1 February 2011

The Secretary to the Committee,
Inquiry into the Social and Economic Impact of Rural Wind Farms
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
community.affairs.sen@aph.gov.au

Dear Sir / Madam,

Rural Wind Farms (Inquiry)

I practised as a solicitor for 37 years, principally in ACT and NSW, with experience in both property law and property development litigation. I retired from legal practice on 31 October 2007.Although I resided throughout most of my professional life in Canberra, I now reside at a rural property near Bombala NSW. I am, therefore, able to bring an urban, rural and professional perspective to the matters the subject of the above Inquiry. I have a particular interest in seeking to ensure that owners of rural properties affected by wind turbines are treated justly. I believe that such owners are not now receiving fair treatment. I prefer to use the expression "industrial wind turbines" which is more accurate than the euphemism "wind farm" preferred by the wind turbine industry.

Please accept the following submission concerning industrial wind turbines in Australia in 2011.

1.**Construction Profits**

As the primary components of large wind turbines are invariably constructed overseas, foreign companies receive substantial profits from their construction, which is not in Australia's best interests. The NSW Government requires no local content for the supply of labour and materials for a wind turbine development. In view of the considerable government incentives to wind turbine developers, in my opinion to participate in such incentives it should be a legal requirement that at least 50% in value of these components should be constructed in Australia by Australian-owned businesses.

2.Operating profits

As large wind turbines are often owned by foreign companies or their subsidiaries, all net profits from their operation are frequently received by foreign interests, which is again not in Australia's best interests. The NSW Government has no requirement that the operator of wind turbines be controlled by Australian interests to any extent. In view of the considerable government incentives to wind turbine developers, in my opinion the operators of wind turbines should be controlled by Australian interests to an extent of at least 50%.

3.No National or State Plan or Rules

3.1 There is no national or NSW plan setting out why industrial wind turbines across Australia or NSW are necessary, where they will be placed and how the difficulties associated with them will be shared equitably among all Australians or NSW residents.

3.2 As a result, there are no wind turbines in any city or urban area and , accordingly, many residents there are largely unaffected by and are either indifferent to or well disposed to them (having regard to government campaigns in favour of "renewable" or "green" means of power generation). This support would, of course, evaporate if wind turbines were to be constructed at North Head, South Head, Sydney Harbour foreshores or the NSW coastline. There would be public outrage by persons resident in urban areas with demands for proper compensation to be paid for all affected.

3.3 Subjective views by government officials (invariably resident in a city) and political (not scientific) considerations dictate where wind turbines will be sited. Hence, there are no wind turbines

- at the windiest place in Australia (the Snowy Mountains)
- at the Blue Mountains
- on any NSW coastal headland or foreshore
- in any city
- at any tourist destination.

3.4 The result is that wind turbines are unfairly sited in other rural areas which are considered expedient.

3.5 If wind turbines were genuinely and urgently required in Australia, they would be sited in urban and rural areas, and all persons adversely affected would be properly compensated. In other words, the problem would be shared by all, not just a few.

3.6 When rural land in Australia was first settled, the squatters and selectors chose the most productive rural land to occupy. Much of the remaining non-productive rural land now comprises crown land and national parks. It is hypocritical of government and contrary to commonsense for government to require that wind turbines be placed on private productive land and not on the substantial areas of non-productive land controlled by government. For example, wind turbines could be located in the Snowy Mountains, a vast and windy area largely controlled by government, with existing electricity infrastructure.

3.7 For as long as anyone can remember, there have been legislative requirements concerning residential and commercial buildings throughout Australia. These requirements relate to the size of rooms, height of buildings, form of construction and setback from boundaries among other numerous detailed provisions. Notwithstanding that industrial wind turbines have been constructed in NSW for about 22 years, there remain no legislative requirements whatever relating to their position, height or appearance or boundary setback or the protection of heritage and other sensitive places. That this is the case, of course, suits developers and governments which wish these structures built. It is a national disgrace that these structures, now having a height of about 45 storeys, are not tightly regulated as are residential and other commercial buildings. No further turbines should be approved unless there are detailed

statutory plans and requirements which will give certainty to landowners and decision makers.

4. Inequality of Bargaining Power and Taxation Arrangements

The law in NSW relating to contracts is particularly concerned with any inequality of bargaining power between parties. Most wind turbine proposals in NSW are now targeting rural areas on the Tablelands. Most rural land in NSW was in drought for many years and most farmers are in difficult financial circumstances. Further, many farmers have little or no experience in negotiating with developers and are vulnerable to superficially attractive financial proposals. There is a need to provide legislative assistance to these farmers, especially having regard to the fact that the developers of wind turbines are frequently multi-national companies, or their subsidiaries, aided and encouraged by the Commonwealth and State governments. Further, the cost of litigating wind turbine disputes is immense and beyond the reach of most farmers, or others. In short, there is a massive inequality of bargaining power between wind turbine developers and landowners.

I will refer later in this submission to the litigation concerning the Taralga NSW wind turbines. In the reported decision of the Land and Environment Court there is no reference to the cost of the litigation. I invite the committee to read the speech of Ms Prue Goward to the Parliament of NSW as recorded in Hansard on 19 June 2007, recording the disappointment of local residents at the approval by the Land and Environment Court of wind turbines. The residents had, according to the speech, raised about $100,000.00 to challenge the proposed wind turbines development and lost the case. No doubt, the developer's legal costs were at least this sum. It is my understanding of income tax law that the legal costs of the developer would be likely to be a tax deduction (as the costs relate to the business of the developer). In contrast, the legal costs of the residents would not be likely to be a tax deduction (as these costs are of a capital nature being incurred in attempting to maintain the value of a capital asset).Accordingly, residents have every reason not to defend their rights when faced with a wind farm proposal; their opponent is likely to have vastly superior financial resources to fund a legal case, their opponent is assisted by national and State government policies and, to add insult to injury, their opponent is likely to receive an income tax deduction for the legal costs incurred in litigation. Further, the NSW Department of Planning has never agreed with an objection to an application to construct industrial wind turbines with the result that the application was refused. This is, of course, partly the result of a lack of scrutiny of the approvals, caused by an inability to appeal to a court and the lack of any assistance to objectors.

5. Arrangements with Landowners

5.1 Having decided on a potential site, wind turbine companies attempt to negotiate an agreement with landowners (frequently farmers) for the right to place turbines on the land. Agreements often take the form of a lease or licence. A 20 year lease with a right to place 10 turbines on land at $10,000.00 per annum for each turbine would yield $100,000.00 per annum or a total sum of $2,000,000.00 to a farmer. Most farmers are in difficult financial circumstances and find such propositions attractive. I am advised that developers commonly seek to negotiate confidentiality agreements with farmers. Such agreements make it difficult to objectively assess whether the agreements are fair and reasonable and hide the true arrangements. I am advised that some farmers sign agreements with developers, against legal

advice, no doubt having regard to the financial vulnerability of farmers. In view of the considerable financial incentives given to the operators of wind turbines, it is my opinion that all financial arrangements and agreements between wind turbine developers and landowners should be publicly disclosed.

5.2 When one considers that in the case of a 20 year lease the developer will expect to recover from the operation of the turbines during that time the full cost of the approval, construction, operation and removal of the turbines and all other costs plus profits and that all of these amounts will be paid by government and electricity consumers, it will be appreciated that the payments offered by developers to farmers are in fact not ultimately provided by the developers at all. One would not expect any trade secret to appear in a lease. Accordingly, there appears to be no reason for any agreement between a developer and a landowner to be confidential.

6.Disadvantages to Landowners Entering into Wind Turbine Agreements.

Disadvantages to farmers and others entering into agreements to allow wind turbines on their land include:

- Interference with radio and television reception
- Animosity of neighbouring landowners opposed to wind turbines
- Wind turbine noise
- Loss of rural land caused by access roads and turbines
- Uncertainty as to whether the turbines and other works will be removed in the future. Technological advances may make the turbines uneconomic, the wind turbine companies may be liquidated or they may simply not remove the turbines at the end of a lease. If rent is not paid or the turbines are not removed at the end of a lease, the cost of removing the turbines is likely to be greater than the value of the farm and the farm may be difficult or impossible to sell. There may need to be negotiations with the wind turbine company as to whether it will pay a sum (equivalent to the millions of dollars estimated to be the cost of removal of the turbines) to be held in trust for the term of the lease as security for its agreement to remove the turbines. As a result of the inclusion of confidentiality clauses in agreements between landowners and wind farm developers, it is not easy to ascertain the contents of these agreements. It is my understanding that wind turbine companies frequently do not provide security for their obligations. It is also my understanding that in the case of some of these developments if the wind turbine company were not to remove the turbines, the farmer may be required to do so, and if this were to occur it may result in the farm being lost and the farmer bankrupted. In the case of the recently approved turbines proposed for Boco Rock near Nimmitabel NSW, the approval did not set out the security arrangements for decommissioning of the turbines. The approval provided, “Prior to the commencement of construction, the Proponent shall provide written evidence to the satisfaction of the Director-General that the lease agreements with the site landowners have adequate provisions to require that decommissioning occurs in accordance with this approval.” Not to have set out in the approval the precise terms of the security required for decommissioning is against the public interest and inexcusable.
- A fire on a turbine caused by lightning or other reason may be difficult or impossible to extinguish.
- Clearly, advice would need to be obtained from a public risk insurer as to whether the farmer continued to have full public risk insurance cover for any adverse event resulting from the presence of the wind turbines.

- High tension power lines and television towers have been associated with health problems. It would no doubt be prudent to establish whether wind turbines may have any adverse health effect upon persons or animals. There are setback requirements for residences near electrical installations, but no such requirements for animals. Until there is scientific evidence available concerning the effect of electrical installations upon animals, they too should be protected by setback requirements.

7. Disadvantages to landowners near wind turbines.

The largely unplanned introduction of industrial wind turbines into Australia has resulted in the most serious violation of the property rights of landowners in Australia. This arises when the owners of land adjacent to wind turbines are not compensated for the loss of value to their land caused by the wind turbines. This is a particular unfairness only occasioned to rural land owners and not to owners of urban land.

Owners of houses and flats with views of Sydney Harbour have their views of the harbour protected by council requirements relating to the height of buildings. This in turn protects property values.

If a city homeowner has adjoining land redeveloped for a block of flats or a shop, offices, factory or other commercial purpose, this is often because all relevant land has been re-zoned and the homeowner can profitably sell his or her land to a developer.

This is not the case for a landowner near wind turbines. The loss of value of a farm near wind turbines can be determined by a valuer, and in Australia the loss of value has usually been substantial. Additionally, an adjoining landowner can be subject to most of the disadvantages caused by wind turbines, but will receive no compensation. The fact that nearby farmers receive no compensation for the loss of value or amenity of their farms is a national disgrace.

Having regard to the potential proliferation of wind turbines in Australia and the unsatisfactory nature of dealing with the rights of affected landowners, there is a real risk of values of rural land generally in Australia being damaged. A consideration of articles available on the internet will reveal the extent of the difficulties and disputes arising from wind turbines overseas.

The wind turbine industry denies that wind turbines cause any loss of value of nearby properties. Expert rural real estate agents,valuers and the NSW Land and Environment Court think otherwise. Wind turbine developers prefer to make payments to local councils and other public institutions such as schools in order to influence public opinion in favour of the development. These payments should rather be made to landowners of nearby properties who have suffered a capital loss in the value of their properties as shown by an independent valuation. It is my understanding that in Europe compensation for the presence of wind turbines is paid not only to the landowner on whose land the turbines are erected, but also to other landowners who suffer detriment caused by the turbines.

The dilemma for a farmer faced with a proposal for wind turbines is whether to reject negotiations with the developer and suffer a substantial capital loss in the value of his farm or have his farm rendered unsaleable if wind turbines are constructed nearby, or to do a deal

with the developer and run the risk of losing the farm altogether, or of being bankrupted, if proper security cannot be obtained for the obligations of the developer, there is default by the operator of the turbines and the farmer is required or wishes to remove the turbines.

An example of the manner in which the NSW Department of Planning deals with the loss of value of nearby properties is the following extract from the approval of the Boco Rock Project:- "……the Department is satisfied that the project would not pose an unacceptable impediment to the future development of dwellings in surrounding properties such as to warrant compensation." This is merely an assertion by the Department as no valuation evidence was available concerning the surrounding properties.

8.Other Options

In the 220 years since the First Fleet arrived at Sydney, the Australian rural landscape has largely survived free from intrusive industrial structures.

This is not to say that the landscape and rural values have not been adversely affected by technological change. For example, high tension electricity cables on pylons have scarred the landscape and reduced the values of land through which they passed. These, however, pale into insignificance compared to 152 metre high wind turbines. If renewable energy is required in Australia, there is no evidence to suggest that wind energy is superior to solar energy, or other renewable energy sources (which will cause no significant damage to the Australian landscape). If solar or other energy proves superior to wind energy, the unnecessary and avoidable destruction of the Australian landscape will not be viewed kindly by subsequent generations. All the evidence overseas indicates that industrial wind turbines are highly controversial, socially divisive, and of dubious environmental value. The damage caused by wind turbines far outweighs any energy benefits. So unpopular are wind turbines in Europe, they are now constructed on platforms at sea. There would be no objection to locally owned, small scale wind turbines which cause no damage to the landscape or to the value of nearby properties.

9.Wind Turbine Efficiency

I invite the committee to carefully consider the following reports:-

- The High Price of PC Power by Roy Evans and Tom Quirk at www.quadrant.org.au/magazine/issue/2009/3/the-price-of-pc-power

  being a readable and sobering insight into the Australian electricity supply industry, including comments on the futility of wind turbines, the waste of public money subsidising their operators and the failure of wind farms to have any real impact on reducing carbon dioxide emissions.

- Wind Power Exposed: The Renewable Energy Source Is Expensive And Unreliable at www.jennifermarohasy.com/blog/2008/11/wind-power-exposed-the-renewable-energy-source-is-expensive-and-unreliable

  containing comments on overseas experience.

- Cost And Quantity Of Greenhouse Gas Emissions Avoided by Wind Generation by Peter Lang at www.climatesceptics.com.au/downloads/wind-power.pdf

10. NSW Law

To my knowledge the current legal position relating to wind farms in NSW is set out in the decision of the Land and Environment Court in Taralga Landscape Guardians Inc v The Minister for Planning and RES Southern Cross Pty Ltd [2007] NSWLEC 59. I invite the committee to carefully read the judgement. I comment on the judgement as follows.

At paragraph 3 the court indicated that there was a conflict between the concerns of landholders and the "broader public good of increasing the supply of renewable energy", and the court held that the "broader public good must prevail".

At paragraph 35 the court indicated that public submissions overwhelmingly objected to the development. In the event these submissions appear to have achieved little or nothing.

At paragraphs 67-71 and 138 reference is made to various reports on climate change. The impression which is given is that science in this area is settled. This is not the case. There are many eminent scientists in Australia and overseas who do not agree with these reports. It seems to me that it is most unsatisfactory for a court to be required to make determinations as to property rights according to whether scientific or political considerations at any particular time achieve a public benefit. If these issues are to be litigated, they will be time-consuming and expensive and divert unnecessarily the resources of the court.

At paragraphs 73-74 reference is made to the principles of sustainable development .In my view, population growth affects sustainable development to a far greater extent than energy production.

At paragraph 81 it is provided " In constructing wind farms, it is necessary to go where the wind is." If this is true, why are there no wind turbines in the Snowy Mountains?

At paragraphs 150-160 the court held that the owners of properties nearby a wind farm had no right to compensation for the loss of value of their properties, although at paragraph 157 the court held that there were two properties that were "sufficiently impacted" that it was appropriate that the developer purchase them at market value as if the property was unaffected by the wind turbines, should the owners elect to sell. It appears that the court was of the view that it would have been unjust for the valuation to be conducted on the basis that there were wind turbines nearby, which would have reduced the market value. The court indicated that this was not creating a right of compensation for the owners of the two affected properties. It seems to me, however, that the order in fact enables the owners to receive monetary compensation for the blight caused to their properties by the wind turbines.

At paragraph 160 the court held that to create a right of compensation would strike at the basis of the conventional framework of land use planning and would be contrary to an objective for the promotion and co-ordination of the orderly and economic use and development of land. If the right to receive compensation strikes at the basis of conventional

land use planning, then in the case of industrial wind turbines legislative reform is required. It seems to me that the decision of the court to refuse compensation will be a disincentive to persons acquiring rural land and hasten the drift of population from rural to urban areas. In my view, the promotion of the orderly and economic use of land is not served by encouraging persons and capital to reside in the city. There are serious social and infrastructure problems created by city population growth. The government and the courts should encourage decentralisation. In many NSW rural areas, unimproved land values are either static or in decline. One of the principal sources of capital in rural areas is capital emanating from a city. Capital is never attracted by controversy or uncertainty. City capital will not be attracted to rural areas of NSW in which there are wind turbines. The land values in those areas will be depressed compared with other rural areas which have no such developments. Further, as rateable values decline, so too will the rate income of the affected councils. This situation is grossly unfair to the residents and landowners of the rural areas of NSW in which the turbines are placed. The NSW Government has said that wind turbines will be encouraged in some areas and not in others. If this policy is not changed, unfairness will continue to result. In the recent NSW Upper House Inquiry into Rural Wind Farms there was a good deal of evidence concerning the loss of value of properties nearby wind turbines.

At paragraph 162 reference is made to a control in the relevant town planning instrument as follows, “Turbine locations should not surround a non related property. Where a non related property has turbines adjacent to more than one axis of the property, there should be sufficient setbacks/ distances to the development to minimise the visual impact of that property.” Developers love these clauses with their vague provisions. These provisions invite subjective judgements to be made. Such subjective judgements are never satisfactory. In any event, one cannot disguise a wind turbine of 152 metres in height. A far better approach is to provide compensation to affected landowners as assessed by independent valuers. If this happens, much of the heat, anger and frustration will be removed. Your committee and the courts need to understand that rural properties are very difficult to sell at the best of times. Further, in Australia, traditionally rural properties have been purchased in significant part with regard to their landscape beauty. Having industrial structures nearby will make many rural properties unsaleable.

The court saw the proposal as merely a private development of land (paragraph 158). I do not agree with this approach. These developments are carried out at huge expense by wealthy developers aided and encouraged by government policy at Federal and State level in rural areas, and which seek to impose on the landscape industrial structures which are inconsistent with the existing and traditional land use. Further, as the population in rural areas relative to cities is so low, many rural landowners see themselves as being politically and electorally disenfranchised, and wind turbines as being another case of “country bashing” by city interests for the benefit of those interests.

11. Additional Proposed Reforms

11.1 The current situation for approval of wind turbine developments in NSW is as follows. As there are no legislated rules concerning these developments, the Department of Planning

provides its requirements to proponents. After an application is made, the Department calls for submissions from interested parties, but as only 30 days is generally allowed for submissions, there is insufficient time to obtain expert reports to refute reports provided by the proponent. Further, to my knowledge, no expert or financial assistance is given to anyone to properly consider or refute assertions by the proponent or the experts it engages. The affected local council may make a submission but its consent is not required and the Land and Environment Court is unable to review any decision on its merits. The NSW Opposition has announced that if elected it will reinstate the Court to review a decision on its merits.

11.2 Financial, expert and legal assistance should, moreover, be given by government in the public interest to an affected council and any interested person to properly consider and refute assertions by the proponent or the experts it engages. In the case of the recently approved development at Boco Rock near Nimmitabel NSW, the cost of the development was estimated to be about $750m. The financial assistance which should be given to properly consider and if necessary oppose such a development should be such sum as is reasonably required, not to exceed $1m.

11.3 In any development application concerning these developments all experts should agree to be bound by a code of conduct along the lines set out in Part 2.12 of the Court Procedures Rules 2006 (ACT) so that the decision maker and any court can be confident of the expert's impartiality.

11.4 In my view, if wind turbine developers are to be given valuable incentives by government, then all financial arrangements concerning industrial wind turbines should be publicly available, and, in addition to all other regulatory requirements affecting turbines, there should be a right for nearby landowners to receive compensation for the loss of value of their properties.

11.5 I suggest that a code or other legislation be passed incorporating the following basic rights for affected landowners and the following other provisions:-

- A right to compensation as determined by independent valuers for the loss of value of their properties. I suggest that the valuation be prepared by two independent valuers with at least five years experience in valuing properties in the relevant locality, with any differences to be settled by a third such independent valuer, with all costs to be paid by the developer.

- If the compensation as assessed by valuation evidence exceeds 10% of the value of the property, then the landowner should have the right to call on the developer to purchase the property at market value as assessed by the valuers.

- Public disclosure of all agreements entered into between landowners and wind turbine developers, so that financial arrangements are a matter of public record.

- A standard form of agreement between wind turbine developers and landowners with a right for the landowner to receive security for 3 months rent and with the right for the landowner to terminate the agreement for a failure by the developer to maintain structures, comply with the law or maintain rent payments, incorporating a solicitor's certificate confirming that independent advice has been given to the landowner, the form of such agreement (and the code or other legislation) to be settled by the Law Council of Australia after consultation

with all State and Territory Law Societies. There have been standard form prescribed residential tenancy agreements in force in NSW for many years.

- A requirement that proper security be provided by the developer to the appropriate Government, local council or other public authority in a sum being the proper cost of removal of all structures from the land when the structures no longer operate or the agreement with the landowner is terminated. That cost should be deemed to be the cost of construction of the structures.

- A requirement that the authority receiving the security apply it to cause the removal of structures at the appropriate lawful time.

- A requirement that the developer be required to pay the local council or other public authority the full and proper cost of the construction and maintenance of all roads and other infrastructure consequent upon the development. (I am advised that in NSW the local council does not now have the right to charge the usual section 94 contributions in the case of these developments.) An example of the manner in which the NSW Department of Planning deals with this matter is the following extract from the approval of the Boco Rock project:-" Prior to the commencement of the construction of the project, the Proponent shall establish a Community Enhancement Program Fund to be jointly administered by Bombala and Cooma-Monaro Shire Councils to fund community enhancement measures in the Bombala and Cooma-Monaro Shire local government areas to offset any potential residual amenity impacts associated with the project within these local government areas. Community enhancement measures may include (but are not necessarily limited to) improvements to community infrastructure and services, sustainability initiatives and opportunities for local economic and tourist development. The Proponent shall contribute an annual sum of $2,500 per operational turbine to the fund, from the commencement of operation of the project until the end of its operational life. The contribution shall be adjusted to take account of any increase in the Consumer Price Index over time, commencing at the June 2010 quarter. The terms of the administration of the funds shall be agreed between the Proponent and Bombala and Cooma-Monaro Shire councils and submitted for the Director-General's approval prior to the commencement of construction."

  This is a good example of the interference of the State Government in the affairs of the local council. It appears that each council is intended to be a trustee, but no trustee is required to accept a trust. The "residual amenity impacts" are not specified. The provision does not specify what will happen if a council refuses to be a trustee or if there is no agreement between the councils or if there is no agreement concerning the administration of the funds. Although the person suffering the most damage are the landowners near the project, it appears that they are not intended to be beneficiaries of the fund. Further, it appears that payments are only required in respect of a turbine which is "operational" and what should happen if payments are not made is not specified. Finally, the approval does not specify what should happen if the electricity output claimed by a proponent for a project is not achieved.

- A prohibition upon the making of gifts by wind turbine developers to political parties, government, councils or others.

- A requirement that a nominated public authority monitor and regulate noise, sound and vibrations emanating from the developments.(I understand that in NSW neither the State Government nor the local council does this.)

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12. Weight to be Given to Submissions and Conclusion

12.1 I have noted that in the decisions of the NSW Government which I have read concerning these developments and in the report of the NSW Parliament Upper House Inquiry concerning these developments, little or no distinction appears to be drawn between reports or submissions made by persons who have a financial interest in or other relationship with a wind turbine developer or the wind turbine industry, and those persons who have no such interest or relationship. In my view, more weight should be given to the submissions of persons who have no financial interest in or relationship with a wind turbine developer or the wind turbine industry.

12.2 No further industrial wind turbine development should be approved in Australia unless all suggestions and legislation referred to in this submission are formally adopted and passed by the legislatures of the Commonwealth, States and Territories.

Yours faithfully,
Alan Gillespie-Jones