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The future for wind farms

Recent VCAT decisions in relation to wind farms highlight the implications of changes to the Victoria Planning Provisions, particularly with regard to health impacts and local community support. By Eliza Bergin

Wind farm proponents may find that the "winds have changed" when applying for a permit under the Victoria Planning Provisions regime, which commenced in March 2012. Written consent is required from all owners of a dwelling within a 2 kilometre radius of a proposed turbine, which means that wind farm proponents must now secure and provide evidence of local community support. In August 2011, the "2 kilometre rule" was included in the Victoria Planning Provisions by effect of a statewide amendment. Amendment VC82 amended clause 52.32 to prohibit wind energy facilities where any turbine is located within 2 kilometres of an existing dwelling, unless there is evidence of the written consent of the owner at the time of the relevant application.

The health impacts of wind farms are the focus of this article, and these have now been carefully assessed by VCAT. In February 2014, the National Health and Medical Research Council (NHMRC) issued a Draft Information Paper, "Evidence on Wind Farms and Human Health" (Consultation Draft). The purpose of the review is to determine whether there is any new evidence to show that wind farms cause adverse human health effects and to update the NHMRC statement on the matter if required.

It has also been clarified that there is no evidence that wind farms in the Australian landscape have been detrimental to tourism.

Cherry Tree Wind Farm

Cherry Tree Wind Farm Pty Ltd v Mitchell Shire Council[1] (*Cherry Tree Wind Farm*) related to an application for a permit under the new controls for wind energy facilities. The wind farm proponent sought approval for a 16-turbine wind energy facility on the Cherry Tree Ranges at Trawool, about 15 kilometres east of Seymour. Mitchell Shire Council refused to issue a permit and the proponent appealed to VCAT.

Before VCAT, objectors included two local resident groups which formed the Trawool Valley and Whiteheads Creek Landscape Guardians, more residents with individual cases to present, and the Waubra Foundation (an organisation whose main object is to investigate the health problems experienced by people living in proximity to wind farms). Over 23 hearing days, VCAT heard evidence from 11 expert witnesses and more than 100 exhibits were tendered. The health impacts were at the centre of the controversy in this case and other impacts were summarised as:

- the impact of the proposal on the landscape and environmental values of the environmentally sensitive areas of the Trawool Valley and Whiteheads Creek environs;
- the impact of the proposal on the visual amenity of the Trawool Valley and Whiteheads Creek environs, including the hilltops and ridgelines of those environs;
- the impact of the proposal on biodiversity;
- the proposed loss of vegetation associated with the proposal; and

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- whether the proposal achieved compliance with cl 52.32 (Wind Energy Facility) of the Mitchell Planning Scheme.

A submission was made that the proposed wind farm was prohibited because some of the turbines were to be located within 2 kilometres of an existing dwelling. The particular dwelling was then under construction and the consent of the owner had not been obtained. It was submitted that the new clause regarding wind farm facilities applied because at the date the amendment to the permit to relocate some of the turbines closer to the proposed dwelling was made, construction was under way.

On this interlocutory point, VCAT ruled that the structure was not an "existing dwelling" as it was currently under construction and did not yet contain all the facilities necessary to satisfy the planning-scheme definition of "dwelling" (a kitchen sink, food-preparation facilities, a bath or shower and a toilet and wash basin). Accordingly, a ruling was made that the application for a planning permit was not prohibited as at the relevant dates due to a failure to obtain the written consent of all owners of a dwelling located within 2 kilometres.

After reviewing a range of expert evidence, VCAT made further interlocutory orders about the following issues:

- landscape and visual impacts;
- public realm;
- private realm;
- tourism;
- the hilltop and ridgeline protection policy;
- ecology;
- fauna and flora surveys including the golden sun moth, bibron's toadlet, growling grass frog, water birds, wedgetail eagles;
- net gain;
- noise; and
- health and wellbeing.

VCAT drew conclusions on each point, except for the last, that the proposal would not have an unreasonable impact on any of the considerations. A major focus of the respondent's case was on the health and wellbeing impacts of the proposal. VCAT considered that the only point of agreement among the range of health and wellbeing experts was that further investigation was required. Accordingly, the matter was adjourned so that further evidence could be led.

Following an adjournment of six months, VCAT accepted evidence on the health impacts and concluded that there was no scientific evidence to link wind turbines with adverse health effects. VCAT considered the views of the NSW and Victorian departments of health. The 2 kilometre rule provides an inbuilt precautionary approach.[2] Any individual with residual concerns about health impacts may choose not to provide written consent.

Further important conclusions from the evidence drawn by VCAT were stated at [44]–[46]:

"There is certainly no compelling evidence, and indeed no expert evidence at all that was capable of being tested, that would justify the Tribunal adopting a view that is opposed to the clearly stated opinions of the public health authorities. Those opinions are underscored by the currently stated position of the NHMRC.

"Furthermore, the Tribunal accepts the statements of the health authorities that the 2 km buffer required by clause 52.32 of the Mitchell Planning Scheme itself incorporates the precautionary principle. Indeed there is no other basis for the adoption of that distance.

"This conclusion makes it unnecessary to answer the second question. However, in deference to the time and effort expended on this case by the parties and many members of the public, the Tribunal will make some observations which may be of assistance in the ongoing research relating to these issues.

"The Tribunal has no doubt that some people who live close to a wind turbine experience adverse health effects, including sleep disturbance. The current state of scientific opinion is that there is no causal link of a physiological nature between these effects and the turbine.

"The totality of material before the Tribunal suggests, but does not conclusively prove, that these effects are suffered by only a small proportion of the population surrounding a wind farm."

The position now, as then, stated by the NHMRC in summary, is that there is no evidence that wind turbines cause adverse health effects. This imports the precautionary principle into the Victoria Planning Provisions and cl 52.32 relating to wind energy facilities. Noise assessments will be carried out in accordance with the New Zealand standard on wind turbine noise under the conditions of approval that were imposed by VCAT.

VCAT also made interesting findings in relation to the impact of wind farms on tourism. It found that the visual character of a wind turbine is very much in the eye of the beholder. Looking at the matter objectively, it was said that wind turbines are in no way comparable to buildings. The turbine tower is a slender object, and the blades are ephemeral objects. The proposed wind farm was found to not unreasonably affect significant views, visual corridors or sightlines in or from the Trawool Valley.[4]

Naroghid Wind Farm

Naroghid Wind Farm Pty Ltd v Minister for Planning (*Naroghid Wind Farm*)[5] related to an application for a permit for use and development of a wind farm in 2004. The application was made in accordance with the planning scheme to the Minister for Planning, who was the responsible authority under the Victoria Planning Provisions at the time of application. The Minister called the permit application in and appointed a panel to hear and consider submissions in relation to the application.

On 10 August 2006, the Minister accepted the panel's recommendation and issued a permit. The permit was subject to 36 conditions, including a requirement for the preparation and approval of development plans prior to commencing development. The time for commencement of the development was within three years of the date of the permit and two extensions of time were granted for the commencement of the development.

The key issue before deputy president Gibson of VCAT was whether or not a third extension of time for the commencement of the applicant's development of a wind farm should be granted. Various bases for this extension were argued before VCAT. VCAT held that there was a legal basis for an extension of time to be granted in this case. However, for reasons of policy, an extension of time should not be granted.

In conclusion, an extension of time to complete a use could only be dealt with by way of a condition of a planning permit. VCAT found that this was reviewable under s149 of the *Planning and Environment Act* 1987 (Vic) and accordingly VCAT had jurisdiction to consider the decision of the delegate to refuse to extend time under the permit on the merits of the case.

As to the merits of the extension, the significant changes to the planning controls and planning policy and the clear legislative intent in cl 52.32-7 were factors that weighed against an extension of time. In particular, the introduction of the new 2 kilometre rule would mean that the current proposal and

turbine layout could not be approved due to opposition from a number of landowners within 2 kilometres who did not consent owing to concerns about noise and visual amenity.

VCAT applied the principles set down in *Kantor v Murrindindi Shire Council* in deciding whether to grant an extension of time.[6]

VCAT considered that the guidelines were applicable and could be summarised as follows:

- whether there has been a change of planning control or planning policy;
- the probability of a permit issuing should a fresh application be made;
- the total elapse of time;
- whether the time limit originally imposed was adequate;
- whether the landowner was seeking to warehouse the permit;
- intervening circumstances; and
- the economic burden imposed on the landowner by the permit.

The applicant had a total of five and a half years within which to get its development plans approved and commence construction. Accordingly, VCAT found at [120] that "the extensions of time so that the applicant had 5½ years to commence development means that, in my opinion, the total time limit imposed was entirely adequate".

The other issue that VCAT took into account in deciding not to extend time was the economic burden on the applicant. The applicant had expended $2 million to facilitate the development, which was a relatively small proportion of the estimated total cost in 2006 of $63 million. VCAT did not consider that the economic burden imposed on the landowner by the permit in having to comply with the conditions was so onerous that the time available for compliance was inadequate or that an extension of a permit on this basis was otherwise justified.

In conclusion, VCAT stated that permits grant rights to use or develop land that continue for the life of the permit, notwithstanding that there may be changes to the planning controls. However, the expiry provisions mean that the ongoing appropriateness of permits can be re-evaluated from time to time in the light of changed circumstances and they also prevent permits from becoming stale. There is opportunity to extend a planning permit even if the use or development may now be prohibited, but the appropriateness of doing so must be weighed against a range of criteria. Accordingly, in order to proceed, the applicant must make a fresh application for permit that responds to the current planning controls and planning-policy framework.

NHMRC Consultation Draft

The NHMRC is currently consulting on a draft paper regarding evidence on wind farms and human health. That paper contains the important conclusion that there is no reliable or consistent evidence that wind farms directly cause adverse health effects in humans. Specifically:

- there is no reliable or consistent evidence that proximity to wind farms or wind farm noise directly causes health effects.
- it is unlikely that substantial wind farm noise would be heard at distances of more than 500 metres to 1500 metres from wind farms. Noise levels vary with terrain, type of turbine and weather conditions.
- there is insufficient direct evidence to draw any conclusions on an association between shadow flicker produced by wind turbines and health outcomes.
- there is no direct evidence on whether there is an association between electromagnetic radiation produced by wind farms and health outcomes.

These conclusions of the draft report indicate that current cl 52.32 of the Victoria Planning Provisions implements the precautionary principle in requiring written consent within a 2 kilometre radius.

Conclusions

The *Cherry Tree Wind Farm* decision confirms that health impacts will not be impediments to future development of wind farms in Victoria under the Victoria Planning Provisions and the Act. The 2 kilometre rule has considerable weight and, in light of *Naroghid*, proponents are not likely to be successful in securing extensions of time for planning permits in circumstances where the time for commencement of development has expired, if the permit was granted prior to the introduction of the 2 kilometre rule. Arguably, as further scientific evidence is obtained, and the NHMRC review proceeds, it is possible that the 2 kilometre rule could be reduced.

These recent cases are good examples of the delicate balancing act that is required by the VCAT when assessing whether permission should be granted for the use and development of new wind energy facilities. ●

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1. *Cherry Tree Wind Farm Pty Ltd v Mitchell Shire Council* [2013] VCAT 421; [2013] VCAT 1939.
2. See, for example, *Rozen v Macedon Ranges Shire* [2010] VSC 583.
3. Note 1 above at [61].
4. Note 1 above at [63].
5. *Naroghid Wind Farm Pty Ltd v Minister for Planning* [2013] VCAT 675.
6. *Kantor v Murrindindi Shire Council* (1997) 18 AATR 285.