

Our Ref: JW:2023:G47768
Your reference: SSD-10315
Date 20/12/2023

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

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

Dear Professor Clark,

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

1. I refer to your correspondence dated 29th November 2023, and my prior correspondence dated 26th November 2023 ('Prior Correspondence'). Capitalised terms in this letter have the same meaning as in my Prior Correspondence.
2. The Commission has dismissed the concerns raised concerning the 'Bias Rule'. It is an important distinction to make that, the common law that imposes the requirements for Natural Justice is not a legislative instrument that is subject to breach, it is a common law right that must be afforded to those affected by Administrative Decisions, such as those made by the Panel.
3. I further note that in addition to its obligations under the Common Law, the Commission must under the Environmental Planning and Assessment Act 1979 (NSW) ('Act') effectively manage and disclose any measures for the management of Conflicts of Interest concerning matters before it. It is well established that Conflicts of Interest can arise in several ways and doesn't necessarily need to be between the Public Officer and the Proponent¹.
4. It is important to recognise that, despite my prior correspondence, highlighting the concerns with Mr. Pearson's appointment, the Commission has failed to publish any updates to its Conflict of Interest Project Register²
5. Given that Mr. Pearson has been empanelled, and a reasonable person would assume he intends to undertake a statutory function delegated to him under the Act. The appointment in itself impedes on the rights of those directly affected by the Proposed Decision to Natural Justice.
6. The Standard by which the 'Bias Rule' is measured is a circumstance where a fair-minded observer might reasonably suspect that a decision-maker is not impartial. It requires no actions or misgivings by the individual concerned. Given the matters of fact raised in my Prior Correspondence, the requirements of the 'Bias rule' have been met concerning Mr Person's appointment.

¹ Government Sector Employment Act 2013 (NSW)

² <https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2023/11/bowmans-creek-wind-farm/commission-conflict-of-interest-register/conflicts-register.pdf> Retrieved on 6/12/2023

7. As outlined in my Prior Correspondence, there is a requirement for Procedural Fairness in all circumstances, not only the circumstances that the Panel believes ought to be considered. The Commission must not demonstrate “tunnel vision” in what it considers important to ensuring Procedural Fairness. The Courts have long held that the application of Natural Justice is circumstantial.
8. Again, the Commission must use the approach of assessing the circumstances from the view of a fair-minded observer when assessing what is considered an appropriate approach for ensuring Natural Justice is afforded to those affected by the Potential Decision.
9. Rationally, no fair-minded observer can consider the time for submissions to the Commission in all the circumstances, giving account the quantum of material submitted by the Proponent and the Department, as reasonable.
10. The Panel is unable to discharge its statutory duties in circumstances whereby those who will be directly affected are not afforded Natural Justice.
11. Any decision made by the Panel, that impedes on a parties right to be afforded Natural Justice, gives the affected party or parties the right to seek a writ of prohibition concerning the Panel’s conduct.
12. Furthermore, in the context of the Commission being well aware of its obligations in relation to Natural Justice³ but then failing in it’s obligations to ensure it’s conduct does not impede on the rights of affected persons, gives those affected by such a Decision the right to seek a tort remedy for misfeasance in public office against those who impeded upon their rights.
13. The Commission must reconsider its stance concerning this matter and ensure all affected parties are afforded Natural Justice.
14. Finally, I note that the Commission gave an undertaking⁴ to publish both my Prior correspondence and its response on its website, but has failed to do so. It is disappointing in the context of the NSW Government's commitment to Open Government⁵ I would hope that all correspondence is now subsequently published.
15. I note the limits on the number of submissions undertaken by a single individual. In this context this correspondence is not to be taken as a submission on the merits of the Proposal, rather it is communication with the Commission on the proper and fit operation of the Panel.

John Wood

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³ Letter dated 29 November 2023, Signed Stephen Barry, Office of the Independent Planning Commission NSW

⁴ Ibid

⁵ <https://www.productivity.nsw.gov.au/open-government#:~:text=The%20NSW%20Government%20is%20committed,%2C%20participation%2C%20collaboration%20and%20innovation.> “Open Government” Retrieved 25/11/2023