

Tabbed at Hearing on 18 November 2015

**BEFORE COMMISSIONERS ON BEHALF OF THE
CANTERBURY REGIONAL COUNCIL**

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of the hearing of submissions on
Proposed Plan Change 3 to the Land
and Water Regional Plan

BY **OTAIO WATER USERS GROUP**

Submitter

TO **CANTERBURY REGIONAL COUNCIL**

Local Authority

SUBMISSIONS OF COUNSEL FOR OTAIO WATER USERS GROUP

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MAY IT PLEASE THE COMMITTEE:

1. The Otaio Water Users Group ("OWUG") is a multi-stakeholder group made up of farmers who obtain irrigation and stock drinking water supply from the Otaio river catchment.
2. Environment Canterbury's variation 3 (PC3) to the proposed Land and Water Regional Plan ("pL&WRP") will have significant effects on how OWUG members take, use and manage water in the future. Whilst OWUG recognise that the environmental effects of their activities need to be managed, an appropriate balance between that and their water use requirements must be achieved. This is particularly challenging within the Otaio catchment because of its unique hydrological characteristics, including its fast flowing nature, and the significant shallow and deep aquifers. These features mean that typical water allocation techniques are not well suited to the area. A more bespoke solution is required.
3. OWUG filed submissions and further submissions in respect of PC3. Expert evidence has also been filed from the following:

- (a) Richard Trevor de Joux – Hydrological and Groundwater Consultant.

Mr de Joux's evidence addresses the surface and groundwater resource in the Otaio Catchment. He also addresses existing resource consents and proposed flow sharing regimes in tables 15(h) to 15(l), exchange of surface water permits to deep groundwater permits, transfer of surface water permits, and 'demonstrated use' for annual volumes of water.

- (b) Gregory Ivan Ryder – Director and Environmental Scientist at Ryder Consulting Limited.

Dr Ryder's evidence addresses the ecology and water quality status of the Otaio Catchment, proposed Table 15(a) and the achievability of the proposed freshwater outcomes. He discusses the appropriateness of the limits/targets in Table 15(c) for surface water and the linkage between these and water quality outcomes. He also addresses the ecological consequences of the proposed minimum flows and allocation limits for the Otaio catchment.

4. In addition to expert evidence OWUG has filed evidence from a number of its members. Mr Johnston the current Chairman of OWUG outlines the history of OWUG before discussing his own property within the

catchment and the expected consequences of PC3. Kerry Ward, Rob McIlraith, David Scott, Bruce Murphy and Ross Rathgen all address their individual circumstances and the anticipated effects of PC3 on their operations.

5. Finally Haidee McCabe has prepared a brief of evidence which outlines the particular concerns OWUG have sought to address during the development and consultation process in relation to PC3 and how that process unfolded.

Assessment Process

6. It is submitted that the statutory framework for preparing and assessing a regional plan has been accurately set out in paragraphs 6.4 to 6.29 of the section 42A report.
7. It is important that close consideration is given to the Regional Council's functions under section 30 of the Act. This section provides the statutory requirement to set rules that allocate water (refer section 30(1)(fa)(i), subject to section 30(4)) and control the discharge of contaminants (refer section 30(1)(f)).
8. A number of submissions have been made in respect of PC3. Some conflict with the pL&WRP and some conflict with each other. You must weigh all competing information and submissions to determine which will be accepted, which will be rejected and why (refer schedule 1, clause 10). This assessment requires a determination of whether:
 - (a) The objectives are the most appropriate way to achieve the purpose of the Act; and
 - (b) Whether the policies, rules and methods are the most appropriate way to achieve the objectives.
9. In respect of paragraph (b) an assessment of the efficiency and effectiveness of the provisions ability to achieve the objectives is required. This becomes a cost/benefit analysis, against which you must compare the risk of doing nothing where there is uncertainty or insufficient information.
10. OWUG has actively participated in the development of PC3. The issues of concern to OWUG and other stakeholders are multifaceted and at times conflicting. The aims and intentions of the proposed rules for the

Otaio Catchment have received reasonably broad support from relevant parties which is a good place to start. However, that is not determinative of the outcome. As the panel appointed to consider this matter you must satisfy yourselves of the relative merits of PC3 as the most appropriate way to achieve the purpose of the Act and the objectives of the pL&WRP and PC3.

11. Notwithstanding OWUG's general support for PC3 there remain a number of outstanding issues. Whilst they are largely operational, they are critical in ensuring that the package of provisions achieve the desired outcomes.
12. In respect of water quantity this means ensuring that ecological values are sustained, but also ensuring that OWUG members can gain access to adequate and reliable water to sustain their farms and their families.
13. In respect of water quality this means ensuring that the provisions provide adequate certainty for operations going forward and do not have unintended consequences.
14. With that in mind, the matters that require particular attention from a legal perspective are:
 - (a) Stacking of consented water takes;
 - (b) Stock drinking water supply;
 - (c) Transfer of water; and
 - (d) Use of Overseer.

Stacking Issue (Pro Rata Formula)

15. One of main features of water allocation under the RMA are the concepts of priority and non-derogation. Perhaps more colloquially known as 'first in first served'. This was first articulated in *Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257 (CA) and has been confirmed in subsequent cases.
16. The 'first in first served' principle was confirmed by the High Court in *Aoraki Water Trust and Others v Meridian Energy Limited and Ors* [2005] 2 NZLR 268 (HC) at [46] where the Court stated:

“where a resource is already fully allocated in a physical sense to a permit holder, a consent authority cannot lawfully grant another party a permit to use the same resource unless specifically empowered by the Resource Management Act...”.

17. The Court then concluded that the consent authority would be acting unlawfully if it granted a water take permit where the resource was already over allocated and the new permit would diminish or derogate from the existing consents (refer [55]).
18. A recent decision of the Court of Appeal, *Hampton v Canterbury Regional Council (Environment Canterbury)* [2015] NZCA 509 confirmed the High Court's conclusion in *Aoraki* albeit by a different route (refer [108]). These decisions highlight the real risk of water being 'locked' up by a small number of consent holders if pro rata system is not imposed.
19. Currently within the Otaio catchment this issue is dealt with by informal water sharing arrangements between OWUG members. Between themselves they manage their takes as water levels decrease to allow everyone to get access to water. The proposed plan in many ways seeks to mimic this through the development of stepped or pro rata reductions in take volumes as flow rates at the Otaio Gorge reduce.
20. OWUG's concern is that if the normal 'first in first serve' principle were to prevail parties will be able to obtain consent and in doing so the essentially increase the minimum flow for the next person who seeks consent. This issue is particularly important for the B allocation block where 1000l/s has been allocated above flow rate of 780l/s at the gorge.
21. This issue can be addressed by the implementation of pro rata reductions commensurate with flow rate in the river. However, the process for implementing this must be clear. The evidence of Ms Johnston sets out some proposed amendments that more clearly articulate the pro rata regime.
22. In essence Ms Johnston is promoting the insertion of a formula within the Plan that clearly articulates how the pro rata flow rates are to be calculated. This allows people using the plan to easily understand how they will be affected by the pro rata reduction regime. The information required to complete the calculation will be information that water users have readily available to them.

23. A pro rata framework ensures that water is shared equally (based on a proportion of their consented take) when the river flows are not sufficient to allow the full allocation to be taken. It is submitted that providing for takes to occur in this way is a more integrated way of managing available water and it strikes a better balance between the interests of all water users. This promotes reliability and ensures the purpose and principles of the RMA are achieved for all users rather than those that gained consent first.
24. OWUG submits that a pro rata framework is appropriate and is consistent with the Council's functions in section 30(1)(e) of the Act.
25. It is further submitted that the process to determining the applicable flow rate within the river should also be incorporated into the Plan. Ms Johnston has proposed a new schedule for this purpose¹. The schedule proposed largely reflects the process already utilised by ECan and available on their website. For certainty it is appropriate to enshrine this in the Plan so that any changes receive careful consideration in accordance with Schedule 1 and section 32 before being implemented.

Stock drinking water

26. As discussed by Ms McCabe and Ms Johnston allocation requirements for the Otaio Catchment were calculated on the basis of existing irrigation consents. Given that the allocation limit does not account for stock drinking water demand. Nor did OWUG expect that the minimum flow rules would be applicable to stock drinking water given the statutory provision for it under section 14. This is the approach taken by the pL&WRP as highlighted at page 9-3 of the section 32 report where it identifies the relevant policies of the pL&WRP and states:

"In instances where the rate of take or volume of water consented exceeds the flow and allocation limit, any further abstraction is limited to community water supplies and stock water".
27. Nothing in the subsequent discussion or analysis of the options presented suggested that the treatment of stock drinking water was to change under PC3.
28. The section 42A report indicates that it is ECan's view that stock drinking water supplies must be either:

¹ Brief of Evidence of Kerl Joy Johnston, 25 September 2015 at [26].

- (a) Taken in accordance with the permitted activity rules in pL&WRP section 5; or
 - (b) In the case of a 'natural person', in accordance with section 14 of the Act.
29. Where neither of those options are satisfied a consent under the provisions within PC3 will be required. That of course means that takes will be subject to the minimum flow and allocation limits. Within the Otaio catchment that means that no consents for drinking water can be obtained because the catchment is fully allocated.
30. At page 242 of the section 42A report there is further discussion of the new rule requested by OWUG to protect takes for stock drinking water purposes. At paragraph 12.173 the author states:
- While I understand the submitters concerns about their responsibility to provide for stock needs during times of restrictions, I do not consider it appropriate for existing users to continue to abstract water for these purposes at the cost of the environment. Rather, I consider it more appropriate that alternative water supplies are sourced for these times (i.e. the use of storage or irrigation scheme water). As such, I do not recommend that a new rule is included to provide for the abstraction of water without adhering to the minimum flows, as requested by submitters".*
31. This has come as somewhat of a surprise to OWUG and is a significant concern. The impacts of the stock drinking water being included within the irrigation allocation do not appear to have been assessed as part of the section 32 analysis. This is clear from section 9 of that report. In particular the discussion about the application of Schedule 10 for calculating reasonable or demonstrated use. This schedule is solely focussed on assessing irrigation demand. If stock drinking water was to be included the schedule would include reference to stock unit water demand or similar. Nor is there any mention of this issue in the efficiency assessment. Had it been intended to include stock drinking water within the allocation the section 32 analysis would have included an assessment of this. For example, the costs of a reduction in reliability for irrigation, possibly the costs of losing stock to dehydration, bringing water in when it cannot be taken or the costs of installing the necessary storage.

32. Up until the receipt of the section 42A report OWUG understood that their stock drinking water was not subject to the minimum flow requirements. The take and use of water for domestic and stock water purposes is addressed by Ms Johnston in her evidence at [72] to [89]. She provides two good examples of the very real consequences of this issue.

Section 14 – Who can take water?

33. It is understood that the Council considers that only a 'natural person' can take water under section 14(3)(b)². It is submitted that this interpretation is incorrect and nonsensical.
34. Section 14(3)(b) confers on any person a right to take water irrespective of section 14(2). It states:

“(3) A person is not prohibited by subsection (2) from taking, using, damming, or diverting any water, heat, or energy if—

(b) in the case of fresh water, the water, heat, or energy is required to be taken or used for—

(i) an individual's reasonable domestic needs; or

(ii) the reasonable needs of an individual's animals for drinking water,—

and the taking or use does not, or is not likely to, have an adverse effect on the environment;”

35. 'Person' is defined in the Act:

“person includes the Crown, a corporation sole, and also a body of persons, whether corporate or unincorporated”.

36. An actual person, a corporation or body of persons are all treated the same under the Act. They can apply for resource consent, seek a declaration or be prosecuted. It is submitted that had the intention been to distinguish between types of people under section 14(3), the term 'person' would not have been used at all. Or the section would have first set out what 'person' was to mean in the context of that particular section.

² Refer Paragraph 6.258 of the Section 42A Report.

37. The Council appear to be of the view that the use of the term 'individual' in the sub paragraphs signals that 'person' means something different in section 14(3)(b). This appears to ignore the use of 'person' in paragraph (3) and falsely distinguishes between paragraph (3) and the sub-paragraphs. The section makes perfect sense if you were to add 'person' after 'individual' in each sub-paragraph and in my submission that is how section 14(3)(b) must be interpreted. Whether that 'person' is a natural person or a company or some other type of organisation is neither here nor there.
38. The specific interpretive question raised by the Council does not appear to have been directly addressed by the Courts. However there are a number of examples where the Court has found that an 'unnatural person' can rely on section 14(3)(b).
39. In *Chatham Islands Seafoods Ltd v Wellington Regional Council* A018/2004, Environment Court, Wellington, 13 February 2004 the Court determined that section 14(3)(b) could apply to *Chatham Islands Seafoods Ltd* in the right circumstances (refer [41-44], [62-63]). The Court analysis proceeded on the basis that company could rely on section 14(3)(b)(ii).
40. The *Chatham Island* decision is consistent with the prior High Court decision in *Wheeler Forest Associates Ltd v Roger James Farquhar and Geraldine Farquhar* HC Christchurch, CP103/00, 14 March 2001. The High Court confirmed the only individual covered by section 14(3)(b) was the plaintiff as owner of the servient tenement. In this case the plaintiff was a company, Wheeler Forest Associates Limited.
41. Again the position taken in these cases was confirmed in *P & E Ltd v Canterbury Regional Council* 2015 NZ EnvC 106. In *P & E Ltd* the Environment Court stated:

"The plain is part of Grassmere Station which is owned and farmed by P & E as a mixed dryland stock and cropping farm. There is an existing diversion structure on the river which diverts water into a water race system currently used by Grassmere Station for stockwater under section 14(3)(b) RMA".

The farm was owned and farmed by a company. It is clear the Environment Court considered that the company could take, and was taking water under section 14(3)(b).

42. It is submitted that there is no basis for limiting the use of section 14(3)(b) to natural persons only.

Scope of Control

43. The next issue that must be addressed is what scope, if any do Council have to limit takes under section 14(3)(b)? Section 14(3)(b) does not provide an entirely unfettered right to take water. To be allowed under section 14(3)(b) the take must satisfy two requirements:

- (a) Only be for reasonable use; and
- (b) It must not have, or be likely to have an adverse effect on the environment.

These are both questions of fact.

44. The section 42A Report correctly referred to *Carter Holt Harvey Ltd v. Waikato Regional Council* [2011] NZEnv C 380 which highlighted that a Council may impose restrictions on takes for domestic and stock water supply provided that they are to define the point at which a take may have adverse effects. While the broad principles of *Carter Holt* are relevant the pL&WRP does not contain provisions equivalent to those challenged in *Carter Holt*. The case must be viewed in that context and in light of section 30(4)(f) which states “*the rule may allocate water, ... as long as the allocation does not affect the activities authorised by section 14(3)(b)*”.
45. In *Carter Holt* the proposed variation to the Plan contained a policy that specifically referred to section 14(3)(b) takes. It set a limit at which those takes would have an adverse effect on the environment. The permitted activity rules at 5.111-5.115 could be said to establish a threshold where an environmental effect may occur. However the issue arises where those permitted activity rules cannot be complied with. Under pL&WRP it is necessary to refer to the specific rules in PC3. The difficulty with this is that where water is fully allocated no application can be sought or obtained, because the activity status is prohibited.³
46. The scheme within the Act is clear. Takes for drinking water purposes (both domestic and stock water supply) get a degree of preferential

³ This is consistent with the guidance in *Small and Community Water Takes – Interpretation – note 1*, which indicates that specific rules in catchment section of the pL&WRP will override the general rules where resource consent is required.

treatment. Section 14(3)(b) recognises the significant importance of providing certainty of supply for those purposes. This sentiment is mirrored in policy 4.5 of the pL&WRP and in Note 2 of the interpretation guidance given with Rules 5.111-5.115 of pL&WRP which states:

“Nothing in this Plan affects an individual’s right to take water in accordance with section 14(3)(b) of the RMA”.

47. The author of the section 42A report has failed to recognise this when reaching the conclusions in paragraphs 12.172 and 12.173.
48. It is further submitted that the pL&WRP cannot be used to determine when the statutory authorisation under section 14(3)(b) would fail to apply. Whilst it may establish a threshold for considering potential effects, the Plan cannot set an absolute control. To do so would be inconsistent with section 14(3)(b) and section 30(4). It is submitted that irrespective of the rules within section 5 of the pL&WRP a water user may be able to establish as a matter of fact that their proposed take does not give rise to adverse effects and can therefore rely on section 14(3)(b)⁴. The presence of a rule is not determinative of effects on the environment under section 14(3)(b). Particularly in the context of the pL&WRP where the thresholds are region wide and do not account for the particular circumstances of each catchment, let alone the effects of an individual take.

Exercise of permitted takes concurrently with consented takes?

49. OWUG agrees with paragraph 6.256 of the section 42A report. It states *“water can be taken under section 14(3)(b) in addition to a volume under a resource consent or a permitted activity rule”*. OWUG submits that there is no legal basis for the exercise of a 14(3)(b) take to be constrained under the pL&WRP. The only relevant constraints are those identified in section 14(3)(b)

Conclusion on section 14(3)(b) takes

50. Section 14(3)(b) can be relied upon by all ‘persons’ as defined under section 2 of the Act.
51. The Council may create rules that define the point at which effects may arise. ECan have done this in Rule 5.111 – 5.115.

⁴ It would be possible for a water user to apply for a certificate of compliance under section 139 should they wish.

52. Irrespective of the above a person may establish as a matter of fact that a take satisfies the requirements under section 14(3)(b) in which case they may rely on the Act to take the water.
53. To enable a Rule (including a minimum flow rule) to trump the statutory protection would be inconsistent with section 14(3)(b) and Section 30(4) of the Act.
54. Therefore, it is unlawful for PC3 to include within the allocation limit subject to the minimum flow, takes which are for the supply of stock drinking water provided for under section 14(3)(b).

Site to Site Transfers

55. Through its submission OWUG sought to constrain the potential for transfers of water permits that would enable an increase in actual usage of water. The reason for this is that transfers to new sites almost inevitably lead to an increase in usage. Given the fact that allocation is already constrained, transfers that had this effect would not enable the objectives of the pL&WRP or PC3 to be achieved.
56. Having said that, a straight out prohibition on transfers does not actually achieve that objective either. And, it could ultimately be circumvented by some creative drafting of an application (i.e. contemporaneous surrender of an existing consent). Therefore OWUG supports the conclusions in the section 42A report that restricting water transfers (site to site) by way of volume is appropriate.
57. It is agreed that rules may be drafted in accordance with section 68(1)(a) for the purpose of a consent authority carrying out its functions under sections 136.⁵
58. This matter is discussed in the evidence of Ms Johnston at paragraphs [65] to [71] where she suggested some further matters that must be considered in any site to site transfer to ensure it does not give rise to adverse effects.

Overseer Version Changes

59. There is considerable uncertainty created by the use of Overseer in PC3. OWUG's concerns are outlined in the evidence of Ms Johnston

⁵ Consistent with the analysis set out in paragraph 6.264-6.274 of the section 42A report.

(refer [90] to [114]) and Ms McCabe (refer [58] to [61]). These concerns are not unique to OWUG and are raised by a number of submitters. They are addressed in the section 42A report at paragraphs 10.28 to 10.33.

60. A number of the pL&WRP tables use Overseer figures to set catchment limits for nutrients (both farm losses and then as a basis for catchment loads). Compliance with these tables will determine whether a resource consent is required for nutrient discharge (refer Ms Johnston's evidence at [109] and [110]). The nutrient loss limits have been determined using Overseer version 6.1, although I understand they are to be updated to reflect Overseer version 6.2. It is convenient that the version change has occurred and updated loss figures can be included within the Plan at this point. But this will not be the case in the future. It is apparent from the evidence that a change to the version of Overseer has significant potential to affect a property's ability to comply with the rules. This is despite the fact that the farming activity that is being undertaken will not have changed.
61. This creates significant uncertainty for land users. They may be compliant and permitted one day and require consent, or be operating a prohibited operation the next. This is an entirely untenable outcome for a Regional Plan.
62. Submissions from various parties have sought the addition of footnotes, or policies to try and address this problem. It is submitted that none of these solutions provide a lawful mechanism to overcome the issue created by changing versions of Overseer. This is particularly so where the activity status may become prohibited. The effect of a prohibited activity status is, of course that consent cannot be sought. Therefore, it doesn't matter what a footnote or policy might say about the version of Overseer.
63. The section 42A report has recommended a new policy be added at 15.4.9A. In light of *King Salmon* this policy does little to address the fundamental issue. At the end of the day the trigger for consent will be the figures in Table 15(p) irrespective of what version of Overseer is in place. The load figures are fixed. If the rationale in *King Salmon* is to be applied then Policy 15.4.9A only adds further impetus to the prohibited activity status for a breach of the catchment load limit in table 15(p).

64. It is submitted that the only way in which the nitrogen limits can be changed following a change to the Overseer version is by way of the Schedule 1 process. This is consistent with the expectations in the Act regarding incorporation of material by reference under Schedule 1, Part 3.
65. In my submission the need to utilise Overseer in order to determine compliance with the nitrogen limit is essentially an exercise in incorporating the Overseer model into the Plan by reference. Therefore, under Schedule 1, Clause 31 any amendment of Overseer triggers a need to amend the plan to reflect the update. This can only have legal effect if a variation providing for that is incorporated or a plan change is implemented.
66. In my view there is simply no legal mechanism that allows the figures in the Plan to be updated consistent with new versions of Overseer, other than through the Schedule 1 process.
67. Without such a mechanism the Plan provisions will quickly become obsolete or will have consequences that were not intended or have not been assessed as part of this process. For example the consequences of existing farming operations becoming prohibited. None of the assessments under section 32, or 42A appear to consider the costs of this uncertainty which include the flow on administrative and consenting cost that will arise, or the opportunity costs from under developed land as a result of the proposed provisions and associated limits.
68. This challenge in utilising Overseer as a regulatory tool is not new. The issue was confronted by Judge Borthwick in *Bellfield Land Company Ltd v. Canterbury Regional Council* [2015] NZEnvC 88. Whilst this case related to a resource consent it does provide some insight into how Overseer might be more usefully employed as a regulatory tool following each update.
69. In my submission the requirements in terms of certainty and clarity are much the same for a condition of consent as they are for a rule in a Plan. One of the perhaps telling aspects of the *Bellfield Decision* is the indication that the Council prefers not to include Overseer outputs as a condition of consent. Despite that the Parties in that case were able to develop a work around by including the benchmark Overseer input file as part of the consent. This allowed the consent holder to run the benchmark file and the proposed operation for the upcoming year in the

same version of Overseer. So long as the proposed operation generated modelled nutrient losses the same or less than the benchmark file the consent was being complied with.

70. The process set out in schedule 1, part 3 was inserted to prevent the rules being changed simply because the incorporated material had changed. It is submitted that the each update of Overseer represents an amendment that is contemplated by Schedule 1, clause 31 such that a variation or Plan Change will be required. While undertaking a variation or plan change every time Overseer is updated is onerous, this is the consequence of an incorporating a document by reference. Particularly one so prone to amendment.

What is the alternative?

71. Use of modelling to help assess effects is not unique in resource management. Models are used to assess potential noise effects, traffic or parking demand and air quality to name a few examples.
72. The difference is that in those instances the models are not relied on as the regulatory tool. The model predictions are either corroborated by actual monitoring or they are used to develop concrete standards. For example, models predicting car parking demand are converted into rules that specify a number of car parks required relative to Gross Floor Area. Or models that predict intersection performance are converted in to rules specifying required queuing distances.
73. That conversion of model predictions to concrete standards is not occurring in the context of water quality and the use of Overseer. Council's are instead simply employing the model output as a standard. It is submitted that this is the genesis of most of the complication.
74. Part of the reason that numerous Council's are looking to rely on Overseer as a regulatory tool despite the obvious shortcomings, is that developing simple standards to reflect the model outputs are difficult to promulgate given the complexity and array of farming systems that they must apply to. There is a high level of attraction to Overseer as it allows Council to absolve itself of any responsibility for determining how to meet the limits which it is not well qualified to do.
75. That is where impending Variation 5 comes in and the extensive work being done to develop the matrix of good management. As I understand

it, the matrix of good management essentially articulates the input measures to achieve the desired output.

76. Given the extensive work being undertaken to develop variation 5, it is necessary to ask why this process would seek to reinvent the wheel. I understand that there may be some specific catchment challenges to address, but I would expect that those can be addressed through variation 5 in any event. Particularly, if the framework proposed will overcome the shortcomings of the current proposal.
77. I note that the Commissioners raised a similar question in Minute 2 regarding caucusing and whether consideration should be given to a set of transitional provisions to apply in anticipation of variation 5. In my submission this idea deserves some considerable attention. Other regions have taken this approach by requiring consents to be obtained for dairy conversion prior to the completion of a limit setting process. This essentially maintains the status quo until the catchment process has been completed.
78. As outlined in my earlier comments, one of the requirements of the section 32 analysis is to assess the risk of doing nothing where there is insufficient information. It is submitted that the risk of doing nothing in this case is low, particularly given the impending Variation 5. No significant land use change is likely to occur in the interim. Land use changes induced by the expansion of irrigation schemes is likely to occur reasonably slowly and will be subject to resource consent in any event.
79. In the Otaio catchment the lack of reliability of irrigation supply will minimise the potential for wholesale land use change. That limitation is a function of the hydrology.

Conclusion

80. The Otaio catchment is a unique catchment. The hydrological functioning of the catchment creates both opportunities and constraints. The presence of a considerable shallow ground water aquifer essentially provides a large storage facility within the catchment as surface water flows into the catchment reduce. This has enabled land users within the catchment to gain access to water for longer periods than water flows within the river might suggest possible.
81. OWUG members have developed their farming systems around these hydrological constraints. They farm at a relatively low intensity (from a

nutrient loss perspective) and reasonably conservatively to insulate themselves from the low reliability of supply to the extent possible.

82. PC3 seeks to impose a minimum flow of 90l/s where previously there has been none. This minimum flow will not prevent large sections of the river bed from drying during the summer months, but is expected to help retain some further refuge flow for the small lagoon located at the mouth of the river.
83. As set out in the evidence, the imposition of this minimum flow will come at significant cost to OWUG members. Alternative water sources have been identified including deep ground water, access to irrigation scheme supply for some and access to 'B' Block allocation for storage. However, all of these options come at a cost. In order to offset these costs and maintain profitability OWUG members will need to increase their productivity. This will have flow on effects on water quality. In light of that the question of whether the proposed minimum flow best achieves the objectives of pL&WRP must be asked.
84. On the evidence before the panel, I would submit that it is questionable in this catchment. Certainly in respect of stock drinking water PC3 fails to implement the Act or the objectives.
85. From a nutrient management point of view, it is submitted that PC3 is very problematic. As discussed above, the incorporation of Overseer figures as triggers for consent, or potentially creating a prohibited activity creates significant uncertainty. In my submission, there is no lawful mechanism, other than a plan change to update the numbers of reflect the changing version of Overseer.
86. It is submitted Overseer outputs need to be recast into clear requirements for land users that are certain and are not subject to the vagaries of an ever changing model. In my view this will be better dealt with in the context of variation 5 when the full extent of the Matrix of Good Management is understood. The time between now and then can be utilised to resolve the significant issues with the complexity of the current proposal.

Signed: .....

18 November 2015

Bridget Irving - Counsel for Otaio Water Users Group



LOCAL GOVERNMENT AND ENVIRONMENT SELECT COMMITTEE BRIEFING

Resource Management (Simplifying and Streamlining)
Amendment Bill

Question

1. On 2 April 2009 the Local Government and Environment Select Committee asked for further information on:
"A comparison of the legal weighting given to Board of Inquiry judgments and Environment Court judgments".

Background

2. There is a legal principle known as *stare decisis*, which determines the legal weighting that a court needs to give to a pre-existing decision of another court. This principle applies to all courts in New Zealand (and is generally applicable in all overseas jurisdictions as well).
3. Where a decision is made in a higher court, then the legal principles from that decision are binding on all lower courts within the jurisdiction. In this way a decision of the Supreme Court is binding on all courts in New Zealand, whereas a decision of the High Court is binding on courts such as the District Court and Environment Court, but not on the Court of Appeal or Supreme Court.
4. Decisions of courts at the same or equivalent level as the court in question are persuasive but not binding. On this basis, the Environment Court cannot bind itself as only decisions of higher courts are binding. However, it is acknowledged by the Environment Court that legal certainty is important, and every effort is made to be consistent in the application of legal principles, depending on the facts of the case before the Environment Court.
5. The principle of *stare decisis* must also be considered in the context of the facts of each case, and where the facts are materially different then a pre-existing decision may be distinguished and the legal principles from it are not regarded as binding.

Comment

6. A Board of Inquiry, even when chaired by a current or former Environment Judge, is not a court so can be distinguished on that basis from the Environment Court. In this way, the call in provisions, both current and as proposed to be amended by this Bill, do

provide for a separate stream of decisions on applications where there will not be a full (*de novo*) hearing of the facts in a court.

7. While there are technically differences in the way a Board of Inquiry operates in comparison to the Environment Court, there are also a number of similarities. A decision of a Board of Inquiry does not create binding legal principles in the way a court can. However, as already noted above, the Environment Court decisions are not binding on that Court or any superior Court.
8. A Board of Inquiry, and indeed the local authorities making decisions on matters under the Resource Management Act 1991 (RMA), is not bound by the formal legal principle of *stare decisis* which applies only to courts. Rather a Board of Inquiry is obliged to correctly apply the law as it stands when the application is heard. This law includes legal principles developed through caselaw including Environment Court judgments. This obligation also applies to local authorities, and to the Environment Court.
9. The correctness of the law as applied by either the Board of Inquiry or the Environment Court, is tested through an appeal on a question of law to the High Court. The treatment that a Board of Inquiry decision is given in the High Court in comparison to an Environment Court judgment is likely to come down to the facts and circumstances of each case.
10. The treatment that local authorities will give a Board of Inquiry decision in comparison to an Environment Court judgment, is also likely to come down to the facts and circumstances of each case. In the RMA jurisdiction, the precedent effect of decisions at all levels, including those of local authorities, based on the facts, has been acknowledged. Therefore even without the benefit of *stare decisis*, it is likely that decisions of a Board of Inquiry will be a valuable contribution to the body of knowledge in this area of law.



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