

BEFORE THE ENVIRONMENT COURT
AT CHRISTCHURCH

I MUA I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2020] NZEnvC 132

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
Sitting alone under section 279 of the Act

Hearing: In Chambers at Christchurch

Date of Order: 20 August 2020

Date of Issue: 21 AUG 2020

CONFIDENTIALITY ORDER OF THE ENVIRONMENT COURT

A: Pursuant to sections 279(1)(b), 279(3)(c) and 42(2) of the Resource Management Act 1991 and rule 6(a) of the District Court (Access to Court Documents) Rules 2017, the Environment Court orders that the Taha Agreement (excluding "Schedule C: Prices" and personal/individual contact information) may be disclosed to the court and the individuals listed in Annexure 1, attached to and forming part of this order, on the following terms:

- (a) the Taha Agreement (and parts of any documents that are created that refer to the contents of it) are to be kept confidential and only used for the purpose of any judicial settlement conference(s), mediation(s) and/or hearing(s) undertaken in the course of the current proceeding (ENV-2020-CHC-99);



- (b) publication or communication of the Taha Agreement in whole or in part to those other than the court or the individuals listed in Annexure 1 is prohibited;
- (c) this order will remain in force until further order of the Environment Court.

B: Leave is reserved for any party to make an application to amend these orders (if necessary).

REASONS

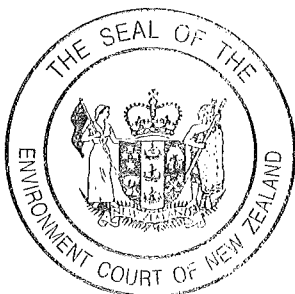
Introduction

[1] These proceedings concern an application for declarations filed by the Environmental Defence Society Incorporated ("EDS") in relation to the movement and storage of dross byproducts from the Tiwai smelter site in Bluff to several sites in Maitua. The application is opposed by the respondent New Zealand Aluminium Smelters Limited ("NZAS"). Gore District Council, Southland Regional Council and the Minister for the Environment have joined the proceedings pursuant to s 274 of the Resource Management Act 1991.

[2] In accordance with the court's Record of Telephone Conference dated 31 July 2020, an application has been filed by NZAS seeking confidentiality orders in relation to the Taha Agreement.¹

The application for confidentiality orders

[3] The Taha Agreement is an agreement between NZAS and Taha International for Industrial Services. It is a large document that contains several schedules and attachments. NZAS considers that all parts of the Taha Agreement are commercially sensitive, with numerous references to particular NZAS/Rio Tinto documents, processes and materials that are confidential.² NZAS says it would be impossible to separate out parts that would not be commercially sensitive.



¹ The Taha Agreement is an agreement between NZAS and Taha International for Industrial Services that was signed in September 2010. It is a large document based on a template NZAS/Rio Tinto contract framework containing a number of schedules and attachments.

² Memorandum of counsel to accompany application for confidentiality orders dated 7 August 2020 at [5].

[4] Having consulted with the other parties, NZAS proposes to release all parts of the Taha Agreement except the pricing (contained in Schedule C) and any reference to personal/individual contact details. All parties agree to the release of the Taha Agreement on the proposed terms set out below.³

[5] Accordingly, NZAS seeks that the court make the following confidentiality orders:⁴

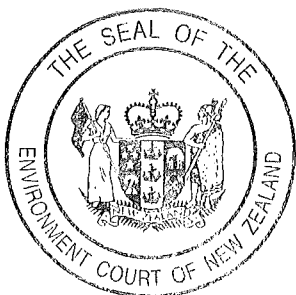
- (a) The Taha Agreement (excluding "Schedule C: Prices" and personal/individual contact information) will only be released and available to:
 - (i) the Court;
 - (i) the individual persons ("Recipients") listed in Annexure 1;
 - and
- (b) it (and parts of any documents that are created that refer to the contents of it) are to be kept confidential and only used for the purposes of:
 - (i) the judicial settlement conference (scheduled for 8 September 2020) and any further judicial settlement conference or mediation; and
 - (i) any hearing(s),

that might arise out of the current proceeding (ENV-2020-CHC-099), unless its further disclosure is agreed to in writing by NZAS or its disclosure is agreed to in writing by NZAS or its disclosure is required by law.

Law and consideration

[6] Sections 279(3)(c) and 42(2) of the Resource Management Act 1991 ("RMA") provide the court with the power to make an order prohibiting or restricting the communication of any information obtained by it during the proceedings and to exclude the public from a hearing where that information is likely to be referred to. The court is not obliged to make such orders, even where those orders are unopposed by the parties. The exercise of any statutory discretion, here whether to make the confidentiality orders sought, must be undertaken in a principled way.

[7] Section 277 RMA provides that all hearings shall be held in public but that the court may (relevantly) require that evidence be heard in private and/or prohibit or restrict



³ Email of Rob Enright for EDS to the Registry, dated 9 August 2020; Email of Karenza de Silva for Southland Regional Council to the Registry, dated 12 August 2020; Email of Shelley Chadwick for Gore District Council to the Registry, dated 14 August 2020.

⁴ Application for confidentiality orders dated 7 August 2020.

the publication of any evidence if it considers the reasons for doing so outweigh the public interest in a public hearing and publication of evidence.

[8] Section 278 of the RMA gives Environment Judges the same powers that the District Court has in the exercise of its jurisdiction which means the District Court Rules are applicable where appropriate. Rule 6(a) of the District Court (Access to Court Documents) Rules 2017 is relevant here as it concerns restrictions on access to court files.

[9] While I have not seen the Taha Agreement, on this occasion I accept NZAS' advice that the information it contains is commercially sensitive and disclosure of the agreement would cause prejudice to NZAS if it were made publicly available. I am satisfied the list of parties to whom the agreement will be disclosed is comprehensive, and that limiting the use of the agreement to only the judicial settlement conferences or hearings held as part of the proceeding is sensible. I consider the potential prejudice to NZAS outweighs the public interest in publication of the Taha Agreement. In coming to this decision, I have given weight to the fact that EDS, Gore District Council and Southland Regional Council have confirmed they consent to the terms of the orders sought.

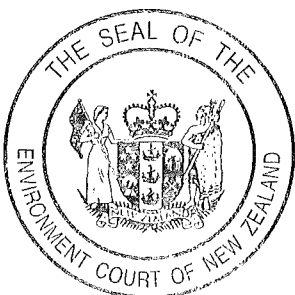
[10] The Minister, having joined the proceedings after this application was made, has not yet had an opportunity to review the orders sought, or to advise whether the Ministry consents. As I am satisfied with the content of the orders, I will grant them on the basis that in doing so there will be no prejudice to the Minister. I will, however, reserve leave for the Minister to apply to amend these orders should the Ministry take issue with the substance of the orders.

[11] Further, while I am satisfied with the contents of the orders, they have been redrafted for clarity and completeness.⁵ I will reserve leave for any party to apply to amend the orders if they have issue with the amended wording.

Outcome

[12] Having considered the draft order filed, I am satisfied that the confidentiality

⁵ Annexure 1 to notice of application has also been amended to include the representatives of the Minister for the Environment (whose s 274 notice was received after the application was made) and Stephen Parry of Gore District Council (who was omitted from the notice in error).



orders in respect of the Taha Agreement should be made.

[13] The court orders a copy of the Taha Agreement be disclosed for use in these proceedings subject to the restrictions as set out in Order [A].

J. Borthwick

J E Borthwick
Environment Judge

The seal of the Environment Court of New Zealand is circular. It features 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 depicts two figures holding a shield topped with a crown.

Annexure 1: Recipients

- Rob Enright;
- Cordelia Woodhouse;
- Shay Schlaepfer;
- Karenza de Silva;
- Stuart Ryan;
- Michael Garbett;
- Shelley Chadwick;
- Gary Taylor, EDS;
- Louise Wickham, Emission Impossible;
- Stephen Parry, CEO Gore District Council;
- Vin Smith (General Manager Policy, Planning and Regulatory Services, Southland Regional Council);
- Chris Jenkins (Team Leader Hydrological Response, Southland Regional Council);
- Simon Mapp (Compliance Manager, Southland Regional Council);
- Eleanor Jamieson;
- Rebecca Elvin; and
- Shaun Lewis (Director, Systems Change and Investments, Ministry for the Environment)

