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Dr Tim Kendall
Acting Secretary
Community Affairs References Committee
Inquiry into the Social and Economic Impact of Rural Wind Farms
PO Box 6100
Parliament House
Canberra ACT 2600

17 February 2011

Dear Senators

Re: Wind Farms Inquiry 2011

I wish to make a submission to the Committee's inquiry 'The Social and Economic Impact of Rural Wind Farms'. In particular I would like to offer comments on the subject of Term of Reference (d) The interface between Commonwealth, state and local planning laws as they pertain to wind farms, as this is a matter directly within my professional expertise.

I am a Lecturer in Environmental Law at the Australian Centre for Environmental Law, and the Centre for Climate Law and Policy at the ANU College of Law, Australian National University, a position I have held since January 2006. I previously held an unrestricted solicitor's practising certificate in the ACT for 5 years, and also practised law with a large and small private law firms in the ACT as well as with Commonwealth agencies including Department of Prime Minister and Cabinet and the Law and Bills Digest Group of the Parliamentary Library. I hold an LLB(Hons, 1st) (ANU) and a PhD in environmental and natural resources law from the University of Wollongong and have published a number of book chapters on the subject of climate and energy law, as well as other publications in the field of environmental law.

My book chapter entitled "The Bald Hills Wind Farm Debacle" from Bonyhady & Christoff (eds.) *Climate Law in Australia*, (Federation Press) regarding the Commonwealth's involvement in the approval process for the wind farm of the same name in Victoria is attached. More recently in September 2010 I was invited to give a paper on the topic of wind farms and planning law to the Yale University Law School. The paper was presented to the 2nd UNITAR-Yale Conference on Environmental Governance and Democracy: Strengthening Institutions to Address Climate Change and Advance a Green Economy (17-19 September 2010) on the topic "Fast Tracking versus Public Participation? Planning Law for Wind Energy Development: Weighing Global Benefits against Local Impacts".

At present, I have only provided an Executive Summary of my full submission which will be provided in full at or prior to hearings of the Committee.

Yours sincerely
[signed]

James Prest

Executive Summary

The Scientific consensus position is that “most of the global warming in recent decades can be attributed to human activities”.

Human induced climate change has already become a reality. The lesson yet to be heeded by some in Australia from the Stern Review (2006) is that policy makers and legislators need to act sooner rather than later in order to avoid the larger costs of delay.

Legislated renewable energy targets are an important means to meet climate change mitigation obligations. In Australia this target, notionally of 20% of total national installed electricity generation capacity by 2020, is implemented by a federal law creating a market in tradeable renewable energy certificates (RECs). Yet if Australia is to heed the findings of the international literature, as well as the examples set by European leaders in renewable energy investment, serious thought should be given to implementing our national RE targets through a more effective renewable energy incentive law in the form of a national feed-in tariff, rather than a tradeable renewable energy certificate law.

Adequate financial incentives are necessary but not sufficient. Rapid expansion of investment in renewable energy generation capacity including wind energy farms requires removing and addressing legal and institutional as well as practical barriers to renewable energy investment. Attention should be given to reviewing how the existing legal framework in all Australian jurisdictions presents barriers to wind energy projects. The evidence given to the recent Parliamentary Inquiry in Victoria suggested that the planning law system in Victoria in a number of respects presents barriers to the expansion of the industry.

The existing regulatory framework governing wind energy development in Australia involves decisions regarding wind energy projects being made under State legislation implemented by State government agencies. Some States have already given wind energy major projects status, seeing them as ‘critical infrastructure’. This is in view of their importance in meeting renewable energy targets and greenhouse gas emission reduction targets. It has also served to remove the decision making away from the level of local government. This has the effect that localised opposition to wind energy, reflected in planning instruments made by local government, such as in NSW - Development Control Plans within Local Environmental Plans – is not permitted to create an framework for land use planning which is inconsistent across a State.

My principal point in this submission is that there is insufficient justification for the enactment of special purpose Commonwealth legislation specifically regarding wind energy, which would be used to intervene in State and Territory approval of wind farms. Nationally significant matters (with the exception of climate change) are adequately addressed by the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

The effect of a blanket overriding of state and territory environmental and land use planning laws, as was proposed in 2006 by the former Commonwealth Environment Minister, would be to create a climate of uncertainty for investors and another layer of regulation without any little environmental protection benefit.

Specific purpose Commonwealth regulation would violate the principle of consistency in regulation. It would be unprecedented for the Commonwealth to step in and apply regulatory requirements to one particular energy industry to the exclusion of all others.

There are three circumstances in which further Federal legislation could be justified in this area. First, to address a failure to achieve a uniform regulatory regime through processes of cooperative

federalism. However these processes are already in train in the form of the Environment Protection and Heritage Council's *National Wind Farm Development Guidelines of 2010*.

The second possible rationale could be to address State legislation which was creating unreasonable and unjustified barriers to renewable energy projects, such as a 2km buffer zone around all wind energy projects, as has been proposed in Victoria. Such barriers are unjustified because they represent the selection of an arbitrary setback distance. It may in fact be possible, on a case-by-case approach applying national noise standards, to meet those standards where wind farms are located closer to dwellings. Prescriptive setback distances will limit wind energy development to rare sites with minimal local population combined with a strong electricity network and consistent winds.

The third rationale for federal legislative action would be to amend the *EPBC Act* to list climate change as a matter of national environmental significance under that Act. This would serve to ensure that the climate damaging aspects of fossil fuel energy projects are actually considered by the Federal Minister. This would give some semblance of a level playing field for clean energy projects.

Failing this, the Committee should also give some attention to how the national regulatory framework could be amended to provide some greater account of the environmental benefits of renewable energy in terms of abatement of greenhouse gas emissions and other air pollution. In the field of wind farm regulation there is always a risk, as was recognised by Preston CJ of the Land and Environment Court of NSW in the *Taralga Landscape Guardians* case (2007), that local concerns about local environmental impacts can overwhelm consideration of broader national and global benefits flowing from clean energy projects. A model for reform exists in national legislation in New Zealand, the *Resource Management Act 1991* (as amended), which requires that decision makers must take account of the benefits of renewable energy in considering whether to grant approval to development applications.