On Deceptive "Decommissioning Plans"

Objection to the Proposed Jupiter Wind Farm

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The decommissioning plan presented in the EIS offers no certainty of the one thing that matters, i.e. decommissioning funding. The EIS purports to offer a process of accumulating funding, where the entire process depends on "trust us", or more exactly "trust whoever eventually owns the wind farm, which probably won't be us".

ERM and EPYC appear to be operating on the belief that Mike Young, David Kitto, Marcus Ray and Carolyn McNally are either stupid, or willing to connive at a deceptive decommissioning funding proposal, presumably on the grounds they will have long left the Department before the NSW taxpayer is stuck with the bill for decommissioning.

Any decision by the Department of Planning, the PAC or the Minister to enter into any scheme of decommissioning funding which relies on the good faith of, or cost estimates by, the developer are in fact at best a gamble and at worst conniving at a scheme to allow the wind farm owner to eventually impose decommissioning costs on the State of NSW. It would be a clear act of misfeasance. Consequently:

1. ***The Department needs to advise the PAC to impose a consent condition on the landowners for each part of the wind farm that, before construction, the landowner must obtain and provide to the Department a guarantee of decommissioning funding from a corporate entity with an investment grade credit rating.***
2. ***If there is any legal impediment to doing so, the Department needs to advise the Minister on changes to the Regulation or Act necessary to remove the impediment.***

Overview

The decommissioning plan presented in the EIS offers no certainty of the one thing that matters, i.e. decommissioning funding. The EIS purports to offer a process of accumulating funding, where the entire process depends on "trust us", or more exactly "trust whoever eventually owns the wind farm, which probably won't be us".

The EIS piously claims decommissioning is the responsibility of the wind farm owner. But does not then take the step of proposing a consent condition which would require the prior establishment of irrevocable arrangements which would ensure the necessary funds are available and committed when decommissioning is necessary.

The EIS puts forward some cockamamie illusion for decommissioning funding which any operator could drive a dozen trucks through, and will do so, to avoid being stuck with the bill.

The EIS fails to mention key legal constraints which affect how certainty of decommissioning funding can be ensured.

The failure to do so and the unenforceable arrangements proposed are *prima facie* evidence of wilful intent to ensure that the wind farm operator can escape its obligations and thereby increase the resale value of an approved wind farm.

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In its EIS for Liverpool Range Wind Farm, Epuron (which has a good deal of wind farm experience) estimated[1] decommissioning costs at $380,000 per turbine. Epuron said "This estimate is on par with other wind farm developments that have recently been approved in New South Wales." These estimates were for turbines up to 165m high, i.e. slightly shorter than for the Jupiter wind farm. This is a major cost to impose on NSW taxpayers.

Decommissioning Funding

Decommissioning will not occur unless someone provides the funds, at end of wind farm life, to do so. No contract can extract funds from an insolvent party. The end-of-life owner of Jupiter wind farm is highly likely to be insolvent at that time and therefore any contract with that company, whether by landowners or anyone else will be unable to extract funds from the company at that time. Likewise any consent conditions imposing a funding obligation on the wind farm owner will be then unenforceable.

The Department of Planning informed the PAC, in its recommendations on the Crudine Ridge wind farm proposal, that the Department had received legal advice that the Department and PAC have no legal power to impose a decommissioning bond on a wind farm developer.[2]

Note, the EIS quotes the 2011 Draft Wind Farm Guidelines that:

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[1] *Liverpool Range Wind Farm EIS, Appendix G Decommissioning and Rehabilitation Plan*, section 2.2, February 2014.

[2] *Crudine Ridge Assessment Report*, Department of Planning & Environment, December 2015, p. 60.

> "Where this is deemed to be inadequate, but the Development Application is granted consent, a condition of consent will be imposed requiring the proponent to pay a decommissioning bond." [3]

Either ERM is out of touch with advice issued by the Department, or for some reason prefers to ignore it.

A decommissioning bond was always an inadequate way of dealing with decommissioning funding. It depends on the Department accurately estimating the true net cost of decommissioning, 25 or 30 years in the future, and then enforcing provision of those funds well in advance. The Department has zero demonstrated capacity to do either and is hardly staffed for that purpose.

The only way to avoid this forecasting problem, for which the Department is ill-suited, is to have decommissioning funding guaranteed by an investment grade corporate entity, with conditions that ensure the obligation remains with an investment grade corporate entity until discharged[4]. That means either an owner of the wind farm which is itself of investment grade status or a financial guarantee from a corporation with that status. Obviously, in the latter case, the guarantor will require the party to whom it is guaranteeing funding to pay appropriate fees in advance.

Such guarantees should be required, as a consent condition, to be tendered to the Department by each landowner prior to construction of turbines on their property.

If there is any legal impediment to doing so, the Department should promptly advise the Minister on how the relevant Regulation or Act needs to be altered to remove the impediment. The Minister and the Department have an obligation to the people of NSW to ensure that future taxpayers of NSW cannot be stuck with decommissioning costs, or wind farms left as a permanent eyesore.

Note. The *Environmental Planning and Assessment Regulation 2000* requires the EIS be consistent with the principles of ecologically sustainable development, which Schedule 2 of the Regulation specifies as including:

> s7(4)(d)(i) polluter pays, that is, those who generate pollution and waste should bear the cost of containment, avoidance or abatement; and
>
> s7(4)(d)((ii) the users of goods and services should pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any waste

So the Regulation makes clear the Department's obligation to ensure the wind farm developer, or the hosts partnered with it, bear all of the lifecycle costs of the wind farm and are given no opportunity to offload any of those costs onto NSW taxpayers.

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[3] *Jupiter Wind Farm EIS*, Annex O, p. 9.

[4] The NSW Government Treasury will always know which corporate entities have investment grade credit ratings. A financial guarantee by such an entity would need a covenant that, in the event investment grade status is lost, the guarantee must be transferred to another entity with investment grade status. Since corporations rarely go from investment grade status to insolvency in one step, such a covenant ensures continuity of obligation on the part of an entity able to fulfil the obligation.

Why the EIS Decommissioning Funding Proposals are a Rorter's Delight

It is commonly accepted in business in the developed world that it is the responsibility of directors to maximise the value of a business to shareholders, subject to the requirement to comply with the law[5].

While some directors may give attention to the interests of employees and customers, that has some instrumental contribution to shareholder value. Nowhere is it accepted that it is the responsibility of directors to comply with what Departmental officials would like them to do, once those officials no longer have power to influence the company's outcomes, unless those wishes are backed up by law and regulation.

Indeed, as we have seen with the Gullen Range wind farm, there is a complete disregard of the wishes of Department officials where those wishes conflict with the financial interests of wind farm owners.

Australia is littered with mines where operators have walked away from remediation responsibilities, and in most cases being largely at ground level, that legacy is far less intrusive than massive, defunct wind turbines.

Given that EPYC and the Jupiter Wind Farm are more than 90% owned by Spanish shareholders, and EPYC has predominantly Spanish directors, it is ridiculous to believe that those directors will reduce the value of their shareholder's interest where they have a legal right not to do so. Indeed, it is widely held that they would be breaching their obligations as directors were they to do that.

Consequently, it can be expected that the beneficial owners of the Jupiter wind farm will ensure that at the end of life the wind farm is owned by a shell company with no other assets and no recourse to the prior beneficial owners. The only exception being if there is, at that time, significant ongoing value to them in use of the Jupiter site.

Therefore the only guarantee of decommissioning funding upon which the Department can rely is one that is contractually enforceable against an entity which can be assured of being financially solvent in 30 years time. That mechanism has been earlier explained.

Consider the carefully deceptive suggestions made in the EIS as part of the proposed funding arrangements:

- Contractual arrangements with the hosts oblige the Jupiter wind farm owners to decommission. ***If the company owning the wind farm at that time is insolvent, as explained, those contracts are worthless.***
- "it is ***anticipated*** *(emphasis added)* that a fund to cover the costs of decommissioning the Project infrastructure and rehabilitating the PA will be established during operation and prior to decommissioning of the wind farm" [6]. ***This is the "trust me" proposal. A lot of people keep anticipating winning the lottery, without success. In other words, don't compel funding to be provided in a way that is certain, which we will have to***

[5] See, for instance, Andrew Keay, "Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach'", *Sydney Law Review*, 2007, vol 29, pp: 577-612. Also Shelley Marshall and Ian Ramsey, "Stakeholders and Director's Duties: Law, Theory and Evidence", *UNSW Law Journal*, 2012, Volume 35(1), pp. 291-316.

[6] *Jupiter Wind Farm EIS*, Annex O, p. 22.

pay for up front (banks as funding guarantors are not going to be in the "trusting" business), leave us an opportunity to escape paying.

- "These funds may be held by a legal firm or an authorised appointed trustee corporation. The estimated decommissioning costs will be re-evaluated every five years with each review of this plan (refer to Chapter 7) and prior to decommissioning." [7] ***The amount of funds to be held by these "trustees" is wholly dependent on what the wind farm operator claims is the difference between the cost of decommissioning and the alleged net value of the wind farm assets at the end of life. If the wind farm owner says there is no difference between the two (and says that every five years) the trustee gets to hold nothing.***
- The EIS claims "Replacement of WTGs is considered the most probable scenario" [8] at end of life of the current proposal. ***This is a forecast for at least 30 years into the future, perhaps 40. ERM has no idea what energy technologies will dominate at that time; no idea whether other newer wind farms will, at that time, have pre-empted any opportunity to redevelop the Jupiter site; no idea whether Australia will have got fed up with the blackouts currently being inflicted on South Australia and entirely walked away from parasite power. It is a forecast with no merit whatsoever***.

We can be sure that if the landowner is obliged to obtain a decommissioning funding guarantee from an investment grade corporation, there will be no trusting going on. The wind farm developer (or host) will be obliged to pay whatever fees are charged by the guarantor and/or provide marketable collateral.

The financial guarantor will not trust any claims about what the wind farm owner will contribute at the end, or what the wind farm owner claims is the net cost of decommissioning. The financial guarantor will make their own independent determination and set fees based on their determination, not the beliefs of the wind farm owner.

This is why the developer and its consultants want the Department to instead agree to an unenforceable alternative which offers the owner a "get out of jail, free, card", paid for by future NSW taxpayers.

Conclusion

1. The Department needs to advise the PAC to impose a consent condition on the landowners for each part of the wind farm that, before construction, the landowner must obtain and provide to the Department a guarantee of decommissioning funding from a corporate entity with an investment grade credit rating.

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[7] *Jupiter Wind Farm EIS*, Annex O, p. 22.
[8] *Jupiter Wind Farm EIS*, Annex O, p. 21.