

John Wood, MBA, GCBA
ABN 54 671 472 647
Correspondence to:

Our Ref: JW:2023:G47768
Your reference: SSD-10315
Date 26/11/2023

Professor Alice Clark
Panel Chair
Bowmans Creek Wind Farm Assessment Committee
Independent Planning Commission of NSW

Via email: ipcn@ipcn.nsw.gov.au

Dear Professor Clark,

RE: Bowmans Creek Wind Farm (SSD-10315) Procedural Fairness

1. I write to the empaneled committee ('Panel') by the Independent Planning Commission ('IPC') concerning State Significant Development ('SSD') known as Bowmans Creek Wind Farm (SSD-10315) ('the Proposed Development'). I am interested party in the Proposed Development, and as an SSD in any event the operation of the Panel holds a Public Interest.
2. There has been serious concerns raised by affected and interested parties concerning the actions and activities of the NSW Department of Planning and Environment ('Department') representatives and officers during the Response to Submission and Assessment stages of the Planning process before the referral of the development to the IPC.
3. There are a considerable number of directly affected parties in relation to the Proposed Development, upon whom the development will have direct visual, noise, socio-economic, and safety risk impacts. There is no contention concerning the types of impacts, nor should it be controversial that there are a number of directly affected parties in relation to the Proposed Development. Indeed, the Department's own referral and proposed Recommendation of Conditions affirms this.
4. The right to Procedural Fairness is a well established right under the common law and extends to the actions of the IPC¹, that is a decision-maker has a duty to act judicially², being that a person must act with fairness and detachment when entrusted with statutory power or authority to make an administrative decision which may adversely and directly affect the rights, interest, status or legitimate expectations of another in his, her or its individual capacity.

¹ Minister for Immigration and Border Protection v WZARH [2015] HCA 40 (4 November 2015) [30] (Kiefel, Bell and Keane JJ).

² See Board of Education v. Rice [1911] AC 179, at p 182



5. Procedural Fairness has two established requirements, of which both must be met, to satisfy the need of a Decision to be Procedurally Fair, being the satisfaction of the Bias Rule, and the Hearing Rule.
6. I hold serious concerns about the Procedural Fairness (that is the common law right to natural justice), being afforded to those affected by the Proposed Development by the IPC.
7. These concern stem largely from two issues, fundamental to ensuring Procedural Fairness, being:

The Bias Rule issues

- a. There have been sufficient serious concerns raised by those directly affected and interested in Proposed Development regarding the conduct of those charged with the Assessment of the Proposed Development within the Department.
- b. A member of the Panel, being Mr. Pearson, is a former senior executive of the Department.
- c. Mr. Pearson has provided advice in a professional capacity to the Department on Planning matters through a company, Pearson Planning Solutions Pty Ltd, from 2015, a company for which he maintains an interest in at the time of writing and at the time of the empanelment of the Panel.

The Fair Hearing issues

- a. There have been 142 objections to Proposed Development by Affected parties, with 60 objections within a 5km radius of the Proposed Development. It is clear to see that the majority of the objections have been lodged from the local communities upon which the proposed wind farm will directly and tangibly impact. It has been well established that developments such as the Proposed Development, have a direct and tangible on residents and landholders in close proximity to them.
- b. The above is reinforced by the National Windfarm Commissioner, who identified those directly affected by windfarms as those within residents or landholders within a radius of 0km – 5km of a project's infrastructure. Within this same report one of the affects outlined is the "increases to the sums insured for public liability due to the presence of the wind or solar farm"³
- c. Natural Justice requires that a person or interested party, who is directly affected by the a Proposed Decision, be afforded by a Decision Maker a Reasonable⁴ opportunity to respond to any proposed Decision that will affect them.

³ Annual Report, Office of the National Windfarm Commission, 2020, at p 31

⁴ Banque Brussels Lambert SA v Australian National Industries Ltd (1989) 21 NSWLR 502

- d. The Proponent was afforded the opportunity to Respond to Submissions on 19th May 2021, with a response provided to the Department by the Proponent 8th October 2021. With a further request from the Department made to the Proponent on 15th October 2021, with a response from the Proponent provided to the Department made on 28th October 2022. An Assessment Report, Recommendation and Referral to the IPC being made on 20th November 2023. With the relevant significant information being made available to those directly affect by the Proposed Development at the same time.
- e. Despite the exhaustive period of time allowed to the Department, to make a Recommendation to the IPC (as the Decision Maker), being over a year, the Panel expects that those directly affected by a Proposed Development, be given only 31 days to review the Recommendation, and associated Assessment Report, some 159 pages of content in totality, and be heard on, and make submissions to the Panel on those matters.
- f. Such a timeframe does not afford a reasonable opportunity for those directly affected by the Proposed Decision in relation to the Proposed Development to prepare and make submissions in response to the quantum of materials which the IPC has published as being relevant to the decision-making process of the Panel.
- g. The above is reinforced by Singleton Council's submission to the Department during the Departmental Planning process whereby the council commented in their submission:

“Council notes that the due date for submissions is 11th May 2021. The timing of exhibition coincided with the April school holiday period, and the Easter long weekend. Additionally, council has two other State Significant Development projects with Environmental Impact Statements on exhibition at the same time and a third requiring a response to submissions. Council has limited resources and a very tight timeframe to review the documents, develop a submission, hear from the proponent, review the submission prepared by Council staff and form a view on the proposal. This timeframe for considered review of the proposed Project is considered too short.

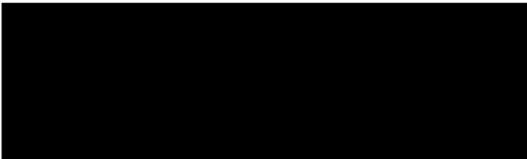
- h. Yet again, the period relating to Submissions by those Directly affected by the Proposed is to take part during the Christmas holiday period, and likewise is too short.
- i. Ensuring that Procedural Fairness is afforded to those Directly affected by a Proposed Decision by a Decision Maker, must be reasonable in all circumstances and requires a fairness in all circumstances,⁵ and that those affected be given that opportunity in fairness at each stage of the Decision-Making process⁶
- j. In any circumstances of objective reasonableness, the timeframe set down by the Panel does not afford Procedural Fairness to all parties affected by the Proposed Development

⁵ O'Rourke v Miller (1985) 156 CLR 342 at 353 per Gibbs CJ.

⁶ Kioa v West (1985) 159 CLR 550



8. These concerns can be alleviated by the following mitigation measures, to ensure Procedural Fairness:
 - a. The appointment of a Panel consisting of members who have no perceived or actual bias towards the decisions or recommendations of the Department.
 - b. The significant extension of the timeframe for submissions to be made to the Panel, to ensure that fairness is afforded to those affected directly by the Proposed Development in all circumstances. Given the periods of time afforded to the Department and the Proponent for the preparation of the relevant documentation to be used within the decision-making process, those directly affected by the Proposed Development ought to be afforded a similar timeframe to give, inter alia, submissions on the same.
9. In the absence of these mitigation measures the Panel, if it makes a decision to approve the Proposed Development subject to the conditions proposed by the Department, will be doing so on the basis that such a decision is made without Procedural Fairness.
 - a. This will be jurisdictional error 'procedural ultra vires' by the Panel as the Decision-Maker⁷ and thus attracts the issue of prohibition⁸
10. The Panel is invited to implement the proposed mitigation measures contained herein so as to ensure that the Panel follows Procedural Fairness when considering its decision in relation to the Proposed Development.
11. This letter and your response should be published on the IPCN Panel website in accordance with the NSW Governments commitment to Open Government⁹



John Wood

Direct:

Mobile:

Email:

⁷ Minister for Immigration and Multicultural Affairs v Bharadwaj [2002] HCA 11; (2002) 209 CLR 597, 614-5.

⁸ [14] Re Refugee Tribunal; Ex parte Aala (2000) 204 CLR 82, [17], [41] (Gaudron and Gummow JJ, Gleeson CJ agreeing); [132], [151]–[152] (Kirby J); [169]–[171]

⁹ [https://www.productivity.nsw.gov.au/open-](https://www.productivity.nsw.gov.au/open-government#:~:text=The%20NSW%20Government%20is%20committed,%2C%20participation%2C%20collaboration%20and%20innovation.)

[government#:~:text=The%20NSW%20Government%20is%20committed,%2C%20participation%2C%20collaboration%20and%20innovation.](https://www.productivity.nsw.gov.au/open-government#:~:text=The%20NSW%20Government%20is%20committed,%2C%20participation%2C%20collaboration%20and%20innovation.) "Open Government" Retrieved 25/11/2023.