

UNDER the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 and the Resource Management Act 1991

AND

IN THE MATTER of the Proposed Canterbury Land and Water Regional Plan

BY TRUSTPOWER LIMITED

Submitter

MEMORANDUM OF COUNSEL ON BEHALF OF TRUSTPOWER LIMITED

19 MARCH 2013

RUSSELL McVEAGH

B J Matheson / D J Minhinnick
Phone 64 9 367 8000
Fax 64 9 367 8163
PO Box 8
DX CX10085
Auckland

MAY IT PLEASE THE COMMISSIONERS:

1. During the course of the presentation by TrustPower Limited ("**TrustPower**") of its submissions on 18 March 2013, the Commissioners queried the lawfulness of rules in regional plans which provide for an activity requiring a water permit as a controlled activity. Leave was sought by TrustPower to respond in writing.
2. For the reasons explained below, in our submission there is no legal impediment to the classification of applications for water permits as controlled activities.
3. Sections 77A and 87A of the Resource Management Act 1991 ("**RMA**") provide an open ability for councils to classify activities as permitted, controlled, restricted discretionary, discretionary, non-complying or prohibited. There is no limit in either section on what classification can apply to any particular activity or type of resource consent.
4. TrustPower accepts that a water permit can only be granted for a maximum term of 35 years,¹ but this by itself cannot justify reading into sections 77A and 87A a fetter on a council's ability to classify applications for water permits as a controlled activity. There is nothing in the RMA to suggest that such a fetter was intended or appropriate.
5. Controlled activities must be granted consent.² However, that is subject to limitations,³ including compliance with any requirements specified in the RMA, regulations, plan or proposed plan.⁴ Accordingly, a controlled activity must not be contrary to a water conservation order, for example.⁵
6. If an activity status as a controlled activity is resulting in unanticipated or inappropriate effects, it is always open to the council to promote a plan change to amend the activity status. In addition, under a national policy statement the Government can direct changes to be made⁶ and under a national environmental standard can effectively reclassify activities,⁷ irrespective of the wording in any plan. Therefore, there can be no risk of

¹ RMA, section 123, although so too do discharge permits and some coastal permits.

² RMA, section 87A(2)(a).

³ RMA, sections 87A(2)(a)(i) and 87A(2)(a)(ii).

⁴ RMA, section 87A(2)(c).

⁵ RMA, section 217(2).

⁶ RMA, section 55.

⁷ RMA, section 44A.

an activity being permanently consented in circumstances where that would not promote the purpose of the RMA.

7. In any event, controlled activities are subject to conditions. Accordingly, the council has the power to reconsider all conditions of consent upon consenting. That remains a broad power, and can be used to ensure that adverse effects are appropriately avoided, remedied or mitigated.
8. Counsel was also asked whether a council has the power to include a rule requiring that any application for a particular controlled activity be notified. Counsel confirmed that a council has such a power, which is contained in section 77D of the RMA.

Dated 19 March 2013



Daniel Minhinnick
Counsel for TrustPower Limited