The Waubra Foundation.
PO Box 7112
Banyule Vic 3084
Australia

Reg. No. A0054185H
ABN: 42 152 077 891

CEO Mobile: 61 + 0474 050 463
E: info@waubrafoundation.org.au
www.waubrafoundation.org.au

1 December, 2014

Hon Simon Corbell
Attorney General and Environment Minister
ACT Government
Cc ACT Chief Minister, Katy Gallagher
Cc Members ACT Legislative Assembly

Minister Corbell,

Re: protection of ACT taxpayers, Government and Officials from future litigation

Thank you for your reply (10th November 2014) to our letter of 2nd October 2014.

In our letter we had suggested that, to protect the ACT taxpayers, Government and officials from future litigation and to encourage industrial wind development (IWD) operators to operate in a way consistent with human rights, the ACT Government include in all wind power supply contracts the simple provision:

> *The ACT Government will have the right to terminate this contract at any time, without penalty, should it be shown that the relevant wind farm is causing repeated sleep deprivation or other adverse health effects to people in its vicinity.*

We understand from your letter that the ACT Government will not do so. We also understand you are deciding to not take this step to protect the ACT and its taxpayers because:

- the ACT Government encourages engagement between IWD operators and local communities and you hope this will prevent actions contrary to human rights, which many people would consider a remarkably optimistic faith in commercial operators;
- all adverse impacts of IWDs on residents are, in your view, psychological and you know this on the basis of what is actually a blatantly false interpretation someone has given you of the 2014 draft literature review conducted for the National Health and Medical Research Council;
- all suppliers are required to comply with relevant State laws and regulations and, implicitly, you assume, despite extensive contrary evidence we previously provided, that this will ensure there is no breach of human rights; and
- in any case, the ACT is only the customer and cannot be held accountable for harm its suppliers cause to provide power to the ACT even after you may be informed of that harm and even though the ACT then keeps paying for power being generated by causing harm.

We draw your attention to two pieces of legislation which have the potential to be invoked against ACT officials, at some point, in relation to this matter:

- Australian Criminal Code Act 1995, Division 274 (prohibition against torture); and
- ACT Human Rights Act 2004, particularly sections 10, 11(2), 40A(3)(b)(i) and 40B(1)(a)-(b).

Division 274 of the Australian Criminal Code Act 1995 prohibits inflicting "severe physical or mental pain or suffering" on a person when done with the acquiescence of public officials. There are certainly people around the world, including Australia, who are having "severe physical or mental pain or suffering" inflicted on them by IWDs. This does not happen to everyone in the vicinity of an IWD but it certainly happens to a number of people. We are sure you understand that under the Criminal Code every instance of torture is actionable. The fact that some other people have not been tortured is not an excuse at law.

You will notice Division 274 prohibits "severe ***mental*** pain or suffering". So even if your assertion that the draft NHMRC literature review "showed that wind farm annoyance is a psychological, rather than physiological, response" was true (and that is not what the draft review actually said), it would still be prohibited by Division 274 if sufficiently intense.

One of the other requirements for Division 274 to apply is that the pain or suffering be inflicted by or with the acquiescence of public officials. As you pointed out in your reply, all IWDs are approved and allowed to continue operating by State and local public officials who are advised by residents of the suffering they are experiencing from IWDs. So the condition of acquiescence by public officials is certainly met.

In addition, most depend on RECs authorised by the Clean Energy Regulator, another public official, who also becomes complicit when notified that pain or suffering is being inflicted and then fails to take action to withdraw the authorisation for funding that allows the offending IWD to operate.

In the case of the ACT we understand ACT Government policy is, through the tender process, to accept wind power supply only from IWDs not previously operating, and those power supply contracts become the financial basis to bring the IWDs into operation. If so, that would make the ACT Government not a casual buyer of power from those IWDs but rather the instigator of the IWDs it so funds. Should the ACT Government then continue to fund those IWDs in the event they cause "severe physical or mental pain or suffering" to persons, it will place ACT public officials (who also are covered by Division 274) in a situation where either they continue funding the activity and thereby acquiesce in, and are complicit in, torture or they terminate the contract and, without the protection of the provision we recommended, potentially render the ACT Government and its taxpayers liable to a claim for this breach.

It would appear the ACT is also engaged in discrimination that will cause "severe physical or mental pain or suffering". The ACT Government will not allow commercial IWDs in the ACT while it pays for them in other jurisdictions. It thus quite explicitly will be discriminating against Australians not in the ACT.

In your justification for not including a protective clause in the power supply contracts you argued IWDs are subject to State noise and other regulations. Those regulations, at least as they are applied, do not protect some residents from being subjected to "severe physical or mental pain or suffering". There is no provision in Division 274 that allows torture so long as the mechanism complies with some government regulation. If you truly believe you can rely on the regulatory actions of other jurisdictions, we suggest you carefully investigate exactly what they do and how often to ensure compliance with their own regulations in relation to IWDs and the effect of those IWDs on neighbours. You may find it revealing.

As earlier noted, there is also the ACT's own Human Rights Act 2004. No doubt you are very familiar with it, so the statements below will be ones you support.

Section 40B says:

(1) It is unlawful for a public authority –
    (a) to act in a way that is incompatible with a human right; or
    (b) in making a decision, to fail to give proper consideration to a relevant human right.

Section 40A has defined the provision of electricity supply as an activity of a public nature and thus a public authority bound by section 40B.

Section 10 says:

(1) no-one may be –
    (a) tortured; or
    (b) treated or punished in a cruel, inhuman or degrading way.
(2) No-one may be subjected to medical or scientific experimentation or treatment without his or her free consent.

In addition, section 11(2) says:

> Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.

Some of those affected by IWDs are children. Aside from the torture or cruel, inhuman or degrading treatment they may experience from IWDs, their biological, intellectual or emotional development may be disrupted (for instance, sleep deprived children fare more poorly in academic development), thus potentially breaching section 11(2).

There does not appear to be anything in the ACT Human Rights Act that allows public officials to breach sections 10 and 11(2) provided there has been active "engagement" between a supplier and some of the affected community or provided the supplier complies with its jurisdiction's noise regulations, however lax they may be.

Obviously the ACT Human Rights Act does not directly restrict the actions of parties outside the ACT. It does, however, restrict the actions of ACT public officials where they may affect human rights, apparently anywhere.

However, if it is your interpretation that the ACT Human Rights Act prohibits ACT officials from breaching the human rights of individuals within the ACT but allows them to breach the human rights of other Australians, we are sure a lot of people will be interested.

If, under the ACT Human Rights Act, restrictions on ACT public officials include the effect of officials' actions on human rights anywhere, then funding an IWD that, through sleep depriviation or other means causes pain or suffering that amounts to torture, or cruel, inhuman or degrading treatment would seem to put ACT officials in breach of section 10, compounded by section 11(2) where children are involved.

Even the process of awarding wind power supply contracts appears to fall under section 40B(1)(b) which makes it unlawful for a public authority, in making a decision, to fail to give proper consideration to a relevant human right.

As we advised in our original letter, all these problems can be avoided by inclusion of the contractual provision we recommended.

We understand the current ACT Government will do what it wishes irrespective of our advice. Our responsibility now, having offered advice in good faith, is to ensure our communications are publicly available so that, in the event individuals in future believe they have been harmed by the ACT Government and its wind power supply policy and they contemplate legal action, a record of the relevant advice is available to them.

Our previous letter to you and the ACT Chief Minister is now publicly available at the following weblink: http://waubrafoundation.org.au/resources/act-government-warned-potential-litigation-re-wind-turbine-generated-electricity/

Yours sincerely

Sarah Laurie
CEO, Waubra Foundation
Bachelor Medicine, Bachelor Surgery Flinders 1995

And

Michael Crawford, PhD
Director, Waubra Foundation
Resident, Boro, NSW