

Windy Hill Wind Farm (“WHWF”)

Power to Issue RECs and suspension of that power

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1. Not Legal Advice

- a. This paper is not legal advice. If you wish to rely upon any part of it, the contents need to be checked by a lawyer with a current practising certificate with appropriate experience in the field.

2. Executive Summary

- a. A Chronology of events is set out in section 3 of this paper. This paper assumes that the chronology accurately reflects the facts.
- b. There is a market in Renewable Energy Certificates ("RECs") created by statute under The Renewable Energy (Electricity) Act 2000 (the "Act". Unless otherwise required by the context, a reference in this paper to a section is a reference to a section of the Act) (See Section 5 of this paper).
- c. As an Accredited Power Station under the Act (See Section 6 of this paper), Windy Hill Wind Farm Pty Ltd A.C.N. 126 722 094 ("WHWF PL") is entitled to create and sell Large Scale RECs ("LS RECs").
- d. The total of RECs created for 2012 by WHWF PL, at an average price of \$35 have a total value of nearly \$900,000. As long as Windy Hill's accreditation is not suspended, WHWF PL can expect to derive this additional income effectively as a subsidy (provided through the statutory market created by the Federal Government) and increasing the costs of electricity to consumers (see Section 5.d.iii of this paper).
- e. The Regulator should investigate and, if there are reasonable grounds for the regulator to believe that WHWFPL has contravened a law of the Commonwealth or of the State of Queensland, suspend Windy Hill's accreditation because:-
 - i. There is reasonable grounds for the Regulator to believe WHWF PL is operating the Windy Hill Power Station in contravention of its Development Approval in 3 potential respects (See Section 8.c of this paper);
 - ii. Those contraventions are an offence under S 580 of the Sustainable Planning Act (Qld) and contraventions of the law of the State of Queensland (see Section 8).
 - iii. If the authorised person has incorrectly answered the relevant question in the annual electricity generation return, WHWF PL is operating its Power Station in contravention of a law of the Commonwealth (see Section 9 of this paper).
 - iv. If the contraventions have occurred, the extent of the subsidy referred to, renders the contraventions more offensive and material and requires the Regulator to act faster and more decisively to investigate, enforce the law and suspend the accreditation of WHWF PL. The Regulator should not wait for

the power station to be closed down by the Local Authority or otherwise before taking action.

- v. The Regulator may suspend accreditation of WHWF PL as an accredited power station if the Regulator believes on reasonable grounds that the power station is being operated in contravention of a law of the Commonwealth or Queensland (See Section 7 of this paper). The Regulator has power to suspend the accreditation of the Windy Hill Power Station without waiting for the power station to be closed down by the Local Authority or otherwise.
- vi. This paper sets out those potential contraventions requiring investigation.
- vii. In terms of the continuum outlined in the risk based approach stated in the Regulator's Enforcement Policy, the conduct of WHWF PL in contravention of the laws of Queensland and the Commonwealth, is deliberate and has continued for a long period of time after admission of non-compliance with the Development Approval in at least one respect (See Section 11 of this paper).
- viii. Therefore under the Regulator's published Enforcement Policy, the Regulator should enforce the law and suspend the accreditation of Windy Hill Power Station.

3. Attachments

- a. Letter from Herberton Shire Council to C Walkden date 22 September 1999.
- b. ASIC Current and Historical Extract for Windy Hill Wind Farm Pty Ltd ACN 126 722 094.
- c. Statutory Declaration by C Walkden dated 13 October 2011.
- d. Noise Mapping Australia Report dated 16 December 2011.
- e. Noise Mapping Australia Report dated 27 March 2013.
- f. MWA Environmental report dated 24 July 2012.
- g. MWA Environmental Report dated 20 April 2013.
- h. Letter from PE Law dated 8 February 2013.
- i. Letter from Tablelands Regional Council to C Walkden dated 30 April 2013.
- j. Noise Measurement Services report dated 12 March 2012.
- k. Titles Office search for Lot 2 on RP 716061 one of the hosts of the Windy Hill Wind Farm.
- l. EMP Pages 1 to 21.
- m. EMP Appendices.
- n. Notice to show cause from Tablelands Regional Council to Ratch, dated 17 April 2012.
- o. Letter dated 5 June 2012 from C Walkden to TRC.

- p. Letter dated 30 April 2013, from TRC to C Walkden explaining delays in monitoring.

q.

4. **Chronology**

- a. On the 20 September 1999 the **Final Negotiated Decision Notice** approving the WHWF was issued. The power station was then owned and operated by WHWF PL the sole shareholder of which company was then Stanwell Corporation Limited.
- b. WHWF PL still owns and operates the WHWF.
- c. 26 October 1999, easement in Gross No 703654054 registered burdening the land in favour of STANWELL CORPORATION LIMITED A.C.N. 078 848 674 over LOT 2 ON RP 716061.
- d. **Construction** of the first 20 turbines of the WHWF was subsequently carried out. The Contractor was Powercorp. The final 22 turbines in Phase 2 have never been constructed.
- e. 2000 – WHWF was **commissioned**.
- f. Tablelands Regional Council's planner has stated: "The current operators provided Council with the results of some noise monitoring undertaken in 2000 after commencement of operation of this wind farm. The associated report concluded that the development was compliant at all monitoring sites, except for the residence on Lot 228 on CWL259".
- g. 18 October 2000 - **Formal noise complaint** made to Herberton Shire Council by GL Prior and Associates, solicitors for Colin Walkden.
- h. **Complaints** made to Operator by Jim Newman regarding excessive noise between 2000 and 2005. He sold in 2005 due to ill health from the wind farm noise.
- i. 1st April 2001, Windy Hill Power station was accredited under the Act.
- j. 2007 - **Noise monitoring** conducted – see the following paragraphs numbered 18 to 23 in Walkden's statutory declaration dated 13 October 2011:-
 - i. "In 2007 Stanwell Corporation agreed to install a monitoring device on my property, after I had consultation with a Herberton Shire Councilor. The device was located on my property approximately 20 meters from the house for several weeks, and recorded the noise emitted (decibels) from the turbines located at the WHWF.
 - ii. I was never made privy to the results of the monitoring, despite repeated requests to Stanwell Corporation to gain access to the records.
 - iii. Prior to the sale of the WHWF venture to Transfield Services (Australia) Pty Limited (ACN 11 093 114 553), Representatives of Stanwell Corporation came to my property,

when I asked the Representatives whether I had a noise problem, they verbally acknowledged that I had a noise problem caused by the WHWF turbines. Despite my repeated requests formal acknowledgement of my problem was not given by the company or its representatives.

- iv. To show their good faith, the Representatives of Stanwell Corporation, offered me \$4,000.00 to insulate the roof of my dwelling, I accepted the offer and they arranged for the work to be carried out. They advised me that they would get in contact with me at a later date to "see how things went". They made contact with me soon after the job was completed.
- v. I say that the noise problem was marginally reduced by the company's effort. The Representative who contacted me said that they may have to look into further options, but they sold the venture to Transfield Services (Australia) Pty Limited (ACN 11 093 114 553) before they addressed my concern.
- vi. In December 2007, the WHWF was sold to Transfield Services (Australia) Pty Limited (ACN 11 093 114 553)."
- k. There was no written agreement in relation to the payment of the \$4,000. WHWF PL just paid for the work to be done.
- l. 04 December 2007 TRANSFER No 711236715 EASEMENT IN GROSS: 703654054 to WHWF PL registered.
- m. 7 January 2008, Stanwell Corporation transferred its shares in WHWF PL to Ratch-Australia Corporation Limited ACN 106 617 332. According to the Current & Historical Extract issued by ASIC for WHWF PL, Transfield Services (Australia) Pty Limited was never a shareholder of WHWF PL. The timing of the transfer from Stanwell to Transfield referred to by Colin Walkden in his statutory declaration, namely December 2007 is very near the recorded transfer of shares from Stanwell to Ratch-Australia Corporation Limited, namely 7 January 2008.
- n. Further paragraphs 24 to 28, Colin Walkden in his Statutory Declaration states:-
 - i. "24. In February 2010, I attended at the Evelyn Central Hall located at Evelyn Central where a meeting and discussions were held regarding the first proposal for the High Road Wind Farm. It was at this meeting that I first made contact with Terry Johannesen, the Project Manager of Transfield Services (Australia) Pty Limited (ACN 11 093 114 553).
 - ii. 25. I informed Terry that I had a problem and what had happened, he proclaimed that he knew nothing about my

problem and said he would look into it. I gave Terry my contact details.

- iii. 26. In February 2011 another meeting was held at Evelyn Central Hall for a meeting and discussions were held regarding the second proposal for the High Road Wind Farm. Again I made contact with Terry, the Project Manager of Transfield Services (Australia) Pty Limited (ACN 11 093 114 553), who apologised for not responding to my request, and advised that all of these records were destroyed in the Brisbane floods. He advised that he would try and find some other source of information about my inquiry.
- iv. 27. I say that I have never formally written a letter to the said company, but have made contact with the Project Manager.
- v. 28. I say that despite repeatedly informing the Project Manager of my vulnerable position, he and the company have failed to take steps to ensure the company upholds its visions and values of⁴:
 - 1. Being open, honest and fair;
 - 2. Doing what is right is more important than doing what is expedient; and
 - 3. No injuries to anyone at anytime.
- o. 8 September 2011 – written complaint lodged by Colin Walkden with TRC on the standard form Ref NO 2648189 over the counter, regarding excessive noise and resulting health and nuisance issues.
- p. 10 – 11 October 2011 – **Tablelands Regional Council (“TRC”) had requested overnight noise monitoring**. This was carried out by Noise Mapping Australia (NMA) between 10.00 pm on 10th October 2011 and 2.00 am on the 11th October 2011 and **possible non-compliance** was identified (very low wind at time of testing).
- q. TRC requested Ratch (presumably on behalf of WHWF PL) to complete monitoring in response to Walkden complaint.
- r. 15 December 2011 email from P Pattison of TRC to C Walkden advising “A further and more comprehensive monitoring was said to be commencing “shortly””.
- s. 16 December 2011 - **Preliminary Noise monitoring report** completed for WHWF by Mark Simpson – NMA.
- t. 21 December 2011 – see C Walkden’s letter dated 5 June 2012 to TRC:-
 - i. *“The 3 month noise monitoring commenced on 21 December 2011. I am aware of this because I observed the installation of the monitoring devices on this date. In March of this year [2012] I wrote to you again advising of my further deterioration of health consequential upon the noise of the turbines. At about this time you received your own advice from Dr Thorne, an expert in this field and Tablelands Regional Council was then notified that the turbines were non-compliant with acceptable standards. Dr Thorne was your appointed expert and he advised during the course of the report of my mental health deterioration being a sequelae of the turbine noise. I received a response from council on 23 March 2012 wherein you advised*

you have instructed the operator to undertake a more detailed 3 month program. That was expected by you to be completed by the end of April. You further advised on that occasion the turbine operator had been instructed to detail a clear timetable for completion of the monitoring and that it had been given a deadline of end of April for that information. You advised also that the operator had been instructed to explain to council their intended operation of the turbines in accordance with their approvals - that explanation was required prior to the other information they were obliged to provide."

- u. 21st December 2011 to 30 April 2012, NMA carried out noise monitoring at C Walkden's house
- v. Dr Bob Thorne (Noise Measurement Services) engaged by Council to overview 3 month noise monitoring by NMA on behalf of WHWF.
- w. 12 March 2012 - Bob Thorne Report – **Report confirms non-compliance** and the NMA noise monitoring was deficient.
- x. 2 April 2012 – Another noise **complaint** lodged by Colin Walkden to TRC. See Letter dated 5 June 2012 to TRC :-
 - i. *"On 2 April 2012 I lodged a further noise complaint with you and stressed my continued and exacerbating health and comfort problems. The council replied to me on 10 April 2012 advising me that the developers were to provide a further report of the 3 month monitoring period. That report was expected to be submitted to the council in May 2012 as it was required to be completed by the operators by the end of April. It is now June. My health continues to suffer. My living circumstances are intolerable. I have made substantial attempts to sell the property, to no avail."*
- y. 17 April 2012 - TRC issued **Show Cause Notice** to Ratch (presumably on behalf of WHWF PL) in the following terms:-

**"SHOW CAUSE NOTICE – COMPLIANCE
WITH DEVELOPMENT APPROVAL
SUSTAINABLE PLANNING ACT 2009 -
SECTION 580**

**LOT 2 ON RP716061, LOT 93 ON CWL3089
AND LOT 227 ON CWL2960 2170 OLD
PALMERSTON HIGHWAY AND 22
COLLINS ROAD, RAVENSHOE**

Tablelands Regional Council has formed the view that a Show Cause Notice should be issued to you under Section 588 of the *Sustainable Planning Act 2009* for contravention of Section 580 of the said Act.

Section 580 of the SPA states:

1. "A person must not contravene a development approval, including any condition in the approval.

Maximum penalty - 1,665 units."

The facts and circumstances forming the basis of this view are:-

1. You are the operator of the windfarm located at 2170 Old Palmerston Highway, Ravenshoe-described as Lot 2 on RP716061 and 22 Collins Road, Ravenshoe - described as Lot 93 on CWL 3089 and Lot 227 on CWL 2960 ("the subject property").

On 20 September 1999, the former Herberton Shire Council issued a Negotiated Decision Notice for a Development Permit for a Material Change of Use for a Wind Farm comprising a maximum of 20 Wind Turbine Generators in 3 stages and Ancillary Infrastructure (provision of internal electricity reticulation network and connection to the external electricity network). A Preliminary Approval for a further 22 turbines was also issued at the same time, however, this preliminary approval is not relevant to the Show Cause Notice.

3. The Negotiated Decision Notice for a Development Permit was subject to conditions, including the following Conditions 37-39:

37. Construction and operation noise associated with each Stage of the Wind Farm shall be monitored periodically for each Stage of the development over representative periods during the day and night for a period of 3 months by the developer/operator to ensure that the existing noise amenity of adjacent houses is maintained.

38. Noise monitoring associated with the operational phase of each Stage of the development shall be monitored periodically at locations to be agreed with Council during the following wind conditions for a period of 3 months or longer, as required:

- marginally above "cut in" wind speed;*
- long term average wind speed; and*
- wind speed greater than the long term average wind speed, but below the "shut off" wind speed*

39. The findings of the noise monitoring programs for each Stage of the development, including an assessment of the findings against the New Zealand Standard for residential sites, in particular houses on the site and houses adjacent to the site and/or within 200 metres of the site, shall be provided to Council upon completion of the monitoring program.

4. The use authorised by the decision notice has commenced.

5. Council officers cannot find evidence which confirms that the requirements of these conditions have been complied with.

The purpose of this Notice is to invite you to make a written representation to Council to show cause why an Enforcement Notice under Section 590 of the *Sustainable Planning Act* should not be issued against you.

You may make a written submission in response to this Show Cause Notice by 25 May 2012 to:

The Chief Executive Officer Tablelands Regional
Council PO Box 573 Atherton QLD 4883

Should you require any further information, please contact Council's **Senior Planner, Peter Pattison**, on the above telephone number.

Yours faithfully

BRETT NANCARROW

MANAGER URBAN & REGIONAL PLANNING

- z. 30 May 2012 NMA report on Windy Hill Wind Farm - Assessment of Long-term Measurement of Turbine Noise at Residence 2238 Old Palmerston Highway Ravenshoe - copy not available but referred to in MWA review of 24 July 2012.
- aa. 5 June 2012, Colin Walkden wrote to the TRC – letter attached.
- bb. 24 July 2012 – MWA Environmental reviewed:-
 - i. the noise compliance monitoring program undertaken in relation to the WHWF at Ravenshoe by Noise Mapping Australia (NMA) for the wind farm operator to determine if it is adequate to demonstrate whether noise emissions from the activity comply with the relevant development approval conditions; and
 - ii. Bob Thorne's report.

And concluded:-

- iii. The monitoring from December 2011 to April 2012 was deficient because:-
 - 1. The location of the monitoring device was not in accordance with the requirements of NZS 6808:1998; and
 - 2. "Concerns raised by MWA Environmental in relation to how the NMA Final Report could conclude that no special audible characteristics were present in conflict to their Interim Report and the independent assessment of NMS.

In the opinion of MWA Environmental the analyses of the amplitude modulation characteristics presented in the NMA Interim Report and the NMS Preliminary Report are superior to that presented in the NMA Final Report."

- cc. 1 August 2012 Council Meeting – TRC resolved to commence **legal proceedings** against WHWF to order monitoring and order shut down of 3 turbines. Below are the minutes from the Tablelands Regional Council requesting the shutdown of 3 turbines at night at WHWF in North Queensland. The meeting was on the 1st August 2012.

ITEM-7 NOISE MONITORING CONSULTANCY - WIND FARM (WINDY HILL)

Moved by Cr Jensen Seconded by Cr Taylor

"That Council note the conclusions of the peer review report, and the legal advice, and resolve to:

(i) Instruct P& E Law to commence proceedings in the Planning and Environment Court seeking orders requiring RATCH Australia:

(a) to carry out a monitoring program in accordance with the New Zealand Standard: 'Acoustics – The Assessment and Measurement of Sound from Wind Turbine Generators';

(b) to shut down wind turbines 8, 9 and 10 during the evenings and night until RATCH can prove compliance with the Standards and this is confirmed by a peer reviewed report;

(c) any other orders as it sees fit.

(i) Send RATCH Australia the letter contained in Attachment 2;

(ii) Provide Mr Walkden with the MWA Environmental Review of Wind Turbine Noise Compliance Monitoring dated 24 July 2012 and inform him of Council's response to that report. "

dd. A court hearing took place between August and November 2012 that ended in WHWF PL agreeing to complete the monitoring.

ee. Nov 14th 2012 WHWF PL's consultants were supposed to start monitoring but their computer was not working, so the attempt was postponed

ff. Dec 7th 2012 WHWF PL's consultants restart monitoring.

gg. Dec 9th Ben (MWA Environmental) arrived to check on monitoring.

hh. Jan 28th 2013 equipment failure due to water damage.

ii. Feb 7th 2013 Chris (NMA) came to restart again.

jj. Feb 20th 2013 Chris (NMA) returned to check.

kk. March 11th 2013 Chris (NMA) returned .

ll. April 1st 2013, monitoring to finish.

- mm. April 4th 2013, extension given.
- nn. May 5th 2013, Chris (NMA) returned ----- 2 more weeks, not sufficient noise evidence.
- oo. Since the 22nd March 2013, the following days have had " audible noise inside home :-
 - i. March 22nd right up till the 31st.
 - ii. April 1st , 3rd ,4th ,5th , 6th. 8th , 11th, 12th, and 25th till the 30th.
 - iii. May every day until 14th..
- pp. 27 March 2013, interim NMA Report of monitoring issued. There appears to be a typographical error in table 5 of this report. In table 5, the columns are headed by reference to L_{A95} . However, in table 2:-
 - i. the second column is headed by reference to L_{Aeq} ;
 - ii. but the sound pressure levels quoted in column 2 of both tables are the same. Advice from a noise expert indicates that the heading in table 2 is incorrect and should be referring to L_{A95} . This paper assumes that.
- qq. 12 April 2013, MWA Environmental peer reviewed the NMA interim report of 27 March 2013 but did not identify the above error but concluded that "Due to the relatively low wind speed conditions during the initial 13 February 2013 to 17 March 2013 monitoring period and the relatively small margin of compliance assessed, it is not reasonable to form an opinion on the compliance status of the Windy Hill wind farm based upon the Interim Report."
- rr. 30 April 2013, Letter from TRC to C Walkden explaining delays in monitoring.
- ss. 2 May 2013, Tablelands Regional Council adopted the following minute:-

"That Council receive and note the report entitled 'Windy Hill Wind Farm Update' prepared by the Senior Planner.

AND FURTHER That Council through its legal advisors request access to the three months of wind data collected since June 2012 including any data that was previously withheld."

CARRIED UNANIMOUSLY

- tt. This needs to be checked but presumably, each year, the nominated person for the Windy Hill Power Station has submitted an annual return under the Act with the declaration certifying "that the information provided in this form is a true and accurate representation of the facts" with the question "Was there a contravention of a permit or conviction of an offence under any Commonwealth, State, Territory, or local Government law related to the operation of the power station in 2012?" answered in the negative.

5. Market for Large Scale RECs

a. Commodity

- i. The Act seeks to create a market in Renewable Energy Certificates ("RECs"). There are 2 types of RECs, large scale

(“LS”) and small scale RECs. Only large scale RECs are relevant to this paper.

- ii. The Act does not set a price for LS RECs.
- iii. The creation of the market is confirmed by the Clean Energy Regulator webpage on:-
 1. RET Power Stations which states “Under the Large-scale Renewable Energy Target (LRET), accredited RET power stations may be entitled to create large-scale generation certificates (LGCs). These certificates can then be sold and transferred to liable entities (usually electricity retailers) using a market based online system called the REC Registry”
 2. Creating and Selling LGCs which states:-

“Once your RET power station has become accredited, you can access your REC Registry account and create large-scale generation certificates (LGCs).

When you have created the LGCs for your RET power station and these LGCs are validated by the Clean Energy Regulator, they become registered in the REC Registry. You can then sell or acquit them against your liability. Most potential buyers will be liable entities (wholesale purchasers of electricity) who must buy LGCs in order to acquit their liability under the Large-scale Renewable Energy Target (LRET).

Why create LGCs?

- To fulfil the requirements of being a RET power station under the Large-scale Renewable Energy Target (LRET)
- To obtain a financial benefit from the sale of LGCs for the renewable energy electricity generated under the LRET.

For information on the LGC formula, visit LGC Eligibility Formula.

For information on how to create LGCs, visit Creating LGCs.

Why sell LGCs?

- To gain a financial benefit for renewable electricity produced by accredited RET power stations.

- To gain a financial benefit for the installation of an eligible small-scale system if installed prior to January 1, 2011.”

b. **Supply**

- i. The supply side of the market is created by empowering the nominated person for an accredited power stations to create LS RECs. S 18(1) provides “The nominated person for an accredited power station may create a certificate for each whole MWh of electricity generated by the power station during a year that is in excess of the power station's 1997 eligible renewable power baseline.”
- ii. The baseline for Windy Hill is 0.
- iii. A separate REC is created for each such MWh of electricity.
- iv. The incentive to create a LS REC is the power to sell and transfer the REC and receive the price payable by the buyer/transferee.
- v. S14(2) “A power station is eligible for accreditation if: (a) some or all of the power generated by the power station is generated from an eligible energy source”;
- vi. Under S 17, eligible energy sources include wind.
- vii. Each certificate must be registered on the relevant register of LS RECs. S26(1) “A certificate is not valid until it has been registered by the Regulator”.

c. **Demand**

- i. S 27 “Certificates that have been registered under section 26 may be transferred to any person.”
- ii. So any person may buy an REC but the incentive to buy created by the Act is S 36 “Subject to subsection (2), if a liable entity has a large-scale generation shortfall for a year, **large-scale generation shortfall charge** is payable in respect of the shortfall.”
- iii. S 35 “A person who, during a year, makes a relevant acquisition of electricity is called a **liable entity**.”
- iv. The charge is the shortfall multiplied by the ***“rate of charge”*** i.e. the rate of charge as specified in section 6 of the *Renewable Energy (Electricity) (Large-scale Generation Shortfall Charge) Act 2000* – currently, \$65 per MWh.
- v. The amount of the shortfall is calculated under S 38 and is basically the amount of electricity (over and above any partial exemption) purchased by a liable entity reduced by the number of LS RECs surrendered to the Regulator.
- vi. When a person buys electricity under a “Relevant acquisition” (basically any first time (as opposed to resale) acquisition of

electricity), the person must purchase an REC for each MWh of electricity purchased and surrender that REC or pay the shortfall charge.

- vii. If the price of an REC is less than the shortfall charge, there is therefore an incentive to purchase an REC.
- viii. The Government forgoes the tax (the shortfall charge) for surrender of the LS RECs created by accredited power stations thus subsidising the accredited power stations as an incentive to use renewable energy sources to create the electricity.

d. **Price and statutory subsidy**

- i. The price for an REC is not set by the Act.
- ii. This is confirmed by the Clean Energy Regulator webpage on Buying STCs and LGCs (<http://ret.cleanenergyregulator.gov.au/For-Industry/Liable-Entities/buying-stcs-lgcs>) which states "LGCs can only be bought through the LGC market where the price varies depending on supply and demand."
- iii. Obviously the price for an REC is a cost to the retailer of the electricity and recovered from the consumer resulting in an increase in the cost of electricity to the consumer.
- iv. Windy Hill has 20 turbines each capable of producing .6 Mw per hour.
- v. Therefore its annual capacity is 105,120 MWh (.6 MW x 20 turbines x 365 days x 24 hours).
- vi. In 2012, Windy Hill created 25,253 RECs (see <https://www.rec-registry.gov.au/getSearchPublicRecHoldings.shtml?recType=LGC> – pending surrender 10,506 and Registered 14,747) equating to 24% production of its annual capacity. The average for the 12 years since accreditation is 25% production of its annual capacity.
- vii. The Prices quoted as at 20 May 2013 at <http://www.icapenergy.com.au/prices> for 2013 created LS RECs is bid \$35 ask \$36.
- viii. If Windy Hill sells all of its 2012 created RECs at an average price of \$35.00, the income it will generate from sale of its RECs created in 2012, will be \$883,855. According to the <https://www.rec-registry.gov.au/getSearchPublicRecHoldings.shtml?recType=LGC>, not all the RECs created for the 2012 year have been surrendered yet.
- ix. The price per REC is effectively a subsidy derived by an accredited power station as a result of the statutory market outlined above.

- x. Because of the subsidy, WHWF PL should have a higher obligation to be a good corporate citizen requiring it to jealously comply with all conditions of its Development Approval.

6. Accreditation of Power Stations

- a. Any power station operating using an eligible renewable energy source may become an accredited power station in respect of the percentage of electricity generated using the eligible source (Ss 9 to 17A).
- b. Windy Hill is an accredited power station under the Act under the Account Name WHWF PL, accreditation date 1/4/2001 with a zero Baseline (MWh); Accreditation No WD00QL01.
- c. Under S 2C of the Acts Interpretation Act (Cwth), in a Commonwealth Act, a reference to a "person" includes a body corporate as well as an individual.
- d. Under S 13 of the Act, a registered person may apply for accreditation as an accredited power station.
- e. Under S 15B of the Act, if the Regulator approves an application, the applicant becomes the nominated person for the accredited power station.
- f. Therefore, in the case of the Windy Hill Power Station, WHWF PL, (a body corporate, registered person No 2434), is the nominated person not an individual because that company was the registered person who applied for accreditation for the Windy Hill Power Station.
- g. Note also that it is the nominated person who is:-
 - i. responsible under S 20 of the Act, for giving the electricity generation return; and
 - ii. empowered under S 18 of the Act, to create the LS RECs for the power station.

7. Suspension of Accreditation of Power Station

- a. S18(1) "The nominated person for an accredited power station may create a certificate for each whole MWh of electricity generated by the power station during a year that is in excess of the power station's 1997 eligible renewable power baseline."
- b. S18(4) Electricity is to be excluded from all calculations under this section (b) to the extent that the electricity was generated during any period of suspension of the accreditation of the accredited power station under section 30D or 30E;
- c. Therefore, the nominated person for an accredited power station can continue to issue RECs for electricity generated using an eligible source (wind) until its accreditation is suspended even if the power station is operating in contravention of the law.
- d. Therefore, also, an LS REC cannot be created for electricity generated during a period of suspension of the accreditation of the power station.
- e. **Power to suspend**
 - i. The relevant power is under S30E:-

“RENEWABLE ENERGY (ELECTRICITY) ACT 2000 - SECT 30E

Suspending the accreditation of a power station--other grounds

Failure to give an electricity generation return

(1) The Regulator may, by written notice, suspend the accreditation of an accredited power station if an electricity generation return for a year, in respect of the station, has not been given to the Regulator in accordance with section 20.

(2) The accreditation is suspended until the return is given to the Regulator in accordance with that section. The notice must include a statement to that effect.

Contravention of Commonwealth, State or Territory law

(3) The Regulator may, by written notice, suspend the accreditation of an accredited power station **if the Regulator believes on reasonable grounds that the power station is being operated in contravention of a law of the Commonwealth, a State or a Territory.**

(4) The accreditation is suspended until the Regulator believes on reasonable grounds that the power station is not being operated in contravention of that law. The notice must include a statement to that effect.

Other circumstances

(5) The Regulator may, by written notice, suspend the accreditation of an accredited power station in any other circumstances prescribed by the regulations.

(6) The accreditation is suspended for such period (including permanently) as the Regulator considers appropriate in all of the circumstances. That period must be specified in the notice.

Note: Any electricity generated by the power station while its accreditation is suspended under this section is to be excluded from all calculations under section 18: see subsection 18(4). “

- ii. Therefore the accreditation of a power station can be, and given the subsidy, should be, suspended:-
 - 1. For failure to lodge an annual return;
 - 2. If the Regulator believes on reasonable grounds that the power station is being operated in contravention of a law of the Commonwealth, a State or a Territory.

8. Contraventions of the law of the State of Queensland

a. Is failure to satisfy conditions of a development permit in Queensland a contravention of a law of Queensland?

- i. Contravention of a condition of a development permit/approval for WHWF is an offence and therefore a contravention of a law of Queensland.

SUSTAINABLE PLANNING ACT 2009 - SECT 580

580 Compliance with development approval

(1) A person must not contravene a development approval, including any condition in the approval.

Maximum penalty - 1665 penalty units.

(2) Subsection (1) applies subject to subdivision 2.

(3) In subsection (1) development approval includes an approval under the repealed LGP&E Act, section 4.4(5) or 4.7(5).

Editor's note

the repealed LGP&E Act, section 4.4 (Assessment of proposed planning scheme amendment) or 4.7 (Assessment of rezoning of land in stages)

- ii. Subdivision 2 referred to in S 580, deals with emergencies and building on heritage places and is not likely to be relevant to WHWF and this paper.

b. Relevant conditions

- i. By letter dated 22 September 1999, Herberton Shire Council notified Colin Walkden, as a submitter in relation to the relevant Development Applications of the approval of the relevant applications and the conditions attaching to the approvals.
- ii. A current full town planning certificate should confirm these conditions and a check of the conditions in the town planning certificate, should confirm that these conditions are the only relevant conditions.
- iii. Subject to paragraph 8.b.ii above, the following conditions are conditions forming part of the Development Permit for the existing 20 turbine wind farm.

“ 6 The provisions of the Integrated Planning Act, the Building Act, the Fire Safety Act, and all other relevant Acts and Regulations and the Local Laws of the Council from time to time shall at all times be observed and performed in

relation to the land, the building and the use and occupation thereof.”

“ENVIRONMENT AND AMENITY

35. The applicant shall lodge with Council an Environmental Management Plan for the approval of the Manager Engineering Services. The EMP shall address all phases and all stages of the project.

In particular, the EMP shall include:

- Management of bird strike**
- Management of noise emissions**
- Management of electromagnetic interference**
- Management of lightening strike**
- Management of cyclonic conditions**
- Management of safety issues**

Details of noise monitoring agreed between Council and the Proponent, as required in Condition 38, shall be incorporated into the EMP.

The EMP shall be approved by the Manager Engineering Services prior to the issue of Development Approval for Building Work associated with Stage 1 of the development.

36. The development shall satisfy the New Zealand Standard: 'Acoustics — The Assessment and Measurement of Sound from Wind Turbine Generators' (NZS6808:1998).

Acceptable limits outlined in the New Zealand Standards refer to:

The sound level from the Wind Turbine Generators (or Wind Farm) not exceeding, at any residential site, and at any nominated wind speeds, the background sound level by more than 5dB(A), or a level of 40 dB (A), whichever is the greater.

The development shall comply with NZS6808:1998 and the acceptable limit for residential sites specified above.

37. **Construction and operation noise associated with each Stage of the Wind Farm shall be monitored periodically for each Stage of the development over representative periods during the day and night for a period of 3 months by the developer/operator to ensure that the existing noise amenity of adjacent houses is maintained.**
 38. **Noise monitoring associated with the operational phase of each Stage of the development shall be monitored periodically at locations to be agreed with Council during the following wind conditions for a period of 3 months or longer, as required:**
 - **marginally above "cut in" wind speed;**
 - **long term average wind speed; and**
 - **wind speed greater than the long term average wind speed, but below the "shut off" wind speed.**
 39. **The findings of the noise monitoring programs for each Stage of the development, including an assessment of the findings against the New Zealand Standard for residential sites, in particular houses on the site and houses adjacent to the site and/or within 200 metres of the site, shall be provided to Council upon completion of the monitoring program.**
 40. **Any noncompliance with NZS6808:1998 during Stage 1 or any other Stage of the development will require noise attenuation measures to be introduced, as agreed between the applicant and Council."**
- c. **3 Potential Contraventions of Conditions of the Development Approval**
- i. Does the EMP include "*Details of noise monitoring agreed between Council and the Proponent, as required in Condition 38*" as required by Condition 35?:-
 1. The full EMP needs to be examined but a copy of an EMP for the WHWF and appendices obtained so far does not include these details.
 2. A copy of the EMP and appendices obtained so far is included with this paper.
 3. It is not clear that this document has been approved by the Manager Engineering Services prior to the issue of Development Approval for Building Work associated with Stage 1 of the development.

4. Page 8 of 21 of the EMP states that "*The EMP has been prepared voluntarily and is not required by any government regulatory authority*".
5. Therefore, it may be that the attached EMP document is not the EMP for the purposes of condition 35 of the development approval for the WHWF.
6. The EMP is originally dated October 1999 and reissued in Nov 1999 with document number P114WTGEMPPrev02.doc (see at the foot of each page in the EMP and note the document number in the appendices is different). The Development Approval was granted 20 September 1999. Therefore from a timing point of view, it is possible that the attached EMP is the EMP required by Condition 35 of the Development Approval.
7. Page 12 of 21 of the EMP states "*The ERMPs [environmental risk management plans] appropriate to this project are included in Appendix C*". A similar reference is contained on Page 13. Therefore the ERMPs in appendix C are part of the EMP.
8. At P 12 of the EMP it is stated that "These ERMPs [*environmental risk management plans*] are only applicable to the site and therefore should be sufficiently detailed to enable an auditor to check site environmental performance" and "Each plan must also specify what monitoring will be done, how often and by whom".
9. Page 20 and following of the appendices are part of appendix C and appear to be an ERMP for "*Noise (Operation)*".
10. Page 21 of the appendices has 2 references to a Noise Monitoring Plan:-
 - a. Under the headings "*Monitoring and Reporting*" and "*Mechanism*", the reference "*Noise monitoring plan – attached Nov 1999*"; and
 - b. Under the heading "*Environmental Performance Indicators*" there is a second reference to "*the Noise monitoring plan*".
11. If:-
 - a. The noise monitoring plan was attached to the EMP; and
 - b. the EMP with the noise monitoring plan was approved by the Manager Engineering Services as required by condition 35; and

- c. the noise monitoring plan contains the details required by Condition 35, including:-
 - i. addressing for all phases and stages of the project, management of noise emissions;
 - ii. Details of noise monitoring agreed between Council and the Proponent, as required in Condition 38, shall be incorporated into the EMP.
 - iii. Monitoring:-
 - 1. Periodically i.e. at regular intervals;
 - 2. Each for a period of 3 months or longer, as required;
 - 3. at locations to be agreed with Council;
 - 4. during the following wind conditions:
 - a. marginally above "cut in" wind speed;
 - b. long term average wind speed; and
 - c. wind speed greater than the long term average wind speed, but below the "shut off" wind speed;
 - 5. over representative periods during the day and night;
 - 6. by the developer/operator;
 - 7. to ensure that the existing noise amenity of adjacent houses is maintained;
 - iv. anything else required by the Manager Engineering Services;

Condition 35 may not be contravened.

12. Otherwise, Condition 35 of the Development Permit/approval, has been contravened.

13. If the quoted provisions, are the only noise provisions contained in the EMP, no provisions of the type required by Condition 35 in relation to noise emissions, have been included and accordingly the development permit/approval is contravened.

- ii. Has noise monitoring as required by Conditions 37 and 38 been carried out?:-
 - 1. From the Chronology above, it appears that monitoring has been carried out by WHWF PL pursuant to the

requirements of the development permit on only one period and provided to Council, in 2000.

2. The other monitoring has been insufficient to demonstrate compliance for the reasons identified in the MWAA Environmental reports, namely:-
 - a. Improper location of the monitoring device;
 - b. Analysis of special audible characteristics as required by the NZS 6808:1998 being inadequate; and
 - c. Inadequate wind speeds during the reported monitoring periods, to properly assess compliance at all wind speeds. NB the full monitoring periods have not been reported by WHWF PL to the TRC yet.
3. Care must be taken not to interpret the Negotiated Decision Notice conditions as a statutory instrument but for what they are – conditions of approval drafted by a town planner for a development approval. Nevertheless, the following comments can be made.
4. Condition 38 refers to the noise monitoring associated with the operational phase referred to in Condition 37 (referring to both construction and operation) and expanded in Condition 38 (in relation to the operational phase).
5. Reading Conditions 37 and 38 together, it is obvious that the EMP should have contained provisions requiring monitoring periodically (and not just one period of 3 months or longer as required) during the whole of the operational phase and not just at commencement:-
 - a. Condition 37 requires that “the Wind Farm shall be monitored periodically ... to ensure that the existing noise amenity of adjacent houses is maintained.”
 - b. Wind Farms generate noise (whether either or both audible and inaudible) during operation.
 - c. The purpose of conditions relating to noise emissions from wind farms must be to protect the amenity of the environment during the whole of the operation of the wind farm.
 - d. Therefore the reference to “maintained” must be to require the compliance with the required standards to be maintained over the whole of the operational stage of the wind farm and not just at commencement.

- e. "Periodically" means relating to something happening at regular intervals i.e. to something happening more than twice.
 - f. "Maintained" when used in relation to the operational phase of a development approval would indicate that regular monitoring is required throughout the operational phase. Council would wish to ensure that the noise emissions do not contravene relevant requirements at any time during the operation of the approval. This would be the purpose behind the condition.
 - g. Adjacent to the reference on Page 21 of the appendices to a Noise Monitoring Plan (and under the heading "Frequency" opposite the headings "*Monitoring and Reporting*" and "*Mechanism*" and the reference "*Noise monitoring plan – attached Nov 1999*") appears "At times designated during 3 months post commissioning". The use of the plural "times" indicates that monitoring was to occur more frequently than just once i.e. not just the 2000 monitoring.
6. Therefore, monitoring was required on more than two occasions and in fact periodically (regularly) during the whole period of operation of the WHWF.
7. Therefore Conditions 37 and 38 have been contravened.
- iii. Do the noise emissions from Windy Hill contravene the noise standards required to be met by Conditions 6 and 36 of the Development Conditions.
- 1. What are the standards:-
 - a. The 2000 Development Approval stated the following, relevant to the standards to be met by the development:-
 - i. The New Zealand Standard:-

"36. The development shall satisfy the New Zealand Standard: 'Acoustics — The Assessment and Measurement of Sound from Wind Turbine Generators' (NZS6808:1998).

Acceptable limits outlined in the New Zealand Standards refer to:

The sound level from the Wind Turbine Generators (or Wind Farm) not exceeding, at any residential site, and at any nominated

wind speeds, the background sound level by more than 5dB(A), or a level of 40 dB (A), whichever is the greater.

The development shall comply with NZS6808:1998 and the acceptable limit for residential sites specified above”:-

1. The NMA reports to date do not demonstrate compliance with this standard.
2. The NMA Interim Report dated 14 December 2011 demonstrated special audible characteristics at the WHWF.
3. The NMS report of 12 March 2012 demonstrated special audible characteristics at the WHWF.
4. These demonstrations were reviewed and accepted by MWA Environmental in their report dated 24 July 2012.
5. NZS 6808:1998 states “Predicted or measured L_R **levels from WTGs with known special audible characteristics shall be adjusted** by adding +5 to the level. This adjustment is a penalty to account for the adverse subjective response likely to be aroused by sounds containing such characteristics (see section 5.3 for compliance assessment for sounds containing special audible characteristics).”
6. Expert advice is needed to determine whether or not special audible characteristics once identified require application of the penalty to all noise level readings or only to those readings when special audible characteristics are identified and if the latter, whether the relevant readings referred to below were accompanied by identified special audible characteristics.

7. The reported noise levels in the reports to date indicate non-compliance if the penalty of +5dB(A) due to special audible characteristics should be and is applied:-
 - a. “Maximum L_{Aeq} noise level (audible noise) from wind turbines was 36.5 dB(A) outside the dwelling. This noise level occurred at 1:50 am to 2:00 am and this time the wind speed was 6.5 m/s at angle of 308 degree” – if 5 dB(A) were added to 36.5 dB(A), the result would exceed the upper limit of 40 dB(A) which would presumably apply at that time of night..
 - b. The table at paragraph 10 of the MWA Environmental report dated 12 April 2013 demonstrates compliance margins of far less than 5 dB(A). The corresponding noise levels would exceed the NZS 6808:1998 standard if the special audible characteristics of +5 dB(A) were applicable.
- b. The Queensland Standard:-

“ 6 The provisions of the Integrated Planning Act, the Building Act, the Fire Safety Act, and all other relevant Acts and Regulations and the Local Laws of the Council from time to time shall at all times be observed and performed in relation to the land, the building and the use and occupation thereof.”
- c. The Environmental Protection (Noise) Policy 2008 (“Noise Policy”) is a “relevant Act” or “Regulation” under Condition 6:-
 - i. “Under the heading “Performance Indicators” paragraph 5.2.3 of the EMP

- states “Compliance with NZS 6808:1998 and any relevant State or Territory legislation.”
- ii. The 1997 Noise Policy is mentioned under the applicable legislation in Appendix A and on P 20 of the appendices as an issue to be addressed.
 - iii. The EMP was prepared by the Developer, Stanwell Corporation.
 - iv. The EMP was to be approved by Council.
 - v. The use of the term “relevant State or territory legislation” and the listing of the Environmental Protection (Noise) Policy 1997 as relevant legislation in Appendix A in the EMP and in the “issues to be addressed” supports the proposition that the Developer and the Council considered that Queensland Noise legislation and in particular the 1997 Noise Policy was a “relevant Act” or “Regulation” for the purposes of Condition 6 of the Development Approval.
 - vi. The Noise Policy is subordinate legislation and requires the approval of the Governor in Council (S 33 of the Environmental Protection Act 1994).
 - vii. Therefore, Condition 6 of the Development Approval, requires the WHWF to observe the Noise Policy from time to time, at all times.
- d. The Noise Policy applies to the Acoustic Environment throughout Queensland (See S26 of the Environmental Protection Act 1994 and S4 of the Noise Policy).
- e. S6 of the Noise Policy states that the purpose of this policy is achieved by—
- i. identifying environmental values to be enhanced or protected; and
 - ii. stating acoustic quality objectives for enhancing or protecting the environmental values; and
 - iii. providing a framework for making consistent, equitable and informed decisions about the acoustic environment.

- f. For the purposes of the wording of Condition 6, the enhancing or protection of an environmental value identified in the Noise Policy is achieved by “observance and performance” of the acoustic quality objective stated in Schedule 1 of the Noise Policy for that environmental value.
 - g. S7 of the Noise Policy identifies that the environmental values to be enhanced or protected under this policy includes the qualities of the acoustic environment that are conducive to human health and wellbeing, including by ensuring a suitable acoustic environment for **individuals** to sleep etc.;
 - h. Colin Walkden’s house is a sensitive receptor (namely a dwelling) identified in Column 1 of Schedule 1 of the Noise Policy.
 - i. The acoustic quality objective to be observed and performed at night time indoors (i.e. with windows opened) stated in Column 3 of Schedule 1 to enhance or protect that environmental value is 30 dB(A) LAeq,adj,1hr among others.
 - j. Therefore, in relation to wind farms (which are not an ERA), the Noise Policy:-
 - i. does not address bracket creep;
 - ii. does not contain 2 criteria or series of criteria; and
 - iii. unlike other guidelines in other countries and States, does not require adherence to the greater of those criteria;
 - iv. requires adherence to only one series of criteria, namely that series of criteria stated in Schedule 1 of the Noise Policy.
2. Dr Bob Thorne, in his report delivered on or about 12 March 2012, concluded at P 13 that the measured noise levels of 43.3 dB LAeq, 1 hr. (outdoors adjusted by 11 dB (A) LAeq for indoors – see Figure 4 on Page 6 of his report leaving 32.3 dB(A) LAeq, adj, 1 hr.) at midnight to 1.00 am from the WHWF exceeded the noise limits under the Noise Policy (30 dB(A) LAeq, adj, 1hr.) and the Negotiated Decision Notice/Development Approval for the wind farm (42 dB(A)).
3. On 27 March 2013, the interim NMA Report of monitoring issued. There appears to be a typographical error in

table 2 of this report. In table 5, the columns are headed by reference to L_{A95} . However, in table 2:-

- a. the second column is headed by reference to L_{Aeq} ;
 - b. but the sound pressure levels quoted in column 2 of both tables are the same. Advice from a noise expert indicates that the heading in table 2 is incorrect and should be referring to L_{A95} . This paper assumes that.
4. This NMA interim report is for monitoring carried out over a 30 day period and is not for a full 90 days.
5. In Table 5 at Page 12 (headed Page 19 on our copy) of the interim report of Noise Mapping Australia (NMA) dated 27 March 2013, NMA record noise levels of L_{A95} 42.7, 45.4 and 46.9 dB(A) at wind speeds of 7, 8 and 9 M/second at a monitor close to Mr Walkden's house. Even allowing for the 11 dB(A) attenuation measured by Dr Bob Thorne, these measured noise levels exceed the objective set in the 2008 Noise Policy:-
- a. Note 2 to paragraph 4.4.2 of NZS 6808:1998 states "Overseas studies on wind farm sound (refer ETSU-R-97), have shown that L_{95} is typically 1.5 dB - 2.5 dB lower than L_{eq} measured over the same period";
 - b. The fact that the same noise recorded as L_{Aeq} results in a number higher than the L_{A95} measurement is confirmed at Windy Hill by Figure 1 in the NMS report dated 12 March 2012. The L_{Aeq} graph line is in blue and is always higher than the L_{A95} line in green.
 - c. The NMA recorded noise levels of L_{A95} 42.7, 45.4 and 46.9 dB(A) would thus convert to at least:-
 - i. Outdoors - L_{Aeq} of 44.2, 46.9 and 48.4;
 - ii. Indoors - L_{Aeq} of 33.2, 35.9 and 37.4;
 - d. **These noise levels exceed the Noise Policy Acoustic Quality Objectives for dwellings indoors for daytime and evening of 35 dB(A) $L_{Aeq,adj,1hr}$ (i.e. by 0.9 and 2.4 dB(A) for the last 2 readings) and night time of 30 dB(A) $L_{Aeq,adj,1hr}$. (i.e. by 3.2, 5.9 and 7.4 dB(A) for the three readings).**
 - e. Of course, if the higher conversion rate was used, the exceedance would be greater.

6. MWA Environmental peer reviewed Dr Bob Thorne's report and confirmed it - see Council minutes of the 1st August 2012 and attached reports.
7. Council Minutes of 1st August 2012 resolved to commence legal proceedings for monitoring and shutdown of 3 turbines based upon these conclusions.
8. See NMA report dated 27 March 2013 - Some 9 months later, WHWF PL still has not produced any evidence of observance and performance of the applicable noise limits under the Development Approval.
9. Accordingly, it seems clear that the WHWF has contravened the provisions of its Development Approval relevant to noise limits.

9. Contraventions of the Law of the Commonwealth

a. If:-

- i. the law of Queensland has been contravened, if the Regulator believes on reasonable grounds that any one of the contraventions of Queensland law outlined above has occurred; and
- ii. the nominated person has lodged annual returns under the Act with the declaration certifying "that the information provided in this form is a true and accurate representation of the facts" with the question "Was there a breach of a permit or conviction of an offence under any Commonwealth, State, Territory, or local Government law related to the operation of the power station in 2012?" answered in the negative,

the Regulator should believe on reasonable grounds that commission of an offence under S 137.2 of the Criminal Code (Cwth) by the nominated person and by the operator of the wind farm has occurred:-

1. Such answers are calculated to avoid investigation by the Regulator;
2. Positive answers could lead to suspension of the accreditation of the power station;
3. Suspension of accreditation results in loss of the substantial income from issuing RECs;
4. Against the deliberate non-compliance outlined above, the consequences of suspension and the answers in the annual return, the motive for and intention, is evident.

b. Offences for false Information in Annual electricity generation return

- i. S 137.2(1) of the Cwth Criminal Code creates an offence:-
- ii. With the following relevant elements:-

1. A person is guilty of an offence if:
 - a. the person produces a document to another person; and
 - b. the person does so knowing that the document is false or misleading in a material particular; and
 - c. the document is produced in compliance or purported compliance with a law of the Commonwealth.

Penalty: Imprisonment for 12 months.

iii. If the authorised person:-

1. signs the return with the question "Was there a breach of a permit or conviction of an offence under any Commonwealth, State, Territory, or local Government law related to the operation of the power station in 2012?" answered in the negative; and
2. with the certification that the information provided in the return is a true and accurate representation of the facts; and
3. knowing that those statements in the return are incorrect which the authorised person should know, if the chronology set out above is correct;
4. both the authorised person and the company WHWF PL will be liable for the offence:-
 - a. if under S 12.3 of the Commonwealth Criminal Code, knowledge of the authorised person is imputed to the corporate nominated person;
 - b. S 12.3 of the Commonwealth Criminal Code provides:-

12.3 Fault elements other than negligence

(1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

(2) The means by which such an authorisation or permission may be established include:

(a) proving that the body corporate's board of directors intentionally, knowingly or

recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or

(d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

(3) Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.

(4) Factors relevant to the application of paragraph (2)(c) or (d) include:

(a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and

(b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.

(5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.

(6) In this section:

board of directors means the body (by whatever name called) exercising the executive authority of the body corporate.

corporate culture means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.

high managerial agent means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.

5. if the document is misleading in a material particular. As the document is misleading in relation to compliance with law and that particular is relevant to suspension of accreditation, the particular in respect of which the document is misleading is likely to be held to be material.
- c. S 125E has no application to the information in an annual electricity generation return either in relation to the Nominated Person WHWF PL lodging the return or the authorised person who signs the return on behalf of the nominated person.
 - i. S 125E only applies if the evidence is given in compliance or purported compliance with section 125A.
 1. S125A only applies if the Regulator has given written notice to the person requiring the evidence and the notice complies with S125A(2).
 2. The annual electricity generation return is not given under S 125A but under S 20 of the Act.
 3. There is no provision in the Act deeming the return to be given under S 125A for the purposes of S 125E or otherwise.
 4. While the form for the annual electricity generation return for 2012, states "I acknowledge that penalties can apply for providing misleading information under Section 125E of the *Renewable Energy (Electricity) Act 2000*", in terms of the provisions of the Act, the statement has no relevance to the information provided in the return.
 5. If the Regulator issues a valid notice under S 125A to the authorised representative who signs the return on behalf of the corporate nominated person for the Windy Hill Power Station, requiring the representative to give the

same information as in the return, then S 125E may have some relevance.

d. S 136.1(1) and (4) of the Cwth Criminal Code creates an offence:-

i. With the following relevant elements:-

1. A person is guilty of an offence if:

- a. the person makes a statement in a document;
and
- b. the person does so knowingly or recklessly that the statement:
 - i. is false or misleading; or
 - ii. omits any matter or thing without which the statement is misleading; and
- c. the statement is made in, or in connection with an application or claim for a benefit; and
- d. the statement is made in compliance or purported compliance with a law of the Commonwealth.

ii. As the electricity generation return is not an application or claim for a benefit, it is unlikely that this offence is relevant to either the authorised person or the nominated person making the return.

e. S 137.1(1) of the Cwth Criminal Code creates an offence:-

i. With the following relevant elements:-

1. A person is guilty of an offence if:

- a. the person gives information to the Regulator;
and
- b. the person does so knowing that the statement:
 - i. is false or misleading; or
 - ii. omits any matter or thing without which the statement is misleading; and
- c. the information is given in compliance or purported compliance with a law of the Commonwealth.

ii. If the authorised person:-

- 1. signs the return with the question "Was there a breach of a permit or conviction of an offence under any Commonwealth, State, Territory, or local Government law related to the operation of the power station in 2012?" answered in the negative; and
- 2. with the certification that the information provided in the return is a true and accurate representation of the facts; and

3. knowing that those statements in the return are incorrect which the authorised person should know, if the chronology set out above is correct;
4. both the authorised person and the company WHWF PL will be liable for the offence:-
 - a. if under S 12.3 of the Commonwealth Criminal Code, knowledge of the authorised person is imputed to the corporate nominated person;
 - b. the misleading does not have to be material.

10. Clean Energy Regulator's power of investigation

- a. The facts needing further investigation are:-
 - i. Identify and obtain a full copy of any Environmental Management Plan (EMP) (including but without limitation any noise monitoring plan) prepared to satisfy the condition 35 of the Final Negotiated Decision Notice issued by the Herberton Shire Council in respect of the Windy Hill Wind Farm on or about 20 September 1999 and approved under that notice by the Manager, Engineering Services under that condition;
 - ii. Identify and obtain a full copy of such approval by the Manager, Engineering Services under that condition;
 - iii. Did the EMP include a noise monitoring plan? This information is in the peculiar knowledge of WHWF PL and WHWF PL should be able to provide a full copy of the EMP including any noise monitoring plan, quickly;
 - iv. If so:-
 1. did that plan meet the requirements of the conditions for it in the Development Approval as listed in paragraph 8.c.i.11 above? Once the noise monitoring plan is identified and obtained, the question can be quickly answered. If the EMP does not meet those requirements, it is not a valid EMP even if it was approved by the Manager, Engineering Services. The power to approve the EMP is delegated to the Manager, Engineering Services by the Development Approval and the Manager can approve only an EMP that meets the requirements of the Development Approval. The EMP, as approved, may contain additional or clarifying material/requirements agreed to by WHWF PL but it cannot contain less than that required by the Development Approval and still be valid as satisfying the conditions of that approval;
 2. If the EMP met those requirements, was the EMP with any noise monitoring plan included, approved by the Manager, Engineering Services as required by Condition 35 of the Development Approval? This information is in

the peculiar knowledge of WHWF PL and WHWF PL should be able to provide evidence of this approval quickly;

3. What monitoring has been carried out? This information is in the peculiar knowledge of WHWF PL and WHWF PL should be able to provide evidence of and the data collected and analysis of the results of the monitoring quickly;
 4. Has the monitoring been carried out in accordance with the terms of the conditions of the Development Approval? This information is in the peculiar knowledge or control of WHWF PL and WHWF PL should be able to provide evidence of the methodology used quickly. Independent peer review will be needed to determine the reliability of any information provided by WHWF PL in relation to this methodology;
 5. If so, do the results of that monitoring establish that WHWF PL has contravened the conditions of the Development Approval, in the ways identified as potential under this paper or otherwise? Independent peer review will be needed to determine the reliability of any information provided by WHWF PL in relation to data and analysis of the results;
 - v. If not, or WHWF PL is unable or unwilling to provide the above information, there is reasonable grounds to believe that there has been a contravention of the Development Approval conditions.
 - vi. Has WHWF PL's annual generation return been lodged under the Act with the declaration certifying "that the information provided in this form is a true and accurate representation of the facts" and with the question "Was there a breach of a permit or conviction of an offence under any Commonwealth, State, Territory, or local Government law related to the operation of the power station in 2012?" answered in the negative? This information is peculiarly within the knowledge of the Regulator.
- b. SECT 125A gives the **Regulator power to obtain information and documents** in the following terms:-

(1) This section applies to a person if the Regulator has reason to believe that the person:

(a) has information or a document that is relevant to the operation of this Act;
or

(b) is capable of giving evidence which the Regulator has reason to believe is relevant to the operation of this Act.

(2) The Regulator may, by written notice given to the person, require the person:

(a) to give to the Regulator, within the period and in the manner and form specified in the notice, any such information; or

(b) to produce to the Regulator, within the period and in the manner specified in the notice, any such documents; or

(c) if the person is an individual--to appear before the Regulator at a time and place specified in the notice to give any such evidence, either orally or in writing, and produce any such documents; or

(d) if the person is a body corporate--to cause a competent officer of the body to appear before the Regulator at a time and place specified in the notice to give any such evidence, either orally or in writing, and produce any such documents.

(3) A notice under subsection (2) must set out the effect of:

(a) subsection (4); and

(b) section 125E; and

(c) sections 137.1 and 137.2 of the *Criminal Code* .

Note: Sections 137.1 and 137.2 of the *Criminal Code* create offences for giving false or misleading information or documents.

(4) A person commits an offence if:

(a) the person is given a notice under this section; and

(b) the person fails to comply with the notice.

Penalty for contravention of this subsection: 20 penalty units.

c. The Regulator should investigate the possible contraventions referred to in this paper by, among other things, issuing a written notice complying with that section 125A to WHWF PL requiring WHWF PL to provide among other things, at least:-

- i. a full copy of any Environmental Management Plan (EMP) (including but without limitation any noise monitoring plan) prepared to satisfy the condition 35 of the Final Negotiated Decision Notice issued by the Herberton Shire Council in respect of the Windy Hill Wind Farm on or about 20 September

- 1999 and approved under that notice by the Manager,
Engineering Services under that condition;
- ii. a full copy of such approval by the Manager, Engineering
Services under that condition;
 - iii. details of all monitoring carried out in relation to Windy Hill Wind
Farm and by whom and on whose instructions such monitoring
was carried out;
 - iv. In relation to any monitoring carried out, the written notice under
S 125A should specify that WHWF PL is required to provide all
available information to enable an acoustician to:-
 1. analyse each item of the data obtained during such
monitoring and compare same to each noise level criteria
applicable at the relevant time under that negotiated
decision notice; and
 2. peer review each analysis of that data;including but without limitation:-
 3. any relevant attenuation;
 4. in relation to each item of data (whether taken for the
purposes of comparison to a noise level criteria or
attenuation):-
 - a. a full definition of each acoustic descriptor used in
relation to (including but without limitation in
recording and analysing) the data;
 - b. the methodologies used to collect the data and
identify, quantify and filter any background noise;
 - c. a comparison of those methodologies against the
standard followed including any deviations
therefrom;
 - d. the type, calibration, special characteristics and
location (including distance from nearest walls,
floors and ceilings of relevant sensitive receptors)
of each device used to collect the data;
 - e. the location of any relevant sensitive receptor and
whether or not, at the corresponding time, the
windows in any dwelling that is a relevant sensitive
receptor were opened;
 - f. the corresponding:-
 - i. date;
 - ii. times of day;
 - iii. sampling rate(s);
 - iv. wind speed and direction;
 - v. how and where the wind speed and
direction were measured; and
 - vi. meteorological monitoring locations;

g. each corresponding noise criteria for noise levels under:-

- i. Condition 6; and
- ii. Condition 36;

of the Final Negotiated Decision Notice issued by the Herberton Shire Council for WHWF and

- iii. the Environmental Management Plan, if any, approved by the Manager Engineering Services at the Herberton Shire Council under the Final Negotiated Decision Notice;
- h. the corresponding background noise and type(s) of background noise and how the background noise was measured;
- i. the corresponding data analysis procedure used for wind farm noise levels;
- j. the corresponding amplitude modulation special audible characteristics identified;
- k. a comparison of those procedures against the standard followed including any deviations therefrom;
- l. the regression coefficients used in the analysis and the justification for using same;
- m. the polynomial regression used in the analysis and the justification for using same;
- n. any corresponding special audible characteristics (including tonality) identified and any penalties applied to the analysis of the data for such characteristics;

11. Clean Energy Regulator Policy on Suspension

- a. The Clean Energy Regulator is responsible for enforcing the Act.
- b. To assist it in this role, the Clean Energy Regulator has adopted a Compliance Education and Enforcement Policy (the "Enforcement Policy").
- c. Under the Enforcement Policy, the Regulator states that
 - i. "Suspected contraventions of the climate change laws administered by the Regulator will be assessed to determine the appropriate response".
 - ii. "While all suspected contraventions will be carefully considered, the Regulator will exercise its discretion in determining the type of response it will employ to address a contravention and resolve matters, including whether to investigate further."

- iii. "For serious or continuing contraventions, corrective action will be used that may include exercise of suspension and revocation powers."
 - iv. "In determining appropriate responses to non-compliance, the Regulator will use a risk-based approach that takes into account participants' behaviours and motivations. The continuum below shows these behaviours and motivations."
 - v. For "Deliberate non-compliance" and "Criminal intent or fraud", the Clean Energy Regulator's response will be "Enforce the Law".
- d. If the chronology is correct, deliberate non-compliance is clearly evidenced by:-
- i. WHWF PL as the operator has been aware of non-compliance since at least 2007 when \$4,000 was offered to Colin Walkden for attenuation of his house based upon monitoring in 2007.
 - ii. WHWF PL has always been the operator of the WHWF and was the operator in 2007 with that knowledge and despite that knowledge, has continued to operate it.
 - iii. The complaints listed in the Chronology, Council's notice to show cause, Council's resolution to commence legal proceedings, an agreement by WHWF PL (following a court hearing) for monitoring to be carried out all after the operator was aware from 2007 monitoring that there was non-compliance.
 - iv. The failure of the operator to take action to comply or even shut down turbines 8 to 10 as recommended by Dr Bob Thorne in 2012 and as resolved by Council on 1 August 2012.
 - v. Unreasonable delays in carrying out the court ordered monitoring between November 2012 and May 2013.
 - vi. The delays (of at least 6 years) in carrying out and providing to the TRC, monitoring results that show the wind farm is compliant support the contentions that the WHWF PL:-
 - 1. is unable to operate WHWF in compliance with the Development Approval;
 - 2. has unreasonably prolonged the life of the WHWF;
 - 3. has forced the TRC to take every step to enforce the conditions of the Development Approval – notice to show cause, peer review of monitoring and court proceedings;
 - 4. has extended the period during which the WHWF is able to derive the subsidies under the Statutory Market.
 - vii. If the stated contention is correct, the motive of WHWF PL for such prolongation must be to continue receiving the subsidies under the Statutory Market scheme for as long as possible i.e. until its accreditation is suspended.

12. Conclusion

- a. Accordingly, the Regulator should comply with its Enforcement Policy and investigate the facts applicable to the Windy Hill Power Station and if the Chronology is found to be correct, the Regulator should suspend the accreditation of the WHWF as a power station.