

BEFORE THE CANTERBURY REGIONAL COUNCIL

In the matter of the Resource Management Act 1991

And

In the matter of a Regional Plan hearing before commissioners appointed by the
Canterbury Regional Council

LEGAL SUBMISSIONS ON BEHALF OF HYDROTRADER LIMITED

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Introduction

1. Hydrotrader Ltd has made the submission that Rules 5.107 and 5.108 are *Ultra Vires* and should be deleted, or if the primary relief is rejected, that condition 5 of Rule 5.107 be deleted.
2. The submission and relief are based on the submission that a Regional Council lacks the power to impose such a rule because:
 - 2.1 Section 77A does not confer that power on the Regional Council; and
 - 2.2 Even if it does, the condition that triggers the non-complying activity status is *ultra vires* s77A.

Legal Source of the Council's Power

3. Section 136(2)(b) enables a holder of a water permit granted other than for damming or diverting water to transfer the whole or any part of the holder's interest in the permit to another person on another site, or to another site, if both sites are in the same catchment (either upstream or downstream), aquifer, or geothermal field, and the transfer:
 - (i) *Is expressly allowed by a regional plan; or*
 - (ii) *Has been approved by the consent authority that granted the permit on an application under subsection (4).*
4. The provision contemplates two scenarios:
 - 4.1 The transfer is expressly allowed, in which case the transfer occurs as of right;
 - 4.2 The transfer is not expressly allowed, in which case it will always be possible, under the wording of s136(2), to make an application under s136(4) to have it allowed.
5. At p246 the s42A Officer's Report cites s136(2)(b)(i) as the source of the power to require a surrender of water on transfer, because it "*requires a transfer to be allowed by a regional plan*". That clause requires *no* application to be made before the transfer can be effected, if it is "*expressly allowed*" by a regional plan. It is not clear how that enables rules to be imposed which govern the process to

be adopted if an application *is* required. That scenario is dealt with by s136(4), which governs how the application is to be made.

6. At pages 50 the Report relies on the fact that s136(4)(b) states that an application to transfer water from site to site shall be treated *as if it were an application for a resource consent* and that in particular ss88-115 apply.
7. On this basis it could be argued that because ss104A-D are not excluded from s136, and they determine how the various categories of activities are to be treated, then that would be an indication that it is possible to assign such an activity status to a transfer.
8. The Report does not mention s68 in this context, which is the source of the Council's rule-making power. Nevertheless, for completeness it should be acknowledged that s68 enables a Regional Council to make rules to carry out its functions and achieve the purposes of the Act, on the basis of which it might logically be expected to be able to make rules controlling transfers of water permits.
9. That is, however, not tenable in view of how the Act confers the power to assign an activity status.

Rule Making Power to Assign Activity Status

10. The power to assign an activity status is conferred by s77A. If that section does not confer the power to assign an activity status to a particular act, the Council lacks that power. Even though s68 does enable a regional council to make rules to carry out its functions and achieve the purposes of the Act, it is constrained or narrowed down by the sections that follow, including s77A. Where there is a conflict between the general and the specific, the specific prevails.
11. The specific enabling provision in relation to rule making for activity status in s77A must therefore prevail over the more general provisions of s68 and indeed s136(4)(b). The fact that s136(4)(b) does not exclude the applicability of s104D therefore cannot expand the clearly defined power in s77A or the way in which s77A clearly narrows down the general rule-making power in s68 when it comes to rules imposing activity status.

12. It is submitted that s77A does not confer the power to assign an activity status, because:

12.1 Transferring a consent is not an “activity”, when that is the only thing to which an “activity status” can be assigned under s77A(1)(a); and

12.2 There are a number of further indications in s136 and elsewhere in the Act that reinforce that point.

Extent of Power under S77A

13. Section 77A(1)(a) states “*A local authority may categorise activities...*” (emphasis added). If something is not an “activity”, the power to categorise it in this way therefore does not exist. For the reasons that follow, it is submitted that transferring a water permit is not an “activity” and is therefore not capable of being assigned an activity status.

Inability to Confer Prohibited Status

14. Under s136(2)(b)(ii), if the transfer is allowed, no application is required, but if it is not allowed, an application can be made. It does not contemplate the situation where no application can be made. Section 87A(6)(a) states that for a prohibited activity “*no application for a resource consent may be made for the activity*”.

15. Section 77A(2) provides that:

“(2) *An activity may be—*
(a) a permitted activity; or
(b) a controlled activity; or
(c) a restricted discretionary activity; or
(d) a discretionary activity; or
(e) a non-complying activity; or
(f) a prohibited activity.”

16. If it cannot be a prohibited activity, then that raises serious questions as to whether it is something to which s77A was intended to apply in order to confer a categorisation power on the Council.

Consequences of Assigning an Activity Status

17. Section 87A explains the full consequences of assigning the various classes of activities. The activity status will determine whether a resource consent is required and if it is required, which activities must always be approved, which are subject to a jurisdictional bar, what conditions can be imposed for certain activities, and which activities will never be able to be undertaken lawfully (prohibited). Of necessity it can only apply to something for which a resource consent is required.
18. Section 87A follows directly on from s87, which defines “resource consent”. That definition leaves no doubt that a resource consent is something that authorises conduct that would, but for that consent, contravene sections 9, 11, 12, 13, 14 or 15. It is that conduct that is an “activity” and can therefore be assigned an activity status under s87A. .
19. In *Port Otago Ltd v Hall* [1998] 2 NZLR 152; (CA) the Court accepted that coastal occupation was an activity because in the absence of a resource consent it would contravene s12(2)(a). The same cannot be said for transferring a water permit without the approval required by s136(2)(b)(ii). It merely renders the transfer invalid.

Overall Effect

20. When considered together, the above factors demonstrate that the transfer of a water permit is not an “activity”. On the wording of s77A it therefore cannot be assigned an activity status.

Indications in s136 and Elsewhere in the Act

21. It is submitted that there are a number of features of s136 and the wider statute that indicate it was never intended that transferring a water permit should *be* an “activity” to which a status could be assigned.

Treated as if It Were

22. Section 136(4) specifies that an application to transfer must be treated as if it *were* a resource consent. Importantly, it does not deem the approval for the

transfer to *be* a resource consent, nor the application to *be* an application for resource consent – it only requires it to be processed as if it *were* such an application. This is an open and direct indication that it is definitely not a resource consent and that it does not authorise an “activity” in the way that a resource consent does.

Sections Excluded from a S136(4) application

23. Some sections normally applicable to resource consents have been excluded by s136(4) from applying to applications to transfer water permits. Section 87A is one such section. Although ss104A-D list some of the consequences for resource consents that flow from an activity status, it fails to set out the full list of consequences of activity status set out in S87A, which is the key provision in this regard; the following matters in that section relevant to water permits are missing from ss104A-D:

23.1 A prohibited activity application cannot be lodged or granted (s87A(6));

23.2 An activity authorised by a consent for a controlled, restricted discretionary, discretionary or non-complying activity must comply with the requirements, conditions, and permissions, if any, specified in the Act, regulations, plan, or proposed plan, s87A(2)(c), (3)(b), (4)(b) & (5)(b).

24. If, as must be the case, the transfer of a water permit cannot be assigned an activity status under s77A, there is no need to apply the full consequences of the various activity statuses set out in s87A to the transfer. Only in that situation is s87A not required and is its exclusion explained.

Location of s136

25. Section 136’s location in the Act is also relevant; forming as it does, part of the provisions governing the administrative acts concerning already granted consents, which also include the change and review of consent conditions, for instance. Section 127(3) also requires an application for change of conditions to be treated as if it *were* an application for resource consent and, like s136(4), does not exclude the applicability of ss104A-D. Section 127 is explicit in that it states that an application to change consent conditions is to be processed as a

discretionary activity. That is logical because, like a transfer, it is not an activity of itself. Both sections govern administrative acts which concern dealing with resource consents.

26. The consequences of the applicant not complying with s136 or 127 are simply that the transfer or change will not be effected. It fits with neither s127 nor s136 to assign to those administrative acts (or indeed any of the other administrative acts controlled by ss125-138) an activity status reserved for “activities”.

Range of Conditions that could be imposed

27. Under s77A(1)(c), “A local authority may specify conditions in a plan or proposed plan, but only if the conditions relate to the matters described in section 108 or 220”. The upshot is that a condition that is *ultra vires* under s108 is likewise *ultra vires* under s77A.
28. The types of conditions that can typically be imposed under s108, of which s108(2) gives examples, do not typically lend themselves to the act of transferring a consent, but rather to an activity that would contravene ss9 or 11-15 without a resource consent.
29. Section 136(5) allows the conditions of the consent being transferred to be amended as and where necessary. Those conditions can only restrict the activity authorised by the resource consent – in this case the water take. They cannot restrict the transfer, which is a separate act.
30. Section 87A(2)(c), (3)(b), (4)(b) & (5)(b) preserve the terms and conditions that applied to that particular activity – the take - by virtue of its status when applied for and granted, after its grant, irrespective of subsequent rule changes. In order for the take authorised by the consent to avoid contravening this requirement, changes to consent conditions under s136(5) must remain within the bounds of the original restrictions, terms and conditions.
31. To assign an activity status to the transfer itself cuts across this requirement by enabling a different activity status to be imposed on the transfer from that which applied when it was first granted and thus potentially a different set of conditions than those preserved by s87A(2)(c), (3)(b), (4)(b) & (5)(b). Not

assigning a status to the transfer itself is therefore necessary to preserve the ability to comply with s87A(2)(c), (3)(b), (4)(b) & (5)(b).

Overall Effect

32. These key features of s136, along with the other indications elsewhere in the Act, indicate that it was never the intent that a water permit transfer should become an activity and be capable of having an activity status assigned to it. Certainly, the manner in which Rule 5.107 attempts to do so simply exceeds the powers bestowed on the Council and is therefore invalid.

Condition 5 Contrary to S77A(1)(c)

33. This part of the submission becomes academic if the first part of the submission is upheld. However, if the Council does have the power to assign an activity status to a water permit transfer, then it can only impose conditions to the extent that it is given the power to do so by s77A s77A(1)(c). For reasons already stated, a condition that is *ultra vires* under s108 is likewise *ultra vires* under s77A(1)(c).
34. The unambiguous purpose behind this rule is for the Council to reduce over-allocation of water resources, by reducing the amount of water allocated, by coercing consent holders to reduce their allocations on transfer.
35. It is clear that in the greater scheme of the Act, a consent authority is generally prevented from reducing or removing a consent, except in some very specific circumstances. Section 68(7) provides very specifically for an allocation regime rule to state that it affects the exercise of existing consents, but then s130(5) specifies that the allocation can only be reduced through a notice of review and subsequent determination under s130. Section 314(1)(e) enables only the Environment Court to take away a consent (or part thereof), and then only if the original consent was granted on the basis of inaccuracies that materially influenced the decision to grant consent.
36. There appears to be a general purpose behind the Act to restrict severely the situations in which a grant of consent can be reversed in part or in total. Allowing condition 5 to stand runs against that purpose, because it sidesteps these very strict restrictions protecting consent holders' rights, in order to

engineer by a back door the removal of allocations, which are a valuable economic right.

37. Condition 5 of Rule 5.107 requires a consent holder to surrender part of his/her consent. Although a condition proffered by an applicant to surrender another consent in order to avoid cumulative effects of concurrent exercise would be valid, there is no authority to the effect that a consent holder can be compelled to surrender part of a consent through a condition of that consent.
38. Numerous decisions have held that a consent condition review cannot be used to cancel a consent or restrict it in a way that it becomes impractical to exercise it, see *Medical Officer of Health v Canterbury RC* [1995] NZRMA 49 (PT), *Minister of Conservation v Tasman DC 9/12/03*, Ronald Young J, HC Nelson CIV-2003-485-1072 at 73-74.
39. It is also widely accepted that a condition that negates the grant cannot be validly imposed, *Ravensdown Growing Media Ltd v Southland RC* EnvC C194/00. Certainly, in many cases the surrender of 50% of the consent as required by condition 5(d) would frustrate or negate the grant of the consent. Condition 5 requiring partial consent surrender is not available under s108 and therefore cannot be imposed lawfully under s77A.
40. The focus of s136(4) and the need for an "application" is the not volume of the allocation, but the location thereof. The existing allocation is part of the lawful existing environment. Whether it is taken at a different place within the same resource will not alter the amount of that resource that is deemed to be allocated.
41. Therefore the volume taken is not within the range of effects of the transfer. Those effects are focused on the effects of taking the already allocated volume in a different location. The requirement for the surrender is an acknowledgement by the Council that it lacks the power under s136(4/5) to amend the consent conditions by halving the allocation.
42. The furthest it can go is to impose additional conditions necessary to deal with effects arising from the new location, which may have the effect of making it difficult or impossible to take the full amount.

43. This rule is a clear attempt to circumvent those constraints. It goes against the purpose of s136(4). As such it is not available, because it is not for a resource management purpose rather than an ulterior one (s77A(2) and *Frasers Papamoa Ltd v Tauranga City Council* [2010] 2 NZLR 202 (HC)). Furthermore, it impinges on a consent holder's right to object to an attempt by the consent authority to remove part of his/her allocation. The consent authority is not permitted to impose a condition which would abrogate the rights conferred by the statute, *Ports of Auckland Ltd v Auckland City Council* (1999) [1999] 1 NZLR 601 (HC).

Conclusion

44. Rule 5.107 and/or condition 5 are *ultra vires*, based on the fact that:
- 44.1 Section 136 contemplates only two scenarios for site to site transfers – they are either expressly allowed by a plan or an approval is needed from the consent authority – there is no provision for a range of activity statuses;
 - 44.2 Transferring a resource consent is not an “activity” which can be given an activity status under s77A;
 - 44.3 A condition requiring the partial surrender of a consent is potentially invalid under s108 and therefore not available under s77A(1)(c);
 - 44.4 The Act severely restricts the ability of a consent authority to take away consents to a few narrow sections, which the rule tries to circumvent;
 - 44.5 Transfers are not about the effects of the volume, but the effects of where that volume is taken; they are not intended to be used to reduce an allocation or to deal with over-allocation;
 - 44.6 Section 136 is one of a number of sections from ss125-138, including s127, which govern administrative acts and not “activities”. There is no statutory basis upon which transfers can be given an activity status.
45. It cannot stand and should be deleted, as sought by Hydrotrader Ltd.