PAUL CONNOR Q.C.
Barrister

[redacted]

25 March 2019

[redacted]
Partner
Maddocks

By email to: [redacted]

And to:

[redacted]
Partner
Maddocks

By email to: [redacted]

'Subject to legal professional privilege'

Dear [redacted]

Notifications of nuisance under the Public Health and Wellbeing Act 2008
Bald Hills Wind Energy Facility

Thank you for briefing me to advise on the above matter. Your firm acts for the South Gippsland Shire Council **('Council').**

1. The questions you have asked me to consider are as follows:

   (a) Is it reasonably open to Council to find that noise emanating from the Bald Hills wind energy facility constitutes a nuisance of the type governed by the *Public Health and Wellbeing Act 2008* (Vic) ('**Act**')?

(b) If so:

(i) What are Council's prospects of success in prosecuting the operator of the facility, Bald Hills Wind Farm Pty Ltd?

(ii) Does Council have an ability to clearly and effectively direct the Operator to abate the nuisance through an improvement notice issued pursuant to s 194 of the Act?

(iii) Is the matter better settled privately as contemplated by s 62(3)(b) of the Act?

Notifications of nuisance

2. Section 62 of the *Public Health and Wellbeing Act 2008* (Vic) ('**Act**') provides that:

> (1) If a person believes that a nuisance exists, that person may notify the Council in whose municipal district the alleged nuisance exists.
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> (2) The Council must investigate any notice of a nuisance.
>
> (3) If, upon investigation, a nuisance is found to exist, the Council must—
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> (a) take any action specified in subsection (4) that the Council considers appropriate; or
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> (b) if the Council is of the opinion that the matter is better settled privately, advise the person notifying the Council of the nuisance of any available methods for settling the matter privately.
>
> (4) For the purposes of subsection (3)(a), the Council may—
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> (a) if section 66 applies, exercise the powers conferred by that section;
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> (b) issue an improvement notice or a prohibition notice;
>
> (c) bring proceedings under section 219(2) for an offence against this Act.

3. Between 15 April 2016 and 6 September 2017, Council received a total of nine notifications made on behalf of 13 individuals for the purposes of s 62(1) of the Act. The notifications were sent by the legal representative of the notifying persons, Ms Dominica Tannock of DST Legal. In each case, through Ms Tannock, the notifying persons stated that the cause of the nuisance which they believe exists is 'noise transmitted by the Bald Hills Wind Farm'.

4. The Bald Hills Wind Energy Facility ('**BHWEF**') is located within the Council's municipal district and each notifying person lives within the Council's municipal district. The BHWEF is a 52 turbine facility covering an area of 1750 hectares. It became fully operational in May 2015.[1]

5. The details of the notifications of nuisance made pursuant to s 62(1) of the Act (listed in chronological order) are as follows:

   (a) By letter dated 15 April 2016, a notification was made on behalf of [redacted][2] The letter stated that:

   > The nuisance is adversely affecting my client's health: since the Bald Hills Wind Farm became fully operational in mid-2015, [redacted] complains of constant sleep disruption and sleep deprivation.

   (b) By letter dated 15 April 2016, a notification was made on behalf of [redacted][3] The letter stated that:

   > The nuisance is adversely affecting my client's health: since the Bald Hills Wind Farm became fully operational in mid-2015, [redacted] complains of headaches and sleep disruption.

   (c) By letter dated 2 May 2016, a notification was made on behalf of [redacted][4] The letter stated that:

   > The nuisance is adversely affecting my client's health: since the Bald Hills Wind Farm became fully operational; in mid-2015, [redacted] complains of headaches and sleep disruption. At times, the noise is so intolerable that my client has to leave his home.

   (d) By letter dated 3 May 2016, a notification was made on behalf of [redacted][5] The letter stated that:

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1 James C Smith & Associates, Investigation Report, Noise Complaint Notifications – Bald Hills Wind Farm, September 2018, 3.

2 The [redacted] residence is located 1,131 metres to the north-east of turbine 16. See the plan of the BHWEF with distances plotted to sensitive receptors at Appendix 2 to Dr Smith's investigation report.

3 The [redacted] residence is located 2,067 metres to the south-east of turbine 42.

4 The [redacted] residence is located 1,659 metres to the south-east of turbine 47.

5 The [redacted] residence is located 3,666 metres to the south-east of turbine 47.

> The nuisance is offensive: since the Bald Hills Wind Farm became fully operational in mid-2015, Mr [redacted] complains that his personal comfort has been affected, particularly at night when he is unable to relax on his outdoor decking.

(e) By letter dated 24 June 2016, a notification was made on behalf of [redacted][6] The letter stated that:

> The nuisance is disrupting my clients' sleep: since the Bald Hills Wind Farm became fully operational in mid-2015, [redacted] complain that they are required to keep the radio playing throughout the night to try to block the sound of the blades.

(f) By letter dated 24 June 2016, a notification was made on behalf of [redacted][7] The letter stated that:

> The nuisance is adversely affecting [redacted] health: [redacted] has a chronic health condition which she believes is aggravated by the constant whoosh sound generated by the Bald Hills Wind Farm. The nuisance is a daily irritation and distraction to [redacted] and injurious to his personal comfort.

(g) By letter dated 26 July 2016, a notification was made on behalf of [redacted][8] The letter stated that:

> The nuisance is adversely affecting [redacted] health: since the Bald Hills Wind Farm became fully operational in mid-2015, [redacted] has developed headaches. His sleep is also disturbed by the nuisance. [redacted] instructs me that the nuisance becomes progressively worse over winter months when the wind is blowing from a north-northwest direction.

(h) By letter dated 30 August 2016, a notification was made on behalf of [redacted] The letter stated that:

> The nuisance is affecting my client's health: [redacted] complains that since the wind turbines have been in operation, she wakes up with

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6 The [redacted] residence is located 1,715 metres to the north-east of turbine 16.
7 The [redacted] residence is located 890 metres to the north-east of turbine 16.
8 The [redacted] residence is located 1,797 metres to the south-east of turbine 10.

> headaches of varying severity and sleep disruption. When the northwest wind has been blowing for four or five days in a row, the noise is so unbearable that [redacted] has to leave her home in order to get rest.

(i) By letter dated 6 September 2017, a notification was made on behalf of [redacted][9] The letter stated that:

> I am instructed that from within the farm house/residence, one can hear low-pitched noises from the surrounding wind farm rebounding off the walls continuously. The sound resembles a 'swoosh, swoosh, swoosh" sound. I am instructed that the [redacted] also feel vibrations from the windfarm within the farm house/residence.
> The nuisance is adversely affecting my clients' health: since the Bald Hills Wind Farm became fully operational in mid-2015, [redacted] especially complains of vibration in his head which affects his sleep. [redacted] and his family no longer sleep at the property because of the nuisance.

6. By letter dated 8 November 2018, Ms Tannock confirmed that she acts for [redacted] in relation to the statutory nuisance notices'.

2016 Noise Nuisance logs

7. In 2016, Council was also provided with copies of 'Noise Nuisance logs' created by some of the notifying persons which record their observations of the noise emanating from the BHWEF.

(a) [redacted] created a noise log covering approximately May, June and July of 2016. The entries in the log range from 'Dead calm no noise' to 'bad all night cannot sleep disturbed sleep very very bad';

(b) [redacted] created a noise log covering part of July of 2016. His entries include '18 July was the worst night I have experienced. Had to turn radio full on, but still could hear W/F.'

(c) [redacted] created a noise log for part of July 2016. His entries record that during this period he woke up with a headache on numerous occasions.

(d) [redacted] created a noise log for part of July 2016. Her entry for 7 July 2016 states 'Turbines roaring this afternoon + night. May as well

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9 The [redacted] residence is located 2,059 metres to the north-west of turbine 41.

10 [redacted] is not a 'notifier' for the purposes of s 62 of the Act.

have been standing @ airport next to revving planes. Sleep disturbance throughout night. Headache.'

(e) [redacted] created a noise log for part of July 2016. Numerous entries are similar to his entry for 1 July 2016 which states 'turbine noise, radio on all nite, disturbed sleep.'

(f) [redacted] created a noise log for part of July 2016. Her entry for 7 July 2016 states 'Turbines are so loud and non-stop. Ear plugs & radio and still could not cover noise, very restless & sleepless night. Headache, agitated due to noise. Can't sleep.'

(g) [redacted] created a noise log covering part of July 2016. His entry for 11 July 2016 states 'Whining / roaring noise from wind turbines or blades. Sleep deprivation headache'.

(h) [redacted] kept a noise log for part of July 2016. Her entry for 3 July 2016 states 'loud drone, could hear it over T.V. had to have TV up quite loud but couldn't drown it out.'

Initial Council investigation

8. Council conducted an initial investigation in 2016. The investigation was conducted by Council Officers who found that a nuisance did not exist for the purposes of the Act.[11] The 2016 investigation and its outcome was controversial. The question of the adequacy of the investigation gave rise to the commencement of Supreme Court proceedings.[12] Council agreed to commission a further investigation to be conducted independently.

Further independent investigation

9. In March 2018 Council engaged Dr James Smith to conduct an independent investigation of the nuisance notifications. Dr Smith's qualifications and experience are set out in an attachment to the Council's Ordinary Meeting Minutes dated 28 February 2018. Dr Smith:

(a) qualified as an environmental health officer in 1980 and worked for four municipal councils undertaking, amongst other things, nuisance investigations;

(b) for the last 30 years, has worked as a consultant in the field of public health and risk management to government and the not for profit sector;

(c) is a Professor in the Health and Environment Group, College of Science and Engineering, Flinders University;

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11 South Gippsland Shire Council, Minutes of Ordinary Meeting of Council, 28 February 2018, 49.

12 John Zakula and Ors v South Gippsland Shire Council, No SCI 2017 01300.

(d) is an Adjunct Associate Professor, School of Psychology and Public Health, La Trobe University.

10. The investigation report of James C Smith and Associates is dated September 2018 ('**Smith Report**'). All nine notification letters (identified at paragraph 5 above) were referred to Dr Smith.[13]

11. Dr Smith conducted extensive field work which included the following:[14]

(a) Interviewing [redacted] and making observations of noise (or the absence of noise) at his residence on 16 May 2018, 3 July 2018, 8 July 2018, 22 July 2018, 24 July 2018 and 25 July 2018;[15]
(b) Interviewing [redacted] at his residence on 8 July 2018;[16]
(c) Interviewing [redacted] and observing noise at their residence on 3 July 2018, 24 July 2018 and 25 July 2018;[17]
(d) Interviewing [redacted] and making observations of noise from their residence on 16 May 2018, 3 July 2018 and 8 July 2018.[18]

The above persons all completed noise logs broadly covering the period April through to July 2018 (with some variations in the time period covered). Copies of these logs are found at Attachment 1 to the Smith Report. The logs describe the noise emanating from the facility, which is not always present and varies with meteorological and wind conditions. The noise logs also describe the impact upon the complainants, including being woken from sleep and 'sleep deprivation'.

12. It is presumed that Dr Smith sought to investigate and interview all persons associated with the nine notification letters. In addition to the extensive field work involving the notifiers set out above, he received:

(a) a noise log entry from [redacted]
(b) a noise log for the period 29 May to 26 June 2018 from [redacted]
(c) advice that family illness prevented the [redacted] family from participating and that a copy of a statutory declaration was provided by DST Legal from [redacted] who worked as a farm helper and stayed on the [redacted]

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13 James C Smith & Associates, Investigation Report, Noise Complaint Notifications – Bald Hills Wind Farm, September 2018, 5-7, 22.
14 See also the Marshall Day Acoustics, Bald Hills Wind Farm, Review of Nuisance Investigation Report (October 2018), 14-15, which contains a helpful summary of the field work conducted by Dr Smith.
15 Ibid 7-10.
16 Ibid 10.
17 Ibid 10-12.
18 Ibid 12-13.

property stating that he had found it hard to sleep at night due to the wind farm turbines.

13. Accordingly, it appears that the following notifiers did not participate in the investigation:

    (a) [redacted]
    (b) [redacted] (observing however that he is a co-notifier together with [redacted]).

14. Dr Smith's conclusions include the following:

    (a) There is consistency with the information contained in the completed log books and the discussions held with [redacted] concerning their experiences. They all consistently allege that wind farm noise is audible within their homes and this gives rise to sleep disruption during the night and early morning hours.[19]
    (b) On the evenings of 24 and 25 July 2018, wind farm noise was clearly audible within the [redacted] and [redacted] dwellings, with windows and doors shut. In the case of the [redacted] dwelling the noise intruded into conversation. Dr Smith found that this experience corroborated claims that, at times, wind farm noise was clearly audible in dwellings and was intrusive. Dr Smith states that "it seems likely then that such noise could be heard over a television, or radio as has been recorded in some noise logs".[20]
    (c) The experiences in the [redacted] and [redacted] residences on 24 and 25 July 2018 were considered by Dr Smith to be 'unreasonable'.[21]
    (d) The noise experience at the [redacted] residence on 24 and 25 July 2018 was detrimental to personal comfort and the enjoyment of the residential environment by Mr and Mrs [redacted].[22]
    (e) Reports in noise logs described as a drone with a pulse or thumping are likely to be a consequence of amplitude modulation (a phenomenon which is not explained further but which I understand is best understood as a regular variation in noise caused by the rotation of turbine blades).[23]

15. Dr Smith concluded that:

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19 Ibid 20.
20 Ibid.
21 Ibid 20-21.
22 Ibid 21.
23 Ibid 20.

> After consideration of the completed noise logs by individual complainants and subsequent discussions with some of these individuals it appears there is a nuisance caused by wind farm noise, in that, the noise is audible frequently within individual residences and this noise is adversely impacting on the personal comfort and wellbeing of individuals.[24]

Provision of Smith Report to operator of BHWEF

16. Dr Smith's report was provided to the operator of the BHWEF which, through its solicitors (Allens Linklaters), provided three independent reports / opinions to Council in reply:

    (a) Peer Review of Smith investigative Report prepared by Arup (2 October 2018) ('**Arup Report**');
    (b) Review of Nuisance Investigation Report prepared by Marshall Day Acoustics (3 October 2018); and
    (c) Joint Memorandum of Advice prepared by Jason Pizer QC and Rudi Kruse (4 October 2018).

17. The Arup Report is authored by Dr Charlotte Clark with assistance from Dr Kym Burgemeister.[25] It identifies a number of shortcomings in the Smith Report, concluding that it cannot be relied upon. The essential criticisms are outlined below.

    (a) Generally, for a nuisance to exist, the level of noise would usually need to be louder than that allowed under the planning permit which is aimed at protecting the health and amenity of residents.[26]

    (b) Noise nuisance cases need to be assessed by objective and suitably qualified investigators. It is not clear what qualifications were held by the personnel who undertook the investigation.[27]

    (c) Investigation of nuisance should be informed by objective and subjective data sources. The Smith Report has not collected or considered data from a range of sources including meteorological data, acoustic data or information from the wind farm operator.[28]

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24 Ibid 21.

25 Dr Clark's CV, appended to the Arup report, states that she is an Environmental and Mental Health Edidemiologist and Chartered Psychologist with a PhD in Psychology and a BSc in Psychology. Dr Burgemeister is an acoustic engineer with a BE and a PhD in Acoustics and Vibration.

26 Peer Review of Smith Investigation Report, Arup (2 October 2018), [27].

27 Ibid [30]. This criticism is understandable given that Dr Smith's experience (cited at paragraph 9 of this advice) is not identified in his report.

(d) The frequency and duration of any problem events need to be considered and the noise logs are not consistent in reporting duration.[29]

(e) The Smith Report does not properly consider the noise sensitivity, hearing problems and existing health of the complainants.[30]

(f) The complainant logs have not been compared to objective noise measurements taken over the same time period. Objective corroboration is therefore not possible. Objective corroboration is required because it is widely acknowledged that noise logs are easily exaggerated, falsified and can be inaccurate. Without corroboration, noise log data cannot be interpreted as supporting a nuisance claim.[31] Further, the noise logs provided lack particularity.[32]

(g) The noise logs and home visits constitute subjective data in the Smith Report.[33]

(h) The Smith Report confuses the evening period with the night-time period.[34]

(i) The Smith Report does not provide comfort that the visits to the complainants' homes were objective.[35]

(j) The Smith Report does not contain an appropriate literature review on the impact of wind turbine noise on health.[36]

(k) It is not appropriate to decide that there is a nuisance based on noise being audible on a couple of occasions.[37]

18. The Marshall Day review of the Smith Report was conducted by Justin Adcock[38] and Christophe Delaire.[39] Their essential criticisms of the Smith Report are outlined below.

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28 Ibid [31], [41].
29 Ibid [44]-[45].
30 Ibid [12].
31 Ibid [32].
32 Ibid 39].
33 Ibid [34], [35]-[37].
34 Ibid [46].
35 Ibid [46].
36 Ibid [49]-[54].
37 Ibid [58].
38 BE (1998).
39 MEng (2001).

(a) The question of whether the BHWEF is compliant with the Planning Permit, broadly, or at the complainant locations, was not considered by the Smith Report.[40]

(b) The Smith investigation did not include monitoring of acoustic or non-acoustic data.[41]

(c) Details of the instrumentation used in recording sound levels at the time of the Smith field work is not recorded. Its location, accuracy and measurement configuration is not known.[42]

(d) Various memorandums and reports prepared by Marshall Day do not appear to have been made available to Dr Broner and these collectively provide extensive information about noise monitoring, audio reviews and analysis of potential Special Audible Characteristics carried out by Marshall Day at complainant residences.[43]

(e) Noise monitoring conducted by Marshall Day at the complainants' residences demonstrate compliance with the Planning Permit.[44]

(f) The investigation is heavily reliant on the subjective observations carried out by the investigator on two visits to residences (24 and 25 July) to reach the conclusion that the BHWEF represents a nuisance.[45]

(g) The Smith Report does not appear to consider the Marshall Day compliance assessments at the complainant locations.[46]

(h) The experiences of the investigators on 24 and 25 July (noise of wind farm intruding into conversation) are exceptional and do not reconcile with the Marshall Day compliance assessments. Extended monitoring demonstrated derived noise levels attributable to the wind farm below 40dB, whereas conversation levels are normally above 50 dB and typically above 60dB. External noise from the facility is therefore well below conversation levels and would not be expected to interfere or intrude on normal conversation.[47]

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40 Marshall Day Acoustics, Bald Hills Wind Farm, Review of Nuisance Investigation Report (October 2018), 12.
41 Ibid.
42 Ibid 13.
43 Ibid 16.
44 Ibid 16.
45 Ibid 17.
46 Ibid 18.
47 Ibid 18-19.

19. The legal opinion from Jason Pizer QC and Rudi Kruse ('**Pizer and Kruse Opinion**'):

    (a) proceeds on instructions that the BHWEF operates in compliance with the NZ Standard;

    (b) identifies a definition / test to determine whether a nuisance, for the purposes of the Act, exists;

    (c) states that the Smith Report does not identify the correct test for determining whether a nuisance exists for the purposes of the Act;[48]

    (d) states that it is unlikely that the BHWEF will give rise to a noise-related nuisance if there is compliance with the operational noise limits in the planning permit;

    (e) states that while the Smith Report is a relevant consideration for Council to consider in determining whether the BHWEF is causing a nuisance, there are other additional matters that Council should consider before reaching a concluded view on the matter.

    The Pizer and Kruse Opinion is thorough and well-researched and I return to aspects of it in the discussion below.

Further comment sought from DST Legal

20. In the interests of fairness and transparency, copies of the three reports / opinions referred to above were provided to DST Legal (acting for the notifiers) for further comment and response. That response was provided by DST Legal by letter dated 8 November 2018 accompanied by numerous attachments. The DST letter stated, amongst other things, that:

    (a) the test for determining a nuisance set out in the Pizer and Kruse Opinion is incorrect to the extent that it states that to be a nuisance, the phenomenon complained of must be more than annoying;[49]

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48 The Smith Report does not provide a detailed analysis or legal reasoning as to what a nuisance is for the purposes of the Act, it does refer to s. 58 of the Act at page 4.

49 DST Legal, letter dated 8 November 2018, [2].

(b) compliance with the relevant planning permit is not a defence to nuisance and in any event, the BHWEF has not shown that it complies with its permit at all times;[50]

(c) asserted compliance with the relevant planning permit is of less relevance in this case given that it invokes a Noise Standard which is now superseded;[51]

(d) the Marshall Day approach is flawed because it focusses on average sound levels;[52]

(e) the Council must decide for itself whether a nuisance exists and the opinions of Pizer and Kruse and even Dr Smith, do not bind the Council;[53]

(f) the question of whether a nuisance exists should be answered on the balance of probabilities.[54]

Further response on behalf of the BHWEF operator

21. The letter of DST Legal dated 8 November 2018 was provided to the operator of the BHWEF. Through its solicitors, Allens Linklaters, it provided a further response under cover of letter dated 25 November 2018. It stated, amongst other things, that:

(a) The Pizer and Kruse opinion addresses the legal meaning of nuisance at length and is essentially not in dispute;

(b) Council should consider the precautions taken by the operator of the BHWEF to reduce its noise emissions;

(c) because of the seriousness of the allegations made, and the gravity of the consequences which will follow from any Council finding to the effect that a nuisance exists, clear and cogent proof is required to support a finding that a nuisance exists;

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50 Ibid [3].
51 Ibid [79].
52 Ibid [19]. This is a difficult criticism to sustain given that Marshall Day have conducted assessments against the NZ Standard which specifically calls for the analysis of levels received at sensitive receptors on the basis of L_{eq} levels. The NZ Standard (in the note to section 4.4.2) calls for predicted levels to be based on the L_{eq} source level of the turbines under consideration and hence the predicted level is also an L_{eq} level. L_{eq} is the preferred method to describe sound levels that vary over time, averaged to give rise to a single decibel value which takes into account the total sound energy over the relevant time period.
53 Ibid [4].
54 Ibid [6].

(d) the NMS Report dated August 2018 ([redacted] contains 'fundamental errors'.

22. While the letter was critical of the work of [redacted] it also stated that Council's investigation 'should not become a contest between competing noise experts'.

23. Allens Linklaters also provided:

(a) a letter from Marshall Day (summarised briefly at paragraph 43(m) below) which contains a critical assessment of an NMS Acoustic report dated August 2018; and

(b) a letter from Arup dated 22 November 2018 responding to the DST Legal letter dated 8 November 2018. It stated, amongst other things, that [redacted] evidence is not admissible due to his individual noise sensitivity and the fact that he suffers from tinnitus.

Council meeting – 6 February 2019

24. Presentations were made to Council on 6 February 2019 on behalf of both the notifiers and the BHWEF. Ms Tannock of DST Legal presented on behalf of the notifiers and Mr Rudi Kruse of counsel appeared on behalf of the BHWEF. Mr Kruse spoke to a written submission dated 6 February 2019.

25. During the course of the presentation on behalf of the BHWEF, it was agreed that the operator would provide further information to Council. This consisted of the filtering methods used by Marshall Day, details of the curtailment strategy employed by Marshall Day, and noise monitoring data compiled by Marshall Day. This material was provided under cover of letters dated 15 February 2019 and 1 March 2019 from Allen Linklaters to Maddocks.

26. By letter dated 3 March 2019, DST Legal provided a detailed response to the additional information. Amongst other things, it criticised a series of reports, relevantly referred to at paragraphs 43(d), (f), (i) and (n) below.

27. Finally, by letter dated 7 March 2019, Allens Linklaters addressed the contentions made in the DST Leal letter dated 3 March 2019. That letter marked an end to the submission process.

What is a nuisance for the purposes of the Act?

28. Section 58 of the Act provides as follows:

> (1) This Division applies to nuisances which are, or are liable to be, dangerous to health or offensive.
>
> (2) Without limiting the generality of subsection (1), this Division applies in particular to nuisances arising from or constituted by any —
>
> (a) premises; or
>
> (b) water; or
>
> (c) animal, including a bird or insect, capable of carrying a disease transmissible to human beings; or
>
> (d) refuse; or
>
> (e) noise or emission; or
>
> (f) state, condition or activity; or
>
> (g) other matter or thing —
>
> which is, or is liable to be, dangerous to health or offensive.
>
> (3) For the purpose of determining whether a nuisance arising from or constituted by any matter or thing referred to in subsection (2) is, or is liable to be, dangerous to health or offensive —
>
> (a) regard must not be had to the number of persons affected or that may be affected; and
>
> (b) regard may be had to the degree of offensiveness.
>
> (4) In this section, offensive means noxious or injurious to personal comfort.

29. Breaking down these constituent elements, in order for Council to find that a nuisance for the purposes of the Act exists, it must find that:

(a) there is a 'nuisance'; and
(b) it is 'dangerous to health'; or
(c) 'offensive' which means 'noxious or injurious to personal comfort'.

30. Where words which have acquired a legal meaning are used in a statute, it will be taken that the legislature has intended to use them with that meaning unless a contrary intention appears.[55] The term 'nuisance' has an acquired legal meaning

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[55] DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (Lexis Nexis Butterworths, 7th ed, 2011), [4.13] citing *Attorney-General (NSW) v Brewery Employees' Union of New South Wales* (1908) 6 CLR 469.

and there is no suggestion in the Act that this meaning does not apply. I agree with the Pizer and Kruse Opinion that the word 'nuisance' picks up its common law meaning.[56] This is also consistent with the Supreme Court's decision in *Fertility Control Clinic v Melbourne City Council*[57] in which McDonald J stated:

> The Act applies to conduct which constitutes a public or private nuisance, provided such conduct is, or is liable to be, dangerous to health or offensive.[58]

31. A public nuisance is an act or omission which interferes with the use and enjoyment of a public right. The essence of public nuisance is interference with rights common to the public at large.[59]

32. A private nuisance is a substantial and unreasonable interference with the private right to use and enjoy land.[60]

33. In this case, what is alleged is a private nuisance, namely an interference with the private right of the notifying persons to use and enjoy their homes. In *Oldham v Lawson (No 1)*[61] the Court, in considering an alleged private nuisance caused by noise, considered the requirement that it be 'substantial' and stated that:

> To establish a nuisance, the plaintiffs must show that there has been a substantial degree of interference with their enjoyment of their use of [their home]. What constitutes such a substantial degree of interference must be decided according to what are reasonable standards for the enjoyment of those premises. What are reasonable standards must be determined by common sense, taking into account relevant factors, including what the Court considers to be the ideas of reasonable people, the general nature of the neighbourhood and the nature of the location at which the alleged nuisance has taken place, and the character, duration and time of occurrence of any noise emitted, and the effect of the noise.

34. In *Riverman Orchards Pty Ltd v Hayden*[62] the Court considered the elements 'substantial' and 'reasonable' in the following way:

> **Substantial interference**

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56 Pizer and Kruse Opinion, [23].
57 (2015) 47 VR 368, [26]-[27]
58 Ibid [26].
59 *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169; *Grand Central Car Park Pty Ltd v Tivoli Freeholders* [1969] VR 62, 72 (McInerney J).
60 *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, 896-7; *Munro v Southern Dairies Ltd* [1955] VLR 332, 334 (SchollJ).
61 [1976] VR 654, 655 (Harris J).
62 [2017] VSC 379 (John Dixon J).

> In *Walter v Selfe*, Knight-Bruce VC described the need for alleged interference to be substantial as follows, a position later affirmed in the Victorian case *Haddon v Lynch*:
>
> > The inconvenience which the Court will protect against must not be one of mere delicacy and fastidiousness, but must be an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain, sober, and simple notions among English people.
>
> This will be a question of fact, however, it should be noted that even transitory activities may constitute a substantial interference.
>
> **Unreasonable interference**
>
> Whether interference is unreasonable is an objective question, requiring consideration of a number of factors, including:
>
> (a) the 'nature and extent of harm or interference';
>
> (b) 'the hypersensitivity (if any) of the user or use of the plaintiff's land although abnormal sensitivity may not entitle additional protection';
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> (c) 'the nature of established uses in the locality';
>
> (d) 'whether all reasonable precautions were taken to minimise any interference'; and
>
> (e) 'the type of damage suffered'.[63]
>
> (Footnotes omitted)

35. The only apparent disagreement between the parties as to what constitutes a nuisance for the purposes of the Act is the question of whether the alleged interference must be more than merely annoying. DST Legal state that there is no basis for this conclusion. I disagree. As the Pizer and Kruse opinion explains, in predecessor legislation (the *Health Act 1958*), the term 'annoying' was formerly included as part of the definition of offensive. The Explanatory Memorandum to the Public Health and Wellbeing Bill 2008 states as follows:

> Clause 58 provides that this Division applies to nuisances if they are, or are liable to be, dangerous to health or offensive. This section defines the term *offensive* to mean noxious or injurious to personal comfort. The definition of *offensive* is narrower than that in the Health Act 1958, which was "noxious, annoying or injurious to personal comfort".

36. I agree that it is reasonable to infer that the deletion of the word 'annoying' in the new legislation had a purpose. Accordingly, if Council is satisfied that a

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63 Ibid [178]-[180].

nuisance exists, in order to attract the application of the Act, it must be more than merely annoying.

37. In considering whether the interference is substantial, disruption of sleep is a significant factor.[64] The loss of even one night's sleep may amount to such a substantial interference with personal comfort as to constitute a nuisance.[65]

The first question - is it reasonably open to Council to find that noise emanating from the BHWEF constitutes a nuisance for the purposes of the Act?

38. In considering whether a nuisance exists, Council must make its own determination.[66] I agree with Ms Tannock that Council is not bound by the conclusions of Dr Smith (or any other persons). However, Dr Smith's observations will be highly relevant for Council to consider.

39. In considering the issue, Council should ask the following questions (consistent with the Pizer and Kruse opinion):

    (a) Has the BHWEF caused a substantial and unreasonable interference with the private right of any of the complainants to use and enjoy their land?

    (b) Is the interference dangerous to health?

    (c) Is the interference *liable* to be dangerous to health?[67]

    (d) Is the interference noxious?[68]

    (e) Is the interference liable to be noxious?

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64 *Andrea v Selfridge & Co Ltd* [1937] 3 All ER 255, 261 (noise from construction works); *Haddon v Lynch* [1911] VLR 5, 9 (ringing of a church bell early on a Sunday morning); *Vanderpant v Mayfair Hotel Co Ltd* [1930] 1 Ch 138, 167 (noise from a commercial kitchen – '… the evidence has satisfied me that there is a nuisance caused in the early hours of the morning by the staff of the hotel leaving by the entrance in Curzon Street, and later by the arrival of the staff and of the milk and ice. The noises thus caused have frequently awakened the several witnesses and have made it difficult for them to enjoy a proper period of rest and sleep'); *Munro v Southern Dairies* [1955] VLR 332, 336 (noise from horses in a stable); *Cohen v City of Perth* (2000) 112 LGERA 234, [182] (noise of garbage trucks).

65 *Munro v Southern Dairies* [1955] VLR 332, 335 (Sholl J).

66 I have not been asked to consider whether the power to find whether a nuisance exists, which is conferred by s 62(3), is delegable. In this case, Council proposes to exercise the power conferred by s 62(3).

67 The use of the term 'liable to be' in the legislation means that the danger to health might not have manifested. A nuisance which is liable to be dangerous to health is one which is likely to be dangerous to health, if allowed to continue. See the Macquarie Dictionary definition of 'liable'.

68 The term 'noxious' is defined by the Macquarie Dictionary as 'harmful or injurious to health or physical well-being.'

(f) Is the interference injurious to personal comfort?

(g) Is the interference liable to be injurious to personal comfort?

If the answer to (a) is in the affirmative, then an affirmative answer to any one of the remaining questions will yield the conclusion that the BHWEF has caused a nuisance for the purposes of the Act.

40. The question arises as to what level of certainty Council must have in answering these questions. Ms Tannock states that in determining whether a nuisance exists, Council should not fall into error by seeking absolute certainty, or by applying a "beyond reasonable doubt" test.'[69] I agree. In my opinion, to find that a nuisance exists, Council should be 'reasonably satisfied' that a nuisance exists.[70]

Relevance of planning permit and NZ Standard

41. The BHWEF has been constructed and used pursuant to Planning Permit No TRA/03/002 issued on 19 August 2004 ('**planning permit**'). It contains the following words of permission:

> Use and development of land for a wind energy facility for the generation and transmission of electricity from wind generators, together with associated buildings and works, including preliminary investigative works.

42. Conditions 18 to 25 of the planning permit specify requirements concerning the emission of noise from the BHWEF. In particular, condition 19 of the planning permit provides that the operation of the facility must comply with the 'Acoustics – The Assessment of Measurement of Sound from Wind Turbine Generators' (NZS 6808:1998) ('**NZ Standard**') to the satisfaction of the Minister for Planning. Condition 19 also provides that:

> (a) The sound level from the wind energy facility, when measured outdoors within 10 metres of a dwelling at any relevant nominated wind speed, should not exceed the background level (L95) by more than 5dBA or a level of 40dBA L95, whichever is greater.[71]

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69 Letter from DST legal to Maddocks dated 8 November 2018, [6].

70 See *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361–2 and also s 140(2) of the *Evidence Act 2008*.

71 The metric 'L95' effectively represents the background noise level. It is a level which is exceeded 95% of the time.

(b) When sound has a special audible characteristic, the measured sound level of the source shall have a 5dB penalty applied.

(c) Compliance at night must be separately assessed with regard to night time data. For these purposes the night is as defined in SEPP-N1. For sleep protection purposes, a breach of the standard set out at 19(a) for 10% of the night, amounts to a breach of the condition.

43. There are numerous technical reports, memorandums and the like which address the issue of whether the wind farm complies with the planning permit and the NZ Standard. These include:

(a) 22 July 2016: Marshall Day Acoustics, Memorandum (Mm 020) concerning noise complaints made by [redacted] This memorandum found that while noise from the facility was at times audible, it complied with the noise levels set by the planning permit.

(b) 22 July 2016: Marshall Day Acoustics, Memorandum (Mm 021) concerning noise complaints made by [redacted] This memorandum found that while noise from the facility was at times audible, it complied with the noise levels set by the planning permit.

(c) 8 August 2016: Marshall Day Acoustics, Memorandum (Mm 018) concerning noise complaints made by [redacted] This memorandum found compliance with the noise levels of the permit and also recommended that field investigations be conducted given the potential sound features identified during the review of audio samples.

(d) 12 December 2016: Marshall Day Acoustics, Bald Hills Wind Farm, Assessment of Wind Farm Operational Noise. This report found compliance with the noise levels of the permit except for 'Property 28' and 'tenement Property B'. It states that a suitable curtailment strategy has been developed. Marshall Day apply a tonal penalty for properties 19 and 61 (demonstrating that the issue has been considered). Looking at the site map in that report (at page 57) and comparing it with the map at Appendix 2 of the Smith Report, properties 19, 28, 61 and Tenement Property B are not owned or occupied by any of the notifying parties.

(e) 20 February 2017: Les Huson & Associates, letter to [redacted] stating, amongst other things, that the Marshall Day compliance assessment is unreliable.

(f) 19 May 2017: Marshall Day Acoustics, Bald Hills Wind Farm, Assessment of Wind Farm Operational Noise. This report considered measured noise levels at receiver locations neighbouring the BHWEF for a period of twenty months. It stated that the noise emitted from the facility generally complied with the noise levels of the permit. However, it also reported that emitted noise exceeded the applicable NZ Standard noise limits by up to 1.2 dB for a limited range of wind speeds during the night period at 'Property 28' and 'tenement Property B'.

Marshall Day's field work is reported as including a number of 'attended listening appraisals' to subjectively evaluate the character of the wind farm sound. Fifty six listening studies were carried out across 13 monitoring locations, with the result that tonality was a characteristic which required objective assessment at 4 properties. Applying the special audible characteristics penalty to the measured noise levels (where a tone was identified), gave rise to non-compliance with the noise levels of the permit at 'Property 61' and 'Tenement Property A'. In summary, the night hours assessment concluded that compliance was not able to be demonstrated at 4 of the 13 assessed properties for a limited range of wind speeds (Property 28, Tenement Property B, Property 61 and Tenement Property A). A preliminary curtailment strategy was implemented for these 4 properties and additional assessment demonstrated the effectiveness of that strategy. However, even with the preliminary curtailment strategy in place, Tenement Property B still showed a marginal excess of 0.3 dB above the limit. Marshall Day reported that 'this level of excess does not represent a subjectively significant change in sound levels perceived by a receiver.' Nevertheless, the preliminary curtailment strategy would require revision for this location. Accordingly, a revised preliminary curtailment strategy would be developed and implemented before the end of May 2017 with further assessment required to determine whether compliance with the permit limits could be achieved.

Looking at the site map in that report (at page 70) and comparing it with the map at Appendix 2 of the Smith Report, Property 28, Tenement Property B, Property 61 and Tenement Property A are not occupied by any of the notifiers.

(g) 2 June 2017: Marshall Day Acoustics, Bald Hills Wind Farm, Assessment of Wind Farm Operational Noise, [redacted] Property. This report assessed noise levels at the [redacted] property between 21 October 2015 and 30

September 2016 and found compliance with the noise levels of the permit. A tonality penalty was considered in this assessment.

(h) 2 June 2017: Marshall Day Acoustics, Bald Hills Wind Farm, Assessment of Wind Farm Operational Noise, [redacted] Property. This report assessed noise levels at the [redacted] property between 7 September 2015 and 30 September 2016 and found compliance with the noise levels of the permit. A tonality penalty was considered in this assessment.

(i) 2 June 2017: Marshall Day Acoustics, Bald Hills Wind Farm, Assessment of Wind Farm Operational Noise, [redacted] Property. This report assessed noise levels at the [redacted] property between 8 September 2015 and 30 September 2016 and found compliance with the noise levels of the permit. A tonality penalty was considered in this assessment.

(j) August 2018: Noise Measurement Services ([redacted] Bald Hills Wind Farm, Summary Noise Monitoring Report. This report concludes that the BHWEF was non-compliant with the planning permit for times in June, July and August 2018.

(k) 9 September 2018: Bald Hills Wind Farm, Review of assessment reports and associated documents, Broner Consulting. In this report, appended to the Smith Report, Dr Broner queries, amongst other things, why Marshall Day did not conduct listening observations at night.[72] If special audible characteristics are present at night, this may give rise to a need to impose a penalty in accordance with the NZ Standard and condition 19(b) of the planning permit.[73]

(l) 5 October 2018: Marshall Day Acoustics, Bald Hills Wind Farm, Review of Nuisance Investigation Report. The substance of this report is summarised above at paragraph 18.

(m) 23 November 2018: Marshall Day Acoustics ([redacted] letter to Allens Linklaters. Provides a critical assessment of the August 2018 report of Noise Management Services stating that it contains 'fundamental errors and limitations' and concluding that it 'is not possible to reach any

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72 Ibid.

73 Paragraph 4.4.3 of the Standard provides that predicted or measured sound pressure levels from turbines 'with known special audible characteristics shall be adjusted by adding +5 to the level. This adjustment is a penalty to account for the adverse subjective response likely to be aroused by sounds containing such characteristics.' See also section 5.3 of the NZ Standard and condition 19(c) of the planning permit.

> firm conclusions about the noise compliance status of the wind farm from the NMS Report.'

(n) 1 March 2019: Marshall Day Acoustics, Bald Hills Wind Farm, Assessment of Wind Farm Operational Noise, [redacted] Property (May – July 2018). This report assessed noise levels at the [redacted] property between 1 May and 7 July 2018 and found compliance with the noise levels of the permit. Assessment of audio recordings was conducted to consider tonality and a tonality penalty was considered in this assessment.

44. Substantial work has been undertaken by Marshall Day Acoustics which supports the proposition that the BHWEF is compliant with the planning permit, particularly at the dwellings occupied by the notifying parties.

45. The Pizer and Kruse opinion concludes that compliance with the planning permit will not be determinative as to whether a nuisance exists. First, they conclude that the grant of a planning permit cannot constitute statutory authority to commit a nuisance.[74] Second, they explain that a potential nuisance may constitute a substantial and unreasonable interference with a person's enjoyment of their land, even if it complies with a planning permit or relevant standard.[75] To this extent, there appears to be agreement as between the Pizer and Kruse Opinion and the response of DST Legal dated 8 November 2018. This position is confirmed by Mr Kruse's 6 February 2019 submissions to the effect that compliance with relevant planning permit conditions is not determinative as to whether or not a nuisance exists for the purposes of the Act.[76]

46. However, if there is compliance with the planning permit, Pizer and Kruse opine that it is unlikely that a noise related nuisance can be made out.[77] This is essentially because the permit conditions and the NZ Standard are designed to establish reasonable noise limits to preserve residential amenity.[78] Amongst other things, Pizer and Kruse refer to the NZ Standard at section 4.4.1 which explains the basis for the noise limits imposed:

> In order to provide a satisfactory level of protection against the potential adverse effects of [Wind Turbine Generator] sounds, this Standard recommends an upper limit of acceptable [Wind Turbine Generator] sound levels outdoors at the residential locations of 40dBA L_{95} … This has been based on an internationally

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74 Pizer and Kruse Opinion [34]-[37].
75 Ibid [38]-[44].
76 Kruse submission dated 6 February 2019, [35].
77 Pizer and Kruse Opinion [50].
78 Pizer and Kruse refer to the noise limits established by the permit as arising from the Victorian Planning Provisions which require the Planning Minister to consider the effect of the proposal on the surrounding area in terms of, amongst other things, noise. At [11]-[12], [49].

> accepted indoor sound level of 30 to 35dBA L_{eq} commonly used as a design level to protect against sleep disturbance … A reduction from outdoors to indoors of typically 10 dB with open windows has been assumed.

47. There is force in the submission that compliance with the planning permit will represent a 'starting point' which supports the conclusion that the noise emitted by the BHWEF is within acceptable limits and is not unreasonable.[79]

48. The question of compliance with a Standard and planning permit conditions which are designed to address acoustic amenity is also clearly relevant as to whether any noise emitted can be found to be unreasonably made. Where there is clear evidence that conditions in a permit addressing acoustic amenity are met, and those conditions, as they are in this case, are based on an international Standard, this provides a strong basis for the proposition that the noise emitted is not unreasonable.

49. There is conflicting evidence and at least some doubt raised by the assessments of [redacted] as to whether the BHWEF operates in compliance with its permit. It is not possible, without having the evidence of all acoustic experts tested, to make definitive conclusions about planning permit compliance in this case. Further, even if these experts were to give evidence and have their evidence tested in a Court or Tribunal, it is clear that [redacted] assessment period differs from the assessments conducted by Marshall Day. [redacted] assessment coincides with part of the period in 2018 in which the noise logs considered by Dr Smith were created. [redacted] concludes that the BHWEF was not compliant with its permit on dates and times in June, July and August 2018.[80] In turn, in a recent letter, [redacted] (of Marshall Day) is highly critical of [redacted] assessment.

50. Given the conflicting evidence and reports, the sheer quantity of the material in the reports, their highly technical nature, and the fact that it is not part of my brief to question the authors in person, I am not in a position to offer an opinion as to whether the BHWEF is operating in accordance with its planning permit. I agree with the comment in a recent letter from Allens Linklaters that Council's investigation 'should not become a contest between competing noise experts.'[81]

51. The proper place to adjudicate whether a land use is operating in accordance with the terms of its planning permit is the Victorian Civil and Administrative

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79 Pizer and Kruse Opinion [49].

80 Noise Measurement Services, Bald Hills Wind Farm, Summary Noise Monitoring Report August 2018), 17.

81 Letter dated 25 November 2018 from Allens Linklaters to Maddocks.

Tribunal ('**Tribunal**'). Section 114(1) of the *Planning and Environment Act 1987* relevantly provides that:

> A responsible authority or any person may apply to the Tribunal for an enforcement order against any person specified in subsection (3) if a use or development of land contravenes or has contravened, or, unless prevented by the enforcement order, will contravene … a condition of a permit …

Further, s 149B(1) of the *Planning and Environment Act 1987* provides that:

> A person may apply to the Tribunal for a declaration concerning—
> (a) any matter which may be the subject of an application to the Tribunal under this Act …

52. It can be observed that no person (including the Minister for Planning, the Council or any neighbour) has commenced proceedings at the Tribunal alleging that the BHWEF is not in compliance with its planning permit.

53. In the event that the complainants wish to pursue the question of whether there is compliance with the planning permit, it is open for them to do so by commencing proceedings which invoke these provisions. A potential complication in taking such action is that condition 19 does not simply state that the facility must observe certain noise limits. Rather, the requirement is compliance with the relevant noise limits 'to the satisfaction of the Minister for Planning'. Strictly speaking, condition 19 is only breached when the given noise limits are not met *and* the Minister for Planning is dissatisfied.

54. Given that it is very difficult for Council to determine whether there is compliance with the planning permit, combined with the fact that compliance will not be determinative as to whether a nuisance exists, I think that the preferable course for Council is to decide whether a nuisance exists, as best this can be done, without coming to a conclusion concerning planning permit compliance. However, if Council forms the view that based on the material before it, there is compliance with the planning permit, this will provide support for the conclusion that any noise emitted by the BHWEF is not unreasonably made. Alternatively, if Council forms the view that based on the material before it, there is non-compliance with the planning permit, this will support the conclusion that any noise emitted by the BHWEF is unreasonably made.

Assessing the evidence

55. While Council will consider all the evidence carefully, it is relevant that the noise logs from 2018 (which are appended to the Smith Report) provide

significant evidence of sleep disturbance. A summary of the noise logs focusing on this aspect is provided below.

(a) On the following dates in 2018, [redacted] was woken by noise from the BHWEF and on numerous of these occasions had difficulty in getting back to sleep – May 4, 6, 15, 24, 26; June 10, 14, 23, 30; July 1, 11, 15, 16 , 17.

(b) On the following dates in 2018, [redacted] experienced difficulties in getting to sleep or otherwise had her sleep disturbed by the BHWEF - 30 May; June 5, 7, 8, 17.

(c) On the following dates in 2018, [redacted] refers to the BHWEF giving rise to sleep deprivation – April 5, 6, 7, 8, 9; May 3, 4, 5, 6, 7, 9, 17, 18, 22, 29; 8, 9, June 13, 14, 20 , 23, 30; July 6, 7, 9, 11, 18, 19, 20, 22, 23, 24, 26, 30, 31.

(d) On the following dates in 2018 [redacted] reported sleep disturbance or being awoken by the BHWEF – 3, 9, 11 May.

(e) On the following dates in 2018, [redacted] reported being awoken or having difficulties in sleeping as a consequence of noise from the BHWEF – July 11, 21, 27; 2 August.

(f) On the following dates in 2018, [redacted] reported that he was either unable to get to sleep or that his sleep was disturbed as a consequence of noise from the BHWEF – April 8, 9, 10, 11, 13, 14, 15, 16, 23, 25, 26; May 1, 2, 3, 4, 5, 7, 9, 11; July 4, 5, 6, 7, 8, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30, 31.

56. A major question for Council to consider is whether these noise logs should be accepted as representing the truth. The Arup Report highlights that the noise logs have not been compared with, or corroborated by, objective noise measurements taken over the same time period. It also states that objective corroboration is required because it is widely acknowledged that noise logs are easily exaggerated, falsified and can be inaccurate.

57. There is no doubt that the investigation by Dr Smith could have been more comprehensive in that it could have involved the collection of objective meteorological and acoustic data. In order to undertake this task, it would have been necessary for Council to engage independent acoustic consultants with calibrated noise measuring equipment to conduct independent assessments

during the 2018 noise log collection period. However, this would also have involved significantly greater cost and no doubt Council has many pressures on its budget to provide services for the broader municipality.

58. The experience and observations of Dr Smith in the properties of two complainants on 24 and 25 July 2018 are in my opinion critical. He observed at the [redacted] and [redacted] properties that noise emissions from the BHWEF are audible, indoors, with the windows and doors shut. These properties are respectively 1,659 and 1,131 metres distant from the nearest turbine. In the case of the [redacted] residence, Dr Smith observed that noise from the facility is capable of intruding into conversation, held indoors, with windows and doors shut. These findings tend to corroborate the fact that noise from the BHWEF is capable of giving rise to sleep disturbance at these properties.

59. Given the significance of the noise intrusion observed by Dr Smith, in my opinion, it is also open to conclude that such noise could give rise to sleep disturbance within the normal population of people (and not just those that might be particularly sensitive, aggravated or otherwise focused upon noise emanating from this facility). Dr Smith's observations also tend to corroborate the recordings in noise logs to the effect that noise from the facility can sometimes be heard over a television or radio.

60. The Arup Report states that the home visits conducted by Dr Smith constitute subjective data and that Council cannot be satisfied that the visits to the complainants' homes were objective. The authors of the Arup Report were unaware of Dr Smith's experience (as his CV is not attached to his report).

61. In my opinion, Council is entitled to treat Dr Smith's direct observations, particularly those made on 24 and 25 July 2018, as those of an independent and objective professional. Dr Smith was engaged by Council on the basis of his independence and experience. A publication often quoted in the Arup Report states that in relation to gathering evidence as part of a nuisance investigation:

> In most circumstances the evidence gathered by Local Authority staff with suitable knowledge and skills will be used to establish whether Statutory Nuisance exists. As a consequence, the evidence collected will need to be robust and of good quality in case it is needed for any subsequent enforcement action by the local authority or at an appeal against any abatement notice. The best evidence is that witnessed and gathered first-hand by the [Local Authority] staff or specialist consultants commissioned by the Local Authority, although reliable and corroborative evidence provided by a complainant will often be an important feature of an investigation, as the use of noise measurements can be.[82]

[82] Wind Farm Noise Statutory Nuisance Complaint Methodology, Report prepared for Defra: Contract No. NANR 277, AECOM, 6 April 2011, 91.

(Emphasis added)

62. Here, Council arguably has to hand the best evidence available, namely that witnessed first-hand by a specialist independent consultant commissioned by Council, namely Dr Smith. It is corroborated by three complainants in this case.

63. In my opinion, if Council can be satisfied that the noise logs represent truthful accounts of the impact of the noise of the BHWEF upon the complainants, then, from time to time, the noise emitted by the BHWEF substantially and materially impacts upon their comfort and the enjoyment of their homes. If the noise of the BHWEF disrupts their sleep as often as is claimed, I believe this represents a private nuisance which is 'offensive' for the purposes of the Act because it is 'injurious' to the personal comfort of the complainants. In other words, it causes injury to their personal comfort. At the very least, noise from the BHWEF is liable to cause injury to the personal comfort of the complainants.

64. As stated above, the common law authorities on nuisance place significant emphasis on sleep disturbance. In stating that the loss of one night's sleep caused by noise may amount to nuisance, the Supreme Court referred favourably to the following passage:

> … that the complaints were substantial complaints I, for one am satisfied, and I certainly protest against the idea that, if persons, for their own profit and convenience, choose to destroy even one night's rest of their neighbours, they are doing something which is excusable. To say that the loss of one or two nights' rest is one of those trivial matters in respect of which the law will take no notice appears to me to be quite a misconception, and, if it be a misconception existing in the minds of those who conduct these operations, the sooner it is removed the better.[83]

65. In this case it does not appear to be argued by any party that the operator of the BHWEF is choosing to cause injury to its neighbours. To the contrary, numerous assessments and acoustic investigations have been undertaken at the expense of the operator in order to assess compliance with applicable noise limits. However, the passage quoted above emphasises the strong approach that the Courts have historically taken to interference with sleep.

66. In my opinion, if Council concludes that the noise logs are truthful, it is reasonably open for the Council to find that noise emanating from the BHWEF constitutes a nuisance for the purposes of the Act. Further, in my opinion, the

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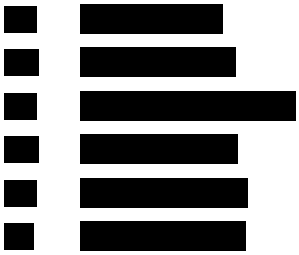
[83] *Munro v Southern Dairies* [1955] VLR 332, 335, Sholl J, referring favourably to the judgement of Sir Wilfrid Greene M.R. in *Andreaa v Selfridge* [1937] 3 All ER 255, 261.

observations made by Dr Smith concerning the level of intrusion caused by noise emitted from the BHWEF support the following inferences:

(a) noise emanating from the facility, observed by Dr Smith to be capable of intruding into conversation, held indoors, with windows and doors shut, is capable of causing sleep disturbance;
(b) such noise has the capacity to cause sleep disturbance within the normal population of people. It is likely that many people within the normal population would be aroused from sleep if a noise was present in their bedroom sufficient to intrude into a conversation held within that room;
(c) such noise has greater capacity to cause sleep disturbance within the normal population of people, if they make a reasonable choice to sleep with windows open;
(d) given the significance of the intrusion, notwithstanding planning permit compliance, such noise is unlikely to be reasonably made.

67. Having particular regard to the investigation conducted by Dr Smith and the evidence he has collected in 2018, including his own observations and the noise logs appended to his report, I believe there is sufficient evidence to make a finding of nuisance in relation to the following complainants:



Timing issues

68. As a consequence of the complexity of the investigation, the detail associated with the written material that is required to be read and absorbed by Councillors, and Council's admirable commitment to providing the parties with procedural fairness, Council's determination on this issue will be made well after the initial notifications and approximately 6 months after the date of the Smith report.

69. Section 62(3) of the Act has a temporal reference. It relevantly provides as follows:

> If, upon investigation, a nuisance <u>is</u> found to exist, the Council must …

Clearly, the statute does not provide that:

> If, upon investigation, a nuisance was ~~is~~ found to exist six months ago, the Council must …

70. Council must find whether a nuisance currently exists. The Smith report is now 6 months old and the noise nuisance logs referred to within that report are older still.

71. In my opinion, it is appropriate for Council to make a finding notwithstanding the age of the Smith report. This is because:

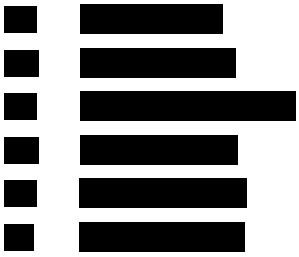
    (a) the notifications have not been withdrawn with the inference that the noise complained of continues;
    (b) the notifications are required to be investigated and considered;
    (c) no curtailment strategy or abatement program has been undertaken by the operator of the BHWEF to address the noise which is the subject of the complaints / notifications. To the contrary, the operator argues that these complaints do not reveal that a nuisance exists. Accordingly, it is reasonable to infer that the meteorological and operational conditions that gave rise to the noise complained of in the period April to August 2018 will still give rise to similar noise emissions;
    (d) I understand that Mr Mark Hayes of Maddocks asked Ms Tannock at the Council meeting held on 6 February 2019 whether her clients were still experiencing the same noise and ramifications as set out in the 2018 noise logs and she replied in the affirmative.

The second question – viability of prosecution

72. Section 61 of the Act establishes a criminal offence for persons causing a nuisance. It provides as follows:

> (1) A person must not —
>
> (a) cause a nuisance; or
>
> (b) knowingly allow or suffer a nuisance to exist on, or emanate from, any land owned or occupied by that person.
>
> Penalty: In the case of a natural person, 120 penalty units;
>
> In the case of a body corporate, 600 penalty units.
>
> (2) A person is not guilty of an offence under subsection (1)(b) if the person had a lawful excuse for knowingly allowing or suffering a nuisance to exist on, or emanate from, any land owned or occupied by that person.

73. The offence created is a summary offence. It is a criminal offence which must be proved beyond reasonable doubt. Pursuant to s 7(1) of the *Criminal Procedure Act 2009*, a proceeding for a summary offence must be commenced within 12 months after the date on which the offence is alleged to have been committed.[84] Accordingly, on the current evidence, if Council did choose to prosecute, the mid 2018 interference with the private right of the following complainants' use and enjoyment of their land (as recorded in the noise logs appended to the Smith Report) could be considered:



74. The Court will be required to be satisfied to the higher criminal standard, namely 'beyond reasonable doubt'.

75. In my experience in prosecuting (and defending) proceedings brought by municipal councils, outcomes are most difficult to predict where proof of the offence relies on the evidence of lay witnesses (as distinct from Council Officers who are inherently reliable and often very experienced witnesses). However, in this case, there is a helpful degree of corroboration that could be provided by Dr Smith.

76. If the Court finds that the evidence of the complainants is reliable and the noise logs appended to the Smith Report are found to be truthful, in my opinion, the Council has a good arguable case upon which to found criminal proceedings. A defence raised by the operator will be that it has taken all reasonable precautions to minimise any interference experienced by the complainants. The operator will emphasise the work undertaken to ensure compliance with the acoustic conditions contained in the planning permit. In the likely event that the question of planning permit compliance is raised before the Magistrates' Court, the proceedings could become lengthy and complicated.

77. By letter dated 15 November 2018, Ms Tannock stated that her clients are not seeking that Council bring criminal proceedings against the operator of the BHWEF. In order to determine whether to prosecute, Council would need to be assured that it will have the full co-operation of the complainants.

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[84] The Act expressly provides for later commencements for various offences at s 220, however, the offence created by s 61 is not identified at s 220 and so the default time limit of 12 months applies.

78. A prosecution will involve an expensive and potentially long court case and will not give rise to a solution to the problem (should Council find that a problem exists). For reasons advanced below, in the event that Council finds that a nuisance exists, I do not recommend that a prosecution be commenced.

The third question - Does Council have an ability to clearly and effectively direct the Operator to abate the nuisance through an improvement notice issued pursuant to s 194 of the Act?

79. In my opinion, the answer to this question is 'no'.

80. Section 194(3) of the Act relevantly provides as follows:

> An improvement notice or a prohibition notice must—
> (a) state the grounds on which the issue of the improvement notice or prohibition notice is based;
> (b) specify the provision of this Act or the regulations that the Secretary or the Council, as the case requires, considers has been or is likely to be contravened;
> (c) specify the actions or measures that the person is required to take and the period within which the actions or measures are to be completed;
> ...

81. By letter dated 15 November 2018, Ms Tannock stated that her clients seek ultimately that Council issue an improvement notice or prohibition notice. Clarification was sought as to what form of notice is sought. Ms Tannock responded by letter dated 4 December 2018 as follows:

> You ask what specific form of abatement my clients are seeking and within what timeframe. My clients submit that those questions are best addressed after the Council has made a finding as to whether or not there is a statutory nuisance.

82. In my opinion, in this case, in the event that it finds that a nuisance exists, and that it also determines to issue an improvement or prohibition notice, it will be important to carefully observe the requirements of s 194(3)(c) of the Act. In other words, it will be necessary to specify, with some precision, the actions or measures required to be taken to appropriately address the nuisance.[85]

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[85] Compare *Hallett v City of Port Phillip* [2015] VSC 313, [84]-[90] (Ginnane J) in which the Court held valid an improvement notice which contained limited specific direction as to the actions or measures to be taken to abate the nuisance. However, it is clear in the context of the facts of that case that the solution was to stop the activity causing the nuisance. Further, while the ground of appeal based on the lack of specificity of the improvement notice failed, the appeal was successful on other grounds.

83. No technical expert has put forward a solution or precise course of action by way of improvement or abatement. For example, it is not known what specific actions or measures will be required to avoid sleep disturbance at various properties. For example, will it require:

    (a) the shut down of the BHWEF during the EPA night period?

    (b) the shut down of given turbines during the night period?

    (c) the restriction or governing of particular turbines in particular meteorological conditions?

84. Without further technical assistance, it is not possible for Council to draft a detailed improvement notice.

85. In accordance with the position put by Ms Tannock on behalf of her clients, in the event that Council considers it appropriate to issue an improvement or prohibition notice, it may be necessary to consider the form and substance of any such notice following the receipt of technical advice on the subject.

86. The operator, via Mr Kruse, has suggested that if a nuisance is found to exist, an improvement notice could be issued utilising conditions 21 and 22 of the planning permit as a guide. This would establish a process directed at abating the nuisance. Utilising condition 22 to address sleep disturbance, the process might be as follows:

    (a) The operator of the facility is requested to take steps to ascertain the meteorological conditions at the time of the sleep disturbance.
    (b) When those meteorological conditions occur again, the operator of the facility is required to selectively curtail or shut down turbines proximate to the residence of the person encountering sleep disturbance until such time as the sleep disturbance ceases.

87. In my opinion, without further technical assistance, an improvement notice will not be capable of clearly and effectively directing the Operator to abate the nuisance.

Final question - Is the matter better settled privately?

88. The combined effect of s 62(3) and (4) of the Act is that, in this case, if Council finds that a nuisance exists, it must:
    (a) issue an improvement notice or a prohibition notice;

(b) bring criminal proceedings for an offence against the Act;
(c) if it is of the opinion that the matter is 'better settled privately', advise the person notifying the Council of any available methods for settling the matter privately.

89. A pre-condition to the application of this last alternative, is that Council form an opinion. The Macquarie Dictionary defines an 'opinion' as a 'judgment or belief resting on grounds insufficient to produce certainty.'

90. There is no definition of the term 'settled privately' and no decision guidelines are provided.

91. When the parties addressed Council at its closed meeting of 6 February 2019, it is understood that this alternative was explored. I understand that both parties expressed the position that in the event that Council finds that a nuisance exists, they would be prepared to explore the potential for a private settlement.

92. In my opinion, the phrase 'settled' has two potential meanings:

(a) to dispose of finally; and/or
(b) to terminate a dispute by consent of the parties.

The phrase 'privately' may also have two possible meanings, namely:

(a) confidentially; and/or
(b) belonging to an individual.

93. In *Fertility Control Clinic v Melbourne City Council*[86] the Melbourne City Council received notification of an alleged nuisance pursuant to the Act. The Council found that a nuisance existed and advised that the matter was better settled privately through a referral to the Victoria Police. In considering the terms of the Act, the Court stated as follows:

> 37 The task of statutory construction "begins and ends with the words which Parliament has used". The Australian Concise Oxford Dictionary defines:
>
> (a) "settle" as "… establish or become established in a more or less permanent abode … cease or cause to cease from wandering, disturbance, movement, etc … adopt a regular or secure style of life … determine or decide or agree upon … resolve (a dispute etc.) … deal with (a matter) finally …"; and
>
> (b) "private" as "belonging to an individual; one's own; personal … confidential; not to be disclosed to others … kept or removed from

[86] (2015) 47 VR 368.

> public knowledge or observation … not open to the public **b** for an individual's exclusive use …".
>
> 38 As a matter of plain English, the advice from the Council to settle the matter privately by the referral of the behaviour in question by an aggrieved individual to Victoria Police did not constitute advice to settle the matter privately within the meaning of s 62(3)(b) of the Act. Whichever limb of "private" set out above is applicable, on no view could the involvement of Victoria Police, an agency of the State of Victoria, facilitate a private settlement. Victoria Police have no statutory mandate to broker private settlements between parties who are in dispute.[87]
>
> (Footnotes omitted)

94. The Court considered that 'settled privately' excludes the involvement of an agency of the State of Victoria which has no statutory mandate to broker private settlements.

95. A close analysis of the definitions quoted by the Court suggests that 'settled' can have the meaning 'disposed of finally'. This could potentially encompass a final disposition by a court or tribunal as well as an agreement between parties. The definitions quoted by the Court of the phrase 'private' strongly suggest that a final disposition of a nuisance claim will be 'private' if it is confidential. Such a settlement will also potentially be private if it 'belongs to an individual'.

Possibility of confidential settlement by agreement

96. Following some nuisance investigations, Council may determine that the parties are willing and able to negotiate and 'settle' their dispute without resorting to litigation. Having regard to the answers given by the parties at the Council meeting on 6 February 2019, there is at least some prospect of that occurring here.

97. While the parties have been implacably opposed on the question of whether a nuisance exists, once that matter is determined by Council, they may be able to reach an agreement as to how to address that nuisance by private negotiation.

Private settlement by litigation?

98. If the parties cannot settle the dispute by consent, another way for the parties to dispose of the dispute, as between themselves, will be through litigation, either in the Court (through an action commenced by the complainants in private nuisance) and / or in the Tribunal (seeking declarations or enforcement orders to the effect that there is non-compliance with the planning permit).

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[87] Ibid [37]-[38] (McDonald J).

99. In both of these scenarios an agent of the State is engaged (the Court or the Tribunal) and any ensuing litigation would be public. Litigation (through to judgment) would not be private in the sense of being confidential. Accordingly, if Council was to advise, pursuant to s. 62(3)(b) of the Act, that litigation is one of the options available to settle the matter privately, this may potentially draw criticism from the Court, similar to that levelled upon Melbourne City Council in the *Fertility Control Clinic* case. However, unlike the Victoria Police, the Court has clear authority to order that the dispute be referred to mediation and the Tribunal has the power to order that any dispute be the subject of a compulsory conference.

100. The term 'settled privately' is an imprecise term, but in my view, it can potentially include disposition by litigation. A judgment of the Court or Tribunal determines the matter finally and in this sense 'settles' the matter. Arguably, it is also 'private' in the sense that the benefit of any judgment accrues to a party 'privately' and can be enforced by that party.

101. In this case, the underlying nuisance alleged is a private nuisance and so the complainants clearly have the capacity to commence legal proceedings (in private nuisance) against the operator of the BHWEF. If the complainants wish to agitate the question of whether there is compliance with the acoustic conditions contained in the planning permit, the complainants are also entitled to commence proceedings in the Tribunal.

Relevant considerations

102. In order to form the opinion that the matter is *better* settled privately, Council would need to form the opinion that this alternative (advising the notifiers of available methods to settle the matter privately) is better than the other two available options, namely:

(a) issuing an improvement or prohibition notice;
(b) bringing proceedings for an offence against the Act.

103. For the reason stated above at paragraphs 79 to 87, the issuing of an improvement or prohibition notice is currently not practical in this case. Accordingly, a private settlement (including potential litigation) would in my view be better than issuing such a notice.

104. In my opinion, the provision of advice to the parties as to how the matter might be settled privately would also be 'better' than commencing criminal proceedings.

105. There are clear disadvantages associated with bringing criminal proceedings.

(a) Criminal proceedings will no doubt involve significant expense which will need to be met by ratepayer funds. Further, even if a prosecution in the Magistrates' Court is successful, an appeal lies as of right to the County Court.[88] Council may have to fund not just the original criminal proceeding but a range of potential appeals.

(b) One of the key purposes of a prosecution is to punish an offender.[89] In my view, this objective is not particularly relevant in this case. It would appear that the operator of the BHWEF has expended significant funds in determining whether it is complying with the acoustic requirements of its permit and there has been no overt intent to cause a nuisance. Nor does it appear that the operator has been recklessly indifferent to the complaints of the neighbours, all of which have been considered and been the subject of detailed investigation by the operator (although this investigation has thus far been limited to the question of planning permit compliance).

(c) Another key objective of the criminal law and the imposition of sentences in particular, is to deter the offender and other possible offenders from committing offences of the same or similar character (the principle of deterrence). It is difficult to see that a finding of guilt and the imposition of a penalty will have significant deterrent value in this case.

(d) A criminal prosecution will establish whether a nuisance exists. This question will be decided to the higher criminal standard of 'beyond reasonable doubt'. However, it will not, of itself, provide a solution to the noise problem.

(e) Finally, and most importantly, it appears clear that no party, including the complainants, seek a criminal prosecution. Rather, the preference is that if a nuisance is found to exist, a path to remediating that nuisance is preferred.

106. Ultimately, in my opinion it is open for Council to consider that the matter is better settled privately.

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88 *Criminal Procedure Act 2009*, s. 254. Pursuant to s. 256, an appeal must be conducted as a rehearing.

89 See for example the *Sentencing Act 1991*, s. 5.

107. If Council forms the opinion that the matter is better settled privately, it must advise the notifying persons of the methods for settling the matter privately. I believe that those methods include the following:

(a) the joint appointment of a mediator to assist the parties to resolve the dispute;
(b) the commencement of legal proceedings in private nuisance by the notifying parties;
(c) the commencement of proceedings pursuant to s. 114 of the *Planning and Environment Act 1987* by the notifying parties claiming that the BHWEF is not complying with the acoustic conditions contained in the planning permit;
(d) the commencement of proceedings pursuant to s. 149B of the *Planning and Environment Act 1987* seeking a declaration that that the BHWEF is not complying with the acoustic conditions contained in the planning permit.

I trust this advice is of assistance. Please telephone me on 9225 8282 if you have any queries.

Yours sincerely

Paul Connor