Submission No 112

INQUIRY INTO NEW SOUTH WALES PLANNING FRAMEWORK

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SUBMISSION TO STATE DEVELOPMENT COMMITTEE

INQUIRY INTO NSW STATE PLANNING FRAMEWORK

by John Formby

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I apologise for the lateness of this submission, but I was not aware of the Inquiry until recently.

The basis of this submission is that defects in the State's planning and in particular its environmental assessment procedures can be illustrated by the approval processes for the current proliferation of wind turbine developments on the Southern Tablelands.

I have had long experience with environmental impact assessment. I was responsible for the first major EIA produced in South Australia. My PhD at the Centre for Resource and Environmental Studies, ANU and several years subsequent research publications centred on EIA policy. I have also reviewed many environmental impact statements, including the Gullen Range Wind Farm EA (2008) proposed for the NSW Southern Tablelands.

The Gullen Range EA is an example of how far the quality of EIA has deteriorated under the present NSW system. It is replete with public relations material, misleading and inadequate information and poor methodologies. This can be demonstrated by reviews of this EA by me and others available from the Department of Planning.

I am Chairman of the Friends of Crookwell, a community-based organisation in the Upper Lachlan Shire. I do not live close to an existing or proposed wind turbine site. My comments are relevant mainly to terms of reference 1(a) 1(b) and 1(d).

Problems with Cumulative Impacts

Nothing in the NSW planning framework deals with the cumulative impacts of multiple large-scale developments such as wind 'farms'. They override the land use planning framework because they are large-scale industrial developments, but not treated as such, spread across rural residential areas. The Gullen Range Windfarm alone is more than 30 kms long, will have 45 kilometres of access roads and will dominate the landscape for hundreds of square kilometres. At present The Upper Lachlan Shire encompasses about 300 wind turbines planned, under construction or completed, the highest concentration in NSW.

The EIA requirement deals with individual developments, not cumulative impacts. This failure to deal with cumulative impacts is particularly important in the Upper Lachlan Shire, because wind turbine development conflicts with a fundamental driver of growth in the Shire, the immigration of 'tree changers' from metropolitan areas. Those seeking a more tranquil rural lifestyle do not want to live near wind turbines.

The expansion of coal mining in the Hunter Region is another example of a poorly controlled suite of cumulative impacts.

Much more thought needs to be given as to how to incorporate review and control mechanisms for cumulative impacts into the planning process. For a start, every additional large proposed development such as a wind farm in a region where there are other such developments nearby should be required to examine its cumulative impacts when added to those already approved or constructed.

Commonwealth and NSW EIA legislation

The Commonwealth's environmental impact assessment legislation relies largely on the somewhat outmoded concept in practice of ministerial responsibility, leaving most decisions ultimately to the discretion of the relevant Minister. This has resulted in a fairly weak system of assessment with no legal recourse provided to aggrieved parties about the impact of proposals or the content of EIAs. Consequently it has had only minor effectiveness in terms of improving environmental outcomes.

The NSW environmental planning legislation (the Act) introduced in 1979 was adventurous in the Australian context in allowing legal recourse to the Land and Environment Court ('the Court'),and in its attempt to integrate planning and EIA legislation. It was expected that the prospect of review by the Court would improve the quality of EIAs and related decisions However, NSW governments over the years have made a series of amendments to return decisionmaking power to the relevant Minister, away from local governments and the Court. Underlying such changes has been the desire to expedite development.

It would be unfortunate if the NSW system is revised further towards something resembling the Commonwealth's discretionary approach to EIA.

Problems with Part 3A

More recent amendments to the Act include Part 3A and the 'critical infrastructure' provisions. These amendments generally favour developers. For example, the Upper Lachlan Shire Council has a Windfarm Development Control Plan, the requirements of which are being repeatedly overridden by wind turbine developers because decisions are no longer in Council's hands. One such Council requirement is that turbines should be two kms from the nearest dwelling: many are now planned to be located well within that limit to as close as 600 metres. This is overwhelmingly close for a structure up to 147 metres high at the blade tip.

Part 3A directs the Director-General to set out the requirements for any EA. This might appear to be a positive step in that the DG can address the specific nature of the proposal. But the problem is that the DG appears to be no longer bound by the Environmental Planning and Assessment Regulation 2000 Schedule 2. This outlines standard requirements for the content of an EIA similar to those required in most other jurisdictions in Australia and overseas. An example is the requirement under Schedule 2 for an analysis of 'any feasible alternatives (my emphasis) to the carrying out of the development or activity'. Because they do not require a review of alternatives, the DG's requirements give the appearance of assuming that the project will proceed. The Gullen Range EA makes no comparisons with existing or developing alternatives such as gas-fired or solar electricity, 'clean' coal or energy conservation, because this was not required. Instead, it repeatedly makes invalid comparisons with the worst-case alternative, coal-fired power.

The Gullen Range EA also fails to consider, except in a superficial way, alternative sites for the proposal: again it is not clearly required to do so by the DG.

Part 3A of the Act should either be abolished or revised so that there are strict and narrow criteria for the circumstances under which a Minister may call in a development. Whether or not these criteria apply should be contestable in the Court.

Any requirements for an EA by the Director General should be regarded as supplementary to the requirements of Regulation 2000 Schedule 2. All EIAs or EAs should be required to conform to Schedule 2.

Problems with the 'Critical Infrastructure' provision
Under Part 3A, appeal to the Court is still possible on the merits of a project as set out in the EA. However, if a project is declared by the Minister to be 'critical infrastructure', an appeal appears to be possible only on procedural grounds. This means that however incompetent and deficient the EA, no legal appeal is possible against the project proceeding or against any aspect of it, if the required procedures have been followed.

Even the most valid public comments on the EA can be completely ignored by the developer, as can comments made at 'community consultations', unless these are incorporated in any modifications required by the Minister on Departmental advice.

In the case of wind turbine developments, critical infrastructure has been set at 250 MW, or 84 turbines each of 3 MW capacity. Given wind variability, electricity production will be about one-third of that. This is a tiny proportion of the State's electricity needs and cannot possibly be justified as 'critical infrastructure' so vital as to be pushed through without review of its merits by the Courts.

Worse, the NSW premier has said that the limit for the 'critical infrastructure' provision to apply to wind farms will be reduced to 30Mw, or 10-12 wind turbines.

The critical infrastructure provisions in the Act should be abolished. They are intended to avoid review of the merits of proposals by the Court. This is undesirable given the demonstrated ineffectiveness of the EIA process without such review. One solution may lie in a thorough revision of the procedures of the Court to reduce delays in the legal process.

Need for 'Draft' and 'Final' EIA
In some jurisdictions, the developer is required to prepare a final EIA taking into account public comments on the draft EIA, but in NSW only one document is required. This means that those who have made comments have no way of knowing if the developer has incorporated them into the project until it is built.

A major benefit of a requirement to produce a draft and final EIA would be to greatly reduce the amount of public relations material and incorrect, inadequate and misleading information included in EIAs. At present the authors of an EIA know that they will not have to change anything they have written as a result of public or Departmental comment.

A further benefit would be that those making public comment will be able to see to what extent their comments have been incorporated. At present making public comment on an EIA is like dropping something into a black hole, with no way of knowing the outcome.

'Draft' and *'Final' EIAs should be required.*

Need for 60 day public comment period on major EIAs
A further serious difficulty is that the time for public comment is limited to 30 days. The Gullen Range Wind Farm EA is over 1000 pages long including Attachments. It demonstrates another common failing of such statements, in that the main report glosses over or understates many of the impacts as set out in the Attachments, and these are further minimised in the Summary. It is therefore necessary to read all 1000 plus pages. Most members of the public reviewing the EA on a part-time basis, and this cannot be done in 30 days. A 60-day period for public comment on 3A projects should be mandatory if Part 3A is retained, or for major projects.

Ineffectiveness of Department of Planning involvement in EIA
The Department has shown itself to be ineffective in ensuring that the EIA process and subsequent development of wind farms is carried out with adequate regard for environmental concerns. Examples are the Cullerin Range and Crookwell 2 windfarms, where turbines have been allowed to be sited well inside the two kilometre separation required by the Upper Lachlan Shire, which has no control over these developments. Departmental staff provide no clear answers as to why this has been allowed.

When contacted, the responsible departmental officers are often unable to answer basic questions. For example, numerous enquiries have been made recently of the Department as to what constitutes a significant start to construction, given that the Crookwell 2 developers must make a significant start before mid-July. If the Departmental Officers cannot say what constitutes a significant start to construction, how can developers or the affected community be expected to know?

Departmental officers have clearly been affected by the government's desire for windfarm developments to proceed.

Term of Reference 1(b). Implications of COAG's reform agenda for planning in NSW
Time does not allow a full review of the Development Assessment Forum's proposed six development assessment pathways. But it should be noted that the Forum consists of developers, the planning professions (who often work for developers) and the three tiers of government (including more planners). This does not include environmental groups, other community groups, or relevant academics. One would expect a pro-development bias in the Forum's recommendations, as has occurred.

For example, even the highest level of assessment '6) *impact assess'* requires only a decision by local government or the Minister based on 'advice by an expert panel' after assessment against 'complex technical criteria'. Who assesses the validity of the complex technical criteria or of the expert advice? Where is public review? Where is the possibility of legal appeal? Where is a review of alternatives including the consequences of not proceeding with the project? Where is a review of regional and cumulative impacts? Only 'local' impacts are mentioned. Why are criteria necessarily 'technical'. Impact assessment should include social impact, which is not centrally a technical matter.

The Forum's recommendations should not be taken seriously as a basis for planning reform in NSW.