Tabled at Hearing Monday 2 May 2016

in the matter of: the Resource Management Act 1991

and: submissions in relation to **plan change 3** to the proposed Canterbury Land and Water Regional Plan

and: **Dairy Holdings Limited**
Submitter

Memorandum of counsel (in response to s42A Officer reply report)

Dated: 29 April 2016

REFERENCE: BG Williams (ben.williams@chapmantripp.com)

Chapman Tripp
T: +64 3 353 4130
F: +64 3 365 4587

245 Blenheim Road
PO Box 2510, Christchurch 8140
New Zealand

www.chapmantripp.com
Auckland, Wellington,
Christchurch

CHAPMAN TRIPP

MEMORANDUM OF COUNSEL (IN RESPONSE TO S42A OFFICER REPLY REPORT)

Introduction

1 This memorandum is prepared on behalf of Dairy Holdings Limited (*DHL*) following:

1.1 Minute 8 of the Hearing Commissioners (dated 22 April 2016); and

1.2 paragraphs [9.68] and [9.69] of the *Officer's Reply For Council Reply Hearing* (the *Reply Report*) dated April 2016.

2 Given that DHL's interest in the resumed hearing is limited to two narrow points, it is not proposing to attend the resumed plan change 3 (*PC3*) hearing (but it respectfully asks that this memorandum be taken into consideration in the wider decision making process).

3 This memorandum should be read in conjunction with the earlier DHL legal submissions and the evidence of **Mr Colin Glass** (both dated 18 November 2015) - both of which set out, in detail, DHL's position on the farming enterprise and nutrient user group regime proposed.

Misunderstanding around farming enterprises (and nutrient users groups).

4 At paragraph [9.69] of the Reply Report the Officer has advised that:

> 9.69 In addition, Dairy Holdings Ltd also sought the addition of a new policy with enables the disestablishment of a Farming Enterprise, by allowing individuals who were formerly included in the enterprise to have a nitrogen loss limit that could exceed that which is permitted by the plan. The submitter has not proposed any corresponding rule to give effect to the proposed amendments. As such, the officers do not recommend adopting the policy proposed by Dairy Holdings for the disestablishment of a Farming Enterprise.

5 With respect to the Officers, it appears they may have missed the point of the proposed policy – which is to provide guidance to plan users and decision makers on the imposition of conditions on resource consents (noting a number of existing rules provide for the establishment of farming enterprises (and nutrient user groups)).

6 In this regard, the actual decision to form or cease a farm enterprise or nutrient user group is ultimately one of contract (or other such commercial arrangement) reached outside of the regulatory

framework – thus specific rules as to how nutrients are actually shared between members would not be anticipated (but a policy as to how resource consent conditions might be structured to ensure the total overall nutrient load is not exceeded remains entirely appropriate).

7 To provide a practical example, DHL's '*Nutrient Management Consent*' (CRC143288) in the Selwyn-Waihora area provides a mechanism for properties to join and exit the group, such that:

7.1 the actual decision to join or exist the group (and the allocation within the group) is still solely one for DHL and any other members; but,

7.2 in any equivalent resource consent application the policy will be very important in ensuring consent conditions are appropriately structured to allow entry and exit to occur (i.e. without increasing the overall nutrient load).

8 As a final matter (and as was set out previously in the legal submissions and evidence provided) it is emphasised again that what is being put forward by DHL is entirely consistent with the final provisions of plan change 1 and the decisions version of plan change 2. The Hearing Panels in those processes considered it important that an equivalent policy was included.

9 The relevant pages from each (i.e. including each equivalent policy) are included in **Annexure 1.**

Consistency

10 Picking up on the consistency point, the Officers have advised at para [9.68] that:

> 9.68 Mr Williams, on behalf of Dairy Holdings Ltd submitted that there is unnecessary duplication between FE and NUG, and that for consistency with Plan Change 1 and Plan Change 2, NUG should be deleted from Plan Change 3. The officers' view has not changed since the preparation of the s42A report, particularly given that the provisions contained in Plan Change 3 reflect the Zone Committee Solutions Package that specifically sought the inclusion of the NUG provisions.

11 This issue has already been dealt with in detail in DHL's earlier legal submissions.

12 As previously stated, DHL was an active participant in the plan change 1 and 2 processes. Both of those plan changes simply refer to and define a "*farm enterprise*" (which in a practical sense

includes both farm enterprises and nutrient user groups as now proposed in PC3).

13 It remains DHL's view that:

13.1 "*farm enterprise*" is the appropriate label to use for both the situations that PC3 attempts (with difficulty) to differentiate between – i.e. farm enterprises and nutrient user groups;

13.2 any differentiation is unnecessary; and

13.3 having different definitions of "*farming enterprise*" (some of which include nutrient user groups and some which do not) in different parts of the plan is very cumbersome (and again unnecessary).

14 The basis for the Officers' view appears to be limited to giving effect to the outcomes sought by the Zone Committee (i.e. there is no practical or legal basis for the differentiation). DHL is respectful of that position but considers in the overall interests of plan workability the same phrases and approaches should be used throughout.

15 The practical outcome sought by the Zone Committee (i.e. nutrient sharing) will still be given full effect.

Relief sought

16 DHL remains of the view that its sought relief (with minor further amendments to align with the more recent decisions version of plan change 2) is appropriate, namely:

16.1 the deletion of the definition of "*Nutrient User Group*" throughout PC3 (with reversion to the use of the "*Farming enterprise*" regime and associated definition contained in the LWRP); and

16.2 amendments policies 15.4.10 – 15.4.13 to provide:

> ***~~Nutrient User Groups and~~ Farming Enterprises***
>
> 15.4.10 Flexibility in nitrogen management is enabled by allowing an increase in nitrogen loss beyond the respective nitrogen baseline, except for any land within the Northern Streams Hill and Waihao-Wainono Hill areas, provided the property is part of:
>
> (a) ~~a Nutrient User Group, or~~
>
> ~~(b)~~ an ~~i~~Irrigation ~~s~~Scheme; or
>
> (c) a Farming Enterprise.

15.4.11 Avoid catchment nutrient load limits being exceeded by only allowing Farming Enterprises ~~or Nutrient User Groups~~ to establish and operate where all the properties are located in the same Surface Water Allocation Zone.

15.4.12 Maintain water quality by restricting the movement of nitrogen between properties unless:

(a) the property is part of a Farming Enterprise ~~or Nutrient User Group~~; and

(b) the combined nitrogen loss calculation from all properties forming the ~~Nutrient User Group~~ Farming Enterprise does not exceed the sum either:

(i) the flexibility cap for the respective area; or

(ii) the nitrogen baselines for the respective area whichever is the greater; and

(c) the maximum cap is not exceeded on any individual property.

15.4.13A (1) Enable the establishment of farming enterprises in circumstances where, for the purpose of nutrient management, the nitrogen loss from the total farming activity does not exceed the aggregate of the nitrogen baselines of all the land used in the enterprise

(2) Enable disestablishment of Farming Enterprises, by which each parcel of land formerly used in the enterprise does not exceed either:

(a) the individual flexibility cap and nitrogen baseline (which is ever is greater) of the land in that parcel; or

(b) a nitrogen loss limit to be determined so that the aggregate of the flexibility caps and nitrogen baselines (which is ever is greater) of all the parcels formerly used in the enterprise is not exceeded.

15.4.13 Manage nutrient losses by requiring applications for a resource consent to establish a ~~Nutrient User Group~~ Farming Enterprise to describe:

(a) the procedures and methods for recording nitrogen losses from properties within the ~~Nutrient User Group~~ Farming Enterprise; and

(b) the methods for ~~redistributing~~ recalculating the combined nitrogen loss load when a property joins ~~or leaves~~ the ~~Nutrient User Group~~ Farming Enterprise; and

(c) the annual reporting requirements; and

(d) how compliance with the actions set out in each Farm Environment Plan will be achieved.

Dated 28 April 2016

Ben Williams
Counsel for Dairy Holdings Limited