VICTORIAN WIND FARM ORDERED TO PAY DAMAGES AND CURB NIGHT NOISE NUISANCE – IMPLICATIONS FOR WIND FARMS IN AUSTRALIA

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OVERVIEW

On 25 March 2022 the Victorian Supreme Court issued its long awaited judgment in the ongoing Bald Hills Wind Farm nuisance proceedings in *Uren v Bald Hills Wind Farm Pty Ltd* [2022] VSC 145. Justice Richards held that operational noise the Bald Hills Wind Farm was causing a nuisance to two local residents at night time and ordered the operator of the Bald Hills Wind Farm to:

- Stop causing nuisance from wind turbine noise at night and implement noise abatement measures to abate the nuisance; and
- Pay a total of AU$260,000 in damages to the two local residents.

This article outlines the decision and its likely implications for other wind farms in Australia.

WHAT WAS IT ABOUT?

The Bald Hills Wind Farm consists of 52 turbines which has been operational since 2015. The planning permit issued for the wind farm contains detailed conditions regulating noise impacts, including operational noise limits applying to both daytime and night time operations. The operational noise limits under the planning permit applied the New Zealand Standard 'Acoustics — The Assessment and Measurement of Sound from Wind Turbine Generators' (NZ 6806:1998) (NZ Standards) and relevantly:

- Imposed a general operational noise limit of the greater of background levels (L95) plus 5 decibels (dBA) or an overall level of 40 dBA L95, with an additional 5 dBA penalty applied for special audible characteristics; and
- Provided that any exceedance of this noise level for 10% of the night time amounted to a breach.

The Bald Hill Wind Farm has experienced a level of ongoing opposition from some members of the local community, including ongoing noise complaints by a number of nearby residents who experienced noise impacts, including sleep disturbance.

The wind farm operator engaged acoustic specialists to investigate the noise complaints. The investigation determined that the operational noise levels from the wind farm were compliant with the noise limits applying

under the planning permit. Accordingly, the wind farm operator took no remedial action in response to the noise complaints.

As a result, the local residents complained to the local Council and asked them to take action under the *Public Health and Wellbeing Act 2008* (Vic) (PH&W Act). The PH&W Act relevantly adopts the common law definition of nuisance and requires the Council to:

- Investigate any nuisance notified to them; and
- If they find a nuisance exists, to take enforcement action under the PH&W Act or, if the local council is of the opinion that the matter is better settled privately, advise the complainant of any available methods for settling the matter privately.

The Council ultimately found that operational noise from the Bald Hills Wind Farm constituted intermittent nuisance but determined that it should take no action under the PH&W Act as the matters were better settled privately.

Accordingly, it advised the complainants of their rights to either commence proceedings in private nuisance or bring proceedings in Victorian Civil and Administrative Tribunal (VCAT) regarding any alleged non-compliance with the operational noise limits under the planning permit.

Notwithstanding that the Council determined to take no action, and that it was always open to the neighbouring landholders to take private action, the operator of the wind farm commenced proceedings in the Supreme Court of Victoria. The operator challenged the legal validity of the Council's decisions that operational noise from the Bald Hills Wind Farm intermittently constituted nuisance within the meaning of the PH&W Act. These proceedings were unsuccessful and the Supreme Court upheld the legal validity of the Council's findings that operational noise from the Bald Hills Wind Farm was causing intermittent noise nuisance.

Following this, in February 2020, a number of individual neighbouring landholders commenced separate proceedings for the tort of nuisance against the operator of the Bald Hills Wind Farm. A claim in private nuisance can be made where there is a substantial and unreasonable interference with a person's land or enjoyment of it. While some of the local residents resolved their claims with wind farm operator prior to trial, two of local residents proceeded with the case.

The Court heard evidence that night time operational noise from the wind turbines caused one resident to replace one of his bedroom windows with bricks, sleep in a car at the beach, and sleep at friends' houses to try and avoid having his sleep disturbed.

WHAT DID THE COURT DECIDE?

The Court applied established principles at common law to determine that operational noise from the wind turbines at night amounted to a private nuisance because it caused a substantial interference with the two residents' use and enjoyment of their land.

In particular, the Court found that:

- Noise from the turbines on the wind farm substantially and unreasonably interfered with both the local residents' ability to sleep undisturbed in their own homes on an intermittent but ongoing basis. While opposed to the wind farm, the two local residents were found to be not "hypersensitive" to noise.

- Given that the planning permit adopted the New Zealand Standards which impose a higher noise limit which is less protective of sleep disturbance than some others, even if the wind farm operator had been able to prove it complied with the noise limits in the planning permit, this would "not necessarily have established that the noise that from time to time disturbed" the complainant's sleep was reasonable such that no nuisance at common law arose. However, it is important to note that most Australian jurisdictions, including more recently approved Victorian wind farms, are required to comply with more stringent operational noise criteria which limit operational noise to the higher of 35 dB(A) or the existing background noise (LA90(10 minute)) plus 5 dB(A).

  While the Court did not expressly consider this issue, the reasoning adopted in the judgement suggests that had the Bald Hills Wind Farm:
  1. Been subject to the more stringent noise limits which generally apply to Australian wind farm; and
  2. Been able to demonstrate compliance with these more stringent noise limits,

  the operational noise may have been regarded as being a reasonable interference only, with no actionable nuisance arising.

- In any event, the Court found that the wind farm operator failed to prove that it had fully complied with the noise conditions in the planning permit at all relevant times (despite two acoustic experts finding that the relevant noise data evidenced compliance). This was because the methodology adopted by the wind farm operator's acoustic experts did not comply with the Courts interpretation as to the methods required by the planning permit to:
  1. determine background noise levels for the purpose of determining compliance with the noise limits;
  2. assess night time operational noise compliance; or
  3. objectively assess special audible characteristics for the purpose of applying the 5 dBA penalty.

  The fact that the wind farm operator could not establish compliance with the operational noise limits in the planning permit also meant that the wind farm could not be taken into account as an established use for the purpose of considering the reasonableness of the noise.

- The wind farm operator had not taken any precautions to reduce the noise levels at the neighbouring residences. In particular, the Court noted that the wind farm operator had relied on the evidence of its noise experts regarding compliance with the planning permit noise limits. However, the Court held that the failure of the wind farm operator to address a known gearbox tonality issue (identified in December 2016 and known to exceed the turbine supply noise warranty) or to offer at-receiver noise attenuation until a very late stage were noted as factors entitling the two residents to aggravated damages of double what they would otherwise have been entitled to based on the Court's findings.

- The public interest in the operation of the wind farm did not outweigh the need to abate the nuisance. The court held that:
  The generation of renewable energy by the wind farm is a socially valuable activity, and it is in the public interest for it to continue. However, there is not a binary choice to be made between the generation of clean energy by the wind farm, and a good night's sleep for its neighbours. It should be possible to achieve both.

As a result, the Court:

- Granted an injunction to restrain the wind farm operator from continuing to permit noise from the wind farm to cause a nuisance at the neighbouring residences at night, with the injunction to take effect three months after the judgment date; and
- Awarded a total of AU$260,000 in damages to the two local residents for loss of amenity and aggravated damages. Aggravated damages were awarded based on the Court's finding that the wind farm operator never tried to reduce wind turbine noise at the local residents' homes but rather "denied that they had any cause for complaint, minimised their lived experience of the noise, and treated them as hypersensitive trouble-makers".

It is not yet clear whether the wind farm operator will seek to appeal the decision.

IMPLICATIONS FOR WIND FARM OPERATORS

The decision highlights the difficulties in balancing the public benefits of wind farm projects against the need to prevent undue interference with neighbouring resident's enjoyment of their properties.

While the judgement is somewhat of a cautionary tale, the decision should not be regarded as "opening the floodgates" for nuisance claims against wind farms across Australia as the operational noise conditions imposed on the Bald Hills Wind Farm planning permit are relatively unique and less stringent than those which apply to most Australian wind farms.

Further, it is important to note that:

1. The wind turbines in question were found to have breached the sound warranties given by the turbines supplier and in that sense were defective; and
2. The approach of the wind farm operator to the noise complainants contributed to the outcome of the case.

That said, to minimise the risk of noise nuisance claims, and to ensure appropriate stakeholder management, we strongly recommend that wind farm operators:

- Carefully assess whether their noise monitoring protocols are fit for purpose in the context of the specific noise limits applying to their project and the required approach for verifying compliance;
- Take steps to "ground truth" noise impacts where noise complaints are received, including considering any special audible characteristics complained of objectively;
- Take proactive steps to mitigate any unacceptable noise impacts, especially at night (such as selective noise optimisation or remedial work to address any tonality issues); and
- Proactively engage with nearby residents to maintain strong ongoing relationships wherever possible.

FURTHER INFORMATION AND ADVICE

The K&L Gates Environment and Planning team are very experienced in advising renewables clients on compliance and stakeholder management, including wind farm noise issues and neighbour deeds. Please contact us if you would like advice or further information.

