BEFORE A COMMISSIONER APPOINTED
BY THE SOUTHLAND REGIONAL COUNCIL

Under the Resource Management Act 1991

In the matter of an application for resource consent

CLOSING LEGAL SUBMISSIONS FOR PAHIA DAIRIES LIMITED

13 OCTOBER 2023

Introduction

1 In my submission, the decision before you is a "game of two halves".

1.1 Firstly, you must determine whether or not it is appropriate, or indeed lawful, to consider animal welfare as a relevant matter under the Resource Management Act 1991 (**RMA**). If you find they are not, there is agreement between the parties that the consents can appropriately be granted, on the conditions circulated with the s42A report.

1.2 If you decide that animal welfare is relevant, you must then turn your mind to whether it is relevant in this case, and if so, what consent conditions would be appropriate to manage any adverse effects.

2 As set out at the hearing, Pahia Dairies Limited (**PDL**) position remains that animal welfare **is not relevant** to your decision making. If you disagree with that position, it is my submission that when considering the facts of this application, and particularly the permitted baseline and existing environment, the effects of the proposal above the permitted baseline are negligible. It would be inappropriate to impose conditions specific to those matters. Despite this, included with these submissions at **Appendix A** is a tracked change version of the proposed consent AUTH-20222765-01, which include some of the conditions sought by the NZALA.

Animal welfare as a matter to be controlled by the RMA

3 At the outset, it's important to note that there is no disagreement as to the importance of animal welfare concerns. Mr Anderson's evidence was clear in his desire to 'do right' by his animals, and explained the connection he feels with them. PDL takes no issue with the NZALA's stated goals. However, that does not mean that NZALA is not bound by the constraints of the RMA. Conditions on a resource consent must be limited to matters which can reasonably be implanted under the RMA, and that remains the fundamental point of disagreement between the parties.

4 The NZALA provided you with examples of work being done to improve the animal welfare framework, as it relates to intensive winter grazing. There was particular reference to the Winter Grazing Taskforce findings. In that document, or any of the information provided to you by NZALA, is it indicated that these changes are being done under the RMA. All proposed changes appear to be related to the Code of Welfare under review. This is consistent

with the position that the RMA is **not** the appropriate legislation to pursue the change sought by the NZALA. I refer also to my opening submissions, where I consider that a submission on the regional planning documents would be a more appropriate way to attempt to bring these matters within the RMA framework, rather than on individual consent applications.

5 At the hearing, I provided you with an outline of the *Kaimanawa* case[1], which I consider it useful to reiterate here. Firstly, the Court found, after consideration of the context of the RMA, that Parliament did not intend the RMA to extend beyond the control of the use of land, water and air. I referred in particular to the following statement made by the Judge:

> *I do not consider that I should impute to Parliament and intention that the general duty imposed by section 17(1) extends to restrain activities that are not subject to control elsewhere in the Act and which are authorised under other legislation, even where they give rise to an adverse effect on the environment.*

6 It was my submission to you that "subject to control" can be read in context for this application. The examples given in the strike out decision, where "animals" are referred to in the RMA, relate to controls on habitat protection and water availability, rather than control over the animals **themselves.**

7 I agree with the NZALA submissions that the general position in *Kaimanawa* seems to indicate that animals can come under the broad definition of environment. This is referred to at paragraph 52 of the legal submissions for the NZALA. However, the NZALA submissions then failed to provide you with the additional limitation that the Court imposed on that broad definition – that it had to be limited by what Parliament intended when enacting the RMA. It referred back to Part 2, and other controls within the RMA, to inform this finding.

8 I refer to my opening submissions, and submissions provided in support of the strike out application, on other relevant considerations and caselaw supporting the exclusion of animal welfare from RMA considerations.

9 If you determine that animal welfare is not a relevant consideration, there is agreement between PDL and the s42A officer as to the alignment of the application with the relevant objectives and policies, and mitigation measures

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[1] *Kaimanawa Wild Horse Preservation Socety Inc v Attorney General* [1997] NZRMA 356

offered which make it appropriate to grant consent. Resource consent conditions were included with the s42A report, and are supported by PDL. The evidence of Mr Hook for the NZALA was that its evidence was confined to matters of animal welfare, and he deferred to Ms McRae's assessment on other considerations.

Relevance to this case

10 If you come to a different conclusion than the above, and consider *in principle* that animal welfare can be a valid consideration under the RMA, it is then necessary for you to consider whether in this case, and on these facts**,** that would be appropriate.

11 My opening legal submissions outlined the legal framework for the permitted baseline and the existing environment. I don't intend to revisit the law on that point, other than to reiterate that this, in my submission, is a clear example of where you should use the discretion given to you in section 104(2) to apply the permitted baseline. This allows you to disregard any adverse effects that would already be authorised by a rule in the proposed Southland Water and Land Plan (**pSWLP**) or the National Environmental Standard for Freshwater (**NES-F**).

12 The scope of the permitted baseline was the subject of some discussion at the hearing. This was summarised by Ms McRae in her officer's response, but for the purposes of completeness, I have also included it below:

12.1 The first relevant point is the definition of "landholding" in the NES-F, which is "one or more parcels of land (whether or not they are contiguous) that are managed as a single operation". That becomes relevant here as the Browns Block was **previously** managed as a separate operation, but is proposed to come within the main dairy platform as part of this proposal. On that basis, Browns Block and the dairy platform are to be treated as a single "landholding".

12.2 During the reference period, the Browns Block lawfully winter grazed 30 hectares of dairy support cattle, and the dairy platform lawfully winter grazed 34 hectares.

12.3 Although this gives a combined total of 64 hectares, as a permitted activity the NES-F only allows a maximum of either 50 hectares, or 10% of the landholding, whichever is the greater. On that basis, as of right, 52 hectares of winter grazing can occur across the landholding – being Browns Block and the dairy platform.

12.4 It is relevant that this application also seeks to authorise winter grazing on slopes greater than 10%. To be a permitted activity, winter grazing must be on slopes less than 10%. I note that **none** of the concerns raised by the NZALA relate to the slope of the winter grazing area, and so for the purposes of the permitted baseline, this matter is less relevant. Regardless, the evidence of Mr Anderson is that there is plenty of non-slope land on each property to undertake 52 hectares of winter grazing, if one chose to (noting that the environmental outcomes would be worse, as the soil is not well suited to winter grazing. However, there are no controls on soil type in the NES-F).

13 As a final note, the Council Officer also made a comment as to what could lawfully happen, if the Browns Block were **not** integrated into this landholding (for example the block was sold, or was leased to a third party). In that instance, each block reverts back to the reference period totals, meaning a total of 64 hectares across the two blocks can be intensively winter grazed as of right, as long as the slope rules of the NES-F are not triggered (noting Mr Anderson's evidence above as to flat land availability).

14 To summarise, your assessment of effects should disregard any effects (including effects on animal welfare, should you consider that relevant) of 52 hectares of winter grazing. That leaves a balance of 3 hectares, for your consideration. In my submission, the level of adverse effects arising from that 3-hectare difference is negligible. By contrast, the **positive** effects of this application are significant, as summarised Ms Mesman and Ms McRae at the hearing. The proposal reduces nitrogen load, phosphorus (and so likely sediment) loss, results in significant planting along several waterbodies, and retires paddocks identified as less suitable for intensive winter grazing (which could otherwise be undertaken as of right).

15 An additional comment was raised by Ms Nightingale in legal submissions, in relation to discharges to the coastal environment. This was addressed in the reply of Ms McRae, and we rely on those comments. Conditions are already suggested by the section 42A officer and agreed by PDL which will reduce nutrient loss and run-off to surface water (and so ultimately, to the coastal environment).

Conditions

16 I include this section for completeness. For the reasons outlined above, I consider that there are two strong grounds as to why your decision making

should not progress to the consideration of conditions that relate to animal welfare.

17 The NZALA provided several versions of proposed conditions that relate to animal welfare. I have had the benefit of these when preparing **Appendix 1** to this evidence. I note that I have not copied these over verbatim, as I consider there are several issues with the conditions as proposed, and I explain my reasons for that below (using the reference to "Condition X" and "Condition Y" per the proposed conditions v2.1. circulated by the NZALA):

17.1 The "preamble" to Condition X has been removed. Compliance with the Code of Welfare: Dairy Cattle is a legal requirement under the Animal Welfare Act, and does not require 'cross-referencing' here.

17.2 The conditions as set out (from i to vi) go further than the requirements of the Code of Welfare. At a practical level, this is problematic when considering lying space in adverse weather events.

17.3 The requirements set out in condition X(i) to (iii) has been accepted in its entirety.

17.4 The minimum lying area of 10m^2 per cow, preferred by the NZALA, has been adopted by the Applicant.

17.5 The wording of condition X(iv) has been amended to require access to clean, soft, dry lying space <u>in standard weather conditions</u>**.** Lying space is identified as a priority (following other urgent welfare considerations) in severe weather events. Severe weather events are defined to mean when Metservice has issued a "Severe Weather Warning" over the region in which the farm operates. This is considered significantly clearer, and able to be complied with, than the wording suggested by NZALA. The NZALA wording contained ambiguity as to how the seasonal average was to be assessed (for example was it the entire winter period? The particular month, or week of a year? The forecast weather (that a farmer can reasonably foresee) or the actual temperature which may be more extreme than forecast?). A Metservice warning is sufficiently clear to the consent holder and anyone auditing the farm plan as to the trigger for when "severe weather events" are occurring.

17.6 The restriction on back fencing is removed. Ms Wouda and Mr Anderson gave evidence that back fencing does not unduly limit the ability for cows to walk around (the fence is not “right on their behind” as explained by Ms Wouda) but it does assist in soil management and environmental protection. The requirement for lying area is set at a minimum of 10m^2 per cow, and so concerns of ‘overcrowding’ are addressed in that way.

17.7 Due to the changes to the above proposed Condition X, advice notes 1 and 2 are not required. Advice note 3 has been amended, as discussed at 15.5 above, to provide greater clarity.

17.8 As set out in my opening submissions, advice note 4 is not lawful, as it requires ongoing compliance with a document that can be changed. For a condition to be changed, an application must be made and approved under section 127 of the RMA.

18 Rather than incorporating animal welfare conditions as a new condition, as suggested by Mr Hook for the NZALA, Appendix 1 incorporates elements of the animal welfare conditions proposed by the NZALA into the FEMP requirement, as suggested by Ms McRae at the hearing. This negates the need for Condition Y, as the requirement for a winter grazing component is incorporated within the FEMP.

19 The proposal, to incorporate the animal welfare conditions within the FEMP, allow for more flexibility than the conditions imposed by Mr Hook. In particular, a Management Plan can be updated to refer to particular documents (such as an updated Code of Welfare) in a way that a resource consent cannot (outside the s127 process). Case law is clear that a consent holder should have the ability to change a management plan without having to go through the process of seeking a change to the conditions of consent[2].

20 I also note that condition 27 is a new condition from the version circulated with the section 42A report. This is **not** tracked in, as it was added by Ms McRae immediately following the hearing and was incorporated within this condition set when I received it.

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[2] *Wood v West Coast Regional Council* [2000] NZRMA 193 and commonly accepted in consent conditions that management plans can be changed annually (or more) without the need for a change of consent conditions.

Dated 13 October 2023

J A Robinson

Solicitor for PDL