

SUPREME COURT OF QUEENSLAND

REGISTRY: Cairns
NUMBER: 683/20

Plaintiff: Jennifer Disley

AND

First Defendant: Mount Emerald Wind Farm Pty Ltd
ACN 149 050 322

AND

Second Defendant: Marshall Day Acoustics Pty Ltd
ACN 006 675 403

CLAIM

The plaintiff seeks the following relief:

1. a declaration that the wind farm known as Mount Emerald Wind Farm and operated by the first defendant on land, including land described as Lot 7 on SP298413 (formerly described as Lot 7 on SP235244) generally to the south of the plaintiff's land located at 603 Channel Road, Walkamin and described as Lot 291 on SP 219087, Title Reference 50770071 is being operated in breach of condition 4 of the first defendant's development permit relating to the conduct of that wind farm in that the noise generated by the wind farm materially exceeds the operational noise limits set by that condition;
2. a declaration that the operation of wind turbines by the first defendant at the wind farm has caused and will continue to cause substantial damage to and for the plaintiff by reason of unreasonable interference with the use and enjoyment of the plaintiff's land;
3. an order:
 - (a) that the first defendant, whether by itself or its officers, servants or agents, be permanently restrained from operating wind turbines at the wind farm known as Mount Emerald Wind Farm other than between the hours of 7.00 am and 8.00 pm ("**permitted period of operation**"); and
 - (b) that the first defendant be directed to operate the wind turbines at the wind farm known as Mount Emerald Wind Farm at all times during the permitted period of operation in reduced power ('low noise') mode;



CLAIM
Filed on behalf of the plaintiff
Form 2 (version 2) – UCPR Rules 1999
Rule 22

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Fax: 07 4031 1525
Our Ref: TGM:2171000

4. a declaration that the second defendant has engaged in conduct which is misleading or deceptive or likely to mislead or deceive in contravention of the ACL;
5. an order that the second defendant be permanently restrained from producing and presenting noise predictions, modelling and assessments in relation to the operation of wind turbines at the wind farm known as Mount Emerald Wind Farm in contravention of the ACL;
6. damages, or further and in the alternative, damages in lieu of an injunction, against each defendant including:
 - (a) diminution in the value of land and business of \$1,800,000.00; and
 - (b) loss of the use and enjoyment of the home and dwellings of \$50,000.00;
7. aggravated damages, against the first defendant, in the sum of \$100,000.00;
8. interest thereon pursuant to s58 of the *Civil Proceedings Act 2011*;
9. costs; and
10. such other orders or relief as this Honourable Court considers appropriate.

The plaintiff makes this claim in reliance on the facts alleged in the attached statement of claim.

ISSUED WITH THE AUTHORITY OF THE SUPREME COURT OF QUEENSLAND:

And filed in the Cairns registry on: . 4 DEC 2020

for Registrar:  

To the defendants: **TAKE NOTICE** that you are being sued by the plaintiff in the court. If you intend to dispute this claim or wish to raise any counterclaim against the plaintiff, you must within 28 days of the service upon you of this claim file a notice of intention to defend in this registry. If you do not comply with this requirement judgment may be given against you for the relief claimed and costs without further notice to you. The notice should be in form 6 to the Uniform Civil Procedure Rules. You must serve a sealed copy of it at the plaintiff's address for service shown in this claim as soon as possible.

Address of registry: 5d Sheridan Street, Cairns

If you assert that this court does not have jurisdiction in this matter or assert any irregularity you must file a conditional notice of intention to defend in form 7 under rule 144, and apply for an order under rule 16 within 14 days of filing that notice.

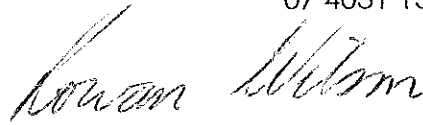


If you object that these proceedings have not been commenced in the correct district of the court, that objection must be included in your notice of intention to defend.

PARTICULARS OF THE PLAINTIFF:

Name: Jennifer Disley
Residential or business address: 603 Channel Road
WALKAMIN QLD 4872
Solicitor's name: Tim McGrath
and firm name: Miller Harris Lawyers
Solicitor's business address: Level 1, 14-16 McLeod Street
CAIRNS QLD 4870
Address for service: Level 1, 14-16 McLeod Street
CAIRNS QLD 4870
Telephone: 07 4036 9700
Fax: 07 4031 1525

Signed:



Description: Solicitor for the plaintiff

Dated: 4 December 2020

This claim is to be served on: Mount Emerald Wind Farm Pty Ltd
ACN 149 050 322
of: Level 7, 111 Pacific Highway
NORTH SYDNEY NSW 2060

and on: Marshall Day Acoustics Pty Ltd
ACN 006 675 403
of: 6 Gipps Street
COLLINGWOOD VIC 3066

SUPREME COURT OF QUEENSLAND

REGISTRY: Cairns
NUMBER: 683/20

Plaintiff: Jennifer Disley
AND
First Defendant: Mount Emerald Wind Farm Pty Ltd
ACN 149 050 322
AND
Second Defendant: Marshall Day Acoustics Pty Ltd
ACN 006 675 403

STATEMENT OF CLAIM

This claim in this proceeding is made in reliance on the following facts:

Background and uncontroversial matters

1. At all times material to this action:
 - (a) the plaintiff was and remains the owner and occupier of land comprising some 43.19 hectares located at 603 Channel Road, Walkamin and described as Lot 291 on SP 219087, Title Reference 50770071 ("**plaintiff's land**"), comprising:
 - (i) the plaintiff's four bedroom home ("**home**"); and
 - (ii) five other residential dwellings which are occupied from time to time by persons employed by local farming businesses and who pay the plaintiff to use those dwellings for their accommodation namely:
 - (1) a cabin accommodating eight people;
 - (2) a house accommodating 12 people;
 - (3) a house accommodating 12 people;
 - (4) a cottage accommodating five people; and
 - (5) a flat accommodating five people,
 - (b) the first defendant was and remains:
 - (i) a company duly incorporated;



STATEMENT OF CLAIM
Filed on behalf of the plaintiff
Form 16 - RR.22, 146

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- (ii) a 'corporation' within the meaning and for the purposes of the Australian Consumer Law ("**ACL**"); and
 - (iii) the occupant of land including land described as Lot 7 on SP298413 (formerly described as Lot 7 on SP235244) located generally to the south of the plaintiff's land from which the first defendant conducts the Mount Emerald Wind Farm ("**first defendant's land**"); and
 - (c) the second defendant was and remains:
 - (i) a company duly incorporated;
 - (ii) a 'corporation' within the meaning and for the purposes of the ACL; and
 - (iii) an acoustic consulting firm retained by wind farm operators to prepare noise predictions for the purpose of obtaining development approvals, permits and development plan consents;
2. From in or about the year 2000 the plaintiff has conducted the business of providing worker accommodation from the plaintiff's land. From in or about June 2018, the plaintiff has conducted a business from the plaintiff's land involving the provision of foreign workers' accommodation in and from the dwellings ("**business**").
3. From in or about April 2015:
- (a) under the authority of a development permit:
 - (i) issued on 24 April 2015; and
 - (ii) amended on 18 December 2015,
 ("**development permit**") permitting the operation at the first defendant's land of wind turbines 24 hours a day, every day of the year, so as to operate constantly whenever wind speeds are sufficient to generate electricity, including at night-time; and
 - (b) the first defendant has constructed and operated on and from the first defendant's land an industrial scale wind power facility comprising 53 wind turbines, on-site access tracks, underground electrical cabling and ancillary infrastructure ("**wind farm**").
4. The 53 wind turbines operated by the first defendant are:
- (a) 16 Vestas V112, 3.3 MW turbines with 56 m blades on 84 m towers; and
 - (b) 37 Vestas V117, 3.45 MW with 59 m blades, on 90 m towers,
 ("**wind turbines**").

5. The nearest turbine operating as part of the wind farm is situated approximately:
 - (a) 1.25 km from the southern boundary of the plaintiff's land; and
 - (b) 1.87 km from the home and dwelling.

6. The second defendant prepared and produced for the first defendant, to assist the first defendant to procure the development permit, a number of documents predicting the impact of the wind farm, including documents identified as:
 - (a) Mount Emerald Wind Farm Noise Impact Assessment Report 27 November 2013;
 - (b) Mount Emerald Wind Farm Noise Impact Assessment Report 16 April 2014;
 - (c) Mount Emerald Wind Farm IES Submissions – Response 16 October 2014;
 - (d) Mount Emerald Wind Farm Background Noise Monitoring 12 September 2016; and
 - (e) Mt Emerald Wind Farm Revised A-Weighted Noise Assessment 30 January 2017,

 (“MDA noise predictions”).

7. The first defendant used and relied upon the MDA noise predictions to procure the development permit.

8. Given the usage of the plaintiff's land and the proximity of the plaintiff's land to the first defendant's land, and to some of the wind turbines then proposed to be operating from the first defendant's land, the impact of the wind farm upon the home and the dwellings was, or alternatively ought to have been, considered and assessed in the MDA noise predictions, with the home described therein as Receptor 32.

Basis of causes of action and other material matters

9. During August 2018 the first defendant commenced operating some of the wind turbines at the wind farm, generating electricity whenever wind conditions were suitable.

10. During December 2018, the first defendant commenced and continues to operate all of the wind turbines at the wind farm, generating electricity whenever wind conditions are suitable.

11. Then and thereafter the plaintiff has suffered loss and damage and will continue to suffer loss and damage due to the operation of wind turbines at the wind farm.

12. The first defendant has created an unreasonable interference with the use and enjoyment of the plaintiff's land in that the operation of wind turbines:
 - (a) generates excessive noise and vibration;

- (b) by reason of that excessive noise and vibration has caused the plaintiff loss and damage including pain and suffering, particularly involving sleep deprivation, and further consequential harm, annoyance and discomfort in the occupancy, use and enjoyment of the plaintiff's land, home and dwelling; and
- (c) has also caused such harm to other occupants of the home and dwellings.

Excessive noise and vibration

13. The wind turbines owned and controlled by the first defendant and operating at the wind farm generate noise during operation comprised primarily of:

- (a) audible low frequency noise; and
- (b) sub audible air pressure fluctuations ("**infrasound**");
- (c) together, low frequency noise and infrasound are referred to as "**ILFN**";

(hereafter, the matters in paragraphs 13(a) and 13(b) are together referred to as "**the noise**").

14. The noise from the wind farm:

- (a) is generated whenever the wind turbines are operating and is therefore, for practical purposes, incessant, uncontrolled and unmitigated;
- (b) causes annoyance or discomfort to persons exposed to the noise, namely:
 - (i) the plaintiff as an occupant of the home; and
 - (ii) other occupants of the home and dwellings;

with such annoyance or discomfort including earache, tinnitus, headache, accelerated heart rate, muscle cramps, sleep disturbance and long-term sleep deprivation;

- (c) possesses "**special audible characteristics**" which serve to increase and aggravate levels of annoyance and discomfort to persons exposed to the noise, including the plaintiff and other occupants of the home and dwellings, with such characteristics including:
 - (i) "**low frequency noise**" being noise with perceptible and definite content in the audible frequency range below 250Hz;
 - (ii) "**infrasound**" being "low frequency noise" below the audible frequency range;

- (iii) "**tonality**" being noise with perceptible and definite pitch or tone as measured and defined by IEC 61400 11 or other recognised standards;
 - (iv) "**impulsiveness**" being noise containing impulse components as part of its characteristics, comprising a single pressure peak, or sequence of such peaks, or a single burst with multiple pressure peaks, whose amplitude decays with time, or a sequence of such bursts; and
 - (v) "**amplitude modulation**" being noise generated as the turbine blades pass the tower and pass through areas of differing wind speeds with an impulsive character often described as "thumping" or "rumbling";
- (d) has sound energy primarily comprising ILFN that:
- (i) causes the material in the home and dwellings and other buildings to vibrate thereby adding to the level of annoyance and discomfort suffered by their occupants, including the plaintiff and other occupants of the home and dwellings;
 - (ii) has been measured inside the home and the dwellings;
 - (iii) is not accounted for in the conditions of the development permit, relevant planning controls, or any other noise standard applicable to operation of wind turbines at the wind farm as these conditions, controls and standards do not require measurement or control of exposure to ILFN inside homes or at all;
 - (iv) causes a significant but unknown proportion of persons exposed to suffer from headaches, vertigo, motion sickness, ear pressure sensations, heart palpitations, muscle cramps, and chronic sleep deprivation; and, by reason of the matters pleaded above; and
 - (v) causes adverse health effects including sleep disturbance, stress and anxiety.
15. The outdoor noise limits specified in Schedule 1 of the Conditions of Approval for the development permit ("**Operational Noise Requirements**") are:
- (a) during the night-time (10.00 pm to 6.00 am) - 35 dB(A) or the background noise level plus 5 dB(A), whichever is the higher ("**night-time noise limit**"); and
 - (b) during the day-time - 37 dB(A) or the background noise level plus 5 dB(A), whichever is the higher ("**day-time noise limit**"),
- ("noise limits").

16. In breach of the Operational Noise Requirements, the noise from the wind farm exceeds the noise limits, in that the noise generated by the wind farm:
 - (a) exceeds the day-time noise limit as hub-height wind speeds increase above 12m/s; and
 - (b) exceeds the night-time noise limit as hub-height wind speeds increase above 8m/s,("periodic non-compliance").
17. The plaintiff repeats paragraph 14(c) above and says that because the noise generated by the wind farm possesses special audible characteristics, noise level penalties are to be applied to measured operational noise levels ("**SAC penalties**").
18. With the addition of SAC penalties, the wind farm is in persistent breach of the Operational Noise Requirements as the noise from the wind farm exceeds the noise limits at all times during operation of the wind farm, in that the operational noise level:
 - (a) exceeds the day-time noise limit at all hub-height wind speeds when an SAC penalty of 4.5 dB(A) is applied to operational noise levels; and
 - (b) exceeds the night-time noise limit as hub-height wind speeds increase above 4m/s (the wind speed at which the wind turbines commence operation) when an SAC penalty of 1.5 dB(A) is applied to operational noise levels; and
 - (c) exceeds the night-time noise limit at all hub-height wind speeds when an SAC penalty 3 dB(A) is applied to operational noise levels,("general non-compliance").
19. The plaintiff says further that the Operational Noise Requirements:
 - (a) do not concern indoor measurements;
 - (b) as a result of advice from the second defendant and further, or alternatively, at the request or behest of the first defendant were amended to remove all consideration of low-frequency noise, by removing conditions 5 and amending condition 6, which originally required satisfaction of a C-Weighted (low-frequency) noise level outdoors;
 - (c) provide no penalty for Special Audible Characteristics such as tonality, impulsivity and amplitude modulation; and
 - (d) are limited to the A-weighting, dB(A) which ignores the low-frequency noise generated by the wind turbines.
20. The home and dwellings are all situated in locations on the plaintiff's land away from industrial noise sources and human-generated noise sources operating constantly at night-time such that, prior to the

operation of wind turbines at the wind farm, the noise levels at the home and dwellings were:

- (a) low to moderate during the daytime; and
- (b) very low at night-time.

21. In all the circumstances, the noise generated by the operation of wind turbines by the first defendant is excessive and has caused and will continue to cause pain and suffering, particularly involving sleep deprivation, and further consequential harm, annoyance and discomfort to:

- (a) the plaintiff in the use and enjoyment of the plaintiff's land and home; and
- (b) other persons occupying the home and dwellings.

22. By reason of the matters pleaded in paragraph 21 the plaintiff has suffered and continues to suffer loss and damage in that the nuisance created by the defendants has:

- (a) diminished the value of the plaintiff's land and business; and
- (b) caused certain [but as yet an unknown total number of] occupants of the dwellings to vacate or to refuse to occupy the dwellings, depriving the plaintiff of the income available from providing accommodation to persons who would otherwise have occupied the dwellings but for the nuisance created by the defendants,

("consequential losses").

23. Particulars of loss and damage are pleaded in paragraph 66 hereof.

The second defendant's liability

Nuisance

24. The second defendant is jointly and severally liable with the first defendant for the nuisance caused to the plaintiff by the operation of wind turbines at the wind farm and the consequential losses suffered by the plaintiff in that the MDA noise predictions, to the knowledge and with the prior consent and approval of the second defendant:

- (a) were presented by the first defendant to the relevant planning authority in support of the first defendant's application for a development permit; and
- (b) were relied upon by the relevant planning authority in deciding to grant a development permit for the wind farm such that that permit would not have been granted without the MDA noise predictions.

25. Accordingly, the MDA noise predictions are causative of the creation of the nuisance suffered by the plaintiff and the consequential losses suffered by the plaintiff.

26. On 17 February 2020 the second defendant issued a report 'Mount Emerald Wind Farm Operational Noise Monitoring, 601 Channel Road Walkamin', Rp 001 20190961 ("**MDA's compliance report**").
27. MDA's compliance report:
- (a) is based on data collected at the plaintiff's land by the second defendant between 3 October and 14 November 2019 ("**MDA's data**");
 - (b) concludes that the operational noise levels satisfy the Operational Noise Requirements at all times because the noise generated by the wind farm does not exceed the night-time noise limit or the day-time noise limit;
 - (c) provided the first defendant with a basis to assert in a letter to the plaintiff dated 8 May 2020 that:
 - (i) the wind farm complies with the Operational Noise Requirements;
 - (ii) no abnormal or excessive noise emissions are generated by the wind farm; and
 - (iii) the first defendant had adequately addressed the plaintiff's noise complaints.
28. The plaintiff says that there is no proper basis for the assertions made by the first defendant (as pleaded in paragraph 27(c) above) as MDA's compliance report is a defective compliance report ("**defective compliance report**") in that:
- (a) the second defendant did not investigate, quantify or report on the special audible characteristics generated by and associated with noise from the wind turbines;
 - (b) the second defendant excluded relevant noise data from the analysis on which the defective compliant compliance report was premised;
 - (c) the defective compliance report included and relied upon wind speed data from a wind monitoring tower (MET-mast) identified as mast 9530 when that MET-mast had been decommissioned in October 2018 and could not have provided any wind speed data relevant to MDA's data gathered between 3 October and 14 November 2019;
 - (d) when the second defendant's data is correctly analysed, the data shows:
 - (i) **periodic non-compliance**, as to which the plaintiff repeats and relies upon paragraph 16 above; and
 - (ii) **general non-compliance**, when SAC penalties are applied to measured operational noise levels, as to which the plaintiff repeats and relies upon paragraphs 17 and 18 above; and

- (e) in the premises, the second defendant did not adequately address the plaintiff's noise complaints.
29. Because of the defective compliance report:
- (a) the first defendant asserts compliance with the Operational Noise Requirements when there is no proper basis for the first defendant to do so;
 - (b) the first defendant will continue to operate the wind farm based on the first defendant's assertion of compliance with the Operational Noise Requirements when there is no proper basis for the first defendant to do so; and
 - (c) the nuisance suffered by the plaintiff and the consequential losses will continue without abatement.

Negligence

30. In preparing the MDA noise predictions, the second defendant assumed and owed a duty to the owners and the occupiers of the homes considered or which ought to have been considered in those predictions, which included the owner and occupiers of the home and the dwellings.
31. The duty assumed and owed by the second defendant to the plaintiff and other occupiers of the home and the dwellings:
- (a) was a duty to take reasonable care in the formulation of the MDA noise predictions so as to prevent the prospect of future nuisance to the owners and occupiers of the homes considered or which ought to have been considered in the formulation of the MDA noise predictions caused by the noise subsequently generated by wind turbines at the wind farm; and
 - (b) included a duty to:
 - (i) reasonably predict the noise levels generated by wind turbines at the wind farm as measured in the dB(A) weighting;
 - (ii) consider the true character of the noise to be generated by wind turbines at the wind farm, namely the noise as described in paragraphs 13 and 14 above ("**true character of the noise**"), and to consider the true impact of such noise upon persons in the vicinity;
 - (iii) use noise prediction techniques capable of identifying the true character of the noise;
 - (iv) include in the MDA noise predictions a statement as to the true character of the noise;
 - (v) properly assess the existing noise environment at the locations considered in the MDA predictions;
 - (vi) consider and advise the relevant planning authority of

any inadequate or incorrect assertions or assumptions express or implicit in the requirements imposed by the planning authority; and

- (vii) consider and identify the impact that the true character of the noise generated would have at the locations considered in the MDA predictions, particularly in relation to sleep disturbance at night-time

32. The second defendant was negligent in that it failed to:

- (a) reasonably predict the noise levels generated by wind turbines at the wind farm as measured in the dB(A) weighting in that an reasonable prediction would have:
 - (i) predicted **periodic non-compliance**, as to which the plaintiff repeats and relies upon paragraph 16 above; and
 - (ii) predicted that the noise generated by the wind farm would possess special audible characteristics, applied SAC penalties to its predicted noise levels, and accordingly predicted **general non-compliance**, as to which the plaintiff repeats and relies upon paragraphs 17 and 18 above;
- (b) consider the true character of the noise, and to consider the true impact of such noise upon persons in the vicinity;
- (c) include in the MDA noise predictions any statement as to the true character of the noise;
- (d) use noise prediction techniques capable of identifying the true character of the noise;
- (e) properly assess the existing noise environment at the locations considered in the MDA noise predictions:
 - (i) thereby overstating the noise levels experienced by the occupants of those homes, including the plaintiff and the occupants of the home and the dwellings, prior to operation of wind turbines in the vicinity of the home and the dwellings, particularly at night-time; and
 - (ii) and thereby allowing the second defendant to incorrectly assert that the noise generated would at all times satisfy the criteria set by the Operational Noise Requirements;
- (f) further and in relation to paragraph 32(e) above a proper assessment of the existing noise environment at the locations considered in the MDA noise predictions required, at a minimum:
 - (i) wind speeds to be measured at a location being considered and correlated to noise levels recorded at that location in order to account for the difference in

wind speeds at wind turbine hub height and at each location where it is often calm or wind speeds are lower than at hub height;

- (ii) separate consideration of noise data gathered as it relates to different wind directions, thereby separating the analysis of noise data gathered during upwind conditions from that gathered during downwind conditions; and
 - (iii) separate consideration of noise data gathered at night-time from noise data gathered during the day-time;
- (g) inform the relevant planning authority that the Operational Noise Requirements are both inadequate and incorrect, including the false assertions or assumptions express or implicit in those requirements that:
- (i) the noise from wind turbines is not annoying to nearby residents because the noise generated by wind interacting with the natural environment and the structure of dwellings generally overwhelms ('masks') the noise generated by wind turbines;
 - (ii) wind turbines do not generate significant levels of low frequency noise;
 - (iii) wind turbines do not generate infrasound at all; and
 - (iv) the dB(A) noise weighting is relevant to identifying and measuring the true character of the noise; and
- (h) identify the impact that the true character of the noise generated would have on the plaintiff and the other occupants of the home and the dwellings, particularly in relation to sleep disturbance at night-time.

33. The second defendant was also negligent in that it provided advice and information which the first defendant used to amend the noise conditions of the permit by removing all protection and constraint with respect to low-frequency noise, by removing conditions 5 and amending condition 6, which originally required satisfaction of a C-Weighted (low-frequency) noise level outdoors.

34. Had the second defendant not been negligent in the manner described in paragraphs 32 and 33 above, the first defendant would not have obtained the development permit, or alternatively, the development permit in its present terms, and the nuisance and loss and damage suffered by the plaintiff, including the consequential losses, would have been wholly or partly avoided or abated.

35. The plaintiff repeats and relies upon paragraphs 26 to 29 above and says that the second defendant was also negligent in preparing and producing MDA's compliance report, insofar as MDA's compliance report:

- (a) failed to address and report on the special audible characteristics generated by and associated with noise from the wind turbines;
- (b) excluded relevant noise data; and
- (c) contains express misstatements of fact,

which statements and omissions have allowed the first defendant to continue to operate the wind farm thereby causing ongoing nuisance and associated loss and damage, including continuing consequential losses.

Negligent misstatement

36. The plaintiff repeats the matters pleaded in paragraphs 30 to 34 above and says further that the second defendant was negligent in presenting the MDA noise predictions.

37. The MDA noise predictions were prepared and produced by the second defendant on behalf of the first defendant with the intention of satisfying the relevant planning authority that the owners and the occupiers of locations considered in those predictions, which included (or ought to have included) the home and the dwellings, would not suffer unreasonable interference in the use and enjoyment of those locations by reason of noise generated by wind turbines at the wind farm.

38. The relevant planning authority:

- (a) was and is responsible for granting development permits to developments that will not generate excessive noise which interferes with the ability of neighbouring and nearby owners and occupiers to use and enjoy their homes; and
- (b) was at all material times aware that wind turbines at the wind farm might generate noise capable of interfering with the ability of neighbouring and nearby owners and occupiers to use and enjoy their homes; and
- (c) accordingly relied upon the MDA noise predictions in granting the development permit to the first defendant on the basis that the second defendant predicted therein that noise from the wind farm would not interfere with the ability of owners and occupiers of the homes considered by those predictions to use and enjoy their homes.

39. The MDA noise predictions include the following express and implicit misstatements of fact on the part of the second defendant that:
- (a) the noise levels generated by wind turbines at the wind farm as measured in the dB(A) weighting would at all times:
 - (i) satisfy the criteria set by the Operational Noise Requirements at the homes considered by those predictions; and
 - (ii) otherwise satisfy the conditions of the development permit relating to noise;
 - (b) the noise generated would not include special audible characteristics, including tonality, impulsivity and amplitude modulation;
 - (c) the noise predictions made were accurate and precise;
 - (d) the noise levels generated by wind turbines at the wind farm:
 - (i) would not cause unreasonable interference to the amenity enjoyed by the occupiers of the homes considered; and
 - (ii) would not cause sleep disturbance to occupants of those homes;
 - (e) the wind turbines operating at the wind farm would not cause adverse noise impacts to nearby property owners and occupiers by way of excessive noise; and
 - (f) the wind turbines operating at the wind farm would not create excessive noise at the homes considered by those predictions.
40. The second defendant made misstatements of fact in relation to the removal of condition 5 and the amendment of condition 6 of the development permit by asserting that:
- (a) the noise generated by the wind turbines would not include a significant level of low-frequency noise; and
 - (b) there was no need to monitor or control such noise by requiring satisfaction of a C-Weighted (low-frequency) noise level outdoors.
41. The matters pleaded in paragraphs 39 and 40 above:
- (a) were misstatements of fact in that they were false at the time they were made; and
 - (b) to the extent that they relate to future matters were statements of opinion which were made without reasonable grounds.
42. Had the second defendant not been negligent in the manner described in paragraphs 39 and 40 above, the first defendant would not have obtained its development permit and the nuisance and loss

and damage suffered by the plaintiff, including the consequential losses, would have been wholly or partly avoided or abated.

43. Further, or in the alternative, the MDA noise predictions failed to include reference to the following relevant facts and matters:
- (a) A true and correct assessment of the existing noise environment at the locations considered by those predictions, including the home and the dwellings;
 - (b) A reasonable prediction of the noise levels generated by wind turbines at the wind farm as measured in the dB(A) weighting in that a reasonable prediction would have:
 - (i) predicted **periodic non-compliance**, as to which and the plaintiff repeats and relies upon paragraph 16 above; and
 - (ii) predicted that the noise generated by the wind farm would possess special audible characteristics, applied SAC penalties to its predicted noise levels, and accordingly predicted **general non-compliance**, as to which the plaintiff repeats and relies upon paragraphs 17 and 18 above;
 - (c) A reasonable prediction of the actual noise levels generated by wind turbines at the wind farm;
 - (d) A statement as to the true character of the noise;
 - (e) A statement as to the impact that the true character of the noise generated would have on the ability of the occupants at the locations considered to sleep at night-time in their homes, which included:
 - (i) the plaintiff as an occupant of the home; and
 - (ii) other persons occupying the home and the dwellings; and
 - (f) A statement informing the relevant planning authority that the Operational Noise Requirements are both inadequate and incorrect in that:
 - (i) the noise from wind turbines is annoying to nearby residents because the noise generated by wind interacting with the natural environment and the structure of dwellings does not mask the noise generated by wind turbines;
 - (ii) wind turbines generate significant levels of low frequency noise;
 - (iii) wind turbines generate significant levels of infrasound; and
 - (iv) the dB(A) noise weighting does not and cannot

measure the true character of the noise.

44. The facts and matters pleaded in paragraph 43 above and omitted from the MDA noise predictions were facts and matters which the second defendant knew or ought to have known would be material to the relevant planning authority in deciding whether or not to grant the development permit to the first defendant.
45. Had the second defendant included in the MDA noise predictions the facts and matters pleaded in paragraph 43 above, the first defendant would not have obtained the development permit and the nuisance, loss and damage suffered by the plaintiff, including the consequential losses, would have been wholly avoided.
46. The plaintiff repeats and relies upon paragraphs 26 to 29 above and says that the second defendant was also negligent in preparing and producing MDA's compliance report, insofar as MDA's compliance report:
 - (a) failed to address and report on the special audible characteristics generated by and associated with noise from the wind turbines;
 - (b) excluded relevant noise data; and
 - (c) contains express misstatements of fact;which statements and omissions have allowed the first defendant to continue to operate the wind farm thereby causing ongoing nuisance and associated loss and damage, including continuing consequential losses.
47. Particulars of the loss and damage are pleaded in paragraph 66 hereof.

Misleading and deceptive conduct

48. In preparing and producing the MDA noise predictions, the second defendant was at all material times engaged in trade or commerce within the meaning of the ACL.
49. In preparing and producing the MDA noise predictions, the second defendant, in contravention of s18 of the ACL, engaged in conduct in trade or commerce that was misleading or deceptive or likely to mislead or deceive by representing that:
 - (a) the noise levels generated by wind turbines at the wind farm as measured in the dB(A) weighting would at all times satisfy the:
 - (i) criteria set by the Operational Noise Requirements at the homes considered by those predictions; and
 - (ii) the conditions of the development permit relating to noise;
 - (b) the noise predictions made were accurate and precise;

- (c) the noise levels generated by wind turbines at the wind farm:
 - (i) would not cause unreasonable interference to the amenity enjoyed by the occupiers of the homes considered; and
 - (ii) would not cause sleep disturbance;
 - (d) the wind turbines operating at the wind farm would not cause adverse noise impacts to nearby property owners/occupiers by way of excessive noise; and
 - (e) the wind turbines operating at the wind farm would not create excessive noise at the homes considered by those predictions.
50. In relation to the plea in paragraph 49 above, the plaintiff relies upon s4 of the ACL to the extent that any of the representations constituted representations with respect to any future matter as at the time they were made.
51. The facts and matters pleaded in paragraph 49 above were representations which the second defendant knew or ought to have known the relevant planning authority would rely upon in deciding whether or not to grant the development permit to the first defendant.
52. Had the second defendant not contravened s18 of the ACL in the manner described in paragraphs 49 and 50 above, the first defendant would not have obtained the development permit and the nuisance, loss and damage suffered by the plaintiff, including the consequential losses, would have been wholly avoided.
53. Further, or in the alternative, in making the MDA noise predictions, the second defendant, in contravention of s18 of the ACL, engaged in conduct in trade or commerce that was misleading or deceptive or likely to mislead or deceive by failing to include in the MDA noise predictions reference to the following relevant facts and matters:
- (a) a true and correct assessment of the existing noise environment at the homes considered by those predictions, including the home and dwellings owned by the first plaintiff;
 - (b) an accurate prediction of the noise levels generated by wind turbines at the wind farm as measured in the dB(A) weighting in that an accurate prediction would have:
 - (i) predicted **periodic non-compliance**, as to which the plaintiff repeats and relies upon paragraph 16 above; and
 - (ii) predicted that the noise generated by the wind farm would possess special audible characteristics, applied SAC penalties to its predicted noise levels, and accordingly predicted **general non-compliance**, as to which the plaintiff repeats and relies upon paragraphs 17 and 18 above;
 - (c) a reasonable prediction of the actual noise levels generated

by wind turbines at the wind farm;

- (d) a statement as to the true character of the noise;
 - (e) a statement as to the impact that the true character of the noise generated would have on the ability of the occupants at the locations considered to sleep at night-time in their homes, which included:
 - (i) the plaintiff as an occupant of the home; and
 - (ii) other persons occupying the home and the dwellings; and
 - (f) a statement informing the relevant planning authority that the Operational Noise Requirements are both inadequate and incorrect in that:
 - (i) the noise from wind turbines is annoying to nearby residents because the noise generated by wind interacting with the natural environment and the structure of dwellings does not mask the noise generated by wind turbines;
 - (ii) wind turbines generate significant levels of low frequency noise;
 - (iii) wind turbines generate significant levels of infrasound; and
 - (iv) the dB(A) noise weighting does not and cannot measure the true character of the noise.
54. In relation to the plea in paragraph 53 above the plaintiff relies upon s4 of the ACL to the extent that any of the representations that ought to have been included in the MDA noise predictions constituted representations with respect to any future matter as at the time they ought to have been made.
55. The facts and matters pleaded in paragraph 53 above and omitted from the MDA noise predictions:
- (a) were facts and matters which the second defendant knew or ought to have known would be material to the relevant planning authority in deciding whether or not to grant the development permit to the first defendant because those facts and matters were relevant to determining the actual noise impacts to be experienced by persons living in the vicinity of the wind farm; and
 - (b) accordingly, persons living in the vicinity of the wind farm, including the plaintiff, were reasonably entitled to expect that those facts and matters would be disclosed by the second defendant to the relevant planning authority.
56. Had the second defendant not contravened s18 of the ACL in the manner described in paragraphs 53 to 55 above, the first defendant

would not have obtained the development permit and the nuisance, loss and damage suffered by the plaintiff, including the consequential losses, would have been wholly avoided.

57. Further, and in the alternative, in providing advice and information in relation to the removal of condition 5 and the amendment of condition 6 of the permit, the second defendant, in contravention of s18 of the ACL, engaged in conduct in trade or commerce that was misleading or deceptive or likely to mislead or deceive by asserting that:
- (a) the noise generated by the wind turbines would not include a significant level of low-frequency noise; and
 - (b) there was no need to monitor or control such noise by requiring satisfaction of a C-Weighted (low-frequency) noise level outdoors.
58. Had the second defendant not contravened s18 of the ACL in the manner described in paragraph 57 above, the first defendant would not have obtained the development permit, or alternatively, the development permit in its present terms, and the nuisance and loss and damage suffered by the plaintiff, including the consequential losses, would have been wholly or partly avoided or abated.
59. The plaintiff repeats and relies upon paragraphs 26 to 29 above and says that MDA has also contravened s18 of the ACL in preparing and producing the **defective compliance report** which omits relevant noise data and contains express misstatements of fact, which statements and omissions have allowed the first defendant to continue to operate the wind farm thereby causing ongoing nuisance and associated loss and damage, including continuing consequential losses.
60. The plaintiff seeks an assessment of the damages the plaintiff has suffered by, or because of the second defendant's conduct in contravention of s18 of the ACL, pursuant to s236 of the ACL. Particulars of the loss and damage are pleaded in paragraph 66 hereof.
61. The plaintiff also seeks an injunction against the second defendant restraining the second defendant from producing and presenting noise predictions, modelling and assessments in relation to the operation of wind turbines at the wind farm, in contravention of the ACL.

Particulars of harm and damage

62. The operation of wind turbines by the first defendant at the wind farm has caused and will continue to cause substantial harm and damage to the plaintiff in the use and enjoyment of the home and the dwellings in that the noise generated:
- (a) has caused the plaintiff loss and damage including pain and suffering, particularly involving sleep deprivation, and further consequential harm, annoyance and discomfort in the occupancy, use and enjoyment of the plaintiff's land, home and dwelling;
 - (b) has caused and will continue to cause annoyance and

discomfort to other occupants of the home and the dwellings;
and

(c) renders the home and the dwellings uninhabitable.

63. The operation of wind turbines by the first defendant at the wind farm has and will continue to cause the consequential losses suffered by the plaintiff in that the noise generated has and will continue to cause annoyance and discomfort to certain [but an as yet an unknown total number of] occupants of the dwellings causing them to vacate or to refuse to occupy the dwellings, and will thereby deprive the plaintiff of the opportunity to conduct the business.

64. By reason of the matters pleaded in paragraphs 62 and 63 above, and as a consequence of the first and second defendants' unreasonable interference with the use and enjoyment of the plaintiff's land:

(a) the plaintiff has been deprived of the opportunity to conduct the business; and

(b) the value of the plaintiff's land and business has been substantially diminished.

Damages

65. For the reasons pleaded above, the excessive noise and vibration generated through the operation of the wind farm has rendered the house and dwelling uninhabitable with the result that the plaintiff will lose her place of residence and the opportunity to conduct the business.

66. The plaintiff expected the business to have the capacity to accommodate 172 seasonal workers as part of the Pacific Labour Scheme operated under the auspices of the Commonwealth Department of Foreign Affairs and Trade. Particulars of the expected income expenses and profit of the business for the period to 30 June 2023 are set out below.

	FY 2021	FY 2022	FY 2023
Gross income	\$462,384.00	\$1,401,972.00	\$1,401,972.00
Expenses	(\$185,801.00)	(\$318,454.00)	(\$318,454.00)
EBITDA	\$276,583.00	\$1,083,518.00	\$1,083,518.00
Tax 27.5%	\$76,060.00	\$297,968.00	\$297,968.00
Capital expenditure	\$164,183.00	\$547,278.00	\$35,573.00
Free cash flow	\$36,339.00	\$238,273.00	\$749,978.00
Present value of cash flow (after 28% discount rate)	\$28,390.00	\$145,430.00	\$357,617.00

67. Having regard to the projected discounted cash flow of the business, the business has a value of \$1,808,642.00 (rounded to \$1,800,000.00), comprising:
- (a) present value of free cash flow for the period to 31 June 2023 - \$531,438.00 ("present value total"); and
 - (b) present value of terminal value (calculated by applying a capitalisation rate of 28% to the present value total) - \$1,277,204.00.
68. The plaintiff seeks damages from the first and second defendant as follows:
- (a) diminution in value of the land and business - \$1,800,000.00 as particularised above; and
 - (b) loss of use of the enjoyment of the home and the dwellings and the plaintiff's land - \$50,000.00.
69. Further, or in the alternative, as against the second defendant the plaintiff seeks an assessment of the damages pleaded in paragraphs 65 above:
- (a) caused by the second defendant's negligence;
 - (b) caused by the second defendant's negligent misstatements; and
 - (c) because of the second defendant's contraventions of the ACL.
70. Particulars of the loss and damage claimed by the plaintiff against the second defendant are pleaded in paragraph 66 hereof. As pleaded above, the plaintiff also seeks an injunction restraining the second defendant from further contraventions of the ACL.

Deliberate infliction of harm aggravating the damage

71. In early 2011, an employee of the first defendant, Terry Johannesen, visited the plaintiff's land and during that visit said to the plaintiff words to the effect: "Jenny [referring to the plaintiff] we have to buy you out as you will be so severely impacted."
72. In January 2017, employees of the first defendant, Anthony Yeates and Kim Forde, visited the plaintiff's land to discuss with the plaintiff the noise to be generated by the wind farm, and during that meeting:
- (a) the plaintiff told Mr Yeates and Ms Forde that the plaintiff's land was already un-saleable as a result of the noise that would be generated by the wind farm; and
 - (b) during a conversation about the 1.5 km setback distance from the wind turbines, Mr Yeates, referring to that distance, said words to the effect: "You will not be protected, your houses will not be protected".

73. In or about March 2017, employees of the first defendant, Rene Kuypers, Ms Forde and the first defendant's Chief Engineer, Paul McDonald, visited the plaintiff's land to discuss with the plaintiff the noise impact from the wind turbines, and during that meeting:
- (a) the plaintiff requested that the first defendant fully insulate the plaintiff's home and the dwellings against the noise generated by the wind turbines; and
 - (b) Mr Kuypers said words to the effect:
 - (i) "If we admit to needing to insulate your houses, it will open a hornet's nest in the neighbourhood";
 - (ii) "We have no idea what noise level these [ie the first defendant's] turbines would put out"; and
 - (iii) "We are going to have a number of noise monitors in the area, but none are going to be put at your property".
74. In the premises, including by reason of the facts and matters pleaded in paragraphs 71 to 73 above, the first defendant is knowingly and intentionally causing nuisance to the plaintiff who:
- (a) has not been offered any compensation for the nuisance caused by the operation of wind turbines at the wind farm;
 - (b) has not agreed to suffer the nuisance caused by the operation of wind turbines at the wind farm; and
 - (c) has given repeated notice to the first defendant that the first defendant's actions will cause nuisance to the plaintiff and to other occupants of the home and the dwellings, which notice has been consistently ignored by the first defendant thereby demonstrating a contumelious disregard for the rights of the plaintiff.
75. By reason of the facts and matters pleaded in paragraph 71 to 74 above, the plaintiff seeks aggravated and further, or alternatively, exemplary damages from the first defendant in the sum of \$100,000.00.

Necessity for injunction additional to damages

76. The continuing harm and damage caused by the operation of wind turbines by the first defendant at the wind farm, including economic loss, pain and suffering, is such that damages awarded against the defendants for the nuisance caused by them would not be an adequate or sufficient remedy to and for the plaintiff.
77. The plaintiff seeks an injunction as against the first defendant:
- (a) limiting the hours of operation of wind turbines at the wind farm, and preventing their operation between the hours of 8.00 pm and 7.00 am; and
 - (b) requiring wind turbines at the wind farm to operate at all other

times in reduced power ('low noise') mode.

78. Unless and until the first defendant is restrained from operating its wind turbines in the manner pleaded in paragraph 77 above, the continued and unrestricted operation of wind turbines at the wind farm:
- (a) will cause further and ongoing substantial damage to the plaintiff, namely discomfort, pain and suffering, particularly in relation to sleep deprivation, and further consequential harm; and
 - (b) will also cause discomfort, pain and suffering, particularly in relation to sleep deprivation, and further consequential harm to other occupants of the home and the dwellings.
79. In the premises, the plaintiff seeks the declarations and orders that follow below.

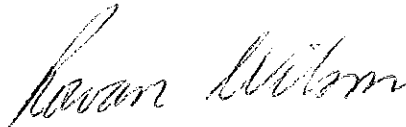
Relief, remedies and ancillary remedies

The plaintiff seeks the following relief:

1. a declaration that the wind farm known as Mount Emerald Wind Farm and operated by the first defendant on land, including land described as Lot 7 on SP298413 (formerly described as Lot 7 on SP235244) generally to the south of the plaintiff's land located at 603 Channel Road, Walkamin and described as Lot 291 on SP 219087, Title Reference 50770071 is being operated in breach of condition 4 of the first defendant's development permit relating to the conduct of that wind farm in that the noise generated by the wind farm materially exceeds the operational noise limits set by that condition;
2. a declaration that the operation of wind turbines by the first defendant at the wind farm has caused and will continue to cause substantial damage to and for the plaintiff by reason of unreasonable interference with the use and enjoyment of the plaintiff's land;
3. an order:
 - (a) that the first defendant, whether by itself or its officers, servants or agents, be permanently restrained from operating wind turbines at the wind farm known as Mount Emerald Wind Farm other than between the hours of 7.00 am and 8.00 pm ("**permitted period of operation**"); and
 - (b) that the first defendant be directed to operate the wind turbines at the wind farm known as Mount Emerald Wind Farm at all times during the permitted period of operation in reduced power ('low noise') mode.
4. a declaration that the second defendant has engaged in conduct which is misleading or deceptive or likely to mislead or deceive in contravention of the ACL;
5. an order that the second defendant be permanently restrained from producing and presenting noise predictions, modelling and

- assessments in relation to the operation of wind turbines at the wind farm known as Mount Emerald Wind Farm in contravention of the ACL;
6. damages, or further and in the alternative, damages in lieu of an injunction, against each defendant including:
 - (a) diminution in the value of land and business of \$1,800,000.00; and
 - (b) loss of the use and enjoyment of the home and dwellings of \$50,000.00.
 7. aggravated damages, against the first defendant, in the sum of \$100,000.00;
 8. interest thereon pursuant to s58 of the *Civil Proceedings Act 2011*;
 9. costs; and
 10. such other orders or relief as this Honourable Court considers appropriate.

Signed:



Description: Solicitor for the plaintiff

This pleading was settled by Michael Jonsson of Queens Counsel with Peter G Quinn of Counsel.

NOTICE AS TO DEFENCE

Your defence must be attached to your notice of intention to defend.