

**BEFORE THE ENVIRONMENTAL PROTECTION AUTHORITY
AT WELLINGTON**

IN THE MATTER of the Exclusive Economic Zone and Continental Shelf
(Environmental Effects) Act 2012 (**EEZ Act**)

AND

IN THE MATTER of an application for marine and discharge consents
to recover iron sand under sections 20 and 87B of
the EEZ Act

BETWEEN **Trans-Tasman Resources Limited**

Applicant

AND **Environmental Protection Authority**

Consent Authority

AND **Royal Forest and Bird Protection Society New Zealand
Incorporated**

Submitter

**MEMORANDUM OF COUNSEL FOR ROYAL FOREST AND BIRD PROTECTION
SOCIETY OF NEW ZEALAND INCORPORATED**

8 FEBRUARY 2017

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MAY IT PLEASE THE DECISION-MAKING COMMITTEE:

1. This memorandum requests that the DMC reconsider its indicative decision excluding Forest & Bird's expert witnesses from attending expert conferencing, and seeks that cross examination be permitted at the hearing.

EXPERT CONFERENCING

2. The Royal Forest and Bird Protection Society of New Zealand Incorporated requests that the DMC allow experts who are employees of parties to attend expert conferencing. Forest & Bird considers paragraphs 4 and 5 of its 20th minute of 3 February 2017 are:
 - a. not consistent with the Environment Court Practice Note;
 - b. out of step with Environment Court processes and earlier applications for marine consent;
 - c. a breach of natural justice; and
 - d. prejudicial to Forest & Bird's case, as the decision to exclude its witnesses from expert conferencing amounts to a finding that they are not experts, and consequently, their opinions are inadmissible. Alternatively, if they are later found to be sufficiently independent to be experts, their evidence will be vulnerable to criticism that by not having attended conferencing they have not fully considered the views of other witnesses.

Background

3. Forest & Bird has filed expert briefs of evidence from Natasha Sitarz (planning) and Anton van Helden (whales). Both experts are employees of Forest & Bird.
4. Paragraphs 4 and 5 of the minute provide:
 4. *The DMC has taken the view that witnesses who are employees of a party may face difficulties in establishing their independence and*

thus complying with the Code of Conduct for Expert Witnesses in the Environment Court Practice Note 2014. Consequently these witnesses have not been scheduled to attend expert conferencing. If a party considers that a witness can and has clearly demonstrated their independence the EPA may be requested in writing to reconsider individual cases.

5. *This does not reflect on the expertise or integrity of witnesses. The question is the ability to demonstrate independence. This difficulty is an almost inevitable consequence of a relationship in which the primary duty of the people concerned is properly owed to their employers. It is important that it is understood that this decision relates to participation in expert conferencing not to giving evidence. The DMC accepts that these witnesses may have access to information that is not necessarily be available to others and the DMC will consider the evidence given by them on its merits.*
5. Forest & Bird considers that paragraph 5 misunderstands the role of the expert witness and the relationship between Forest & Bird and its employees.
6. Ms Sitarz and Mr van Helden have stated in their evidence that they have complied with the Environment Court Code of Conduct. The DMC has concluded, without hearing from Ms Sitarz, Mr van Helden or counsel, that, despite saying they have complied they are not able to comply with the code of conduct. In those circumstances, the decision to exclude Ms Sitarz and Mr van Helden from conferencing reflects on the integrity of Ms Sitarz, Mr van Helden, counsel and Forest & Bird. The DMC is wrong to suggest that it does not.
7. Forest & Bird employees face no difficulties with presenting expert evidence and complying with their obligations as Forest & Bird employees. Mr van Helden and Ms Sitarz have been asked by counsel (who himself has duties to the Court and analogous bodies in accordance with his professional obligations) to prepare expert evidence in accordance with the Code of Conduct. The witnesses have not been asked to prepare evidence that furthers Forest & Bird's submission. They have prepared evidence in accordance with

the code of conduct. Their duty to Forest & Bird in the present circumstances is to present independent expert evidence as requested, consistent with their duty to comply with the Code of Conduct.

8. A further problem with the DMC's reasoning is that it assumes that the expert opinion follows the employer's view. When deciding whether to submit and what issues to submit on Forest & Bird considers expert advice very carefully. If Mr van Helden's expert opinion was that the application raised no significant issues for whales, then there would be no reason for Forest & Bird to advance these issues.
9. Forest & Bird finds it difficult to understand how the DMC could suggest that Forest & Bird would place a duty on its employees to prepare evidence otherwise than in accordance with the code of conduct.
10. It will be prejudicial to Forest & Bird if its witnesses do not attend conferencing. The finding that the witnesses cannot attend expert conferencing is a finding that they are not experts. This has the effect of rendering their opinions inadmissible. Only experts are entitled to provide opinion evidence.¹ The DMC cannot consider the evidence on its merits if it has concluded they have not complied with the Code of Conduct. Such opinions are inadmissible.
11. The Environment Court regularly allows experts who are the employees of parties to present expert evidence, and as part of that role, to attend conferencing. Counsel is not aware of any case where the attendance at conferencing by experts who are employees of parties has been questioned. Experts who were employees of parties attended expert conferencing in earlier applications for marine consents under the EEZ Act:
 - a. David Thompson and John Leathwick attended expert conferencing on the Chatham Rise application despite being employed by the submitter they appeared for: the Crown (DOC); and

¹ Section 23-25 Evidence Act 2006

- b. Paul Baxter attended expert conferencing on the earlier TTR application despite being employed by the submitter he appeared for, the Crown (DOC).
12. In the last 6 months, Ms Sitarz has attended expert conferencing on two cases.² In one case, the Environment Commissioner who facilitated the conference, Commissioners Hodges, commended all participants in the following way:

I wish to record my appreciation in the way in which all experts, without exception, worked co-operatively and contributed positively to the conferencing process to ensure the requirements of the Practise Note were met.
13. The participants included six experts who were employees of parties.
14. Ms Sitarz has also recently presented expert evidence before the Environment Court, and her ability to appear as an expert was not questioned by the Court (Environment Judge Smith presiding) or any party.
15. The DMC's decision to request that a DOC appoint an expert to attend conferencing is inconsistent with the decision to exclude submitter employees from expert attending conferencing. DOC has a statutory function "*to advocate the conservation of natural and historic resources generally*".³ The "issue"⁴ that arises with respect to the duty placed on experts who are employees of parties would appear to apply equally to any DOC expert.
16. The decision to exclude experts who are employees of parties is out of step with Environment Court practice and the previous practice of DMC's that considered the earlier TTR application and the Chatham Rise application.
17. If there are issues with an expert's compliance with the code of conduct, the Environment Court, correctly, waits to hear from the witness before reaching conclusions about the witness that are prejudicial, go to the integrity of the

² *Royal Forest & Bird Protection Society of New Zealand Incorporated v Bay of Plenty Regional Council* (ENV-2015-AKL-129) and *High County Rosehip Orchards Ltd v Canterbury Regional Council* (ENV-2012-138).

³ Section 6

⁴ Forest & Bird does not accept that it is an issue.

witness, and affect the weight given to their evidence.

18. If Forest & Bird experts are not able to attend caucusing, their evidence is immediately devalued because they are unable to contribute their opinion to any joint statement that is prepared, they are unable to consider the views of other expert witnesses raised in conferencing, and material may not be made available to them that is available to other witnesses. This unfairly impacts on Forest & Bird's case, and has natural justice implications for Forest & Bird as a submitter.
19. Forest & Bird asks that the DMC reverse its decision that experts who are employees of parties are not entitled to participate in expert conferencing.

Cross examination of witnesses

20. Forest & Bird supports the 5th memorandum on behalf of KASM and Greenpeace dated 30 January 2017.
21. Forest & Bird had intended to raise this at the pre-hearing conference on 10 February 2017. However, given the DMC has ruled that cross-examination should not be allowed, Forest & Bird asks that its objection to the process whereby cross examination is not allowed is recorded.

Dated this 8th day of February 2017

A handwritten signature in black ink, appearing to read 'Anderson', is written over a light grey rectangular background.

Peter Anderson
Counsel for Royal Forest and Bird Protection Society of New Zealand
Incorporated