Tabled at Hearing 30/09/14

BEFORE CANTERBURY REGIONAL COUNCIL

In the matter	of the first schedule of the Resource Management Act 1991
And	
In the matter	submissions on variation 1 Proposed Land and Water Regional Plan

LEGAL SUBMISSIONS ON BEHALF OF HYDROTRADER LTD

30 September 2014

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Introduction

1 HydroTrader Ltd ("HydroTrader") has made a submission opposing the policies and rules that impose a compulsory surrender of 50% of a water allocation on transfer and make transfers that fail to do so a prohibited activity. It has done so on the basis of:

1.1 The *vires* of the conditions implementing that approach;

1.2 Evidence that the approach is not the most appropriate means of giving effect to the statutorily prescribed aims.

2 HydroTrader seeks the removal of the compulsory surrender requirement and prohibited activity status, or failing that, as a less preferred relief, making the imposition of the fully discretionary activity status for surrenders that do not meet the 50% standard. That relief could be granted on either the *vires* or the s32 test basis.

3 The vires of conditions requiring surrender was addressed in detail in HydroTrader's submissions on the Proposed Land and Water Regional Plan, of which the current provisions are a Variation. The hearing panel was similarly constituted and is aware of the arguments raised. They will not be repeated. The current submissions will be confined to matters not covered by those submissions on that point.

4 The key basis for the s32 test is laid by the expert evidence provided by Dr Anthony Davoren. That evidence also has relevance to the *Vires* issue.

Vires Issue

5 This matter is addressed in the s42A officers' report from paragraph 7.216 onwards, dealing with the issues under two main questions: The ability to assign an activity status to a transfer and the ability to impose a compulsory transfer condition. We follow this structure.

6 The report relies on paragraph 456 of the Environment Court's decision in *Carter Holt Harvey v Waikato Regional Council* [2011] NZEnvC380, which was also relied on by the Hearing Panel for the Proposed Land and Water Regional Plan in rejecting the submissions as to the ability to assign an activity status other than permitted or discretionary to transfers.

7 Importantly, there is no indication that the issue of the ability to assign an activity status other than discretionary or permitted was argued at all. It appears rather that no party raised that issue, or that the Court turned its mind at all to whether it had the power to

impose an activity status other than permitted or discretionary. Rather, it seems that the Court, having assumed there was an ability to do so, was considering the appropriateness of the particular activity status the consent authority had imposed against the test in s32.

8 That case therefore cannot be authority for the proposition that an activity status more stringent than discretionary can be imposed on a transfer. It certainly is not authority for the ability to impose the prohibited activity status. For that to be the case the Court would have had to have considered the consequences of the failure of s136 to provide for a scenario where a transfer cannot occur at all. It did not.

9 HydroTrader takes no issue with the Consent authority's ability to impose a rule expressly allowing transfers, as the Court did, because that is what is expressly contemplated by s136(2). Nor does it take issue with the consent authority's ability to impose conditions which, if contravened, trigger the need for an application to be lodged, as the Court did, because that is expressly provided for by s136(4).

10 While HydroTrader does not concede that the full range of activity statuses is available for transfers, it is clear that the restricted discretionary activity status is no more restrictive than s136(4) suggests. It simply regulates the way in which an application can be made. In that sense what the Court did in *Carter Holt Harvey* is significantly easier to reconcile with s136(4), which fails to provide for a scenario where no application can be made at all.

11 That is also the critical issue that did not face the hearing panel in the Proposed Land and Water Regional Plan hearings, where the non-complying activity status was proposed. While that scenario sits less comfortably with s136(4), as it imports an additional statutory test in the form of s104D not contemplated by that section, it at least still allows for an application to be made.

12 While the s42A report has set out an argument addressing the failure of s136 to provide for the situation where no application can be made, that still requires this hearing panel to adopt an interpretation that conflicts with the plain and ordinary wording of s136. That plain and ordinary wording provides for two possibilities: the plan can permit site-to-site transfers and if it does not, an application is required. It does not provide for such transfers to be prohibited.

13 The s42A report fails to provide a compelling justification on the basis of the Interpretation Act to justify a departure from the meaning of the text.

Statutory Test

14 The key statutory test is that set out in s32, which requires this Panel to be satisfied on the evidence before it that the relevant rules and objectives/policies are the most appropriate way to give effect to Part 2 and the applicable hierarchy of policies and objectives, *Gisborne DC v Eldamos Investments Ltd* 26/10/05, Harrison J, HC Gisborne CIV-2005-485-.

15 Although this is technically a separate issue from that of *vires* as raised above, there is potentially some overlap. If the panel is unconvinced on the evidence before it that the prohibited activity rule and the supporting policies meet the *Eldamos* "most appropriate" requirement and decides that a rule providing for "an application" to be made is more appropriate, then the issue of the vires of the prohibited activity rule becomes somewhat academic. Further, the fact that the legislation does not appear to contemplate the situation where no application can ever be made must raise questions as to whether that situation is the "most appropriate" under the *Eldamos* test.

16 That matter aside, the key focus of HydroTrader's submission is the expert brief of Dr Anthony Davoren, which was filed in accordance with the panel's directions. It is that evidence that shows that the prohibited activity status and the policies that support it are not the most appropriate means of giving effect to the requisite statutory aims in accordance with the test in s32, but that those are far more appropriately addressed by a rule requiring an application for transfer which does not surrender the requisite amount of allocation to be treated as a discretionary activity.

17 For completeness, it is not suggested that the *Eldamos* decision is the sole or ultimate authority on the applicable test; there are a number of other decisions that also provide helpful guidance, but none require a substantially different approach. Nor is it suggested that s32 is the only relevant section. Rather, *Eldamos* helpfully expresses the way s32 is applied in conjunction with the other provisions that specify what planning documents must contain and to what they must give effect. While that decision relates to district plan requirements which are specified by ss72-75, it is equally applicable to the parallel requirements of ss65-68 for regional plans. It is referred to simply to avoid the need to list for this Panel statutory requirements of which it will be more than sufficiently aware already.

18 Furthermore, *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development* (2007) 13 ELRNZ 279; [2008] 1 NZLR 562; [2008] NZRMA 77, the authority concerning permitted activity rules cited by the s42A report, focuses the inquiry on whether the prohibited activity status and underlying policies are the most appropriate means of achieving the requisite statutory aims.

19 Dr Davoren's evidence establishes that they are not, but that a discretionary activity rule is more appropriate because:

19.1 An assumption that transferring water invariably leads to an increase in the volume of water taken is not available in view of the evidence;

19.2 There has been a failure to consider the extent to which land use rules triggered by the increase in water use that invariably accompanies increased abstraction volumes effectively prevent such increases;

19.3 The evidence does not support a conclusion that there is a sufficiently large volume of allocated but unused water that is available for transfer and likely to be transferred, so that transfers without the specified surrender constitute a real risk of serious or even material increases in water actually used;

19.4 There is an insufficient evidentiary basis to conclude that the prohibited activity status will have any substantial effect in reducing the level of over-allocation;

19.5 There is insufficient evidence to show that the reduction of the degree of allocation cannot be equally well achieved through a discretionary activity rule which enables those transfers that will, or are likely to, lead to the use of previously unused but allocated water to be refused.

20 In view of the above it is clear that, *vires* aside, the evidence does not show that the prohibited activity rule will, or is likely to, deliver the reduction in over-allocation that is cited as its justification. Under ss68(7), 128 and 130 a review is available once the allocation limits in the plan become operative. That is the obvious tool for reducing the level of over-allocation. For this reason also, the prohibited activity rule is not the most appropriate means of reducing the level of over-allocation.

Conclusion

21 The evidence demonstrates that the prohibited activity rule approach proposed by Variation 1 for water transfers is not the most appropriate means of giving effect to the statutorily prescribed aims. Furthermore, the evidence does not support a conclusion that it is the most appropriate means. On this basis alone the relief sought by HydroTrader can and should be granted.

22 If that relief is granted, the issues as to *vires* become largely academic. Even if the *vires* issues are rejected, the questions they raise indicate that if is not unlawful such a

prohibited activity rule is certainly unwise and unwarranted. The relief sought should be granted.

Dated 30 September 2014

J M van der Wal
Solicitor for Hydrotrader Ltd