

Senate Economics Legislation Committee
ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

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2014 – 2015

Department/Agency: CEFC

Question: AET 335-347

Topic: Portland Wind Energy Project

Reference: written - 11 March 2015

Senator: Madigan, John

Question:

335.

At Senate Estimates on 25 February, I asked whether the CEFC made certain that Portland Wind Energy Project's earlier wind farms had met all conditions of planning permit and approval requirements before providing \$70 million in debt financing to Pacific Hydro. On Behalf of CEFC, Mr Yates said that CEFC expects that companies will make valid representations and noted: 'it is not for us to take those representations without due inquiry, to check the validity of whether those representations are actually true.' Mr Yates also said there was an extensive due diligence process in place where CEFC requires external law opinions from external law counsel to go through and make sure that any representations that the company has made are legitimate because 'you do not want to lend to a project which is in default.'

Condition 13 of the Portland Wind Energy Project's Incorporated document, "the planning permission" relates to NOISE.

The operation of the wind energy facility must comply with the New Zealand Standard "Acoustics – The Assessment and Measurement of Sound from Wind Turbine Generators" (NZ 6808: 1998) the ("New Zealand Standard"), in relation to any dwelling existing or approved (by way of a planning permit or a building permit) at the date of approval of this document, to the satisfaction of the Minister for Planning.

Please supply the evidence that CEFC obtained to support that condition 13 of the planning permission had been met to the Minister's satisfaction?

336.

Condition 14 of the Portland Wind Energy Project's planning permission states:

Condition 13 does not apply if an agreement has been reached with a specific landowner through which the landowner accepts predicted noise levels or otherwise agrees to implement appropriate acoustic attenuation measures to ensure a reasonable level of acoustic amenity in relation to the indoor habitable areas of any dwelling, and acknowledges that the operation of the wind energy facility may still generate noise in outdoor areas on the land which may from time to time exceed the New Zealand Standard.

Condition 14 institutes an agreement between the wind farm operator and a specific landowner that allows the exceedance of the NZ standard and thus the breach of condition 13. However, Section 180 of the planning and Environment Act instructs that:

'An agreement must not require or allow anything to be done which would breach a planning scheme or a permit.'

CEFC recognises the importance of Pacific Hydro's compliance obligations. As part of the CEFC's extensive due diligence process, did CEFC observe, obtain and/or retain copies of any agreements that were made as described in Condition 14 - to be certain that agreements which authorise the breach of Condition 13 were properly made, are enforceable and legally

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valid?

337.

Legal officers from the Victorian Planning Department have advised that the Responsible authority is required to enter into and sign agreements relating to permit conditions in order for agreements to meet the requirements of the Victorian Planning and Environment Act, 1987. If the agreements referred to in Condition 14 do not have the Responsible authority's signature and thus do not meet the requirements of the Act, it would reasonably follow that the agreements are not legal and should be invalid. Before lending \$70 million to Pacific Hydro, did CEFC and its external law counsel, did CEFC confirm that Condition 14 agreements (authorising the breach of Condition 13) between the operator and landholders were legally valid and entered into and signed by the Responsible authority? Please provide any supporting evidence held by CEFC.

338.

The inclusion of a condition such as Condition 14 and indeed, the need for Pacific Hydro to have agreements with landowners about exposure to noise which "may from time to time exceed the New Zealand Standard," in the first place suggests that at the time the Portland Wind Energy Project's planning permission was granted Pacific Hydro anticipated, expected or knew that the project could or would 'from time to time' fail to meet its compliance obligations under Condition 13 of the planning consent at specific sites. In the event that the agreements are invalid and Condition 14 is not legally enforceable, how might those circumstances impact on the risk profile of the lending agreement? Is it fair to suggest that the following position should apply?

If the project fails to meet its compliance obligations, there is typically a right of termination of the funding requirements under the facilities.

339.

On February 25, 2015, Senator MADIGAN asked:

Wouldn't you say, Mr Yates, that a project that has neither a definitive statement of compliance nor noncompliance exposes the CEFC to greater risk?

Minister for Finance, Senator Cormann, suggested that this would have "implications for the risk profile for the project."

Mr Yates agreed that there is a planning failure at a regulatory level, further and in relation to the above and acknowledged that this is "a situation that is occurring right across Victoria," adding: "Unfortunately, there are numerous wind farms in Victoria where you cannot get clarity."

Mr Yates understood also that

All projects are required to comply with the law.

Could you please provide copies of all documents and other information presented by Pacific Hydro in relation to its claims to be operating the Cape Bridgewater Wind Farm in compliance with its planning consent?

340.

Would the CEFC please advise as to whether any of that information was considered as part

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of its due diligence process; if so, did the CEFC rely upon that information documentation without further investigation?

341.

If any further investigations were undertaken by the CEFC, what were they? Please produce a copy of any documents or information obtained as a consequence of any such investigation, including any assessments in relation to terminating funding of Pacific Hydro's Portland Wind Energy Project.

342.

It was recently reported that Pacific Hydro has incurred a \$685 million loss. Pacific Hydro last year blamed this write-down in part on uncertainty about the RET. These losses have occurred in circumstances where there has been no regulatory change and the shortfall charge hasn't set in. In the event that there was to be an adverse change to the LRET, and the value of the subsidies drawn from power consumers and directed to Pacific Hydro decreased, it is reasonable to conclude losses will only increase. Does the CEFC consider that Pacific Hydro's losses will increase in the event that there is any adverse change to the LRET affecting the value of the REC subsidy?

343.

What, if any, steps does the CEFC propose taking to limit the Australian tax payers exposure to losses which will result from the increased likelihood that Pacific Hydro will be wound up in insolvency?

344.

At any point during the due diligence process, referred to by Mr Yates at Senate Estimates on 25 Feb 2015, were any of these events considered and if so, to what extent?

345.

Ordinarily, commercial lenders aware of an increased risk of their borrower's insolvency will use an event of default to call in the loan and, if the loan is not repaid, appoint a receiver to secure the assets and recover the value of the loan. Given that the Australian taxpayer is exposed to the risk of financial collapse (in Pacific Hydro's case in particular), has the CEFC considered calling in the loan to protect the current value of the assets and thereby limit the taxpayers exposure to an event of insolvency? If the CEFC has taken advice in that regard, please provide a copy of the considerations or advice.

346.

To assist with the Australian public's understanding of these issues, please provide a copy of the loan agreement with Pacific Hydro?

347.

In the current circumstances, it appears that the CEFC will inherit a non-compliant wind farm by default through the increasingly likely insolvency of Pacific Hydro. Would the CEFC please provide a detailed explanation as to how its lending practices serve the public

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interest in the event of that result?

Answer:

335-336.

The CEFC's processes and approach to investment screening, selection and due diligence is detailed in the CEFC Investment Policies, available at <http://www.cleanenergyfinancecorp.com.au/what-we-do/investment-policies>. Chapter 5 describes the CEFC's investment strategy, including investment procedures and processes. Please note these policies are presently under review by force of section 68(6) Clean Energy Finance Corporation Act 2012. In addition, please refer to the CEFC Annual Report 2013/14 between pages 82 and 86.

The CEFC provided \$70 million in debt financing as part of a syndicate of domestic and international banks, towards funding the \$361 million Portland Wind Energy project (PWEF). The financing was for construction of stage four and refinancing of stages two and three of the project. The CEFC, as a part of the financing syndicate, undertook technical and legal due diligence into this project. Due diligence was undertaken by the CEFC and other syndicate members who made their own independent lending decisions in respect of their financing to the project.

The due diligence process included:

- in the case of Stages 2 and 3, sighting letters of Ministerial approval dated 31 October 2006 (in the case of Stage 2) and 22 January 2008 (in the case of Stage 3) which noted that the Minister approved the application documents in accordance with the requirements of the Glenelg Planning Scheme Incorporated Document (Portland Wind Energy Project, Cape Bridgewater Wind Energy Facility, Cape Nelson Wind Energy Facility, Cape Sir William Grant Wind Energy Facility, May 2004); and
- in the case of Stage 4, sighting a letter of the Minister dated 20 April 2011 enclosing an endorsed Application to Construct, again referable to the Glenelg Planning Scheme Incorporated Document (Portland Wind Energy Project, Cape Bridgewater Wind Energy Facility, Cape Nelson Wind Energy Facility, Cape Sir William Grant Wind Energy Facility, May 2004).

The CEFC understands that the pre-construction and post-construction noise tests for stages 2 and 3 have been completed to the standard specified by condition 13 (noting stage 4 is still under construction). As far as the CEFC is aware, these test results have been provided to the satisfaction of the Victorian Minister for Planning. The standard required for acceptance of these tests is, as the honourable Senator points out, Ministerial 'satisfaction' rather than 'approval'. The CEFC is not in a position to provide legal advice in respect of the interpretation of Victorian planning law, permits and approvals. As far as the CEFC is aware, no objection or expression of dissatisfaction with the tests performed has been raised by the Victorian Minister for Planning, despite ample opportunity. If the Minister is in fact dissatisfied, and makes that known to the applicant, the CEFC would act within the terms of the law and the contract.

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The CEFC is not aware of any non-compliance in the PWEF projects that the CEFC has been involved in financing, and the CEFC is not aware of any non-compliance with condition 13.

If anyone has evidence that the Victorian Minister for Planning ought to object or express dissatisfaction, because this (or any other project) is not in compliance, they are entitled to bring the matter to the attention of the appropriate authority to determine it in accordance with Victorian law.

337-338.

As advised in the answer to questions 335 – 336 above, the CEFC is not aware of any non-compliance with Condition 13. Further, the CEFC is not aware of any Condition 14 landowner agreements being invalid or unenforceable. If anyone has evidence that a Condition 14 landowner agreement is invalid or not enforceable, they are entitled to bring the matter to the attention of the appropriate authority to determine such matter in accordance with Victorian law.

339-341, 346

The material requested in these questions contains legal advice of a confidential nature and/or commercial in confidence information. The CEFC is bound by confidentiality and non-disclosure undertakings in connection with this material. In respect of this requested disclosure, the CEFC does not wish to waive any legal privilege available to the Corporation as this material could be required in future legal proceedings.

A description of how the Corporation deals with investment risk and its due diligence process can be found in the *CEFC Investment Policies* at <http://www.cleanenergyfinancecorp.com.au/what-we-do/investment-policies/risk-management.aspx> Please note this document is presently under review by force of section 68(6) *Clean Energy Finance Corporation Act 2012*. In addition, please refer to the CEFC Annual Report 2013/14 between pages 82 and 86.

342-344.

These questions invite the CEFC to speculate hypothetically on the RET price impacts on an individual business. The CEFC must decline to comment other than to advise that it performs extensive assessment of investment risk - please see the *CEFC Investment Policies* at <http://www.cleanenergyfinancecorp.com.au/what-we-do/investment-policies/risk-management.aspx> Please note this document is presently under review by force of section 68(6) *Clean Energy Finance Corporation Act 2012*. In addition, please refer to the CEFC Annual Report 2013/14 between pages 82 and 86.

345, 347

The CEFC must decline to speculate hypothetically on the trading prospects of an individual business.

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Without providing legal advice, the CEFC does not accept the claim that “commercial lenders aware of an increased risk of their borrower’s insolvency will use an event of default to call in the loan”. Generally speaking, there will be prescribed events of default which include among other matters, the insolvency of the borrower. However, these do not typically include a unilateral right to call in the loan in the event of a simple increase in risk associated with the borrower.

Please refer to the CEFC Annual Report 2013/14 between pages 84 and 86 as to general information on treatment of investment risk.