BEFORE THE ENVIRONMENT COURT

AT WELLINGTON

Decision No. [2016] NZEnvC 217

IN THE MATTER	of the Resource Management Act 1991
AND	of an application pursuant to s 279 of the Resource Management Act 1991
BETWEEN	KIWIS AGAINST SEABED MINING INCORPORATED (ENV-2016-WLG-000041) Applicant
AND	ENVIRONMENTAL PROTECTION AUTHORITY First Respondent
AND	TRANS-TASMAN RESOURCES LIMITED Second Respondent
AND	TALLEY'S GROUP LTD TE RUNANGA O NGATI RUANUI s 274 Interested Parties

Court:	Environment Judge B P Dwyer Environment Commissioner I Buchanan
Hearing:	7 November 2016
Appearances:	D Currie and R Haazen for the Applicant D Randal and C Haden for the First Respondent M Holm and V Morrison-Shaw for the Second Respondent R Makgill for Talley's Group Ltd J Inns Te Runanga o Ngati Ruanui
Date of Decision:	8 November 2016
Date of Issue:	11 November 2016

ORAL DECISION OF THE ENVIRONMENT COURT

KIWIS AGAINST SEABED MINING INC v ENVIRONMENTAL PROTECTION AUTHORITY, TRANS-TASMAN RESOURCES LTD & TALLEY'S GROUP LTD, TE RUNANGA O NGATI RUANUI

A: Directions Made

B: Costs Reserved

REASONS

Judge Dwyer

[1] This is our decision in these proceedings. As with any oral decision, we reserve the right to amend the written record to correct any minor errors or omissions which do not affect the rationale for or outcome of the decision. We are issuing this decision as an oral decision because of what we perceive to be its considerable urgency. Commissioner Buchanan and myself have divided responsibility of various aspects of the decision between us, so we will be giving it in separate parts. We have discussed with each other our findings in each case and we are in agreement about them, so this decision reflects our unanimous views.

[2] These proceedings come before the Court by virtue of a combination of provisions of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (the EEZ Act) and the Resource Management Act 1991 (RMA).

[3] On 23 August 2016 Trans-Tasman Resources Ltd (Trans-Tasman) made application to the Environmental Protection Authority (EPA) pursuant to the EEZ Act for various marine and marine discharge consents to allow it to extract and process iron-sand from the seabed in the South Taranaki Bight. The site where it proposes to undertake these activities occupies an area in the order of 65 square kilometres, situated between 22 and 36 kilometres off the coast, outside of the territorial sea but within New Zealand's exclusive economic zone.

[4] The EPA has delegated its power to process and determine the Trans-Tasman application to a Decision-Making Committee (the Committee). The application has been publicly notified and approximately 8,000 submissions have already been filed with EPA pursuant to s 46 of the EEZ Act. Kiwis Against Seabed Mining Inc (KASM), the Applicant in these proceedings, is one of those submitters. We are told that submissions close on 14 November 2016.

[5] When filing its application with the EPA, Trans-Tasman also applied for a direction pursuant to s 158 of the EEZ Act, restricting the publication of what it contended was certain sensitive information contained in the application which had been redacted. On 14 September 2016 the Committee made a direction (the Direction) pursuant to s 158(3) of the EEZ Act restricting the publication or communication of certain identified information to the Committee, EPA staff dealing with the application, EPA experts, or persons who enter into a confidentiality agreement with Trans-Tasman. For convenience we will call the information subject to the Direction the "Sensitive Information" although whether or not that is the case and the extent of sensitivity is under dispute in these proceedings.

[6] Section 158(6) of the EEZ Act provides that when the EPA makes a direction pursuant to s 158(3), any party to the proceedings may apply to this Court pursuant to s 279(3)(a) RMA for an order cancelling or varying the direction. That is what KASM has done in this case. It seeks orders:

- Setting aside the Direction;
- That the Sensitive Information be made publicly available;
- That the public submission period in respect of the application be restarted to allow submitters to consider the Sensitive Information.

[7] The parties in these proceedings are:

- KASM as Applicant;
- EPA which adopts a neutral position on the application;
- Trans-Tasman which opposes the application;
- Te Runanga O Ngati Ruanui (Ngati Ruanui) which joined the proceedings pursuant to s 274 RMA and supports the KASM application;
- Talley's Group Ltd (Talley's) which also joined under s 274 and similarly supports the KASM application.

We record that there was no challenge to participation of those latter two parties in these proceedings.

[8] We propose structuring our decision on the following basis:

- We will summarise the nature of the Sensitive Information and assess

its significance in determination of the Trans-Tasman application. Commissioner Buchanan will undertake that;

- We will analyse the Direction and the basis for it, together with the terms of a related confidentiality agreement;
- We will briefly summarise the positions of the respective parties;
- We will then make our determination.

[9] Finally on these preliminary comments we record that it was the parties' common position that these proceedings should be conducted as a hearing *de novo*. We understand that to mean that the Court must itself be satisfied that grounds exist for making a Direction pursuant to s 158(3) EEZ Act. In effect that puts an onus on Trans-Tasman to establish that.

Commissioner Buchanan

[10] Trans-Tasman first made application for marine consents and marine discharge consents to extract and process iron-sand from the South Taranaki Bight in 2013. This application was declined, in part on the adequacy of the information available to support the evaluation of effects of the discharge of processed material back to the marine environment following extraction of minerals.

[11] Trans-Tasman re-applied for similar consents in 2016 supported by considerably greater information on the composition and dispersal characteristics of the discharge plume than provided for in 2013 application. A report was filed with the application entitled "South Taranaki Bight Offshore Iron-Sand Extraction and Processing Project - Impact Assessment- August 2016" (the Impact Assessment).

[12] Trans-Tasman also provided a number of technical reports referenced in the Impact Assessment. It is these referenced documents that contain the redacted sections which are the subject of the Direction. The Committee referred to the redacted sections as "the Sensitive Information"[1] as we have also done.

[1] M3 – Minute and Direction of the Decision-Making Committee – 14 September 2016 at para 4.

The Sensitive Information is:

(a) Redacted sections of a report being HR Wallingford (2014b), Support to Trans-Tasman Resources: Laboratory Testing of Sediments, DDM7316-RT002-R01-00;

(b) Redacted sections of a report by HR Wallingford (2015), Support to Trans-Tasman Resources: Source Terms and Sediment Properties for Plume Dispersion Modelling, DDM7316-RT004-R01-00;

(c) Redacted sections of a memorandum entitled "Contribution to source terms report for TTR" from Matt Pinkerton, NIWA, to Mike Dearnaley, HR Wallingford, dated 4 September 2015;

(d) Tables 2-3, 2-4 and 2-5 in a report by Hadfield, M and McDonald, H (2015), Sediment plume modelling, NIWA Client Report No WLG 2015 – 22;

(e) Table 5-1 in a report by Pinkerton, M, and Gall, M (2015), optical effects of proposed iron-sand mining in the south Taranaki Bight region. NIWA Client Report No. WLG2015 - 26 and;

(f) Table 1, "1. The industry (employment) multipliers generated/applied by Butcher & Partners" and Point 5 – Direct Expenditure forecasts, in a document entitled "Confidential Response to EPA Information Request", dated 28 January 2016.

[13] With the exception of (f) (above) all of the reports containing the redacted sections relate to aspects of the plume expected as the result of post-processing discharge of mined material back to the marine environment.

[14] Mr S Thompson (Project Director for Trans-Tasman) described the purpose of the reports containing the redacted information. In brief, the Wallingford (2014b) Report provides laboratory test results for input into the source terms analysis (which is Wallingford (2015)) for plume dispersal modelling. This information informs the ROMS sediment transport model, NIWA sediment plume model and optical effects model.

[15] The outputs from the modelling undertaken are important components for the evaluation of effects contained in the Impact Assessment. Mr Thompson described the information in the documents as providing "critical information into TTR's design basis crucial for the planned detailed design and development of its re-deposition equipment and supporting operational models".[2] Mr Thompson went on to assert that the value of the redacted information is limited to expert evaluation of the inputs into the sediment transport models.

[2] Affidavit of Shawn Thompson in opposition to Notice of Motion by Kiwis Against Seabed Mining, 7 October 2016 at para 11.

[16] This view was supported by Dr P Mitchell (Lead Environmental Consultant for Trans-Tasman). It was his opinion that "the only reason why any person would need to access the referenced technical documents would be for the purpose of undertaking a detailed technical peer review".[3] Dr Mitchell asserted that the Impact Assessment provided sufficient information for any interested person to be able to understand the environmental effects of the project without needing to access the referenced technical documents.

[17] It is clear to us that Sensitive Information is considered by the Trans-Tasman experts as being of crucial value for the plume dispersion models applied in the Impact Assessment.

[18] Mr D Greer (an oceanographic expert advising KASM) described the potential environmental effects of the plume as being a central issue in the 2013 hearing and also a central component of the 2016 application by Trans-Tasman. He considered the updated modelling (including flocculation) contained in the Impact Assessment has "dramatically altered the plume model results".[4] In his opinion access to the information on flocculation, in particular in the referenced documents, is required to assess the environmental effects of the plume.

[19] Mr D Todd (a coastal and hazards scientist advising Talley's) considered access to the numerical model input information was required for any technical peer reviewer to have confidence in model outputs. Like Mr Greer, he considered this of particular importance because of the size of the change in model results between the 2013 and 2016 Impact Assessments. Mr Todd did not consider the information in the Impact Assessment alone was of sufficient detail to allow adequate understanding of the changes in model output.

[20] Mr P McCabe (Chairperson for KASM) provided a summary of the scope of information contained in the redacted sections of the documents in question, together with his view on the value of the documents. This provided us with a useful insight into the importance of the Sensitive Information to the assessment of the consent applications from the viewpoint of the Applicant for the Notice of

3 Affidavit of Philip Hunter Mitchell, 7 October 2016, at para 3.3.
4 Affidavit of Dougal Greer, 25 October 2016, at para 6.

Motion. We produce this in full without further comment.[5]

HRW Laboratory testing of sediments report, which is attached as Exhibit "E", is 61 pages long. Some 51 pages are redacted. Its environmental relevance is shown in the one page Executive Summary, which is not redacted. That records that the tests were to investigate the behaviour of the tailings under saline and fresh water conditions, and reach conclusions on the rate of settlement of the sediment. That will be a crucial issue as it affects the plume, its distance, composition, longevity, sedimentation and effects. The plume and sedimentation are probably the two most crucial issues of the application, as they will smother benthic life, and cause matter to be suspended in the water column with effects on other marine life. All of the tests supporting the executive summary are redacted.

HRW Source terms and sediment properties report, which is attached as Exhibit "F", is 88 pages long. Again, the vast majority of the report is redacted: perhaps some 18 pages are not. The Executive Summary, which is not redacted, similarly records that the report makes recommendations for the discharge rates of fine material, which influences the speed of settling of the material. Again, this is a crucial issue affecting the plume and sedimentation and the importance is as for the laboratory testing report.

NIWA Memo to HRW, which is attached as Exhibit "G", is almost entirely redacted. It appears to relate to a hydrodynamic model, which relates to the sink rate of particles. Like the previous documents, this relates to the plume and sedimentation, and is of crucial environmental interest. The memorandum, as redacted, is almost completely useless in assessing the environmental impacts of the proposed seabed mining project, as a result.

NIWA Sediment plume modelling report which is attached as Exhibit "H", is 117 pages. It is less redacted than the previous reports. Redacted documents in Table 2.3 give the discharge rate, and in Table 2.4 give the summary of changes in discharge rates. Table 2.5 gives patch sediment parameters.

NIWA Optical effects report which is attached as Exhibit "I", is 79 pages. Like the NIWA Sediment plume modelling report, it is less redacted than the

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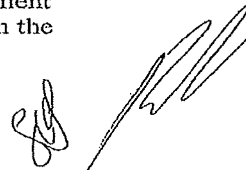

[5] Affidavit in support of application under s 279 to have EPA Directions set aside. Phil McCabe, 30 September 2016.

> other documents. Table 5.1 lists classes of sediment in the hydrodynamic model.
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> **Martin Jenkins information request** which is attached as Exhibit "J", is three pages long. It redacts various industry (employment) multipliers and breakdown of expenditure. Economic cost and benefits is a crucial aspect of the analysis under the Act.
>
> Confidentiality agreement which is attached as Exhibit "K", is 11 pages long. This is the agreement which, according to the directions of the DMC, must be signed by any person who wishes to view the redacted information.
>
> 33. In summary, any submitter who wanted to obtain specific information about the projected plume and sedimentation would need to sign the confidentiality agreement. The plume and sedimentation are critical aspects of the application. The DMC in the Decision on the first application said that "Achieving an appropriate particle size distribution and mass flux within the plume is a key environmental performance criteria" (para 136). Yet it is precisely these parameters which the Applicant is seeking to redact.

[21] There appears to be little dispute between the experts that the (redacted) Sensitive Information is crucial to understanding the plume dispersal modelling relied on by Trans-Tasman in the Impact Assessment. In turn, evaluation of the effects of the plume created by the discharge of process material will be central in determining the application itself. This view is supported by Mr McCabe for KASM and we agree.

Judge Dwyer

[22] Those comments bring us to analyse the Direction and the legal considerations pertinent to it. Section 158 of the EEZ Act relevantly provides that:

> **158 Protection of sensitive information**
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> (1) The Environmental Protection Authority may, on its own initiative or on the application of any party to any proceedings or class of proceedings, give a direction described in subsection (3) where it is satisfied that the order is necessary –
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> (a) to avoid causing serious offence to tikanga Māori or to avoid disclosing the location of wāhi tapu; or
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> (b) to avoid disclosing a trade secret or to avoid causing unreasonable prejudice to the commercial position of the person who supplied, or is the subject of, the information.
>
> (2) Despite subsection (1), the EPA may not give a direction described in subsection (3) if, in the circumstances of the particular case, the public interest in making the information available outweighs the importance of avoiding such offence, disclosure, or prejudice.
>
> (3) The EPA may give a direction for the purpose of subsection (1) –
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> (a) requiring the whole or part of any hearing or class of hearing at which the information is likely to be referred to be held with the public excluded:
>
> (b) prohibiting or restricting the publication or communication of any information supplied to it, or obtained by it, in the course of any proceedings, whether or not the information may be material to an application.

[23] It was these provisions which formed the basis of Trans-Tasman's application to the Committee to restrict publication of the Sensitive Information. For the sake of completeness, we record that s 158(8) provides that "information includes any document or evidence". The Sensitive Information which we have earlier described undoubtedly falls within that description.

[24] The Direction was made in the following terms:

> 10. Therefore in accordance with section 158(3) of the Act the DMC issues the following direction:
>
> a. The publication or communication of the information described in paragraph 4 above is restricted to the DMC, EPA staff dealing TTRL's application, EPA experts, and persons who enter into a confidentiality agreement with TTRL.
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> b. TTRL shall, as soon as reasonably practicable, advise the EPA in writing of the

names of all experts and other individuals who have entered into a confidentiality agreement in respect of the information, and shall continue to advise the EPA in writing when any additional experts or other individuals enter into a confidentiality agreement.

c. Relevant expert witnesses who have entered into a confidentiality agreement and considered the information may be asked to conference in accordance with the Environment Court of New Zealand's Practice Note 2014, at a time to be arranged, and prepare a joint witness statement or statements recording the outcomes of conferencing, including any matters that were agreed, any matters that were not agreed, and reasons why. If appropriate, multiple witness statements covering multiple disciplines or aspects of the information are to be prepared.

d. If any content of the statement or statements would disclose the sensitive information then publication or communication of that aspect of the joint witness statement (or statements) will be restricted to TTRL, the DMC, EPA staff dealing with TTRL's application, parties' legal counsel, and persons who enter into a confidentiality agreement with TTRL and are provided with the information that is the subject of the statement. Otherwise, the joint witness statement or statements are to be made publicly available.

e. Attendance at any part of the hearing that addresses the sensitive information or the restricted aspects of any joint witness statement (or statements), including through questioning of the signatories to that joint witness statement about the information, will be restricted to TTRL, the DMC, EPA staff dealing with TTRL's application, parties' legal counsel, and persons who enter into a confidentiality agreement with TTRL and are provided with the information that is the subject of the witness statement .

[25] The effect of the Direction was not to totally preclude parties or their advisors from access to the Sensitive Information but rather to restrict access to the persons identified in paragraph 10(a) of that Direction. Most relevantly for the purposes of these proceedings, those persons included persons who entered into a confidentiality agreement with Trans-Tasman (the Confidentiality Agreement). Trans-Tasman contended that in seeking a direction to that effect, its objective was not about secrecy or denying access to technical or environmentally critical information, but rather about controlling access to economically valuable technical data.

[26] Persons who signed the Confidentiality Agreement were able to access the Sensitive Information subject to the restrictions and controls contained in the agreement. Trans-Tasman advised that a number of parties had done precisely

that. These included the legal advisor for Ngati Ruanui, the Department of Conservation, Taranaki Regional Council and various EPA technical reviewers. Although paragraph 10(a) provided for parties to enter into the Confidentiality Agreement, the Direction did not specify what the form of that agreement should be. That was left as a matter to be negotiated between Trans-Tasman and the various parties or persons seeking access to the Sensitive Information.

[27] The Confidentiality Agreement was prepared by Trans-Tasman's advisors and was described by Mr Holm as a "boilerplate document", which we understood to mean a commonly used, standard or stereotype document. Mr Makgill described the terms of the Confidentiality Agreement as draconian. We will consider those matters as part of our determination.

[28] EPA took a neutral position as to the outcome of these proceedings. It addressed the Committee's exercise of its discretion under s 158 and described the marine consenting process in the EEZ Act. Mr Randal briefly identified the evidential basis for the Direction but noted that under s 279(3)(a) RMA, this Court essentially undertakes a re-exercise of the powers contained in s 158. He disputed that the Court had jurisdiction to order the restart of the public submission period as sought by KASM.

[29] Mr Holm filed two submissions on behalf of Trans-Tasman. His submissions referred to the affidavits of Mr Thompson and Dr Mitchell. In summary, Mr Holm contended that the evidence of Mr Thompson established that the Sensitive Information was a trade secret and that its disclosure would cause unreasonable prejudice to Trans-Tasman's business position.

[30] In his first statement Mr Thompson described the testing and analysis process undertaken by Trans-Tasman and its technical advisors relating to the sediment which might be generated by Trans-Tasman's iron-sands processing operation. In his second statement he said that Trans-Tasman had spent in the order of $65M dollars "in acquiring the in-depth knowledge of the extracted material, environmental research and the development of an environmentally sustainable mining technology solution". This related back to the contention in his first statement that releasing information obtained through these processes would enable Trans-Tasman's competitors to acquire the information without having to undergo the required cost and effort. Mr Thompson estimated that this

could save competitors up to $10M dollars. Mr Thompson identified the commercial prejudice which he claimed Trans-Tasman would suffer from release of this information and we summarise that as follows:

- Competitors would significantly reduce their entry and development costs and reduce Trans-Tasman's competitive edge;
- Trans-Tasman's shareholder wealth would be diminished;
- Competitors could start work on acquiring patents;
- Commercial consultants could use the data for modelling purposes without having to pay Trans-Tasman for it;
- Trans-Tasman's ability to acquire copyright or database protection would be diminished;
- Trans-Tasman's ability to acquire patents would be jeopardised.

[31] A feature of the submission made by Mr Holm and the evidence of Mr Thompson and Dr Mitchell was the contention that understanding of the environmental effects of the Trans-Tasman proposal could be adequately obtained by reading the Impact Assessment and that the Sensitive Information would only be of use to experts undertaking a peer review of the technical documents. The Sensitive Information would be available to those experts provided they entered into the Confidentiality Agreement.

[32] In its submission KASM identified the information principles contained in the EEZ Act and the importance of public participation in the consenting process. It contended that s 158 contemplated a balancing process between undue prejudice to any information holder such as Trans-Tasman on the one hand and the public interest in making the Sensitive Information available on the other. KASM examined the contents of the Confidentiality Agreement which it submitted was an extremely intimidating and one-sided document. It challenged the jurisdiction of the Committee to make the Direction which it did, requiring parties to sign the Confidentiality Agreement exposing them to civil and criminal liability. It referred to the gagging effect of such agreements.

[33] KASM contended that there was strong public interest in the Sensitive Information, which related to the environmental effects of the plume of material discharged into the marine environment after extraction of iron from the sand. It pointed to the centrality of the plume in the environmental effects generated by

the extraction process and contended that information regarding the plume and modelling of its effects was key information and that the public interest in making that information available was overwhelming, given its central importance to the case.

[34] KASM provided an affidavit in support of its case from Mr Greer, who confirmed the centrality of the effects of the sediment plume, which he described as "the single biggest environmental effect of the activity". He identified that the primary difference between the modelling undertaken for this current application as opposed to Trans-Tasman's first application was the inclusion of flocculation in the model which had dramatically altered the plume's model results. This information is subject to the Direction and can only be accessed by signing the Confidentiality Agreement which effectively precludes summarisation of the information by experts for their clients and the public.

[35] Talley's supported the KASM position. It referred to the views expressed by Mr Todd and contended that the Sensitive Information is no more commercially sensitive than any modelling information tendered in support of large scale proposals and that the cost and effort expended in acquiring that information should not be used as a basis for withholding it.

[36] Mr Makgill suggested that treating this information as confidential would open the floodgates for non-disclosure of all sorts of information normally provided in support of notified applications for consent. He made comparisons with provisions of the Official Information Act as a test. Mr Makgill contended that it had not been established that there would be unreasonable commercial prejudice to Trans-Tasman if the Sensitive Information was made available without restriction and that even if there was commercial prejudice, this did not outweigh the public interest in submitters being afforded access to that information. He challenged EPA's jurisdiction to make the Direction in the form which it did.

[37] Mr Todd was given access to the Sensitive Information in preparation for this hearing. In his second affidavit he had this to say about the information[6]:

> 5. I found the technical information in the Wallingford reports extremely useful for understanding the laboratory testing undertaken to determine the sediment properties, how this information was applied as input parameters in the NIWA models, and how these inputs varied from those used in the modelling for the first impact assessment contained in TTR's 2013 application. This is the level of information that I consider should normally be made available with a publicly notified application to enable experts for potentially affected parties to undertake a technical peer review of the full modelling process and results.
>
> 6. The laboratory testing appears all to be standard scientific procedure, which I do not consider is sensitive information that would normally otherwise be withheld from the public. In my opinion, the only piece of information provided in the reports listed under paragraph [1] that might be commercially sensitive is the presentation of data on the magnetic qualities of the sediment samples, which covers 2 pages. This information is not required for the technical peer review of the modelling inputs.
>
> 7. The deducted tables in the NIWA modelling reports are sourced directly from the Wallingford reports. Their removal from the reports limits the ability to understand and interpret modelling results, as they are the vital inputs into the modelling.
>
> **CONCLUSION**
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> 6. Based on my brief review of the supplied documents, I have no reason to alter the conclusions of my primary affidavit that as a technical peer reviewer I would expect to have access to the detailed technical information contained in the Wallingford reports, and that this is particularly important for the TTR sediment plume modelling to justify the magnitude of change in the model results between the first Impact Assessment in 2013 and second Impact Assessment in 2016.
>
> 7. I would also conclude that in my opinion the over whelming majority of the information contained in the Wallingford Reports is not of a commercially sensitive nature, in the sense that I would expect this kind of information to be supplied with any assessment of an activity on the scale proposed.[7]

[38] In her submission for Ngati Ruanui Ms Inns referred to the Ombudsman's publication known as the Part 2 Guide which cited a Victorian case *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd*[8] where the Supreme Court

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6 Further affidavit of Derek John Todd for Talley's Group Limited 4 November 2016.
7 Incorrect numbering as per affidavit.
8 *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VicRp 7; [1967] VR 37.

of Victoria had identified criteria for determining whether information constitutes a trade secret. These included:

- The extent to which the information is known outside of the business in question;
- The value of that information to the business and its competitors;
- The amount of money expended in acquiring the information;
- The ease or difficulty with which the information could be acquired or duplicated by others.

She contended that the evidence before the Court did not enable these questions to be determined. Arguably, the evidence subsequently provided by Mr Thompson addressed those questions.

[39] Insofar as the unreasonable prejudice to Trans-Tasman's commercial position was concerned, Ms Inns asked four questions:

- Would the disclosure prejudice Trans-Tasman's commercial position?
- If so, would the prejudice be unreasonable in the circumstances?
- What is the public interest in making the information available?
- Does that public interest outweigh the importance of avoiding any demonstrated unreasonable prejudice?

[40] An aspect of Ngati Ruanui's case which we noted, was the evidence of Mr G J Young, the Manager of its Environment Unit, who explained the difficulty in communicating with its 7,900 members about the Sensitive Information should the Runanga sign up to the Confidentiality Agreement. Although Ms Inns had entered into such an agreement with Trans-Tasman, she had done so on her own behalf so that she could advise Ngati Ruanui as to its options on the Direction. She considered that the Confidentiality Agreement precluded her from discussing the Sensitive Information with her client.

[41] The submissions which we have only briefly summarised, identify the following issues which we must determine in deciding this matter:

- The legality of the Direction and the relationship between the Direction and Confidentiality Agreement;
- Whether or not the Sensitive Information constitutes a trade secret?
- Whether or not there would be unreasonable prejudice to Trans-Tasman's commercial position if the Sensitive Information is made

available?

- If the answer to either of those questions is yes, does the public interest in this particular case outweigh the importance of avoiding disclosure of a trade secret or the commercial prejudice to Trans-Tasman?

[42] On the issue of the Direction, we consider that as a matter of principle it was open to the Committee to restrict publication of the Sensitive Information to persons who had signed a Confidentiality Agreement. Although s 158 is silent as to the terms on which a Direction might be made, s 15 EEZ Act gives EPA (and through it the Committee) all the powers necessary to enable it to carry out its functions. Section 158(3)(b) provides that a Direction may prohibit or restrict publication or communication of any information. That is what the Direction did. It restricted publication and communication of the Sensitive Information to persons who had entered into the Confidentiality Agreement.

[43] Where we take issue with the Direction however, is its failure to specify what the form or terms of the Confidentiality Agreement might be and leaving that as a matter of private contract between Trans-Tasman and anyone wanting to view the Sensitive Information. We agree with those parties who express concerns about this process.

[44] The Confidentiality Agreement (which is a side agreement) appears to create a contractual relationship between Trans-Tasman and those signing it and contains a threat of civil liability for any breach. In our view, the Confidentiality Agreement has a strongly inhibiting effect on the ability of those who sign it to canvas other opinion or discuss the Sensitive Information with other persons, including persons seeking their advice. That is of course its purpose, but we note the strongly inhibiting effect of this side agreement.

[45] If we were considering a similar situation in this Court, we would proceed on the basis of a confidentiality order with specific terms as Judge Borthwick did in the *Pickering v Christchurch City Council*[9] case cited before us. That Order could require the signing of a confidentiality undertaking by persons viewing the information and any breach would be a matter for the Court rather than a private

9 *Pickering v Christchurch City Council* [2016] NZEnvC 46.

matter between parties.

[46] A matter of particular concern for the Court is that while the Direction only permitted disclosure of the Sensitive Information to persons who had entered into the Confidentiality Agreement, Clause 4 of that agreement purported to authorise disclosure of the information to a wider group of persons described as "Affiliates". We do not consider it possible for the parties to ignore the terms of the Direction by agreement.

[47] Ultimately, we do not need to decide whether this process constituted an effective delegation of the Committee's power to make directions as contended by some of the parties to these proceedings. We propose to determine these proceedings on the basis of the Direction as made, but having expressed our reservations about the contents of the Confidentiality Agreement and its relationship to the Direction.

[48] Those observations bring us to the issue of whether or not the Sensitive Information constitutes a trade secret? There is no definition of that expression in either the EEZ Act or RMA. The closest Counsel came to assisting the Court in definition of that term was Ms Inns' reference to the rubber case in Victoria *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd*[10]. However, that case related to the acquisition of information by employees, who subsequently sought to use it for their own benefit and is a substantially different context to this.

[49] We consider that the term "trade" in this case refers broadly to commercial activity as identified in the case *Kapiti Coast Airport Holdings v Alpha Corporation*[11]. Trans-Tasman is unquestionably in trade in that sense and has acquired the Sensitive Information to advance its commercial purposes.

[50] The word "secret" obviously refers to something which is kept from general knowledge, kept hidden or private from all or all but a few - that is a distillation from the New Shorter Oxford English Dictionary. Trans-Tasman has kept the Sensitive Information secret in the sense that it has not publically circulated the information and has sought to restrict its distribution in this case.

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10 Above n 8.
11 *Kapiti Coast Airport Holdings v Alpha Corporation* [2016] NZEnvC 137.

[51] We consider that determining whether or not these factors combine to make the Sensitive Information a trade secret is best achieved by reference to context.

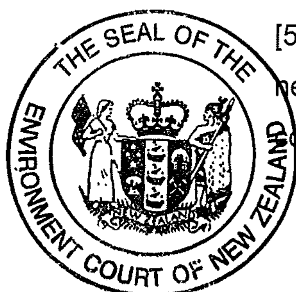
[52] The Sensitive Information was obtained by Trans-Tasman for the purposes of advancing its application for marine consents under the EEZ Act. Its previous application had failed (as we understand it, at least in part) because of inadequacies in the evidence relating to plume effect. Trans-Tasman has acquired the Sensitive Information to address those inadequacies in a situation where its previous application had been subject to public scrutiny and it would have known that its current application would similarly be subject to a public process. The Sensitive Information was acquired for the purpose of that public process.

[53] Mr Greer described the Sensitive Information as being the kind of information which he would expect to be provided in support of an application for an activity on the scale proposed. Mr Todd made a similar assessment. In this context we consider that there was a high degree of inevitability that the Sensitive Information would need to be subject to public scrutiny and we do not consider it to be a trade secret.

[54] Turning to the issue of prejudice to the commercial position of Trans-Tasman, we accept that there may be potential for that to occur due to the Sensitive Information coming into the public domain.

[55] Mr Thompson said that Trans-Tasman had spent $5M dollars in collecting and testing sediment and that is clearly a substantial amount. He contended that competitors would have to expend at least $10M dollars to duplicate this information and would avoid the cost of doing so if the Sensitive Information was publicly available. He identified ten other permits to extract iron-sand around New Zealand. If these statements are accepted at face value, we accept that they establish a degree of prejudice to Trans-Tasman's commercial position.

[56] Determining whether or not that is an unreasonable prejudice again needs to be considered in the context we have already discussed of the public consent process. As the result of its previous application having been declined,



Trans-Tasman was in a position where it had to obtain the Sensitive Information if it wished to pursue its iron-sand mining proposal in the South Taranaki Bight. It had to expend funds for that purpose or abandon the proposal. We do not consider that the cost of acquiring the Sensitive Information can be advanced in that situation as a reason for seeking to restrict its publication under those circumstances.

[57] We accept that once the Sensitive Information is in the public arena it may potentially be available to other mining operators, although Mr Thompson provided no detail as to how those operators might achieve the costs savings which he contended they might by virtue of having the information. Nor did we understand that any of the miners he identified were seeking to mine the site of the Trans-Tasman application, so that acquisition of the information would not prejudice this current application in any way.

[58] Under those circumstances, we do not consider that any potential prejudice to Trans Tasman's commercial position arising from disclosure of the Sensitive Information can be described as unreasonable. We make that determination in the context of this particular proposal and the importance of the Sensitive Information in assisting assessment of the effects of the proposed mining operations.

[59] It follows from these findings as to trade secrecy and unreasonable prejudice that we are not satisfied that it is necessary to make the Direction. In the event that we might be considered to be wrong in our findings on those issues, we now consider whether or not the public interest in making the information available outweighs the importance of avoiding disclosure or commercial prejudice.

[60] We commence our discussion in that regard by observing that there is unquestionably considerable public interest in the Trans-Tasman proposal which involves the mining of material in the public domain. To date, some 8,000 submissions have been received on the proposal and one of those submitters, Ngati Ruanui, represents nearly 8,000 people in its own right.

[61] In identifying the public interest in having the Sensitive Information made available, we refer to various sources. We commence by reference to s 17(1)(b)

of the EEZ Act which relevantly provides:

> (1) The Environmental Protection Authority must keep records and make available information –
>
> (b) in particular, to enable the public and persons undertaking or proposing to undertake activities in the exclusive economic zone or in or on the continental shelf to be better informed of their duties and of the functions, powers, and duties of the EPA and to participate effectively under this Act.

[62] This constitutes an unequivocal statement to the effect that the public is entitled to receive information enabling it to participate effectively in processes under the Act. However, we acknowledge that statement must be read subject to s 17(4) which provides that s 158 "overrides this section". In short, the public's right to information enabling its effective participation in processes may be overridden by the trade secrecy and commercial prejudice considerations identified. There is a discretion given to the Committee or the EPA in that regard.

[63] We refer to the provisions of ss 39(1) and (2) of the EEZ Act which require that applicants must provide information, specifying measures to avoid, remedy or mitigate adverse effects in such detail as corresponds to the scale and significance of those effects. The Sensitive Information which goes directly to the issue of effects of the plume is clearly relevant in that regard.

[64] Further relevant provisions of the EEZ Act are found in s 61 which identifies "Information Principles". Section 61(1)(b) provides that the EPA must "base decisions on the best available information". We consider that this requires that in determining any application, EPA is obliged to have before it the full range of relevant information.

[65] In this particular case, that will or may include a peer review of the Sensitive Information which is crucial to Trans-Tasman's assessment of the effect of the waste plume. The particular significance of such a peer review must be considered in light of s 61(2) EEZ Act which provides that in making a decision, if "the information available is uncertain or inadequate, the EPA must favour caution and environmental protection" and s 59(2)(e) of the EEZ Act which provides that in making a decision "[t]he EPA must take into account the importance of protecting the biological diversity and integrity of marine species, ecosystems and processes". These provisions demonstrate the importance of

the issues at stake in this case.

[66] We refer to the provisions of s 27 of the New Zealand Bill of Rights Act 1990 which requires the observance of the principles of natural justice by various tribunals and authorities. At a general level, those principles require that processes such as these applications be conducted in an open and transparent fashion. We appreciate that those general principles do not preclude bodies such as the Committee or the Court making directions for confidentiality, but they emphasise the requirement for openness in judicial processes.

[67] Finally on this topic, we refer to the proposition advanced by Mr Holm, Dr Mitchell and Mr Thompson that the Sensitive Information is of such a technical nature that it would be of little informative value to members of the public and is only of use to technical experts undertaking a peer review who may access the information as long as they sign the Confidentiality Agreement. We make two observations regarding that proposition:

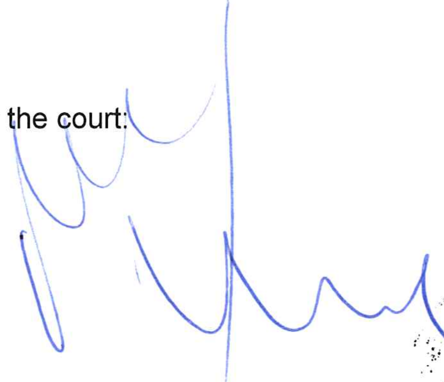
- Firstly, we do not accept the proposition as a general statement. We agree that many members of the public may not understand the information or how it relates to the impact assessment undertaken by Trans-Tasman. Indeed they may not wish to do so. However, some members of the public will do so as they apparently did regarding technical issues at the hearing of Trans-Tasman's previous application. Members of this Court frequently have to come to grips with highly technical information during the course of its hearings and we have no doubt that many members of the public have a similar capacity to do so;
- Secondly, if we accepted that proposition, that would highlight the need for expert advisers to be able to freely access the Sensitive Information and explain its significance to the persons they are advising in an open fashion. The Direction and Confidentiality Agreement strongly inhibit them in that regard.

[68] Ultimately we conclude that the crucial nature of the Sensitive Information in informing the conclusions in the Impact Assessment, when combined with the public's right to participate effectively in the consent process, outweigh any trade secret or business prejudice interest of Trans-Tasman by a considerable margin. Accordingly, we set aside the Direction made by the Committee on 14 September

2016 and direct that the information listed in paragraph 4 of Minute 3 of that date be made publicly available. We otherwise decline to intervene in the Committee's processes as sought in paragraph c of KASM's application.

[69] Our initial view is that costs should lie where they fall. However, if any party wishes to make a costs application it may be filed and responded to in accordance with the Environment Court's Practice Note 2014.

For the court:



B P Dwyer
Environment Judge