Introduction

Noise conditions imposed on this development need to be robust over the project's lifetime and allow the NSW Government to strengthen specific terms in the conditions if the Government subsequently decides that is important.

Restrictions are now emerging, as part of international trade and other agreements, on the ability of governments to change conditions applying to investments with international owners. It is possible and practical to express noise conditions in simple terms which preserve the NSW Government's future discretion. Unless that is done, the DPE/PAC are likely to create a situation where a future NSW Government has the invidious choice of allowing known harm to occur to citizens, or acting to prevent it but incurring a commercial penalty of tens of millions of dollars, or even being prohibited from such action.

Changing Environment for Noise Conditions

The fact that excessive noise can disrupt sleep and harm health has long been recognised by the NSW Government. As is stated in the very first paragraph of the NSW Industrial Noise Policy:

> The adverse effects of noise on communities are well reported in the literature (for review see Berglund & Lindvall, eds, 1995). These vary from direct effects (including noise-induced hearing loss, speech interference, sleep disturbance and annoyance), to indirect or secondary effects, such as long-term effects on physical and mental health as a result of long-term annoyance and prolonged disturbance to sleep. [1]

In relation to wind farms, the issue is whether residents are exposed to noise of a character and strength that has these effects. State governments have established standards for the strength of noise. and to a lesser degree its character, which they believe, based on current evidence and advice, provide adequate protection for residents.

Wind farm proponents adduce noise modelling for their projects to demonstrate they ***could*** meet those standards (not that they ***will***) and the "black box" nature of this modelling makes it hard for consent authorities to disprove. So they rely on giving approval subject to the noise conditions which they currently believe adequate.

Despite that, most wind farms end up with a number of residents complaining strongly that they are badly affected by noise – even if the wind farm appears to comply with its noise conditions.

Year by year, research continues to amass growing evidence of harm being caused by wind farm noise, of the biological mechanisms through which this occurs, and in particular of the adverse effects of some infrasound, whether from wind farms or other sources.

There has been sufficient troubling evidence for the Australian Government to take serious investigatory steps. They are in the form of targeted research now being commissioned by the

[1] *NSW Industrial Noise Policy*, Environment Protection Agency, January 2000, p. 1.

NHMRC[2]; and the establishment of a National Wind Farm Commissioner and an Independent Scientific Committee on Wind Turbines[3], following the investigation by, and recommendations of, the Senate Select Committee on Wind Turbines. It would be unreasonable to conclude that those steps by the Australian Government will not produce more evidence of harm from wind farm noise or that they will not document more noise characteristics responsible for harm.

State Governments have some basis for claiming that despite the troubling evidence and the investigatory steps now being undertaken, they have not been provided with technical specifications they can use to provide appropriate protection in a clearly measurable way – but that they will do so if and when such specifications are determined by relevant research.

Unfortunately international trade and other agreements are moving in a direction that can nullify the ability of governments to impose *ex post* restrictions on commercial investments, at least when owned by foreigners (as is common with wind farms).

ISDS and International Trade Agreements

The pervasive growth of Investor-State Dispute Settlement (ISDS), as part of international trade agreements, has introduced growing uncertainty about the future sovereignty of Australian national and state governments , and their courts, when making decisions that adversely affect foreign owned investments within their nominal jurisdiction.

As discussed in more detail in Annex A, the horse has already bolted. Australia is now subject to 27 trade agreements that include ISDS (28 with TPP); decisions about the application of ISDS are wholly up to international tribunals not bound by Australian law or courts; the use of ISDS by investors against host government decisions is growing rapidly globally; and ISDS arbitrators have effective power, and incentive, to expand the scope of what they deem disputes appropriate for their jurisdiction.

These developments are significant enough to draw comment from the Chief Justice of the Australian High Court, who, in an extensive paper, observed "Their long-term consequences for national judiciaries ***cannot be stated with confidence*** (emphasis added)" [4]. By implication, that conclusion applies also to Australian state governments.

It is noteworthy that "A quarter of all the arbitrations commenced in 2013 involved challenges to regulatory action by the Czech Republic and Spain affecting the interests of the providers of renewable energy."[5] So foreign investors in renewable energy clearly consider ISDS a powerful tool in protecting their interests when governments change rules to their detriment.

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[2] Following its investigation of current research on wind farms and health, the NHMRC is commissioning research into "The relationship between wind farm noise and health effects", https://www.nhmrc.gov.au/media/releases/2015/targeted-call-research-wind-farms-and-human-health-now-open

[3] "Appointment of National Wind Farm Commissioner and Independent Scientific Committee on Wind Turbines", Media Release, The Hon. Greg Hunt MP, Minister for the Environment, 9 October 2015, which includes the statement "The Committee is convened as an independent, multidisciplinary, expert group to improve science and monitoring of the potential impacts of sound from wind turbines (including low frequency and infrasound) on health and the environment."

[4] "Investor-State Dispute Settlement — A Cut Above the Courts?", Chief Justice RS French AC, *Supreme and Federal Courts Judges' Conference*, 9 July 2014, Darwin, pp. 3-4.

[5] Chief Justice French, *op cit*, p 7.

This provides a stark warning for the NSW Government that if, in approving developments, it does not impose conditions that explicitly entitle it to subsequently vary those conditions if it deems appropriate, then there is a high likelihood that ISDS will be used to block such action and to impose penalties on the NSW Government.

Since ISDS tribunals are not bound by Australian law or courts, nor by precedent, and their whole purpose is to protect foreign investors, the NSW Government cannot with any certainty predict the outcome of such disputes.

Ex Ante Retention of Government Responsibility to Protect

The NSW Government can fully retain discretion to later enact quantified noise (or other) conditions for this and other wind farm projects by including consent conditions that:

1. *The wind farm must cause no material harm to the health of residents and no recurrent sleep disruption for residents, without the informed consent of those residents, and that consent for harm to health or sleep disruption cannot be given for minors; and*
2. *The wind farm will be bound by any revised, quantified, noise (or other) conditions the NSW Government may subsequently impose, based on reasonable research evidence, to protect the health and sleep of residents.*

These are conditions wind farm proponents cannot oppose in good faith. The wind industry and wind farm owners all insist they do not cause harm to health or sleep – in which case the addition of these consent conditions will never actually cause them a problem. And they will surely agree that in the unlikely (from their perspective) event that strong evidence emerges of harm to health or sleep, they would not want to continue to operate in a way that causes such harm.

The NSW Government repeatedly refers to application of the precautionary principle to proposed developments and their potential impact. The recommended conditions are totally consistent with the precautionary principle. In fact, they impose no restrictions from project inception other than existing standards and the requirement to not cause material harm to health or recurrent sleep disruption (with which surely no one can disagree), while protecting from any restrictive impact of trade or other international agreements the NSW Government's discretion to in future formalise if necessary, on the basis of evidence, specific conditions whose effect is to better protect residents.

Recommendations

The Biala project could well extend over thirty years, allowing for construction time and delays between approval and construction (Crookwell 2 has now gone at least 10 years since approval without construction commencing). Even 10 years is plenty of time for the Australian Government's investigatory work on wind farm noise health effects to reveal information that demands tighter, quantified, noise restrictions.

It is also plenty of time for new international agreements, or the interpretation of those agreements by ISDS, that more tightly constrain the control of individual governments over the conditions under which foreign investments must operate. So in thirty years there can be

enormous changes and it is critical the NSW Government acts to preserve its right to protect citizens.

The financial interests behind the Biala wind farm appear to be predominantly overseas, fronted by a lady operating from a house in suburban Sydney. Even were the proponents wholly Australian owned, DPE is well aware that ownership of wind farms changes regularly, in many cases to foreign owners, as it has seen with the Gullen Range Wind Farm, where Chinese owners have been thumbing their noses at the Department with great, consequent, harm caused to nearby residents.

Therefore:

- if the Biala wind farm is approved, it should be subject to the suggested conditions 1 and 2 above; and
- those conditions should be standard in consent conditions for all future wind farms and any other developments where there are reasonable grounds for believing the potential for harmful emissions exists that cannot be fully codified at present.

Choosing not to apply such conditions would be a clear statement that the current NSW Government:

- agrees to material harm to the health of residents and to recurrent sleep disruption for them; and
- is unwilling to ensure future NSW Governments have continued discretion to protect citizens that may be affected by wind farms, or other harmful noise sources, even though it is easy and costless to preserve this discretion.

The Minister for Planning should be made aware of the general issue raised here since presumably he will want to ensure the ability of the NSW Government to make *ex post* adjustments to policy and conditions for developments is not restricted, particularly where it concerns the health of NSW residents.

Annex A. Investor-State Dispute Settlement (ISDS)

Investor-State Dispute Settlement (ISDS) creates uncertainty about the effective sovereignty of national and state governments, and their courts, wherever they make decisions that affect existing, foreign-owned, investments within their jurisdiction. This uncertainty is likely to grow over time.

The Australian Department of Foreign Affairs and Trade (DFAT) describes ISDS as:

> ISDS is a mechanism that is included in a Free Trade Agreement (FTA) or an investment treaty to provide foreign investors, including Australian investors overseas, with the right to access an international tribunal if they believe actions taken by a host government breach its investment obligations.[6]

and

> An investor can have their claim determined by an independent arbitral tribunal without having to rely on domestic legal remedies. ISDS cases are usually decided by three arbitrators who are independent of both the government and the investor.[7]

So the rulings are outside the legal framework of the countries involved, with no appeal to their legal systems, and not bound by their laws.

According to DFAT:

> Australia has ISDS provisions in six FTAs: China-Australia Free Trade Agreement (not yet in force), Korea-Australia Free Trade Agreement, Australia-Chile Free Trade Agreement, Singapore-Australia Free Trade Agreement, Thailand-Australia Free Trade Agreement, and ASEAN-Australia-New Zealand Free Trade Agreement.[8]
>
> It also has "ISDS provisions in its 21 Investment Protection and Promotion Agreements (IPPAs)" [9]

and it is commonly expected that ISDS is part of the Trans Pacific Partnership to which the Australian Government has now agreed.

DFAT claims this imposes little policy constraints on governments, asserting:

> ISDS does not prevent the Government from changing its policies or regulating in the public interest. It does not freeze existing policy settings. It is not enough that an investor does not agree with a new policy or that a policy adversely affects its profits.[10]

and

> The Australian Government is opposed to signing up to international agreements that would restrict Australia's capacity to govern in the public interest —

[6] http://dfat.gov.au/trade/topics/pages/isds.aspx
[7] http://dfat.gov.au/trade/topics/pages/isds.aspx
[8] http://dfat.gov.au/trade/topics/pages/isds.aspx
[9] http://dfat.gov.au/trade/topics/pages/isds.aspx
[10] http://dfat.gov.au/trade/topics/pages/isds.aspx

> including in areas such as public health, the environment or any other area of the economy. [11]

While DFAT under the current Government believes ISDS "does not prevent the Government from changing its policies or regulating in the public interest", the Gillard Government apparently took a different view, at least of the risks ISDS poses to the ability to regulate in the public interest. The "Gillard government declared it would never enter into another ISDS provision after the Philip Morris case".[12]

While DFAT, under the current Government, is sanguine about the legal consequences of ISDS, in assessments of legal implications it is more appropriate to rely on the views of Chief Justice RS French AC of the Australian High Court, who in a recent paper commented:

- "Arbitral tribunals set up under ISDS provisions are not courts. Nor are they required to act like courts. Yet their decisions may include awards which significantly impact on national economies and on regulatory systems within nation states."[13]
- "It has not been unusual for investors to claim that decisions of courts in a Respondent State constitute a breach of a provision of the investment treaty to which the State is a party."[14]
- "However, the significance of ISDS arbitral processes is global. They have general implications for national sovereignty, democratic governance and the rule of law within domestic legal systems. ***Their long-term consequences for national judiciaries cannot be stated with confidence*** (emphasis added)." [15]
- "A quarter of all the arbitrations commenced in 2013 involved challenges to regulatory action by the Czech Republic and Spain affecting the interests of the providers of renewable energy."[16]

DFAT points to the fact that, to date, Australia has been subject to only one instance of ISDS, i.e. the case brought by Philip Morris. However, the existing FTA with the United States does not provide for ISDS while the TPP almost certainly will. As ANU Law Professor Thomas Faunce has pointed out, "America is not just Australia's largest source of foreign investment, it's also the nation whose corporations are the most frequent users of ISDS."[17]

Faunce has drawn attention to the situation of Canada following its signing of NAFTA, which includes ISDS, and that under NAFTA, "Canada has been sued nearly 20 times and has lost or settled seven times, paying American corporations at least $US158 million in compensation." [18] and now "There are eight cases pending against Canada, with damages claims totalling almost $6 billion." [19] Simply defending the cases is expensive.

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[11] http://dfat.gov.au/trade/topics/pages/isds.aspx

[12] http://www.smh.com.au/business/trade-treaties-expose-australia-to-costly-litigation-experts-warn-20140828-109ht7.html

[13] "Investor-State Dispute Settlement — A Cut Above the Courts?", Chief Justice RS French AC, *Supreme and Federal Courts Judges' Conference*, 9 July 2014, Darwin

[14] Chief Justice French, *op cit*, p. 3.

[15] Chief Justice French, *op cit*, pp. 3-4.

[16] Chief Justice French, *op cit*, p 7..

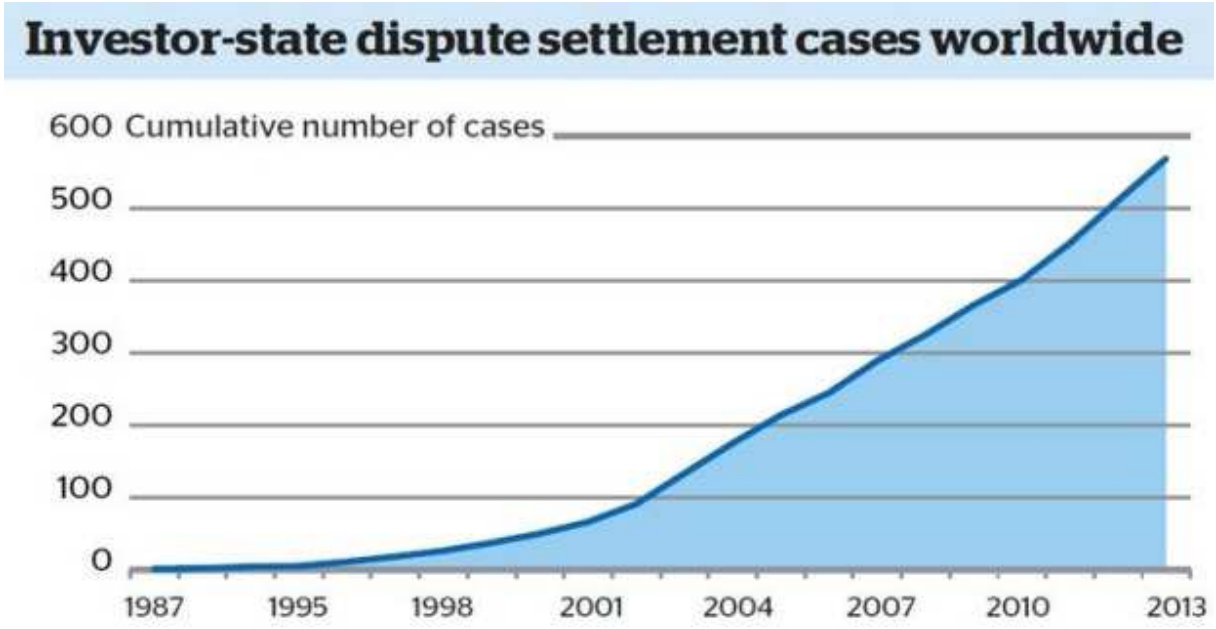
[17] http://www.abc.net.au/radionational/programs/backgroundbriefing/isds-the-devil-in-the-trade-deal/5734490

[18] http://www.abc.net.au/radionational/programs/backgroundbriefing/isds-the-devil-in-the-trade-deal/5734490

[19] http://www.abc.net.au/radionational/programs/backgroundbriefing/isds-the-devil-in-the-trade-deal/5734490

There is a further important factor, which is the opportunity for "treaty shopping". After the Australian Government announced it would introduce tobacco plain packaging laws, Philip Morris Australia Ltd was acquired by Philip Morris Asia Ltd, a company incorporated in Hong Kong. That meant the matter affected an overseas investor (Philip Morris Asia Ltd), which was domiciled in Hong Kong, and because Hong Kong has an Investment Protection and Promotion Agreement with Australia, including ISDS, the new owner of Philip Morris Australia Ltd could pursue the matter against the Australian Government through ISDS.

The issue here is not whether ISDS as part of trade agreements is a good thing or not. What is relevant is the potential for ISDS to be used to challenge legal and regulatory changes that governments may make, and for that challenge to occur outside the Australian legal system through tribunals established to protect investors, not governments, and certainly not the public.



Source: "Trade treaties expose Australia to costly litigation, experts warn", *Sydney Morning Herald*, August 30, 2014.

As the graphic above shows, the number of ISDS cases being brought worldwide is escalating. Even if Australia chose not to enter into any more agreements including ISDS, the existing 27, together with "treaty shopping" leave a high level of exposure for government decisions that adversely affect foreign investors, particularly given a range of issues in the way ISDS operates that were identified by the European Parliamentary Research Service in January 2014:

- "vague formulation of major treaty provisions leaving a wide range of interpretations open to arbitrators;
- loopholes which enable abuses such as nationality shopping by companies which create subsidiaries abroad specifically to take advantage of the agreements;
- lack of transparency with varying degrees of secrecy attaching to arbitral processes depending upon the institutions or rules which are applied;
- a relatively small pool of arbitrators — arbitrators appointed to ISDS arbitrations are said to be mostly male (95%) and from Europe and North America;

- role-swapping by arbitrators who appear from time to time as counsel in ISDS cases;
- the high cost of ISDS arbitrations — estimated by OECD as averaging about $8 million each;
- associated with the high cost and potentially high awards, a growing phenomenon of third party funding of claims by banks, hedge funds and insurance companies in exchange for a share of the proceeds ranging from 20% to 50%;
- absence of effective review or appeal processes;
- inconsistency in decisions on similar provisions." [20]

So, even if the Australian Government never signs another trade agreement that includes ISDS:

- "treaty shopping" by investors from countries not directly covered by an ISDS agreement with Australia allows them to not only attain that status but do so with the benefit of the treaty most advantageous to them.
- Whether a dispute falls under ISDS and a particular treaty is up to the arbitration tribunal assigned the dispute. It is not under the control of governments impacted by such claims. And there is no appeal from these decisions.
- Thus it is quite possible that ISDS tribunals will evolve the scope of what they consider a legitimate claim under ISDS, to become more encompassing. Given the financial interests of those involved as ISDS arbitrators and/or counsel, it is highly unlikely they will choose to limit the scope of ISDS cases and thereby their income.

So, if in the words of Australian High Court Chief Justice French, "Their long-term consequences for national judiciaries cannot be stated with confidence" [21,] that is equally true of the long-term consequences for state and national governments.

[20] Chief Justice French, *op cit*, pp. 1-2.
[21] Chief Justice French, *op cit*, pp. 3-4.