

**Before a Decision-Making Committee
Of the Environmental Protection Authority**

APP203660

Under the Hazardous Substances and New Organisms Act 1996

In the matter of the modified reassessment of methyl bromide

By **Stakeholders in Methyl Bromide Reduction Inc**
Applicant

33RD MEMORANDUM OF COUNSEL FOR THE APPLICANT

10 JUNE 2021

Counsel Acting

M J Slyfield
Stout Street Chambers

(04) 915 9277
morgan.slyfield@stoutstreet.co.nz
PO Box 117, Wellington

Introduction

1. This memorandum responds to the two issues raised by the memorandum from the Tauranga Moana Fumigant Action Group (**TMFAG**) dated 3 June 2021.

Process

2. TMFAG asserts¹ that the DMC's determination of the third waiver application² did not follow a s 59(4) requirement to enquire whether other submitters consented to the waiver.
3. Section 59(4) does not require the DMC to make enquiries. It requires the DMC to be "satisfied". If the DMC was in a position to be satisfied without making enquiries, then the process required by subsection (4) was followed.
4. The DMC was plainly aware of the need to comply with subsection (4).³ It turned its mind to the possibility of seeking feedback from parties.⁴ It considered it would not receive information different from that previously provided in response to the two earlier applications.⁵ It considered no feedback was required,⁶ and despite this, it felt able to conclude that there would be no undue prejudice to any parties.⁷
5. The decision must be considered in context, which includes the following factors:
 - (a) The group to be considered in terms of any potential for 'undue prejudice' was not open-ended. It was limited to the applicant and submitters.⁸
 - (b) The positions of the applicant and submitters in relation to the recapture obligation had already been presented in evidence and submissions at the hearing on 11-17 August 2020.

¹ At [15].

² Documented in Direction & Minute WGT030, 1 March 2021.

³ WGT030 at [18].

⁴ WGT030 at [20].

⁵ WGT030 at [21]].

⁶ WGT030 at [22].

⁷ WGT030 at [28].

⁸ Section 59(4)(a)

- (c) Supplementing that information, the DMC had had the benefit of notifying all submitters of the two previous waiver applications, and receiving submissions in opposition, which it took into account in granting the previous waivers.
 - (d) The possibility of 'undue prejudice' had to be assessed specifically in relation to the 3-month extension being sought, in a context where waivers, on notice, had already been granted for a total of 10 months.
6. Taking all of the above factors into account, STIMBR submits it was open to the DMC to reach a conclusion that no undue prejudice would arise, without making any further enquiries. This approach discharged the DMC's obligation to be "satisfied" in accordance with s 59(4).
7. For completeness STIMBR also responds to two of TMFAG's incidental assertions:
- (a) TMFAG asserts that the DMC's process was contrary to legal advice.⁹ The advice in question was provided in March 2020. It preceded any applications for waiver. The advice was not specific to the circumstances before the DMC in March 2021, by which time the DMC had conducted a hearing over 5 days, and had considered and determined two prior applications for waiver on full notice.
 - (b) TMFAG asserts the waivers have allowed logging exporters to breach the 2010 EPA approval.¹⁰ On the contrary — the waivers have ensured that logging exporters do not breach the 2010 EPA approval, by providing a limited and temporary extension to that approval. Breaches of the methyl bromide controls may well have resulted if STIMBR had not sought, or the DMC had not granted, the waivers.

⁹ TMFAG's Memorandum at [15].

¹⁰ TMFAG's Memorandum at [18].

The extent of waiver

8. TMFAG correctly identifies that STIMBR's waiver applications have sought to resolve a particular problem, namely the problem of ensuring security of payments for log exports to India.
9. However, the waivers have not been sought, and nor have they been granted, in terms that are limited to addressing that problem.
10. In all of its waiver applications STIMBR has requested waiver of "the requirement to apply recapture technology to methyl bromide fumigations". It has not limited its request to fumigations of any particular commodity or for any particular overseas market.
11. This breadth is mirrored in all of the DMC's waiver decisions. In each case the DMC has recorded that it is waiving "the date for the implementation of the recapture control" and directing a new date "at which the recapture control takes effect". These terms do not place any limit on the nature of the methyl bromide fumigations to which the waivers apply. Just as the recapture obligation applies to *all* methyl bromide fumigations, so too do the waivers.
12. STIMBR therefore opposes TMFAG's request for confirmation that the waivers are of limited application.
13. If the problems surrounding payments for log exports to India did not exist, there would have been a need to seek a waiver, prior to 28 October 2020, for other reasons, i.e. to ensure that the recapture obligation did not take effect while the DMC was processing the reassessment. Otherwise, an impossible recapture standard (5ppm inside each fumigation enclosure) would have taken effect from 28 October 2020, and almost all fumigations with methyl bromide would have been required to cease, pending the DMC's decision; with disastrous and potentially irrevocable effects on export industries that rely on fumigation.
14. However, the waivers sought by STIMBR (and granted by the DMC) were broad enough to avoid these issues arising.
15. If the DMC decides, contrary to STIMBR's submissions above, to confirm that the past waivers have been limited in scope, then STIMBR will immediately apply for additional waivers to cover all methyl bromide fumigations that are

not covered by the existing waivers. The reassessment application has been made on behalf of all methyl bromide users, and it is crucial to all parties reliant on methyl bromide fumigations to delay an impossible recapture standard from taking effect while the reassessment is in process, i.e. while the DMC is actively working towards a new recapture obligation that is fit-for-purpose.



M J Slyfield
Counsel for STIMBR
10 June 2021