

**Before an Independent Hearings Panel**

**The Proposed Waikato Regional Plan Change 1**

**IN THE MATTER OF** the Resource Management Act 1991 (**RMA**)

**IN THE MATTER OF** the Proposed Waikato Regional Plan Change 1, Block 3 hearings

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**MEMORANDUM OF COUNSEL ON BEHALF OF MIRAKA LIMITED IN RELATION TO:**

- 1) PANEL MINUTE OF 26 JULY 2019**
  - and**
  - 2) REQUEST FOR LEAVE TO FILE LATE EVIDENCE**
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**BUDDLE FINDLAY**

NEW ZEALAND LAWYERS

Barristers and Solicitors

Auckland

Solicitor Acting: **Jennifer Caldwell / Mathew Gribben**

Email: [jennifer.caldwell@buddlefindlay.com](mailto:jennifer.caldwell@buddlefindlay.com) / [mathew.gribben@buddlefindlay.com](mailto:mathew.gribben@buddlefindlay.com)

Tel 64-9-358 2555 Fax 64-9-358 2055 PO Box 1433 DX CP24024 Auckland 1140

## MAY IT PLEASE THE COMMISSIONERS

### 1. INTRODUCTION

- 1.1 This memorandum responds to the Minute from the Hearing Panel, dated 26 July 2019, regarding *Miraka Limited's (Miraka) Block 3 rebuttal evidence (Minute)*.
- 1.2 In summary, the Minute advised Miraka of the Panel's preliminary view that the rebuttal evidence of Mr Jackson, Ms Addenbrooke and Ms Hardy (**Rebuttal Evidence**) is not rebuttal; but more in the nature of "supplementary" evidence-in-chief, as it does not rebut any other person's evidence. On that basis Miraka will need to seek leave for this evidence to be filed late.
- 1.3 This memorandum:
- (a) Outlines the principles of rebuttal evidence, including referring to the Environment Court Practice Note, relevant case authority and the Panel's hearing directions;
  - (b) Sets the context for the Rebuttal Evidence;
  - (c) Explains why Miraka considers the majority, if not all, of its Rebuttal Evidence is rebuttal; and
  - (d) Seeks leave to file the Rebuttal Evidence as late primary evidence, in the event that the Panel still considers that some or all of that evidence is not rebuttal.

### 2. PRINCIPLES OF REBUTTAL EVIDENCE

- 2.1 Section 4.16 of the Environment Court Practice Note 2014 describes rebuttal evidence in the following terms:

(a) Rebuttal evidence should be confined to a **response to matters raised by a witness called by another party**, on **topics not addressed** in the evidence of the party seeking to call the rebuttal evidence, and **which could not reasonably have been foreseen** before the other party called that witness or produced his or her statement of evidence. The admission of rebuttal evidence is a matter for the Court's discretion, to be exercised in the interests of fairness to the parties and the Court being as fully informed of the issues as is reasonably possible. (Emphasis added)

2.2 There is limited case authority in the resource management context on this topic, but the Environment Court in *Trevor v Timaru District Council*<sup>1</sup> observed that:

Experts should beware of bolstering their cases with rebuttal evidence which really should have been in the evidence in the first place if a necessary foundation of evidence is to be laid to support their client's case.

2.3 The High Court has considered the scope of rebuttal evidence in other statutory contexts, in particular intellectual property and criminal law. The principles from those authorities, however, are relevant in the resource management context. In *Bayer New Zealand Limited v Merial Limited*<sup>2</sup> the High Court outlined a legal test for refusing to admit reply evidence in the intellectual property context as follows:

The test was described as whether:

- (a) the "reply evidence" could have been filed in support of the notice of opposition... ; and
- (b) the dominant purpose for its being adduced in reply is to support the original notice of opposition, as opposed to responding directly to something said in the evidence of the applicant.

2.4 Similarly, the Court in *Merial v Virbac*<sup>3</sup> observed that reply evidence should not be admitted if such evidence is 'gaming the system', where a party is "*keeping their forensic powder dry until after an applicant has fired its best (and only) evidential shot*".

2.5 Taken together, the principles relating to rebuttal evidence are that it should:

- (a) Respond to other parties' evidence;
- (b) Relate to matters that a party could not foresee and not be material that could have been filed as primary evidence;
- (c) Should not be seen as gaming the system or be used in an unfair manner; and
- (d) Assist the decision maker to be as fully informed of the issues as is reasonably possible.

2.6 Importantly, there is no established principle that rebuttal evidence may only be in opposition to other evidence. Rebuttal evidence that responds to or is expressed to be in support of other parties' evidence is not on its face invalid or inappropriate if the

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<sup>1</sup> *Trevor v Timaru District Council* Decision C35/2001. The decision related to a costs application rather than directly the admissibility of evidence.

<sup>2</sup> *Bayer New Zealand Limited v Merial Limited* [2017] NZHC 2946.

<sup>3</sup> *Merial v Virbac SA* [2012] NZHC 3392.

arguments and material in question could not have been foreseen by the party providing the rebuttal to enable primary evidence to be lodged. This approach to rebuttal is particularly relevant to rebuttal evidence in a resource management plan-making context involving multiple parties.

- 2.7 Counsel's own experience of rebuttal evidence within Environment Court proceedings, Boards of Inquiry, independent hearing panels and local authority hearings is that:
- (a) Rebuttal evidence is part of an iterative process in which parties respond to other parties' evidence and adopt or amend (in part or in full) ideas and drafting from other parties; and
  - (b) Iterative amendments to planning provisions are common as parties address issues, endeavour to find common ground, to narrow issues in contention and to propose drafting solutions.
- 2.8 The Panel's own direction on rebuttal evidence requires that rebuttal evidence:
- (a) Is strictly in rebuttal to matters not already raised;
  - (b) Contains no material relating to new issues not previously raised in evidence; and
  - (c) Will not be accepted if it simply restates primary evidence.
- 2.9 The Panel's Direction does not limit rebuttal evidence to evidence that is only in opposition, or place any express limits on evidence that responds substantively to or is expressed to be in support, or partial support of another party's evidence. The only express restriction is that it does not raise new issues or simply repeat primary evidence. There is no restriction on a party filing rebuttal evidence that refines, clarifies or advances its position in light of evidence filed by other parties.
- 2.10 Counsel respectfully submits that the principles of rebuttal evidence do not require the Panel to take such a constrained view in circumstances where multiple parties are endeavouring to assist the Panel with constructive drafting solutions.

### **3. CONTEXT OF EVIDENCE ON FARM ENVIRONMENT PLANS**

- 3.1 Farm Environment Plans, Schedule 1 and the activity status for farming within a Certified Sector Scheme (CSS) has been a significant issue for Miraka throughout

PC1 and this has clearly been signalled in its evidence<sup>4</sup> and legal submissions<sup>5</sup> in earlier hearing blocks.

3.2 Miraka has needed to adjust to a number of changes in position and approach by various parties throughout the hearing process; consideration of the issue by the Miraka case team has evolved in response. Miraka's Rebuttal Evidence needs to be placed in this context. The following matters are relevant:

- (a) There was an early indication from the Panel that Farm Environment Plans would be the subject of an information forum or expert caucusing<sup>6</sup>. Miraka has expressed support for such a step but the Panel has to date not directed it to occur<sup>7</sup>;
- (b) There have been considerable changes to the position of the Waikato Regional Council to this issue in the Section 42A reports;
- (c) In Block 2, the Section 42A report recommended a substantial amendment to amend the activity status of farming within a CSS from a permitted activity to a controlled activity;
- (d) The details of Schedule 1 were expressly excluded from the Block 2 Section 42A report and parties were advised that it would be considered in Block 3;
- (e) Despite the Section 42A Report excluding the details of Schedule 1, some of the Panel's questions to Miraka witnesses at the Block 2 hearing involved details within Schedule 1. Miraka expressly advised the Panel that it would be carefully considering those matters in its Block 3 evidence, and signalled that it was keen to pursue permitted activity status notwithstanding the drafting challenges;
- (f) The Section 42A Report for Block 3 contained substantial amendments to Schedule 1 along with technical papers to support the changes. That Report was released before parties such as Miraka had even attended its Block 2 hearing;<sup>8</sup>

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<sup>4</sup> Block 1 Primary evidence of Mr Grant Jackson, section 5 and Block 2 Primary evidence of Mr Jackson, para 4.6-4.13.

<sup>5</sup> Block 1 Legal submissions, para 1.6 and 2.1 and Block Legal Submissions, section 3, 4 and 5.

<sup>6</sup> Hearing Panel Minute dated 7 December 2018.

<sup>7</sup> Hearing Panel Minute dated 9 April 2019 removed the Forum for FEPs from the hearing schedule on the basis it was premature to hold such a forum before reviewing and hearing the evidence.

<sup>8</sup> The section 42A report for Block 3 was released on 14 June 2019 and Miraka appeared at the Block 2 on 18 June 2019.

- (g) The timeframes are tight for all parties but these restrictions are exacerbated for those submitters who do not support the recommendations in the Section 42A report. They have had less time to respond to the new Council position;
- (h) A number of parties and their experts filed primary evidence on Block 3 including detailed amendments to Schedule 1 responding to the Council's new position. This included experts in support of the Section 42A approach as well as those seeking a reversion to the notified version of Schedule 1:
  - (i) Mr Willis – Fonterra;
  - (ii) Mr Allan – Fonterra;
  - (iii) Mr Eccles - Federated Farmers;
  - (iv) Dr le Mierre - Federated Farmers;
  - (v) Mr Milner - Federated Farmers;
  - (vi) Ms Young – Dairy New Zealand;
  - (vii) Ms Marr – Auckland & Eastern Region Fish and Game;
  - (viii) Ms McKessick – Director-General of Conservation; and
  - (ix) Mr Dragten – Waikato Regional Council
- (i) Miraka's primary evidence for Block 3 stated that it was interested in this issue, outlined its general approach, advised that it expected other parties to provide detailed mark ups and signalled that it would provide its further drafting in light of that other evidence.<sup>9</sup>

#### **4. MIRAKA'S REBUTTAL EVIDENCE**

4.1 Miraka respectfully disagrees with the Panel's preliminary view on the status of its Rebuttal Evidence.

4.2 The majority of the Rebuttal Evidence expressly addresses another person's evidence or refines or clarifies Miraka's position on the known issues in light of that evidence. With a few exceptions it does not introduce material that could have been provided as primary evidence or discuss new issues that were not previously raised in evidence by Miraka or another party. The exceptions are:

- (a) Section 5 of Mr Jackson's evidence regarding Certified Farm Environment Planners; and

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<sup>9</sup> Block 3 Primary evidence of Ms Kim Hardy, para 6.10.

- (b) Section 5 of Ms Addenbrooke's evidence entitled "Using FEPs to achieve improvements in Water Quality".
- 4.3 On reflection, the material in those sections could have been provided as primary evidence and does not directly respond to the evidence of another witnesses in order to amend or clarify Miraka's position.
- 4.4 As outlined above, the interrelated issues of the activity status of farming, Farm Environment Plans and the details of Schedule 1 were clearly raised in the Section 42A report for Block 3 and were discussed in a preliminary way with Miraka's witnesses in questions from the Panel during Miraka's Block 2 hearing. Miraka's primary evidence addressed the issues and responded to the Panel's questions on the basis of the material had seen at that time.
- 4.5 However, Miraka could not have foreseen the final details of the drafting amendments proposed in other parties' primary evidence to the PC1 provisions and in particular to Schedule 1. Miraka was informally provided draft versions of those provisions by other aligned submitters prior to exchange of primary evidence, but it could not have included that material in its primary evidence as it was not aware of the final drafting until the evidence was filed. Miraka's only opportunity to respond to that material, and to oppose it or to support and offer further refinements to the drafting, was in rebuttal evidence. Whether the rebuttal would be in opposition to or in support of other parties' drafting proposals could only be determined once the Miraka witnesses had analysed all relevant drafting proposals and determined which of those most closely aligned with the Miraka position, and whether they could be enhanced with further drafting refinements.
- 4.6 Mr Jackson's rebuttal evidence outlines that there are a number of different approaches to the issue and that Miraka carefully considered the competing considerations and the evidence provided. Its ideal outcome would be for an objectives/principle approach (as outlined by Mr Eccles), but Miraka is conscious of concerns about such an approach. As an alternative Miraka would support an alternative approach whereby Schedule 1 specified clear actions and minimum standards.<sup>10</sup>
- 4.7 For this reason, those sections of Miraka's Rebuttal Evidence that provide a response to the detailed evidence of other witnesses (for example Messrs Eccles or Willis)

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<sup>10</sup> Rebuttal evidence of Mr Grant Jackson, paragraphs 4.4-4.7.

qualifies as rebuttal evidence, both on the basis of general legal principles and the Panel's Hearing Directions because it:

- (a) Responds to matters not previously raised (ie specific drafting proposals);
- (b) Contains no material relating to new issues not previously raised; and
- (c) Does not simply restate primary evidence.

4.8 Finally, counsel notes that expert witnesses are required by the Code of Conduct to consider the expert evidence of other parties and adjust their position accordingly. The Rebuttal Evidence of Ms Hardy and Ms Addenbrooke (with the exception noted above) adheres to this requirement.

## **5. REQUEST FOR LEAVE**

5.1 If after considering the foregoing matters the Panel remains of the view that Miraka's Rebuttal Evidence is not in fact rebuttal, Miraka hereby seeks leave to file late primary evidence and for it to be heard within Block 3.

5.2 It is necessary to provide this evidence now because:

- (a) There is no further opportunity in the hearing process for Miraka to present this evidence;
- (b) While some of the Rebuttal Evidence material could be presented as part of legal submissions, it is more transparent and efficient for it to be included as supplementary primary evidence, in writing before the hearing;
- (c) It allows expert witnesses, such as Ms Hardy and Ms Addenbrooke, to clearly outline their expert opinion on the issues in contention, as they are obliged to do under the Expert Code of Conduct. If questioned by the Panel on these topics the witnesses would provide the same answers as outlined in the Rebuttal Evidence so it is efficient for the evidence to be provided in a written form for the Panel and other parties to consider;
- (d) The material contained in the Rebuttal Evidence is relevant to the issues before the Panel and assists the Panel to be fully informed both as to Miraka's position and the detail of the extent to which that position is aligned with those of other parties; and
- (e) If the Rebuttal Evidence is not considered to be rebuttal then the primary evidence of the relevant witnesses could be considered to be incomplete.

Filling the evidentiary gap is arguably “necessary” in the sense used in previous Panel Directions.<sup>11</sup>

5.3 Miraka contends that there is no prejudice to any other party if the evidence is received because:

- (a) Miraka’s interest in the relevant topics has been clearly signalled in its original Block 1 evidence<sup>12</sup> and Block 1 legal submissions.<sup>13</sup> No party will be taken by surprise;
- (b) The Rebuttal Evidence refines and clarifies Miraka’s position in light of evidence from other parties. It offers alternative or refined drafting solutions to those proposed by Federated Farmers, Fonterra and Dairy NZ. All of these submitters are largely aligned with Miraka on the nature of the relief they seek on the activity status for farming (although some differences remain on the detailed drafting solutions to accomplish that status). It therefore seems unlikely that any of those parties would be prejudiced by Miraka’s evidence being accepted as late evidence.
- (c) Allowing late supplementary primary evidence could potentially place submitters who support the recommendations in the Section 42A report at a disadvantage (e.g. the Director-General of Conservation). They may have wished to respond to such evidence had it been filed on time. However, those parties have seen many of the same concepts and ideas in the evidence of Federated Farmers, Fonterra and Dairy NZ and have had the opportunity to file rebuttal evidence on those statements. It appears they have not done so, and it therefore seems unlikely they would have lodged rebuttal evidence solely in response to Miraka’s evidence refining or further developing those proposals.
- (d) As the evidence has been lodged and published on the website well before the hearing, all parties have had an opportunity to review it and raise any concern or comment. The Panel has afforded submitters the opportunity to comment on this memorandum and to request leave. Those submitters could also lodge legal submissions on the issue when they appear at the hearing;

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<sup>11</sup> This was one of the reasons cited by the Panel in allowing the late supplementary evidence of Ms Jordan on behalf of Beef + Lamb NZ, in its Minute dated 28 June 2019.

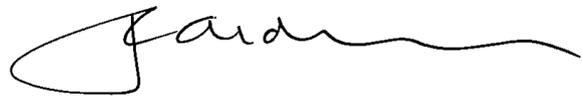
<sup>12</sup> Primary evidence of Mr Grant Jackson, paragraph 4.3.

<sup>13</sup> Legal Submissions for Block 1, paragraph 1.6.

- (e) The Panel has previously allowed late supplementary evidence where it comprised a succinct expression of an expert's reasons for accepting the primary evidence of another witness.<sup>14</sup> Parts of Miraka's Rebuttal Evidence fall into this category; and
- (f) Finally, the Panel will be able to test the strength of the evidence and give it due weight.

5.4 By contrast Miraka could be prejudiced if leave is not granted as it will not have the opportunity to clearly outline its position on this important set of related issues. The Panel has allowed late evidence from other parties in the past, including material lodged on or just before a party's hearing day. Miraka's evidence was filed significantly ahead of its hearing date.

**DATED** this 30<sup>th</sup> day of July 2019



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**J Caldwell / M Gribben**  
Counsel for Miraka Limited

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<sup>14</sup> Minute from Panel dated 2 May 2019 regarding Watercare Service Limited seeking to present supplementary planning evidence.