

**BEFORE THE ENVIRONMENT COURT
AT CHRISTCHURCH**

**I MUA I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI**

Decision No. [2020] NZEnvC 149

IN THE MATTER of the Resource Management Act 1991
AND of an application for declarations under s 310
of the Act
BETWEEN ENVIRONMENTAL DEFENCE SOCIETY
INCORPORATED
(ENV-2020-CHC-99)
Applicant
AND NEW ZEALAND ALUMINIUM SMELTERS
LIMITED
Respondent

Court: Environment Judge J E Borthwick

Hearing: Sitting alone in Chambers pursuant to s 279 of the Act

Date of Decision: 10 September 2020

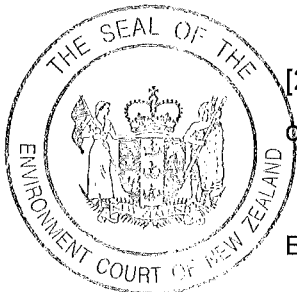
Date of Issue: 10 September 2020

**DETERMINATION OF THE ENVIRONMENT COURT ON APPLICATION FOR
ACCESS TO COURT DOCUMENTS BY NON-PARTIES**

Introduction

[1] The proceeding to which this application relates concerns an application for declarations in relation to the movement and storage of dross by-products from the Tiwai smelter site in Bluff to several sites in Mātaura. In summary, the declaration filed by Environmental Defence Society Incorporated would require New Zealand Aluminium Smelters Limited to remove the ouvea premix from the Mātaura site on a priority basis.

[2] Melanie Phipps, a senior producer at Radio New Zealand, has requested copies of electronic versions of the first affidavit of Shay Schlaepfer (for EDS) and the affidavit



of Stephen Hamilton (for NZAS).¹

District Court (Access to Court Documents) Rules 2017

[3] Rule 8(1) of the District Court (Access to Court Documents) Rules 2017 stipulates that every person has the right to access the formal court record relating to a civil proceeding. The formal court record is defined by Rule 4 as documents kept in the registry of the court and include a register or index, a published list that gives notice of a hearing, a judgment, an order, or a minute of the court, including any record of the reasons given by a judicial officer. The definition does not include affidavits as sought by Ms Phipps' application.

[4] Where a person is not entitled to access a document relating to a proceeding as of right, Rule 11 provides the option to make a written request for access. Rule 11 has several procedural requirements, including that the applicant must detail the documents sought and the reasons and purpose for doing so. Ms Phipps' initial email advised the following as the intention behind her request:²

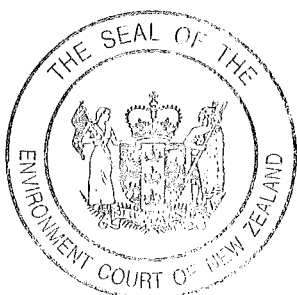
I'm working with Gary Taylor from the Environmental Defence Society (EDS) on Radio New Zealand's coverage of the forth-coming judicial settlement conference.

[5] This was promptly followed by a further email clarifying:³

Gary has asked me to clarify that he has no intention of discussing anything with respect to the JSC in any RNZ program: he has reminded me that the JSC is private and confidential to the parties.

Gary will discuss the hazards posed by the presence of ouvea premix in Maitua, as is allowed in contemporary reporting, strictly avoiding any discussion about the JSC. In fact this discussion will occur before the JSC begins.

I am interested in any background material available to me in the fore-mentioned affidavits, if you are able to help please.



¹ Email of Melanie Phipps to the Registry regarding access to documents (3 September 2020).

² Email of Melanie Phipps to the Registry regarding access to documents (3 September 2020).

³ Email of Melanie Phipps to the Registry regarding clarification of request for access (3 September 2020).

[6] Once the parties to the proceeding have been provided the opportunity to respond, the Judge may then refuse the application, grant the request in whole or in part with or without conditions, or refer it to a Registrar to determine.⁴

Referral to parties

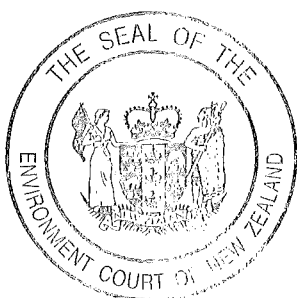
[7] Ms Phipps' request was referred to the parties with the direction that any party opposing the request was to file a memorandum identifying the documents they oppose being released and the grounds for objection. NZAS advised that, consistent with its position on previous applications, it does not oppose the release of the first affidavit of Shay Schlaepfer (for EDS).⁵

[8] NZAS further advised an objection to the release of the affidavit of Mr Hamilton on the following grounds:⁶

the affidavit of Mr Hamilton includes references to and discussion around (with extensive direct quotes) documents to which the Court has previously direct[ed] confidentiality (most notably the 'Taha agreement' and its implementation and assignment which is in particular discussed at para 29 to 61 (but also relevant to other parts of the affidavit), and also the Inalco arrangements including the *Ouvea Premix Removal Agreement* at para 64 to 68). NZAS would similarly regard its tender evaluation process (at paras 13 to 28) as commercially sensitive:

- a. as per the cover email provided with the affidavit, it was prepared (and provided) on the understanding that confidentiality would apply to it;
- b. the existing confidentiality orders refer to (for example "... and parts of any documents that are created that refer to the contents of it" or "and any parts of any document that are created that refer to it") (as per the Taha agreement orders 21 August 2020 and the Ouvea Premix Removal Agreement orders 25 August 2020);
- c. there is limited, if not any, substantive material that could be released without breaching the above; and
- d. the affidavit was also prepared on the basis of, and for the specific purpose of, being a "narrative" affidavit to assist discussions as a part of the judicial settlement conference process.

[9] No other party responded to the request.



⁴ District Court (Access to Court Documents) Rules 2017, rule 11(7).

⁵ Email of Ben Williams for NZAS to the Registry re access to documents (7 September 2020).

⁶ Email of Ben Williams for NZAS to the Registry re access to documents (7 September 2020).

Consideration

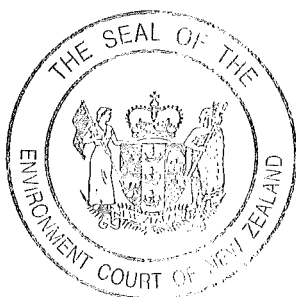
[10] The factors set out in Rule 12 provide guidance to consideration of applications of this kind. I must consider the nature of the request, the reasons given for it and any relevant factors to the proceedings which may include but are not limited to:

- (a) the orderly and fair administration of justice;⁷
- (b) the right to bring and defend civil proceedings without the disclosure of any more information concerning private or commercially sensitive matters than is necessary to satisfy the principle of open justice;⁸
- (c) the principle of open justice, including the encouragement of fair and accurate reporting of, and comment on, court hearings and decisions;⁹ and
- (d) the freedom to seek, receive and impart information.¹⁰

[11] There is a need to strike the correct balance between providing for open justice and protecting the privacy interest of parties. Rule 13 makes it clear that prior to a hearing the importance of public scrutiny is to be afforded less weight, while the protection of the parties' privacy and the orderly and fair administration of justice is to be given greater weight, potentially by requiring any access granted to be limited.¹¹

[12] Of the factors above, the right of parties to bring and defend civil proceedings without having to disclose any more information concerning private or commercially sensitive matters than is necessary to satisfy the principle of open justice¹² is of particular relevance to this application, given the early stage of these proceedings.

[13] I am aware of previous reporting of this case in the media and the high level of public interest. In coming to my decision, I have given weight to the fact that NZAS have confirmed they consent to the disclosure of the affidavit of Ms Schlaepfer. I note that approach is consistent with previous requests by non-parties to access this affidavit. I am satisfied the disclosure of this affidavit will provide context to the background of these proceedings and the natural hazard risk Ms Phipps intends to discuss without impinging



⁷ District Court (Access to Court Documents) Rules 2017, rule 12(a).

⁸ District Court (Access to Court Documents) Rules 2017, rule 12(c).

⁹ District Court (Access to Court Documents) Rules 2017, rule 12(e).

¹⁰ District Court (Access to Court Documents) Rules 2017, rule 12(f).

¹¹ District Court (Access to Court Documents) Rules 2017, rule 13(a).

¹² District Court (Access to Court Documents) Rules 2017, rule 12(c).

on the privacy interests of the parties. I direct the Registry to provide access to the affidavit of Shay Schlaepfer.

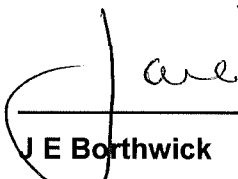
[14] I have also considered the objections expressed by NZAS in relation to disclosure of the affidavit of Mr Hamilton. That affidavit was provided to assist discussions as part of the judicial settlement conference, a procedure designed to allow parties open expression of information and ideas for resolution on a confidential basis to enhance settlement of issues and cases promptly in the public interest. The affidavit provides a broad overview of the background to, and arrangements made by the TAHA Agreement. It also notes issues that arose around Maitua and the subsequent arrangements in the Ouvea Premix Removal Agreement to address those issues. Both of those documents are the subject of court orders assuring confidentiality by restricting access to certain persons for use only within these proceedings. Those restrictions extend also to any documents created that refer to the contents of the two agreements.¹³

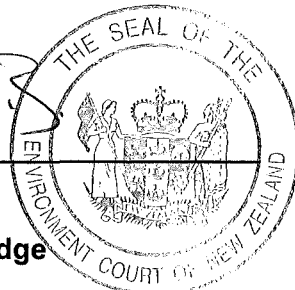
[15] Having reviewed Mr Hamilton's affidavit, I agree that little, probably even no, substantive material could be released without breaching the existing confidentiality orders. It is my view that the disclosure of this affidavit would not protect the privacy of the parties before the court, nor would it promote the orderly and fair administration of justice. Accordingly, I direct that the affidavit of Mr Hamilton will not be disclosed.

Outcome

[16] The following document is to be released to Ms Phipps at Radio New Zealand:

- (a) the affidavit of Shay Schlaepfer affirmed 3 July 2020.


J E Borthwick
Environment Judge



The seal of the Environment Court of New Zealand is circular, featuring the text 'THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND' around the perimeter. In the center is the coat of arms of New Zealand, which includes a crown, a shield with a cross, and two figures holding a shield.

¹³ *Environmental Defence Society Incorporated v New Zealand Aluminium Smelters Limited* [2020] NZEnvC 136 order A(b); *Environmental Defence Society Incorporated v New Zealand Aluminium Smelters Limited* [2020] NZEnvC 132 order A(a).