

Lesson 15: The New Game is Nuisance and the Judge is the Umpire

The New Game is Nuisance

Forget about pursuing compliance, the new game is “Nuisance” with the Judge as the Umpire and the Bald Hills Judgement as the new Rule Book.

The Bald Hills Judgement is a Game Changer

No matter how much a wind farm or local council remonstrates, the Bald Hills case is now Law.

Any dissension by the players is futile – wind farm noise nuisance is a Torts Law Game – and the Judge holds the whistle.

TORTS – Nuisance – Private – Wind farm operated by defendant – Plaintiffs complain noise from wind turbines disturbs sleep – Substantial interference with plaintiffs’ enjoyment of land – Interference is intermittent and specifically affects plaintiffs’ ability to sleep undisturbed at night – Social and public utility of wind farm – Whether plaintiffs hypersensitive – Nature and established uses in locality – Whether wind farm an established use in locality – Whether defendant took reasonable precautions – Noise found to be substantial and unreasonable interference with plaintiffs’ enjoyment of land.

The Judgement: 13(1)

The issues for determination in the proceeding, and my conclusions in relation to each issue, are as follows.

Nuisance

(1) Has noise from wind turbines on the wind farm operated by Bald Hills caused a substantial interference with the plaintiffs’ use and enjoyment of their land?

Yes.

Noise from the turbines on the wind farm has caused a substantial interference with both plaintiffs’ enjoyment of their land – specifically, their ability to sleep undisturbed at night, in their own beds in their own homes. The interference has been intermittent and, in Mr Zakula’s case, is ongoing. While both Mr Uren and Mr Zakula have been annoyed by the sound of the turbines during the day, it has not substantially interfered with their enjoyment of their properties.

The Judgement: 13(11)

Having regard to the answers to questions 3 to 10, has the interference with the plaintiffs’ use and enjoyment of their land been unreasonable?

Yes.

Noise from the wind turbines on the wind farm has amounted, intermittently at night, to a substantial and unreasonable interference with the plaintiffs’ enjoyment of their land. The wind farm noise has been a common law nuisance at both properties.

Role of the Responsible Authority (Local Municipal Council)

The Responsible Authority is listed on the permit.

Older permits list the Planning Minister as the Responsible Authority, whilst newer permits list the Local Municipal Council as the Responsible Authority.

With regards to the Bald Hills Wind Farm, the Minister for Planning is the Responsible Authority.

PLANNING PERMIT

Permit No: TRA/03/002
Planning Scheme: South Gippsland
Responsible Authority: Minister for Planning

The Responsible Authority is Not the umpire in a game of Nuisance.

- Noise Compliance comes under the rules of Permit Compliance.
- Noise Nuisance comes under the rules of Torts Law.

The Bald Hills Boys are the first to win the new game of wind farm noise nuisance.

Noise nuisance is based on evidence not on hearsay reports, or votes at council.

A wind company can submit all the noise reports they like, their acousticians and the Responsible Authority **cannot** determine compliance. Their reports are only an expression of opinion about compliance. The reports and opinions are mere hearsay.

The Bald Hills precedent has determined that only a Judge or adjudicator can determine noise compliance based on the evidence presented at court.

The Judgement: 102

The question of whether the sound from the wind farm received on the plaintiffs' land complied with the noise conditions in the permit at relevant times is to be determined on the evidence in this proceeding. It is not determined by the Minister's letter of 23 March 2019.

The Judgement: 100

*However, the phrase does not have the effect contended for by Bald Hills, that it is the Minister and only the Minister who can determine whether the wind farm is operating in compliance with condition 19. That interpretation would be repugnant to the enforcement framework provided in the Planning Act. It is for the Tribunal, not the Minister, to determine whether to make an enforcement order in accordance with s 119 of the Planning Act. **It is for a court, not the Minister, to determine whether the operator of the wind farm is guilty of an offence against s 126 of the Planning Act.***

A Game of Torts Law is played with Evidence

The Standards for Compliance, the New Zealand Standards (NZS 1998 or 2010) are not written to identify intermittent noise nuisance.

A wind farm that claims compliances can still from time to time cause a nuisance.

The Responsible Authority can only express an opinion on compliance and has no authority to determine noise nuisance.

It is the preferred evidence that Wins !!

The Litigation Game is about “Noise Nuisance” NOT “Noise Compliance”.

It’s a Torts Law Game determined by the evidence tendered at court.

The Judge is the umpire, and only the Judge decides on which evidence they prefer when making their final Judgment.

The Judgement: 13(5)

If so, what is the relevance of compliance with the noise limits in the permit?

Demonstrated compliance with the NZ Standard and condition 19 of the permit would not necessarily have established that the noise that from time to time disturbed Mr Uren’s and Mr Zakula’s sleep was reasonable.

Significantly, the NZ Standard sets a limit on the extent to which wind turbine noise may increase continuous underlying noise levels, assessed over a long period.

It is not directed to intermittent loud noise from wind turbines, and does not provide a way of assessing whether a wind farm produces unreasonably annoying noise in certain weather conditions, or on a particular night.

The Judgment: 334(C)

Even if Bald Hills had been able to establish compliance with the noise conditions in the permit at the plaintiffs’ houses, this would not have been determinative of reasonableness. The noise limits under the permit and the Environment Protection Regulations are at the higher end of the range applied in Australia. Significantly, while the NZ Standard and condition 19(a) limit the extent to which continuous underlying noise levels are increased by wind turbine noise, they are not directed to intermittent loud noise from wind turbines, and provide no means of determining whether a wind farm produces unreasonably annoying noise in certain weather conditions, or on a particular night.

The Judgement: 241

More significantly, I would have considered that the NZ Standard sets a limit on the extent to which continuous underlying noise levels may be increased by wind turbine noise, assessed over weeks or sometimes months. It is not directed to intermittent loud noise from wind turbines, and provides no means of determining whether a wind farm produces unreasonably annoying noise in certain weather conditions, or on a particular night. Demonstrated compliance with the NZ Standard and condition 19 would not necessarily have established that the noise that from time to time disturbed Mr Zakula’s and Mr Uren’s sleep was reasonable.