
BEFORE THE BOARD OF INQUIRY

In the matter of a Board of Inquiry appointed under s146 of the Resource Management Act 1991 to consider an application by Mighty River Power Limited for resource consents to construct and operate a Windfarm at Turitea

**MEMORANDUM OF COUNSEL
FOR PALMERSTON NORTH CITY COUNCIL**

Dated: 22nd June 2009

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MAY IT PLEASE THE BOARD

1. The Memorandum for MRP dated 16 June 2009 and supporting affidavits contain a lot of hearsay, innuendo and information that is largely irrelevant or can be characterized as 'playing the man rather than the ball'. Rather than respond to this material line by line, Counsel has invited Ms Shaw a primary witness to the matters in issue to respond. Please see her evidence attached.
2. Rebuttal evidence is defined in the Directions of the Board as:

"evidence disputing evidence already circulated¹"
3. The Board has advised that departure from the Directions timetable will only be granted in exceptional circumstances.
4. What are the exceptional circumstances that MRP claim exist? As far as can be ascertained, these exceptional circumstances are:
 - (a) the submission of PNCC was inspecific as to its scope and extent (this is dealt with in Ms Shaw's affidavit and is not accepted);
 - (b) there is a new paradigm as to the nature of evidence and scope of expertise of witnesses revealed in recent cases before the Environment Court (a dubious proposition).
5. The AEE in the application identifies the major potential effects of the TWF (Turitea Windfarm) proposal. PNCC has consistently, since October 2006 (see Council's Resolution 18.6 - 18.8 Henry affidavit page 48), states it will engage independent experts to peer review MRP's assessment of the scale, character and intensity of potential effects.
6. The first class of evidence sought to be introduced by MRP is what can be termed 'corroborative peer reviews'. In this class, are the peer reviews of Dr. Burns in relation to the RNZ survey and Mr

Coombs in relation to the evidence of Mr Brown. This evidence does not meet the definition of 'rebuttal evidence'. It should be excluded. There are no exceptional circumstances justifying its introduction at this late stage and allowing it would be of limited assistance and undermine the process established by the Board. It is plain old cribbing and if not checked, leads to all sorts of problems. The motivation for introducing it is misconceived, as the cogency of expert evidence is not a numbers game.

7. The second class of evidence sought to be introduced by MRP, is evidence by experts that rebut a primary statement by a submitter (e.g. PNCC) but is not rebuttal in the accepted sense of that term and is not evidence from a person who has undertaken a comprehensive assessment of the relevant subject. A good example is the evidence of Dr. Phillips. Dr. Phillips did not do a social impact assessment of the MRP proposal. His sole function is to critique the evidence of submitters who provide evidence on social impact. His function may be described as that of an expert assassin. He doesn't make a positive contribution to the subject, but does critique the evidence of submitter experts. If such experts are entitled to give rebuttal evidence then this alters the fairness of the process from one where experts provide a body of helpful evidence, and then identify areas of disagreement to one where the applicant is given the indulgence of additional experts whose sole function is to critique. This type of evidence is particularly prone to a mushrooming of accusation upon accusation between experts and increasingly diminishing marginal returns in terms of probative material.
8. The third class of evidence is evidence that is related to a primary statement and rebuttal in nature but by a new expert. This is some of the evidence on effects on water quality and climate change. It is accepted that the evidence from the BECA suite of witnesses on water quality and geology make a positive contribution to the total

¹ See para 5 Directions Memorandum

package of evidence and can be described as rebutting a subject their colleague (Mr Levy) dealt with in his primary evidence. It is simply a change of personnel to ensure relevant expertise.

9. The following quote from *Deutsche Finance Ltd v. Commissioner of IRD*² cited by Whiting ECJ with approval in *Te Maru v. Bay of Plenty Regional Council*³ encapsulates the law:

“In *Air Chathams Ltd v Civil Aviation Authority of New Zealand* (2003) 16 PRNZ 676 (HC), Hammond J stated at [48]:

Judges are always hesitant to rule out a brief of evidence at the outset. First one can never be completely confident that something might not be useful or matters might have been misperceived by the Judge at the outset. Secondly, Judges do not lightly turn away from the seat of justice matters of “evidence” which one wide would like to have before the Court.

The role of the trial Judge in considering pre-trial applications regarding the admissibility of evidence was succinctly put by McGechan J in *Donovan v Graham* (1991) 4 PRNZ 311 (HC) at 313-314:

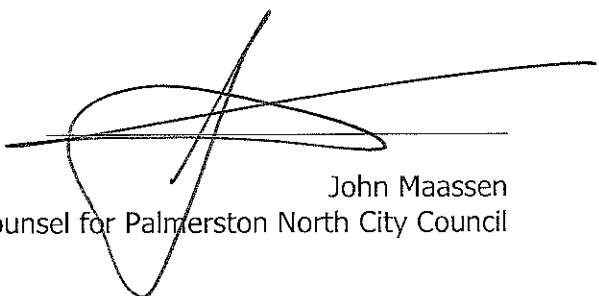
Pre-trial objections as to evidential matters are not particularly common. The more usual situation is one where the Judge picks his way through the total material at ultimate trial stage, discarding the dross. Where, however, pretrial objection is indeed taken the Judge must act in a manner which will best promote the overall interests of justice given the facts of the particular case. The Judge must bear in mind risks involved in premature exclusion of evidence which on the more fully informed basis emerging at trial might be seen as admissible. He

² HC Auckland Registry CIV-2006-404-2535

³ Decision A018/2008 dated 29 January 2008

must keep in mind the desirability of the case being kept within bounds, and open to efficient disposal. It is important affidavits not be allowed to mushroom, with irrelevance piled upon irrelevance, accusation upon accusation, and with the parties becoming increasingly and unproductively inflamed. Having said that, it also is important the Court not become buried in extensive interlocutory battles over evidential points of relatively trivial importance, without time to decide substantive disputes. There is room for pretrial pragmatism, particularly over lesser matters. Each case must depend very much upon its own facts."

10. It is submitted that at least evidence in class 1 and class 2 should be excluded. If the Board allows all or some of the evidence, then it is submitted that a corresponding ability to present further evidence should be granted to submitters. At this stage, the nature and extent to any such further evidence cannot be confirmed by PNCC (or when it can be made available) as that depends on the ultimate directions of the Board, the availability of experts and the utility of that evidence following careful reflection.
11. MRP claims to want to provide the best evidence to the Board. In that regard, should any evidence in class 1 and class 2 be admitted, then PNCC places on record its request to MRP that it disclose the contents of the report of Corydon Consultants Ltd (see email dated 12 June 2009, Exhibit A to the Shaw affidavit).



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