Systematically Biased Behaviour by DPE Officials in relation to Crudine Ridge Wind Farm

IPC Submission

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The Commissioners have no ethical option but to reject this modification proposal on two grounds. First there is overwhelming evidence that their principal advisor, officials from the Department of Planning & Environment (DPE), have provided false and/or misleading information to the Commissioners and that this is part of a pattern of long term bias by DPE and its officials in favour of the developer, denying procedural fairness to residents adversely affected by the proposal. Case law indicates that should the Commissioners ignore this manifest bias and act as recommended by DPE officials, their decision will itself be tainted with apparent bias and procedural unfairness. Second, the developer, who also has a history of apparently providing false and/or misleading information as part of the planning process for CRWF, is seeking a modification to approve much greater vegetation clearing along Aarons Pass Road (APR) than approved in the May 2016 CRWF Consent and the reason for the developer requiring additional vegetation clearing is either that they provided a materially false statement of APR vegetation clearance to the PAC in 2016, or additional clearance is required because they are intending to use turbine blades longer than were approved in the May 2016 Consent, or a combination of those two factors. Either is a reason to reject the modification proposal. The developer has NOT lodged an application to increase blade length from what was approved in the May 2016 Consent, nor have they provided any data and analysis, let alone independent data and analysis, to allow the Commissioners to determine the extent to which the vegetation clearance now sought is due to one or the other of those potential reasons. Nor have DPE officials done so. Thus the Commissioners have no basis on which to determine whether there are valid grounds to approve the modification request. In addition, the Commissioners have an obligation to refer to the Attorney-General the manifest bias that has been shown by DPE officials and in particular the prima facie materially false and/or misleading statements made to the Commissioners by DPE officials and by the developer, given DPE has displayed no interest in assessing whether any statements by the developer have been materially false or misleading, despite strong evidence that a number of them are.

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Overview

Systematic bias and false or misleading statements by DPE officials in favour of the CRWF developer

DPE's Assessment for CRWF modification 1 presents materially false and misleading information, by both commission and omission. Were it a submission by a developer it would be clearly in breach of section 10.6(1) [*previously s148B(1)]* of the *Environmental Planning and Assessment Act*. In any case there is at least grounds to examine whether those statements are a breach of section 307B of the NSW *Crimes Act*.

Importantly, those false and misleading statements are not something new by the Department in relation to the Crudine Ridge Wind Farm. As this document lays out, there is an extensive history of false and misleading statements by DPE officials, to the PAC/IPC, in relation to CRWF. This document also shows that those statements are material, impacting PAC decisions.

This document also shows that there are additionally a number of other actions taken by DPE officials in relation to CRWF which evidence clear bias by those officials in favour of the developer.

Importantly, those actions include (but are not restricted to) a refusal to investigate whether the developer has made material false or misleading statements to the planning authorities in relation to CRWF, despite multiple instances where there is strong prima facie evidence the developer has done just that and despite those instances being brought to the attention of DPE officials and/or being of a nature that they should have been obvious to those officials.

In a number of instances, the developer has made important claims of purported fact which the Department has repeated as its own, despite being given strong reasons why the purported facts were false, and by repeating them without investigation Department officials have given those purported facts legitimacy when presented to PAC/IPC Commissioners.

This pattern of fraudulent behaviour demonstrates a clear bias by DPE in favour of the developer. Since the IPC depends on DPE's assessment and its advice, and IPC is so skimpily resourced to independently investigate the modification application, any decision to endorse DPE's recommendations would make the Commissioners complicit in the bias and deny procedural fairness to parties affected by the proposal.

The IPC needs to refer the DPE officials who tendered the false and misleading planning documents to the IPC for investigation for potential prosecution under the *EP&A Act* and the Crimes Act. Normally DPE is responsible for prosecuting false or misleading statements in planning documents. However, given that these are DPE officials, there is an internal vested interest against the Department so doing. In addition, DPE has a history of being unwilling to prosecute anyone for FOM statements in planning documents, so certainly cannot be expected to start with its own staff. Consequently, the IPC needs to refer the breaches of the *EP&A Act* and the *Crimes Act* to the Attorney-General.

The investigation of false or misleading statements by DPE officials may well also implicate false or misleading statements by the developer.

DPE officials have given PAC/IPC Commissioners materially false advice in relation to CRWF on multiple occasions and multiple matters. On their track record, nothing they say can be relied upon. That has been proven repeatedly, and if the Commissioners choose to rely on anything from DPE officials in relation to CRWF they knowingly make themselves culpable.

The evidence against DPE officials and the developer

This document provides systematic evidence of the charges made above. The evidence involves the original CRWF approval, the Modification application, and other actions by the developer and Department officials. It is understood that the Commissioners for the Modification application do not have power to alter the decision made by the PAC is 2016. However, evidence which has since emerged shows that certain statements at that time were false or misleading, and certain actions were biased. As such they contribute to the pattern of systematic bias by the Department extending throughout the life of the CRWF proposal.

In brief, the evidence detailed in this paper shows:

1. **DPE improper behaviour re visual impact assessment**
    a. Improper behaviour by DPE officials appointing an alleged "independent" visual impact advisor who was in fact conflicted through prior (and subsequent) work for the developer whose proposal he was supposed to be independently assessing.
    b. DPE, by omission, misled the PAC Commissioners about the status of that advisor, who provided advice which according to the Commissioners was material to their decisions.
2. **False or misleading VI assessment by DPE**
    a. DPE provided the PAC with alleged evidence in relation to visual impact which was grossly misleading in multiple ways which should have been known to the Department.
3. **Improper behaviour re noise impact assessment**
    a. A DPE official collaborated with the developer and their noise consultant in a manner which provided the opportunity to influence what was supposed to be an independent report, and in a manner which evidenced partiality towards the developer denied residents opposing the proposal.
    b. That official, whose bias was unknown to the PAC, was then part of formulating the Department's noise advice to the Commissioners, including what to include, omit or emphasise in the Department's Assessment.
    c. When the official's behaviour came to light via a court case, Department officials attempted to cover up what had occurred and to misrepresent a very restricted investigation that had been done for the Department.
4. **False statements to the PAC about project viability if number of turbines reduced**
    a. The developer made material statements to the PAC about project viability were turbine numbers reduced from the 77 requested.

b. DPE officials endorsed those false statements to the PAC. Those statements influenced the decisions made by the PAC Commissioners and were therefore material.
c. Subsequent events have shown that those statements were quite false and the developer should reasonably have known they were false.

5. Water use: Grossly false advice by developer and DPE

a. The developer provided materially false statements to DPE and the PAC in relation to water use, which the developer ought reasonably to have known were false.
b. DPE endorsed those false statements despite being given clear evidence the statements were false.
c. Subsequent developments have shown the statements were false.

6. False statements by DPE about APR vegetation clearing

a. There is strong evidence that in clearing vegetation along APR the developer breached the Consent.
b. There is evidence that the developer gave DPE a false statement about the extent of clearing.
c. There is strong evidence that in their modification Assessment and meetings, DPE officials have made deliberately false and/or misleading statements about:
    i. the extent of vegetation clearing conducted; and
    ii. its compliance with the existing consent.

7. APR clearing proposal

a. DPE officials have made false and/or misleading statements about the basis for the increased clearing which the developer wants approved along APR.
b. These statements are despite the obvious geometry, despite contrary advice from the developer, and despite contrary advice internal to the Department.
c. The false and misleading statements by DPE officials appear intended to support a previous decision by those officials that the developer did not need to request a modification to use turbine blades substantially longer than approved in the May 2016 consent.

8. Spurious claim CRWF consent does not regulate blade length

a. DPE officials have made misleading statements to the IPC Commissioners that the existing consent does not regulate turbine blade length.
b. That claim, if accepted, would destroy a key term of consent in all NSW consents.

9. DPE failure to investigate false or misleading statements by CRWF developer

a. DPE has been aware of multiple, material apparent false and/or misleading statements to planning authorities by the CRWF developer.
b. They include numerous instances in the original EIS.
c. They also include instances where evidence of falsehood has been revealed post the May 2016 decision, including in relation to turbine numbers and viability; water use; extent of clearing conducted along APR; and (according to DPE's claims) statements made to the PAC by the developer about the clearing they required along APR.
d. DPE has never conducted any internal examination of whether any of those statements were materially false and/or misleading and thus has refused to consider the possibility of prosecution for any of those statements, a task for which it is responsible.

It can be seen that DPE's handling of the Crudine Ridge wind farm (CRWF) proposal has been riddled with major, improper actions all of which are partial to the interests of the developer. This happened leading up to the PAC decision on CRWF and following that decision and a subsequent decision by the Federal Department of the Environment. It appears multiple DPE officials have behaved improperly to do everything possible in order to get CRWF approved and to then over-ride proper processes which might impede its construction.

Some of the evidence of the relevant behaviour and actions of DPE's officials has only recently been revealed. The multiple instances of improper, partial behaviour, and their extensive and material nature guarantees procedural unfairness to anyone potentially adversely affected by this proposal.

No ground for IPC to accept increased vegetation clearance along APR

The developer, who has a history of apparently providing false and/or misleading information as part of the planning process for CRWF, is seeking a modification to approve much greater vegetation clearing along Aarons Pass Road (APR) than approved in the May 2016 CRWF Consent.

While there is a lot of hand waving and bonhomie about this by the developer and DPE officials, the reason for the increase comes down to either:

1. the developer provided a materially false statement of APR vegetation clearance to the PAC in 2016, and one which at the time they ought reasonably to have known was false and misleading; or
2. they are intending to use turbine blades longer than were approved in the May 2016 Consent; or
3. a combination of those two factors.

Any of these is a reason to reject the modification proposal. The developer has **NOT** lodged an application to increase blade length from what was approved in the May 2016 Consent, nor have they provided any data and analysis, let alone independent data and analysis, to allow the Commissioners to determine the extent to which the vegetation clearance now sought is due to one or the other of those potential reasons. Nor have DPE officials done so.

However the Commissioners have multiple instances detailed in this report to show that both the developer and Departmental officials have made repeated, material false and/or misleading statements to planning officials, over a number of years, in relation to this project – including as part of this modification application.

Thus the Commissioners have no basis on which to determine whether there are valid grounds to approve the modification request.

Legal referrals required

In addition, the Commissioners have an obligation to refer to the Attorney-General the manifest bias that has been shown by DPE officials and in particular the *prima facie* materially false and/or misleading statements made to the Commissioners by DPE officials and by the developer, given DPE has displayed no interest in assessing whether any

statements by the developer have been materially false or misleading, despite strong evidence that a number of them are.

What the modification is NOT about

Finally, it is worth being clear what this proposal is not about. Despite concern the developer has managed to create in the local community, this modification application and its determination is **NOT** about

- whether the find farm can be built. The developer already has authorisation to build a wind farm with 37 turbines, each of up to 3.4MW and each with blades up to 63m.
- improvement of APR. The developer is already obligated to improve APR consistent with Appendix 6 of the May 2016 Consent. That includes lowering a number of crests in the roadway, making a number of corners less sharp, providing up to 38 passing bays, replacing and upgrading a number of culverts and causeways, and grading and levelling the road, including filling in the road surface on a number of corners.

The modification application is not about making any additional improvements or increasing safety for the community. It concerns removing an enormous number of trees so that CRWF can get 68m blades along APR, rather than the 63m blades which were approved by the PAC. That will add nothing to the safety of the road compared to what CRWF is already required to do under the existing consent.

DPE improper behaviour re visual impact assessment

Visual impact assessment is a major part of any wind farm determination. The actual impact assessment depends very heavily on the subjective perceptions of the person making the assessment. DPE appointed as "independent" peer reviewer a company with a repeated prior financial relationship with the developer. DPE drew on that person's advice in forming its own assessment to the PAC, and allowed that person to select and shape the VI information presented to the PAC, without informing the PAC of the conflicted situation of DPE's appointed "independent" peer reviewer. This is highly improper behaviour and clearly partial to the interests of the developer.

Subjective nature of VI assessments

The process of visual assessment for a wind farm is predominantly subjective as conducted for all wind farms, including CRWF. The subject matter is the adverse impact that may be suffered by landowners in the locality. It thus involves the conflicting interests of the developer and non-associated landowners. Consequently, it is essential the assessment process not be conducted in a way where biases in favour of the developer may affect judgements made – contrary to what happened for the CRWF assessment.

In order to appreciate why the process is inherently subjective, it is necessary to understand what is involved in a wind farm visual impact assessment.

As part of the assessment process for a wind farm, there is a requirement to determine the visual impact the project will have on all properties, and other important viewing points, which will be able to see some of the wind farm.

In its CRWF Assessment Report, DPE says:

> "As a guiding principle, the Department's assessment methodology adopted the widely accepted and commonly utilised approach that visual impacts can be determined from a combination of receiver sensitivity (a person's susceptibly to a specific type of change) and the magnitude of visual effect (the size, scale and overall extent of change)."[1]

A similar statement appears in DPE's 2016 VI Assessment guidelines[2].

The Department describes a process with two parts: the magnitude of visual effect; and how it is will be experienced by people affected. The Department also acknowledges that is widely accepted as appropriate.

Therefore the process requires the assessor to imagine what will be seen from each of the viewpoints (private properties and public). The term "imagine" is not used gratuitously. For those situations where physics indicates the wind farm will be part of the view, anyone making a visual impact assessment has to imagine what that impact will be, since it does not exist at the time. Tools such as photomontages may be of some assistance but as researchers

[1] *Crudine Ridge Wind Farm Assessment Report*, NSW Department of Planning & Environment, December 2015, p. 27.

[2] *Wind Energy Visual Assessment Bulletin 2016*, Department of Planning & Environment, p. 24.

have reported, viewing photomontages generally underestimates visual impact[3]. This is partly because they are open to manipulation by those seeking approval of a wind farm but also even high quality photos fail to match on-the-ground visual impact because they exclude critical elements[4, 5].

To imagine what will be seen, assessors often have to simultaneously imagine tens of turbines, 150 metres or more high, at various distances from the viewpoint, spread over kilometres both horizontally and in depth of field, while the basepoints for many of the turbines are concealed by intervening terrain. It is a prodigious task of imagination for which there appears to be no evidence that any of the people performing the task in relation to CRWF have been trained.

So the assessor has to imagine what will be the magnitude of visual effect, and imagine how that will be experienced by the people who will be subject to it at a viewpoint, i.e. how disturbing it will be for them. On the second aspect, obviously the more similar the assessor is to the people who will experience the change in view, the more likely the assessor is to accurately judge the magnitude of impact on them. Conversely, the more the assessor is associated with the developer's interests, the less likely are they to accurately judge the magnitude of impact on those actually affected.

The subjective nature of VI practice is demonstrated by comparison with the DPE noise impact guidelines (and general noise assessment practice). For noise assessment, the primary estimation of effects, and explicit constraints, are in relation to SPLs (*sound pressure levels*, essentially loudness, measured in dBA).

Standard limits (maximum SPLs) have been established in terms of dBA exceedance of measured background noise and those limits have been derived by extensive, scientifically conducted, international research on normal human audibility and noise levels detectible to and disturbing to human beings[6]. Importantly, the measurement is done with scientifically based equipment, providing strong grounds for considering the results objective.

In contrast, "measurement" for VI is by the personal perceptions and imagination of individual assessors. They typically are members of a class which DPE deems "experts" which research has shown to have visual values "profoundly different" from members of the public [7] ***and*** to be individually ***unreliable*** in their assessments [8]. This is the antithesis of objectivity.

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[3] University of Newcastle (2002) *Visual Assessment of Windfarms Best Practice*. Scottish Natural Heritage Commissioned Report F01AA303A, p. 55, 60.

[4] Sullivan, Robert G., et. al., 2012. *Wind Turbine Visibility and Visual Impact Threshold Distances in Western Landscapes*. Argonne National Laboratory and the U.S. Department of the Interior, Bureau of Land Management. USA, [***BLM Study***], p.43.

[5] Sullivan, Robert G., et. al., "Offshore Wind Turbine Visibility and Visual Impact Threshold Distances", *Environmental Practice* 15(01):33-49, March 2013 [***Offshore Study***], p. 45.

[6] A major criticism of currently used wind farm noise standards is that they are based on studies of human annoyance due to noise from sources other than wind farms. Research has also shown that because of sound characteristics from different sources (e.g. traffic, rail, aircraft) the typical level of annoyance at a particular SPL differs between sources and is higher for wind farm noise than other common sources. This is an important defect in standards used for wind farms. Nonetheless, there is no scientific impediment to doing noise-response studies specifically for wind farms.

[7] *Evaluation of Methodologies for Visual Impact Assessments, NCHRP Report 741*, Transportation Research Board of the National Academies, Washington DC, 2013, p 139.

[8] *Op cit*, pp. 34-37 and 39-40.

In addition, those "experts" have no standard metric in which to express their observations[9]. This is totally unlike the situation with acousticians who have dBA (and other weighted measures of sound levels) to use and the ability to objectively quantify sound intensity in discrete frequency ranges.

Under DPE guidelines and current practice, an acoustician can be deaf and yet produce a noise impact assessment, since it depends solely on their ability to use and read standard instruments, use common software, and perform standard mathematical calculations. It does not depend in any way on their sense of hearing.

Under current practice (and as done for CRWF), a VI assessor cannot produce a VI assessment if blind (or blindfolded). The assessor is the "measurement instrument", except what they are "measuring" is not VI that exists, but the VI they imagine will exist once the wind farm is built.

Thus VI assessments under current practice are inherently subjective.

Absence of demonstrated relevant expertise

DPE will not accept background noise measurement unless done with standardised equipment with proof of calibration (i.e. that the particular piece of equipment used measures accurately throughout the relevant frequency range). EPA will not accept noise monitoring from wind farms or any other industrial operation unless done with standardised, calibrated equipment.

Yet DPE accepts a practice in which the "measurement instrument" is actually a person, retained by the developer or the Department – and does so without any evidence of accuracy or reliability (i.e. calibration equivalent) to be included in advice to consent authorities. That was the case for CRWF, as at other NSW wind farms.

The PAC determination for CRWF was made by three commissioners. Visual impact of the wind farm was an important factor to be considered in making their determination. The PAC held no information to show that those three individuals had either training or expertise in making valid VI assessments for wind farms[10]. Given the importance of visual impact in wind farm determinations, one might expect the PAC to have a record of any such training or expertise on the part of its commissioners. So it is reasonable to conclude none of them have such training or expertise.

That in itself is not necessarily a problem. It is quite likely that none of those commissioners is an acoustician either. Instead, as in many other matters, they needed to rely on advice from parties who do have the relevant training and expertise. That applies not just to noise impact and visual impact but a range of specialist areas.

The predominant source of advice to the PAC/IPC is usually, as for CRWF, via the assessment provided by DPE. In the case of CRWF, the assessment was signed by two senior

[9] Assessors may all use terms like "high", "low" and "moderate" to describe their ratings but there is no basis to establish that "high" as used by one assessor encompasses exactly the same situations as "high" used by another. In contrast, when an acoustician says the SPL at a certain location is 46dBA, it is understood that any other acoustician using calibrated instruments would likewise measure an SPL of 46dBA at that location.

[10] Revealed through a GIPA request to PAC. See Appendix A.

DPE officials. DPE did not hold any record of training or expertise in wind farm VI assessment for either of those individuals[11]. Consequently, to the extent there was evidence of relevant training and expertise, it depended on the "independent" advisor hired by DPE to review the CRWF LVIA.

Grossly conflicted position of "independent" advisor

DPE appointed Green Bean Design (GBD), i.e. Mr Andrew Homewood, as "independent" peer reviewer of the CRWF LVIA that had been submitted by CWP. When DPE was asked for a copy of documentation showing the wind farm specific VI training and testing for Mr Homewood, it reported it had no such documentation.

Obviously that does not mean Mr Homewood has not been trained or tested, though it is dubious practice to employ someone for such specialist expertise without obtaining evidence they possess it. Certainly Mr Homewood has written VI assessments for many wind farm developers, and his repeated employment by the industry suggests industry satisfaction with his work (though not necessarily to the satisfaction of residents affected by those wind farms). But the fact that someone can write an article on music doesn't mean they can play an instrument, compose a tune, or have the same reaction to music as other people.

Aside from the fact that Mr Homewood appears to have developed a valuable practice writing LVIAs for wind farm developers, there is a very specific link with CWP. Mr Homewood had done LVIA's for two other CWP wind farm projects (Bocco Rock and Sapphire) on which he was employed by CWP as their paid consultant. On that basis there are no reasonable grounds for considering him independent of CWP and he had a financial interest in "staying on their good side" with the hope of future work from CWP. He apparently managed to do that, since CWP subsequently employed him as their LVIA consultant on the Bango wind farm.

Note. It is not suggested that Mr Homewood has done anything illegal or unethical. However, as demonstrated, VI assessment is very subjective and results are strongly affected by the values, perceptions and biases of the person producing an assessment. Further, it is commonly understood that a financial relationship with a party can induce perceptions favourable to that party, even if this is not consciously intended or recognised.

In a legal case tangentially related to CRWF noise assessment, DPE's noise expert discussed commissioning someone to provide independent advice in relation to CRWF noise impact. He referred to needing to choose "somebody that was independent of the wind farm industry"[12] and other statements in the case made clear that by "independent" he meant someone who "had not worked for any wind farm proponent"[13].

So DPE's noise expert believed that in commissioning an independent noise expert, that person needed to be independent of the wind industry in the sense of not having a history of employment in that industry. Yet, in choosing a VI advisor, for a task that is inherently much more subjective than noise assessment, and so more readily affected by alignment with an industry, DPE chose a person who had very extensive experience working for the wind industry.

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[11] Revealed through a GIPA request to DPE. See Appendix A.

[12] Transcript, p. 113, ls 32-33.

[13] Transcript, p. 120, ls 18-19.

Any reasonable person would agree with the principle identified by DPE's noise expert, that it is inappropriate to hire into a role that required absolute impartiality, someone who had extensive experience working for the industry of which the developer was a member. And any reasonable person would agree that it is even more inappropriate to hire for such a role a person who had previously worked for the same developer involved in the case at issue and where the hired party might be expected to seek future employment by that same developer.

The appointment of GDB as "independent" VI advisor to DPE for the CRWF was wholly improper and evidences a lack of impartiality on the part of the DPE officials involved.

Lack of transparency in DPE's use of "independent" advisor

Despite having employed GBD as "independent" peer reviewer and quoting GBD and placing reliance on the GBD opinions in the published DPE assessment, DPE did not publish the actual report from GBD and failed to respond to a request to see it during the public exhibition period for the project.

So there was no opportunity to challenge anything about the subjective process by which GBD reached conclusions upon which the Department was happy to rely in its advice to the PAC.

While DPE presented its visual impact assessment as a "Departmental assessment", the officials who signed the assessment apparently had no training or testing in making VI assessments for wind farms, nor apparently did anyone else in the Department (that being the reason DPE employed an "independent" VI advisor). Thus, any validity and integrity in the Department's VI assessment depended on the "independent" VI advisor.

This is further evidenced in the PAC's Determination Report, which states:

> "In response to issues raised by residents regarding visual impact the Commission requested that the Department review its recommendations for residents classified as having a moderate and low visual impact. In response, the Department's independent visual expert indicated that there should be no change to the originally determined classification of residences."[14]

Note that key statement "the Department's independent visual expert indicated that there should be no change". Thus the DPE response was simply GBD's response.

The IPC report subsequently says:

> "However, the Commission is concerned that in this case where mitigation measures are limited, property owners with a potential high visual impact should be enabled to negotiate effective solutions with the Applicant to offset such impacts.
>
> Accordingly, the Commission amended the conditions (with time limits) to afford the six potentially highly affected landholders with voluntary acquisition rights or to enter into separate agreements with the Applicant (which may include the removal of some turbines)" [15]

[14] Crudine Ridge Wind Farm Project PAC Determination Report, 10 May 2016, p. 6.
[15] Crudine Ridge Wind Farm Project PAC Determination Report, 10 May 2016, p. 7.

So, the commissioners decided to grant significant legal rights to landowners subject to a "potential high visual impact" and the composition of that group was determined by the opinion of the "independent visual expert".

That person was someone with a history of writing VI assessment reports for wind farm developers which, given the number of wind farms for which he worked, developers found to their liking. To make the situation worse, that consultant had been paid by CWP (the CRWF developer) to produce VI assessments on their behalf for two previous wind farms.

DPE apparently never advised the Commissioners of the conflicted situation of the person DPE had chosen as an "independent visual expert" and upon whose advice the Commissioners relied according to their Determination Report. Certainly the report does not mention the Commissioners being aware of the status of GBD and it would have been improper for them to take advice from such a party without clearly noting the situation and explaining their decision to rely on advice from such a party.

Thus, the substantial evidence in the public domain shows that:

- DPE appointed as an "independent" visual advisor someone whose prior work history showed alignment with the industry and a financial association with the CRWF developer – someone no fair-minded person would have nominated for a role that required clear impartiality.
- DPE did not advise the Commissioners of GBD's history, particularly in relation to prior work for CWP, and thus materially misled the Commissioners.
- Based on DPE's presentation of GBD as an "independent visual expert", the Commissioners relied on advice from that person in making their determination, in a manner which clearly restricted which landowners were granted protective rights under the determination and which may have affected whether approval was granted at all.

This is indisputably behaviour partial to the interests of the developer, with a major impact on the determination and adversely on rights of affected parties.

Appendix A: Lack of DPE evidence of VI expertise by officials and advisors

A GIPA request was lodged with DPE in relation to the authors of the DPE assessment and recommendations for Crudine Ridge Wind Farm and for any individuals who provided specialist visual impact advice to the Department in relation to those recommendations. The request sought, for each of those individuals (authors and advisors), records held by DPE which show that the individual:

1. has undertaken any formal courses in order to learn how to accurately assess the visual impact specifically of wind farms or similar infrastructure;
2. has been tested for their ability to make accurate assessments of the visual impact of wind farms or similar infrastructure, and their score on those tests;
3. has been tested for the degree to which their assessments of the visual impact of wind farms or similar infrastructure are consistent with the visual impact judgements made by residents to the impact and their consistency scores.

DPE responded[16] to the GIPA request by advising that the Department held none of the information covered by points 1, 2 and 3 above, for any of the individuals (DPE officials and specialist visual impact advisors) involved in producing DPE's Crudine Ridge Wind Farm assessment and recommendations. In its response, DPE stated that Andrew Homewood (of GDB) had provided VI advice to the Department and it did not hold any evidence indicating he had formal training or testing in accurately assessing wind farm VI or to show the consistency between his rating of VI and those of impacted residents.

The Crudine Ridge Wind Farm was approved by PAC Commissioners Pegrum, Hutton and Evans. In response to a GIPA request about the specific wind farm visual impact assessment expertise of the Commissioners, the PAC advised[17] that:

1. The PAC held no records showing those commissioners have any specific training in wind farm VI or any testing of their relevant expertise;
2. The PAC did not engage any VI advisors and relied on advice from the Department of Planning & Environment.

This does not mean all of those individuals necessarily lack specialist training and testing in the unique visual impact assessment task associated with wind farms. However, it does mean DPE employed them to do that task without any evidence of the necessary skills and the PAC had no evidence of the necessary skills on the part of their Commissioners to make up for any deficiency on the part of DPE staff and the DPE "independent" advisor.

[16] File Ref: GIPAA – 2016/17-091 – IR, 20 July 2017.

[17] GIPA Response, Decision maker: James Hebron – General Counsel, Department of Planning & Environment, 16 October 2017.

False or misleading VI assessment by DPE

VI judgements by IPC commissioners depend primarily on two things. They are advice from the Department and supposed VI experts, and the use of visual aids to represent at least some part of the view with the proposed wind farm in place. The supposed experts provide recommendations about how severe will be the VI and they normally use visual aids to support their claims and to convince the commissioners.

If the EIS visual aids are materially false, that will tend to mislead the commissioners and bias their decisions. More importantly, if the visual aids presented by DPE are materially false, the only explanations are either that DPE officials are woefully incompetent for the task they claim to be performing or that they have wilfully sought to mislead the commissioners by providing false images.

If they are simply incompetent and unable to determine whether or not the images are an accurate portrayal, and have accepted whatever was presented by the developer, that in itself is an indisputable instance of improper conduct biased to serve the interests of the developer.

Evidence from the Department's Assessment Report clearly reveals that DPE provided the IPC with information about the visual impact of the then proposed CRWF which was false and which DPE should have known was false – especially since DPE had employed a supposed independent VI expert – whose "independence" was at best conflicted, as the previous chapter has shown.

Nature of misleading VI material

The EIS and the DPE Assessment Report include photomontages which purport to show what will be seen from selected viewpoints if the wind farm is built. The photomontages are grossly misleading in that they spectacularly understate VI for a number of reasons:

1. They way in which they are presented in the reports is a massive deviation from proper practice for wind farm photomontages;
2. They are of such poor resolution in the pdf versions of the EIS that pixilation is grossly obvious and it is impossible to see essential details due to this poor quality;
3. At least one important part of the scaling of turbines in the images is wrong, in a way that diminishes apparent visual impact.

Deviation from proper photomontage practice

DPE's Wind Farm Visual Bulletin says:

> "Photomontages shall be prepared in accordance with the Scottish Natural Heritage Visual Representation of Wind Farms, Version 2.1 December 2014 guidelines, noting they are generally consistent with the Land and Environment Court's Photomontage Policy." [18]

[18] *Wind Energy Visual Assessment Bulletin 2016*, Department of Planning & Environment, p. 13.

The CRWF EIS was produced before issue of the 2016 guidelines, but the Scottish Natural Heritage advice, referred to in the guidelines, was first published long before the CRWF EIS was prepared. The earliest version was the 2006 document *Visual representation of windfarms: good practice guidance*[19] released by Scottish Natural Heritage, which pre-dated the CRWF EIS by six years. Thus, good practice for producing and reproducing wind farm photomontages was well established and should have been known to both the proponent and DPE long before the EIS was produced and assessed.

The photomontages, as published in the EIS and then republished in the Assessment Report bear no relationship to good practice.

For instance, photomontages published at A4 do not remotely represent the view that will be seen from each viewpoint. As is finally admitted in later LVIAs (for other projects), photomontages need to be printed at A0 and viewed at arm's length to get a true representation. DPE and their contracted VI expert and the proponent and their VI expert knew this at the time the CRWF Assessment was being done.

In addition, on page 29 of the Assessment, the Department published a photomontage (sourced directly from the LVIA) from residence CR34 described as "zoomed and cropped" Readers are entitled to assume that this view as presented brings the turbines closer and even larger than reality. Not true, it still grossly under-represents the view the resident will see, being an approximation to an A2 image.

However, it is worse than this. This view was originally printed in landscape format in the EIS (page 70, Vol 4_Landscape & Visual Impact Assessment_Part B). The Department presented it to PAC Commissioners in portrait format, so it is scaled down further by close to 50%.

Low resolution, blurred images

The images in the electronic versions of the EIS are of an incredibly low resolution, so that much of the images are just blurred masses of pixilated colour and it is impossible to see any detail of turbines shown in the distance in an image.

When it was exhibited, public submissions included comments about this defect, such as: "The images also appear to be photoshopped to appear blurred or softened".

These comments were never refuted by the proponent and ignored by the DPE planner, who made no comment in their assessment and who took no action to require the developer to provide proper, high resolution photomontages.

Misleading scaling of turbines in photomontages

In its Assessment Report, DPE stated that turbines would be a maximum of 160m to tip height and have blade lengths between 40 and 63m[20]. The developer claimed that the photomontages were conservative and represented the "worst case".

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[19] *Visual representation of windfarms: good practice guidance*, Scottish National Heritage, Report FO3 AA 308/2, 2006.

[20] *Crudine Ridge Wind Farm Assessment Report*, NSW Department of Planning & Environment, December 2015, Table 1, p.12.

That would require the photomontages to use images of turbines 160m high (and appropriately scaled in the images) with blades of 63m.

Whilst the height of turbines is a significant factor in VI assessment, rotor swept area is equally or more important, second only to distance, especially in real life as the eyes are drawn to the moving blades. The worst case swept area is given by the proponent as 12,470 square metres.

Although the photomontages as published have a very low pixel density (by far the worst seen over a number of LVIAs), it is clear that the turbine blades and therefore the swept area are significantly underscaled.

If the tower height used for the photomontages is 160m then blade length used is a max of 58m (see Appendix B), not 63m and thus the swept area is 10,567, i.e. 85% of actual worst case.

Similarly it appears that the relative size of blades to total tip height used in the wireline images is also around 58m, not 63m.

DPE complicit in combined distortion of VI representation

So the VI visual aids provided to DPE, the public and the IPC grossly understate actual visual impact through multiple factors:

1. Using blade lengths in the images materially under the 63m (worst case)
2. Using terribly poor resolution, blurred images which conceal turbine detail and contrast; and
3. Creating and presenting photomontages which in other ways are contrary to what was known to be good practice in 2012 when the EIS was lodged.

DPE, with its supposed "independent VI expert" would have sent the EIS back to be done properly if DPE was acting impartially. Instead, DPE allowed the public to be presented with grossly misleading information, to which the public was supposed to respond. When members of the public complained about the most obvious defects in the imagery, DPE ignored them. DPE then took some of that same imagery and presented it to the PAC in its Assessment Report, without ever mentioning any of the defects that rendered the imagery worthless in representing what would be the actual situation – and it backed up its misrepresentation by assuring the PAC that its position was based on the advice of an "independent" VI consultant, without informing the Commissioners of the extremely conflicted position of that consultant.

That was one more DPE action depriving members of the affected community of procedural fairness.

Appendix B: Determination of blade length in photomontages

The photomontages in the CRWF EIS are some of the worst ever exhibited, in terms of resolution, colour and contrast. Nonetheless, it is possible to derive some idea of blade length from some of the images. The image below is from Fig 13 in DPE's Assessment, with the swept area of one turbine outlined in red.

A larger image of that turbine is shown in below.

Several important ratios can be measured from the image, in particular the diameter of the swept area relative to the height to the top of the swept area. That ratio is 0.72.

If tip height is 160m, then the diameter of the swept area is 0.72 * 160m = 116m. The radius, which is blade length is then half of that, so 58m.

The EIS claims the photomontages are "based on a worst case scenario", which given the turbine description in the EIS means 160m to tip height with 63m blades.

The identified image shows blade lengths a maximum of 58m, ie well under 63m and they could be shorter than that. The length from the image has been determined by assuming that none of the tower base is hidden, and thus the whole tower is visible. If any of the tower is hidden then the distance from base to tip height would be greater than apparent from the image. As a corollary, the ratio of swept area diameter to height would then be smaller, and the blade length in the image would be smaller.

For instance, if 10% of the tower was hidden, the ratio of the diameter of swept area to tip height would actually be 0.68, thus the radius 0.68 * 160m = 108m, with a blade length of 54m.

Improper behaviour re noise impact assessment

Evidence in a legal case indicates that DPE engaged in improper conduct, effectively covertly collaborating with the developer, with respect to noise impact assessment for the Crudine Ridge Wind Farm – and doing so in a way which indicates bias in favour of the developer and against the interests of affected residents. Further, the Department has attempted to conceal the improper actions and this bias and done so through misleading statements by its General Counsel.

Improper behaviour revealed in a court case

In 2018, a NSW Court case revealed that a DPE official dealing with Crudine Ridge Wind Farm noise matters had collaborated with the developer and the developer's noise consultant while failing to provide similar interaction with either the local community or with a noise consultant working on behalf of that community. It occurred in a manner which allowed the developer and their consultant to potentially influence the content of an independent consultant's report and/or the way that report was commented on and presented to the PAC by the Department.

This biased consultation, including sharing the then unpublished independent consultant's report with one party, only emerged after the official was confronted in court with subpoenaed communications between the official and the developer's noise consultant. This revelation occurred after that official had previously told the court they had shared the document ***only*** with government officials, not mentioning to the court that they had also shared it with the developer and their consultant.

After being confronted with what they had actually done, the official claimed in court that it was standard practice. Thus they claimed it was standard practice to collaborate with developers in a way that is not transparent and which was not provided to community members or their consultants.

Coverup and misleading statements by the Department

When the Department was queried about this occurrence, the Department's General Counsel claimed there was no problem. He also claimed that the Department had commissioned an independent probity advisor to review the matter and the advisor had "concluded both that the employee's conduct was appropriate and the process sound"[21].

That claim by the General Counsel was at best misleading, since it neglected to mention that the terms of reference for the probity advisor did not cover interaction between the official and the developer and their consultant, but only the interaction between the official and the company commissioned as independent noise consultant. From the terms of reference and the report provided by the advisor "on an urgent basis" and "recommending a more detailed review" (which apparently never happened), it appears the probity advisor had no awareness

[21] Letter from DPE General Counsel, MDPE18/2913, dated 19 September 2019.

of the interaction which had occurred between the DPE official and the developer and their noise consultant.

This is detailed in an open letter (Attachment A) sent to Minister Roberts on 1st October 2018, and to which no reply was ever received on the substance provided to the Minister. That followed an earlier letter to the DPE Secretary on 23rd August 2018 (Attachment B) providing greater detail of the court case and its implications and to which the only answer was the General Counsel's non responsive and misleading letter on 19th September 2018.

The appalling sequence of events

In short, what occurred was:

- The developer's noise consultant had prepared a noise report for the proposed Crudine Ridge Wind Farm. Members of the local community retained an independent professional noise expert to also produce a report. In a meeting with members of the local community, the DPE Secretary undertook to have an independent noise expert review the matter, including the reports from the developer's noise consultant and the community's noise consultant.
- A Department official subsequently commissioned a third noise expert to do that.
- The independent noise expert completed their work and sent what they considered the final document to the Department official.
- That official forwarded the independent noise report to the developer's noise consultant and solicited comment from the developer's consultant about the independent report. (Note, this is separate from the phase called *Response to Submissions*, at which point all relevant documents, including submissions from various parties, are published online by the Department and the relevant published documents are sent to the developer by the planning officer for the project [the official in this case was not a planning officer], and to whom the developer's response will be returned for publication and consideration formally by the Department.)
- Only after receiving those detailed comments from the developer's consultant did the Department official prepare their own comments which they then sent to the developer's noise consultant, essentially asking if they were OK.
- Once agreed by the developer's noise consultant, the official then sent those comments to the independent noise consultant and the consultant finalised the report.
- The official subsequently advised the developer's consultant that the independent consultant had accepted some points made but not all.
- Comments in the official's email to the developer's consultant could be construed as stating that the official needed their assistance to subsequently mount an argument favourable to the developer and contrary to certain advice in the independent consultant's report.
- The official did not provide a copy of the independent consultant's report to the noise consultant acting for the community, despite the fact that the independent report also commented on the report produced by the consultant for the community. Nor was there any other relevant communication between the official and the community's noise expert.

- It subsequently became apparent to members of the local community that something odd had occurred in the production of the independent noise expert's report, though the specifics were unclear.
- The Secretary then undertook to have an independent probity advisor examine what had occurred, to check it was above board.
- The terms of reference for that advisor referred ***only*** to interaction between the official and the independent noise consultant. That advisor was apparently unaware of the more serious interaction between the official and the developer and the developer's consultant.
- The probity advisor stressed in their report that it was done on an urgent basis and there should be a more detailed review but, on what they had seen, the official had not influenced the final report but that the behaviour (of which they knew) could give rise to a public impression that the Department was able to influence an independent report.
- In a subsequent meeting with members of the local community, the Secretary advised that a relevant training course had been instituted following the probity advisor's report.
- About two years later a court case[22] occurred in which that same Department official, giving sworn testimony, was queried about what had occurred in relation to the independent noise expert's report. The official was asked to whom they had given the initial version of the report.
- The official claimed to have sent it only to other government officials and their annotated version to other officials and the independent noise consultant. The official explicitly denied sending either the initial or final version to the developer's noise consultant.
- Under cross-examination, the official was confronted with a number of emails between the official and the developer's noise consultant. The emails had been subpoenaed from the developer's noise consultant. They showed that the official's earlier statements to the court were false.
- After the official had been taken through the series of emails which had been exchanged, the following series of questions from counsel and answers by the official were made to the court[23]:

> Q. Just to recall, to refresh what we had been through yesterday, you had received on 18 July an email from **X** (*the independent noise expert*)[24] enclosing what he referred to as "a final report"?
> A. Yes.
>
> Q. You had sent that final report onto **Y** (*the developer's noise consultant*) and the developer?
> A. Yes.

[22] The case is identified in Attachment B.

[23] From transcript of case identified in Attachment B, p. 159.

[24] Actual names were used in the trial. To preserve anonymity, letters are used here instead of the names given to the court.

Q. They had sent you a seven page matrix with their comments and concerns about the report?
A. Yes.

Q. You discussed it with them during a two hour teleconference?
A. Yes.

Q. You prepared your comments on the report and sent them to **Z**, the planning officer at the department on or about 29 August?
A. Yes.

Q. On 3 September you had sent those same comments to **A** at **Y**, the developer's expert?
A. Yes.

Q. And you'd said to him, "Please consider these comments and get to me with your response"?
A. I can't recall exactly the words.

Q. That's in the email at tab 9 of exhibit 2. I can have it shown to you, if you'd prefer?
A. I will, I will concur with that at this point.

And later[25]

Q. You provided an independent report to the developer but not to **G** *(the community's noise consultant*) and the wind farm opponents, didn't you?
A. Yes.

Q. You discussed it with one side, that report, the developer, I suggest.
A. Yes.

Q. You prepared a set of comments that were influenced by the concerns of the developer.
A. Yes.

Q. You've provided those comments to the developer.
A. Yes.

Q. In fact, you then provided them to the independent expert later?
A. Yes.

- In testimony, when asked about the probity advisor's report and outcome, the official stated "even though in 3.6 it does suggest some training, that's not something that - that's ever been implemented, because I guess the department didn't, didn't feel it was necessary" [26] – thus contradicting what the DPE Secretary had told community members.

[25] From transcript of case identified in Attachment B, p. 203.
[26] From transcript of case identified in Attachment B, p. 201.

Summary of the misbehaviour and departmental bias

Whether or not the independent noise report was actually influenced by the official, it is absolutely clear that:

- The official behaved in a matter partial to the developer and discriminated against the local community and their advisors in terms of communication and opportunity to influence the report. (After all, if there was to be no opportunity for the developer and their consultant to influence the independent noise report when it was at a draft stage, it made no sense to give them a copy and ask for comments back to the official before the official finalised their comments to the independent advisor.) In short, the official behaved in a way biased to serve the interests of the developer.
- The official's role in relation to the wind farm assessment was not simply to obtain that independent report. The official was also an internal advisor about how the Department viewed noise aspects and a contributor to the production of the Department's assessment in relation to noise.
- Since the official behaved in a way biased to the developer's interests, a reasonable expectation is that bias applied wherever the official had some involvement with the formation of the Department's position on noise and in the Department's relevant advice to the PAC.
- The Department did not sanction the official for what had been done. Indeed the General Counsel claimed it was OK, even after extensive damning detail was revealed in the court case. Instead, the Department attempted a cover-up using misleading statements about what the probity advisor had actually considered. Further, the Department has refused to answer a series of relevant questions as to policy relating to its officials dealing with developers. (See letter to Secretary McNally at Attachment B.)
- It follows that either the Department is systematically biased towards this developer and perhaps others) or that it allows individual officials to act in a way biased towards this developer and effectively supports them in their bias.
- The net result is to corrupt all advice from the Department to the PAC/IPC in relation to this project (and perhaps others).

False statements to the PAC about project viability if number of turbines reduced

The developer made false statements to the PAC about the financial viability of CRWF if the number of turbines was reduced below the 77 sought at the time by the developer. DPE officials advising the PAC endorsed that claim. Subsequent developments have proved those claims to be false, and that the developer ought reasonably to have known they were false.

Thus both the developer and DPE officials made false and misleading statements to the Commissioners about the matter and, based on those false and misleading statements, the Commissioners made a determination which they believed would be materially adverse to some residents.

In its Determination Report on the CRWF proposal in May 2016, the PAC stated:

> "The Applicant has also advised that whilst it has put forward a 60 turbine option it is not possible for them to simply delete 17 turbines from the proposed 77 layout and retain a viable project. The Applicant's two layout options have been designed having regard to site selection and turbine capacity. The Applicant noted they have also already reduced turbine numbers from the original proposal of 106 to a maximum of 77 turbines.
>
> The Commission agrees with the Department that the removal of a significant number of turbines to mitigate the high visual impact residences would most likely place the Project at risk and in this case is not a viable solution."[27]

That quote tells us several important facts:

- The developer put to the Department and PAC that eliminating 17 turbines from the 77 it was requesting for approval would make the project non viable.
- The Department advised the PAC that it agreed with that statement.
- The PAC was persuaded by this advice to believe that deleting 17 turbines from the 77 would make the project non viable and, as a consequence, did not order deletion of turbines from the 77, despite the Commissioners recognising that there would be a serious visual impact on a number of residences.

It is now publicly known that the advice received by the PAC at that time, from both the developer and the Department was ***false***. That is known to be the case since the developer was subsequently restricted to 37 turbines by the Federal Department of the Environment and is still proceeding with the wind farm.

If the wind farm is viable with 37 turbines, it certainly would be viable with 60 turbines. ***Thus the advice given to the PAC by the developer and the Department was false***.

The advice was also clearly material, because the Commissioners were considering whether they might approve the wind farm with less than the requested 77 turbines in order to limit

[27] *NSW Planning Assessment Commission Report, State Significant Development Application, Crudine Ridge Wind Farm (SSD 6697),* 10 May 2017, p. 7.

seriously adverse visual impact on residences. Because they were persuaded by that advice that doing so would make the project non viable, they approved 77 turbines, not a lesser number.

Specious claim that new technology explains the difference

CWP officials who provided the advice to the Department and Commissioners might try to claim that they are now going to use large turbines (3.6MW) and blades (67m) than they were proposing in 2016. However, that ignores what they actually requested and that was approved in 2016, specifically[28]:

Project Summary	**Development of a wind farm, involving:** • **up to 135 megawatts (MW) of installed electricity capacity;** • **up to 77 wind turbines and associated operating infrastructure including internal access roads, site compound and crane hardstand areas;**

and

Wind Turbine Components	• Construction and operation of up to 77 wind turbines, each with a maximum height (to blade tip) of 160 metres (m) and a nominal capacity of between 1.5 and 3.4 MW[3]. • Typical tower heights up to 101.5 m, and blade lengths between 40 and 63 m.

The developer has not lodged a modification request to increase either blade size or turbine size, relying on the "up to" provisions in their original application and consent (despite that 3.6MW and 67m+ blades are greater than approved.) However, if we take them at what they claim is their understanding of their own request and consent, then we have:

- They now claim the project is viable with 37 3.63MW turbines = 134MW.
- At the time of the original PAC, within the original parameters, those 37 turbines could have been 3.4MW = 126MW (i.e. only 6% less than currently intended).
- In fact within the alternative framework being considered by the PAC at the time, of 60 turbines, the potential was the 37 they now intend to build (126 MW @ 3.4MW each) plus up to another 23 of various capacities. This was more than enough to achieve the 135MW maximum capacity being sought and approved.

Thus the developer always had the ability to produce the maximum capacity they sought, without requiring 77 turbines and not dependent on technology that has since become available. After all, the developer requested approval for turbines up to 3.4MW and GE, their apparently intended supplier, had publicly announced 3.4MW turbines in November 2015[29].

Nor are 3.6MW turbines something new. More than five years ago, in December 2013, Windpower Magazine[30] listed a number of onshore turbines of 3.6MW or greater.

If the developer's officers are trying to tell IPC commissioners that turbines of the power they now want to use were not available in 2016 when the project application was considered, that would be false. And as already noted they requested approval to use 3.4MW turbines.

[28] *Op cit*, p.3.

[29] https://www.genewsroom.com/press-releases/ge-renewable-energy-unveils-new-3-mw-wind-turbine-platform-ewea-282327

[30] https://www.windpowermonthly.com/article/1225350/turbines-year---turbines-36mw-plus

What was the role of DPE in promulgating falsehoods?

Note that the Commissioners wrote:

> "The Commission agrees with the Department that the removal of a significant number of turbines to mitigate the high visual impact residences would most likely place the Project at risk and in this case is not a viable solution."

So the Department had falsely advised the IPC that project viability was at risk if turbines were deleted. How did DPE officials come to that conclusion which has since been demonstrated as false? Did they conduct some detailed analysis themselves? If so they have proved incompetent. Or did they simply take the advice of the developer, thus failing to act as an impartial, arm's length advisor?

DPE officials have given PAC/IPC Commissioners materially false advice in relation to CRWF on multiple occasions and multiple matters. On their track record, nothing they say can be relied upon. That has been proven repeatedly, and if the Commissioners choose to rely on anything from DPE officials they knowingly make themselves culpable.

Legal action required

The *Environmental Planning and Assessment Act* makes it an offence to provide false or misleading information in a planning matter. Specifically s10.6(1) [*previously s148B(1)]* states:

> "A person must not provide information in connection with a planning matter that the person knows, or ought reasonably to know, is false or misleading in a material particular."

S307A of the NSW *Crimes Act* defines an offence if anyone makes a false or misleading statement to a government official when seeking a benefit, including a consent, and where they have been reckless as to whether the statement is false or misleading either explicitly or through omission. Thus s307A arguably applies to the statements which have been made by CWP officers in relation to the viability of the project if turbines were deleted from the 77 turbine proposal.

S307B of the NSW *Crimes Act* makes it an offence to knowingly provide false or misleading information to a public authority exercising authority in connection with State law. Arguably s307B would apply to any DPE official who knowingly provides false or misleading information to the IPC as a consent authority. The only defence for DPE officials in relation to the claimed non viability of the project is that they were ignorant on the matter – in other words they were negligent in their advice to the PAC.

It is quite clear from what has since occurred that in May 2016, the developer "ought reasonably to know" that reducing the number of turbines to significantly less than 77 would **NOT** render the project non viable. Even without the benefit of hindsight, since the developer had sought turbines of up to 3.4MW, its officers should reasonably to have known the project could produce 135MW with substantially less than 77 turbines. Consequently the only reasonable conclusion is that they breached s10.6(1) of the *EP&A Act* and potentially s307A of the *Crimes Act*.

It also appears that DPE officials who advised the PAC also breached s307B of the *Crimes Act*, unless their excuse is that they were negligent at the time, and either failed to do any due diligence themselves on the claim or their arithmetic was not up to multiplying 40 * 3.4MW (= 136MW > 135MW max sought and 37 turbines less than sought).

The IPC has a reasonable expectation that any advice provided to it by the Department of Planning will have been independently tested by the Department. The developer already puts their own case to the consent authority. Any advice from the Department must be an independent evaluation by the Department and not simply repeat a claim by the developer in a way that misleads the consent authority to believe the claim has been independently tested in a manner that gives it strength beyond the developer's assertion.

Water use: Grossly false advice by developer and DPE

The EIS contained materially false statements about the volume of water required to construct the project. DPE echoed those same false statements in its assessment to the PAC. The PAC approved the project with a general condition which would require the developer to restrict its water use to roughly what it had estimated.

After approval, the developer advised the community that it would use at least three times the volume of water it had previously claimed to DPE and the PAC and has been conducting its development activities accordingly, in a way contrary to the consent conditions.

The evidence now in the public domain shows:

- The developer provided materially false statements to DPE and the PAC in relation to water use;
- DPE endorsed that false information despite DPE being warned by members of the public that it was a gross underestimate;
- DPE has taken no action against the developer to enforce compliance with the consent conditions in relation to water use;
- DPE has not initiated legal action against the developer for providing materially false information in its planning documents.

Thus DPE acted improperly in favour of the developer's interests in the preparation of its assessment and advice to the PAC and in relation to DPE's compliance and enforcement responsibilities after consent was given. It has done so in a way that is biased in favour of the developer's interests while deliberately ignoring valid information from the public and the true impact on members of the affected community.

The false information

In its EIS for CRWF, dated December 2012, CWP stated:

> "It is estimated that in the order of 8.9 mega litres (ML) of water would be required to produce the quantity of concrete required for gravity footings for Layout Option A, and as such can be considered the maximum amount of water required for use in concrete batching."[31]

and

> "In addition, it is estimated that a further 11.7 ML of water would be required for road construction and dust suppression activities. This would provide sufficient volume for all new and upgraded internal road construction and dust suppression activities, including those associated with the 21 km of unsealed arterial road. These activities are not embargoed and as such require the Proponent to apply for a permit to the NSW Office of Water (NOW). This will be undertaken pending Development Consent." [32]

[31] *Crudine Ridge Wind Farm Environmental Assessment*, Volume 1, CWP, December 2012, p. 45.
[32] *Crudine Ridge Wind Farm Environmental Assessment*, Volume 1, CWP, December 2012, pp. 45 - 46.

DPE, in its assessment stated:

> "Operation of the project is unlikely to require significant demand on local water resources. However, up to 20.6 megalitres of water would be required for concrete batching, dust suppression and related activities during the construction phase. . . . The Department and DPI Water are satisfied that this water use is unlikely to have any significant impact on water supply and demand in the region."[33]

Note that the ***maximum*** figure for water use stated by DPE is 20.6 megalitres, which is the sum of the two amounts of 8.9 ML and 11.7ML claimed in the CRWF EIS. Well before DPE had produced its assessment, the Department had received a community submission[34] which included two pages of detailed calculations showing that on any reasonable grounds water used would be many times the amount stated by the developer.

Note also, that submission was provided to the developer as part of the normal exhibition and submission process. So the developer itself had the opportunity to correct its estimate before DPE produced its assessment for the PAC. The developer did not make a correction but wilfully stuck with the false statement.

It is unclear whether DPE did any calculations itself. The community submission gave DPE grounds to do so and a template for such calculations (assuming DPE did not already have one).

If DPE did its own calculations, then amazingly it came up with precisely the same result as CWP, and in error by the same massive amount as CWP. The more reasonable conclusion is that DPE simply accepted the claim given by CWP, despite a substantiated basis for doubting CWP's claim. Doing so would clearly be improper behaviour by the Department, favouring the developer.

For whatever reason, DPE officials gave the PAC materially false advice about CRWF water use, did so without proper consideration of relevant public submissions, and did so in a way that favoured the developer's interests.

True water requirement revealed

The true water requirement was revealed in 2018 communications from CWP. For instance, an August 2018 letter from a CWP executive stated[35]:

> "Approval was granted to secure 64ML per annum" [Reference to approval from WaterNSW]

and

> "The usage rates will fluctuate subject to site activities and will be ongoing until the completion of construction in October 2019."

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[33] *Crudine Ridge Wind Farm Assessment Report*, NSW Department of Planning & Environment, December 2015, p. 58.

[34] *Submission to Department of Planning & Infrastructure: Preferred Project Report, Crudine Ridge Wind Farm*, Crudine Ridge Protection Group, 17 December 2013, pp. 12-13.

[35] Letter to Owain Rowland-Jones from Brendan McAvoy, Project Director, CRWF Nominees Pty Ltd, 9 Auguest 2018.

Note the approved water usage is 64ML ***per annum***, to be used for apparently more than a year, not simply a total of 64ML. The 20.6 ML claimed in the EIS and echoed by DPE was a ***total***, not an annual rate for some period.

Further, that 20.6ML was for a wind farm with 106 turbines, which was subsequently reduced to 37 turbines for a number of reasons, including the intervention of the Federal Department of the Environment. This change should require less concrete and a lot less activity on site needing dust suppression than for the original proposal. Thus the original estimate was out by a factor of at least three and possibly five or more.

In its assessment DPE claimed that, based on the 20.6ML figure, "this water use is unlikely to have any significant impact on water supply and demand in the region". When you say something is *unlikely*, rather than *impossible*, it means there is some possibility of the alternative occurring. Thus, DPE was admitting that even with a total water use of 20.6ML for the project it was possible that there would be a "significant impact on water supply and demand in the region". Basic logic tells us that if the actual use is 3 or more times higher than 20.6ML then the chance of a "significant impact on water supply and demand in the region" is substantially increased. Consequently, the advice given by DPE to the IPC was materially wrong.

Relevant consent conditions

There are two CRWF consent conditions relevant to water use. The PAC approved the project subject to the general condition that "the applicant carry out the development (a) generally in accordance with the EA; and (b) in accordance with the conditions of this consent".

The second relevant consent condition (16) stated: "The applicant shall ensure that it has sufficient water for all stages of the development, and if necessary, adjust the scale of the development to match its available water supply." and noted the requirement to obtain a water licence for the development.

That condition did not confer specific water use rights on the developer, rather it imposed a constraint that the scale of development was to be reduced if the water supply available to it due to either other consent conditions or physical circumstances was insufficient to properly develop the whole project.

The condition noted that, under law, the developer would need to obtain a water licence for water to be used. But nothing in that condition overrode the general consent condition to "carry out the development generally in accordance with the EA".

The developer has since claimed it has received approval from WaterNSW to use 64 megalitres ***per annum***, i.e. more than 3 times the amount specified in the EA. No one can reasonably claim that amount is "generally in accordance with the EA".

The EP&A Act (section 4.55) allows the consent authority to modify the consent upon application from the developer, including in cases involving "minimal environmental impact" (1A) or other (2). It is possible to argue whether an increase in water use by at least a factor of 3 (particularly in a period of drought) constitutes just "minimal environmental impact" or more, but it is certainly some environmental impact. Even if "minimal environmental

impact", it requires approval by the consent authority to change the limit imposed under the general consent condition in the CRWF approval.

More than 2 years after the PAC approved the project, no modification application has been lodged by CRWF to amend the water use covered by the consent.

Meanwhile, DPE has taken no compliance action to require the developer to abide by the relevant constraints under the consent or to have the developer lodge a modification application. This inaction has been beneficial to the developer's interests.

Finally, DPE has taken no legal action in relation to what has now been proven to be materially false information provided by the developer about water use for the project. This inaction has been beneficial to the developer's interests.

Further, as shown above, DPE officials themselves gave that same false advice to the PAC Commissioners – and they did so after receiving detailed calculations from a member of the public showing why that advice was false.

False statements by DPE about APR vegetation clearing

There is strong evidence that in clearing vegetation along APR, the developer breached the Consent as it related to that clearing. There is also strong evidence that the developer subsequently made false and/or misleading statements to the Department about the clearing. Further, there is strong evidence that DPE officials are deliberately making false and misleading statements to the PAC in relation to the clearing of vegetation along Aarons Pass Road (APR) and that they have done so in the Assessment submitted to the PAC and in meetings with the Commissioners.

The breach and its detection

In August 2018, the developer was caught by local residents in environmental destruction along APR, contrary to the consent conditions imposed by the PAC in May 2016. This was quickly brought to the attention of the Department and, through strong effort by residents, the Department's compliance section was forced to inspect what was occurring while the work was underway.

The work was carefully inspected on the ground by Mr Chris Schultz, a member of the Department's compliance unit. Consultation between DPE and the developer then led to the developer abandoning the work and later the Modification application to approve much greater clearance along APR than had been previously approved for the project.

Members of the local community were of the view that the developer had clearly breached the consent conditions with respect to clearing along APR, conditions which were defined in Appendix 6, Road Upgrade Requirements, of the May 2016 Consent. The Department has taken a contrary view and refused to bring action against the developer for breach of the Consent on this matter.

The Department has attempted to justify its position by claiming that the area cleared by the developer before it stopped is less than the total approved for clearance along APR in the consent. In so doing, the Department has claimed that the area cleared was "approximately 0.3 hectares (ha) of vegetation at the eastern end of Aarons Pass Road" and that this "did not exceed the estimated 1.54 hectares (ha) of vegetation clearing for the road upgrades as documented in the Preferred Project Report (PPR) for the original project"[36].

There are a number of problems in that position, involving multiple false or misleading statements by the Department.

1. The actual Consent for work on APR is at explicitly defined points along the road and for the removal of a specific number of trees at certain of those points. The consent conditions were not for clearance of a quantified area (such as the 1.54 ha claimed by Department officials). Further, the 1.54 ha which DPE officials now claim was for clearance in the PPR was not an estimate of clearance. It was an estimate of ***disturbance*** (which can include clearance) and the documentation in the PPR

[36] *Crudine Ridge Wind (Mod 1) | Modification Assessment Report*, Department of Planning and Environment, May 2019, p. iv.

explicitly showed that a large proportion of that figure was to disturbance of the existing road surface (which contains no vegetation to be cleared).

2. The Department never measured the area cleared and simply relied on a claim from the developer, who obviously had a self-interest in understating the area cleared. The Department has refused, despite repeated requests, to transparently make available the measurements and calculations upon which their figure of 0.3 ha is based.
3. A local resident, Mr Owain Rowland-Jones, conducted a documented, on-the-ground measurement (i.e. not a desktop or back-of-the-envelope) calculation and discovered that the actual area cleared was 2.0 ha ± 15%. That amount is at least six times the figure claimed by the Department and greater than the total which the Department claimed the developer was authorised to clear along the whole of APR – and this clearing was done over a distance of 3 – 3.5 kms whereas the consent covered work over 20kms of APR. So in less than 1/6 of the road length which the developer wanted to modify they had cleared more than the total hectares which DPE claims they were authorised to do. Mr Rowland-Jones has provided details of his measurement and the results to the NSW Minister for Planning and to the IPC [37].
4. The DPE official, Chris Schultz, who did the actual inspection of clearing along APR, subsequently advised local residents in late August 2018 that the Department had told the developer "that we do not believe that they are compliant with the consent for the proposed area of vegetation clearing". In addition, an internal DPE briefing document in August, either to or from Mr Young, advised that the clearing of trees which had occurred was not consistent with Appendix 6 of the consent and that it appeared the clearing undertaken by the developer already exceeded approved limits.

What was approved to be done

Like most development consents, the CRWF consent has a clear statement at the beginning[38]:

TERMS OF CONSENT

2. The Applicant shall carry out the development:
   (a) generally in accordance with the EA; and
   (b) in accordance with the conditions of this consent.

   Note: The general layout of the development is shown in Appendix 2.

3. If there is any inconsistency between the above documents, the most recent document shall prevail to the extent of the inconsistency. However, the conditions of this consent shall prevail to the extent of any inconsistency.

Thus the developer is authorised to undertake the development "generally in accordance with the EA" and subject to the conditions of "this consent", with the latter over-riding the EA in any case where there is an inconsistency with the EA.

The May 2016 consent contains a very specific description of approved work and specifically tree clearing along APR. That is Appendix 6 in the Consent document. It is also Appendix F

[37] Letter to Minister for Planning and Public Spaces, cc'd to IPC, from Mr Owain Rowland-Jones, dated 6-6-2019.

[38] Development Consent, Crudine Ridge Wind Farm SSD-6697, 10 May 2016.

in the Assessment Report presented to the PAC by Mr Young and DPE. That Report discussed the Appendix as follows[39]:

> *Aarons Pass Road*
> MWRC is the relevant roads authority for Aarons Pass Road. The PPR includes a detailed transport route survey and upgrade assessment by Downer Infrastructure that identified specific road upgrades to be undertaken along Aarons Pass Road. These upgrades include widening, passing bays, levelling and replacement of several causeways.
>
> MWRC initially identified a number of concerns about the scope of the proposed road upgrade works and recommended that a number of additional works should be undertaken based on its assessment and further investigations by Council's road engineers. These road upgrade works are presented in Appendix F.

Thus the DPE Assessment Report in December 2015 advised that the road upgrades identified as necessary by Downer Infrastructure for the developer **and** the additional work required by MWRC based on "further investigations by Council's road engineers" are already included in Appendix F to the DPE Assessment Report, which in turn became Appendix 6 in the Consent document.

The Downer Infrastructure report[40], which was presented as part of the EA was not some vague general statement about road upgrade and associated vegetation clearance. It identified the exact work which needed to occur and the precise locations where it was to occur, and at each point where trees needed to be removed, it provided photos on which were marked the trees to be removed.

An ecological report[41] was then prepared by Ecological Australia, based on the Downer Report. The ecological report examined each of the sites of work proposed by Downer and evaluated the ecological impact at each and measured the area that would be ***disturbed*** at each of those locations.

In some instances the disturbance involved actual vegetation clearance. For instance, Downer identified a number of corners that needed to be made less sharp and where doing so would remove identified trees at those corners. Doing so would also require the removal of any undergrowth. So in those cases the area to be disturbed which was measured by Ecological Australia was also the area of vegetation clearance at those locations.

In other cases the area of disturbance involved either zero vegetation clearance or almost none. A substantial amount of the work identified to be done was on the roadway itself, where there was no vegetation. For instance, Downer identified four locations where crests in the roadway needed to be lowered to make them less steep. The area of disturbance which Ecological Australia calculated for those four locations, which were entirely on the roadway, was a total of 0.6 ha.

Other areas of disturbance not involving any vegetation clearance were culverts and causeways which needed to be replaced and a number of corners of the existing roadbed which needed to be properly graded and levelled. In total the areas of disturbance identified by Ecological Australia included just over 1 ha which involved **no** removal of vegetation.

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[39] *State Significant Development Assessment Crudine Ridge Wind Farm (SSD-6697)*, Department of Planning and Environment, December 2015, p. 44.
[40] *Downer Report – Heavy Haulage Route Survey and Upgrade Assessment Aarons Pass Road*.
[41] *Ecological Australia Report for Aarons Pass Road*

Consequently, Ecological Australia identified locations involving at most 0.56 ha of vegetation removal along APR in order to perform the work identified by Downer and to conform to Appendix 6 of the Consent document. This is detailed in Attachment C to this paper, *What the PAC Approved in Environmental Disturbance on APR.*

Whether through ignorance, carelessness, or deliberate connivance, the developer and the Department have been misrepresenting what was presented to the PAC in 2016 and what was consequently approved by the PAC. The DPE Assessment Report for this Mod says:

> "This change would lead to a localised increase in the total disturbance footprint and associated vegetation clearing for the road upgrades from approximately 1.54 ha to 6.59 ha (an incremental increase of 5.05 ha)." [42]

Note that statement blurs "disturbance footprint" with "vegetation clearing", providing no indication to the reader that the latter, as approved, is less than the former. Also note that when trying to justify its failure to act on the obvious breach of the APR vegetation clearance approval, DPE officials claim the work done:

> "did not exceed the estimated 1.54 hectares (ha) of vegetation clearing for the road upgrades as documented in the Preferred Project Report (PPR) for the original project"[43].

In that statement there is no mention of "disturbance footprint", only of what are falsely claimed to be a prior statement of "vegetation clearing". Whether intentional or otherwise, this is a grossly misleading statement and leaves all related DPE statements bereft of integrity.

In accordance with paragraphs 2 and 3 of the Terms of Consent, Appendix 6 overrides all other matters in relation to approved vegetation clearance along APR. This is actually not a problem with respect to the Downer Report or the related Ecological Australia Report, since they are all congruent and consistent with Appendix 6. The problem that has occurred is that the developer and DPE officials have repeatedly misrepresented the measurements in the Ecological Australia report.

In doing so, they have presented two falsehoods. They have conflated an approved area of "*disturbance*" with an area of "*vegetation clearing*", though the latter was only about one third of the former. They have also tried to pretend there is some fungibility of the area approved for clearance along APR, even though what was approved was work at only precisely identified sites and the only places where Ecological Australia had checked for potential ecological damage was at those specific sites.

What was actually done along APR

In August 2018, the developer's contractor started massive vegetation clearance along APR, commencing from the Castlereagh Highway intersection. Local residents saw not only the damage then being done but the thousands of trees marked for removal along the rest of APR. They protested vigorously to DPE and forced a quick response by the Compliance unit. Chris

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[42] *Crudine Ridge Wind (Mod 1) | Modification Assessment Report*, Department of Planning and Environment, May 2019, p. iv.

[43] *Crudine Ridge Wind (Mod 1) | Modification Assessment Report*, Department of Planning and Environment, May 2019, p. iv.

Schultz from that unit inspected what had been done and was intended and swiftly concluded (see below) that the developer was already in breach of the Consent or very shortly would be.

The developer of course attempted to brazen it out but at that stage politicians and the media were already aware of what was occurring and the Department indicated to the developer that a direction to stop would be issued unless they themselves ceased the work. The developer halted the unauthorised destruction. The media, including *The Australian*[44], continue to display an interest in the non-compliant harm being caused to APR.

To understand the magnitude of what was done in the first 3 or so kms, you need to view relevant imagery. Two sets are attached:

- *Chris Schultz photos of clearing* (Attachment D)
- *Unauthorised Tree Clearing along Aarons Pass Road: Satellite Images* (Attachment E)

The first is a set of photos taken by Mr Schultz at ground level during his inspection on 16 August 2019. It shows the work in progress and many of the photos show the extent of tree removal that had already occurred. Some of his photos also show large numbers of trees marked for removal, including at least one which had been identified as a habitat tree that was required to be retained.

The second set of imagery is courtesy of Google Earth, which provided pre and post aerial photography of APR and specifically the area where clearance occurred in the first 3 – 3.5 kms.

The document *Unauthorised Tree Clearing along Aarons Pass Road: Satellite Images* includes pages with two images. The top image is a road section before the clearing commenced, while the bottom image is the same road section after the vegetation clearing.

It is clear to the eye that the right hand side (coming from the Castlereagh Highway) has been almost entirely denuded with the removal of a massive number of trees. In fact, Appendix 6 of the May 2016 Consent, consistent with the Downer Report, authorised removal of six trees along that section of APR. The developer had managed to remove about 300 trees in that distance [45], before being forced to halt.

The total number of trees which Appendix 6 of the Consent authorised for removal along the whole of APR was just over 100. So, in the first 3 – 3.5 kms the developer had already removed three times as many trees as had been authorised for the whole of APR, over a distance of almost 20 kms.

The images in *Unauthorised Tree Clearing along Aarons Pass Road: Satellite Images* include red pins showing the location of specific trees authorised for removal by Appendix 6 of the Consent. As can be plainly seen, the developer has removed vast numbers of trees all around those which were actually authorised for removal.

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[44] "Crudine Ridge wind farm upsets locals", Graham Lloyd, *The Australian*, October 7th, 2018.
[45] *Unauthorised Tree Clearing along Aarons Pass Road: Satellite Images*, p. 1.

Did the developer breach the conditions of consent in relation to APR vegetation clearing?

Appendix 6 of the Consent authorised the developer to remove 6 trees in the first 3.5kms of APR. The developer removed around 300 trees. That is a clear and massive breach.

Ref	Site ID	Sqm	Trees	Work	Site
1	1.0 km Rd	262	2	Remove two trees on RHS and level corner on both sides	The left hand side of the road comprises a dirt verge and nature strip of scattered eucalypts over a native grassy understorey. The right hand side of the road comprises eucalypts and Acacia implexa regeneration over an exotic dominated shrubby and grassy understorey.
2	PB02	60	0	Potential passing bay – RHS	Open road verge and nature strip adjacent to farm gate. Several shrubs of Acacia implexa and a ground layer dominated by native and exotic grasses and forbs to 50% cover, and bare earth.
3	PB03	80	0	Potential passing bay – RHS	The left hand side of the road comprises a dirt verge and nature strip of scattered eucalypts over a native grassy understorey. The right hand side of the road comprises eucalypts and Acacia implexa regeneration over an exotic dominated shrubby and grassy understorey.
4	PB04	100	0	Potential passing bay - LHS	Open road verge and disturbed nature strip dominated by bare earth, litter and stones. Few native shrubs and groundcover species.
5	PB05	100	0	Potential passing bay - LHS	Open road verge and disturbed nature strip dominated by bare earth, litter and stones.
6	2.5 km Rd	236	0	Fill and cut to widen on LHS required	Open road verge and mixed vegetated and non-vegetated nature strip with few weeds.
7	PB06	60	0	Potential passing bay – LHS	Open road verge and grassy nature strip characterized by a mix of native and exotic grasses and forbs.
8	PB07	80	0	Potential passing bay – RHS	Open road verge and exotic –dominated grassy nature strip adjacent to farm gate.
9	2.8 km Rd	618	0	Fill and level on outside of corner	Open road verge and vegetated nature strip (includes a potential passing bay (PB08) adjacent to farm gate).
10	3.0 km Rd	180	2	Remove approximately two trees on right and level corner	Earth verge and batter, with scattered eucalypts over a native shrubby and grassy understorey.
11	3.1 km Rd	219	2	Remove two trees as indicated on right and level corner	Earth verge and batter, with scattered eucalypts over a native shrubby and grassy understorey.
12	PB08	60	0	Development of passing bay - LHS	Bare earth verge, with scattered native grasses along property fence line.
13	PB09	60	0	Development of passing bay - LHS	Vegetation at site dominated by scattered native grasses
	TOTAL	2,115			

The response of the developer, of Mr Young and his subordinates has been "Forget about trees, all that matters is area of vegetation clearance and we reckon CWP is OK on that". This flies in the face of the clear primacy of Appendix 6 over any documents in the EA. It also grossly misrepresents the matter in relation to clearance area.

Appendix 6, the Downer Report and the Ecological Australia Report identify 13 work sites (or potential work sites, inasmuch as many of them are referred to by Downer and Ecological Australia as ***possible*** passing bays) in the first 3.5 kms. Those sites are detailed in the table above.

The table includes a description from the Ecological Australia Report of each of those sites and of the proposed work. It also includes a statement of the number of trees to be removed under that work and the square metres of disturbance (not vegetation clearance) which Ecological Australia calculated would occur as part of the work.

The total of that disturbance area is 2,115 square metres, i.e. 0.21 ha. Even if we assume that for this section of APR that disturbance area is the same as area for vegetation clearance, the Consent would authorise the clearance of only 0.21 ha.

Yet Mr Young and his subordinates have been claiming that the developer has cleared "only" 0.3 hectares (ha). That figure in itself is a fiction, as the measurement by Mr Owain Rowland-Jones and the estimates by DPE Compliance Officer Chris Schultz showed. But even if it was correct, that 0.3 ha (which seems to have started out as 0.366 ha and been conveniently and erroneously rounded down) exceeds the 0.21 ha allowed for work on the 13 points in the first 3.5 kms of APR identified in Appendix 6 – the only points in that section where clearing was authorised.

The developer knew they were bound by Appendix 6

The developer and their contractor knew that they were bound by Appendix 6 for the clearing on APR – they just disregarded what Appendix 6 specified.

The DPE Assessment Report for Mod 1 tells us that:

> "Since the consent was issued in 2016, CWO developed a more detailed civil works package and improved road design for Aarons Pass Road in consultation with MWRC and was granted a section 138 approval for the works in July 2018."[46]

Indeed they did. In July 2018, Zenviron on behalf of MWRC applied to MWRC for approval of work on APR. It was authorised by the MWRC Manager Development Engineering on 30/7/18. The description of the development given in the application to MWRC[47] was:

[46] *Crudine Ridge Wind (Mod 1)* | *Modification Assessment Report*, Department of Planning and Environment, May 2019, p. 2.
[47] Released under GIPA DPE 19-564, 8th February 2019.

Description of Development:	
Type of Work:	Works Within Road Reserve
Description	Clearing Vegetation to the extent approved in State Approval SSD-6697 Appendix 6 Road Upgrade Requirements and Roadworks

Plans and Specifications Approved	State Approval SSD-6697 Appendix 6 Road Upgrade Requirements *(Vegetation Removal)* Drawings CRWF-C-0000-00 to CRWF-C000-14 Relevant Council Standard Detail Drawings

And the conditions explicitly required by MWRC and stated in the approval document included:

1 Approved Vegetation removal is limited that described in State Approval SSD-6697 Appendix 6 Road Upgrade Requirements and Roadworks.

So on July 30th, before commencement of the clearing work on APR, the developer's contractor and the MWRC explicitly stated that the vegetation removal was to be done "to the extent approved in" Appendix 6 of the CRWF consent.

Once the non-compliant vegetation clearing was discovered and the developer put on notice by the Department by at least the 17th August, the developer submitted to MWRC a revised application for the work (apparently on 27th August), which was approved by the MWRC Manager Development Engineering on 28th August [48]. The revised application description is:

Description of Development:	
Type of Work:	Works Within Road Reserve
Description	Clearing Vegetation to the extent detailed in State Approval SSD-6697 and Relevant Management Plans, Works to Upgrade Aarons Pass Road

Plans and Specifications Approved	State Approval SSD-6697 and Relevant Management Plans Drawings CRWF-C-0000-00 to CRWF-C000-14 Relevant Council Standard Detail Drawings

And the approval conditions re vegetation removal then changed to:

1 Approved Vegetation removal is limited that described in State Approval SSD-6697 and Relevant Management Plans.

So, once the developer had been caught in non-compliant action and was trying to get DPE to allow them to continue their non-compliant vegetation clearing, they deleted all reference to Appendix 6 which, until that time, they had recognised as the relevant defining section of the Consent.

It also begs the question as to why, in the space of a day, the MWRC Manager Development Engineering decided it was an appropriate authorisation to remove reference to Appendix 6 of the Consent and add in the ambiguous reference to "Relevant Management Plans". It seems

[48] Released under GIPA DPE 19-564, 8th February 2019.

somewhat unlikely that he was able to obtain authoritative, independent legal advice on that matter within the space of a day. Was he operating solely at the behest of the developer or did he perhaps have input from DPE officials?

In any case, it is clear that so far as MWRC was concerned, until the 28th August, the developer was prohibited by council from removing any more vegetation than was explicitly allowed by Appendix 6 of the consent – and yet the developer plainly did so, since Appendix 6 did not specify an area for clearance but a specific number of trees at identified locations along the road. In addition, as shown above, the total approved potential area for vegetation clearing at the 19 sites in the first 3.5 kms of APR was 0.21 ha, which is less than every estimate (including the developer's) that has been made of the clearance which occurred.

What evidence did DPE have of the extent of clearance which had occurred?

In August 2018, a document[49] titled "Crudine Ridge Wind Farm – Aarons Pass Road Vegetation Clearing" and marked *Sensitive: NSW Government* was produced within the Department. It had no signature but was further headed "Briefing: Executive Director – Resource Assessments and Compliance" and "FOR INFORMATION – August 2018". From detail and dates in the document it is apparent it was produced around the 20th August. It either came from, or was sent to, Mr Young.

It contained the following summary at the top:

> **Purpose**: To provide an update on the investigation into vegetation clearing along Aarons Pass Road associated with the road upgrade for the Crudine Ridge Wind Farm.
>
> **Analysis**: An assessment of the information provided indicates that clearing in excess of approved limits has occurred. Clearing has only been undertaken along approximately 3 kilometres of the road and is currently continuing, with up to 20 kilometres is to be upgraded.

The document included a number of specific points:

> - A site inspection was undertaken on 16 August 2018 that confirmed that clearing of trees was not consistent with Appendix 6. Clearing has been undertaken along approximately 3 km of the road as at the date of the inspection.
> - The Preferred Project Report *Addendum – Crudine Ridge Wind Farm, Part 3A Ecological Assessment, Alternate access – Aarons Pass Road, and north site access point* dated 14 November 2013, states that 1.48 hectares of Red Stringybark – Scribbly Gum – Red Box – Long-leaved Box shrub – tussock grass open forest of the NSW South Western Slopes Bioregion and White Box – Blakely's Red Gum – Yellow Box grassy woodland of the NSW South Western Slopes Bioregion (remnant woodland) would be cleared along Aarons Pass Road.
> - Based on what was observed during the site inspection, it is anticipated that the amount of vegetation that has been cleared is either approaching or has reached the 1.48 hectares, and less than a quarter of the road upgrade works have been completed.
>
> The Applicant has been advised that the Department does not consider that they are complying with the consent.

[49] Released under GIPA DPE 19-564, 8th February 2019.

- Site Inspection undertaken on Thursday, 16 August 2018. Meeting with complainants and Applicant.
- Identified that it is likely that the permitted area of clearing has been already reached, or will be reached in the immediate future.
- Applicant advised on Friday afternoon by Chris Schultz that the Department believed that a breach of the consent had occurred i.e. that the area of clearing in the Environmental Assessment of 1.48 hectares had been exceeded, and that it was likely that a Draft Order would be issued early in the week commencing 20 August 2018.

[Note. The extract above claims the ecological assessment addendum to the PPR says 1.48 ha would be cleared. As noted earlier and detailed in Attachment C, this is a mis-statement of the ecological report, which quantified the area of *disturbance*, not of *vegetation clearance*, with the latter being about one third of the former.]

In addition, on August 29th, Mr Schultz sent an email to local residents[50] saying:

As advised, I would like to provide you with an update on the clearing of vegetation along Aarons Pass Road.

The Department met with the Applicant again today. We have reiterated with the Applicant that we do not believe that they are compliant with the consent for the proposed area of vegetation clearing. The Applicant will be considering a variety of options to make the proposed vegetation clearing compliant and will be getting back to the Department when they have determined the preferred option.

In the meantime, clearing will not recommence until the Department is satisfied that additional clearing can occur in accordance with the consent or some other approval.

On 30th October 2018 Mr Young emailed Julie Robertson at the Midwestern Regional Council as follows[51]:

The situation has not changed in recent weeks, and CWP Renewables voluntarily ceased all clearing on the Aarons Pass Road on 21 August 2018.

I understand clearing has occurred along a 3km stretch of the road, but only 0.366 hectares has been cleared to date – which is not inconsistent with the development consent.

The company has undertaken surveys of the clearing, although no independent survey has been prepared by the Department.

However, Departmental compliance officers have inspected the site to verify the situation on the ground.

The Department has no reason to believe the surveys are incorrect, and has advised members of the community that the company is complying with its consent at this time.

It is now up to the company to progress the road works in a manner that adheres to the requirements of the development consent or seek a modification to the consent to increase the area of clearing.

So around the 20th of August Mr Young had been advised by Chris Schultz that his on-the-ground inspection showed that the clearing either exceeded or was approaching 1.48 ha, two months later Mr Young was claiming that only 0.366 ha had been cleared while admitting that

[50] Email from Chris Schultz, Aug 29, 2019 at 1:05pm.
[51] Released under GIPA DPE 19-564, 8th February 2019.

the Department had conducted **NO** independent survey (apparently not considering Mr Schultz, his junior official, to be independent)!

In late November, the document *Unauthorised Tree Clearing along Aarons Pass Road: Satellite Images* Attachment E) was sent to Mr Marcus Ray, Deputy Secretary for Planning at DPE, who would presumably have passed it to Mr Young and the planners responsible for CRWF.

Yet despite the visually apparent clearing much greater than the claimed 0.366 ha, the Assessment Report presented to the IPC, has actually reduced the 0.366 ha to 0.3 ha.

It is blatantly obvious that the Department has accepted a figure concocted by the developer and that figure is a gross understatement compared to two other sources, being the estimate made by the DPE official who did the on-the-ground examination, and the carefully measured figure of 2.0 ha ± 15% by Mr Rowland-Jones. It is also a ridiculous figure for anyone who does a careful review with Google Earth of the images immediately after the clearing occurred.

Mr Young's conflict of interest

There were two signatories to the DPE Assessment Report for Crudine Ridge in December 2015, Mike Young and David Kitto, recommending approval of the project. Mr Young was at the time Director, Resource Assessments.

Mr Young is now Executive Director, Resource Assessments and Compliance. Mr Young's role responsible for compliance now places him in a position of conflict of interest. For a number of years he has been supporting the progress of the CRWF proposal. Finding CRWF was actively engaged in environmental destruction along APR contrary to the existing consent has the potential to delay or even stop the project.

So we have a situation where the Compliance Officer who did the on-the-ground inspection of the work (and provided the attached photos) said the developer was non-compliant, whereas his superior, who has been involved in recommending the project, says they are not in breach and, to support his claim, says the developer cleared only 0.3 ha but without that official being able to provide a transparent calculation of the area cleared. Indeed his email to MWRC on 30th October is explicit that the Department had not arranged any independent evaluation of the area cleared and that he was relying solely on advice from the developer.

He then says "The Department has no reason to believe the surveys are incorrect", despite the compliance officer Chris Schultz having advised local residents more than two months before that from his on-the-ground inspection, the developer was non-compliant. Mr Young's fatuous statement is like the police relying on someone accused of speeding to tell them how fast the person was going and whether they were within the speed limit. This is an approach which seems never to have found favour with traffic authorities anywhere in the world – no matter how appealing it may be to drivers and Mr Young.

The structure which combines Mr Young's planning responsibilities with compliance responsibilities is a poor one, likely to encourage conflicted decisions in a way recently identified by the Hayne *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*. Commissioner Hayne was scathing in his report of the two

primary regulators for those industries, ASIC and APRA and his recommendations included[52]:

> **Recommendation 6.2 – ASIC's approach to enforcement**
>
> ASIC should adopt an approach to enforcement that:
>
> - takes, as its starting point, the question of whether a court should determine the consequences of a contravention;
> - recognises that infringement notices should principally be used in respect of administrative failings by entities, will rarely be appropriate for provisions that require an evaluative judgment and, beyond purely administrative failings, will rarely be an appropriate enforcement tool where the infringing party is a large corporation;
> - recognises the relevance and importance of general and specific deterrence in deciding whether to accept an enforceable undertaking and the utility in obtaining admissions in enforceable undertakings; and
> - separates, as much as possible, enforcement staff from non-enforcement related contact with regulated entities.

It can be seen that Mr Young's role clearly conflicts with the fourth point in Commissioner Hayne's recommendation 6.2, and that is leaving aside the fact that Mr Young was the prime signatory recommending approval of CRWF, and thus may be considered to have a vested interest in the progress of that development.

Commissioner Hayne's recommendations were not some abstract outcome of organisation theory but based on findings under his Royal Commission that under existing organisational arrangements in ASIC, there had been lax regulatory performance and that in turn had contributed to the extent of misconduct in the industries the subject of the Royal Commission.

It should be apparent to the Commissioners determining this modification that there has been lax regulation by DPE officials (Mr Schultz excepted) in many aspects of the CRWF planning process and enforcement and particularly in the matter of identifying whether clearance conducted on APR was in breach of the May 2016 consent – and that Mr Young's role places him in a conflicted position likely to influence his advice to the Commissioners.

[52] *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report, Volume 1*, Kenneth M. Hanye Commissioner, Commonwealth of Australia, 2019, p. 446.

Summary

- In July 2018, the developer's contractor submitted a request to authorise work on APR, noting vegetation clearance had to be done consistent with Appendix 6 of the Consent. It was authorised by MWRC, stipulating that vegetation clearance had to be according to Appendix 6.
- The contractor then proceeded to obliterate vegetation in complete disregard for Appendix 6.
- When the local community saw what was happening, they prevailed on DPE's compliance unit to quickly inspect.
- The compliance officer who inspected the site concluded that the work was in breach of Appendix 6 and that the clearance done already exceeded what he understood to be an area allowed for the whole of APR.
- The developer was forced to stop work.
- At that point the developer had removed about 300 trees along 3 – 3.5kms of APR where the Consent allowed only 6 trees to be removed (and the Consent allowed only about 100 trees to be removed along the whole 20 kms of work by the developer).
- Subsequently the developer claimed to the Department that it had cleared only 0.366 ha and Mr Young chose to believe that figure despite it being a quarter or less of what DPE's compliance officer had estimated and despite DPE not commissioning any independent survey of the area cleared.
- Later careful measurement on the ground by a local resident concluded the area cleared to be 2.0 ha ± 15%.
- DPE has refused to provide a copy of any measurements and calculations to support their claim of 0.366 ha, which DPE officials have reduced to 0.3 ha in their Assessment Report to the IPC.
- In addition, Appendix 6 of the Consent approved work at only explicitly identified locations along APR and the ecological study presented in the PPR identified areas of *disturbance* (not *vegetation clearance*) at those locations. Detailed examination of the ecological study shows that about two thirds of the disturbance would involve **NO** vegetation clearance, so the total vegetation clearance surveyed in the ecological report was about 0.56 ha along the full 20 kms of work. This is less than half the area Mr Schultz (DPE compliance officer) estimated had been cleared when he inspected the work.
- Further, the total of disturbance area for the 13 work sites in the first 3.5 kms of APR amounts to 0.21 ha. So even if all of it involved vegetation clearance (and it did not), then on every estimate made of the clearance which occurred, CRWF would be in breach of the Consent.
- It is blatantly obvious that senior officials in DPE have provided to the IPC false information about what was done on APR **and** misrepresented what was approved in relation to APR vegetation clearing in the Consent (and in terms of both approved tree removal and allowable area of clearing) apparently for the purpose of avoiding prosecution of the developer for breach of the Consent.

APR clearing proposal

The modification application for CRWF involves a large increase in the approved vegetation removal along Aarons Pass Road (APR). The reason for requiring an increase is either that the developer made a false and misleading statement to the PAC about the clearance it needed, or it is a consequence of the developer deciding to use longer blades than were approved under the Consent, or a combination of those two factors.

DPE officials are insisting that it is not due to the longer blades (because otherwise, according to them, the blades would be contrary to the Consent). However, they have provided no calculations to show that the longer blades will make no difference, despite it being obvious to anyone who understands geometry that on a winding road the longer blades must have some effect, and despite the developer telling the Commissioners that the longer blades are some or all of the reason. Thus DPE officials have simply fabricated a falsehood, which they expect the IPC to conveniently swallow. Thus they are guilty of making false and/or misleading statements to the IPC on this planning matter.

The DPE falsehood

CWP's much increased clearing requirement along APR is substantially due to the increase in blade length over what was approved in the May 2016 consent. Mr Young and his DPE planners insist that is not the case, despite basic geometry demonstrating it is relevant and the developer having admitted it is the case.

Now why are Mr Young and his subordinates so insistent that the extra clearance is unrelated to blade size? The likely explanation can be found in this comment in the DPE Assessment Report:

> "In this regard, the Department does not consider that the proposed change in blade length would result in any material difference to the extent of vegetation clearing that needs to occur on Aarons Pass Road to facilitate delivery of the wind turbines. Accordingly, the Department considers that the increase in blade length is consistent with the existing consent." [53]

The answer is in the last sentence. So long as the Department is able to insist that the extra vegetation clearance along APR is not due to increased blade length which CWP is attempting to use, then they can make a specious claim that the "increase in blade length is consistent with the existing consent". If it is acknowledged that the increased length is a significant part of the reason for the much increased clearing along APR, then the Department cannot maintain its fiction that the increase in blade length is consistent with the existing consent.

That leads to the question of why the Department is so desperate to maintain this fiction. Once members of the local community became aware of the increase in blade length and turbine power compared to what was approved, they began to press the Department to require a modification application for the increase. The Department resisted. Perhaps an official had

[53] *Crudine Ridge Wind (Mod 1) | Modification Assessment Report*, Department of Planning and Environment, May 2019, p. iv.

carelessly given the nod to the increase without understanding all the ramifications. Perhaps they simply did not, for whatever reason, want to see the wind farm delayed. But the fact is, DPE officials dug in their heels that no modification application was necessary.

Unfortunately for them, local residents picked up the massive tree destruction that was a necessary consequence along APR and forced the Department to investigate and call a halt to that work. That in turn led to a halt in the entire project. The Department, and the developer, have been bitten by their own intransigence.

The simple fact is that APR is a twisty road, largely bounded by trees. If you have a bounded, twisty pipeline and you widen it just enough to be able to move a rigid 63 metre object through it, then you will not be able to move a rigid 64 metre object through it – let alone a 67 or 68 metre one. That is simple geometry. The fact that Mr Young and his subordinate planners have such difficulty with simple geometry is a serious concern, not only on this issue but given their comments about wind farm visual impact (in part determined by geometry).

The geometry which eludes DPE officials

The geometrical facts of life are obvious to the Commissioners sitting on this modification. That is shown in this exchange between the Commissioners and Mr Young [54]:

> "MR COCHRANE: But, of course, it's blade length that determines the road clearing requirements.
>
> MR YOUNG: Well, no. I don't think the issue of four metres on a 67 metre blade – 63 or 67 metre blade with a truck and low loader, etcetera. It's something you could
>
> ask the company in terms of the difference, but the additional five hectares is not as a result of the - - -
>
> MR DUNCAN: The blades.
>
> MR YOUNG: Of slightly longer blades."

Mr Cochrane clearly understands the geometrical facts of life, whereas Mr Young does not. Despite that, Mr Young has put himself forward as an expert on the matter and he has allowed a similar blanket statement to be made in the formal Assessment Report from the Department.

After the meeting with DPE officials, Mr Duncan put the same question to CWP representatives and got a more accurate response [55]:

> "MR DUNCAN: So the increase in blade length doesn't – is factored into your clearing requirements?
>
> MR MOUNSEY: Yes. Absolutely. It's factored in.
>
> MR DUNCAN: Okay.
>
> MR MOUNSEY: Yes. That's right. And it's primarily because of the increase in blade length, which allows each turbine itself to have a greater install capacity per machine.

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[54] Transcript of Proceedings, Independent Planning Commission Meeting with Department of Planning and Environment re: Crudine Ridge Wind Farm, 5th June 2019, p. 10.

[55] Transcript of Proceedings, Independent Planning Commission Meeting with Applicant re: Crudine Ridge Wind Farm Mod 1, 5th June 2019, p. 10.

MR DUNCAN: Yes."

Previous advice to the Department

Even if Mr Young does not understand geometry, he was advised of the actual situation at least in August 2018. An internal DPE document[56] titled "Crudine Ridge Wind Farm – Aarons Pass Road Vegetation Clearing" and marked *Sensitive: NSW Government* was produced within the Department. It was further headed "Briefing: Executive Director – Resource Assessments and Compliance" and "FOR INFORMATION – August 2018" and was produced around the 20th August. On its first page it contains the following points:

- Applicant has advised the Department that approximately 20 kilometres of roadworks are required, and that up to 22 hectares of vegetation may need to be cleared (works will be restricted in some areas to minimize the amount of clearing required and to meet limits under the Biodiversity Management Plan).
- This is to allow for the transport of the turbine blades along the road (indicated that more clearing may be required than initially anticipated due to the blade length increasing from 63 metres to 68 metres).

So, in August last year, Mr Young had been advised that CWP wanted an increase in vegetation clearance and that the reason was due to the increase in blade length from 63 metres to 68 metres. This is the same reason that Mr Mounsey gave to Mr Duncan when asked the reason for the increase in clearing.

DPE's attempt to invent alternative (unsubstantiated) reasons

Since DPE officials are claiming that increased blade length is not the reason for the extra vegetation clearance sought along APR, they had either to claim that the developer had clearly given the PAC in 2016 materially false or misleading information about what was needed in order to get 63 metre blades along APR, or there was some new requirement. What the DPE officials have said in the Assessment Report is:

> "The Department notes that vegetation clearance required along Aarons Pass Road is due to several factors, principally MWRC's road safety requirements including adequate passing bays and site (*sic – do they mean "sight"?*) distances. The road design also considers the delivery dimensions of the wind turbines." [57]

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This is strangely phrased since it does not say the "increased vegetation clearance" is due to changes in the matters they mention. However, it immediately precedes their statement that:

> "In this regard, the Department does not consider that the proposed change in blade length would result in any material difference to the extent of vegetation clearing that needs to occur on Aarons Pass Road to facilitate delivery of the wind turbines." [58]

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[56] Released under GIPA DPE 19-564, 8th February 2019.

[57] *Crudine Ridge Wind (Mod 1)* | *Modification Assessment Report*, Department of Planning and Environment, May 2019, p. iv.

[58] *Crudine Ridge Wind (Mod 1)* | *Modification Assessment Report*, Department of Planning and Environment, May 2019, p. iv.

Either the officials have put in two disconnected statements hoping that no one will notice that the leading one does not justify the subsequent one, or they are claiming there is some change in the factors they mentioned.

One of those factors is "the delivery dimensions of the wind turbines", which obviously has changed, at least in terms of the blades. But that is the very factor which DPE officials are claiming, without corroboration, does not alter the vegetation clearance being sought.

So what about the other factors mentioned. They instance passing bays. The Downer Plan for the road improvement, which was evaluated for environmental impact by Ecological Australia and was the basis for Appendix 6 of the Consent identified plenty of parking bays and their vegetative clearing impact was assessed. In fact they identified at least 38 sites for passing bays (on average, one every 500 metres) and it was noted that was probably more than would actually be required.

The areas identified were predominantly areas of bare earth and scattered grass alongside the road [59]. Of the 38 passing bay sites identified and assessed, 18 were in areas whose biometric condition was classed as Moderate to Good and the total area involved was 0.11 ha. The remaining 20 sites were in areas classed as biometric condition Low and the total area involved was 0.15 ha.

Thus the 38 passing bays totalled 0.26 ha of the 1.56 ha of potential disruption and not one of them required removal of a tree. Note this 0.26 ha assessed by Ecological Australia, based on the Downer report, is an area of *disturbance*, not of *vegetative clearance*. That is because at many locations there is already bare earth and rocks. So the area of actual *vegetative clearance* allowed for passing bays would be something less than 0.26 ha.

Yet DPE officials now want us to believe that a substantial part of the large increase sought in vegetation clearance is due to the need for passing bays – despite more than sufficient area being included in the 1.56 ha of disturbance identified by Ecological Australia based on the Downer Report which was the basis for Appendix 6 in the May 2016 Consent.

There is likewise no corroboration provided by the DPE officials for their claim that MWRC requirements for site (or *sight*?) distances have made a large difference. Are we to believe that the Downer Report did not include appropriate sight distances? Or that MWRC has allowed APR to exist for decades without appropriate sight distances?

Note that the DPE Assessment Report in December 2015 stated that the road upgrades identified as necessary by Downer Infrastructure for the developer **and** the additional work required by MWRC based on "further investigations by Council's road engineers" are already included in Appendix F to the DPE Assessment Report[60], which in turn became Appendix 6 in the Consent document.

So this latest claim by DPE is already denied by what its officials advised the PAC more than three years ago. In addition, in July 2018, MWRC approved Zenviron to conduct the work on APR subject to restricting vegetation clearance to what was allowed by Appendix 6 of the Consent. MWRC could not have signed off on that basis if MWRC was also requiring changes to the work and to vegetation clearance which conflicted with Appendix 6.

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[59] See attached document *What the PAC Approved in Environmental Disturbance on APR*.

[60] *State Significant Development Assessment Crudine Ridge Wind Farm (SSD-6697)*, Department of Planning and Environment, December 2015, p. 44.

DPE has claimed in its assessment report that the vegetation clearance which CWP had started along APR and which is now requested via this modification is **NOT** due to the increased blade size. This claim is made despite the obvious issue of geometry in terms of increased blade length and despite the developer saying the increase in blade length is the reason **and** despite Mr Young having been advised in August by one of his staff that "more clearing may be required than initially anticipated due to the blade length increasing from 63 metres to 68 metres".

DPE has used its unsubstantiated claim about the cause of increased clearing as the sole basis for arguing that the increase in blade length is consistent with the existing consent. It follows, on DPE's logic, that if the increase in blade length has substantially increased the clearance required (as logic and others agree) then the increase in blade length is not consistent with the existing consent and ***a modification request must be lodged for an increase in blade length*** – which the developer has refused to do and the Department has failed to require.

It is apparent that on this matter DPE officials have made false and/or misleading statements to the Commissioners, apparently hoping that no one will see the contrary statements they made in advice to the PAC Commissioners or see the contrary advice they had received in internal documents.

There are of course other reasons, discussed elsewhere, why DPE's claim that the increase in blade length and the increase in turbine power are compliant with the May 2016 consent are false.

It is not the fault of either the community or the IPC Commissioners that a modification request has not been lodged for the increased blade length and the Commissioners cannot ethically provide *de facto* approval for a change, not consistent with the existing consent, which has not been formally requested and gone through the proper assessment and community exhibition and debate process.

When did the developer decide it would need to clear much more of APR?

According to Mr Mounsey, the developer realised in mid 2016 that they were going to "exceed the existing corridor"[61]. This was a few months after approval of the wind farm by the PAC in May 2016 and some months before the developer proposed to the Federal Minister for the Environment that the wind farm have 37 wind turbines.

Leaving aside the issue of the credibility of Mr Mounsey's comment, given his vagueness on a number of points and the fact that his company appears to have repeatedly made false statements to the planning authorities in relation to CRWF, what is unknown is what blade length was involved in that realisation. Was it a length of 63m or less? Or was it 67m or 68m, being the length that CWP apparently intended when it proposed to the Federal Minister for the Environment that it could operate the wind farm with 37 turbines?

In any case, Mr Mounsey's testimony is that two whole years before the developer started clearing vegetation along APR, the developer already knew that the clearance provisions in the Consent did not suit them and they were going to breach those provisions. This was more

[61] Transcript of Proceedings, Independent Planning Commission Meeting with Applicant re: Crudine Ridge Wind Farm Mod 1, 5th June 2019, p. 19, lines 1-3.

than enough time to lodge a modification request for longer blades and for greater clearance authority along APR. Yet the developer chose not to do so and instead to plough ahead, breaching the Consent terms.

It was a deliberate decision to ignore the law, a decision not caused by any pressure of time on the developer. It betrays complete disrespect for the planning process and for consent authorities and gives no grounds for expecting the company to abide by the letter or the spirit of any other aspects of the consent. The Commissioners are clearly dealing with a rogue company which warrants no leniency. They have no ethical option but to insist the company formally apply for every change it wants relative to existing Consents.

What is the real area of vegetation clearance intended by the developer?

We have seen that the developer claims to have cleared 0.366 ha along APR, while the figure estimated by the compliance officer Chris Schultz was somewhere around 1.5 ha, and when Mr Owain Rowland-Jones carefully measured it, he got a figure of 2.0 ha ± 15%.

If we take the low side of Mr Rowland-Jones' figure (1.85 ha) and average with that from Mr Schultz, we are looking at 1.675 ha – which is 4.5 times the figure claimed by CWP to the DPE.

According to DPE in its Assessment Report to the IPC, the developer is seeking 6.59 ha of vegetation clearance along APR[62]. However, as we have seen earlier, the internal DPE paper about the work on APR said:

> "Applicant has advised the Department that approximately 20 kilometres of roadworks are required, and that up to 22 hectares of vegetation may need to be cleared (works will be restricted in some areas to minimize the amount of clearing required and to meet limits under the Biodiversity Management Plan)." [63]

The ratio between 22 ha, identified in August 2018, and the 6.59 ha DPE now claims is required by the developer is 3.33. That figure is in a similar ballpark to the ratio (4.5) between the clearance which has occurred, as judged by both Mr Schultz and Mr Rowland-Jones, and the figure claimed by the developer.

That poses the obvious inference that if the IPC approves clearance of 6.59 ha along APR, what is very likely to occur is a lot more than that, with the developer claiming it is within the limits and senior officials in DPE turning a blind eye to it as they have done with respect to the vegetation clearing already done.

DPE officials have shown repeatedly that there is no integrity in their claims about what has occurred in relation to CRWF, or in enforcing Consent conditions. Thus, until the Attorney-General has investigated the behaviour of DPE officials and taken appropriate action, IPC Commissioners can have no reliance on plasticine numbers from the Department and cannot

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[62] *Crudine Ridge Wind (Mod 1) | Modification Assessment Report*, Department of Planning and Environment, May 2019, p. iv.

[63] DPE document titled "Crudine Ridge Wind Farm – Aarons Pass Road Vegetation Clearing" and marked *Sensitive: NSW Government*, further headed "Briefing: Executive Director – Resource Assessments and Compliance" and "FOR INFORMATION – August 2018, p. 1: released under GIPA DPE 19-564, 8th February 2019.

give approval on the basis of those figures.

Spurious claim CRWF consent does not regulate blade length

Mr Young has claimed[64] that the Consent does not regulate the length of turbine blades because the Consent does not specifically mention a particular maximum length. This is a claim DPE has trotted out since it became apparent the developer was proposing to use longer blades than the maximum size proposed at the time of the PAC determination.

This claim by Mr Young has serious implications for the CRWF determination generally but more importantly for all planning consent decisions in NSW. If upheld, it destroys a critical element of all those consents.

The top level provisions in the CRWF Consent are shown below. It is a standard set of terms appearing in NSW planning consents generally, not just for wind farms, and certainly not just for CRWF.

TERMS OF CONSENT

2. The Applicant shall carry out the development:
   (a) generally in accordance with the EA; and
   (b) in accordance with the conditions of this consent.

   Note: The general layout of the development is shown in Appendix 2.

3. If there is any inconsistency between the above documents, the most recent document shall prevail to the extent of the inconsistency. However, the conditions of this consent shall prevail to the extent of any inconsistency.

Para 2 deals with the overriding conditions applying to the Consent. The first (a) is that the development be "generally in accordance with the EA". The second (b) is that it be "in accordance with the conditions of this consent".

The Consent contains specific limitations on the number of turbines (para 5) and on their height (para 6). There are no explicit statements about the length of blades, just as there is no explicit statement about the maximum power of turbines, and there is no explicit statement about the total power of the wind farm.

There is, however, the scope of para 2(a). The EA covers a lot of verbiage, not all of it necessarily completely consistent. However, the Department summarised in a table the essentials of the project according to the EA and that table was repeated by the Commissioners in their Determination Report [65].

That table says:

Project Summary	**Development of a wind farm, involving:** • **up to 135 megawatts (MW) of installed electricity capacity;**

and

[64] Transcript of Proceedings, Independent Planning Commission Meeting with Department of Planning and Environment re: Crudine Ridge Wind Farm, 5th June 2019, p. 10.

[65] *NSW Planning Assessment Commission Determination Report, State Significant Development Application, Crudine Ridge Wind Farm (SSD 6697),* 10 May 2016, p.3.

Wind Turbine Components	• Construction and operation of up to 77 wind turbines, each with a maximum height (to blade tip) of 160 metres (m) and a nominal capacity of between 1.5 and 3.4 MW[3]. • Typical tower heights up to 101.5 m, and blade lengths between 40 and 63 m.

That statement is clear that the wind farm will be:

- up to 135MW
- use turbines with a nominal capacity between 1.5 and 3.4 MW; and
- blade lengths between 40 and 63 m.

If Mr Young's thesis applies that the Consent does not govern blade length, then it also does not govern turbine power and total output from the wind farm. In that case there is nothing stopping the developer from using 5MW turbines if they wish, or from replacing them in a decade's time with 10MW turbines. Nor from having a wind farm producing 200MW or 300 MW, so long as they stick to 37 turbines (given Federal Government DOE imposed restrictions) with maximum height of 160 metres (which would allow them to use 75 metre blades) if they wished.

There must be many other consents that have been granted in NSW for which important parts of the control are captured under para 2(a), as opposed to para 2(b). If the Young doctrine stands, then by precedent all of those conditions are now inoperative.

Mr Young will presumably try to claim that somehow 67 metres is OK (and incidentally, does anyone know whether the true length is 67 m or 68m?), even though the EA terms were "between 40 and 63 metres", which allowed the developer a great deal of latitude in blade length. But having been given a latitude of 23 metres, Mr Young apparently claims that can be arbitrarily lengthened at his discretion.

If 67m is OK, according to the Young doctrine, how about 70m or 75m? Where is the limit at which being outside the range which was well defined in the EIS, the DPE Assessment Report and the PAC Determination Report is OK?

The same with turbine power. If 3.63MW is OK when the EIS, Assessment Report and Determination Report said "between 1.5 and 3.4MW, how about 4MW, or 4.5MW, or 5.3MW (such as GE is now offering)?

Mr Young may claim that a 67m blade is "only" 6% longer than a 63m one. But he has been working with wind farms long enough to know that it is the rotor swept area which is what people see and where bird strike occurs – and the swept area increases with the square of rotor diameter.

So, compared to 63m blades, 67m blades create a 13% increase in swept area and 68m blades, which are 8% longer, create a 17% increase in swept area.

In 2013, the Capital 2 Wind Farm wanted to increase approved turbine power from 3 MW to 3.5 MW. An effective increase of 17%. They submitted a modification request (Mod 1), which was considered and determined in the established way.

The following year they decided they wanted to be allowed a large rotor diameter, to go from 114 m to 126 m, an increase of 10% in turbine length and 22% in swept area. They submitted another modification request (Mod 2), and that modification was determined by the PAC.

There is no material difference between the magnitude of blade and rotor swept area increase which was sought by Capital 2 Wind Farm and what CRWF wants. Capital 2 followed the correct process and argued their case. CRWF decided it was better to not ask permission.

Unfortunately for them, charging ahead meant massive amounts of unapproved vegetation clearance along APR. Presumably they expected no one to notice until it was done, at which point they might expect a friendly DPE to give them a fine of $15,000 or some such figure, which is not even a rounding error in their accounts. And now they are trying to get the IPC Commissioners to effectively bless their increase in blade length and turbine power without formally asking for approval and having to present their case to justify those increases.

And for some reason Mr Young is fighting in their corner, either arguing that para 2(a) of Schedule 2 of the Consent has no import and the statement of turbine length (and turbine power) in the EIS, in the Assessment Report, and in the PAC Determination Report is of no consequence, or that he has a secret allowance for developers everywhere (or is it just for CRWF, or does it vary with developer?) beyond similar constraints in Consents, and 13% or even 17% increases in the relevant dimensions will be OK.

It is not the rule of law when individual bureaucrats like Mr Young get to decide they will allow developers to step over formally established bounds, and those bureaucrats will decide how far is OK without being transparent. Consent authority for CRWF is granted to the PAC and now IPC, not to Mr Young and not even to the DPE Secretary. And in order for the IPC to make a ruling on an increase in turbine length or turbine power beyond what is determined by para 2(a) of the existing CRWF Consent, the developer is required to submit a modification request to make that change and provide a related EIS and justification.

Specious reason for Mod 1

The developer and DPE officials claim that one reason for CRWF Modification 1 proposal is to effect "a reduction in the maximum number of wind turbines from 77 to 37 to align the development consent with the Commonwealth (EPBC Act) approval"[66].

That claim by the Department and the developer does not pass the smell test. IPC Commissioners should be aware that developers do not impose conditions on themselves unless there is some benefit for them in so doing. DPE has apparently not thought to ask what that benefit may be.

The original approval to the developer was to construct a wind farm of up to 135MW capacity with up to 77 turbines. Subsequently the Federal Department of the Environment restricted the total number of turbines to 37, apparently after the developer put that number to them. The developer is now attempting to build the wind farm with 37 turbines of 3.63MW capacity compared to the average 1.75MW upon which the original proposal was based.

Supposedly as some sort of community service, the developer is formally asking to restrict the maximum number of turbines authorised by the NSW consent authority to match the maximum number authorised by the Federal Department of Environment.

There are a number of possible financial advantages which the developer may gain from this proposal, which DPE has apparently not considered worth investigating, at least for honesty in the process. It is also possible that the only thing the developer is actually seeking from this modification is approval to use turbines which are more powerful, with longer blades than were authorised by the original consent, and to do that without actually asking for permission.

Potential financial advantages

It appears common in NSW that hosting turbines attracts a payment of something like $10,000 per annum. On 77 turbines that would amount to $770,000 p.a. Reduce the number of turbines to 37 and the figure becomes $370,000 p.a. – a benefit of $400,000 p.a. to the wind farm owners. So already the process to date may have improved financial results for the developer by $400,000 p.a. – unless of course some of the hosts or other parties entered into contracts with the developer which required payment for unused sites unless the State Government refused approval to use those sites. In which case an alteration by the IPC to reduce the allowed number of turbines may expunge the effect of those contracts and thus effect a financial benefit to the wind farm owner.

Of course it is no particular concern of the IPC if the developer is achieving a financial benefit relative to other parties, but the IPC should not be taken in by some non-sensical purported altruism behind the application – a purported altruism which is being used to emotionally sway support for approval of increased clearing on APR and *de facto* approval to breach Consent restrictions on turbine size and blade length.

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[66] *Crudine Ridge Wind (Mod 1) | Modification Assessment Report*, Department of Planning and Environment, May 2019, p. iv.

Obscuring clearance changes

What is pertinent to the IPC is the specious claim that by "requesting" a limit to 37 turbines, the developer will forego a certain amount of approved environmental impact within the project area and that the additional impact it wants to create along Aarons Pass Road should be accepted as a trade off.

This is a false and misleading argument which is being supported by DPE officials.

The reality is that the environmental impact within the project area, which the developer is currently authorised to make, is determined by the ***combination*** of the original PAC decision ***and*** the restrictions imposed by the Federal Department of Environment.

The environmental impact authorised by the PAC is now irrelevant to be extent it was over-ridden by the Federal Department of Environment. The developer cannot "surrender" some environmental impact to the IPC, while asking for an offset for more impact along APR, when the DOE already disallowed that environmental impact.

DPE failure to investigate false or misleading statements by CRWF developer

There is strong evidence that the developer has made multiple false and/or misleading statements to planning authorities in relation to CRWF, which the developer ought reasonably to have known were false or misleading, and that this has occurred on multiple occasions. There is further evidence that this has been repeatedly brought to the attention of DPE officials, and in addition a number of instances should be blindingly obvious to DPE officials.

Despite that, DPE officials have never documented any investigation into whether any of the developer's statements were materially false or misleading. DPE officials have simply refused to consider whether the developer had breached relevant sections of the EP&A Act or the Crimes Act. They have thus displayed repeated bias in favour of the developer by wilfully refusing to consider whether the developer has breached the law, despite evidence suggesting it has done so.

Refusal by DPE officials to apply the law in relation to the developer

A number of substantiated claims have been made against the developer of making false or misleading statements to planning authorities in relation to the CRWF proposal. In addition, subsequent to the May 2016 consent by the PAC, information has emerged which provides a strong *prima facie* case that the developer made statements to DPE and/or PAC which the developer ought reasonably to know were false or misleading.

If the developer has made material false or misleading statements to the DPE and/or PAC, which they reasonably ought to know were false or misleading, then those who made the statements are in breach of s10.6(1) [*previously s148B(1)]* of the *Environmental Planning and Assessment Act* and likely in breach of sections 307A, B or C of the NSW *Crimes Act* and also possibly s192G of that Act.

I make no claim here that the developer or its agents are guilty of a breach of those Acts, only that there are multiple documented instances of statements which, *prima facie*, suggest a breach of the Acts. Those matters have either been drawn to the attention of the Department of Planning and its officials or should be patently obvious to those officials involved in managing the proposal on behalf of the NSW Government.

Documentation obtained from DPE under GIPA shows that despite the extensive evidence suggesting material false or misleading statements and documents provided by the developer to planning authorities, ***DPE officials have not undertaken any formal evaluation of whether the developer has apparently breached the legal prohibitions against material false or misleading statements in relation to planning matters***.

It is clear that DPE officials have not charged the developer or their agents with any such offences. That, however, is not my point since investigation of a *prima facie* case might conceivably have led to a reasonable conclusion that the case could not be proven in court. My point is that ***the Department never conducted any such investigation***, despite substantial grounds for doing so. That failure by DPE officials evidences a dereliction of duty on their

part in a manner biased in favour of the developer and to the detriment of other parties affected by planning decisions made in relation to the CRWF proposal.

That bias is further evidenced in actions and statements by DPE officials which have denied procedural fairness to parties adversely affected by the CRWF proposal and continues to deny them procedural fairness. The IPC Commissioners, like the PAC Commissioners who determined the initial proposal in May 2016, are fundamentally dependent not only on advice from DPE officials but on the information those officials marshal for presentation to the Commissioners and relevant information they fail to present, the details of which cannot otherwise be known to the Commissioners. That renders any decision made by the IPC on this matter inherently biased and inherently a denial of procedural fairness to parties adversely affected by the proposal.

Prima facie instances of false or misleading statements

Raised with DPE at or before the PAC determination

A number of submissions in response to the EIS accused the EIS of being false or misleading in various ways, including:

- A number of objectors provided strong evidence that photomontages used to support the developer's claims about visual impact were grossly in error, giving an impression of far less visual impact than would occur. Once of those criticisms[67] stated:

  "I work in the design field, teach design and have experience working with doctored photographs using various computer programs such as Adobe Photoshop.

  The images of the projected wind farm do not accurately show the turbines to their proposed true scale in the environment. They are deliberately misleading. Even the quality of the image and the subtle way that they are printed do not give a true representation of the visual impact that these turbines will have upon the landscape and surrounding area. These photographs are filtered...and in the design or media industry these kind of images are used to soften/blur the true look of things."

  While another objector provided evidence that towers in at least one photomontage were "40% - 50% of the size they should be" relative to an existing wind measurement tower of known height.

- Maps and images which misrepresented the true visual character of the locality.
- Misleading selection of public viewpoints for which to prepare VI assessments, misrepresenting the impact.
- Misleading statements in relation to bushfire risk, including mischaracterising the topography in the locality as it affects bushfires and their spread; and falsely giving the impression that a number of locations in the area are towns which could provide personnel to fight any bushfires when those locations are not even villages.
- Misleading statements giving the impression that use of aircraft for farming purposes in the vicinity of the proposed wind farm is less than the true situation and thus falsely diminishing the potential threat of the wind farm to aviation in the area.

[67] Submission 56656.

- Misleading statements about the energy that would be generated from the project, which statements were used to boost the claimed strategic value of the project to the State.
- Misleading statements about likely scrap value of turbines at end of life leading to an understatement of the decommissioning risk to the State and locality.
- Accusations of blatantly false statements by the developer about the consultation which had occurred with local residents.
- Misleading assessment of the impact the project would have on land values in its vicinity.

Collectively they indicated a pattern of providing misleading statements, any one of which might not be material alone but which together were likely to be material – particularly if there was a systematic pattern of grossly underscaling and/or blurring turbines in photomontages. The VI issue is particularly pertinent given that, as discussed elsewhere in this paper, DPE had commissioned as its supposed "independent VI expert" a person who had represented the same developer as a "VI consultant" on other wind farms and, as it transpired, again worked for that developer on another wind farm after being DPE's "independent VI expert" for the Crudine Ridge Wind Farm proposal.

Revealed subsequent to the PAC determination

Since the CRWF determination in May 2016, a number of revelations have brought to light what have been *prima facie* cases of material false and/or misleading statements by the developer to the NSW Government planning authorities, including to the PAC:

- The claim that the wind farm would become non-viable if turbines were deleted from the 77 being sought – which was given the lie when the developer subsequently proposed to the Federal Department of Environment that it construct only 37 turbines, on which basis the developer has procured funding. Thus the statement to PAC was patently false. It was material because, as discussed elsewhere in this paper, the PAC Commissioners stated they had considered removing some turbines from the 77 proposed but had been convinced by the developer and DPE officials that doing so would imperil the wind farm[68]. Yet eight months later, the developer proposed to the Federal Government[69] that the wind farm consist of 37 turbines – a reduction of 40 turbines, i.e. far more than mentioned as a possibility by the Commissioners which the developer led them to believe would make the wind farm non viable.
- The developer's false claim about the water requirement for constructing the wind farm. In its EIS, it claimed that:

> "It is estimated that in the order of 8.9 mega litres (ML) of water would be required to produce the quantity of concrete required for gravity footings for Layout Option A, and as such can be considered the maximum amount of water required for use in concrete batching." [70] and

[68] *NSW Planning Assessment Commission Report, State Significant Development Application, Crudine Ridge Wind Farm (SSD 6697),* 10 May 2017, p. 7.

[69] Statement of Reasons for Approval under the *Environment Protection and Biodiversity Conservation Act 1999* for Crudine Ridge Wind Farm, Minister for the Environment and Energy, 25/5/2017, para 17.

[70] *Crudine Ridge Wind Farm Environmental Assessment*, Volume 1, CWP, December 2012, p. 45.

> "In addition, it is estimated that a further 11.7 ML of water would be required for road construction and dust suppression activities. This would provide sufficient volume for all new and upgraded internal road construction and dust suppression activities, including those associated with the 21 km of unsealed arterial road." [71]

That was a total of 20.6 ML of water, at a time when the developer was proposing to construct 77 turbines, not the 37 now intended.

The true water requirement was revealed in 2018 communications from CWP to a member of the local community. An August 2018 letter from a CWP executive, at the time the company was about to start construction, stated[72]:

> "Approval was granted to secure 64ML per annum"

and

> "The usage rates will fluctuate subject to site activities and will be ongoing until the completion of construction in October 2019."

Note the water usage which the developer sought and obtained was 64ML ***per annum***, to be used for apparently more than a year, not simply a total of 64ML. The 20.6 ML claimed in the EIS was a ***total***, not an annual rate for some period. Thus the figure in the EIS was out by a factor of at least three and possibly five or more times when it is realised that the developer is now constructing less than half the original number of turbines.

DPE has displayed a decided lack of interest in pursuing this massive difference. That may in part be because DPE echoed that false water statement in its Assessment Report to the PAC and did so despite having received at least one careful quantitative analysis from a member of the public showing that the figure had to be an under estimate.

- Mr Young and the DPE Assessment Report for Mod 1 contend that the substantially increased vegetation clearing required along APR, compared to what the developer originally claimed would be needed, has nothing to do with increasing blade length from 63 metres to 67 or 68 metres. If the Department truly believes that to be the case then it follows that the statement of APR vegetation clearing presented to, and approved by the PAC in May 2016, was in fact false and that had the developer done proper due diligence on the requirements they would have known their statement was false.

  DPE has attempted to obscure the cause of the increase, blaming passing bays. As demonstrated elsewhere in this document, the APR roadworks and clearing proposal referred to as the Downer Report and tabulated in Appendix 6 of the Consent document, already included 38 possible passing bays and their total size is minute compared to the increase in the amount of vegetation clearance sought.

  As part of its obfuscation, DPE has attempted to claim the increase is due to new requirements by MWRC – without the Department providing any tabulation of the detail of the alleged new requirements. Further, the authorisation of work on APR which was issued by MWRC in July 2018 gives the lie to DPE's claim. The MWRC authorisation explicitly states that vegetation clearance **must** be conducted in

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[71] *Crudine Ridge Wind Farm Environmental Assessment*, Volume 1, CWP, December 2012, pp. 45 - 46.

[72] Letter to Owain Rowland-Jones from Brendan McAvoy, Project Director, CRWF Nominees Pty Ltd, 9 August 2018.

accordance with Appendix 6 of the Consent document, which would not be possible had MWRC imposed roadwork requirements which substantially increased vegetation clearance needed for those requirements.

The increased APR vegetation clearance compared to what was presented to the PAC is obviously material since the developer is claiming that without the much greater clearance authorisation it cannot get its turbine blades onto the site.

Thus, if the assertion by Mr Young and repeated in DPE's Assessment Report for Mod 1 are correct, that increased blade length is not the reason for needing more vegetation clearance along APR, then Mr Young and the Department have established another *prima facie* case that the developer provided material false information to DPE and the PAC on a matter which the developer ought reasonably to know was false, had they done proper due diligence on moving the turbine parts along APR.

- In August 2018, CWP began vegetation clearing along APR and was forced to stop when locals realised CWP was exceeding Consent conditions. According to Mr Young, CWP told him that "only 0.366 hectares has been cleared to date – which is not inconsistent with the development consent." [73]

  However, in late August, Mr Young had been told that, based on the observations of Compliance Officer Chris Schultz, "Based on what was observed during the site inspection, it is anticipated that the amount of vegetation that has been cleared is either approaching or has reached the 1.48 hectares"[74]. That advice from the compliance official who conducted the on-site inspection was clearly a *prima facie* reason to doubt DPE's claim of 0.366 ha and to conduct a full survey, and if that survey showed the 0.366 figure was a gross understatement, to review whether the developer had breached the false or misleading provisions of the EP&A Act and/or the Crimes Act.

  We know that Mr Young did not instigate any independent survey because on the 30th October, in his email to Julie Robertson of MWRC, he told her "no independent survey has been prepared by the Department."

  The advice from the developer was clearly material, since it was being used by DPE to decide whether the developer had breached Consent conditions related to APR clearing and the Department and developer were both interpreting those conditions as relating to an approved area of vegetation clearance (conveniently ignoring the explicit conditions in relation to removal of trees, on which grounds the developer was clearly guilty as sin, having removed about 300 trees where the PAC had approved 6).

  If the conclusions of Mr Schultz were correct, then there was a strong likelihood that CWP had already breached the APR clearing conditions, even on the lax interpretation of those conditions favoured by Mr Young. The observations from Mr Schultz were clearly disinterested. He had no interest in providing an erroneous estimate either way, whereas the developer obviously had a reason to provide an underestimate.

  An impartial official, committed to compliance with the law, would at that point have had no alternative but to either take the estimate from Mr Schultz or to commission a survey by a wholly independent third party. By Mr Young's own admission, he and DPE did neither but instead accepted the self-serving claims of the developer.

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[73] Email from Mr Young to Julie Robertson at MWRC, dated 30th October 2018, released under GIPA DPE 19-564, 8th February 2019.

[74] Released under GIPA DPE 19-564, 8th February 2019.

The law about false and misleading statements in planning matters

The *Environmental Planning and Assessment Act* makes it an offence to provide false or misleading information in a planning matter. Specifically s10.6(1) [*previously s148B(1)]* states:

> "A person must not provide information in connection with a planning matter that the person knows, or ought reasonably to know, is false or misleading in a material particular."

S307A of the NSW *Crimes Act* defines an offence if anyone makes a false or misleading statement to a government official when seeking a benefit, including a consent, and where they have been reckless as to whether the statement is false or misleading either explicitly or through omission. S307B of the NSW *Crimes Act* makes it an offence to knowingly provide false or misleading information to a public authority exercising authority in connection with State law. And under s192G of the NSW *Crimes Act* it is an offence to make a false statement with the intention of obtaining a financial advantage.

What is important about s10.6(1) is not simply whether the statement is false or misleading but whether the person making it ***ought reasonably to know that was the case***. It does not require that the person can be shown to have known the statement was false, only to show that had they been reasonably careful and done proper due diligence they would have known the statement was false or misleading.

Thus, given all the instances cited above, there is *prima facie* evidence, on multiple matters, that the developer had provided material false and/or misleading statements to DPE and PAC officials in the course of their duties. And there was sufficient information for DPE officials to be able to evaluate whether in a number of those cases the statements were such that the developer "ought reasonably to know" they were false or misleading.

What did DPE officials do?

In a word: ***nothing***.

As noted above in relation to the amount of clearing done by the developer on APR in August 2018, Mr Young was presented with grossly conflicting estimates from the developer and from Compliance Officer Mr Schultz. At that point Mr Young had an opportunity for a third party independent survey of the area which had been cleared. He chose not to do so and instead to accept the advice of the very self-interested developer.

The results of a GIPA request to DPE show that this refusal to investigate whether the developer had provided false or misleading information was not confined to that occasion.

In December 2018, I lodged a GIPA request with DPE in the following terms:

My request is in relation to the Crudine Ridge Wind Farm (CRWF).

I request copies of all documents produced by Department of Planning officials (or anyone else for the Department) discussing whether information lodged by the proponent in any planning documents for CRWF may be materially false or misleading.

My reference to documents includes letters, memos, emails, reports, meeting notes, minutes of meetings, Business Contact Forms or any other record.

My request covers the period from the proponent's submission of its EIS and development application in November 2012 until 19th December 2018.

The GIPA response[75] identified a small number of documents which GIPA staff thought pertinent to my request, e.g. a letter from the Minister to concerned residents, making the usual meaningless placatory comments and a business contact form recording a meeting between the Secretary and local residents. However, not one of the documents was an evaluation by Departmental officials of whether the developer had made material false or misleading statement on even one matter.

Concerned lest there was something in DPE's search process which had failed to locate documents which ought to exist, I lodged a request for an internal review of the GIPA request and response. The determination of that review[76] produced no more documents and included the following statement:

I have decided, under section 58(1)(b) of the GIPA Act, that the Department does not hold further information responding to your access application.

It is thus established that despite having multiple, strong grounds to carefully review whether the developer had made material false or misleading statements to planning authorities in relation to the CRWF proposal, DPE officials had never conducted a documented examination of even one.

That evidences a systematic bias to the benefit of the developer and one which has denied, and continues to deny, procedural fairness to adversely affected parties by allowing material false and/or misleading statements to influence the determination in favour of the developer and to allow the developer to breach the Consent.

[75] Notice of Decision, DPE 19-559, 21 January 2019.

[76] Internal Review – Notice of Decision, DPE GIPA 19-559 IR, 8 March 2019.

The Honourable Anthony Roberts MP
Minister for Planning
Level 16, 52 Martin Place
Sydney NSW 2000

1st October 2018

Open letter re apparent improper behaviour of officials in your Department affecting planning matters

Minister Roberts

Evidence emerged in a recent court case of an official in your Department acting in a way which impartial parties are likely to see as grossly improper, and as involving procedural unfairness and bias in favour of a developer. Even more troubling, the Department's General Counsel has written to me that the Department considers the behaviour not at all improper.

The combination of the official's testimony in court, together with the subsequent assertion by the Department's General Counsel, suggests that your Department believes that while sourcing, or itself producing, what are supposed to be independent assessments and reports, it is actually legitimate:

- to discuss drafts with developers but not other members of the public; and
- to take suggestions for amendment to those documents from developers (but not other members of the public) while producing final versions; and
- to give the impression to the Independent Planning Commission (IPC) and to the public that there has been no involvement in forming the content of such documents except by government agencies or consultants officially employed by those agencies.

On the basis of the statements from those two officials in your Department, and other departmental documents, it is reasonable to suspect that this improper behaviour is more widespread than the specific instance revealed in court.

If this is the practice of you and your Department, it is a massive breach of public trust which invalidates all submissions your Department has made to the IPC (or former PAC) over the years, the integrity of IPC decisions based on such advice and the integrity of all decisions which have been made by the Department under delegation from the Minister.

It is essential that you expeditiously authorise a comprehensive and transparent investigation of this matter and take the steps necessary to ensure full integrity on the part of your Department and its officials, and that where their past behaviour has involved the improper actions indicated by court testimony, then the IPC and all parties who may have been affected are advised so they can seek appropriate remedies.

The improper behaviour revealed in court

To summarise the essence of what occurred and what was revealed in the court case:

- Because of community criticism of a developer's consultant report, the Department undertook to arrange an independent review of what that consultant had done and also of a submission from a consultant whom the community had hired.
- An external, independent consultant was appointed to perform the task and submitted a report commenting on what had been previously submitted by both the developer's consultant and the community's consultant.

- Your official who was managing the process said in court he regarded the independent consultant's submitted report as a draft (though the covering email from the independent consultant referred to it as "the final report"). Your official passed it to the developer and their consultant, asking for their comments. He did not provide the supposed draft to members of the affected community or to their consultant, so he sought no comments from them.
- After the official received comments from the developer's consultant and spoke with them, the official prepared "his own" comments, influenced by the concerns of the developer. He then sent his comments to the developer's consultant, essentially asking if they were OK. Once they agreed, he forwarded his comments to the independent consultant, suggesting the latter consider them. At no point did he advise the independent consultant that he had conferred with the developer's consultant in producing those comments.
- When the independent consultant submitted a new final version of his report, the official advised the developer's consultant that the independent consultant had accepted some of his (the official's) suggestions but not all. The official indicated that he might need some assistance from the developer's consultant in subsequently arguing against certain advice from the independent consultant.
- During the court case, your official first indicated that he had never shared either the independent consultant's "draft" report or his own comments with anyone except other government officials and then the independent consultant. When confronted with documents subpoenaed from the developer's consultant, he admitted that, contrary to his earlier testimony, he had in fact shared them with the developer's consultant and had received comments from the developer's consultant – and that he had not done the same with the consultant hired by members of the affected community.
- He then claimed his actions were ethical, professional, "standard practice" and ***he would do it exactly the same way again***. Further, he claimed he had an ***obligation*** to act as he had done. He did not explain why the obligation extended only to sharing a draft with the developer's consultant and not with the community's consultant, even though the independent consultant's report commented on both of those previous submissions.
- Despite claiming his actions were ethical and an obligation, he did not mention these actions when he had an opportunity to do so while giving testimony ***until*** counsel for another party confronted him with emails proving what he had done.
- It is noteworthy that the actual author of the independent report apparently did not consider it appropriate to share a draft with either of the consultants whose submissions he reviewed, yet your official decided to do so – but only with the developer's consultant.

Your Department condones this behaviour

I brought this matter to the attention of your Department's Secretary and included a number of questions about the extent to which it reflects common practice within the Department and the implications for other projects, and the need to inform parties where decisions adverse to their interests may have been based on such practices.

I received a reply from the General Counsel of your Department which condones the actions mentioned above. So it is not just the official involved who claims the actions revealed by the court case are OK but the Department's senior executives.

In trying to justify this assertion, the General Counsel stated that the Department had done an investigation of the matter "which included seeking independent probity advice". That sounds fine if you knew no more. However, it actually takes us further down the rabbit hole.

Note that in his letter the General Counsel did not refute the facts laid out above. They are clear in the transcript of the court case and presumably the General Counsel acquainted himself with the detail of the transcript. I can refer him to the relevant lines of the transcript if he is having trouble finding them.

Further, there is at least one document which shows others in your Department were aware of the official's interaction with the developer's consultant in relation to the "draft" independent review and apparently considered it normal – suggesting your Department has a culture which practices what impartial parties would reasonably consider collaboration with developers.

The "independent probity advice" and its treatment by your Department

But back to the "independent probity advice", since it also got a mention during the court case.

The reason there was an internal enquiry and "independent probity advice" was that members of the affected community had noted an odd insertion in the independent consultant's report published on the Department's major projects website for the particular project. That insertion lead to a suspicion that your official had tried to influence the content of the independent consultant's report, and members of the community raised their concerns with the Secretary.

The Secretary undertook to have it investigated and subsequently informed members of the community that an external advisor had looked at the matter and concluded that nothing unethical had been done but that nonetheless some training should be implemented. The Secretary advised community members that this training **had** been implemented. (Should the Department be unable to find that letter, I can provide you with a copy.)

However, during the court case, your Department's official, under oath, claimed that the Department had **NOT** implemented the training which the "independent probity" advisor had recommended and which the Secretary had told members of the community had actually been implemented.

If we take the official's sworn evidence at face value, two things follow:

- That evidence contradicts what the Secretary told members of the community. Was someone lying?
- The Department thought so highly of the "independent probity advice" that it did not bother implementing the recommendations. So was the inquiry just for show?

Did Department officials conceal information from the independent investigator?

Very importantly, was the source of "independent probity advice" aware of the full facts of what happened? It appears that party was given limited time and resources to review the matter. Was that party made aware of the correspondence between the official and the developer's consultant, the sharing of the "draft" report with the latter, and the exchange of opinions on it? If not, then any ethical conclusions by the "independent probity" advisor could not be soundly based and have been dishonestly procured.

There are reasons why we might doubt the "independent probity" advisor was provided with the full facts. During the court case, when the official had the opportunity to describe the full set of interactions which had occurred, he made no mention of those with the developer and its consultant (despite later claiming they were ethical and his obligation, once forced to admit to them).

When being questioned by his own lawyer, he was not forthcoming to the court about his interactions with the developer's consultant. That interaction became known not from any direct Departmental documents but from copies of emails subpoenaed from the developer's consultant.

Further, when the Secretary advised community members of the outcome of the Department's inquiry and that she had implemented a consequent training program, she made no mention of the official's interaction with the developer's consultant, leaving them aware only of the communication between the official and the independent consultant which had alarmed them.

As it happens, I have seen a report provided to the General Counsel by the "independent probity" advisor. Importantly, the terms of reference from the Department restricted the advisor solely to the interaction between the departmental official and the independent consultant commissioned by the Department. The terms of reference included nothing about the official's related interactions with the developer and the developer's consultant.

It is difficult to believe that a reputable probity advisor would have accepted a task of advising on the ethics of what had occurred if they knew about the official's related interaction with the developer's consultant but were required to investigate and report only about the official's interaction with the independent consultant.

Unless the "independent probity" advisor had been given a remit to investigate and report on the full scope of the official's interactions around the report in question, it would be very naughty of your Department's General Counsel to convey the impression that the "independent probity" advisor had given a tick to all the actions which occurred, including what can reasonably be seen as collaboration, to some degree, with the developer.

A wholly independent inquiry required

It is plain that any investigation and reporting on what occurred has been marked by concealment – and that this has apparently involved not just the official who gave evidence in court but other Department officials, perhaps even the Secretary (unless the full actions were concealed from her).

A few days ago I happened to see a rerun of a *Yes Minister* program, in which Sir Humphrey Appleby advises his minister that the reason for holding an internal inquiry is to ensure inconvenient facts do **not** come to light. In this instance, the inconvenient facts came to light only because of a court case which your Department could not control and then only because one party subpoenaed the relevant records of a developer's consultant. They did not come to light from your Department which might reasonably be suspected of adhering to Sir Humphrey's dictum.

While many of us have enjoyed a few laughs from *Yes Minister,* we understand that instances such as just mentioned are not how a government with integrity would be run, and that when government departments are dishonest with the community they are essentially anti-democratic and help to destroy the rule of law,which is the bedrock of our society.

It is clear why your Department wants to shut down any discussion about the matter I raised. If the behaviour revealed in this particular instance is more widespread in your Department, as evidence suggests, then the integrity of every decision made by the IPC/PAC over years, relying on advice from your Department, is in question.

Consequently the investigation you instigate must be by someone wholly independent of the Department but with authority and resources to fully examine all departmental records and to question anyone in the Department. That investigator must have a mandate to publicly report providing a completely transparent record of what they did to investigate the matter mentioned in this letter and others where collusion with developers (or their agents) may have occurred, all the evidence they considered, and their findings.

You have an obligation to the people of NSW to ensure that the actions of your Department are conducted ethically, that they are procedurally fair and not biased to serve the interests of developers, whether particular individuals or as a class.

In summary, due to admissions during a court case, there is public evidence that one of your officials engaged in acts which any impartial person would consider improper and clearly biased to the benefit of a developer. Subsequent correspondence from your Department's General Counsel says the Department condones and supports those actions. Additional departmental documentation shows other officials were aware, and accepting, of the actions while they were occurring, indicating an established culture of what can only be described as collaboration with developers in the production of your Department's supposedly independent advice and documents.

Moreover, the evidence indicates your Department appears to understand this is indefensible to either the public or "independent probity" advisors. That would explain why your official made no mention of it in court until confronted with evidence of what had actually occurred, and why the terms of reference given to the "independent probity" advisor likewise excluded any mention of the interaction that had occurred with the developer's consultant while finalising what was supposed to be an independent report.

If you fail to instigate a wholly independent inquiry into what occurred in the particular instance and into the extent to which it reflects wider practice within your Department, you also will be condoning the behaviour and thus unfit to be a Minister of the Crown.

Your Department has the more detailed letter I sent to the Secretary about this matter and the General Counsel can provide you with a copy of his reply and no doubt a copy of the transcript from the related court case. You should also be able to obtain copies of the emails subpoaened from the developer's consultant about their interaction with your official, but contact me if you have trouble doing so.

Yours sincerely

Dr Michael Crawford
[redacted]

cc: Premier; Members of NSW Parliament; Media; Other interested parties

Secretary
Department of Planning & Environment
GPO Box 39
Sydney NSW 2001

23rd August 2018

Secretary McNally

Court evidence suggesting systematic corrupt conduct in DPE

You are no doubt aware of the recent court case[1] involving one of your employees, Mr Jeff Parnell, in relation to certain of his actions dealing with noise matters for the Crudine Ridge wind farm (CRWF) proposal.

I understand that evidence in the case raises serious questions not only about the ethics and procedural fairness of Mr Parnell's actions but also, by implication, about the ethics and procedural fairness of the Department more broadly.

If the type of action apparently revealed in relation to the preparation of an independent report on prospective noise impact from Crudine Ridge wind farm has occurred with other wind farms, or indeed any other projects, it would indicate systematic procedural unfairness and bias by the Department in assessing projects and that might be deemed systematic corrupt conduct[2].

That naturally leads to some questions as to what you have done, since Mr Parnell's actions in this matter came to light, to identify and eradicate any such behaviour and to report any such occurrences to parties who may have been affected by it, to the Government, and to ICAC.

I will briefly state what I understand to have been revealed during Mr Parnell's testimony in the case, and then come to the implications and questions for the Department. I acknowledge that my understanding may be imperfect and you need to confirm the case details for yourself. The comments below are in the context of my understanding.

The events

Some members of the community affected by the CRWF proposal raised strong concerns about potential noise impact on them and about the adequacy of assessment done.

Mr Parnell, on behalf of the Department, consequently undertook to arrange an independent review of the noise assessment that had been done, of comments by at least one community member, and of a report by a noise consultant who had been engaged by the community.

In May 2013 Mr Parnell commissioned Renzo Tonin to conduct that review.

Dr Tonin's company provided a report on the matter around July 2013. Mr Parnell testified that he did not regard that version as a final report.

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[1] 2016/00255812 - JEFF PARNELL v HARBOUR RADIO PTY LIMITED
[2] DPE's Fraud and Control Policy, November 2017, p. 11.

Mr Parnell sent that report to the developer and its noise consultant Sonus. They then sent Mr Parnell a substantial document covering their concerns with the initial Tonin report and Mr Parnell then had a lengthy teleconference with them about those concerns.

Mr Parnell subsequently prepared his comments on the initial Tonin report and sent them to Sonus asking for any comments on what he had prepared.

After an apparent positive response from Sonus, Mr Parnell then sent his comments to Tonin.

Mr Tonin then (16 October) provided a revised version of his report.

Subsequently Mr Parnell advised Sonus that Tonin had accepted some, but not all, of his arguments and consequently amended his report. Comments in his email to Sonus could be construed as stating that Mr Parnell needed their assistance to subsequently mount an argument favourable to the developer and contrary to certain advice from Tonin in his report.

Emergence of interaction with the developer

In testimony, apparently Mr Parnell initially said he had not given copies of the draft report or his comments to anyone other than DPE and EPA personnel and the contractor who was producing the report, noting it was the job of the relevant planning officer to send the final report to the proponent for their RTS.

Evidence was presented contradicting Mr Parnell's initial statements about his limited circulation of the Tonin report and his comments. Specifically copies of emails involving Mr Parnell, the proponent and Sonus in which Mr Parnell said he had received a draft report from Tonin which he (Mr Parnell) would release to the proponent and Sonus for comment.

Mr Parnell was shown an email from him to the proponent and Sonus inviting comment from them on the initial Tonin report before he had finalised his subsequent comments to Tonin.

Under cross-examination Mr Parnell acknowledged that:

- He had given Sonus the opportunity to make representations to him about the 18 July version of the Tonin report (which version Mr Parnell treated as a draft).
- When Mr Parnell had subsequently drafted comments on that version of the Tonin report he sent those comments to Sonus and invited them to give him any further comments.
- Then he sent his comments to Tonin.

Questions of probity and practice

When challenged by counsel for the defendant over the probity of releasing to the proponent something he considered a draft report, Mr Parnell asserted that he had an obligation to do so [despite having previously claimed releasing submissions/reports to proponents was a responsibility of planning officers].

When challenged about the integrity of what he had done, Mr Parnell asserted his actions had been ethical, professional and ***he would do it exactly the same way again***.

When challenged by counsel about the fact he had not advised Tonin about his interaction with the proponent and Sonus in relation to Tonin's first report, Mr Parnell claimed that Tonin would have expected him to have interacted as he did because it was normal practice.

When challenged by counsel about comments in the Maddock review which might be an adverse reflection on some of what he had done, Mr Parnell apparently disagreed with the relevant observation by Maddock and said that no one in the Department had criticised his actions and the Department had not implemented the training that Maddock had apparently recommended.

Questions for the Secretary

No doubt you can confirm for yourself whether the evidence in the case was as I understand it to have been. If indeed it was, then it leads to a number of reasonable observations and questions, as follows.

Tasked with producing or acquiring an independent review of a matter, Mr Parnell gave the developer and their consultant (but no other affected parties) the opportunity to review and comment on what he considered a draft report and he discussed their comments with them, which were provided for his consideration, allowing them the opportunity to potentially affect opinions and recommendations in the final report.

The Department told no one of this interaction but a version of the report was placed on the public website inadvertently containing some comments by Mr Parnell which led members of the public to question what had occurred. In other words there was a total lack of transparency by the Department about the process.

When questioned in court, Mr Parnell apparently initially claimed to have not given copies of the draft report or his comments to anyone other than DPE and EPA personnel and the contractor who was producing the report. He admitted that he had shared them with the proponent and sought comments by the proponent about the draft only after he was confronted with emails which had been acquired from the proponent's consultant under subpoena. That might be considered an attempt to conceal the interaction with the developer and consultant.

When challenged by counsel about his behaviour, Mr Parnell claimed it was ethical, professional and that he had an obligation to behave as he did; and that he would act in precisely the same way again. He also claimed that while he had not discussed with the report's author (Tonin) his interactions with the developer in relation to the draft, that Tonin would have expected him to do exactly what he had done because that was normal.

When challenged by counsel about the Maddock review into some of his actions in the matter, he said he disagreed with a critical Maddock conclusion and claimed no one in the Department had criticised him for what he had done and that training recommended in the Maddock review had not been implemented, indicating to him that the Department did not think it necessary and confirming his view that he was acting appropriately.

Q1. Is it Department policy that draft independent reports on projects or draft departmental assessments on projects may be shared with developers or their agents and made available for comment by them which will be considered by the authors before they finalise and publish

those reports (in cases where those preliminary documents are not published for open public comment)? [Note, the matter raised here is clearly distinct from the Department asking for specific evidentiary information from developers, such as noise data, or precise locations of installations.]

Q2. If that is DPE policy, has DPE informed the public and the IPC that any such reports tendered as part of a project assessment involve collaboration with the developer?

Q3. Were the IPC and PAC aware at the time that such actions may have occurred in reports and assessments presented to them?

Q4. If it is either formal DPE policy or common practice within the Department to share draft project assessments or draft policy statements with developers which have not been either published or shared with other interested parties, what are the limitations on material that can be shared in this way? For instance, may officers of the Department share unpublished communications from members of the public?

If the actions noted are contrary to DPE policy

Q5. What action has DPE taken to review all past work to discover the extent to which similar interaction has occurred on other projects or policies involving Mr Parnell, given that Mr Parnell apparently considers such interaction is not just right but in fact his obligation?

Q6. Given that such interaction seems to have effectively been denied by Mr Parnell's testimony until he was challenged with irrefutable correspondence between him and the developer showing it had occurred, and given the critical evidence appears to have been obtained not from the Department but from the proponent's consultant under subpoena, how forensic and intensive has been DPE's efforts to ascertain the extent to which this behaviour has occurred in other projects on which Mr Parnell worked and to ensure it has not been affected by defects in the Department's record-keeping?

Q7. Has DPE advised members of other communities affected by projects on which Mr Parnell worked that, given recent admissions, there may be a possibility that inappropriate interactions occurred between Mr Parnell and the relevant proponents/consultants and that this may have had some impact on the advice given to the consent authorities?

Q8. Has DPE advised ICAC that the evidence in this case suggests inappropriate behaviour by Mr Parnell contrary to DPE policy in a way that might appear partial to the developer and therefore might be regarded as corrupt conduct? Further, has DPE advised ICAC that since Mr Parnell appears to have indicated to the court that this is normal behaviour, that it may not be confined to this case?

Q9. Has the Department commissioned independent noise audits of all projects in which Parnell was involved in noise assessment and advice to consent authority.

Given that Mr Parnell has described the behaviour as normal and says the external consultant would have expected it, and also that despite the Maddock review he said he has not been told by the Department that his behaviour was inappropriate or required to undertake training such as Maddock recommended, it is reasonable to surmise that Mr Parnell's behaviour in this case may be consistent with more widespread practice within DPE.

It seems Mr Parnell did not mention communicating with the proponent about the initial version of the Tonin report until confronted with irrefutable evidence he had done so, which he then apparently described as normal behaviour in such work.

Q10. Was Mr Parnell describing a common practice within the Department which staff know is unethical and indefensible and which they and the Department attempt to conceal from the public (though the developer beneficiaries obviously know it is occurring)?

Q11. Has DPE conducted forensic examination to determine whether other members of the Department, or other parties employed by DPE as independent experts reviewing aspects of projects, have shared drafts of reviews or assessments with proponents or their advisors and consequently obtained comments from proponents or their advisors before finalising and publishing those reviews or assessments?

Q12. If such examination has been conducted, who did it and where are the results available?

Q13. Has the Minister been advised of the apparent admissions by Mr Parnell in court and of the potentially wider implications?

Q14. Has DPE advised the IPC that such actions have occurred in reports and assessments presented to it and the former PAC?

Yours sincerely

Dr Michael Crawford

[redacted]

What the PAC Approved in Environmental Disturbance on APR

DPE is apparently attempting to claim that in its consent for CRWF, the PAC approved a substantial amount of vegetative clearance to occur along Aarons Pass Road (APR) -- and that this "approved area" can somehow be applied to vegetative clearance anywhere along APR. Reading the detail of the relevant documents, with attention to the detail, shows the PAC did not do so. It approved work on a specific set of sites along APR, after careful evaluation of the environmental value and potential impact on those sites, and the aggregate vegetative clearance involved in those approved sites is much less than DPE appears to be claiming.

When CRWF consent was granted by the PAC, that consent contained some explicit and implicit approvals in relation to environmental disturbance along Aarons Pass Road (APR). The explicit approval is contained in Appendix 6 of the Consent document. The implicit approval covers two documents which formed part of the EA submitted by the developer. Those documents are:

- Downer Report – Heavy Haulage Route Survey and Upgrade Assessment Aarons Pass Road
- Ecological Australia Report for Aarons Pass Road

These three documents are essentially consistent. The Downer Report proposed specific sections of work to be performed on APR in order to upgrade it for CRWF's use. The ecological Australia report examined the actual environmental impact for each of the work sites proposed by Downer and evaluated any adverse environmental consequences. Appendix 6 of the Consent, itemised the sections of work proposed by Downer and, in particular, noted the number of trees to be removed at each site.

The ecological Australia Report produced an assessment of trees to be removed at each site. In a few cases it determined a larger number than Downer but in all such cases only a few more than Downer had stated. The ecological Australia Report also provided an estimate of the area of disturbance for each work site and evaluated the environmental consequence and recommended mitigation actions.

There are 77 work sites listed in the ecological Australia Report, with a detailed assessment for every one of them. Of those, 55 are in areas assessed as having a biometric site condition of Moderate to Good and the remaining 22 were assessed as Low biometric condition. The total disturbance area of the Moderate to Good 55 was summarised in Tables 1 and 2 of the Report.

It is important to realise that the quantitative areas specified for each work site, and aggregated in Tables 1 and 2 of the ecological Australia Report are areas of ***disturbance*** and **not** necessarily areas of ***vegetative clearance***. For some sites, as assessed, there would be no vegetative clearance. For some only part of the area of disturbance bears vegetation, and in some cases the vegetation is no more than grasses. Consequently, the areas summarised in Tables 1 and 2 of the Report are far more than the actual area of vegetative clearance examined in the ecological Australia Report and implicitly approved by the PAC.

There are five types of work site for the APR upgrade: Culverts and causeways, Corners, Passing bays, Crests, and Widening. The following table summarises the details for each of them for sites rated as biometric condition Moderate to Good.

What the PAC Approved in Environmental Disturbance on APR

APR works sites with biometric condition rated Moderate to Good

Type of work	Number	Area (ha) *	Trees to remove*
Culvert/causeway	9	0.21	34
Corner	21	0.59	74
Passing bay	18	0.11	0
Crest	4	0.60	0
Widen	3	0.05	1
Total	55	1.56	109

* from ecological Australia Report

It is immediately obvious from the table that 99% of tree removal approved by the PAC is for two situations: corners and culvert/causeways. The latter are predominantly culvert widening, impacting some trees.

Crests

Four of the work sites, accounting for 0.6 ha of disturbance are to reduce crests in the road so the gradient to them is less steep. They basically involve cutting into the road bed to lower the crest and thus reduce the gradient. They involve no tree removal **and** they involve no clearing of vegetation. However, the disturbance may be damaging to trees alongside the road if it affects their roots. So the disturbance has a potential environmental impact but approval of these work sites did not authorise any vegetative clearance.

The photographs below are from the Downer Report for two of the Crest work sites. While there are many trees alongside the road, the road sections are basically straight, so disturbance approved by the PAC was just to the pavement to lower the crest (vertical curve).

What the PAC Approved in Environmental Disturbance on APR

3.8 - 3.8 km

Crest of hill needs to suit vertical curve R 200.

3.10 - 5.3 km crest

Crest to suit vertical curve R200.

What the PAC Approved in Environmental Disturbance on APR

Passing bays

The other category with no tree removal is Passing bays, of which there were 18 in the Moderate to Good biometric category. By definition they are all off the road. They have all been chosen as areas where no trees need to be removed. The descriptions of these areas are all fairly similar, e.g.
PB04 "Open road verge and disturbed nature strip dominated by bare earth, litter and stones. Few native shrubs and groundcover species."
PB19 "Earth road verge adjoining disturbed roadside nature strip from previous soil road works. Native-dominated shrubs and grassy regrowth on soil mounds. Scattered rubbish present."
PB27 "Earth road verge adjoining vegetated nature strip with few shrubs and grasses. Previously cleared with bare earth and surface stones common."
PB38 "Narrow earth road verge and batter adjoining previously graded nature strip. Disturbed roadside habitat dominated by a mix native and exotic grasses with a cover of 70%."

So they are predominantly earth and stones, some grasses and some low shrubs. As approved, they do not involve removal of trees or even dense shrubbery.

What the PAC Approved in Environmental Disturbance on APR

Corners

The bulk of trees approved for removal are on corners, where the purpose was typically to make the corners less sharp. Not all of the corners involve removing trees. In some instances it is basically filling and levelling the road surface. The next two images from the Downer Report show curves with trees to be removed. The white lines mark the bounds of the area to be affected.

3.24 - 13.2 km

Remove approx. fifteen trees and level.

For the site below, the ecological Australia Report estimates disturbance of 180 sq metres. It is visually obvious that the section being cut out of the corner, including removal of the trees is far less than 180 sq metres and that the disturbance area includes the road, where there is no vegetative clearance.

What the PAC Approved in Environmental Disturbance on APR

3.6 - 3.0 km

Remove approx. two trees on right and level corner

The next two photographs from the Downer Report show curve work sites that involve no vegetative clearance at all. They typically involve just filling and levelling the corners.

3.5 - 2.8 km

Fill and level on outside of corner

3.14 - 7.7 km

Fill in RHS of corner and level camber.

Of the 28 curve sites approved as part of the work, 8 of them involve no or minimal vegetative clearance. The total disturbance area for those sites is 0.29 ha, i.e just under half the total disturbance area for all curve work sites and, as earlier noted, for those other curve work sites part of the disturbance area is on the road and involves no vegetative clearance.

Culverts and causeways

Culverts are one of the main types of work sites for APR involving tree removal. The next image illustrates the situation. Nonetheless, for work on culverts and causeways, a large part of the disturbance area is on the roadway and thus involves no vegetative clearance.

What the PAC Approved in Environmental Disturbance on APR

3.28 - 16.0 km culvert

Road and drainage needs widening to at least 6 metres (this is generally the case from this point on to the proposed site entry).

What the PAC Approved in Environmental Disturbance on APR

3.30 - 17.9 km causeway

Causeway is founded on poor sub layer will crack under load. Recommend full replacement.

Vegetative Clearance vs Disturbance Area

The plan put to the PAC and implicitly approved as part of the consent conditions involved removal of slightly over 100 trees along APR and a detailed work plan on specific sites along the road. The work plan was clear about the sites and evaluated the environmental impact in each case. Some of the work involved vegetative clearance but much of the disturbance calculated in the plan involved either no vegetative clearance or the levelling of areas currently bearing grass and a few shrubs (or just dirt and stones).

It is totally invalid to treat the aggregate of the disturbance areas in the ecological assessment as a total approved for vegetative clearance, particularly if clearance involves trees and extensive

shrubbery. From examination of the individual assessments in the relevant reports, it is possible to make a conservative estimate of the disturbance area which did not involve vegetative clearance. That is shown in the following table.

For APR in total, under the plan the disturbed areas with biometric condition of Moderate to Good would amount to 1.56 ha. Of that, at least 1.02 ha would involve no vegetative clearance and another 0.11 ha would be grass and small shrubs – leaving at most 0.43 ha of vegetative clearance of trees and more extensive shrubbery.

Type of work	**Number**	**Area (ha)**	**Trees to remove**	**Non Veg Clr**	**Grass,etc Clr**
Culvert/causeway	9	0.21	34	.07	
Corner	21	0.59	74	0.35+	
Passing bay	18	0.11	0		0.11
Crest	4	0.60	0	0.60	
Widen	3	0.05	1		
Total	55	1.56	109	1.02	0.11

In addition to the sites rated biometric condition of Moderate to Good, there were another 22 in the plan whose biometric condition was rated Low. They are summarised in the table below and are either Culvert/causeways or Passing bays.

APR works sites with biometric condition rated Low

Type of work	Number	Area (ha)	Trees to remove
Culvert/causeway	2	0.02	0
Passing bay	20	0.15	0
Total	22	0.17	0

Those sites involve no tree removal and the most limited vegetative cover. Typical descriptions of the Passing bay sites are:
PB08 “Bare earth verge, with scattered native grasses along property fence line.”
PB24 “Earth road verge adjoining cleared roadside nature strip comprising earthworks and two drainage swales. Low cover of scattered native grasses and forbs.”
PB41 “Bare earth verge and adjoining nature strip dominated by exotic grasses and bare earth adjacent to property entrance.”

PAC approval to perform work preparing those sites for use as passing bays cannot reasonably be taken as approval to instead cut down trees or remove native plants along other parts of APR where they are not currently disturbed.

Summary

The PAC approved a specific plan of work for APR, not some quantity of vegetation clearance to be applied wherever suited the developer when they came to do the work. The approval gave particular prominence to the limited number of trees to be removed, documenting that explicitly in

the Consent conditions (though for a few work sites the actual number was not specified, though the scope of work was).

The Consent conditions did not explicitly mention the extent of environmental disturbance to occur as part of the work, though that was documented in the ecological assessment by ecological Australia which formed part of the EA submitted by the developer.

The ecological assessment did **not** calculate the physical extent of vegetative clearance associated with each of the work sites or in aggregate. Instead it calculated the area that would be **disturbed** at each of those sites. Given the nature of the work sites, in many cases the disturbance from the approved work involves **no** vegetative clearance or the clearance only of grasses and low shrubs.

Examination of the detail of the assessments for the approved work sites shows that in aggregate, the total vegetative clearance for locations rated biometric condition of Moderate to Good is no more than 0.43 ha and the approved number of trees for removal is just over 100 (109).

Any work on APR which involves material vegetative clearance outside the sites identified in the plans considered by the PAC (which must be understood to have considered them in detail since that is part of the PAC's responsibilities) is contrary to the Consent. Certainly the Consent provides no basis for vegetative clearance of more than 0.43 ha of locations with biometric condition of Moderate to Good, and only for that clearance to occur at the work sites for which the ecological impact had been assessed in the plan submitted to the PAC.

CRUDINE RIDGE WIND FARM

Thursday, 16 August 2018

Proponent : CWP Renewables

16 Photos Identified

Chris Schultz - Senior Compliance Officer
NSW Department of Planning and Environment

NSW GOVERNMENT | Planning & Environment

Photo 1

Tree specifically noted by Section 14 Clause 3(a) and Clause 3(b) as a habitat tree that was to be retained and is marked for potential removal.

Photo 2

Habitat tree as noted in Photo 1.

Photo 3

Trees marked with pink dots indicating that they are located within the road easement for potential removal.

Photo 4

Excavator being used as part of tree clearing activities.

Photo 5

Tree clearing.

Photo 6

Tree clearing.

Photo 7

Tree clearing.

Photo 8

Bobcat with mulcher attachment.

Photo 9

Tree clearing.

Photo 10

Tree clearing.

Photo 11

Tree clearing.

Photo 12

Tree clearing.

Photo 13

Tree clearing.

Photo 14

Tree clearing.

Photo 15

Tree clearing.

General

I met with Section 14 Clause 3(a) and Clause 3(b) at 10.05 am on site. We had a discussion and then went for a drive along Aaron's Pass Road.

At 11.10 am I met with representatives from CWP Renewables and Downer, and Sally Mullinger from the Mid-Western Regional Council.

We had a discussion regarding the clearing along the road, with the notes from the discussion recorded in my contemporaneous notebook.

Following the discussion, at approximately 12.05 pm, I drove along Aaron's Pass Road again, taking some video of the areas that had been cleared and to be cleared, and on the return trip I took some photos of areas to be cleared and cleared.

I left the site at approximately 12.45 pm.

Unauthorised Tree Clearing along Aarons Pass Road: Satellite Images

The clearance of trees along Aarons Pass Road (APR) **vastly** exceeds what was authorised by the PAC. The PAC approved a plan which included the removal of a quite limited number of tress in very specific locations. The roadworks commenced for CRWF have already removed hundreds of trees whose removal was not authorised by the PAC.

Google Earth provides independent satellite imagery[1] which shows the scale of unauthorised tree removal conducted in the first 3.5 kms, or so, of APR (as at 15 September 2018) before intervention by DPE's compliance unit forced a stop.

The following pages provide pre and post clearance photos from Google Earth for the first 3.5kms of APR. The top photo on each page is before clearance occurred. The bottom photo is post clearance.

There are five pages of comparison photos. The first page covers the full section, to give a global view of what has occurred. Each of the other four pages is a smaller section in higher resolution to provide more visual detail. There are three locations up to 3.1kms for which tree removal (2 trees at each spot) had been proposed in the plan put to and approved by the PAC. Those three locations are all marked on the satellite photos. The vast swathe of tree removal outside those locations is clear on the photos.

Number of Trees PAC Authorised for Removal and Number Removed

APR Section	Approved by PAC	Number of Trees Removed		
		Right side	Left side	Total
0 – 0.9 kms	0	53	12	65
0.9 – 1.7 kms	2	58	30	88
1.7 – 2.4 kms	0	56	20	76
2.4 – 3.5 kms	4	54	14	68
Total	**6**	**221**	**76**	**297**

Note. Side of road is when driving from Castlereagh Highway.
Number of trees removed determined by visual inspection of the pre and post satellite photos.

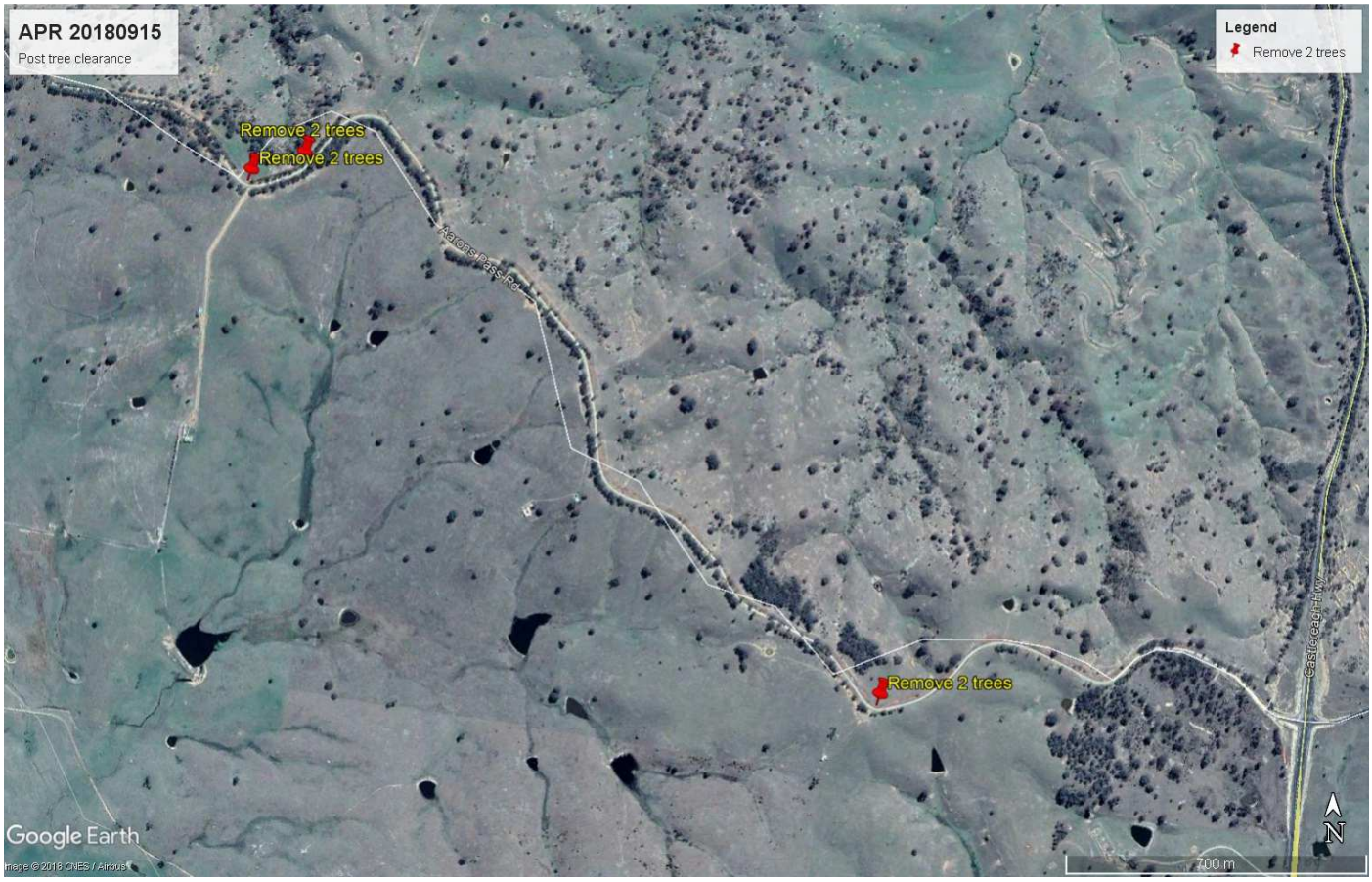
[1] Note. The dates on the satellite images are Google Earth's date for those images. It refers to the dates the image was photographed at the resolution shown in the particular image.

Unauthorised Tree Clearing along Aarons Pass Road: Satellite Images

First 3.5kms of APR **Approved: 6** **Removed: 297**

Pre-clearance

Post-clearance



Unauthorised Tree Clearing along Aarons Pass Road: Satellite Images

APR section 0 – 0.9 kms (approx) **Approved: 0** **Removed: 65**

Pre-clearance

Post-clearance

Unauthorised Tree Clearing along Aarons Pass Road: Satellite Images

APR section 0.9 – 1.7 kms (approx) **Approved: 2** **Removed: 88**

Pre-clearance

Post-clearance

Unauthorised Tree Clearing along Aarons Pass Road: Satellite Images

APR section 1.7 – 2.4 kms (approx) **Approved: 0** **Removed: 76**

Pre-clearance

Post-clearance

Unauthorised Tree Clearing along Aarons Pass Road: Satellite Images

APR section 2.4 – 3.5 kms (approx) **Approved: 4** **Removed: 68**

Pre-clearance

Post-clearance