



The parrot, the wind farm and the Minister (A)

In April 2006, Australian Federal Environment Minister Ian Campbell vetoed a proposed Victorian wind farm on the grounds that it would push an endangered species – the Orange-bellied Parrot – closer to extinction. This decision was made despite the existence of two reports which concluded that the farm only presented a very minor additional risk to the species. It also went against the recommendation by his Department of Environment and Heritage (DEH) to approve the farm. Campbell's verdict prompted the developer (Bald Hills Wind Farm Pty Ltd) to take legal action to compel him to reconsider. In August 2006, the company and the Commonwealth agreed on consent orders, which ordered the matter to be reconsidered by the Minister according to law.

A species in crisis

The Orange-bellied Parrot (*Neophema chrysogaster*) is an endangered bird species native to southern Australia. Though it was difficult to determine numbers, experts estimated that fewer than 200 Orange-bellied Parrots (OBPs) remained in the wild.¹ Despite the efforts of breeding programs, the size of the population had remained relatively stable since 1999.² Projections suggested that the species would very likely be extinct within 50 years.³

This case was written by Marinella Padula, Australia and New Zealand School of Government, for Professor Owen Hughes as a basis for class discussion rather than to illustrate either effective or ineffective handling of a managerial situation.

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¹ Smales, I. et al. 'Modelled cumulative impacts of wind farms on the Orange-bellied Parrot' *Wind farm collision risk for birds: Cumulative risks for threatened and migratory species* Biosis Research Pty Ltd, December 2005 p.6

² *ibid.*

³ *ibid* p.47.

Each year, OBPs migrate from breeding sites in south-west Tasmania to, typically, Victoria's central and western coastal regions, as well as parts of South Australia's east coast (*Exhibit A*). The species has also been spotted sporadically in eastern Victoria and southern New South Wales. However, it was difficult to track the movements of such a small population with great certainty, especially since there were few ornithologists who could reliably identify the species. Another problem was that migration occurred along long stretches of coastline which were hard to monitor and there was the possibility that some migration occurred at night. Only a small proportion of the population returned regularly to well-known sites on the mainland; the majority of birds used sites yet to be discovered.⁴ OBP sightings were generally confined to within 2km of the coastline; there had been virtually no sightings more than 5km inland.⁵

Cause for concern

Nearly two years earlier, in October 2004, Federal Environment Minister Ian Campbell halted development of a 52-turbine, \$220 million wind farm proposed for Bald Hills in Gippsland situated on Victoria's east coast (*Exhibit B*). The project had been approved by the Victorian Government earlier that year but many local environment and community groups were strongly opposed to the farm claiming that the fast-spinning rotor blades of the wind turbines put the parrot at risk. They also felt that it was a visually intrusive development that would have a negative impact on tourism. Community activist Tim Le Roy believed that Bald Hills "was an unacceptable site from a fauna, landscape and community perspective" and claimed that of the 1500 submissions lodged with the Minister, only 40 supported the project.⁶

Indeed, coastal developments of any kind had become increasingly contentious as growing numbers of Melburnians sought retirement or investment properties in south Gippsland.⁷ The influx of people, money and development proposals meant that regional councils were frequently caught between job and infrastructure creation and the need to preserve local character and heritage values. Both long-term and new residents were often extremely wary of large-scale projects and the changes they brought with them.

Among the laws administered by the Department of Environment and Heritage was the *Environment Protection and Biodiversity Conservation Act 1999* which sought to promote ecologically sustainable developments and preserve biodiversity. Campbell cited a need for further research to better determine the impact of the wind farm on the OBP before he could make a judgement. His decision to delay the development came three days after the 2004 election when Liberal MP Russell Broadbent (who had campaigned against the farm) won the marginal Gippsland seat where Bald Hills was located.

Some weeks later, Campbell commissioned a report from Latitude 42 Environmental Consultants which concluded that the area in question did not support abundant birdlife

⁴ *ibid* pp.10-12

⁵ *ibid* p.20.

⁶ Hogan, J. 'Fury over wind farm decision' *The Age*, 5 April 2006.

⁷ Millar, R. 'Boom or gloom? Debate rages on plans for Bass towns' *The Age*, 14 January, 2004

or significant numbers of threatened species. It also added that: “Additional species-specific surveys are unlikely to add much value or additional information in terms of (legislative) requirements, and any impacts on bird populations appear likely to be negligible....more sophisticated modelling would seem inappropriate and unlikely to yield meaningful predictions”.⁸ Keen to move forward, the developer Bald Hills Wind Farm (formerly Wind Power) contacted the DEH to find out when the Minister was likely to make a decision.

In March 2005, DEH informed the developer that Minister Campbell wanted a further study on the cumulative impacts of all existing and proposed wind-farms in Victoria, Tasmania, New South Wales and South Australia on the Orange-bellied Parrot and other migratory birds. Campbell justified the study on the basis that wind farms were relatively new and their collective impact on birdlife needed to be better understood. After further enquiries, DEH told the company in May that the new study was expected to be complete by June, after which point the Minister would be able to make a decision. Different sections of the study were conducted by Biosis Pty Ltd during 2005; the overall findings were delivered in January 2006.

Risky business

Biosis used risk modelling to determine the impact of wind farms on a number of species listed under the *Environment Protection and Biodiversity Conservation Act 1999*. In addition to the Orange-bellied Parrot, modelling was done for the Tasmanian Wedge-tailed Eagle, the Swift Parrot and the White-bellied Sea-eagle. Where the Orange-bellied Parrot was concerned, Biosis found that, “the additional mortality predicted for the cumulative effects of turbine collisions for wind farms within the range of the Orange-bellied Parrot is likely to result in the additional death of less than one bird per annum.”⁹

Bald Hills itself was the fifth largest proposed or existing wind farm in terms of turbine numbers. However, the projected survivorship rate (i.e. the proportion of the parrot population expected to survive all encounters with turbines at a given wind farm during the course of a year) was estimated to be between 0.9999001 – 0.9999392.¹⁰ Of the 17 farms modelled, it was the 9th “most survivable”. These figures were based on the assumption that OBPs would make 15 passages through the farm each year, despite the fact that no sightings had been recorded there. Bald Hills was categorized by Biosis as a “possible migration passage only”.¹¹ In conclusion, Biosis noted that:

“Given that the Orange-bellied Parrot is predicted to have an extremely high probability of extinction in its current situation, almost any negative impact on the species could be sufficient to tip the balance against its continued existence. In this context it may be argued that any avoidable deleterious effect - even the very minor predicted impacts of turbine

⁸ Hannan, E. ‘Wind farm ban a marginal call’ *The Australian* 29 July 2006.

⁹ Smales, I. et al. ‘Modelled cumulative impacts of wind farms on the Orange-bellied Parrot’ *Wind farm collision risk for birds: Cumulative risks for threatened and migratory species* Biosis Research Pty Ltd, December 2005 p.33.

¹⁰ *ibid.* p.29.

¹¹ *ibid.* p.27.

collisions - should be prevented. Our analyses suggest that such action will have extremely limited beneficial value to conservation of the parrot without addressing very much greater adverse effects that are currently operating against it.”¹²

Early’s warning

In March 2005, DEH first assistant secretary Gerard Early provided the Minister with written advice recommending that he approve the Bald Hills wind farm. He reportedly wrote that the impact on the parrot would probably be “negligible and there is no threat of serious or irreversible damage” to the bird given that “no Orange-bellied Parrot has been recorded there; there appears to be no suitable habitat on the site; (and) even though the assessment report has noted the occasional parrot may fly across the site in the migration season, it is not considered to be a major migration passage”.¹³

If Campbell disagreed and considered that there was indeed the threat of a serious or irreversible impact on the parrot, Early believed that the Minister would need to rely on Biosis’s conclusion that any negative impact on the parrot would jeopardize its continued existence. In addition, he suggested that Campbell could argue that there appeared to be good parrot foraging habitat 35km east and west of the site, “which may add strength to the view that the site is a migration passage”.¹⁴ The difficulty of identifying OBPs due to their small size and numbers could also be invoked to boost the argument. In the event the Minister chose this route, Early laid out two potential options: (1) to have Bald Hills Wind Farm resubmit the proposal; or (2) grant the application, provided wind turbines were not within 2km of the coastline.

But neither alternative was recommended. Early apparently told Campbell that : “On balance, these options are not supported by the department...Both of these approaches would represent a lowering of the previous threshold for unacceptable impact on the orange bellied parrot, particularly as there does not appear to be direct evidence of any impact on the orange-bellied parrot at Bald Hills.”¹⁵ Similar wind farms in Portland in Victoria and Woolnorth and Musselroe in Tasmania had already been approved. Early warned the Minister that further delaying or substantially altering the Bald Hills proposal could be viewed as inconsistent, adding that such a move would “have ramifications for all coastal development in western Tasmania, Victoria, southern NSW and southeast South Australia.”¹⁶ That same month, the company lost patience with the Minister. Using the *Administrative Decisions (Judicial Review) Act 1977*, Bald Hills Wind Farm launched Federal Court action to compel Campbell to make a decision.

Ruffled feathers

Early in April 2006, Campbell made an announcement: “On the basis of the information that has been presented to me on the orange-bellied parrot, I have decided not to approve

¹² Ibid p.47.

¹³ Hannan, E. ‘Wind farm ban a marginal call’ *The Australian* 29 July 2006.

¹⁴ *ibid.*

¹⁵ *ibid.*

¹⁶ *ibid.*

the Bald Hills wind farm. I understand that this will be a disappointing outcome for the proponents of the wind farm but it is very clear to me from reading this report that every precaution should be taken to help prevent the extinction of this rare bird.”¹⁷ While the move was welcomed in Gippsland, many environmentalists were disappointed. They contended that global warming and pollution presented a far greater threat to the OBP than the theoretical risks posed by wind farms. Local opponents were also accused of using the parrot and concerns about landscape degradation to mask their real motive – protection of property values.

The Victorian government was quick to criticise Campbell, claiming that his decision was purely political and conflicted with the Howard Government’s own renewable energy policies. The media was also skeptical of his motives. One article revealed that out of the 2745 cases referred to the Government since the *Environmental Protection and Biodiversity Conservation Act* was passed, this was only the fourth time an environment minister had used the legislation to veto a proposed development.¹⁸ Others pointed out that Bald Hills, even according to worst-case-scenario estimates, only represented one additional dead parrot every 667 years¹⁹ and that potentially riskier farms had already been approved. Campbell claimed that the Biosis data had been manipulated and misrepresented by his detractors. He also claimed that the Victorian Government had suppressed a report which warned that wind farms posed a significant risk to OPBs but it did little to quell the censure and his decision was widely pilloried (*Exhibit C*).

In response to Campbell’s decision, Bald Hills Wind Farm launched further Federal Court proceedings against the Minister in May 2006. The company applied to have the decision reconsidered under Section 5 of the *Administrative Decisions (Judicial Review) Act 1977* and listed the following grounds for review:

1. That a breach of the rules of natural justice occurred in connection with the making of the decision. (The proponents contended that the Biosis reports had not been available to them prior to the decision, nor were they afforded the opportunity to respond to its claims.)
2. That there was no evidence or other material to justify the making of the decision
3. That the decision was not authorised under the Environmental Protection and Biodiversity Act (EPBC Act) resulting in an Error of Law
4. That the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made.

Under the legislation, “an improper exercise of power” could be defined as:

- taking an irrelevant consideration into account in the exercise of a power;
- failing to take a relevant consideration into account in the exercise of a power;
- an exercise of a power for a purpose other than a purpose for which the power is conferred;
- an exercise of a discretionary power in bad faith;

¹⁷ Hogan, J. ‘Fury over wind farm decision’ *The Age*, 5 April 2006.

¹⁸ Minchin, L. and Khadem, N. ‘Minister defensive over parrot “hypocrisy”’ *The Age*, 8 April 2006.

¹⁹ Minchin, L. ‘Minister ignored parrot advice’ *The Age*, 26 July 2006.

- an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
- an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power.

In relation to the case, Bald Hills asserted that the Minister had failed to take several relevant considerations into account whilst assessing the application against the EPBC Act. The decision was also contested on the grounds of “unreasonableness”. During a Federal Court directions hearing before Justice Mark Weinberg, the DEH advice to approve the wind farm became public. An application to force Campbell to appear in court was denied but the pressure to defend his decision mounted. During a television interview, he attempted to explain his actions:

“As the minister you've got to make these decisions, and I take advice from my department, I also took advice from an independent consultant who looked at the cumulative impact of wind farms across that piece of coast, and that report said that to add further turbines in this migratory path, would in fact hasten the potential extinction of this species. So I listen to all sorts of advice, if you just always took - only took the advice of your department, then you could be in the position of Sir James Hacker, you'd be a Yes Minister. You're paid as minister to look at all of the information, and make a decision.”²⁰

After the directions hearing, Campbell claimed that Bald Hills Wind Farm had approached him in order to “get the matter out of court.”²¹ In August 2006, the company and the Commonwealth agreed on consent orders, which were then given by the court. These set aside the minister’s decision, and ordered the matter be reconsidered according to law. The Commonwealth was also required to pay the company’s costs. Campbell insisted that the consent orders did not represent a backdown. According to the Minister, he had been forced into a making a quick decision by the company which had now offered to resubmit its proposal. He said he had agreed to this offer in the interest of preventing further costly litigation, and saw the result as a “good outcome for the taxpayers and a good outcome for the environment” although media commentators differed in their assessment of events (*Exhibit D*).

²⁰ Channel Ten interview, ‘9am with David and Kim’ broadcast date: 28 July 2006.

²¹ ‘Campbell to reconsider Bald Hills wind farm veto’ AAP 4 August, 2006.

Exhibit A: Orange-bellied Parrot distribution

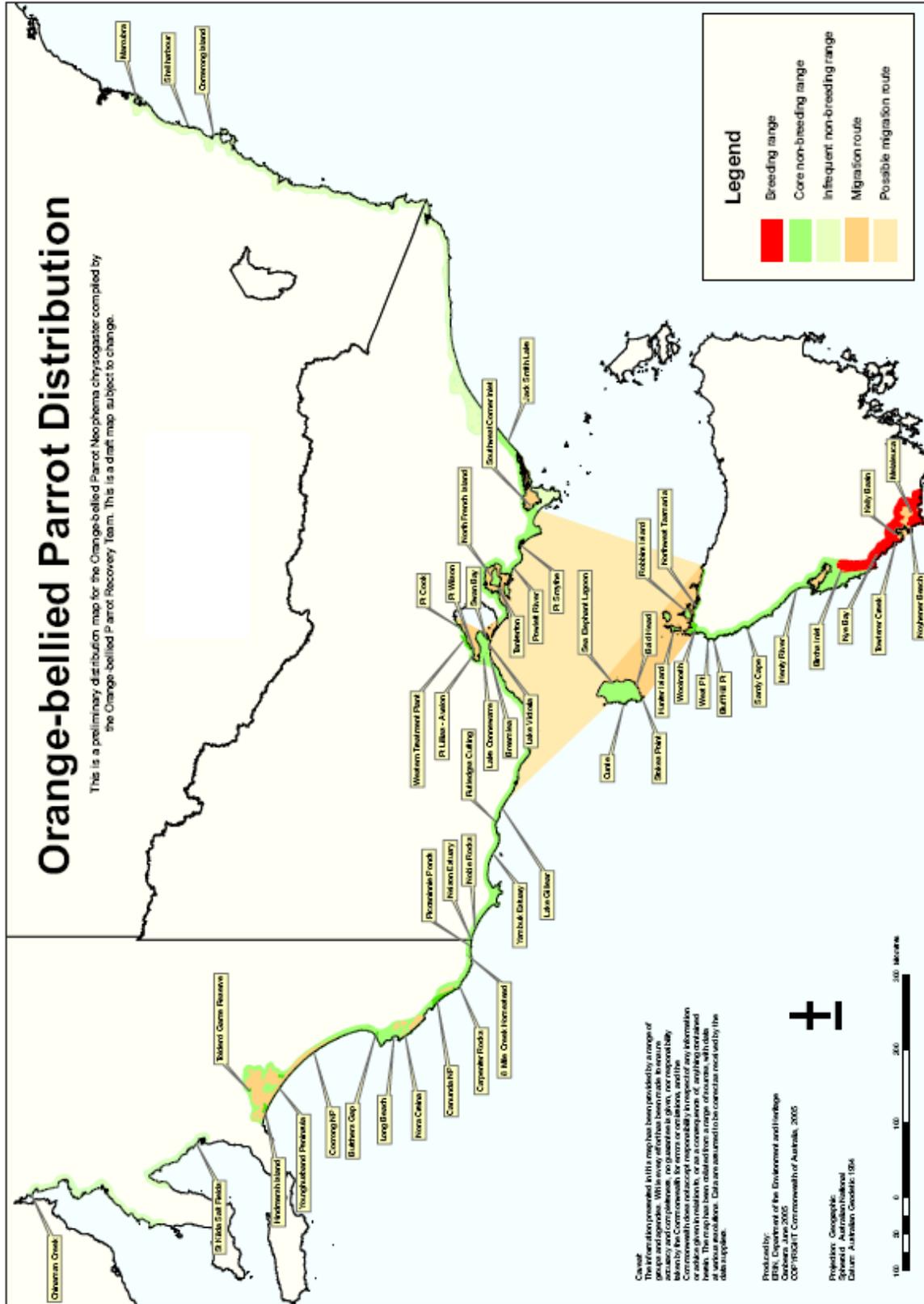


Exhibit B: Wind farms in the Orange-bellied Parrot zone

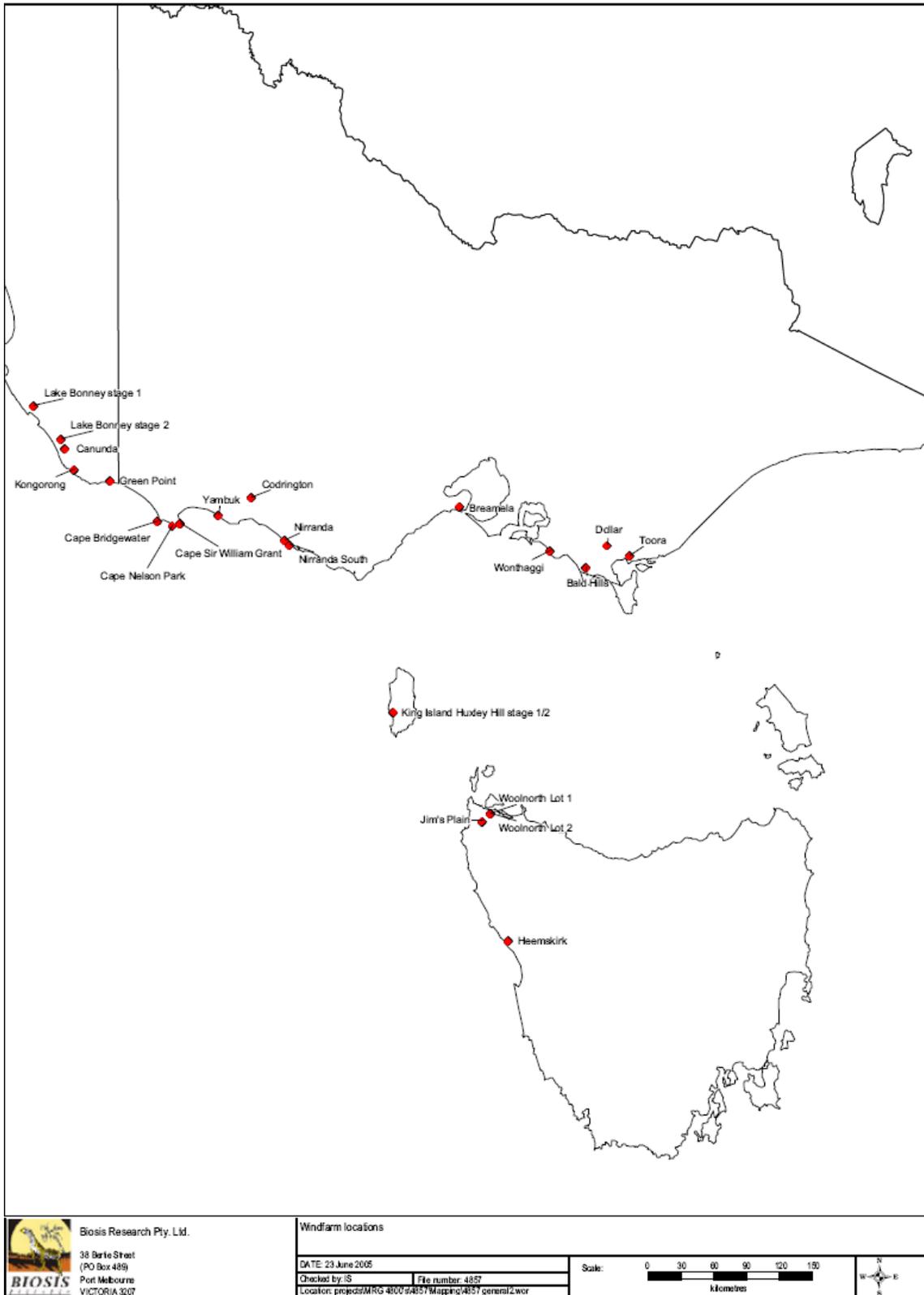


Exhibit C: 'The Wind Farm'



Source: *The Age* July 26, 2006

Exhibit D: ABC Radio Interview

Jon Faine Program, Melbourne. Broadcast Date: 4 August 2006

JON FAINE: Senator Campbell, good morning. Rob Hulls says that this just shows that you're not just a lame duck but a dead duck for thinking that the Parrot as endangered is a good enough grounds for stopping this wind farm?

SENATOR CAMPBELL: Well, what's a bit scary John is that, and I've only heard it second-hand, but it sounds like you know more about the law than the Attorney-General of Victoria. As I understand your remarks put it, the proponent and the Commonwealth have both agreed that it would be better to have this out of court. The only real winners having it in the court are in fact the lawyers. The proponents came to me last week and said look, we would like to get this out of court; we would like to have the chance to review the paperwork that the Commonwealth has put forward and we would like to make a further submission to you. And I said that's entirely reasonable and we're happy to consent to that and the court's agreed to that agreement between the two parties. It makes no reflection at all on my decision.

FAINE: Minister, I was a litigator 20 years ago but I did learn that the reason you consent to orders is usually because you fear that the outcome from the court will be worse for you so you agree to something to avoid an outcome that you don't want. Have you agreed to reconsider this rather than be ruled by the court to have improperly decided it?

CAMPBELL: No, that's not what it's my mind. It was the proponents who came to us. We were happily going along defending my decision and the process but much of the court's consideration of this Jon is in relation to the process and one of the key elements was that the proponents said that they had not been given the opportunity to look at the key report that I relied upon.

FAINE: The report that said that you should not stop this farm going ahead because of the Orange-bellied Parrot but you publicly said that's why you did do it?

CAMPBELL: No, the report from Biosis which was recommended by my Department that looked at the cumulative impact of wind turbine development along that coast and it came to the same conclusion that the Victorian Government's own department did. And that is that the cumulative impact of massively expanding the number of rotor blades along that coast would have a significant effect on the Orange-bellied Parrot and their own report said that and perhaps next time Mr Hulls is on the program you'd ask him to say, why doesn't he release that report.

FAINE: The bottom line here is Minister you're being asked to reconsider the approval....

CAMPBELL: No, I'm not Jon. Mr Hulls again has misled you.

FAINE: Well, what are you agreeing to do?

CAMPBELL: We have basically agreed to the proponents' suggestion that they go away and have some time to consider all of the information that they've now got at their disposal - and quite frankly they would have had at their disposal had they not forced me to make a decision ahead of time but, and I have agreed to receive any submissions they may make to me. That's the beginning and end of it. I'm happy to do that. I want to make sure every Australian, every Australian company gets fair process and that's what we've agreed between the two parties. If Mr

Hulls wants to play politics with it well you'd expect that but you'd think he should understand the law a little bit better.

FAINE: You're not embarrassed by the Federal Court consent orders?

CAMPBELL: Well, I actually helped negotiate them and agreed to them. I'm very happy with them. I think it's a good outcome for the taxpayers and a good outcome for the environment.

FAINE: Thank you.