

**Before the Environment Court  
at Wellington**

In the Matter of                      section 87G of the Resource Management Act 1991

And

In the Matter of                      the direct referral of the Application for resource consents  
associated with an extension to the runway by Wellington  
International Airport Limited

(ENV-2016-WLG-00058)

**Legal Submissions for  
Wellington International Airport Limited**

Dated:      13 April 2018

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## INTRODUCTION

1. These submissions are filed on behalf of Wellington International Airport Limited (**WIAL**) in accordance with the Eighteenth Minute of the Environment Court dated 19 March 2018 and in advance of the judicial conference scheduled to address WIAL's request for an adjournment and other relevant matters on 18 April 2018.

### Background

2. As the Court is aware, WIAL is seeking further consideration by the Director General of Civil Aviation (**DG**) as to an acceptable runway end safety area (**RESA**) specification at Wellington Airport as part of WIAL's proposed runway extension.
3. After careful scrutiny of the Supreme Court decision and with the assistance from independent experts WIAL is close to finalising its view on what RESA specification is required by the Civil Aviation Rules. It will then seek an indication from the DG as to what he would, on the basis of the material provided to him, consider acceptable in the event that the runway extension proceeds (**RESA Proposal**).
4. It is now expected that the RESA Proposal will be filed by 30 April. The DG has indicated he will take approximately six months to consider WIAL's Proposal.
5. WIAL seeks the leave of the Court to adjourn these proceedings to a reporting date of 31 October 2018.
6. To use the words of the Court, WIAL wishes to keep the current resource consent application (**RC Application**) "alive" in circumstances where it considers there are potential options following the DG's consideration of WIAL's RESA Proposal that could retain the extension in its current form or near current form and within the scope of WIAL's RC Application.
7. The Court issued its Seventeenth Minute dated 1 March 2018 directing any party wishing to comment on the requested adjournment and/or reporting date to file memorandum by 16 March 2018.
8. Four memoranda were received from various parties in response to the requested adjournment. Wellington City Council and Wellington Regional

Council (**Councils**) jointly supported the request. Strathmore Park Progressive and Beautifying Assn Inc, Guardians of the Bays Inc (**GOTB**) and Air NZ Ltd and the Board of Airline Representatives of New Zealand Inc opposed the request.

9. The Court issued its Eighteenth Minute summarising the position of the above parties and outlined a number of concerns regarding the request for further adjournment.
10. These legal submissions address the Court's concerns as well as other matters raised in the memoranda of the parties identified above.

## **MATTERS RAISED BY THE COURT AND PARTIES**

### **Potential for changes in identity of persons affected**

11. The Court has queried whether it has the power to direct further notification in order to address any changes in the identity of persons affected.
12. The Councils' memorandum dated 6 April 2018 set out a mechanism by which the Court could enable further people to join the proceedings. WIAL agrees with the approach outlined by the Councils and proposes some alternative options to enable potentially affected persons to join the proceedings.
13. The Councils have submitted the Court can use its powers under section 279(1)(a) of the Resource Management Act 1991 (**RMA**) to make an order allowing persons who were not originally submitters on the RC Application to lodge a submission (within a certain time frame) and then waive the timeframe to join the proceedings as a section 274 party as discussed in paragraph 16 below.
14. Section 279(1)(a) provides a wide power for the Court to make orders during proceedings and the Court using those powers could direct that the Councils issue a public notice inviting persons who have not already made a submission to make a submission on the RC Application if they desire.
15. However, I note it is not necessary for persons who wish to join the proceedings to have made a submission. Section 274(1)(d) provides an alternative route for persons to join the proceedings if they have "*an interest in the proceedings that is greater than the interest that the general*

*public has*". For example, WIAL considers this would apply to those people who have since moved into the vicinity of the airport and consider themselves adversely affected by the proposed runway extension. It is submitted, it is these persons who should be given the opportunity to participate, rather than any member of the public who simply chose not to participate at the earlier opportunity given the nature of the RC Application will not have changed.

16. Either of these options requires the Court to grant a waiver under section 281(1)(a)(iia) to extend the time in which a person must give notice under section 274. WIAL could apply for a blanket waiver for persons who have an interest greater than the general public<sup>1</sup> or who are a submitter<sup>2</sup> (either an original submitter or a new submitter if the Court uses the method described above). The Court could then direct the Councils to issue a public notice inviting such persons to advise the Court by a certain date whether they wish to join the proceedings.
17. WIAL does not consider that it, or any other parties, would be unduly prejudiced by such Court directions and waiver application as the Environment Court process is at its early stages and no evidence has been filed.
18. Additionally, section 2A of the RMA provides that any reference to person, however described, includes the successor of that person. I note the Environment Court has held that succession should not be viewed in a narrow sense given the emphasis in the RMA on participatory processes<sup>3</sup> and extends the application of the section beyond just successors in title. As such, WIAL considers it would be appropriate for the Court to take a wide interpretation of successors in order to enable successor 274 parties or submitters to join the proceedings.
19. In my submission successors to any 274 parties would automatically be able to continue their involvement in the direct referral process<sup>4</sup> and any successors to a submission could seek to join the appeal as a section 274 party using the waiver process described above.

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<sup>1</sup> Section 274(1)(d) of the RMA

<sup>2</sup> Section 274(1)(e) of the RMA

<sup>3</sup> *Te Mauri o Te Wai Inc v Northland Regional Council* [2011] NZEnvC 65 at [21]

<sup>4</sup> I note an application to be a substituted party is not needed, given the legal fiction of s 2A. However if the successor has a different name from the party it is succeeding, the proper approach is to change the name of the party on the record under 4.54 District Courts Rules 2014

**Issue of Delay/Currency of Resource Consent Application Information**

20. The Court has raised the concern that parties cannot be certain as to the precise nature of the proposed runway extension and the impact of that delay on accuracy/relevance of the information filed in support of the RC Application. It is important to remember that the only way the RC Application will survive beyond the DG's consideration of WIAL's RESA Proposal is if it is the same or similar (i.e. within scope) to what was originally applied for.
21. In order to address the concern that the delay in hearing the RC Application may have implications on the relevance and currency of the accompanying technical assessments, WIAL commissioned a report from Mitchell Daysh to provide an assessment of the technical reports provided with the RC Application as to whether they will remain valid in the circumstances the RC Application is reactivated in its current form (or near to it). A copy of that report can be made available to the Court if the Court wishes.
22. The conclusion reached by Mitchell Daysh is that the technical reports provided as part of the RC Application can continue to be relied on, with any new information or updates being presented in evidence. In my submission it is not uncommon in Environment Court proceedings that updated assessments are provided by way of evidence to reflect the latest information and any changes to a proposal since it was originally notified.
23. The consideration of a resource consent application is an iterative process which can and often does involve changes to what was originally proposed, often in order to address the concerns of submitters and councils. These changes must be within the scope of the original application and therefore cannot result in any increased adverse effects.
24. Accordingly, the environmental effects have already been canvassed by the AEE and the Councils 87F Report and can be updated through evidence, for example to respond to submissions as well as the passage of time. However the precise nature of the proposal will not have changed in any material way.

25. Although clearly undesirable, lengthy delays in Court proceedings are not uncommon when the need arises.<sup>5</sup> While the Court generally has an obligation under section 272 to hear and determine all proceedings as soon as practicable, in the present circumstances it is not appropriate to do (as section 272 recognises may sometimes be the case) for the reasons discussed throughout these submissions.
26. I also note the lengthy process to date is partially as a result of extensions to the statutory process sought by or supported by WIAL including volunteering to extend the submission period, agreeing to extend the timeframe for the Councils to provide their section 87F reports, and applying to extend the section 274 time period for submitters as a result of the Kaikoura earthquake that affected Wellingtonians.
27. Finally it is noted WIAL has advised it is committed to a runway extension, therefore any perceived uncertainty as to the nature of the runway extension for residents/submitters will continue regardless.

#### **Uncertainty as to RESA Proposal and CAA Process**

28. The Court has raised concerns about the uncertainty as to the nature of the RESA Application, the “*nature of any approval which might be given by the DG*” and how that might impact on the RC Application, and the time which it might take the DG to consider the RESA Proposal.
29. As discussed above, WIAL’s documentation for its RESA Proposal to the DG is currently in its final stages of preparation.
30. As a result WIAL’s preliminary view (including assessing the applicability of EMAS) is the RESA type and length to be put forward as part of the RESA Proposal could be accommodated within the current RC Application, taking into account the Civil Aviation Rules, the Supreme Court’s decision, and assuming it is otherwise acceptable to the DG.
31. Although WIAL is not yet able to confirm the exact “nature” of its RESA Proposal (which I have taken to mean the type and length of the RESA), it is submitted that the uncertainty in these particular circumstances is not sufficient to meet the high threshold to establish an abuse of process,

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<sup>5</sup> For example the proceedings relating to PC13 of the Mackenzie District Plan and proceedings relating to Queenstown Airport Corporation Limited’s designation of Lot 6.

especially when it concerns knowledge associated with a separate statutory process.

32. While there will be some uncertainty as to the nature of any response of the DG that uncertainty will end when the DG responds to WIAL's RESA Proposal. The specification of the RESA considered acceptable to the DG will either be within the scope of the RC Application or it will not. If not, WIAL will need to withdraw the RC Application at that time.
33. In my submission some of this limited uncertainty can be remedied by WIAL reporting to the Court and parties as to the progress of the RESA Proposal as discussed further below.
34. In terms of uncertainty as to the time it might take for the DG to consider the RESA Proposal, the DG is aware WIAL is about to put forward its RESA Proposal and while the process will no doubt be different as a result of the Supreme Court decision, there is no reason to believe that it cannot be undertaken in 6 months given:
  - (a) the time taken in the previous Civil Aviation Authority (**CAA**) RESA considerations; and
  - (b) the DG's awareness of the time constraints associated with this adjournment sought by WIAL.

#### **Section 279(4)(c) of the RMA**

35. The Court has asked the parties to address the provisions of section 279(4)(c) of the RMA. Section 279(4)(c) provides the Court with specific statutory power to strike out a proceeding (in whole or part) if the Judge considers it would otherwise be an abuse of the process of the Court to allow the case to be taken further.
36. The power under section 279(4)(c) is a statutory recognition of the Court's wider jurisdiction to prevent its own procedures from being misused to achieve a result which would be manifestly unfair or which would otherwise bring the administration of justice into disrepute.<sup>6</sup>

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<sup>6</sup> *Hurunui Water Project Ltd v Canterbury Regional Council* [2015] NZHC 3098 at [83]

37. The Court in *Fletcher Challenge Energy Power Generation Ltd v Waikato Regional Council*<sup>7</sup> held that abuse of process involves using the Court process for an ulterior purpose, that is, a purpose not within the scope of such process.<sup>8</sup>
38. In *Coldway Installation Ltd v North Shore City Council*<sup>9</sup> the Court held the jurisdiction to strike out a case is to be used sparingly and only in cases where the Court is satisfied that it has the requisite material before it to reach a certain and definite conclusion.<sup>10</sup>
39. The High Court in *Hurunui Water Project Ltd v Canterbury Regional Council*<sup>11</sup> identified that there are two aspects that need to be stressed when considering the legitimate resort to this jurisdiction:
- (a) The jurisdiction relates to the protection of the integrity of the Court's process and the threat must be to the process of the Court which is wrongly being made use of and from which the Court must protect itself; and
  - (b) a charge that a party is misusing the Court's process is a serious allegation and the threshold to establish abuse of process is a high one.<sup>12</sup>
40. The High Court in *Hurunui Water Project* went on to hold that in assessing whether there has been an abuse of process the focus must be on the actions of the parties, however the jurisdiction is not a punitive one.<sup>13</sup>

*Are there grounds for a finding of abuse of process?*

41. The threshold to establish abuse of process is high and respectfully in my submission has not been met in the present circumstances.
42. In *Karatea v Manawatu-Wanganui Regional Council*<sup>14</sup> the Court held that abuse of process involves (inter alia) a litigant misusing Court Processes, and can encompass situations where:<sup>15</sup>

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<sup>7</sup> EnvC A109/98

<sup>8</sup> Ibid at [37]

<sup>9</sup> W118/96

<sup>10</sup> Ibid at page 3

<sup>11</sup> [2015] NZHC 3098

<sup>12</sup> Ibid at [84]

<sup>13</sup> Ibid at [86]

<sup>14</sup> W039/2009

- (a) Court processes are conducted for an ulterior purpose;
  - (b) A decision will have no utility;
  - (c) A litigant seeks to delay other parties; or
  - (d) A litigant fails to comply with directions of the Court.<sup>16</sup>
43. While this is not an exhaustive list, it does highlight that the Court's processes must be wrongly used or used for an ulterior purpose in order to establish there has been an abuse of process.
44. In my submission, the present circumstances are not comparable to the above examples. By seeking the adjournment WIAL is not attempting to deliberately delay other parties but rather is seeking to preserve the investment that WIAL and the other parties have made in the process to date while a separate and very necessary statutory process is revisited. There will be no further costs to other parties during the adjournment period other than those relating to any requested reporting as to the progress of the Civil Aviation Authority (**CAA**) process.
45. Finally on this point GOTB have criticised WIAL for "*embarking on its resource consent application and direct referred proceeding in light of the knowledge that the Director's decision was under challenge and could always have been set aside*". Acknowledging that while WIAL filed the RC Application in that knowledge, it did so recognising the Councils would take some time to review the RC Application<sup>17</sup> before the general public became involved and with the intention that if a negative decision was received from the High Court then WIAL would have to put the RC Application on hold. Following the positive High Court decision WIAL continued with its RC Application. In order to avoid wasting both the Court's and parties time and resources WIAL sought appropriate adjournments of the proceedings following the Court of Appeal decision.
46. Accordingly, in my submission the requested adjournment does not represent an abuse of the Court's process.

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<sup>15</sup> Ibid at [14]

<sup>16</sup> For example delay was found to amount to an abuse of process in *Kidman v Wellington City Council* [2016] NZEnvC 64 where the appellant had not responded to the Court's communications regarding timetabling, or in *Court v Dunedin City Council* [2013] NZEnvC 242, one of the section 274 parties was struck out as they failed to respond to the court's directions and were the cause of the 5 month delay in signing the consent order

<sup>17</sup> WIAL was responsible for the Councils processing fees of the Application

## Provision of RESA Proposal and Reporting

47. GOTB in their memorandum<sup>18</sup> have requested the Court direct WIAL to:

*“Immediately provide the parties with details as to the length of RESA that it intends to seek the Director’s approval for;*

*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*

*Provide the Court and parties with regular, end of month, updates as to progress with the CAA.”*

48. I will address the first and second of the GOTB’s requests together and the third separately.

*Provision of details of the length of RESA and all information put before the DG*

49. In my submission, the DG’s process of assessing the RESA Proposal is a separate statutory process which while the result of the process will in time be relevant to these proceedings, is a process that is outside of the Court’s jurisdiction.

50. The DG will be exercising a statutory function under specific empowering legislation namely the Civil Aviation Act 1990 (**CA Act**), and the DG’s process under the CA Act is not a public one. In my submission it is up to the DG to decide as to the scope and need for consultation taking into account the particular issues that arise as a result of CA Act considerations.

51. If some of the parties to the proceedings wish to obtain copies of WIAL’s RESA Proposal once it has been made then the appropriate mechanism for doing so would be to contact the CAA.

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<sup>18</sup> 16 March 2018

### *Reporting as to Progress*

52. WIAL is agreeable to reasonable reporting as to progress of the RESA Proposal to the DG. However in my submission, monthly reporting as sought by the GOTB has the potential to be an inefficient use of time and resources as there will potentially be a period with nothing to report while the DG considers the RESA Application.
53. WIAL suggests that a more appropriate reporting mechanism would be to require reporting when there are any significant events (i.e. when the RESA Proposal is filed and if and when further information is sought), or alternatively reporting at a frequency the Court considers appropriate.

### **Adjournment**

54. The overall principle applying to an adjournment application is whether it is in the interests of overall justice<sup>19</sup> and noting the general duty under section 21 of the RMA to avoid unreasonable delay.
55. In *St John's College Trust Board v Auckland Council*<sup>20</sup> Judge Harland outlined some of the considerations relevant to determining whether there is unreasonable delay in a decision on an application for a stay/adjournment:

*"In some cases awaiting the outcome of another court's decision will amount to delay that is unreasonable but in others it will not. Financial factors are one aspect to be considered, but overall the wise use of the parties and the Court's resources must be taken into account in deciding whether or not a delay is such that it becomes unreasonable. I accept that speedy resolution is a goal, but I agree that it should be afforded no additional priority over saving expense or indeed the appropriate allocation of the court's resources. It is all a question of balancing these factors in the context of the particular case before the Court."*

56. In my submission, in the present circumstances the adjournment is in the interests of overall justice and the delay is not unreasonable for the following reasons:

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<sup>19</sup> *Director-General of Conservation v Waikato Regional Council* EnvC A232/02 at [16]

<sup>20</sup> [2011] NZEnvC 70 at [28]

- (a) The adjournment will enable the DG to provide his view as to the acceptability of the RESA specification put forward by WIAL as part of the RESA Proposal which, depending on the outcome, could enable the present RC Application to proceed to a hearing;
  - (b) WIAL has invested significant time, cost and resources in the preparation and processing of the current RC Application. The submitters and parties to this proceeding have also invested their time and resources to participate;
  - (c) Those resources could still be utilised if the DG approves a RESA length that can be accommodated within the scope of the current RC Application as part of the runway extension. At the time of drafting these submissions it is WIAL's preliminary view that this is a real possibility based on its experts' views so far;
  - (d) No evidence has been exchanged so there is no prejudice to parties in terms of costs to prepare evidence or evidence becoming stale; and
  - (e) WIAL can agree to provide its evidence for any modified proposal (within scope) well in advance of other parties so there is sufficient time for them to prepare.
57. Accordingly, the adjournment is in the interests of overall justice and can be granted subject to a condition that WIAL reports to the Court and the parties as to progress when significant events occur (or at a frequency otherwise considered appropriate by the Court).

## **BREAKER BAY MOA POINT PROGRESSIVE ASSOCIATION INC**

58. On the basis these proceedings are adjourned, WIAL agrees to the Breaker Bay Moa Point Progressive Association Incorporated joining the proceedings as a section 274 party.

## **CONCLUSION**

59. WIAL respectfully considers that there are insufficient grounds to establish a finding that the request for an adjournment is an abuse of process and the request for adjournment can be granted.

60. An adjournment will preserve the investment already made by all parties and not incur any additional cost while the DG considers WIAL's RESA Proposal. If in the event the DG accepts a RESA specification that is within the reach of the current RC Application then these proceedings can continue. If not then WIAL will withdraw it.

Dated: 13 April 2018



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Amanda Dewar

**Solicitor for Wellington International Airport Limited**