and migratory bird species. That report, tabled on 18 January 2005, stated that any impacts on bird populations were likely to be 'negligible'.<sup>36</sup> Olsen advised:

The survey design is adequate ... The [survey] effort is low, but given the absence of threatened species, or at least their rarity or infrequent use of the site, a greater effort does not seem warranted. More sophisticated modelling would seem inappropriate and unlikely to yield meaningful predictions. Additional species surveys are unlikely to add much value, or additional information in terms of the EPBC requirements, and any impacts on bird populations appear likely to be negligible.<sup>37</sup>

Given the reasoning and the conclusions that this 'assessment documentation' came to, we can see that the Latitude 42 Report accurately reflected the results of the Victorian assessment. The Commonwealth accredited Victorian assessment process had already concluded, and had already been dealt with - via a 300-page assessment report, two EES and associated panel inquiries. Senator Campbell had received the Victorian report and s 130(1B) EPBC Act notice, at least a month earlier, on the 27 August 2004.

The Minister promptly instructed his department to engage additional consultants to conduct further research. Biosis Pty Ltd were commissioned on 23 May 2005 to prepare a report that would assess the cumulative impacts of bird strike from 23 wind farms on threatened bird species including the orange-bellied and swift parrots. That report was eventually completed on 22 February 2006 but its contents were not revealed to the wind farm developers.

The Commonwealth Minister's approach to EIA of the Bald Hills wind farm was odd because, having initially decided to rely upon the results of the Victorian legislative process for the purposes of assessment under the EPBC Act, he later decided this would not provide sufficient information. From the beginning he could have selected an assessment method such as a Public Environment Report or an Environmental Impact Statement, which would have required more detailed information to be produced.

### *Litigation*

The considerable delay associated with seeking these additional reports began to cause serious concerns within the wind farm company. These concerns led to a decision to commence legal action. Instead of the Minister's decision having been made by September or October 2004, within 30 days, it took hundreds.<sup>38</sup> The company expressed its views in a media release on 5 April 2006:

It has been over 580 days since the State government approved a permit for the \$220 million Bald Hills wind farm which was the subject of two separate Environmental Effects Statements (EES) and an independent planning panel report which included some six weeks of hearings.

In order to force the Minister to make a decision, Bald Hills Wind Farm Pty Ltd, a company related to Wind Power Pty Ltd, commenced proceedings on 2 February 2006 in the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The application for review concerned the Minister's failure to make a decision under the EPBC Act in relation to the Bald Hills wind farm. It contended that the Minister was under a statutory obligation to make his decision on the project by 8 October 2004. The application sought review of the failure to make the approval decision within the 30 day time frame set out in s 130(1)(a) of the EPBC Act. It sought orders from the Federal Court that the Minister be directed to make a decision.

Shortly before the matter was due to be heard, on 5 April 2006, the Minister announced a decision to refuse to approve the wind farm, thus removing the basis for the litigation, by providing the relief the applicants were seeking.<sup>39</sup> Justice Young made orders on 7 April that the proceedings be dismissed. He did so with no order as to costs, principally because of the applicant's failure to give notice of their intention to bring the proceedings, and because of a finding that the Commonwealth had not acted unreasonably, as it had informed Bald Hills by letter of the fact that decision-making had been deferred pending the provision of a report by the Biosis consultants.

On 5 April 2006, Senator Campbell held a media conference in Perth to announce the decision – made two days earlier – not to grant EPBC Act approval. Senator Campbell relied upon the Biosis Report in making his announcement. He referred to his decision to refuse approval, saying:

I have done so on the basis that the report commissioned by my department has said that the Orange-bellied Parrot, which is threatened and is in a very precarious situation as a species, can't really stand any further potential impacts. The wind farm proposed could have such an impact and hasten the extinction of that species.<sup>40</sup>

He continued:

It's such that this report says that if you even lose more than one bird per year it will impact on the potential for extinction, they're saying that under

current conditions this bird could well be extinct in fifty years and that the wind farm proposal even if you kill one bird per year it will have an impact and likelihood to hasten their extinction. I found it fairly compelling as an environment minister, I think it would be particularly hard for me to sign off on a proposal having been given that advice, I have quite frankly agonised over it the last couple of days since I read the report.<sup>41</sup>

### *The Biosis Report*

What was this report that Senator Campbell placed so much reliance upon? Biosis, a prominent firm of natural environment and cultural heritage consultants, had been asked to prepare a report on the *cumulative* impacts of bird strike from 23 wind farms including the Bald Hills. The report was finalised on 22 February 2006, and the complete six-volume report was provided to the Minister on 16 March 2006.<sup>42</sup> It assessed two priority species relevant to the windfarm: the orange-bellied parrot and the swift parrot.

The key paragraph upon which the Minister relied upon in his public justifications came from the volume devoted to the OBP. It read:

Given that the orange-bellied parrot is predicted to have an extremely high probability of extinction in its current situation, almost any negative impact on the species could be sufficient to tip the balance against its continued existence. In this context it may be argued that any avoidable deleterious effect – even the very minor predicted impacts of turbine collisions – should be prevented.<sup>43</sup>

However, Senator Campbell did not draw attention to the next sentence. It read:

Our analyses suggest that such action will have extremely limited beneficial value to conservation of the parrot without addressing very much greater adverse effects that are currently operating against it.<sup>44</sup>

These 'other effects' are identified by the *National Recovery Plan for the OBP 2006-2010* as drainage of wetlands for grazing; alteration and destruction of saltmarsh for industrial and urban development; grazing of native vegetation; vegetation clearance for agricultural purposes; changes to land use practices and recreational activities.<sup>45</sup> The listing advice to the Minister of September 2006 which recommended upgrading the OBP from 'endangered' to 'critically endangered' described the same main threats, and listed others:

[P]otential threats to the Orange-bellied Parrot population may include loss of unknown breeding sites, loss of genetic variability, competition with introduced species, predation, collision with structures, ingestion of toxic weeds and crops, and reduced availability of food due to the changed species composition at feeding sites.<sup>46</sup>

A key point about the Biosis Report is that it modelled not just the likely impact of the Bald Hills wind farm but the likely cumulative impacts of

building 23 wind farms along the SA-Victorian-Tasmanian coastlines. Only eight of the wind farms considered in the report were actually in operation. One other, Yambuk, near Portland, was under construction and a further 14 had yet to be constructed.<sup>47</sup>

The first step in this form of modelling of cumulative risk was to model the collision risk posed by individual wind farms within the range of the species of interest. To determine a cumulative impact on a threatened or listed species, the multiple impacts predicted for all of the relevant individual wind farms would be combined.<sup>48</sup> After these steps, the authors concluded 'the cumulative mortality of Orange-bellied Parrots that is likely to result from turbine collisions at current and proposed wind farms across its range will be very small at the population level.'<sup>49</sup>

The cumulative modelled risk posed by all 23 of the wind farms put together was described:

Predictions of the current modelling suggest that between 1.35 and 0.84 additional parrot mortalities might result annually from the *cumulative effects* of wind turbine collisions across the species range if all potential wind farms were to be built.<sup>50</sup>

The import of these findings was summarised on the next page:

The cumulative impacts of collision with turbines on the population of Orange-bellied Parrots predicted by the modelling undertaken here are small and it is highly likely that their effects would be masked by normal fluctuations that occur in the population due to natural environmental variables.<sup>51</sup>

The report stated '[t]he current and proposed levels of wind farms within its habitat do not significantly affect the chance of survival,'<sup>52</sup> partly because the OBP is facing extinction regardless of wind farms. The authors stated:

Of vital concern for the Orange-bellied Parrot, is the fact that PVA modeling utilising the most up-to-date and comprehensive population information indicates that the species has a very high probability of going extinct within about 50 years *in the absence of any mortality due to wind turbine collisions*.<sup>53</sup>

The report did recommend mitigation and conservation measures:

Mortality of Orange-bellied Parrots due to collisions with turbines may be very small – even barely noticeable – compared with natural mortality ... however, we are of the view that it is nonetheless a negative impact on the species and should be offset by mitigation and conservation measures.<sup>54</sup>

In summary, the Biosis report concluded that, even if all 23 of the wind farms were built across three States, the impact would be 'very small, even barely noticeable', and in total could possibly cause up to one extra OBP death per year. This was why the report – as described above – concluded that banning wind farms 'will have extremely limited beneficial value to the conservation of the parrot'.

Officers of the Victorian DSE were keen to quantify the precise risk posed by the Bald Hills wind farm *alone*. A leaked exchange of emails, read out in an Estimates hearing of the Senate Environment Committee in Canberra was revealing. This exchange, on 13 April 2006 was between Mr Ashley Stephens of the DSE and Mr Ian Smales of Biosis, the principal author of the report. Smales wrote:

For the purpose of the exercise, the process of finding a number of birds modelled as likely to be killed at any one wind farm within our model would be to multiply the annual mortality rate (inverse of survival rate in Table 4 of our report) for that site by the number of individual birds modelled as interacting with that wind farm per annum.

Stephens wrote back:

For Bald Hills, if I multiply  $(1 - 0.999392)$  from table 4 by the number 15 from table 3, I get 0.000912. This means one mortality every 1,000 years. Is this right?

Smales of Biosis replied:

Yes you've calculated correctly.

In other words, the primary author of the Biosis Report personally confirmed the conclusion, widely reported in the news media, that the best estimate of the expected impact of the Bald Hills wind farm would be one dead parrot every thousand years.

#### *Local politics*

The site for the Bald Hills wind farm is within the marginal federal electorate of McMillan, which had changed hands four times in the 1990s. McMillan was marked as a 'key seat' in the ABC's guide to the 2004 election.<sup>55</sup> At the 2004 election, the Liberals wanted to win it back from Labor who had won it in 1998 and 2001.

Prior to the federal election in October 2004, the Liberal candidate, Russell Broadbent, campaigned vigorously against the approval and construction of wind farms within the electorate. His feelings about wind power are evident from a speech he made a year later:

I do not like wind turbines. I do not like what they do to the landscape and I find that they are an inefficient renewable energy proposal. In fact, I would go so far as to say I will never offer South Gippsland as the sacrificial lamb to the gargantuan appetite of the feckless, burping juggernaut that the wind industry is.<sup>56</sup>

Senator Campbell told the Senate Environment Communications, Information Technology and the Arts Committee in an Estimates Hearing in 2006 that he went to the aid of Mr Broadbent by writing to McMillan electors before the 2004 election on the subject of wind farms. He signed a letter which started:

On 9th October your vote may well decide the future of South Gippsland's magnificent landscapes.

The letter continued:

As Minister for the Environment I guarantee I will exercise my responsibilities to ensure that any development submission meets every requirement of the *Environment Protection and Biodiversity Conservation Act*.

Campbell also visited the electorate to assist Broadbent. He later recounted that at a public meeting – apparently attended by close to 1000 residents – just prior to the election.

I pointed out ... that for every wind turbine built under the existing renewable energy target for the coalition government there would be three or four wind turbines built under a Latham government. But I said that the provisions of the EPBC Act were likely to apply to this project and that, if we were re-elected and I was honoured to be asked to be environment minister again, I would ensure that it was given proper scrutiny under that law.<sup>57</sup>

Broadbent was blunter. The local newspaper, the *Great Southern Star* quoted him as saying on 12 October 2004:

When Ian Campbell arrived, the whole complexion of the campaign changed for me. Senator Campbell gave a commitment to do everything within his power under the EPBC Act to veto the Bald Hills project.<sup>58</sup>

Campbell's own pre-election media release of 21 September 2004 provides a clear indication of his position. It was headed, 'Labor's ill wind for South Gippsland community'. It read:

The people of Gippsland who are opposed to the Bald Hills wind project should carefully consider their vote if they want a say in the future of their local area with respect to wind farms.

Another of Campbell's media releases, dated 6 October 2004, just three days prior to the federal election, was headed 'Bald Hills wind farm project in the balance'.<sup>59</sup> It implied that he would at the least be very closely scrutinising the project if re-elected.

This anti-wind farm stance may have helped the Liberal candidate, Russell Broadbent, wrest McMillan from Labor. There was a 13.8 per cent swing to Mr Broadbent at the 2004 election.<sup>60</sup>

### *Litigation: part two*

In spite of being in possession of findings that blocking the wind farm would have 'extremely limited beneficial value to conservation of the parrot', the Minister decided on 3 April 2006 to do exactly that. A media conference was held on 5 April and a statutory statement of reasons was completed to explain the decision. The almost inevitable result – particularly given the content of the Statement of Reasons – was further litigation.

Victorian Premier Steve Bracks had responded to Campbell's decision on 5 April, referring to dealings between Russell Broadbent and Senator Campbell prior to the 2004 election, saying: 'This is a ridiculous decision which is politically motivated to meet [a promise to] his mate who wanted to get the seat.'<sup>61</sup> The next day, the Minister attempted to justify his decision. Speaking to journalists from *The Age*, he said: 'if I had made a political decision, I would be in court now.'<sup>62</sup>

In fact, *The Age* reported that the developer, Wind Power, and the Victorian Government were seeking legal advice to appeal the rejection.<sup>63</sup> On 1 May 2006 they filed suit in the Federal Court seeking review of the refusal. One of the principal grounds of review was procedural fairness – on the basis that the Minister failed to provide the proponents with an opportunity to review and respond to the Biosis report prior to stopping the wind farm. Another was *Wednesbury* unreasonableness, essentially that the decision was 'so unreasonable that no reasonable Minister could have made it'. Outside the court, Bald Hills Wind Farm director Andrew Newbold said Senator Campbell had acted unfairly. He declared, 'based on the advice to the minister, we don't think any reasonable person would conclude this wind farm was a threat to orange-bellied parrots.'<sup>64</sup>

A key challenge for the plaintiffs was to obtain the paper trail leading to the Minister's decision. Orders for discovery of documents requiring the Minister to make available all unprivileged documents in his possession, custody and control were made by Justice Weinberg on 26 July 2006. A list of documents was filed by the Minister on 28 July and shortly after, extensive discovery was provided by the Commonwealth in the form of internal briefings, emails, and scientific documents. At that same hearing on 26 July, the court set the matter down for a four-day hearing, to begin on 28 August 2006. That hearing never took place as the matter settled on 4 August.

Other efforts were made to obtain information that could explain the decision-making process. In July the plaintiffs applied for a subpoena to require Minister Campbell to appear and give evidence in the Federal Court in a hearing in August. This application was not successful. As co-litigants, the Victorian Government also sought to obtain documents to assist their preparation for the Federal Court litigation, applying in April 2006 for access under the *Freedom of Information Act* for documents including the departmental briefing sent to Senator Campbell. The Commonwealth initially refused to release it on the grounds that 'to do so would not be in the public interest and could promote ill informed speculation about government decisions'<sup>65</sup> but in December 2006, long after the litigation settled, six documents – four in full, two only in part – were released.

### *The departmental brief*

In court on 25 July 2006, barrister and former Commonwealth Solicitor General, Gavan Griffith, QC, acting for Bald Hills Wind Farm Pty Ltd, cited a Department of Environment and Heritage briefing paper sent to Senator Campbell in March 2006, which had recommended that the project be approved subject to conditions to minimise the risk to endangered birds.<sup>66</sup>

Close examination of the brief shows that that it was meticulously prepared. Signed off by First Assistant Secretary, Mr Gerald Early, it was accompanied by 11 attachments. It was submitted to the Minister on 10 March 2006. Several weeks later, on 3 April 2006, the Minister recorded his decision on the brief: 'proposed project *not* agreed'.<sup>67</sup> Two days later, he publicly announced the decision.

When news of the contents of the department's briefing became public in July 2006, as a result of a court discovery order, it led to a furore. The briefing had actually advised the Minister that the project should be approved subject to eight standard conditions, and the Minister had rejected that advice. It stated '[t]he Department considers that if undertaken in accordance with the proposed conditions, the impact of the Bald Hills wind farm on listed threatened species and migratory species should be acceptable'.<sup>68</sup> The brief referred specifically to the fact that the Minister must not act inconsistently with Australia's obligations under international conventions governing biodiversity. It stated:

[P]rovided the proponent complies with the proposed approval conditions, we consider that the action will not have an unacceptable adverse impact on listed threatened species and endangered communities, and that the approval will not be inconsistent with Australia's obligations under those agreements.<sup>69</sup>

The brief made a point of referring to the Latitude 42 Report, which had reviewed the results of the Victorian assessment process, and was left to gather dust by the Minister. Its findings were summarised:

[W]hile noting that the survey effort [in the Victorian assessment] was low and presented in a piecemeal manner, the reviewer [Latitude 42] found that there was sufficient data in the documents to conclude that the site does not support an abundance of birds; any impact on the species of concern are likely to be negligible and as a result, that more surveying or modelling is not warranted.<sup>70</sup>

In relation to the Minister's obligations under the *EPBC Act* to consider the precautionary principle when making a decision, the department declined to apply the principle in favour of the parrot. It said:

[E]ven though there is not full scientific certainty about the possible impact of the Bald Hills windfarm on the OBP and the extinction model suggests that the conservation status of the species is more precarious than previously thought, further information is unlikely to alter the department's view that impacts, both direct and indirect, on the OBP are likely to be

negligible and there is no threat of serious or irreversible damage to the OBP in this respect, given:

- no OBP have been recorded there;
- there appears to be no suitable habitat on the site;
- even though the assessment report has noted that the occasional OBP may fly across the site in the migration season, it is not considered to be a major migration passage.

Close reading of the brief suggests that the department was of the view that the Minister was predisposed towards rejecting the application. The brief provided specific advice tailored towards a possible conclusion that there was a threat of 'serious or irreversible impact' on the OBP from the Bald Hills wind farm. If the Minister was to decide this way, the department advised that he would need to rely upon either the finding of Biosis that almost any negative impact could threaten the OBPs, or that a failure to identify OBPs did not mean that OBPs do not use the area. As a long shot, it suggested that there was good OBP habitat within 35 km east and west of the site, which might support the conclusion that the site may be a migration passage.

On the other hand, the brief counselled against that approach and raised some implications of rejecting the wind farm. It advised that a refusal:

- [W]ould represent a 'lowering' of the previous threshold for unacceptable impact on OBP, particularly as there does not appear to be direct evidence of any impact on OBP at Bald Hills. It may also be seen as inconsistent with the approach to other windfarms that have previously been approved (Woolnorth (2000/12), Portland (2000/18), and Musselroe (2002/683).
- [W]ould have ramifications for all coastal development in western Tasmania, Victoria, southern New South Wales and southeastern South Australia. A consistent approach should be adopted for all development proposals in the OBP's migratory range and such a lowering of the threshold may attract criticism in relation to other developments.

### *The litigation settles*

On 4 August, Senator Campbell held another press conference in Perth to announce that an agreement had been reached between Wind Power and the Commonwealth over the litigation. It was discontinued by consent, after an approach was made by the developers to the Commonwealth. The Minister's decision was set aside, and Justice Weinberg of the Federal Court ordered the decision go back to the Minister 'for reconsideration according to law'.<sup>71</sup>

Why was the litigation settled? Most probably the Minister was advised that he would be highly unlikely to successfully defend the litigation. The main reason was because of the denial of natural justice associated with his reliance upon the Biosis report. On this basis the Commonwealth struck a deal with the proponents to resolve the matter, by promising that a fresh application under the EPBC Act could be considered by the Minister. Still, the Minister attempted to dodge the proposition put to him by ABC radio journalist Jon Faine that 'the reason you consent to orders is usually because you fear that the outcome from the court will be worse for you, so you agree to something to avoid an outcome that you don't want.' Campbell replied: 'No, that's not what was on my mind. It was the proponents who came to us. We were happily going along defending my decision and the process ...'.<sup>72</sup> He continued, 'one of the key elements was that the proponents said that they had not been given the opportunity to look at the key report that I relied upon'. And then continued, 'I want to make sure every Australian, every Australian company gets fair process'.<sup>73</sup>

#### *Campbell's Christmas back-down*

A fresh application under the EPBC Act was lodged and federal approval for the Bald Hills wind farm was eventually granted on the eve of the 2006 Christmas shutdown.<sup>74</sup> *Renenergy*, the alternative energy news report, described this back flip as 'humiliating' and 'farcical'.<sup>75</sup> The Victorian Planning Minister Justin Madden explained the timing, 'if you were a sceptic you'd believe that the Minister was hiding behind Santa Claus and Shane Warne' (who had just retired from the Australian cricket team).<sup>76</sup>

The approval came in a four-page document, with eight conditions and a map. These required a revised layout, prevented construction of turbines within 2 km of the coast to prevent impacts on OBP, and required an avifauna management plan. Also required was annual reporting on bird monitoring and reporting of any bird strike incidents involving EPBC listed threatened species within 48 hours. The conditions required all operations within 1 km to cease operation immediately in the event of two or more OBP or swift parrots being killed. Operations were not permitted to recommence unless a supplementary management plan was submitted and approved.

#### **The Denmark wind farm**

Senator Campbell's actions in relation to the Bald Hills wind farm were not an isolated incident. He also took a strong interest in Australia's first ever community owned and operated wind project, at Denmark in south west Western Australia, a tiny two-turbine (1.8 MW) wind farm, only 2.3 per cent the size of Bald Hills. The Denmark Council had decided in April 2005 not to approve a necessary rezoning of the site despite an EPA

recommendation that it proceed. The proponents successfully exercised a right of appeal to the State Planning Minister, Alanah MacTiernan, who approved the rezoning in November 2005.

After this rezoning, it took only four days for Senator Campbell to come to the aid of the opponents of the project. He attended a public meeting at Denmark on 14 November 2005, in his own words, 'at Wilson Tuckey's invitation' as 'Iron-Bar' was the local member for O'Connor.<sup>77</sup> At the meeting, Senator Campbell made an undertaking to 'try to prevent any of the current federal funding being paid and to ensure that there would be no further federal funding', according to the Chair of the Community Wind Farm, Craig Chappelle.<sup>78</sup> Campbell's intervention came too late, as federal grant money had already been allocated to the project and the funding could not be pulled without proof of breach of grant guidelines.

On 4 April 2006, one day before publicly announcing his veto of the Bald Hills proposal, Senator Campbell reiterated his intention to have federal funding to the Denmark wind farm frozen, saying 'these sort of disputes give wind [power] a bad name'. Campbell stated to ABC radio in Albany that he had asked the Regional Services Minister Warren Truss to cease funding the project from the Regional Partnerships program. He said 'before we put any more Commonwealth money in Denmark let's make sure [we] get community agreement.'<sup>79</sup>

This episode showed the willingness of the Minister to become involved in local planning disputes over the siting of wind farms. This was despite the fact that his own department on 27 May 2005 had determined under a delegation that the project was *not* subject to federal approval requirements as it would not affect any matters of national environmental significance.<sup>80</sup> Given that it was not 'a controlled action' under the EPBC Act, Campbell needed some other reason for becoming involved.

The idea of a national code for the siting and approval of wind farms provided cover for Campbell's intervention in both the Denmark and Bald Hills wind farms. It was first flagged by writing to State and Territory environment ministers on 30 November 2005. The public first heard about it from a Ministerial media release on 31 March 2006, just before the Bald Hills veto.

Around that time, Campbell began to actively promote the idea of a National Wind Farm Code. The Code would give the Federal Minister unspecified new powers to block wind projects which faced significant local opposition. He explained to ABC Radio in April 2006 that such a code would 'ensure local communities have a say' about windfarms.<sup>81</sup> Campbell used the Denmark dispute to promote the idea of a windfarm code. Via media release, he said, 'The controversy over the proposed wind farm in Denmark should leave no doubt in anyone's mind that Australia needs a national code for wind farms.'<sup>82</sup> He said wind power 'is being given a bad name because the views of local communities are often ignored when large-scale wind farm proposals are being considered in their area.'<sup>83</sup>

The public launch in May 2006 of a discussion paper about the code enabled Campbell to spin the rejection of Bald Hills as part of consistent national policy on wind farm siting. In the discussion paper's foreword, he suggested the reputation of wind power could be salvaged if 'we make every effort to ensure majority community endorsement'.<sup>84</sup> The discussion paper took some steps to outline the content of the proposed code. Even then, the detail was sketchy.<sup>85</sup> It proposed 'a consistent National Code would include local communities in the decision-making process and capture their local knowledge about the potential impacts on the landscape, property values and wildlife in their area.'<sup>86</sup> It did not fully explain how the code would operate through the EPBC Act. Yet the departmental website suggests the intention was for it to operate as an industry specific guideline to supplement the general 'significant impact' guidelines which had been made to assist the implementation of the Act. These provide guidance on whether or not an action will require approval under the EPBC Act. They are not legally binding on the Minister, the department or proponents, and in another dispute, guidelines were successfully challenged in the Federal Court by the Humane Society as an invalid use of a mere policy instrument to purportedly vary the effect of legislation.<sup>87</sup>

A meeting of State environment Ministers rejected Senator Campbell's wind farm code in June 2006 as 'a bureaucratic speed hump'.<sup>88</sup> Western Australia's Environment Minister said it was 'unnecessary' and 'an impediment to new wind farms'.<sup>89</sup> The States reiterated that they already had planning and EIA processes sufficient to address issues raised by wind farms.

The wind farm code would go in the opposite direction – authorising Commonwealth intentions to override the State planning laws. Overriding State planning laws on wind farms would go against the overall thrust of the Commonwealth EPBC Act. The code would go against the history of federal assessment of at least four wind farms – including Bald Hills and Portland – where State EIA law was *relied upon* for the purpose of the EPBC Act rather than being overridden.

## Observations

There is a broader series of contradictions and inconsistencies that also suggest that the Minister's decision was an aberration ultimately having little to do with biodiversity conservation. The Minister's stance on Bald Hills was generally at odds with his department's approach to assessing windfarms under the EPBC Act. 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 proposals were considered to be a controlled action requiring a Commonwealth decision on approval.<sup>90</sup> Only one – Bald Hills – was refused.

Other wind farms with some potential to impact on the OBP were either found not to be a controlled action or were approved. As the departmental brief warned the Minister, a refusal could be seen as 'inconsistent with decision-making on other windfarms with a potential impact on the OBP that have previously been approved (Woolnorth (2000/12), Portland (2000/18), and Musselroe (2002/683)'. Another relevant decision concerned the Jim's Plain wind farm (2003-1162), a 30-turbine development in north-west Tasmania. The proponent readily admitted that the proposed wind farm lay in the migratory path of the OBP. Still, the department held that it was not a controlled action. This was probably because a scientific estimate was provided of a maximum rate of collisions of 0.018 per annum. Further, the Kongorong (Port McDonnell) wind farm (South Australia) was determined in 2002 not to be a controlled action,<sup>91</sup> despite the proponent's admission that the site was potentially OBP habitat. The department accepted their conclusion that a significant impact on the OBP was not likely, given that five months of surveying had not recorded any OBP sightings.<sup>92</sup> In relation to Bald Hills, it was always accepted by all parties that the site did not contain any OBP habitat. The brief said that the Minister's proposed approach to Bald Hills 'would represent a "lowering" of the previous threshold for unacceptable impact on OBP, particularly as there does not appear to be direct evidence of any impact on OBP at Bald Hills'.

More broadly speaking, the proposition that the Bald Hills decision was motivated by biodiversity conservation concerns is generally inconsistent with the Howard Government's relative lack of attention to impact on birds from broadacre native vegetation clearing. As the National Audit Office pointed out in a 2007 Performance Audit on the Conservation and Protection of National Threatened Species, there have been few referrals under the EPBC Act in relation to native vegetation clearing for activities such as agriculture and forestry. Many land clearing efforts are never referred to the Commonwealth, a crucial failing in the operation of the EPBC Act in practice. The report drew attention to various decisions not to treat clearing as a controlled action – particularly in the Wimmera (Victoria) and the Brigalow Belt (Queensland).

Other developments likely to have a significant impact on threatened bird species have been allowed to proceed. One particularly serious example is that of the Christmas Island detention centre and its likely impact on the critically endangered Abbott's booby. In April 2002, the Howard Government completely exempted this project from the EPBC assessment. Yet Christmas Island is the only known nesting habitat of this bird remaining in the world. Although the centre is being built on what was previously a mining lease, it is adjacent to a crucial forested breeding area, and this fact remains a problem, according to Birds International. Studies show that the breeding success of Abbott's booby is reduced near -

forest clearings. Conservation action for the species is focussed on reforestation clearings adjacent to important breeding sites.

Overarching this is the key point that the risks to the orange-bellied parrot which concerned Senator Campbell are overshadowed by the greater threats posed to many birds by rapid climate change. A survey of international journal literature regarding the impact of wind farms on bird life (2007) stated:

The impact of windfarm developments on bird populations must also be viewed in the context of the possible impact of climate change in the absence of windfarms.<sup>93</sup>

Close reading of the Minister's statutory statement of reasons shows that he did not consider the wind farm's contribution to the abatement of greenhouse gas emissions, and thus assistance in reducing the threat to biodiversity posed by rapid climate change.<sup>94</sup>

#### *Bald Hills and energy policy*

The Bald Hills decision has been described as 'surreal',<sup>95</sup> 'bizarre'<sup>96</sup> and 'baffling'.<sup>97</sup> Our understanding of it is improved if we see it in the context of energy policy. The Commonwealth Government's love-hate relationship with its mandatory renewable energy target (MRET) is crucial to the explanation. First mooted in 1997, and eventually made into law by the *Renewable Energy (Electricity) Act 2000* (Cth), the MRET requires generation of an extra 9,500 gigawatt hours (GWh) of renewable electricity per year until 2010.<sup>98</sup> It requires wholesale purchasers of electricity to make a proportional contribution to the target by surrendering renewable energy certificates (RECs) or paying a shortfall charge. Those supplying electricity from accredited renewable sources can generate, obtain and then sell RECs.

The MRET led to a boom in wind farm construction across Australia. Similar schemes overseas have also led to rapid rates of growth. Revelations in 2005 that the Industry Minister had expressed a view that the Commonwealth MRET had worked *too well* provide a context in which we can understand the extraordinary story of Bald Hills. Despite the MRET scheme's success in encouraging renewables investments, the Commonwealth government announced in its 2004 *Energy White Paper* that it would not extend the MRET scheme beyond its scheduled expiry date.<sup>99</sup> The decision came six weeks after John Howard and Industry Minister Ian Macfarlane met executives from ExxonMobil, Rio Tinto and BHP Billiton to discuss funding of 'low-emission technology'. Leaked minutes taken by Rio Tinto's then acting chairman, Sam Walsh, reveal Macfarlane complained 'investment in renewables was running ahead of the original planning'. Aware of the potential for public backlash, Macfarlane requested 'absolute confidentiality' about the meeting to prevent 'a huge outcry'.<sup>100</sup> The minutes, plus emails and memos were obtained by the ABC's Investigative Unit. These suggest the fossil fuel industry had a major role

in the recommendation of the White Paper that MRET not be extended. Excessive success in the renewables sector would lead to unwanted competition with the government's preferred options of 'clean coal' and nuclear power.

The failure to extend MRET was important because by 2005 the original target for increased generation from renewables had already been met. As a result, MRET is no longer exerting any incentive effect on investment in renewables. With steady growth in electricity use across Australia, there has in fact been a decrease in renewables' share of total electricity produced, despite the boom in wind generation.<sup>101</sup>

Investment in the Australian renewables industry was hampered by the 2004 decision not to expand and extend MRET. Yet Bald Hills and the Denmark wind farm are two instances where the Commonwealth Government went several steps further and actively worked to thwart several wind farms. The result undermined investor confidence in the Australian wind industry. Nevertheless, at the press conference announcing the refusal of Bald Hills, Senator Campbell unconvincingly sought to confine the parrot issue, saying: 'The one issue we're faced with here won't have impact in the other parts of Australia and it will create clarity for people building wind farms in this section of Victoria'.<sup>102</sup> The chief executive of Renewable Energy Generators of Australia, Susan Jeanes, saw it differently. She suggested, 'You're never going to have a renewable energy industry if we don't have some investment certainty, and the politicisation of the planning process is not conducive to that'.<sup>103</sup>

The Bald Hills decision added to the difficulties that the wind industry was already facing due to the decision not to expand and extend MRET. These problems were predicted as early as January 2004, shortly after the publication of the *Tambling Review* of MRET. By August 2005, key players in the wind industry in Australia had already publicly declared that they were considering whether they would take their investment dollars elsewhere. These included the Danish wind energy giant Vestas, Britain's Renewable Energy Systems, and the Belgian turbine gear box manufacturer Hansen. The Asia-Pacific president of Vestas, Thorbjørn Rasmussen, said that the company felt a lack of a viable long-term policy supporting wind and renewables was leading it to look towards locating in countries that 'are more supporting of renewables, such as China and the US'.<sup>104</sup> In May 2006, industry representatives said the decision not to extend MRET was threatening \$12 billion of proposed wind investment.<sup>105</sup> That year, many wind projects were either postponed or cancelled. In May, the Tasmanian company Roaring 40s announced a decision to stop work on its \$300 million Heemskirk wind farm on Tasmania's west coast. It blamed the decision on the non-extension of MRET.<sup>106</sup> It then shelved plans for the \$250 million Waterloo windfarm in South Australia. By June, its plan for a \$230 million project in Tasmania's north-east at Musselroe was looking 'increasingly uncertain'.<sup>107</sup> In New South Wales, Acciona Energy announced

it would postpone work on its Woodlawn wind farm near Tarago, and another planned for Molonglo Ridge near Queanbeyan.<sup>108</sup> By August, Vestas closed Australia's first wind turbine nacelle factory in Wynard, Tasmania, just two-and-a-half years after it had opened.<sup>109</sup> One company director said the implications of the non-expansion of MRET was that projects were becoming impossible to finance. 'We are hurtling towards a cliff,' said Ian Mays, managing director of Renewable Energy Systems. The Bald Hills and Denmark incidents taken together with non-extension and non-expansion of MRET and the uncertainty created by Senator Campbell's proposed national code for wind energy amounts to a pattern of policy that had the effect, if not the intention, of thwarting the expansion of the wind energy industry in Australia.

### *Analysis*

The cynical observer could see the Bald Hills debacle as another example of the Howard Government's practice of wedge politics. The desire of conservationists to see renewable energy advance was pitted against their inclination to have developments thoroughly assessed to protect threatened species. The Commonwealth Government's approach to approval of the Bald Hills wind farm may even have involved a perverse attempt to undermine the broader credibility of the very objective of biodiversity protection. Commentators and cartoonists drew parallels with Monty Python's *Dead Parrot* skit and its depiction of the fate of a 'Norwegian Blue' Parrot.<sup>110</sup> Other media reports after the decision cast doubt on the whole idea of halting, modifying or delaying development to protect threatened species. On 7 April, two days after the Bald Hills decision, Neil Mitchell of 3AW put the Prime Minister on the spot in relation to a housing project west of Melbourne at Melton, saying 'there's a \$400 million development out there at risk' because of the elusive and endangered grassland-dwelling Golden Sun Moth. The Prime Minister was unaware of the moth. Still he promised, 'I will investigate that.' Other stories queried whether the endangered red-tailed black cockatoo would 'sink a \$650 million pulpmill' in SA,<sup>111</sup> and whether the little known flatback turtle would continue to raise an issue for Chevron's \$11 billion Gorgon gas project off the northwest coast of Western Australia.<sup>112</sup>

Rather than seeing the Bald Hills incident as just an example of environmental decision-making influenced by local electoral considerations, it may also be seen as symptomatic of a broader stance on renewable energy taken by the Howard Government since 1996. The Commonwealth's stance towards renewable energy has been to do relatively little to encourage it, and at times, as we have seen with the Bald Hills and Denmark wind farms, to actively discourage its growth. The key has been the decision not to expand the mandatory renewable energy target MRET. The proposed introduction of a national code for wind farms, which -

appears not to have progressed since Senator Campbell's demise, represented a Commonwealth signal against it.

The renewable energy industry is already operating on a very uneven playing field due to the subsidisation of the coal sector which does not pay for the impact of its emissions.<sup>113</sup> While some benefits and grants have been provided to the renewables industry, such as under the Renewable Energy Development Initiative (REDI) scheme, these payments need to be seen in the context of massive funding injections in the order of \$500 million for 'clean coal' research and the development of carbon capture and storage technologies, and active spruiking of the nuclear option. The \$500 million Low Emissions Technology Demonstration Fund has been dominated by coal and fossil fuel related projects. Renewables projects such as the \$75 million Solar Cities program involving discounted micro-scale solar PV generation and solar hot water systems in Adelaide, Alice Springs, Ballarat, Blacktown and Townsville, while of benefit, have done little to address the broader lack of incentives to investment in large-scale renewable energy capacity since the non-expansion of the MRET target.

A key factor, which will affect the uptake of renewables into the future, will be the extent of carbon pricing introduced into the Australian economy. An emissions trading scheme – as proposed by the Prime Ministerial Task Group on Emissions Trading's final report in May 2007 – as a means of raising the price of carbon emissions will generate indirect incentives for investment in a range of low emission energy alternatives, including renewable energy, as well as nuclear power. The question is how high that the carbon price will go to generate incentives, and how far future governments will go in order to fund the development of the presently favoured options of 'clean coal' and nuclear power. However, the alarming proposal to scrap all renewable energy target laws at State and federal level, suggested by the emissions trading Task Force, would further handicap the renewable energy sector.

Within this context it is significant to note that Senator Campbell's views on the limits of wind power and renewable energy were widely shared within Cabinet. In an interview with the ABC's *Four Corners* in April 2006, the Industry Minister, Senator Ian Macfarlane described State incentive schemes such as VRET as 'Mickey Mouse schemes'.<sup>114</sup> Mr Peter McGauran MP, the federal Minister for Agriculture and member for Gippsland, went further in June 2006, saying, 'Wind farms don't live up to the hype that they're the environmental saviour and a serious alternative energy source'.<sup>115</sup> Speaking to dairy farmers at the 'Cheeseworld' museum near Warrnambool, McGauran continued, 'The wind farms will diminish greenhouse gas emissions by so small an amount I doubt you could calculate it. They are simply an excuse for some entrepreneurs to make money at the expense of taxpayers and adjoining landholders'.<sup>116</sup> In July 2006, in a keynote speech to business leaders, the Prime Minister, John Howard called for 'realism' on renewables.<sup>117</sup> He said, 'Renewables will

play an increasing role in Australia's energy mix, but pragmatism, rationality and flexibility also call for realistic expectations about this role for the foreseeable future. The cost of delivering low-emission electricity from renewables remains very high, with difficulties surrounding baseload power demands.' The same month, the Treasurer Peter Costello stated in a doorstep interview, 'Well if you are asking me my view on wind farms, I think they are ugly, I wouldn't want one in my street, I wouldn't want one in my own back yard'.<sup>118</sup> Malcolm Turnbull, who replaced Campbell as Minister for Environment<sup>119</sup> is unlikely to alter Campbell's stance on renewables. On 28 February 2007 in Canberra he counselled an assembled pack of press gallery journalists, saying, 'You cannot run a modern economy on wind farms and solar panels. It's a pity that you can't, but you can't'.<sup>120</sup>

## Conclusion

What does the Bald Hills incident tell us about the present state of climate law in Australia, particularly at the Commonwealth level? While the government has 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',<sup>121</sup> the barest review of the EPBC Act indicates that it does very little to directly tackle the question of climate change. The Bald Hills incident is just one illustration. In particular, it draws our attention to the fact that the EPBC Act does little to promote sustainable development by encouraging renewable energy installations.<sup>122</sup> In terms of greenhouse gas abatement, the Act does nothing to require a decision-maker to consider the positive benefits of a development. In fact, at present, it prohibits a decision-maker from taking into account positive environmental benefits of a development. 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' (s 136(5)).<sup>123</sup> Thus nothing in federal planning law exists to explicitly 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 about the consequences of overly cautious responses to climate change.

The Bald Hills incident also illustrates the broad discretion available to the Environment Minister in making decisions under the EPBC Act. Questions were raised about the impact of the proposed wind farm on endangered species. The problem is not that the Act enabled the Minister to examine the potential risk to the orange-bellied parrot. The argument is not that all projects with potential to reduce greenhouse emissions should be approved, regardless of impact on threatened biodiversity. The flaw in the Minister's decision-making was that an extremely remote possibility of

significant impact on a threatened bird – the orange-bellied parrot – was given weight out of all proportion to its true significance. Thus the difficulty is with politicisation of the planning and environmental approval decision-making process. Nevertheless, the court outcome, in which the matter was settled by consent, due to the weakness of the Minister's position, shows that inappropriate ministerial decision-making can in some cases be constrained by resort to the administrative law system. In this instance, review in the Federal Court was effective in overturning politicised decision-making. This underlines the need to retain access to the courts to litigate to ensure compliance with the law in administrative decision-making. Yet government amendments to the EPBC Act in December 2006 removed pro-participation provisions, reintroducing the probability that third party litigants would be required to provide an undertaking as to damages when seeking an injunction. This represented the reintroduction of a barrier that will discourage access to the courts to review suspect decision-making.

The Bald Hills incident raises broader questions about the adequacy of Australian government's legislative response to climate change. Energy law does not exist in a political vacuum. It articulates the policy intentions of the legislature and the government that dominates it. The range of ministerial comments about wind power, when combined with Senator Campbell's comments to the Estimates Committee reproduced at the beginning of this chapter, indicate the Howard Government's indifferent, ambivalent and at times antagonistic approach towards renewable energy. While decision-making such as that involving the Bald Hills wind farm is not directly connected with this Government's advocacy and interest in nuclear power, it is still possible to say that, if there was a more rapidly growing renewable energy sector in Australia, this would inevitably diminish the case for nuclear energy, by presenting a starker alternative of a zero-emissions technology that can be implemented within a much shorter timeframe. Time will tell whether Australians choose to build a body of policy and laws that more seriously encourages the production of sustainable zero-emissions energy.

## Notes

- 1 The other refusals were: R Bosworth, Agriculture and forestry, Kennedy, Far North Queensland, Electrocution of Spectacled flying-foxes to protect a lychee orchard, Received: 14 February 2002, Ref 2002/571, Refused 21 March 2003. The second was G and H Pedel, Urban and commercial new development, Kingston, Norfolk Island, Residential Building, (to construct a residential building, garage, garden, and reservoir on freehold land), Received: 24 December 2002, Ref 2002/911, Refused: 10 March 2004. The third was a subdivision development that had been refused approval under State law: G Bittar, Urban and commercial new development, American River, SA, Subdivision and development on Kangaroo Island, Received: 13 July 2004, Ref.2004/1631, Refused: 31 December 2005.

# THE BALD HILLS WIND FARM DEBACLE

- 2 Since that time, an application for mining on Christmas Island was refused in May 2007.
- 3 Wind Power Pty Ltd, website, Bald Hills: environmental benefits, <www.wind-power.com.au/projects/baldhills/BaldHills\_benefits.asp>.
- 4 Jonathan Starks and Mark Holdsworth, *National Recovery Plan for the Orange-bellied Parrot (Neophema chrysogaster)*, 2006 – 2010, Department of the Environment and Heritage, Commonwealth of Australia, 2004, p 7.
- 5 Minister for the Environment and Heritage, Senator Ian Campbell, 'Bald Hills Wind Farm and cumulative impact study', Transcript of Press conference, Perth, Wednesday, 5 April 2006.
- 6 <<http://deus.nsw.gov.au/publications/Wind%20Energy%20-%20A%20Growth%20Industry.pdf>>.
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- 9 British Wind Energy Association, *Planning Status Report: Onshore Wind*, March 2007.
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- 11 *Taralga Landscape Guardians Inc v Minister for Planning* [2007] NSWLEC 59.
- 12 *Kittel & Vandeppeer v DC of Yankalilla & Wind Farm Devt*, No ERD-02-547, ERD-02-593 [2002] SAERDC 131.
- 13 *Power Lines Underground v Burnie City Council obo Woolnorth Studland Bay Wind Farm Pty Ltd v Burnie City Council* [2005] TASRMPAT 235.
- 14 *Ramholdt v Planning Panels Victoria* [2004] VCAT 2432.
- 15 *Hislop v Glenelg SC*, [1999] VCAT 120.
- 16 *Hydro-Electric Corporation v Circular Head Council* [2001] TASRMPAT 176.
- 17 *Macarthur Wind Farm Pty Ltd v Moyne SC* [2006] VCAT 1423, *Upson v Corangamite SC* [2005] VCAT 2267.
- 18 Tim Nelson, 'Strategic Investments in Zero Emissions Infrastructure' (Manager Carbon & Renewable Energy Strategy, AGL), presentation to 8th Annual Forum of the Renewable Energy Generators of Australia, 3-4 April 2007, <[www.rega.com.au/forum2007.htm](http://www.rega.com.au/forum2007.htm)>.
- 19 Referral Number (EPBC 2002/730).
- 20 Under s 87(1)(a) and s 87(4) *Environment Protection and Biodiversity Conservation Act*. Note that there is no bilateral agreement in place with Victoria in relation to EIA under the EPBC Act.
- 21 The Minister might still attempt to confine the scope of the panel's assessment. For example, with the Hazelwood power station, the Minister sought to exclude impacts of greenhouse gas emissions from the project from consideration by the panel.
- 22 The current proposed configuration is 52 x 2MW turbines which would generate 346,195 MWh of electricity annually.
- 23 Minister for Planning, *Media Release*, 6 October 2003.
- 24 Senator Ian Campbell, *Statement of Reasons for Decision under s 133 Environment Protection & Biodiversity Conservation Act relating to Bald Hills Wind Energy Installation*, 5 April 2006, p 5.
- 25 Starks and Holdsworth, above n 4, p 2.
- 26 Minister for Planning *Bald Hills Wind Farm: Assessment under Environment Effects Act 1978*, August 2004, Dept Sustainability & Environment, Victoria (hereafter 'Victorian Assessment Report'), p 15.
- 27 Above, p 20.
- 28 Starks and Holdsworth, above n 4, p 174.

- 29 Above, p 163.
- 30 Victorian Assessment Report, p 14.
- 31 Starks and Holdsworth, above n 4, p 161.
- 32 Above, p 174.
- 33 B Dougherty, 'Minister Lines the Nests of Orange-bellied Parrots with \$3M', *The Age*, 30 August 2006, p 8.
- 34 <[www.abc.net.au/elections/federal/2004/guide/mcml.htm](http://www.abc.net.au/elections/federal/2004/guide/mcml.htm)>.
- 35 Senator Campbell, *Media Release*, 12 October 2004.
- 36 Senator Conroy, *Senate Hansard*, 8 August 2006, p 37.
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- 38 Senate ECITA Committee, Estimates, *Hansard*, 25 May 2006, p 110. According to the FAS, Mr Gerald Early of DEH 'Probably 400 days from the time that the Victorian government gave us its assessment report and section 131B notice is probably about right.'
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- 46 Advice to the Minister for the Environment and Heritage from the Threatened Species Scientific Committee (the Committee) on Amendments to the list of Threatened Species under the Environment Protection and Biodiversity Conservation Act 1999 (*Environment Protection and Biodiversity Conservation Act*), p 5, <[www.environment.gov.au/biodiversity/threatened/species/pubs/neophema-chrysogaster-listing.pdf](http://www.environment.gov.au/biodiversity/threatened/species/pubs/neophema-chrysogaster-listing.pdf)>.
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# THE BALD HILLS WIND FARM DEBACLE

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# THE BALD HILLS WIND FARM DEBACLE

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