

**Submission
No 43**

INQUIRY INTO RURAL WIND FARMS

Name: Mr Alan Gillespie-Jones

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The Director
General Purpose Standing Committee No. 5
Parliament House
Macquarie Street
Sydney NSW 2000

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Rural Wind Farms (Inquiry)

I practised as a solicitor for 37 years, principally in ACT and NSW, and 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 enquiry. I have a particular interest in seeking to ensure that owners of rural properties affected by wind farms are treated justly. I believe that such owners are not now receiving fair treatment.

Please accept the following submission concerning wind farms in Australia in 2009.

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. In view of the considerable government incentives to wind farm 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 invariably owned by foreign companies or their subsidiaries, all net profits from their operation are usually received by foreign interests, which is again not in Australia's best interests. In view of the considerable government incentives to wind farm developers, in my opinion, the operators of wind farms should be controlled by Australian interests to an extent of at least 50%.

3. No National or State Plan

- 3.1 There is no national or NSW plan setting out why wind farms 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 farms 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. Imagine how this support would evaporate if wind towers were to be constructed at North Head, South Head, Sydney Harbour foreshores and the NSW coastline. There would be public outrage by persons resident in Sydney 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 farms will be sited. Hence, there are no wind farms
 - 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 farms are unfairly sited in other rural areas which are considered expedient.
- 3.5 If wind farms were genuinely 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 For the purpose of this submission, I have assumed that it will not be possible to have a national code regulating the wind power industry and that it will be necessary to regulate the industry in NSW by NSW legislation.

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 farm proposals in NSW are now targeting rural areas on the Tablelands. Most rural land in NSW has been 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 farms are frequently multi-national companies, or their subsidiaries, aided and encouraged by the Commonwealth and State governments. Further, the cost of litigating wind tower disputes is immense and beyond the reach of most farmers, or any other person for that matter. In short, there is a massive inequality of bargaining power between wind farm developers and landowners.

I will refer later in this submission to the litigation concerning the Taralga wind farm. 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 carefully 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 a wind farm. The residents had, according to the speech, raised about \$100,000.00 to challenge the proposed wind farm 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 as they are 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.

5. Arrangements with Landowners

Having decided on a potential site, wind farm companies attempt to negotiate an agreement with landowners (invariably 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 20 turbines on land at \$8,000.00 per annum for each turbine would yield \$160,000.00 per annum or a total sum of \$3,200,000.00 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 commonly solicitors advise farmers not to sign agreements with developers, but the advice is often not followed, no doubt having regard to the financial vulnerability of farmers. In view of the considerable financial incentives given to the operators of wind farms, it is my opinion that all financial arrangements and agreements between wind farm developers and landowners should be publicly disclosed.

6. Disadvantages to Landowners Entering into Wind Farm 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 farms
- 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 farm 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 will 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 farm 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 farm companies frequently do not provide security for their obligations. It is also my understanding that if the wind farm company

- were not to remove the turbines, the farmer may be required to do so, and if this were to occur it would be likely that the farm would be lost and the farmer bankrupted.
- 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.

7. Disadvantages to landowners near wind farms.

The largely unplanned introduction of wind farms 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 farms are not compensated for the loss of value to their land caused by the wind farm. 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 adjoining a wind farm. The loss of value of a farm nearby a wind farm can be determined by a valuer, and in Australia the loss of value determined in this way 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 farms 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 farms overseas.

The wind farm industry denies that wind farms cause any loss of value of nearby properties. Valuers and the Land and Environment Court think otherwise. Wind farm 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 a wind farm is paid not only to the landowner on whose land the turbines are erected (called "host landowner"), but also to other landowners who can demonstrate by valuation evidence that the wind farm has caused a reduction in value of their properties.

The dilemma for a farmer faced with a wind farm proposal 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 when the wind farm proceeds nearby, or to do a deal with the developer and run the risk of losing his farm altogether, or of being bankrupted, if proper security cannot be obtained for the obligations of the wind farm owner, there is default by the wind farm operator and the farmer is required to remove wind turbines.

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 135 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 energy sources (which will cause no significant damage to the Australian landscape). If solar 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 wind turbines are highly controversial, socially divisive, and of dubious environmental value. The damage caused by wind farms far outweighs their energy benefits. So unpopular are wind farms in the United Kingdom, they are now constructed on platforms at sea.

9. Wind Farm 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 farms, 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. I invite the committee to read the publication Heaven and Earth by Dr Ian Plimer and the article in the Sydney Morning Herald, News Review page 7 of August 15-16, 2009 by Miranda Devine, wherein information is given concerning the government’s chief science advisor and comments are made as to the confected sense of urgency in the climate science industry. 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 and 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 farms 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 farm development, 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 was a wind farm 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 farm.

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 wind farm development 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.

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, how can one disguise a wind tower of 135 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 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 farms as being another case of "country bashing" by city interests for the benefit of those interests.

11. Proposed Reforms

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

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 then 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 farm developers, so that financial arrangements are a matter of public record.
- A standard form of agreement between wind farm 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 to be settled by the NSW Law Society.
- A requirement that proper security be provided by the developer to the NSW 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.
- A requirement that the authority receiving the security apply it to cause the removal of structures at the appropriate lawful time.
- A statement that the landowner at no time be obliged to remove the structures.
- A prohibition upon the making of gifts by wind farm developers to political parties, government, councils or others.

Yours faithfully,

Alan Gillespie-Jones