

**DOUBLE SIDED**

**ORIGINAL**

Decision No. C **93.** /2002

IN THE MATTER of the Resource Management Act 1991 (**the Act**)

AND

IN THE MATTER of a reference pursuant to Clause 14 of the First Schedule of the Act

BETWEEN TELECOM NEW ZEALAND LTD

(RMA433/99)

Section 271A Party 420199 and 443199

AND

VODAPHONE NEW ZEALAND LTD

Appellant (RMA 443/99)

AND

TELSTRA CLEAR LIMITED

Appellant (RMA 420/99)

AND

CHRISTCHURCH CITY COUNCIL

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J Smith

Environment Commissioner I G C Kerr

HEARING at **Christchurch** on 8<sup>th</sup> April 2002

APPEARANCES

Mr J J Hassan for Telecom New Zealand Ltd (Telecom) and New Zealand Radio Network Limited (Section 271A party)

Mr A J Prebble for the Christchurch City Council

Ms L M Ritchie for Environmental Protection for the Children Trust (Section 271A party on all references)

Vodaphone New Zealand Ltd (Vodaphone) and Telstra Clear Ltd adopt the submissions of Telecom and abide the decision of the Court.



## DECISION AS TO JURISDICTION

### *Introduction*

[1] Telecom seek to be able to substitute in the Christchurch City Plan new and more liberal radio frequency standards than those which they sought to insert at the **time** of the notification of the Christchurch City Plan.

[2] At the time of their submission to the Christchurch City Plan NZS6609:1990 Part I and II were the relevant standards for radio frequencies in New Zealand. Subsequent to hearing submissions, but prior to issuing its decision, the Standard NZS6609 part I was replaced with NZS2772 (interim:1998) on the 27 February 1998. On the 30<sup>th</sup> April 1999, that interim Standard was replaced with NZS2772.1:1999. The Council issued **its** decision on submissions on the 8<sup>th</sup> May 1999 (the Proposed Plan).

[3] The issue is whether Telecom can now seek to have included within the Proposed Plan the provisions of the Standard 2772.1 even though those provisions were not in existence at the time of the notification of the Plan, or Telecom's submission.

### *Background*

[4] The Christchurch City Plan was publicly notified on the 24<sup>th</sup> of June 1995 (the Notified Plan). NZS6609 was referred to in the General City Rules at 4.6 (Volume 3 Chapter 9123) of that Plan. This was the then current New Zealand Standard on radio frequencies. The Proposed Plan drafters were aware that there was a change to the New Zealand Standard pending and noted (at 4.6):

*“Pending the review of the New Zealand Standard 6609 (1990) in respect to microwave and ultra high frequency emissions, a conservative approach has been adopted having regard to the potential effect of such facilities on the health of persons in the vicinity... ”*

[5] On the 29<sup>th</sup> November 1995 Telecom lodged a submission which included **the** following statement:



“*Radio frequency emitting utilities should be regulated by requiring compliance with the relevant New Zealand Standard (the current Standard being Section 6609:1990)*”

[6] In its submission to the Christchurch City Council, Telecom sought replacement of Rule 4.4.2(a)(i) with the following Rule (or to like effect):

*“(i)so designed and operated as to emit radio frequency emissions in excess of the maximum non-occupational exposure levels prescribed by New Zealand Standard 6609:1990 (or any replacement New Zealand Standard) on the basis of measurement undertaken in accordance with the applicable New Zealand Standard’s principles and methods of measurement. ”*

[7] In their reference to this Court, Telecom seeks, *inter alia*, that the Proposed Plan be modified as follows:

6.1 *Amend rule 4.4.5 (a) by deleting the words “NZS 6609 (1990) Parts I and Part II” and inserting the words “NZS 2772.1:1999 and NZS 6609.2:1990 (or any replacement New Zealand Standard)”;*

### *Issues*

[8] The parties accept that the remedy sought before this Court must be one which is raised not only in the reference but also in the original submission. A submission to a local authority must comply with clause 6 of the First Schedule to the RMA and Regulation 5 and Form 3 of the Resource Management Act (Forms) Regulations 1991.

[9] The particular wording of the submission which is in question in this case, is the *use* of the words (*or any replacement New Zealand Standard*). There are two possible interpretations of that wording open. They are:

- (1) That Telecom sought to insert wording into the Plan which read:  
“*...NZS6609:1990 (or any replacement New Zealand Standard).*” or
- (2) That Telecom sought to be able to include within the Plan another Standard which came into existence after the submissions were concluded but before the Plan became operative.



[10] It is the latter of these two interpretations that Telecom presses upon the Court. Telecom argue that anyone reading the Plan would have been lead to the conclusion that there was the potential for the Plan to be changed to incorporate a Standard which may exist in the future. Having regard to the wording of the notified Plan which referred to the pending review of the Standard, and reading the submission as a whole, Telecom argue that it would be clear that there was potential for a different Standard to be inserted in the Plan.

[11] Telecom argue that the Standard NZS 2772.1:1999 having been finalised prior to the Plan becoming operative, it should be possible for them to now argue for its inclusion both within the decisions on the Plan and also on reference to this Court.

***Relevant Principles and Case Law***

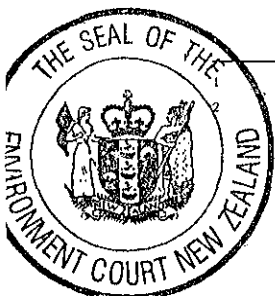
[12] Telecom argue that the test is whether the issue of a new Standard was fairly and reasonably raised in their original submission. Mr Hassan refers to ***Royal Forest Bird and Protection Society v Southland District Council***<sup>1</sup> where Pankhurst J. stated:

*...The assessment of whether any amendment was reasonably and fairly raised in the course of submissions, should be approached in a realistic workable fashion rather than from the perspective of legal nicety.*

[13] The, parties were agreed that the question was whether the substitution of Standard 6609 Part I with a Standard promulgated between the time of notification and the Plan becoming operative was contemplated by the original submission. There is no doubt that by the time of the tiling of their reference Telecom had remedied this position by the inclusion in their reference to ***NZS 2772:1999 Part Z*** and ***NZS 6609.2:1990 (or any replacement New Zealand Standard)***.

[14] The parties referred to ***Vivid Holdings Ltd***<sup>2</sup> where the Court considered on an application for declaration whether it had jurisdiction to grant certain relief sought by the Referrer Society. Again the principles of that case were agreed by the parties and are, with respect, summarised in paragraphs 26 and 28 of that decision looking at three principles:

[1997] NZRMA 408 at 413 (HC)  
[1999] NZRMA 467



- (1) Was a submission to that effect made to the local authority?
- (2) Has there been, and will there be, an opportunity for public participation?
- (3) Can any concerns about other interested persons be overcome through the provisions of Sections 293?

*Was this Amendment Fairly or Reasonably Raised in the Course of Submissions?*

[15] The matter turns on the reasonable meaning of the words used in the submission. Mr Prebble appearing for the Council put the matter in this way:

*This involves, as part of the ultimate question of whether the relief in Telecom's reference was reasonably and fairly raised in its submission, consideration of whether interested persons would reasonably have appreciated that such a Rule could have resulted from Telecom's submissions as summarised by the Council.*

[16] Mr Prebble referred to several cases, including *Telecom New Zealand Ltd v Manawatu Regional Council*<sup>3</sup> and he then stated the following:

*Having decided that the relief sought in the reference comes within the ambit of the original submissions, the Court has decided that specific amendments also come within that ambit, because these are what the Court would be considering in terms of the merits of the case. Again a fair and reasonable test would be applied.*

[17] When deciding if the specific amendments come within the ambit of the original submissions the Court must also consider whether those who are affected by the specific amendments would have contemplated such amendments when reading the first notified submissions. To do this one would employ the test from *Haslam v Selwyn District Council*<sup>4</sup> namely:-.

*...whether the amendment made after the period for lodging submissions had commenced is such that any person who did not lodge a submission would*



*have done so if the application information available for examination had incorporated the amendment.*

[18] In *Telecom v Manawatu*<sup>5</sup> at page 8 the Environment Court noted:

*Using the Haslam (supra) test it must be decided whether the amendments come fairly and reasonably within the original submissions and whether it is plausible that someone who did not make a submission under the original proposal would now wish to do so given the amendments made.*

[19] The full court of the High Court in *Countdown Properties Limited v Dunedin City Council* put the issue this way”:

*...In our view it would neither be correct nor helpful to elevate the “reasonable appreciation test” to an independent or isolated test. The local authority or Tribunal must consider whether any amendment made to the Plan change as notified goes beyond what is reasonably and fairly raised in submissions on a Plan change. It will usually be a question of degree to be judged by the terms of the proposed change and of the content of the submissions. We adopt this statement as being equally applicable to the scope of a remedy sought on a reference.*

[20] The High Court in *Healthlink South v Christchurch City Council*<sup>7</sup> was considering the wording of a submission seeking to provide for rural activities and other activities. On a reading of the whole of the submission it was clear that the hospital was not seeking a rural or other activities zone but a residential activity zone. At paragraph 14, the High Court cited the Environment Court’s conclusion that the Council had no power to amend the clause directly unless it renotified the availability of the clause and gave the opportunity for further submissions.

[21] The High Court concluded that on the facts of that case, the wording of the provision itself created confusion. His Honour noted at paragraph 29:

*Despite Mr Marquet’s compelling submissions, I am not satisfied that any reasonably informed person could ascertain from the documentation exactly what Healthlink intended.*



Above at page 8  
[1994] NZRMA 145 at 166] Noted  
AP 14/99 Hansen J 16 January 2000

[22] *In the Healthlink* case Mr Prebble for the City Council made a submission that a reasonable reader on reading the heading would have been alerted to potential development on the site. The Court discussed this matter at paragraph 33

*With respect it seems Mr Prebble goes too far. He seeks to raise too great [a] barrier to participation by persons interested in submissions received. In my view, the RMA envisages a significant degree of public participation. Such participation would appear to be particularly important in relation to a proposed District Plan. Furthermore, the RMA is one area where ordinary citizens would come in contact with the operations of our legal system. The barrier for participation should not be unreasonably high...*

*...I agree with Mr Marquet, the test should be that of a reasonably informed reader or citizen, not someone with knowledge of Planning matters well above the informed citizen and apparently approaching expertise, as contended by Mr Prebble.*

### **Consideration**

[23] When examining the facts of this case, it is clear to us that the first interpretation is open namely that the submission has specifically indicated the wording it sought to have included in the Plan and the portion it sought to have deleted. Accordingly, Telecom sought a Plan with wording.. .Standard 6609: 1990 (or any replacement Standard).

[24] Clause 3.1 of the original submission stated:

*'Replacement of Rules 4.4.2(a)(i) and (ii) with the following rule... (or to like effect): "*

[25] We have concluded that a clear natural ordinary reading of the submission is that the clause was sought to be reworded as stated in that submission. In our view the words "or to like effect" merely indicated that the wording could be changed to achieve the same result, namely "Standard 6609:1990 (or any replacement New Zealand Standard)" could have other words saying the same thing.



[26] Could the Plan contain the words *or any replacement New Zealand Standard*? If it could not, then words to that effect must be superfluous and would not meet the criteria under Clause 14 and would not constitute a submission to include a provision in the Plan.

[27] The Environment Court in *Vivid Holdings* (supra) noted at paragraph 19:

*“I consider that in order to start to establish jurisdiction a submitter must raise a relevant ‘resource management issue’ in its submission in a general way” [as the term is used in section 751(1)(a) of the Act].*

[28] In this case it is common ground between the parties that the Plan cannot include a provision with a Standard and then state in brackets *or any replacement New Zealand Standard*. That would be to delegate to a third party powers to alter the Plan thereby avoiding the notification provisions of the Resource Management Act. Accordingly the first interpretation must lead to the words in brackets *or any replacement New Zealand Standard* being *ultra vires*.

[29] The other interpretation would seek to qualify the Standard named with words in brackets to substitute that with another Standard.

[30] It is accepted that as the words *or any replacement New Zealand Standard* could not appear in the Plan **itself**, they could only have effect for the period between the time the submission was filed and the time the Plan was finally determined by the Council or on reference by this Court.

***Is the alternative meaning fairly and reasonably available to the parties?***

[31] In considering that, we have weighed a number of countervailing matters. We recognise on the one hand the desire on the part of Telecom to have the provisions of the Plan as close to the current Standards as possible and to avoid if possible seeking a variation to the Plan to refer to the current Standards. On the other hand we recognise the degree of public interest in this issue and the marked increase in the permitted microwattage output between NZS6609 and NZS2772. We also recognise that if Telecom had been explicit that they were seeking to substitute NZS 6609 with any Standard which may be issued between the **time** of the filing of the submission and the determination of the terms of the Plan by the Council or **the** Court, this may not have generated any further submissions. It is possible that if the Environmental



Protection for the Children Trust had appreciated that Telecom intended to replace NZS6609 with NZS2772, they may have tiled their own Appeal instead of relying on Section 271A Notice. That is at best speculative because quite clearly NZS2772 was available to the EPC Trust prior to the Appeal period expiring and they were aware of Telecom's attempts to include it in the Proposed Plan.

***Public Participation and S293***

[32] We turn to the other matters identified in ***Vivid Holdings*** which we accept as being relevant. We note that in relation to the submission and cross-submission process, Telecom did file a further submission to that of the Environmental Protection for Children Trust. In that they noted (at 3.2) their position as being:

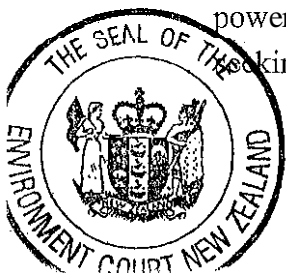
*Radio frequency emitting utilities should be regulated by requiring compliance with the relevant New Zealand Standard (the current Standard being 6609:1990.)...*

[33] This cross submission does not make it clear that Telecom is seeking to use any other Standard if it is promulgated prior to the Plan decisions. On the other hand the use of "current" and "relevant" indicate an intent to adopt up-to-date Standards,

[34] As regards the issue of public participation, this decision in respect of the scope of this case would not increase or decrease the level of public participation. We have a concern that a Standard which has been promulgated after the closing of submissions should be incorporated into the Plan without the opportunity for further submissions. A variation or change relating to a new Standard would ensure this occurred. This appears to have been a view held by the Council who at the time of their decision specifically referred (at 4.4.5(b)) to this issue in the Plan when they said:

*"...Any change to the Standard subject to this Rule can only be made as a formal change to the Plan under the Resource Management Act. "*

[35] However the Court could address public participation issues through section 293 of the Act. The Court in ***Vivid Holdings*** considered the potential for the Court to order a change to the Plan under section 293. The Court noted in that case that the powers in 293 especially in 293(2) cover the situation where the relief the referrer is seeking is not spelt out in adequate detail in the submission and / or the reference.



The Court noted that it is good practice to spell out precisely the relief sought but it is not essential to do so.

[36] This case is somewhat different. In this case the standard relied on did not exist at **the** time a submission was made and the wording of the submission itself is very precise. **We** do however recognise that section 293 would give **the** power for the Court to rectify the situation if it was convinced that a further change should be made.

[37] The Court can give interested parties some opportunity to consider the proposed changes and make submissions under section 293. To proceed now in the absence of such notice would impose a burden on both the Council and the other section 271(A) party for an outcome which has not been through a full consultation process at this point in time. It is likely **that the** Court if it were minded to adopt such a provision would seriously consider whether it should go through a process largely similar to that which would be used for a change or variation. We are satisfied **that** section 293 gives the Court adequate powers to protect the public and participatory process **if** a change appears justified.

#### **Conclusion**

[38] This alternative interpretation of seeking to use the words *or any replacement New Zealand Standard* to rely **on** the new Standard 2772 is in our view one which is fairly and reasonably available when the matter is looked at as a whole.

[39] We conclude that the adoption of NZS2772 can be pursued in this reference. The words in brackets are accepted as being ultra vires. The reference must now be contained within **Clause** 6.1 of the reference with the words in brackets deleted as follows:

*...Amend rule 4.4.5(a) by deleting the words NZS 6609 (1990) Parts 1 and 2 and inserting the words "NZS 2772.1:1999 and NZS 6609.2:1990.*

[40] We have concluded that the reference is within jurisdiction with the deletion of the words **(or auy replacement New Zealand Standard)**.



## Outcome

[41] Telecom may seek to substitute NZS 2772.1:1999 for Part 1 of NZS 6609: 1990. The words (or any replacement New Zealand Standard) are struck out.

[42] The parties are now to advise the registrar of:

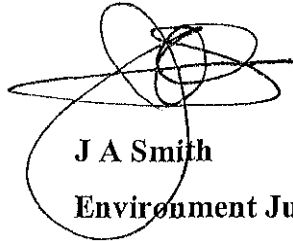
- (1) The number of witnesses;
- (2) Time estimate for hearing;
- (3) Any date the parties are unavailable.

[43] The matter will be set down for hearing on a date to be fixed by the Registrar.

[44] Costs on this issue are not appropriate and no party sought them. There is no order for costs.

**DATED** at CHRISTCHURCH this 2<sup>nd</sup> day of August 2002.

For the Court



J A Smith

Environment Judge

Issued:

2 AUG 2002

