

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010

AND

IN THE MATTER of the proposed Canterbury Land and Water Regional Plan

**REPORT AND RECOMMENDATIONS
OF THE
HEARING COMMISSIONERS
ADOPTED BY COUNCIL AS ITS
DECISION
ON 5 DECEMBER 2013**

Hearing Commissioners:

David F Sheppard (chairman)

Edward Ellison

Rob van Voorthuysen

reallocated for abstraction) "... until such time as the catchment is no longer over-allocated."

- [335] Another recommendation is to amend the time of year when the A permit minimum flows for the South Branch apply. Among the evidence we received on this matter we give greatest weight to the evidence of Dr Ryder⁷⁹ who, having reviewed a number of previous technical reports, concluded that

"... a higher minimum flow period expressed in the Plan for the South Ashburton (3,200 L/s October - April) is unnecessary to maintain the Ashburton salmonid fishery. A period of higher flow from February to April is adequate provided the frequency of floods and freshes is not significantly reduced."

We therefore recommend that Table 12 be amended by altering the period that the 3,200 L/s flow applies to "February to April" (instead of October to April as notified). Consequently the 2,300 L/s minimum flow is to be amended to apply to the balance of the year.

- [336] Based on the submission of Dairy Holdings Limited, we recommend the Table 12 allocation limit for B permit takes from Taylor's Stream above the South Branch Confluence is raised from 200 L/s as notified to 800 L/s. The reason for this amendment is that it "... would allow for the B-block take in process (CRC082614, 500 L/s) and for the 'error' to not include all existing B block takes in the B-allocation block ..."⁸⁰

16 Part surrender on transfer of water permits in over-allocated catchments

- [337] As notified, the LWRP provided by Rules 5.107 and 5.108 for transfer of water permits. Rule 5.107 would classify certain transfers as restricted discretionary activities on certain conditions. Of them, Condition 5 would apply in any catchment where surface water and/or groundwater allocation limits are exceeded. That condition of eligibility for a transfer to be considered as a restricted discretionary activity would stipulate that any transferred water is surrendered according to stated proportions. Rule 5.108 would classify as a non-complying activity a transfer of a water permit that does not comply with any condition of classification as a restricted discretionary activity.
- [338] Condition 5 is to implement Policy 4.73 (as notified), which applies to over-allocated surface-water catchments and groundwater zones. The policy is to enable transfers of water 'moving' to irrigation schemes, and in all other instances provided there is a partial surrender which is not re-allocated.

⁷⁹ Statement of Evidence by Gregory Ian Ryder on behalf of Rangitata Diversion Race Management Limited (Hearing 3), May 2013, page 13, paragraph 6.2.

⁸⁰ Statement of Evidence of Bas Veendrick, 2013, page 18, paragraph 54.

- [339] A number of submitters opposed Condition 5 in that it would require surrender of some of the amount of water that can be taken under the water permit to be transferred. One submitter (HydroTrader) also asserted that Rules 5.107 and 5.108, or at least Condition 5 of the former, are *ultra vires* the CRC. Several other submitters supported that assertion, and the legal submissions presented on it.
- [340] If the rules, or at least Condition 5, are indeed *ultra vires*, there may be no need for us to consider whether they are justified on their merits; so we address the legal questions first.

16.1 Are Rules 5.107 and 5.108, or is Condition 5 of Rule 5.107, ultra vires the CRC?

- [341] Counsel for HydroTrader made two main submissions: that section 77A of the RMA does not confer on the CRC power to assign an activity status on transfer of water take consents; and that, even if it does, Condition 5 is *ultra vires* section 77A.

Can transfer of a water permit be assigned to an activity class?

- [342] On the first main submission, that section 77A does not empower a council to assign an activity status to transfer of a water permit, counsel advanced these grounds:
1. Transferring a water permit is not an ‘activity’, which is the only thing to which, under section 77A(1)(a), activity status can be assigned.
 2. Section 136(2)(b)(ii) does not contemplate a situation where no application can be made, leaving a question whether section 77A was intended to apply to transfers.
 3. Section 87A only applies to something for which a resource consent is required, being an ‘activity’.
 4. By section 136(4) an application for approval of a transfer is not an application for a resource consent, but is to be considered “as if ...an application for a resource consent”: A transfer does not authorise an ‘activity’ in the way a resource consent does.
 5. As section 136(4)(b) does not apply sections 104A to 104D to consideration of applications for approval of transfers, there is no need to apply the full consequences of the various classes of activity described in section 87A.
 6. The location of section 136 among the provisions of the RMA governing administrative acts concerning consents already granted indicates it is not intended to be among the activities for which resource consent is required.
 7. Conditions authorised by section 108 do not typically lend themselves to the act of transferring a consent, but rather to an activity that would contravene sections 9 or 11 to 15 without a resource consent.

Consideration of HydroTrader’s legal submissions on classifying transfers

- [343] Transfers of water permits are governed by section 136 of the RMA. Relevantly, section 136(2) enables a holder of a water permit (other than for damming or diverting water) to

transfer it to another person or another site if both are in the same catchment or aquifer, and either the transfer is expressly allowed by a regional plan, or it has been approved by the consent authority that granted the permit.

- [344] Section 136(4) applies to applications for the consent authority's approval. It stipulates that an application is to be considered in accordance with certain provisions that apply to resource-consent applications generally; and also that the consent authority is to have regard to the effects of the proposed transfer, including the effect of ceasing or changing the exercise of the permit under its current conditions and the effects of allowing the transfer.
- [345] We understand that in considering submissions on a proposed plan, a local authority should apply the law as declared by the courts. The Environment Court has held⁸¹ that a regional plan may classify transfers of water permits as permitted activities or as restricted discretionary activities.
- [346] We have considered whether, on HydroTrader's submissions, the CRC should decline to apply the case law on the point. We understand that, in making provision for approval of water permits, instead of creating a new protocol for the purpose, Parliament chose to adapt the existing well-established protocol for resource-consent applications. As can occur when a process designed for one purpose is adapted for another, there may be instances where the 'fit' may be imperfect. A purposive interpretation may be appropriate in such cases.
- [347] A basis of Hydrotrader's submissions on this point is that transferring a water permit is not an 'activity' to which activity status (such as restricted discretionary) can be assigned.
- [348] We accept that transferring a permit is not a physical activity, and calling it an 'activity' is metaphorical or conceptual. Similarly the items in the list of activities in section 77A(2) (e.g. a permitted activity, a restricted discretionary activity etc) are not physical activities either. For identifying an activity, we cannot distinguish a transfer of a water permit from items in that list.
- [349] By section 136(5) where a transfer is approved (and is not for a limited period) the original permit (or the part transferred) is deemed to be cancelled, and the holder's interest (or part of it) to be transferred is deemed to be a new permit on such conditions as the consent authority determines. So although it is in the approval process that a consent authority is empowered to determine such conditions, they are not conditions of the approval as such, but conditions of the deemed new permit replacing that which is being transferred.
- [350] We infer that the purpose is twofold: for the consent authority to have opportunity to decide whether or not a proposed transfer deserves approval; and to review the

⁸¹ *Carter Holt Harvey v Waikato Regional Council* [2011] NZEnvC 380 [456].

suitability for the changed circumstances (including new site) of the conditions of the water permit. Although various provisions for resource consent applications raised by HydroTrader may not fit precisely for the adapted context for approval of transfers of water permits, the provisions should be interpreted so as to serve the dual purpose by which approval may be granted or declined, and new conditions may be determined. That can be achieved by classifying transfers as, for instance, restricted discretionary activities.

[351] Therefore we are not persuaded by HydroTrader's submissions, and consider that the CRC should apply the Environment Court decision by which approval of transfers of water permits may be classified as a restricted discretionary activity.

Is Condition 5 *ultra vires* section 77A?

[352] On HydroTrader's second main submission, that Condition 5 is *ultra vires* section 77A, counsel presented these points:

1. The Act restricts circumstances in which grants of consent can be reversed in whole or in part, as they are valuable economic rights.
2. A condition that is *ultra vires* section 108 is *ultra vires* section 77A.
3. Conditions under section 136(5) can only restrict the activity being authorised by the resource consent, such as taking water, and cannot restrict the transfer itself.
4. Section 87A preserves the terms and conditions that applied to a particular activity (taking water for example), when consent was granted, irrespective of subsequent rule changes.
5. Changes to consent conditions have to remain within the bounds of the original restrictions, terms and conditions.
6. A requirement to surrender 50% of the amount to be taken would frustrate or negate the grant, and is therefore not available under section 108, and cannot be required under section 77A.
7. The focus of section 136(4) and the need for approval is not the volume of the allocation, but the location where it is exercised. Wherever it is exercised does not alter the effect of the amount allocated, so it is not within the effects of the transfer.
8. The purpose of the surrender requirement is not a resource management purpose, but an ulterior one and would abrogate rights conferred by statute.

Consideration of HydroTrader's submissions that Condition 5 is *ultra vires*

[353] We accept the general thrust of points 1, 2 and 3. On point 4, even if section 87A has the effect suggested (of which we are unsure), that would not restrict the separate power conferred by section 136(5).

[354] The latter, by paragraphs (a) and (b), makes separate provisions about conditions of deemed new water permits on transfer. Paragraph (a) applies to transfers to which subsection (3) applies, that is, where approval is not required. Paragraph (b) applies to

transfers to which subsection (4) applies, that is, transfers that are not expressly allowed by a regional plan, and for which consent authority approval is required. Paragraph (a) stipulates that a deemed new permit to which it applies is to be on the same conditions as the original permit. But paragraph (b) expressly empowers the consent authority to set such conditions of the deemed new permit as it determines.

- [355] The class of transfers addressed by HydroTrader's submissions is that to which section 136(4) applies. Section 136(5)(b) empowering the consent authority to set conditions of the deemed new permit is to be read in the context of section 136(4)(b)(ii) which directs the consent authority to have regard to the effects of the proposed transfer, including the effect of ceasing and changing the exercise of the permit in the current conditions of the site, and the effects of allowing the transfer. Reading those provisions together, the permissible scope of conditions determined for the deemed new permit is that stated generally in section 108, and the additional matters to which the consent authority is directed by section 136(4)(b)(ii) to have regard.
- [356] Although conditions of a deemed new permit to which subsection (3) applies is limited to the same conditions as the original permit, we have not found any indication or necessary implication that the scope of conditions set under paragraph (b) is restricted to the bounds of those of the original permit. Indeed, the purpose of the separate provision in paragraph (b) for transfers to which section 136(4) applies can only be to allow a broader scope of conditions than the original conditions. So we do not accept HydroTrader's points 4 and 5.
- [357] On point 6, it is the nature of conditions of resource consents that they restrict what otherwise would be allowed. The scheme of the Act allows questions of extent or degree on whether a particular condition is excessive or disproportionate to be reviewed on appeal. In the present context, partial surrender is a condition of a transfer being classified by notified Rule 5.107 as a restricted discretionary activity, and is not applied to a transfer treated as a non-complying activity by notified Rule 5.108 (recommended Rules 5.133 and 5.134 respectively). Submitters on the LWRP are entitled to question the appropriateness of those rules, including by raising questions of extent or degree of conditions of eligibility for transfers to be considered as restricted discretionary activities. But those questions are for consideration on their merits. We do not understand that they bear on HydroTrader's legal submission that Condition 5 of Rule 5.107 is *ultra vires* the CRC's powers under section 77A.
- [358] We are not persuaded by point 7. Condition 5 of notified Rule 5.107 only applies to transfers in catchments that are over-allocated. It is in those catchments that amounts of water taken may have significant effects.
- [359] The amount of a permit to take water that may be transferred to another site may bear on the effects of allowing the proposed transfer, including the effects of ceasing or changing its exercise under current conditions. We do not accept that the place where a permit to take water is exercised does not alter the effect of the amount allocated.

- [360] Nor do we accept point 8 that phasing out over-allocation of water taking is not a resource management purpose, but an ulterior one. Section 30 RMA identifies taking and allocation of water as functions of every regional council. The NPSFM (an instrument under the RMA to which the LWRP is to give effect) requires regional councils to phase out over-allocation, and to state criteria in regional plans for approval of transfers of water take permits.⁸² The RPS (another instrument under the RMA to which the LWRP is also required to give effect) identifies that where a water resource is over-allocated, transfer mechanisms can promote the efficient use of water resources, especially where potential demand may exceed availability.⁸³ In fully allocated catchments, transfers need to be considered in a comprehensive and integrated manner.
- [361] Having considered the several points made in support of Hydrotrader's second submission on whether Condition 5 is *ultra vires*, we find that it is not supported, and we do not accept it.

16.2 Is Condition 5 inappropriate on its merits?

- [362] Having rejected HydroTrader's submissions that Condition 5 is *ultra vires*, we have to consider the submissions that it should be deleted or amended as inappropriate or excessive. Following the presentation of submissions and evidence, we consider the surrender of a portion of the water allocated should be addressed by making reduction in the rate or volume of taking, as may be required to assist with the phasing out of exceedance of limits, a matter to which exercise of discretion should be restricted. In that way some water in over-allocated catchments, particularly if not currently being used, or used efficiently, may be recovered. But the specific proportions stipulated in the notified version would no longer be prescribed.
- [363] We consider that such an amendment to the rule (recommended Rule 5.133) would be responsive to the CRC's duties in respect of over-allocation in giving effect to the NPSFM and the RPS. The extent of reduction would be assessed by the consent authority case by case. In our judgment amended in this way the rule would carry out the CRC's relevant functions under section 30; would be the most appropriate for achieving the objectives and implementing policies of the LWRP; and would show regard to actual and potential effects of taking water on the environment. The benefits and costs of taking water, and the risk of acting or not acting, would be taken into account by the consent authority's consideration of granting or withholding approval of a proposed transfer. We are satisfied that the recommended rule would show regard to the vision and principles of the CWMS, and would assist the CRC to carry out its functions in order to achieve the purpose of the Act, and would promote the sustainable management of the natural and physical resources involved. So we recommend that the submissions on notified Rule 5.107 and condition 5 are accepted to the extent that

⁸² Objectives B2, B3; Policies B3, B5, B6.

⁸³ See CRPS Issues 7.1.4 and 7.1.5; Policy 7.3.4(2).

condition 5 is omitted and that item 7 is added to the list of matters to which the exercise of discretion is restricted, as shown in the marked-up version of the LWRP in Appendix 2 to this report.

17 Lapsing of resource consents

[364] Some submissions questioned whether the LWRP can or should control the period for lapsing of unimplemented resource consents.

[365] Relevant parts of section 125 of the RMA provide:

- (1) A resource consent lapses on the date specified in the consent or, if no date is specified, —
 - (a) 5 years after the date of commencement of the consent ...;
- (1A) However, a consent does not lapse under subsection (1) if, before the consent lapses, —
 - (a) the consent is given effect to; or
 - (b) an application is made to the consent authority to extend the period after which the consent lapses, and the consent authority decides to grant an extension after taking into account—
 - (i) whether substantial progress or effort has been, and continues to be, made towards giving effect to the consent; and
 - (ii) ...
 - (iii) The effect of the extension on the policies and objectives of any plan

[366] The LWRP as notified addressed this in Policy 4.75 (now recommended Policy 7.73):

Resource consents to abstract water shall be given effect to within two years unless a longer lapse period is justified to give effect to the consent due to the scale or complexity of the activity. For the purpose of this policy, 'given effect to' requires the installation of infrastructure, water meter and use of the water as proposed.

[367] That policy drew a number of submissions. Some asked that this policy be deleted; and those requests were opposed by other submitters. Other submitters asked that the policy be amended to extend the presumptive period from 2 years. Most of them asked that the period be extended to 5 years. One asked that it be 3 years for individual consent-holders and 5 years for irrigation schemes.

[368] Other submitters opposed extending the presumptive lapsing period.

[369] We note that the lapsing period applicable to any permit to take water would not be set by the policy: It is to be specified by the consent authority in the circumstances of the particular case. The two-year period in the policy is only a general and presumptive period, and does not constrain the consent authority.