BEFORE THE SOUTHLAND REGIONAL COUNCIL

UNDER	the Resource Management Act 1991
IN THE MATTER	an application by **PAHIA DAIRIES LIMITED** for resource consent

---

MEMORANDUM OF COUNSEL ON BEHALF OF THE NEW ZEALAND ANIMAL LAW ASSOCIATION IN RESPONSE TO A STRIKE OUT APPLICATION

Dated: 9 June 2023

Govett Quilliam
THE LAWYERS

Rebecca Eaton
Phone: (06) 768 3700
Fax: (06) 768 3701
Private Bag 2013/DX NP90056
NEW PLYMOUTH 4342
rebecca.eaton@gqlaw.nz

MAY IT PLEASE THE COUNCIL:

Introduction

1. Pahia Dairies Limited ("**PDL**") has requested that the Southland Regional Council ("**Environment Southland**") strike out the submission of the New Zealand Animal Law Association ("**NZALA**") on PDL's application (APP-20222765) ("**Consent Application**") pursuant to section 41D of the Resource Management Act 1991 ("**RMA**").

2. These submissions respond to and oppose the application to strike out ("**Strike Out Application**").

Section 41D

3. The ability to strike out a submission is governed by section 41D of the RMA.

4. The section 41D(1) powers are discretionary in that an authority "*may*" direct that a submission or part of a submission be struck out. The RMA does not make it mandatory to strike out a submission in the event that at least one of the specified grounds are made out. This can be contrasted with other powers and duties in relation to applications and hearings, which provide mandatory directions.[1]

5. Section 41D(1) enables an authority, where it is satisfied that it may use its discretion to strike out a submission, to do so in whole or in part. PDL has sought that NZALA's submission be struck out in whole and has not provided consideration as to whether it would be more appropriate to seek a partial strike out of NZALA's submission.

6. Finally, Section 41D(1) expressly states that "at least one of" the specified grounds must be met before an authority may strike out a submission. This suggests that Parliament intended this provision to often be used in instances where more than one of the specified grounds are present, and emphasises that this is a tool that should be used sparingly (as discussed later in these submissions).

[1] See sections 39(1) and (2), section 41C(5) and (5B)

7. There is a significant lack of case law regarding section 41D. However it is submitted that section 41D mirrors the Environment Court's strike out powers under section 279(4). The case law in relation to section 279(4) provides useful guidance and instruction to authorities regarding the application of section 41D.

Strike out powers should be used sparingly

8. Case law in relation to section 279(4) has emphasised that the jurisdiction to strike out is exercised sparingly and only in cases where there is the "requisite material…to reach a certain and definite conclusion.[2] There is a "very high" threshold to be met before striking out.[3]

9. Further, the discretion is only to be used where the claim is beyond repair and so unobtainable that it could not possibly succeed.[4]

Public participation

10. Case law has acknowledged that the RMA encourages public participation in the resource management process, which should not be bound by undue formality.[5]

11. In *Everton Farm Ltd v Manawatu-Wanganui RC*[6], the Court again highlighted that the jurisdiction to strike out (under s279) is to be exercised sparingly and persons should not be deprived of their "day in Court" for the sake of efficiency.

12. The importance of public participation is reinforced by the fact that the ability to submit on a consent application is not constrained (except for trade competition limitations). Section 96(1) of the RMA states:

> If an application for a resource consent is publicly notified, a person described in subsection (2) **may make a submission about it** to the consent authority.
>
> **[emphasis added]**

13. While section 96 goes on to prescribe the form a submission must be filed in, it does not constrain the content or subject of such submissions, except to

[2] *Hern v Aickin* [2000] NZRMA 465 at [6]
[3] *Simons Hill Station Limited v Royal Forest and Bird Protection Society of New Zealand Incorporated* [2014] NZHC 1362 at [37]
[4] *Coldway Installation Ltd v North Shore CC* W118/96
[5] *Countdown Properties (Northland) Ltd v Dunedin CC* [1994] NZRMA 145
[6] ENC Wellington W8/2002, 22 March 2002 at [44]

the extent that a submission *may* state whether it supports, opposes or is neutral in respect of the application.[7]

14. Importantly, in the case of a submission struck out under section 41D, while there is a right to object to the decision to strike out under section 357, if a decision to strike out is upheld, the submitter will not be entitled to appeal to the Environment Court against the consent decision. This is accordingly, a significant impingement on public participation, which is a hallmark of the resource management system. As emphasised in the relevant case law, such limitations on public participation should be exercised sparingly.

15. It is respectfully submitted that the Council ought to bear in mind the RMA's generally inclusive approach to public participation, and accordingly, that any exercise of power to limit this participation should be exercised with significant caution. The exercise of the strike out provisions are a heavy-handed tool and should accordingly be used sparingly. It is noted that the Consent Application was publicly notified, enabling the highest level of public participation in the consenting framework.

PDL's application to strike out

16. PDL have sought that the NZALA be struck out on the grounds that:

    16.1 It discloses no reasonable or relevant case; and

    16.2 Would be an abuse of the hearing process to allow the submission to be taken further.

Reasonable or relevant case

17. What is reasonable and relevant will depend on the particular circumstances of each case. It is sufficient for a submission to meet only one of the limbs of s41D(1)(b) (ie it is sufficient that the case is either reasonable or relevant).

18. PDL submit that to disclose a reasonable or relevant case, a submission must raise issues within the scope of an application under the RMA. PDL have submitted that the sole issue raised in the NZALA submission is animal welfare and that animal welfare is not an issue which is within the scope of the RMA.

[7] Section 96(7)

19. It is submitted in the first instance that this is an overly simplified characterisation of the NZALA submission. By way of summary, NZALA's submission raises concerns regarding:

19.1 Whether the Consent Application and if granted, the consent and any relevant consent conditions comply with relevant legislation and regulations, including the National Environmental Standards for Freshwater and the Animal Welfare Act 1999 and associated regulations;

19.2 Effects of the Consent Application on animal health and welfare;

19.3 Whether the Consent Application provides for sufficient management of the effects of intensive winter grazing, including the ability to manage the effects of pugging.

20. It is noted that it is common for consent conditions to include a condition ensuring compliance with all applicable legislation and regulations. The Consent Application proposes specified consent conditions "In addition to standard conditions".[8] NZALA as a submitter is entitled to raise concerns regarding compliance with other legislation, including the Animal Welfare Act 1999, particularly in instances where a full suite of proposed consent conditions are not provided by the applicant.

Animal welfare considerations

21. Notwithstanding the above, importantly, there is no need for an authority to agree with the *merits* of the case included in submissions or even to consider if they are strong at the time of considering a section 41D application. This is particularly the case for submissions that raise novel arguments.

22. It is submitted that the definitions of both "environment" and "effect" under the RMA are broadly constructed. While neither terms expressly capture animal welfare, a lack of direct legislative reference does not automatically exclude its consideration in the course of decision making.[9]

23. Further the purpose of the RMA, captured by section 5 is to promote the sustainable management of natural and physical resources. The definition of natural and physical resources includes all forms of plants and animals.

[8] At 3.6 of Consent Application

[9] See *Back Country Helicopters Limited v The Minister of Conservation* [2013] NZHC 982 for an example of where the High Court found that animal welfare concerns were not "irrelevant or improper" in the context of the Wild Animal Control Act 1977 and the Conservation Act 1987, where neither statute makes reference to animal welfare.

Further, an assessment of environmental effects must also address *any effect* on animals.[10]

24. While there is scarce case law regarding the consideration of impacts on animal welfare in consenting decisions, this issue has been considered in passing (and not deemed to be irrelevant) by the Environment Court.[11] Animal welfare issues are also commonly assessed in enforcement proceedings under the RMA.

25. Conditions of consent constructed to ensure that animal welfare requirements and standards are met, have also been accepted and confirmed by the Environment Court.[12]

26. It is noted that PDL's strike out application relies heavily on references to internal local authority and Ministry legal advice and statements made in correspondence from the Minister for Environment in 2010. It is submitted, that while any individual or entity is entitled to obtain legal advice and take a position based on this advice, this is not binding authority. Further, it is established case law that Ministry guidance or statements regarding the interpretation of legislation or secondary legislation, including formal published guidance, do not have authoritative weight in decision-making.[13] It is submitted that PDL have not provided any binding authority for its position in the Strike Out Application.

27. Accordingly it is submitted that there is no authoritative case law or authority confirming that animal welfare is irrelevant to resource management considerations sufficient to meet the high bar required to strike out submissions.

28. It is also noted that section 331B of the RMA, which was incorporated into the RMA in April 2023 by way of the Severe Weather Emergency Legislation Act 2023, expressly allows for the consideration of the well-being of animals. While provisions 331 – 331F will be automatically repealed in April 2024 and are irrelevant to this application, this express inclusion suggests that animal

[10] Schedule 4, Clause 7 RMA
[11] See for example *Stark v Waikato District Council* [2014] NZEnvC 150 where the Court considered possible effects of noise on animal welfare.
[12] See for example, *Gray Cuisine Limited v South Waikato District Council* [2011] NZEnvC 121
[13] See for example, the High Court's observations in *Opoutere Ratepayers and Residents Association v Waikato Regional Council* [2015] NZEnvC 105 at [97], *Gray v Dunedin City Council* [2023] NZEnvC 45 at [205]

welfare considerations are not outside of the ambit of the RMA as suggested by PDL.

29. Finally, the Consent Application required consent as a discretionary activity under the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 ("**NESFW**"), including those provisions relating to intensive winter grazing ("**IWG**").[14]

30. The IWG provisions of the NESFW were introduced to address, among other factors, negative effects on "animal welfare" [15] and the environment, and accordingly are relevant concerns that may be raised by a submitter.

31. It is therefore respectfully submitted that NZALA's submission raises a reasonable and a relevant case and cannot be struck out on this basis.

Abuse of process

32. An abuse of process involves using the Court (or equivalent decision-making forum) for an ulterior purpose, for example a purpose not within the scope of such process.[16]

33. The equivalent power under section 279(4)(c) requires a high threshold to be met and is no more than "statutory recognition of the Court's wider jurisdiction to prevent its own procedures from being misused to achieve a result which would be manifestly unfair or which otherwise would bring the administration of justice into disrepute."[17]

34. It is submitted that to allow NZALA's submission to stand would not amount to a misuse of Council's procedures or create a result that is "manifestly unfair".

35. PDL have submitted that allowing the NZALA submission to progress to a hearing would amount to an abuse of process and would "put PDL to unnecessary expense", noting that the NZALA submission is the only submission on the Consent Application. It is submitted that the "cost of responding to" the points in the NZALA submission does not meet the high

[14] PDL Resource Consent application at 5.4.4.
[15] Ministry for the Environment, *Wai Māori Mātuatua Essential Freshwater; Intensive Winter Grazing;* INFO1067; August 2022
[16] *Fletcher Challenge Energy Power Generation Ltd v Waikato RC EnvC A109/98*
[17] *Hurunui Water Project v Canterbury RC* [2015] NZHC 3098

threshold required to be an abuse of process. As set out above, it is submitted that NZALA's submission does raise a reasonable and relevant case.

36. As noted in these submissions, the Consent Application was publicly notified and any person (other than those precluded due to trade competition) may make a submission about the application to the consent authority. Section 96 and Form 13 of the Resource Management (Forms, Fees and Procedure) Regulations 2003[18] enables (and in fact, requires) submitters to identify whether they do or do not wish to be heard in support of their submission. The NZALA submission states that "if it is considered helpful to the Authority, NZALA can appear and speak in support of this submission". In accordance with section 100 of the RMA, a hearing need not be held unless the consent authority considers that a hearing is necessary or the application or submitter requests to be heard.

37. The associated cost of any such hearing, regardless of the number of submitters or number of those seeking to be heard, is not an abuse of process, but rather is a consequence of the process intended by the relevant provisions of the RMA. It is respectfully submitted that striking out NZALA's submission on the basis that the cost to the Applicant of proceeding to a hearing would be an abuse of process, would deny NZALA of their public participation rights as a submitter under the RMA.

38. Finally, PDL's Strike Out Application also notes that NZALA did not attend the pre-hearing meeting. NZALA wishes to note that it was provided with PDL's extensive response to its submission on 24 April 2023, with the pre-hearing meeting scheduled for 28 April. NZALA instruct that while it was prepared to attend the pre-hearing meeting on the basis of the Consent Application and its submission, it required more time to obtain legal and technical advice and representation in relation to PDL's response of 24 April. NZALA is a voluntary organisation, and unfortunately the timeframe did not allow it to engage appropriate counsel and advice to enable meaningful participation in the pre-hearing meeting. NZALA's position was communicated with Environment Southland prior to the pre-hearing meeting, and NZALA was gratefully given the opportunity to provide further written feedback once it had engaged and received appropriate technical advice.[19]

[18] Resource Management (Forms, Fees, and Procedure) Regulations 2003; Schedule 1
[19] Which it provided by way of letter dated 10 May 2023

NZALA has now had the opportunity to engage appropriate technical expert advice and legal counsel in relation to the Consent Application.

Summary

39. It is submitted that the threshold for striking out NZALA's submission in accordance with section 41D has not been met. NZALA's submission raises a reasonable and relevant case and does not amount to an abuse of process.

40. It is respectfully submitted that the ability to strike out under section 41D must only be used sparingly, given the significant implications on public participation.

Yours faithfully
GOVETT QUILLIAM

REBECCA EATON
Senior Associate
Direct Dial: (06) 768-3716
Email: Rebecca.Eaton@gqlaw.nz

REE-742577-10-21-1