BEFORE A COMMISSIONER APPOINTED
BY THE SOUTHLAND REGIONAL COUNCIL

Under The Resource Management Act 1991 ('**The Act**')

In the matter of an application for resource consent

SUBMISSION IN RESPONSE TO NZALA ON BEHALF OF

PAHIA DAIRIES LIMITED

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MAY IT PLEASE THE COUNCIL:

Introduction

1 These submissions are provided to address several issues raised in the Memorandum of Counsel for NZALA, dated 9 June[1] (**the Memorandum**). We do not intend to raise new issues, or readdress matters which the original application for strike out has already raised.

Section 41D

2 We agree with the submissions of NZALA that there is limited applicable case law in relation to s41D, and that s279(4) is similar enough to provide useful guidance to the Commissioner when determining this application[2]. We do note that section 41D provides an additional **two** grounds beyond those of s279(4), that is:

(d) it is supported only by evidence that, though purporting to be independent expert evidence, has been prepared by a person who is not independent or who does not have sufficient specialised knowledge or skill to give expert evidence on the matter:

(e) it contains offensive language.

3 We disagree with the statement at paragraph 6 of the Memorandum that implies a Parliamentary intention that more than one of the specified grounds are met. Were that the case, the grounds for strike out would be indicated by an "and" between (a) and (e). Rather, we submit that reference to "at least one of" indicates that there is potential for submissions which should be stuck out to meet several grounds.

Strike out powers should be used sparingly

4 The Memorandum states that strike out powers should be used sparingly. Firstly (and somewhat obviously) we point out that direction to use **sparingly** is not to say they can not be used at all. The RMA has allowed for strike out when particular grounds are made out, and as long as the threshold is met, it is appropriate for the power of strike out to be used.

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[1] Noting that these were not circulated to PDL until 16 June.
[2] Paragraph 7 of the NZALA memorandum

5 The Memorandum refers to the decision of *Coldway Installation Ltd v North Shore City Council* as support for using strike out powers sparingly. In *Federated Farmers v Wellington Regional Council*[3], the Environment Court commented on the *Coldway* case, distinguishing the two saying

> "what are essentially civil law tests in that case are of only limited relevance in the administrative law context of the RMA. In particular when there are jurisdictional boundaries facing a Council or this Court, if those boundaries are exceeded - bearing in mind the pragmatic nature of such a decision… then there is no discretion to be exercised "sparingly". The case must simply be struck out as legally frivolous or vexatious or as disclosing no reasonable or relevant case."

6 In my submission, the *Federated* Farmers case supports the argument by PDL in its application to strike out. There is no discretion towards strike out where there is no case to answer. The grounds for strike out are clearly stipulated in section 41D and if Council finds that one of the grounds are met, then it should use its authority to strike out.

Scope

7 NZALA seeks the Authority to decline PDL's application for resource consent (or if granted, to limit the duration of the resource consent to a period of three years) based on animal welfare concerns. As outlined in the strike out application, it is submitted that animal welfare concerns are **not** an issue within the scope the RMA.

8 It is evidenced in *Elwell-Sutton v West Coast Regional Council* that scope is a relevant consideration of the Environment Court when considering an application to strike out under section 279(4). Furthermore, to grant relief sought that is not within the appropriate scope "would be an abuse of the court's process in terms of section 279(4)(c) of the Act."[4]

9 In *Federated Farmers*, the Environment Court determined that relief can only be granted within the scope of an original submission. In that case, two submitters filed notices under s271A of the RMA (now repealed), which went beyond the scope of the original submission filed by Federated Farmers.

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[3] Federated Farmers v Wellington Regional Council [1999] ENC Christchurch C192/99 at [17]
[4] *Elwell-Sutton v West Coast Regional Council* [2013] NZEnvC 58 at [15]

Under section 279(4), the Environment Court partially struck out paragraphs of the notice as disclosing no reasonable or relevant case.

Animal welfare concerns

10 As noted by NZALA in its Memorandum, considerations of animal welfare by the Environment Court have only been made in passing, and in no case has the Environment Court considered animal welfare in conjunction with the RMA's core purpose of promoting sustainable management.

11 In *Gray Cuisine v South Waikato District Council*[5] (referenced in the Memorandum), the Environment Court's confirmation of consent conditions related to animal welfare standards simply reinforced the existing statutory requirements of the AWA and no other matters of animal welfare were addressed by the Court. PDL will comply with the conditions of consent imposed by the Council, as well as all other legal obligations (which naturally captures the AWA alongside a range of other legislation).

12 The Memorandum criticizes the strike out application for reliance on the ECan and Ministry for the Environment position in relation to the relationship between the RMA and the AWA. Although it is established that secondary guidance and commentary are not legally binding on the Court, it is nevertheless still "helpful,"[6] and in absence of case law and legislative authority, it is not unreasonable to turn to secondary commentary available to provide guidance on an issue, where otherwise there would be none. In *Opoutere Ratepayers and Residents' Association v Waikato Regional Council* (referenced in NZALA's Memorandum), the Environment Court dismissed the reliance held by the Council on the Department of Conservation's guidance notes because in this case, there was clear authority provided for in the New Zealand Coastal Policy Statement 2010 and the provisions of the RMA. There is no such clear authority (as agreed at paragraph 24 of the Memroandum) in relation to this issue. I submit it would be unusual to disregard the Ministry for the Environment's position on such an analogous issue, whilst noting it is in no way authoritative on your decision.

13 As previously submitted, the Ministry of Environment concluded that animal welfare would more appropriately be addressed via the AWA. In *Winter and Clark v Taranaki Regional Council and Fletcher Challenge Energy Taranaki*

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[5] Gray Cuisine Ltd v South Waikato District Council, [2011] NZEnvC 49
[6] Opoutere Ratepayers and Residents' Association v Waikato Regional Council [2015] NZEnvC 105 at [97].

Ltd, an appeal was lodged against resource consents granted in respect of a proposed gas well in North Taranaki. The appellants argued that the proposal was contrary to the provisions of section 7 of the RMA and the Council had not had regard to the efficient use and development of oil and gas or its finite characteristics. The Environment Court held that efficient allocation of rights in respect of Crown-owned minerals was more appropriately governed by the Crown Minerals Act, not by the RMA and consequently the appeal was struck out.[7] The purpose of the AWA is to ensure animal welfare standards are met. Where legislation exists that exists purely to address the issue of animal welfare, it would be more appropriate for animal welfare issues to be addressed via the AWA, as Parliament had intended, rather than the RMA, which makes very limited references to animal welfare throughout the Act. It should also be noted that animal welfare is not a matter listed in sections 5, 6 or 7 of the RMA, which sets out the purpose and principles of the act, as well as the matters of national importance and other matters which persons exercising functions and powers under the Act must have particular regard to..

14 As NZALA noted in its response, the provisions of s331 – 331F (inserted by way of the Severe Weather Emergency Legislation Act 2023 (SWELA)) is time limited and will be automatically repealed in April 2024. The SWELA was introduced specifically in response to the severe weather events that affected the North Island earlier this year. The intent of provisions s331 – 331F, as evidenced in the Hansard reports, is to enable rural landowners and occupiers to undertake permitted activities to repair or prevent damage on their land, without the need to obtain resource consents.[8] The inclusion of animal welfare in these provisions is not, as submitted by NZALA, to expressly allow the consideration of the well-being of animals, but rather to allow farmers to more effectively and efficiently manage their property, which includes livestock and animals in the aftermath of a severe weather event. We submit its relevance to this decision is negligible.

Conclusion

15 We trust that these submissions are useful in determining the application for strike out.

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[7] Winter and Clark v Taranaki Regional Council and Fletcher Challenge Energy Taranaki Ltd [1998] 4 ELRNZ 506

[8] (16 March 2023) 766 NZPD (Severe Weather Emergency Legislation Bill – Second Reading)

16 It remains our submission that:

16.1 The issues of animal welfare are out of scope of the RMA (and instead sit within the AWA); and

16.2 Pursuant to the *Federated Farmers* finding, it is appropriate (and indeed correct) to strike out a submission where there is no case to answer, and that can be established by a lack of scope.

17 The PDL position remains that the NZALA submission only relates to animal welfare concerns (despite paragraph 19 of the Memorandum). All matters raised (such as pugging) are linked to issues of animal welfare[9] rather than relevant RMA considerations.

Dated 22 June 2023

J A Robinson
Solicitor for Pahia Dairies Limited

[9] as summarised in paragraph 14 of the NZALA submission