

Before the Independent Commissioners

In the matter of the Resource Management Act 1991

And

In the matter of the Proposed Canterbury Land and Water Regional Plan

**Memorandum of Counsel for ANZCO
Foods Limited, CMP Canterbury Limited
and Five Star Beef Limited**

Dated: 14 June 2013

Lane Neave
LAWYERS

137 Victoria Street

PO Box 13149

Christchurch

Solicitor Acting: Amanda Dewar/Jane Walsh

Phone: 03 379 3720

Fax: 03 379 8370

Email: jane.walsh@laneneave.co.nz

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Introduction

1. ANZCO Foods Limited, CMP Canterbury Limited and Five Star Beef Limited (together referred to as **ANZCO**) appeared before the Commission on 28 March 2013 to present legal submissions and produce evidence on the proposed Land and Water Regional Plan (**LWRP or Plan**).
2. Five matters were raised at the hearing which the Commission gave ANZCO the opportunity to respond to via memorandum at a later date. This memorandum addresses those matters.

MATTER ONE: Appendix A showing ANZCO's proposed changes

3. Commissioner van Voorthuysen queried an apparent inconsistency between the legal submissions and Appendix A to the legal submissions (which proposed annotated changes to the Plan provisions) in respect of Rules 5.107 and 5.108.
4. The legal submissions stated that ANZCO sought the deletion of condition 5 to Rule 5.107 and all of Rule 5.108. That is incorrect. ANZCO seeks the deletion of condition 5 of Rule 5.107 only. If that is accepted, it would be unnecessary to also delete Rule 5.108.
5. Commissioner van Voorthuysen also discussed a simpler solution to avoid the one discharge being captured under multiple rules affecting ANZCOs activities. His suggestion was to modify Rules 5.69 and 5.70 by including the underlined part “...*from an industrial or trade process including livestock processing*...”.
6. The submitters agree this is a sensible addition but consider the addition of the Advice Note after Rule 5.70 is still necessary.
7. Commissioner van Voorthuysen sought confirmation that Appendix A had reflected any changes proposed by the officers in their Officer reports. The table does incorporate those changes recommended by the Officers, and which are supported by the submitters.
8. **Attached as A** is an updated version of Appendix A. Column 1 shows the provisions as notified. Column 2 shows the changes sought by the submitters in legal submissions or evidence. It also incorporates the

recommended changes of the Officers, where those are supported by the submitters. Column 3 shows further changes that have been added as a result of addressing matters raised at the hearing and as explained in this memorandum.

MATTER TWO: Ngai Tahu Property Limited's proposal for the Rule 5.107

9. Commissioner van Voorthuysen noted that Ngai Tahu Property Ltd (NTPL) had proposed an amendment to Rule 5.107 at page 9 of its original submission. He requested ANZCO consider whether that amendment, if adopted, would meet its concerns.
10. The amendment proposed by NTPL is that condition 5 be deleted and a new matter of discretion be added which reads "*In an over allocated surface or groundwater zone, if and to what extent any water should be surrendered by the consent holder from whom water is being transferred*".
11. Although the proposed amendment goes some way to addressing ANZCO's concerns, it does not meet ANZCO's fundamental concern with the Rule.
12. That is; it is ANZCO's primary position that the resource has not been determined to be "over allocated", particularly when one considers the process envisaged under the NPS Freshwater for determining whether a resource is over allocated and what limits might be appropriate. Therefore, whether condition 5 of the Rule is the most appropriate, cannot be determined until the resource has been established to be over allocated. Whether it is, and if so by how much, are fundamental and precursory questions to determining whether the rule is the most appropriate.
13. Further, NTPL's suggested amendment does not provide any certainty or guidance as to what matters might be taken into account in considering whether a surrender is appropriate. The proposed amendment therefore remains, at least potentially arbitrary, and gives discretion to require a surrender greater than 50% of the volume on transfer.
14. ANZCO also notes there is no change proposed to Policy 4.73 which as a policy direction, would still require water to be surrendered upon transfer.

15. If Ngai Tahu's amendment was adopted, a commensurate change to Policy 4.73 should be considered.

MATTER THREE: Definition of "proposed effluent area"

16. Rules 5.35 and 5.36 as notified allows the use of land for a stock holding area, collection, storage and treatment of animal effluent and subsequent discharge as a restricted discretionary activity. Condition 2(b) of that Rule requires the discharge to not occur "beyond the boundary of the site". If any of the conditions are breached, a non-complying activity is required.
17. The Rules were proposed by the Officers to be split into 6 rules which is supported by ANZCO¹. However, although a new definition of "property" has been proposed by the Officers, new Rule 5.36 still refers to "site".
18. ANZCO detailed its concerns with these Rules in respects of its operations at paragraphs 26 – 29 of the legal submissions and in the evidence of Messrs Ensor and Douglass.
19. It is important to note that ANZCO does not oppose the intention of condition 2(b) but rather it has a concern with the definition of "site" and/or "property".
20. ANZCO's operations often utilise a parcel of land for the processing plant and a separate parcel surrounding or near the plant for the discharge area. However, as the "discharge land" is often not in the ownership of ANZCO, or part of the same parcel as the plant, but is secured by a lease or other legal arrangement, it would still fall to be non-complying because of the definition of "site" or "property". That would be so, despite the fact that the parcels of land operate for intents and purposes as one site.
21. Accordingly, ANZCO sought an amendment to newly numbered Rule 5.36 to allow for the situation where an operator creating the contaminant has a legal interest in the land to which the contaminant is being discharged to.
22. The amendment sought to condition 2(b) read:

"(b) does not occur beyond the boundary of the site property or proposed effluent discharge area."

¹ At pages 33-46 of the s42A Report, Volume 2

23. Commissioner Sheppard was concerned that the amendment might inadvertently allow for a discharge plume to extend further unchecked and / or allow for a private deal between landowners that could somehow circumvent the RMA process.
24. After a detailed discussion on this point Commissioner Sheppard was satisfied that was not ANZCO's intention. We have transcribed that discussion for the Commission's convenience and attach that as **Appendix B**.
25. To further ensure the concern was captured, Counsel suggested that a definition be provided to make it clear that was not being authorised by ANZCO's proposed amendment.
26. ANZCO accordingly propose the following definition (included in **Appendix A**):

"Proposed effluent discharge area" means the area of land to which the effluent will be discharged to and must be shown or detailed in the application for consent. This land may or may not be owned by the consent holder and may include multiple land parcels, provided there is a legal right to discharge to that land, such as through a contractual or leasehold interest, or through the provision of a written approval from the landowner of that land."

27. The intention is that an applicant will be required to detail that discharge area in the application. Where that land does not fall within the strict definition of site or property, in order for the activity to be classed as restricted discretionary, the applicant would need to provide written approvals or similar evidence of all of the land within the "Proposed effluent discharge area".
28. If that can be shown, a restricted discretionary consent would still be required ensuring there is no circumventing of the RMA process. If not, a non-complying consent would be required.

MATTER FOUR: First in first served approach

Background to the Commissioner's question

29. This question from Commissioner Sheppard related to paragraph 69 of the legal submissions. That paragraph discusses proposed transfer Rule 5.107 and associated policies:

“Mr Ensor and Mr Douglass discuss alternative methods in detail that will both give effect to the NPS and overall in my submission be more appropriate. They discuss how implementing a variety of methods, based on sound and best available information will cause less hardship over a more a reasonable timeframe as envisaged by the NPS, and ensure that inequitable situations do not arise. They consider that transfers assist in alleviating the bias created by a first in first served approach and this, along with the imposition of “adaptive management” conditions, and the creation of a “B allocation block” for those consents, have not been contemplated by the Officers”.

30. Commissioner Sheppard asked whether the bias created by the first in first served approach was in fact RMA law.
31. Counsel responded that the Act did not appear to preclude such an approach and an example of the Waitaki Plan was given which allowed for other approaches to be taken to allocating water.
32. Commissioner Sheppard noted however, that the Waitaki Plan had its own statutory authority in the Resource Management (Waitaki Catchment) Amendment Act 2004 and further noted the Court of Appeal decision in the *Central Plains Water Trust* case which seemed to uphold the first in first served approach in terms of the RMA.
33. Counsel submitted in response that it was open to a council under the RMA to provide for a planning framework that still meets purpose of Act and that might allow for some specific recognition of certain activities over others for example where they might be disadvantaged by the first and first served approach. However, Counsel noted a thorough review of that case would be appropriate to confirm the validity of that submission.
34. Commissioner Sheppard invited Counsel to provide a brief note explaining the basis for that submission².

Response

35. Counsel does not disagree that *Central Plains Water Trust v Synlait Limited and the Canterbury Regional Council* [2009] NZCA 609 upholds the first in first served principle between competing applications for a finite resource.

² This discussion is taken from Counsel’s notes as well as confirmed against the audio transcript of 28 March 2013: Week Three, Day 3, file “Audio 1” around 1.15.30 into the recording until around 1.17.30.

36. That case assists in determining priority between two competing applications for consent where those activities are under an existing planning framework that does not allocate resources between competing activities in any particular way or treats both activities equally.
37. It is submitted that the case does not however, as a matter of law, preclude a consent authority, when developing its regional plan, from giving certain activities some advantages over other activities competing for the same resource where that is considered appropriate. That may be by providing policy support for certain essential services or users over others, and / or through different categories of rules.
38. In this instance, it is submitted that it is appropriate on the evidence to allow for water abstraction for community supplies, stock drinking water and other essential users such as livestock processors with minimal adverse effects to be classed as restricted discretionary activity, where other abstractors might be categorised differently in that framework.
39. Statutory authority for this is provided under section 30(1)(fa) and (4)(e) of the Act which reads:

30 Functions of regional councils under this Act

- (1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:

...

- [(fa) if appropriate, the establishment of rules in a regional plan to allocate any of the following:

- (i) the taking or use of water (other than open coastal water);
- (ii) the taking or use of heat or energy from water (other than open coastal water);
- (iii) the taking or use of heat or energy from the material surrounding geothermal water;
- (iv) the capacity of air or water to assimilate a discharge of a contaminant:]

...

- (4) A rule to allocate a natural resource established by a regional council in a plan under subsection (1)(fa) or (fb) may allocate the resource in any way, subject to the following:

- (a) the rule may not, during the term of an existing resource consent, allocate the amount of a resource that has already been allocated to the consent; and
- (b) nothing in paragraph (a) affects section 68(7); and
- (c) the rule may allocate the resource in anticipation of the expiry of existing consents; and
- (d) in allocating the resource in anticipation of the expiry of existing consents, the rule may—

- (i) allocate all of the resource used for an activity to the same type of activity; or
 - (ii) allocate some of the resource used for an activity to the same type of activity and the rest of the resource to any other type of activity or no type of activity; and
- (e) **the rule may allocate the resource among competing types of activities; and**
- (f) the rule may allocate water, or heat or energy from water, as long as the allocation does not affect the activities authorised by section 14(3)(b) to (e).

[Emphasis added]

MATTER 5: Mr Ensor's evidence in relation to the NZCPS

40. This matter related to Mr Ensor's evidence in relation to Policies 4.28, 4.30 and 4.35 and his opinion that the language used in those provisions sets an overly stringent test for achieving an objective and departs from the purpose of the RMA.

41. Mr Ensor went on to propose amendments and at paragraph 41 of his evidence, noted:

"There are relevant mitigating environmental factors that will not be able to be considered under Policy 4.35 as notified. An example of a mitigating factor in ANZCO's case is the location of the Five Star Beef feedlot adjacent to a high energy coastal environment. This means that loss of nutrient is less adverse than if it were sited inland as there are limited sensitive receiving environments that can be adversely affected." [Emphasis added]

42. Commissioner Sheppard requested that in relation to the last sentence of that paragraph that Mr Ensor consider whether that statement was consistent with the New Zealand Coastal Policy Statement (**NZCPS**).

43. Specifically he requested whether the NZCPS contemplated using the coastal environment to dispose of waste contaminants. As hearing commissioners, Commissioner Sheppard noted they needed to ensure they were giving effect to the NZCPS.


44. Mr Ensor responded that he recollected that the NZCPS did contemplate that but could confirm that after a detailed review.

45. Mr Ensor has now undertaken that review and has requested we include his response in this memorandum. His response is as follows:

"Policy 21 of the NZCPS requires the enhancement of water quality where it is significantly degraded. However, that is not the case at Wakanui, where the Five Star Beef feedlot is located.

I further note that Policy 23 lists matters to consider when managing discharges to the coastal environment which among other things includes: the sensitivity of the receiving environment and the capacity of the receiving environment to assimilate contaminants.

This Policy allows for reasonable mixing which from my experience at Wakanui is likely to be extremely rapid. Monitoring has indicated no adverse effect on the coastal environment from wastewater discharge associated with Five Star Beef, and I also understand that the sampling of sea water has found no microbial indicators".

A handwritten signature in black ink, appearing to read 'Jane Walsh', written over a horizontal line.

Jane Walsh

Counsel for ANZCO Foods Limited, CMP Canterbury Limited and Five Star Beef Limited