Submission
No 113

INQUIRY INTO NEW SOUTH WALES PLANNING FRAMEWORK

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The Director
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Submission to the Standing Committee on State Development: Inquiry into the NSW Planning Framework

I apologize for the lateness of this submission, after the period for submissions has closed. I have only recently learned of this inquiry.

Parkesbourne/Mummel Landscape Guardians Inc. (PMLG) is a community group of residents living in Parkesbourne, Mummel and other districts around Goulburn, NSW. It was formed in 2006 to act to protect the landscape beauty of the area, and to protect the quality of life and general amenity of its members, and of the wider community of Parkesbourne, Mummel and adjacent districts.

PMLG is especially concerned about current plans for large-scale wind farm development around Goulburn. It opposes the Gullen Range Wind Farm proposal, and has put a case concerning this proposal into the Land and Environment Court (due to be heard in August 2009). [At the time of completion of this submission the Gullen Range Wind Farm has been approved. It was approved on 26 June 2009.]

The criticisms below of the NSW Planning framework are from the standpoint of local communities faced with the prospect of large-scale developments in their area. In general, we feel that the existing planning framework in NSW gives too much favour to development companies and developments, and tends to marginalize, or ignore the needs and interests of local communities.

This submission bears upon Terms of reference 1(a) and 1(d).

Objections to the Current Form of the Planning Process

1. When a development proposal goes on public exhibition, the general public has only 30 days to examine the proposal, understand it and its ramifications, and to write a submission on it. This period of time is very much too short. A development application may be 1000 pages long, and contain specialist studies based on science and engineering. People who work for their living, and/or who have families to look after, cannot possibly make a full examination and criticism of such a document in 30 days. It is difficult to resist the impression that the 30 day limit is designed to minimize the input of the general public into the planning process. It must surely tend to function in this way. The period for submissions should be extended to 90 days.

2. Part 3A of the planning legislation removes planning authority for 'state significant' proposals from the local council to the State Government. This removes from the local council the power to protect the interests of its constituents, and tends to reduce the ability of local residents to have an input into the planning process. It appears as though this is precisely the function of Part 3A.

   What is at stake here can be illustrated from the Gullen Range Wind Farm proposal. If the Upper Lachlan Shire Council were the planning authority for this proposal, the Council's Development Control Plan would insist on a buffer zone of 2 kilometres (or 15 times the tip height of the turbine used, whichever is greater). The developer would be obliged to agree to purchase (with the owner's consent) any property falling inside the buffer zone. This being so, the proposal for this wind farm would almost certainly never have been made, as there are 32 non-involved residences within 1.5 k of the turbines, and about 60 non-involved residences within 2 k. To purchase these properties would require millions of dollars, which would be added to the cost of the wind farm.

   It is hard to resist the impression that removing planning authority from the local council is designed to prevent the council from protecting the interests of local residents, and to promote a development that the developers would not otherwise have felt to be in their own self interest to promote. But this development can only be promoted at the expense of the local community, whose interests must be sacrificed. While it may be legitimate for a state government to facilitate development projects by tax cuts, or subsidies, it ought not to be considered legitimate to sacrifice the interests of local residents, and to undermine local democracy as means for this facilitation. Objectively, this way of doing things simply promotes the private interests of developers, and sacrifices those of local residents. I will return to this topic below.

   Part 3A should be repealed, and planning authority returned to local councils. If regional and state-wide interests need to be considered, then forums should be established in which the balance of these interests may be negotiated by the local council and regional/state bodies. To vest all power in the state government is simply draconian.

3. In February 2008 ~~2005~~ the planning category of critical infrastructure was introduced. If a proposal is approved by the Minister for Planning as critical infrastructure, then the general public loses all rights of appeal to the Land and Environment Court. There may be no appeals whatever on grounds of merit. Appeals on the ground of process may only be made with the consent of the Minister. This, again, is draconian, and appears to be designed to minimize any democratic input into such proposals, and to abolish the possibility – desirable in itself – of testing in court proposals that are contentious or even dangerous.

   In February 2009 Premier Nathan Rees announced that the threshold for critical infrastructure status for renewable energy power stations would be reduced from 250 MW to 30 MW. This amendment has not yet been gazetted. When it is gazetted, it will radically change the conditions of wind farm development in NSW, to the detriment of local communities. It is possible to construct a 30 MW wind farm from 10 x 3.0 MW turbines, or from 15 x 2.0 MW turbines. This means that in future virtually all wind farm proposals will qualify as critical infrastructure, so that local communities on the Great Dividing Range will lose all rights of appealing such developments to the Land and Environment Court. It appears as if the current state government is intent on depriving the citizens of New South Wales of recourse to a court that was established to serve their interests, and to substitute government by administrative fiat. This is a retrograde change to the legal structure of NSW.

   A factsheet on the website of the Department of Planning states that the provision for critical infrastructure is "rarely used". If and when the reduction of the threshold for critical infrastructure is gazetted, then virtually all renewable energy power stations, and in particular all wind farms, will qualify as critical infrastructure. The provision will no longer be rarely used. It will be used for virtually every proposal. From being the exception, it will become the rule. This is no doubt the purpose of the current state government. However, this will deprive all citizens of NSW of the right of appeal to the Land and Environment Court. It is wrong to attempt to solve the problem of climate change by abolishing the rights of citizens. It ought not to be beyond the ingenuity of governments, state and local, and of citizens, to find ways of alleviating climate change, while maximising rather than minimising the enjoyment of individual and collective liberties. The current state government has not attempted to demonstrate that this deprivation of rights is necessary to coping with the global environmental crisis. This is not even discussed. It is merely taken for granted. Parliament's inquiry into the planning framework is an opportunity for this topic to be explicitly discussed, so that the rights of citizens, and the interests of local communities, wherever developments are proposed, may be protected.

   The category of critical infrastructure is unnecessary to the planning process in NSW. It only serves to promote the interests of developers, and to enhance the autocratic powers of the Minister. It should be abolished.

4. It should be noted that the three features of the planning process, discussed above, viz. the 30 day limit for submissions, Part 3A, and the category of critical infrastructure

infringe upon the rights, and damage the interests of *all* citizens of NSW, both urban and rural. It is not merely rural residents, threatened by wind farm proposals, whose interests are at stake.

5. The same three features of the current planning process tend to confer upon the Minister for Planning autocratic powers. This ought not to be accepted in any state that professes to be a liberal democracy. First, under the Westminster System of Government, since the seventeenth century, it has been generally assumed that the defence of liberties and the enjoyment of property require a system of checks and balances within the constitution, to prevent or reduce abuses of power. One of these checks has been the right to test government and administrative decisions in court. The planning process in NSW tends to reduce or negate this right. Second, democracy demands that all citizens have the right to participate in the political process, at all levels of government. The planning process in NSW undermines democracy by conferring autocratic, or semi-autocratic powers upon the Minister, and by abolishing powers of local government.

   These political developments are retrograde, and deserve to be reversed. The planning framework of NSW requires reform, to restore the powers of local councils, and to protect the rights and interests of citizens, and of local communities.

Flaws in the Assessment Process

6. After a developer has submitted an initial project application to the Department of Planning, the Department will issue Director-General's Requirements (DGR), and in accordance with these the developer must submit an Environmental Assessment. This is simply the final, complete development application, but it is supposed to be sensitive to environmental concerns, in relation to both the human and natural environment.

   There is a problem even at this stage of the planning process. It is that the so-called Environmental Assessment is not in any real sense an 'assessment' of the proposal. It is rather the proposal itself. The developer will hire an environmental service company to design the proposal in detail, and to provide arguments in support of the proposal. The environmental service company writes all this up, and calls the result an Environmental Assessment. But the environmental service company is not assessing the proposal. It is creating it. The so-called Environmental Assessment is a partisan document, produced on behalf of the developer, and paid for by the developer. The environmental service company does not carry out the function of a judge, but rather that of an advocate.

   The developer of course has a right to employ another company to construct its proposal. Nonetheless, the Environmental Assessment so produced will be partisan on behalf of the developer. It will not be an impartial, critical examination of the proposal. The Environmental Assessment, therefore, must be examined for error, bias, and failure to comply with relevant legislation, and this task devolves upon the Department of Planning. This raises the question of the Department's capacity and willingness to assess

the proposal according to any very strict criteria, and whether in any controversial or grey areas the Department may not incline towards the wishes of the developer and against the concerns of the local community, under pressure from the government of the day. There are, unfortunately, grounds for thinking that this is so.

7. Before the developer submits the final Environmental Assessment document to the Department, it will submit drafts to the Department. The Department's role, then, is to point out inadequacies in the drafts, and to help the developer to rectify these. E-mails back and forth, face-to-face meetings, and the resubmission of drafts may go on for several months. This process will continue until the departmental officials consider that the Environmental Assessment is in sufficiently presentable form to go on public exhibition. What all this amounts to is that the Department assists the developer to construct the proposal. And as some Environmental Assessments are of very poor quality, the Department can find itself giving a large amount of help to the developer.

   This situation gives rise to several grounds of concern. First, in general, there is a potential conflict of interest between the Department's two roles of (i) helping to construct the proposal ('facilitating a development'), and (ii) judging the proposal. One would normally expect a helper to be sympathetic to the project that he is helping, whereas a judge is supposed to be impartial. After spending several months getting a proposal into shape, departmental officials can hardly be expected to have the same degree of detachment that they would have if their role were merely to examine the proposal and judge it. A parent may help a child to do its homework, but it would not be considered acceptable if the same parent were also the teacher who was going to mark the homework. The Department's role of judge of development proposals is compromised by the enormous *de facto* emphasis nowadays on the Department's role in facilitating developments.

   Second, there is uncertainty about the criteria used by the Department at both stages of the assessment, i.e. at the initial stage where the Department has to decide whether the Environmental Assessment is fit to go on public exhibition, and at the later stage where the Department gives its determination of the proposal, i.e. decides whether to approve, approve with conditions, or reject the proposal. There ought to be two different sets of criteria here, since, if there is only one set of criteria, an objection to a proposal on the basis of the criteria at the stage of determination ought to have been an objection to the proposal at the earlier stage of fitness for public exhibition, and so such a proposal should never have got beyond the earlier stage. In the case of the Gullen Range Wind Farm proposal, the Environmental Assessment contains graphs which chart noise levels of the 3.0 MW turbine at residences around the site (Attachments, vol. 2, Section 3.2 'Noise Assessment', Addendum 1.0). These graphs are supposed to present the worst case scenario for noise. But the graphs are partially indecipherable, because some of the lines depicting noise levels for individual houses are so close together as to be indistinguishable, and because on several of these graphs the same symbol has been given to more than one house. It is therefore impossible to make a clear and thorough identification of noise-affected houses. The failure here is lack of clarity of presentation.

One would think that the criterion of clarity of presentation would be relevant to the initial stage of assessment, where the Department has to decide whether the Environmental Assessment is in a fit state to go on public exhibition. But, if so, then the Gullen Range Environmental Assessment should have been held up at this stage, and not gone on public exhibition. But the point here is that if clarity of presentation is a criterion of the initial stage of assessment, it ought not to be also a criterion for the later stage of assessment, i.e. that of determination. And yet it appears that the Department has blurred the distinction between the needful two sets of criteria, and has reserved to itself the prerogative to apply the same criteria at both stages of the assessment. But if this is so – and it seems to be so – then the general public, and in particular local communities can have no confidence that the Department is following a clear and definite procedure in making its assessment. The general public remains ignorant of the criteria used by the Department, and whether the criteria are being followed in any logical way.

Third, and following on from the last point, there must be a concern that the Department may let standards slip during the assessment process, and not be as rigorous as is desirable during the assessment. The example above of the noise graphs in the Gullen Range Wind Farm proposal is a case in point. The inadequacy of the graphs ought to have prevented the Environmental Assessment from going on public exhibition. Public exhibition should have been delayed until the developer had provided the relevant information regarding noise levels in a clear form. But the Department allowed the Environmental Assessment to go on public exhibition, notwithstanding the deficiency. Moreover, this was not the only deficiency in the Environmental Assessment. The most powerful turbine proposed for the wind farm is the 3.3 MW turbine, and it is clear from the original report from the noise consultants that no tests whatever have been done on the 3.3 MW turbine (Attachments, vol. 2, Section 3.2 'Noise Assessment'). It is also the case that the Gullen Range Environmental Assessment claims to qualify for the status of critical infrastructure, which requires a minimum generating capacity of 250 MW, whereas the Environmental Assessment fails to specify the capacity of the turbine to be used for the wind farm. It declares that turbines from 1.5 to 3.3 MW are being considered. But since the maximum number of turbines is 84, only the 3.0 and 3.3 MW turbines would enable the wind farm to reach the threshold of 250 MW (84 x 3 = 252). Of the 24 different types of turbine under consideration by the developer 22 will not allow the wind farm to reach the threshold of critical infrastructure. This absurdity should not have been allowed to appear in the Environmental Assessment. The Department might have allowed this indefiniteness in the original project application, but ought to have insisted that the developer make up its mind in the Environmental Assessment what capacity the turbines for the proposal would have. It is hard to avoid the impression that the Department has relaxed standards of assessment for the Gullen Range proposal, partly because the Environmental Assessment is of such poor quality that to correct all its deficiencies would take too long, partly to suit the commercial convenience of the developer, and partly under pressure from a state government that has a policy of promoting wind farms.

Whatever the reasons of such sloppiness in procedure, it remains the case that there are grounds for fearing that the assessment procedure of the Department of Planning lacks transparency, is uncertain and unreliable, and may be biased to favour a development proposal against the interests of a local community, under the influence of the Department's knowledge of the wishes of the government of the day.

The only solution to this problem is to separate the functions of facilitating developments, and assessing developments. The helpmate cannot continue to be the judge. One method of separation would be for the developer to be entirely responsible for the construction of the proposal, without any help from the Department, and for the Department's role to be restricted to judging the proposal. If this is felt to be too radical, then the function of helping the developer construct the proposal should be carried out by a unit within the Department whose only function would be helping the developer. Another, separate unit within the Department would have the role of judging the proposal. Whichever way is preferred, the function of facilitating development (helping the developer) must be separated from the function of judging a development proposal. (The supervisor of a Ph.D. thesis cannot act as its examiner.) If the two functions are not kept separate, there must remain a concern that the integrity of the assessment process may be compromised. This would mean that any local community could not look to the Department for protection of its interests. This would be unjust. This unsatisfactory situation almost certainly exists already.

8. Even if departmental officials carry out their assessment with a perfect integrity that is perfectly conscious, there are still problems in the assessment process from the standpoint of local communities. These arise from the legal and political contexts of the assessment process.

   When a development proposal is being assessed by the Department, the officials can only make a strict criticism of the proposal where there are authoritative rules (backed by legislation) bearing on a topic, and where the authoritative rules present definite criteria. Where this is so, the departmental officials are compelled to apply the criteria. This is the case with noise. According to NSW law, the Department of Environment and Climate Change (DECC) decides on the framework within which noise impacts are to be assessed, for wind farm proposals. DECC has decided that the South Australian Noise Guidelines will be used in NSW to assess the noise impacts of wind farms. The Guidelines set a definite threshold for acceptable noise, which is 35 dbA, or 5 dbA above background noise (whichever is greater). The Guidelines thus enable the officials to find that one noise impact is acceptable, because it is beneath the threshold, and that another impact is unacceptable, because it is above the threshold. And the officials must apply these criteria.

   However, in the cases of the location of wind farms, or of visual impact, or of impact on land values, there are no authoritative rules that impose the use of definite criteria on the departmental officials. For example, the Gullen Range Wind Farm is proposed for a site in the Southern Tablelands, such that there 32 non-involved residences within 1.5

kilometres of a turbine, about 60 non-involved residences within 2 kilometres, and about 240 non-involved residences within 5 kilometres. PMLG feels that to locate a wind farm of such size (84 turbines; tip height of 125-135 metres) in the middle of what is a residential district is outrageous. And as I have already pointed out, this could only be proposed under Part 3A, which removes planning authority from the local council to the State Government. There are no authoritative rules that would enable departmental officials to find that any given wind farm proposal is appropriately or inappropriately located. Wind farm developers will propose to locate their wind farms close to a power line, in order to reduce their costs, regardless of whether there are few or many houses in the vicinity. As there are not many high-powered power lines crossing the Great Dividing Range, all the wind farm proposals for the next ten years will be clustered around the same few power lines. This will mean a few regions with a very high density of wind farms. This is the real meaning of Premier Nathan Rees's announcement of 5 "precincts" for wind farm development in NSW. If the 5 designated 'precincts' are covered with wind farms over the next ten years, imposing on local communities the burdens of these developments, it will be due to the absence of authoritative rules (backed by legislation) protecting local residents from inappropriately located developments. [The location of power lines is depicted on *The NSW Wind Atlas*, available from the Department of Water and Energy.]

The case is similar with visual impact and with the impact on land values. The DGR for the Gullen Range Wind Farm stipulates that an assessment for visual impact must be made for all existing and approved dwellings within 10 kilometres of the site. The Environmental Assessment has not made a single visual impact assessment on any individual property. But even if it had, there are no authoritative rules to define what is an acceptable visual impact, and what is not.

It is the same with the impact on land values. The DGR for the Gullen Range Wind Farm stipulates that a prediction must be made of the short-term and long-term impact on land values. The Environmental Assessment does not perform this task. But even if it had, there are no authoritative rules to define what is an acceptable impact, and what is not.

On the question of compensation for a fall in land value there is at least a precedent established by the Taralga wind farm case in the Land and Environment Court. Over two judgments (for the original case and the appeal) the Court found that the developer should purchase (with the owners' consent) five properties, all so badly impacted by the development that the Court considered the impacts unacceptable (Taralga Landscape Guardians Inc. v Minister for Planning and RES Southern Cross Pty Ltd [2007] NSWLEC 59; RES Southern Cross v Minister for Planning and Taralga Landscape Guardians Inc. [2008] NSWLEC 1333). However, to take advantage of this precedent a local community must be able to take a case to the Land and Environment Court. But, as we have seen, if a wind farm is approved as critical infrastructure, there is no right of appeal to the Court. Also, as we have seen, when Premier Rees's announcement concerning the reduction of the threshold for critical infrastructure from 250 MW to 30 MW for all renewable energy power stations is turned into law by being gazetted, then

virtually all wind farm proposals will qualify as critical infrastructure, and local communities will be unable to take any wind farm proposal to the Court. The precedent established by the Taralga case will therefore cease to provide any protection for local communities. This is tyrannical, and undermines the function of the Land and Environment Court.

The inevitable result of this absence of authoritative rules for those impacts of most concern to local residents (location, visual impact, impact on land values) is that the Department will simply ignore the case made by local communities in their submissions, no matter how well argued those submissions may be. No set of rules (backed by legislation) compels the Department to consider such concerns. By contrast, the Department is compelled to consider the impact of noise, and by strict criteria. Practically speaking, the only submissions that the Department will take notice of are those of other government agencies, such as DECC, and statutory bodies, such as the Sydney Catchment Authority or CASA. Legislation will compel the Department to take notice of these. But with the submissions of the general public, the Department will read them, and then ignore them.

This makes a mockery of the Director-General's Requirements insofar as these stipulate the consideration of visual impact and impact on land value. These specific requirements are nothing but a cruel joke. Nothing whatever depends on them. They give the false impression that the Department sees environmental concerns in these areas, but really it does not. No set of authoritative rules exists to allow it to distinguish acceptable from unacceptable impacts in these areas. A local community may be deluded into thinking that it has some protection in these areas, but it has not.

The absence of rules for specific impacts of concern to local communities reduces the submissions made by the general public to a merely formal exercise, of no substance or power. This is both an injury and an insult.

9. The factor of absence of authoritative rules on specific impacts now combines with the factor of government policy and its influence on departmental culture.

The government of the day will set policy for development in NSW. The government will naturally want the Department of Planning to implement its policy. In principle, this is no doubt right and proper. However, it is possible for government policy to be oppressive, or discriminatory.

In influencing the Department the government cannot require the Department to do anything illegal. Even if the government wants wind farms up and down the Great Dividing Range, it cannot order the Department to ignore legally backed rules concerning specific impacts, such as noise or water quality. However, where no legally backed rules exist for specific impacts, such as visual impact, the government's policy of promoting a certain kind of development, such as wind farms, will influence the Department to ignore

concerns expressed by the local community to be affected by the development. The Department will have no choice but to follow government policy.

Clearly, if local communities are to have any protection for their interests from inappropriately located or otherwise burdensome developments, then legislation to create enforceable rules concerning location and specific impacts is required. But such legislation presupposes agents able and willing to introduce and pass such legislation. Do such agents exist within the NSW Parliament? Whether they do or not, it would be appropriate for this Inquiry into the NSW Planning Framework to consider this issue, viz. what new legislation would be required to create enforceable rules necessary to protect the needs and interests of local communities faced with the prospect of living close to burdensome developments? Rules for noise impacts are not enough.

10. There is one other flaw in the assessment process that needs to be considered. It looks as though, in the case of wind farm proposals, the Department may have abandoned the category of rejecting a proposal, and considers that in the determination of a proposal there are only two options open to it, viz. outright approval and approval with conditions.

    If a proposal is approved with conditions, this is tantamount to the Department constructing the final form of the proposal. This collapses the distinction between facilitating a development and assessing it, between helping the developer and judging the proposal. This suggests that the category of rejecting a proposal has *de facto* been abolished.

    At the time of writing this section (2.7.09) there are 10 proposals concerning wind farms that have received determination from the Department, listed on the Department's website. (5 of these are for the farms themselves, and 5 for modifications or amendments). Of these 10 proposals none has been rejected; all have been approved. A rejection rate of 0% has to raise a suspicion. If the Department has decided in advance that no wind farm proposal will be rejected, and that all wind farm proposals will be approved or approved with conditions, then the assessment process no longer has any authenticity or integrity. It has no authenticity because it is not a genuine process of assessment. It can have no integrity, because the decision not to reject a proposal has been taken in advance of the proposal being examined. This means that the assessment process must be biased in favour of the developers.

    If this is so, then it is quite unacceptable. The assessment process must be a genuine assessment, and must be rigorous and impartial. If this is not so, then the general public, and in particular local communities faced with the burdens of living close to developments can expect no protection of their interests from the Department of Planning.

    If a development application is so poor in quality that it deserves to be rejected, then it should be rejected. It ought not to be the role of the Department of Planning to help a deficient development proposal to scrape through the assessment process, as if a weak

teacher were helping a poor student to scrape a bare Pass. Developers that are not competent enough to submit, unaided, an adequate development proposal should be rejected, and should exit the business.

Regional Planning Panels

11. The planning framework in NSW is now complicated by the existence of Regional Planning Panels, commencing on 1 July 2009. Whether these panels will be viable without the cooperation of almost half the local councils in NSW remains to be seen (*Sydney Morning Herald*, 30.6.09, p. 3). Whether these panels will remain in place after a possible change of government at the next state election also remains to be seen.

    The Regional Panels will assess proposals of less than $100 million CIV, while Part 3A projects will have a minimum threshold of $100 million CIV. Most wind farm proposals will probably continue to be Part 3A projects. As PMLG is primarily concerned at present with wind farm development in NSW, the existence of the new panels does not lead us to modify our discussion above.

    Insofar as some wind farm proposals may fall under the assessment of the Regional Panels, the same general issues arise. The panels, in effect, remove planning authority from local councils, since councils only have 2 members out of the total of 5 members of a panel. The Minister's powers still tend to be autocratic in that she appoints 3 of the 5 members. The separation of functions of helping the developer, and of judging a proposal will remain illusory if the same Department officials both assist the developer to construct the proposal, and advise the panel on how the proposal is to be determined. The issue of the absence of legislation to create rules for specific impacts is not changed by the creation of the panels. The influence of government policy on assessment culture will be unchanged. The suspicion must remain that the category of rejecting a proposal will have been *de facto* abolished. Approval of a proposal as critical infrastructure, even if the CIV is only between $10 million and $100 million, will still prevent any appeal to the Land and Environment Court.

    The Regional Planning Panels therefore do not make the planning framework in NSW any less draconian, or any more transparent, reliable, or unbiased.

Externalities

12. There is implicit bias in favour of the developer and against the local community in the features of the NSW planning framework (30 day limit for submissions, Part 3A, critical infrastructure). There is further bias in the assessment process, as we have seen above. There is additional bias in the form of *externalities*. An *externality* is, in the jargon of economists, a cost imposed by a project upon those who do not share in the ownership of the project. The externality is therefore a kind of informal subsidy.

Such externalities are probably widespread in the field of development proposals in general. They certainly occur in the case of wind farm proposals. As we saw above, wind farm developers propose to locate their wind farms close to one or another of the power lines that cross the Great Dividing Range. The purpose of this is to reduce their own costs, and to increase their profits. If the wind farms were to be located away from the power lines, the companies would have to bear the cost of the extra infrastructure needed to transmit the electricity produced. The state government supports the location of the wind farms close to the power lines, thus favouring the developers, and owner/operators of the wind farms. All this is at the expense of the local residents who are *already* living in the designated areas. The local residents will suffer both financially by the fall in the value of their property, and also in their quality of life from the impact of noise and the visual impact.

A local council might want to protect its constituents by a buffer zone around the site of the wind farm, but Part 3A and the category of critical infrastructure will deprive it of the planning authority to do so.

The wind farm developer may offer to set up a "community enhancement fund" as some sort of compensation. But, setting aside the fact that the fund will almost certainly be paltry in relation to the state-guaranteed profits from state-guaranteed markets, a collective good is no compensation for the loss of an individual good. If a local resident is woken up in the middle of the night by a wind turbine cranking up, it is no consolation for that resident to know that the local council has a little more money to spend on repairing the roads. And yet this is the sort of compensation that is likely to be accepted by the Department of Planning. As there is no legally backed rule to define what is acceptable compensation, and what is not, the Department is free to accept whatever the developer proposes.

As we have already seen, a local community cannot even take advantage of the precedent set for purchase of properties in the Taralga wind farm case, if the proposal is approved as critical infrastructure. Approval as critical infrastructure abolishes all right of appeal to the Land and Environment Court. And as we have already seen, when Premier Rees's reduction of the threshold for critical infrastructure is gazetted, virtually all wind farm proposals will qualify as critical infrastructure.

The absence of legally backed rules concerning the location of developments, and concerning specific impacts, such as visual impact and impact on land/property values exposes local residents to the imposition of externalities, both financial (loss of wealth) and qualitative (diminution in the quality of life).

13. One blatant form of externality is the cost of going to court (assuming one is not prevented by the category of critical infrastructure from doing so). A case on the ground of process costs (I am told) about $50,000, or more. A case on the ground of merit costs about $250,000. A developer is likely to have millions of dollars at his disposal. A local

community will be hard-pressed to raise even the sum necessary for a case on the ground of process. In civil actions it is true that there is one law for the rich, and one for the poor. Or it may be that there is no law whatever for the poor, if they cannot afford to go to court.

Since this situation is glaringly unjust, there ought to be legislation to create rules to cover all aspects of development (location, specific impacts, and compensation), so that the Department's determination will reflect the interests of the local community as well as those of the developer. In this way the need to go to court might be avoided. Justice for local communities ought not to depend on their capacity to pay legal costs.

The State, the General Interest and Private Interests

14. In liberal democratic states it has been generally assumed that the functions of the state include both (i) representing the general interest against all private interests, and (ii) acting as umpire in the clash of private interests. But in the field of development in NSW the second function, acting as umpire in the clash of private interests, seems to disappear. The Department of Planning will find that a development proposal is in the general interest of NSW, and that any private interests that conflict with the proposal must simply be sacrificed. The Department seems to feel no obligation to recognize that both the developer and other parties have private interests, and that these should be adjusted in the interests of fairness. This is certainly the case with wind farm proposals.

    The Department will find that a proposal for a wind farm represents the general interest of NSW, and that, since the general interest must trump any private interests, the private interests of any local residents that may suffer from the proposal must be ignored (Part 3A, critical infrastructure, loss of right of appeal to the Land and Environment Court, refusal to consider appropriateness of location, refusal to consider seriously visual impact or impact on land values, etc.).

    But this way of looking at the balance of interests misrepresents the truth of the situation. In truth, all the parties concerned in the proposal can be said to represent the general interest, and their own private interests. We can distinguish 4 parties that are concerned with the proposal: (i) the developer, (ii) the landholders who will host the turbines, (iii) the non-involved local residents who may suffer from the proposal, and receive no benefits, peculiar to themselves, from it, and (iv) the state government.

    All these parties have a private interest in the proposal. The developer has his profits. The hosting landlord has his rent. The non-involved residents have the loss of their quality of life, and perhaps loss of wealth. The state government has its interest in gaining public approval (and votes at the next election) for a conspicuous show of trying to reduce greenhouse gas emissions.

All parties can also be said to represent the general interest. The developer, the hosting landlords, and the state government will all claim to represent the general interest in the form of securing a reduction of greenhouse gas emissions. The local residents will claim to represent the general interest in the form of the need of all citizens of NSW to be protected from damage to their interests, and a loss of rights, by the action of an oppressive government. If the interests of one local community are sacrificed to one development, then the interests of another local community will be sacrificed to another development, and then the interests of a third local community to third development, and so on. The interests of all local communities, and hence of all citizens are involved. If this is not recognized, then over time the interests of all citizens will be under threat, and potentially damaged. This is "divide and rule", over the long term.

To recognize this means recognizing that the function of the state is not only to represent the general interest against private interests, but also to act as umpire in the clash of private interests, in this case the gains of the developer, the hosts and the state government versus the losses of the local community.

When a development proposal really is in the general interest, then those citizens who are going to lose from it ought to be compensated. If they are not compensated, this is inequitable.

It is an error to suppose that the general interest can only be secured in one way, so that the developer gets his profits, the host gets his rent, the government gets its votes, while the local community bears its losses, and that is the end of it. It is by no means the end of it. Other arrangements can be made.

In the case of a wind farm proposal, the wind farm could be located away from any local community, and if this removed the wind farm from a power line, then the extra cost of the infrastructure for transmission of the electricity could be born partly by the developer, partly by a levy on the rent paid to the hosts, and partly by the general community through taxation. This would be fair, as all these parties are going to gain from the wind farm. Or a buffer zone could be established around the wind farm, and properties within the zone purchased from a fund sourced in the same way (from the developer, the hosts, and taxation). Or compensation could be paid directly to affected, non-involved residents, again from a fund sourced in the same way. These arrangements would be equitable, since they would recognize the pattern of gains and losses from the proposal. The only reason why developers and the state government do not want to accept such arrangements is that developers want as much profit as possible, and the state government does not want to go to the electorate to ask for a levy for the purpose. It is easier to sacrifice local communities, one at a time – easier, but unjust.

If it is said that such arrangements would discourage development, then the question has to be raised: should all concerns of justice and equity be sacrificed to economic development? Is economic development all we are concerned about? What sort of society

do we want to live in? Do we want to live in a society where some make all the gains from developments, while others bear all the losses?

Politics

15. It will be difficult to establish equitable arrangements such as those described above so long as the planning framework of NSW has to exist in a political environment that is hostile to justice and equity in various ways. The different states of Australia will compete for investment by deals on taxation, subsidies, etc. This is liable to lead to a 'race to the bottom'. Local communities are likely to be sacrificed in this way. Donations by the development lobby to political parties will continue to compromise the integrity of the planning process. Major reforms are necessary to ensure that the planning process in NSW is compatible with justice and equity. We can only commend these matters to the attention of the Committee.

Need for Compliance Authorities

16. When an approved development is constructed, there will still be questions as to whether it is complying with its conditions of consent. In the case of wind farm proposals there are likely to be questions about noise, about damage to flora and fauna, about damage to water resources. If such concerns are to be dealt with efficiently and adequately, there must be a special compliance authority dedicated to the carrying out of this function. If there is no such body, then the complaints of local residents are likely to get lost, as the developers and government departments shift responsibility back and forth. Local residents cannot be expected to fund their own noise tests. To do this would cost thousands of dollars.

The Global Context

17. The world is facing both an environmental crisis, and a global economic crisis. It is likely that the investment for infrastructure, and for renewable energy power stations will act as part at least of the engine that will drag Australia out of its share of the global slump. In this situation it is likely that there will be enormous political pressure to 'facilitate development'. But these combined crises are also an opportunity to reform the planning framework in NSW. What is clearly needed is the general agreement of all parties represented in Parliament on this matter. The Standing Committee's Inquiry is an opportunity to negotiate such agreement. PMLG hopes that if and when such an agreement is arrived at, it will take account of the needs and interests of local communities, and that the interests of local communities will no longer be sacrificed to the profits of developers, under the cover of the general interest.

In the Westminster tradition, for several centuries it has been the custom for local communities to be able to petition Parliament for redress of grievances. The current NSW planning framework contains features that are grievances to local communities. We ask the Committee to recommend that these grievances be redressed.

Yours sincerely

David Brooks
Deputy Chairman
Parkesbourne/Mummel Landscape Guardians Inc

APPENDIX

Summary of Recommendations

1. Period for submissions to be extended to 90 days.

2. Part 3A to be abolished, and planning authority to be returned to local councils. Forums to be set up for negotiations between local councils, regional bodies, and the state government.

3. The category of critical infrastructure to be abolished.

4. Right of appeal to the Land and Environment Court to be guaranteed, concerning all planning decisions.

5. Criteria for the presentability of Environmental Assessments for public exhibition, and criteria for the final determination of proposals to be made public.

6. Separation of the functions of helping the developer ('facilitating development'), and of judging the proposal.

7. Legislation to create rules to define what is appropriate and what is not appropriate, concerning the location of developments, visual impact, impact on land/property values, and compensation for affected but non-involved local residents.

8. Options for the determination of a proposal to include *rejection* (in reality, not just in theory).

9. Environmental Assessments that are deficient to be rigorously examined, and rejected, rather than reconstructed by the Department.

10. Planning authority to be returned to local councils from Regional Planning Panels.

11. Compensation to be paid for externalities imposed on affected but non-involved local residents. Compensation to be paid to individuals, not collectively as 'community enhancement fund'.

12. Planning decisions to reflect the interests of affected local communities/local residents, as well as the interests of developers, and to construct ways and means for the interests of local residents to be satisfied.

13. Need for a national planning framework for wind farm proposals, but one that provides justice and equity for local residents/local communities.

14. Abolition of donations from developers to political parties.

15. Establishment of compliance authorities dedicated to assessing the compliance of developments with their conditions of consent, and to respond to complaints from the general public.