BEFORE THE ENVIRONMENT COURT **ENV-2016-WLG-00058**
WELLINGTON

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of a Notice of Motion under Section 87G requesting the granting of resource consents to Wellington International Airport Limited for the Wellington International Airport Extension of Runway: Construction, Operation and Maintenance (the **Application**)

BY **WELLINGTON INTERNATIONAL AIRPORT LIMITED**
Applicant

JOINT SUBMISSIONS FOR AIR NEW ZEALAND LIMITED AND THE BOARD OF AIRLINE REPRESENTATIVES NEW ZEALAND INCORPORATED

13 April 2018

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Introduction

1. These submissions are filed on behalf of Air New Zealand Limited (**ANZL**) and the Board of Airline Representatives New Zealand Incorporated (**BARNZ**) in response to the Court's direction of 18 March 2018.

2. ANZL and BARNZ wish to be heard jointly at the judicial conference on 18 April 2018.

Summary of position

3. ANZL's and BARNZ's position was expressed through a joint memorandum dated 16 March 2018. ANZL and BARNZ continue to generally support the concerns of GOTB and, in particular:

    (a) Support the request for directions in paragraph 20 of the GOTB Memorandum dated 16 March 2018 (**GOTB Memorandum**) to direct Wellington International Airport Limited (**WIAL**) to notify the Environment Court and the parties of the length of the RESA it is seeking and to provide the information it puts before the Director of Civil Aviation (the **Director**).[1]

    (b) Consider it reasonable:

        (i) for the parties to this proceeding to have details of the Runway Safety Area Extension that WIAL intends to seek approval for from the Director (including copies of all information that WIAL puts before the Director in support of its revised application); and

        (ii) that WIAL provide monthly updates to the Environment Court and the parties to this proceeding on the progress of the revised application to the Director.

4. ANZL and BARNZ share his Honour's concerns as expressed in paragraph 6 of the Court's 18 March minute. ANZL's and BARNZ's

[1] We note we have now seen the legal submissions for GOTB and this position aligns with the relief sought at paragraph 30.3.

primary concern at this stage is the question of procedural fairness and uncertainty created by WIAL in not conclusively disclosing the length of RESA it is requesting from the Director, the potential impact of any change to the runway proposal on the original information provided in support of the application under the RMA and the further work required by the parties in response to any changed runway proposal in preparation for hearing.

Powers of an Environment Judge sitting alone

5. It is submitted that his Honour has the power to:

   (a) make the directions requested in paragraph 20 of the GOTB Memorandum (or for WIAL to apply for a confidentiality order that could be granted to protect any sensitive information); and

   (b) if WIAL is not prepared to disclose the information it intends to provide to the Director in the revised RESA application, strike out the proceeding pursuant to section 279(4)(c) on the grounds that it would otherwise be an abuse of the process of the Environment Court to allow the case to be taken further.

Power to make directions

6. In paragraph 20 of the GOTB Memorandum, counsel for GOTB respectfully requests the Court direct WIAL to:

> 20.1 immediately provide the parties with details as to the length of RESA that it intends to seek the Director's approval for;
>
> 20.2 provide the parties with copies of all information that it puts before the Director in support of its application, within two weeks of any such information being filed with the Director. If any information is considered confidential, the reasons should be clearly identified by WIAL and an appropriate application made to the Court for confidentiality / the redacting of any information; and
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> 20.3 provide the Court and parties with regular, end of month, updates as to its progress with CAA.

7. WIAL's application to the Director is a separate process to this proceeding. However, whether WIAL is able to obtain the approvals through this proceeding is contingent on the Director's decision. There is

also a degree of overlap, as issues of safety and economic costs or effects are potentially relevant to both types of statutory approval required in this case. It is submitted that WIAL should simply provide the Environment Court and parties with the information the Environment Court and the parties reasonably require to determine the scope and nature of the application before the Court. The Environment Court could do this by way of a direction pursuant to section 281(1)(b)(iii) of the Resource Management Act 1991 (**RMA**).

8. If there are issues as to commercial sensitivity, or broader confidentiality concerns, these matters could be addressed through an order pursuant to sections 279(3)(c) and 42(2) of the RMA. WIAL would need to make an application to the Court for confidentiality orders pursuant to sections 42, 277 and 279 of the RMA and rules 6 and 8 of the District Council (Access to Court Document) Rules 2017. Other parties could then respond to any such application if they wished to, whether in support, or in opposition, or to abide the decision of the Court

9. In a recent decision of the Environment Court, relating to the proposed expansion of the Waikeria prison, the Court made a confidentiality order pursuant to sections 279(1)(b), 279(3)(c) and 42(2) of the RMA.[2] The confidentiality order was made in relation to the Works Requirements that the Court determined it needed to review in the context of the proposed expansion. This information was not originally provided to the Court and the Minister of Corrections submitted it was part of a separate confidential tender process (the Public Private Partnership tender process). Although it was submitted by counsel for the Minister of Corrections that it was not necessary for the Court to have the Works Requirement document, counsel proposed options with respect to confidentiality orders should the Court continue to require the documentation. Ultimately, the Court did require the Works Requirement document and the Minister of Corrections applied for the confidentiality order.

10. It is submitted the current situation is analogous to that of the Waikeria Prison expansion in relation to the Court requiring information, that was

[2] *Minister of Corrections v Otorohanga District Council* [2017] NZEnvC 161.

part of a separate process, in order to appropriately inform the Court's consideration of the Notice of Requirement. As was appropriate in that case, a confidentiality order was applied for and granted. A similar order could equally be applied for by WIAL if there are sensitivities around disclosure of information. The Court would then have all of the information before it to make an appropriate decision on the status of the proceeding.

Power to strike-out

11. Counsel has had an opportunity to review counsel for GOTB's legal submissions dated 13 April 2018 on the Court's power pursuant to section 279(4)(c).[3] The case law cited establishes that inordinate / inexcusable delay and serious prejudice are required to warrant a strike out.

12. Counsel for ANZL and BARNZ, acknowledge that as corporate entities their clients are not subject to the same degree of potential prejudice caused by delay as may be experienced by members of the Guardians of the Bay Society, although, like all parties, they will inevitably be subject to increased costs of evidence preparation when WIAL's supporting information is updated.

13. As a result, ANZL and BARNZ's submissions address the matters that the Court should consider if it does not strike out the application.

Procedural fairness

14. It is submitted that procedural fairness concerns should be addressed by a direction compelling WIAL to provide the relevant information on a timely basis. This will assist in ensuring that the Environment Court and the parties have the information they require to determine how and /or whether the proceeding can continue. It is not apparent whether WIAL is willing to do that.

15. In relation to procedural fairness the High Court has stated that "the RMA envisages hearings replete with procedural safeguards to ensure

[3] Submissions on behalf of GOTB, 13 April 2018.

a fair and rigorous process by which evidence and submissions are tested."[4]

16. In this instance, if the adjournment to September 2018 is granted the matter may not be heard until more than three years after the application was lodged, by which time many of the supporting technical documents may be stale or out of date. During that period it may also become apparent that the nature of the application will need to significantly change.

17. The Environment Court and the parties have a right to know what WIAL is seeking from the Environment Court well in advance of the matter being set down for a hearing. Provision of the information that will be provided to the Director will assist the parties in understanding the likely nature of the current application, the additional or updated reports or evidence it may require to respond to those changes and whether it is likely that WIAL will be able to proceed with its current application. It would be procedurally unfair for WIAL not to be transparent in its application to the Environment Court as to do so would risk breaching the principles of natural justice and put the other parties at an unfair disadvantage.

18. It is an acknowledged "principle of law that no one can … take advantage of the state of things which he himself produced".[5] From the outset, WIAL has been cognisant of the risks inherent in proceeding with the RMA applications while subject to the concurrent judicial review proceedings. It chose to proceed with the RMA applications so if it is able to obtain an extended adjournment of the matter without informing the parties as to the true nature of its application, while able to continue preparing its own evidence, it may obtain a strategic advantage.

19. It is submitted that the Environment Court should not move forward with this proceeding without all parties understanding exactly what WIAL is seeking from the Director. An extended adjournment to allow WIAL to continue with this process, without appropriate information sharing with

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[4] *Whangamata Marina Society Inc v Attorney- General* [2007] 1 NZLR 252 at [72]; and
[5] *New Zealand Shipping Co v Societe Des Ateliers et Chantiers de France* [1919] AC 1(HL) at 6 per Lord Finlay LC.

the Environment Court and parties, is inappropriate and should not be granted.

Relief sought

20. ANZL and BARNZ seek directions from the Environment Court that WIAL:[6]

    (a) disclose to the Court and parties when it has made its application to the Director, including the length of RESA that it has asked the Director to approve; and

    (b) provide regular (eg end of month) reporting to the Court and parties as to progress of the application; and

    (c) identify what information WIAL has provided to the Director in support of its application and making copies of that information available to the Court and parties. If any information is considered confidential, the reasons should be clearly identified by WIAL and an appropriate application made to the Court for confidentiality / the redacting of any information, which other parties could respond to.

21. If this information cannot be obtained, or WIAL refuses to provide it, then it may not leave the Environment Court with an option other than to use its power to strike the matter out.

DATED at Wellington and Auckland this 13th day of April 2018

Derek Nolan QC / Horiana Irwin-Easthope / Te Rangimārie Williams
Counsel for ANZL

[6] What ANZL and BARNZ are seeking aligns with its memorandum of counsel of 16 March 2018, the GOTB memorandum and counsel for GOTB's legal submissions at paragraph 30.3.

Gill Chappell
Counsel for BARNZ