

 **RES SOUTHERN CROSS v MINISTER FOR PLANNING AND TARALGA
LANDSCAPE GUARDIANS INC BC200900427**

Unreported Judgments NSW · 39 Paragraphs

Land and Environment Court of New South Wales

Roseth SC and Moore C

11216 of 2007

23, 30 January, 11 February 2009

Res Southern Cross v Minister for Planning and Taralga Landscape Guardians Inc [2009] NSWLEC 1034

Headnotes

DEVELOPMENT CONSENT; MODIFICATION APPLICATION — Remitter on appeal — Windfarm — Increase in rotor height.

(NSW) Land and Environment court Act 1979

RES Southern Cross v Minister for Planning and Taralga Landscape Guardians Inc [\[2008\] NSWLEC 1333](#); *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* (2007) 161 LGERA 1 ; [\[2007\] NSWLEC 59](#); *RES Southern Cross Pty Ltd v Minister for Planning and Anor* [\[2008\] NSWLEC 332](#), cited

Roseth SC and Moore C.

[1] In a decision in this modification application which we gave on 21 of August 2008 (*RES Southern Cross v Minister for Planning and Taralga Landscape Guardians Inc* [\[2008\] NSWLEC 1333](#)), we dealt, amongst other things, with the issue of what measures, if any, might be needed, by way of variation or addition to the conditions of consent originally determined by Preston CJ in the principal proceedings (see *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* (2007) 161 LGERA 1 ; [\[2007\] NSWLEC 59](#)) for which these proceedings are a modification application.

[2] *RES Southern Cross Pty Ltd* ("the company") has appealed against our decision in pursuant to s 56A of the Land and Environment court Act 1979 on a number of grounds. A first hearing of this appeal has been held and resulted in an initial determination by Biscoe J (see *RES Southern Cross Pty Ltd v Minister for Planning and Anor* [\[2008\] NSWLEC 332](#)) which determination has the effect of sending the issue of the terms of a noise condition back to us for further consideration. The reasons for this are set out in Biscoe J's decision but, in short, might be summarised as being because we had not settled the conditions of consent in our decision but had requested the parties to the proceedings to meet and agree on how the matter of principle discussed in our 2008 decision might be implemented.

[3] We note that the company had declined to take part, at that time, in such finalisation process and had elected to initiate the appeal proceedings.

[4] We note that, in the initial hearings in this matter, the company conceded that there was likely to be some (unquantified) increase in noise as the result of higher turbines and larger areas swept by longer rotor blades. The company did not present any evidence concerning noise. As a consequence, we considered that that we were obliged to take account of what we considered was the likely increase in noise from higher turbines and larger areas swept by longer rotor blades.

[5] As part of these further proceedings, we have also taken the opportunity of finalising the remainder of the conditions of consent in dealing with other matters as discussed later in this decision.

[6] We turn to the principal issue, that of noise monitoring.

[7] The relevant condition in the conditions of consent determined by Preston CJ, which was the subject of our decision in August 2008 is condition 41. That condition, immediately following the heading “Operational noise monitoring”, reads:

42. The Applicant must design, operate and maintain the development to ensure that for the relevant receiver locations of H1, H5, H7, H12 and ‘The Farm’, while they continue to be not associated with the development, the equivalent noise level (LAeq, (10 minute)) from the development at each of these receiver locations does not exceed:
- a) 35 dB(A); or
 - b) the pre-existing background noise level (LA90, (10 minute)) at each receiver location (as determined under condition 41), respectively, by more than 5 dB(A),

whichever is the greater, for each integer wind speed (measured at 10m height) during operation of the development, measured in accordance with the SA Guidelines.

[8] The terms of the section of our judgement dealing with noise were as follows:

Additional noise

79. The issue of noise having an increased impact on specific locations is dealt with elsewhere in this decision.
80. Here, we deal with the broader question of whether there is adequate data to consider the noise implications of the modification proposal and, indeed, whether it is necessary for us to do so.
81. The conditions of the current approval place limits on noise levels at various receptor locations. Those noise levels are capable of accurate determination.
82. The position which RES Southern Cross takes in these proceedings is that it remains bound by those conditions; it proposes to manage the wind farm in a fashion to comply with those conditions; and, as a consequence, there is no need to (nor any power to) re-visit the conditions of consent relating to noise.
83. 83 In the alternative, RES Southern Cross says that any variation to the conditions of consent dealing with noise should be limited to the adoption of the draft Operational Noise Management Plan, a document required to be prepared by condition 39(d) of the original consent and presented to us.
84. The Guardians, on the other hand, submit that there is inadequate information about the effect of the modification on noise. RES Southern Cross concedes that there will be some increase. The uncertainty should lead us to re-visit the question of monitoring to ensure that RES Southern Cross meets the performance standard for the various locations established by the existing conditions of consent (particularly those sensitive receivers listed in Condition 42).
85. The Guardians propose that there should be permanent noise monitoring established. This might include a system that automatically shuts down one or more of the turbines when permitted noise levels are exceeded.
86. In the proceedings before Preston CJ, the desirability or appropriateness of permanent monitoring had been canvassed. For us to require permanent monitoring we must be satisfied that there are sufficiently changed circumstances warranting a change in the conditions before we can consider the merits of permanent monitoring.
87. We are satisfied that the fact that there will be some change in the noise levels and that we do not have precise information (such as an updated version of the noise contour map in the Environmental Impact Statement reflecting the change in noise levels by the modification proposed) provides the basis for us to reconsider this issue.
88. However, consistent with the approach taken by the Preston CJ, we do not consider that a permanent real-time monitoring system is appropriate because such a system could be manipulated by creating noise that has nothing to do with the turbines. Such noise could shut down the operations of turbines without justification.
89. However, we believe that there is sufficient uncertainty to require a regime of random compliance testing to be undertaken in a fashion similar to that used for licensed premises.
90. This would permit random testing (using equipment which complies with condition 48 within the present conditions of consent to avoid wind noise on the testing equipment) to be undertaken without notice to Southern Cross on a

limited number of occasions in any 12 month period. Noise testing undertaken on this basis should be paid for by RES Southern Cross but should be organised by an independent body.

91. We have considered what might be an appropriate frequency for such testing and who might be authorised to commission and manage it.
92. The Guardians put to us that they did not consider that the Upper Lachlan Shire Council was the appropriate body for this task as the Council might not be interested in this enforcement role. As the Council has taken no part in these or the earlier proceedings, we consider it would be inappropriate to delegate this task to the Council.
93. We propose that a testing regime should be undertaken; paid for by the applicant; and independently organised, on six occasions during each year at the locations identified in condition 42 (provided their owners give consent to such testing occurring and the properties do not become associated with the development). The results of such tests should be made available to the company, the Guardians, and each property owner whose property was tested within 28 days of the tests being conducted.
94. We have also considered whether the monitoring role should be given to the Director-General of the Department of Planning. We note that the Director-General has significant supervisory roles for other aspects of the wind farm. On balance, we have a preference for the Director-General undertaking that role. However, we propose to provide the parties with the opportunity to consider this issue and settle an appropriate monitoring regime in the altered conditions of consent.
95. We do not consider it appropriate to rely on the adoption of the draft Noise Compliance Assessment Plan provided by RES Southern Cross. We consider that the independent monitoring proposed is appropriate for two reasons. First, monitoring independent of an operator is a commonly accepted practice for assessing compliance with conditions of consent. Second, it is desirable the local community have a degree of comfort that noise compliance is being monitored at arm's length from the company. The limited monitoring we propose will ensure that both these objectives are satisfied.

[9] In these remitted proceedings, however, we have permitted the company, over objections from the Taralga Landscape Guardians Inc ("the Guardians"), to tender a statement of evidence from Mr J Turner, an acoustic consultant, who is undertaking the process of establishing relevant background noise levels for the company (as required by condition 41 of Preston CJ's consent) and who was, before becoming a private sector consultant, an employee of the South Australian EPA and the person principally involved in drafting the South Australian "Environmental Noise Guidelines: Wind Farms" (2003) ("the South Australian guidelines"). These guidelines underpin a considerable portion of the regulatory regime for the conditions of consent imposed by Preston CJ.

[10] Mr Turner's uncontradicted expert evidence has now provided a basis upon which we can give informed consideration to the matters on which we were required to deliberate without this basis in 2008. Indeed, had the company made Mr Turner's evidence available in the 2008 proceedings before us, the conclusions we would have been obliged to reach then (and have now reached) would have been significantly different from those we reached without that evidence.

[11] There are, in our opinion, three critical elements in Mr Turner's uncontradicted evidence namely:

to comply with the South Australian guidelines and to have a regime as we envisaged in para (93) of our earlier decision, the necessary testing (six times a year at the discretion of the Director-General that times chosen by Director-General), one would have to be over a minimum of a three-week period and would involve the collection of at least 2000 valid data sets per location;

it is not unreasonable to assume, that, even with sufficient personnel and testing equipment, three weeks was merely a minimum period for the undertaking of such testing and that significantly longer periods were likely to be needed to be devoted to it. The consequence of this is that, instead of a single visit to each of the receiver locations nominated in condition 42 (analogous to random noise testing associated with licensed premises as we had envisaged would be possible), a radically more extensive regime would be necessary; and

in fact, such a regime would effectively amount to a continuous operational monitoring regime — being a style of monitoring regime expressly rejected by Preston CJ.

[12] It was also Mr Turner's uncontradicted expert opinion that, for reasons which we accept, the taking of a single reading in the fashion we envisaged would be of no utility to a regulator in assessing whether condition 42 had been

breached or in assessing whether a valid complaint concerning an alleged breach of condition 42 warranted further investigation.

[13] However, Mr Turner also considered the issue of whether the existing noise compliance monitoring conditions contained in conditions 51–53 of the conditions imposed by Preston CJ could be improved upon.

[14] These existing conditions are as follows:

Noise Compliance

Noise Compliance Assessment Plan

51. The Applicant must prepare a Noise Compliance Assessment Plan which must be submitted to, and approved by the Director-General, in consultation with the EPA, prior to Commissioning. The Noise Compliance Assessment Plan must outline how the noise compliance assessment will be achieved and be consistent, to the extent applicable, with the data acquisition methods outlined in the SA Guidelines (2003).

Compliance with Noise Limits during Operation

52. Within six months of Commissioning, compliance monitoring of noise during operation of the development is to be undertaken at the locations identified in condition 42. If prevailing meteorological conditions do not allow the required monitoring to be undertaken in this period, the Director-General must be notified and an extension of time may be sought.
53. A Noise Compliance Assessment Report, must be submitted to the Director-General and the EPA within one month of completing the compliance monitoring outlined in condition 52. The Noise Report must include, but not be limited to:
 - a) an assessment of the performance of the development against the noise limits contained in condition 42 and where relevant, condition 43; and
 - b) in the event that the assessment indicates that noise from the wind turbines exceeds the noise limits set under this consent, details of proposed mitigation and management measures that are available to achieve compliance, including a timetable for implementation.

Following approval by the Director-General, in consultation with the EPA, the Applicant must implement the mitigation and management measures outlined in the Noise Compliance Assessment Report with such amendments as required by the Director-General in order to achieve compliance with the conditions of this consent, within such period as may be directed. The Noise Compliance Assessment Report must be made publicly available.

[15] Mr Turner expressed the view that the above conditions could be improved with some changes and the addition of a new condition which he proposed as triggering a regime for the requirements of additional compliance monitoring pursuant to condition 51. The consequence of this was that the company's legal representatives drafted replacement conditions for conditions 51 to 53 and a new proposed condition 53A. The Minister accepted these conditions, in their finalised form as appropriate.

[16] The proposed revised conditions are as follows:

- 51 Within six months of commissioning, the Applicant must engage an independent acoustic consultant(s), who is to receive the prior approval of the Director-General, and to undertake a program of noise monitoring to test the noise emission performance of the development at the locations identified in condition 42 at times without notice to the Applicant (but only where the consent of the landowner has been provided to undertake the program). The program must include, but not necessarily be limited to:
 - (a) noise monitoring and assessment generally in accordance with procedures outlined in the SA Guidelines;
 - (b) assessment of the noise performance of the development against the noise limits specified in conditions 42 and where relevant, condition 43;
 - (c) details of any complaints received during monitoring and assessment in relation to noise generated by the proposal; and

- (d) recommendations and a timetable for implementation for any Reasonable and Feasible additional measures necessary to ensure compliance with the relevant noise-related conditions of this consent.
- 52 Within 28 days of undertaking the noise compliance programs referred to under condition 51 of this consent, the Applicant shall provide the Director-General, each landowner on which the program was carried out and make publicly available a report prepared by the acoustic consultant(s) on the results of the program. If the noise monitoring report identifies any non-compliance with the noise limits specified under this consent, the Applicant shall detail what additional mitigation measures would be implemented to ensure compliance, clearly indicating who would implement these measures, when these measures would be implemented, and how the effectiveness of these measures would be measured and reported to the Director-General.

Additional mitigation measures shall include, in the first instance, all Reasonable and Feasible source control measures to reduce noise emissions from the development (such as sector management). Once all Reasonable and Feasible source controls are exhausted, mitigation measures may include offering building acoustic treatments and/ or noise screening to affected residents, but may only be used to address noise limit exceedances at the absolute discretion of the relevant landowner. The Applicant shall also demonstrate that the relevant landowner has been made fully aware of the noise levels and other implications of making any agreement

- 53 Following consideration of the outcomes of the noise compliance program referred to under condition 51 of this consent, the Director-General may require the Applicant to implement additional noise mitigation, monitoring or management measures to address noise associated with the development. The Director-General may require any or all of the measures proposed by the Applicant in the noise compliance report(s), or other measures considered appropriate by the Director-General to be implemented having regard to the SA Guidelines (2003). The Applicant shall implement the measures required by the Director-General within such period as the Director-General may specify.
- 53 A In the event of:
- (a) any complaint from any resident at a relevant receiver about noise of operating turbines being received which the Director-General considers, after investigation, to be a valid complaint, or
 - (b) after any alteration to the noise operating strategy of the development

the noise compliance testing procedure in condition 51 is to be repeated for any relevant receiver.

[17] During the course of the final submissions, Mr Pickles, barrister for the company, was granted leave to incorporate these amended conditions as forming part of the modification application being reconsidered by us pursuant to the remitter from Biscoe J.

[18] The final element of Mr Turner's evidence concerned the likely changes in noise level at any of the relevant receiver locations as a consequence of the higher turbines and larger areas swept by longer rotor blades. It was his opinion that, at the relevant receiver locations, there would not be additional noise generated as a result of the proposed modifications or, if there were any increase in noise, it would be negligible. This evidence is also uncontradicted.

[19] In summary, we are left in the following position concerning this issue:

the results of any single visit noise monitoring (on the basis we envisaged in para (93)) would provide no data which would assist in determining whether or not the terms of condition 42 imposed by Preston CJ had been complied with;

for there to be a six times per year monitoring regime on a basis which would provide useful data for such purposes, there was a significant probability that such a monitoring regime (complying with the South Australian guidelines) would amount to a de facto permanent, continuous compliance monitoring regime (being a compliance monitoring regime specifically rejected by Preston CJ);

the modified installation involving higher turbines and larger areas swept by longer rotor blades will cause, at worst, an imperceptible increase in noise at any of the relevant receiver locations (including those nominated in condition 42); and

the company has sought and been granted leave to amend its modification application in a fashion which provides a modest degree of additional protection to the local community of Taralga.

[20] Although Ms Grahame, secretary of the Guardians, submitted that sufficient protection for the local community (and a less onerous burden for the company) could be achieved if the monitoring were required only four times a year this cannot overcome our concern that there is still a significant risk we would be imposing what amounted to a permanent compliance monitoring regime of the type specifically rejected by Preston CJ.

[21] As a consequence, we believe that we should accept the matters now proposed in the company's revised conditions (51) to (53A).

Tablelands Basalt Forest

[22] The second matter arising from the conditions of consent to be finalised following the decision of August 2008 concerns the protection to be given to possible remnants of Tablelands Basalt Forest. Our decision in this regard was as follows:

- 102 As noted earlier, since Preston CJ's decision Tablelands Basalt Forest has been listed as an endangered ecological community.
- 103 To the extent that the modification application might impact on this endangered ecological community, it is necessary to consider the extent to which the modification application involves any alteration to the physical footprint of and impact by the approved development.
- 104 RES Southern Cross submits that additional concrete in the footings may be required but that, essentially, there will be no need to change the existing conditions of consent.
- 105 Dr Mills, an ecologist on behalf of RES Southern Cross, gave evidence concerning possible presence of Tablelands Basalt Forest at the various locations for the approved development.
- 106 He conceded that he had identified a number of locations in his original assessment where Tablelands Basalt Forest, or that some of the various species forming part of the community, may have existed.
- 107 He also agreed that it was possible that some elements of the community remained present at some parts of the approved development.
- 108 RES Southern Cross accepts that with the modification there are additional locations where the rotor blades will need to be lifted into place on the turbine individually in order to minimise damage to vegetation. It conceded that some modification to the conditions in this regard might be appropriate. We agree.
- 109 Although there is no evidence that Tablelands Basalt Forest is present located anywhere to be impacted by the proposal, we believe that a precautionary approach should be taken to guard against the modification application having any impact on Tablelands Basalt Forest. To achieve this, we consider that three alterations to the conditions of consent are appropriate.
- 110 The first is a modified version of Condition 86 or Condition 87 of the present conditions; the second is a modified version of Condition 88 of the present conditions; and the third is a list of all those turbines where "separate lift at installation" of rotor blades directly onto the turbine is required. This is consistent with what is discussed at p 2.15 of the original Environmental Impact Statement.

[23] We had left it to the parties to work out the new conditions to give effect to this element of the decision, particularly which wind turbine rows should be incorporated within such conditions.

[24] Although there is broad agreement between the parties as to what is to be described, in the process observes, there is disagreement between the Guardians, on one hand, and the Minister and the company on the other hand about the turbine rows to be incorporated. As a consequence, we have needed to return to the evidence of Dr Mills to consider what turbine rows should be incorporated into the new condition.

[25] The relevant element of the condition proposed by the Minister and agreed to by the applicant to give effect to this is as follows:

To ensure compliance with this condition, the Applicant must engage a suitably qualified person(s) who must receive prior approval of the Director-General, to undertake a detailed survey of:

turbine rows 1,5,6,11 and 13; and

all access roads required during construction or upgrading,

to determine the presence of this community ...

[26] The Guardians propose that rows 2, 3, 4, 7, 9, 10 and 12 should be added to the rows specified above.

[27] The effect of adding these rows would be that only row 8 would be omitted from the further examination process required by the conditions.

[28] To resolve this disagreement, we have turned to the evidence given by Dr Mills on 12 August 2008 and the statement of evidence given by Dr Mills, which was Ex F.

[29] After some questioning, by us and by Ms Grahame, about specific rows and their characterisation, Dr Mills said, at p 63 line 11 and following:

... to truncate further question from your good self if I can agree that I would agree that any of these sites or these rows that are on basalt in that location would have some remnants of that community, it's obvious.

[30] To ascertain those rows that are on basalt in that location, Doctor Mills referred us to Table 1 — Vegetation of the Turbine Sites in his 2006 flora report on the original proposal. This table included a column headed geology and identified those rows where he considered that the underlying geology was basaltic. Those rows so identified by Dr Mills were rows 2–5, 8–13. In addition, although Dr Mills did not identify row 6 as having basaltic soils, the parties have agreed that it should be incorporated in this condition.

[31] Whichever rows are specified in the condition, we note that it requires precautionary investigation rather than limiting of works. Only if the preliminary investigation reveals the evidence of Tablelands Basalt Forest at a location impacted by construction of the windfarm does the condition require additional work or moving a turbine.

[32] We have carefully reread the transcript of Dr Mills' evidence on this issue. We are not satisfied that the additional rows identified by him (as having basaltic soils in Table 1 — Vegetation of the Turbine Sites in his 2006 flora report) do not warrant the further precautionary investigation required by the condition.

[33] As a consequence, the additional rows proposed by the Guardians should be included in the provisions of the new condition to give effect to this part of our decision.

Conclusion

[34] We conclude that we have no evidence on which to base a requirement for a random noise testing regime which would be contrary to Preston CJ's decision. Moreover, we accept that such testing would not provide any useful information on whether the permissible noise levels in condition 42 were breached.

[35] These circumstances would not have risen had the company provided relevant noise evidence during the course of the initial hearing of this modification application. It is not appropriate to rely on that earlier failure to seek to impose the testing regime of modest dimensions which we envisaged if that were to be futile, as we now accept on Mr Turner's uncontradicted evidence that it would be, or to impose a properly conducted random monitoring program compliant with the South Australian guidelines for monitoring which would have a significant probability of imposing a permanent and ongoing testing regime (being a proposition specifically rejected by Preston CJ in the original proceedings).

[36] With respect to the other contested issue, concerning Tablelands Basalt Forest, we have reached the conclusion that the further rows proposed by the Guardians should be incorporated in the conditions.

The entry of orders

[37] At the conclusion of the hearing, Mr Pickles submitted that we should not enter the orders because the company wishes to reserve the right not to take up the modified consent. We understand that this request is primarily based on the possibility that we might persist with a monitoring regime for noise on the basis discussed in para (93) of our August 2008 decision. As we accept that the company's now amended application incorporating revised noise conditions is the appropriate course to adopt in this regard, this concern may no longer exist.

[38] However, there is a continuing appeal on foot, at least with respect to one element in our earlier decision concerning the Cushendall vineyard. Following the changes to the processes for the issuing of sealed copies of orders which came into effect on 1 December 2008 we do not need to direct that the orders not be entered (and indeed may not have the power to do so). However, pursuant to Pt 36 r 4(1)(b) of the Uniform Civil Procedure Rules 2005, we order that the further orders below are not to take effect until they are entered.

[39] As a consequence, the orders of the court (in addition to the order in (38) immediately above), are:

The appeal is upheld;

The Development Consent given by the court on 12 February 2007 to Development Application 241/04 is modified by amendment of the conditions of consent as set out in Sch 1; and

The Exs are returned

Order

Orders accordingly.

Counsel for the applicant: *Mr A Pickles, barrister*

Counsel for the second respondent: *Ms M Grahame, agent*

Solicitors for the applicant: *Middletons*

Solicitors for the first respondent: *Ms J Smith, solicitor Department of Planning*

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