

IN THE MATTER OF the Resource Management Act 1991

AND

IN THE MATTER OF a joint application by Central Plains Water Trust and Ashburton Community Water Trust to:

Canterbury Regional Council for resource consents to take water from the Rakaia River for use by the Central Plains Water Enhancement Scheme and the Rakaia Terrace Hydro Scheme

IN THE MATTER OF applications by Central Plains Water Trust to:

Canterbury Regional Council for resource consents to take and use water from the Waimakariri River and to use water from the Rakaia River for the Central Plains Water Enhancement Scheme and for associated consents required for the construction and operation of the Central Plains Water Enhancement Scheme; and to

Selwyn District Council for resource consents to construct and operate the Central Plains Water Enhancement Scheme

AND

IN THE MATTER OF a notice of requirement by Central Plains Water Limited to:

Selwyn District Council for the designation of land for works associated with the construction and operation of the Central Plains Water Enhancement Scheme

IN THE MATTER OF applications by Ashburton Community Water Trust to:

Canterbury Regional Council for resource consents to use and divert water from the Rakaia river for the purposes of hydro electricity generation and associated consents required for the construction and operation of the Rakaia Terrace Hydro Scheme.

**Minute 7 of Commissioners, reasons for decision as to continuance of the hearing
19 May 2009**

1. DISCUSSION

Background

- 1.1** We have issued a Minute which sets out our decision to request further information from Central Plains and to continue the hearing to hear that evidence and any responses to it. In view of the public and submitter interest in this matter generally and the views of some submitters that we should not continue with the hearing, we discuss our reasoning in more detail than would normally be necessary.
- 1.2** A detailed discussion of this matter is appropriate given that a number of submitters argue that it would be contrary to case law, and/or unfair to submitters to continue. We are appreciative to all counsel who assisted us on this matter. It proved to be a more complex issue than we had envisaged. This is reflected in the six hours of argument which we heard. Whether or not we have mentioned them in here, we have carefully considered all arguments advanced to us, in reaching this decision.
- 1.3** We are hearing a comprehensive set of resource consent application by Central Plains Water Trust (CPWT) and a joint application by CPWT and Ashburton Community Water Trust (ACWT) to take water from the Rakaia River along with Notices of Requirement (NoR) by Central Plains Water Limited (CPWL).
- 1.4** We left both the hearings open in case we required further information. In the case of CPWT/ CPWL we signalled that if we were going to grant consents and recommend in favour of the Notices of Requirement we would need to request further information regarding conditions and reconvene the hearing to deal with that.
- 1.5** We are issuing a final decision in respect of ACWT this week granting those applications. As part of that decision, we have decided to issue a separate consent to ACWT to take water from the Rakaia River, notwithstanding that its application was made jointly with CPW. The reasons for that are set out in the substantive decision.
- 1.6** In March, we informally advised CPW that we would most likely be recommending that CPW should withdraw that part of its Notices of Requirement relating to the Waianiwaniwa dam and reservoir, and for the associated upper Waimakariri intake and tunnel and that we would be declining associated consents.
- 1.7** We also indicated that our tentative view was that if we reject the dam and reservoir, we would probably need to also reject the balance of the project (even if we concluded that some or all of the other components could be acceptable without the dam). This view was based on our understanding that the scheme has been presented to us as an integrated package and because it seemed to us that it would be a very different scheme without large scale storage. We also noted that without the reservoir, the volumes of water required by the scheme for take and for use (at least during winter) are likely to be less than what has been advanced to us thus far. At this stage we do not have sufficient information to be able to assess the implications of a scaled down proposal.
- 1.8** We also noted that we have reached a tentative conclusion that, but for our likely decision on the storage facility, the Waimakariri and Rakaia takes could possibly

be granted (albeit for lesser rates and volumes of take than have been applied for, at least in the case of the Waimakariri).

- 1.9** We took the unusual step of advising CPW of our likely conclusions on the dam, because we considered it appropriate for CPW to have an opportunity to respond, in terms of how it sees that decision impacting on its scheme and on our decision making power in relation to the balance of the scheme
- 1.10** For example, in the event that we conclude that the taking of water could be sustainable within appropriate limits, we need to decide whether it would be appropriate to grant consents for take and use in circumstances where the details of the use may not have been finalised. (The area of land to be irrigated and the volumes of water required for that, depend upon how much storage is available and final details of that may not be known when we make our decision.)
- 1.11** CPW responded with a Memorandum which suggested that we do not close the CPW part of the hearing but instead seek further information from CPW as to the implications of our likely decision on the dam components for the balance of the consents and Notice of Requirement for Designation.
- 1.12** CPW wished to address us on this issue. It suggests that we could still potentially grant consents for other aspects of the project and recommend in favour of the NoR for the lower Waimakariri intake, the Rakaia intake, terrace canals and headrace canal.
- 1.13** Given the significant investment in this project and the hearing to date, we considered it appropriate to provide CPW with the opportunity to make submissions on this point and for others to respond. Whilst we had some reservations as to whether we could or should do what CPW suggest, we were also of the view that an "all or nothing" approach is potentially wasteful of the significant effort that CPW, submitters and officers have put into this hearing. (In short, there is a danger that we may throw both the baby and the water out with the bathtub.) We also accepted that there are arguments available to CPW to support the approach it is suggesting.
- 1.14** In our Minute of 1 April we set out a process to resolve this procedural issue which we considered to be fair to all parties.
- 1.15** We emphasised that even if we are persuaded that we could consider the other applications matters independently, there is no guarantee that we would find in favour of those. Whilst we have reached some reasonably firm conclusions on the dam and associated components, we have not yet finalised our views on other components and effects. (By way of example, we have not reached detailed conclusions on nutrient and mounding issues nor on the amenity, landscape, natural character and safety effects of the lower intake and terrace canal.)
- 1.16** We observed that if we were to agree to the request to keep the hearing open, we would then need to request further information from CPW as to the effect of the removal of the storage dam from the scheme on other components of the scheme. For example, we would need to understand the implications in terms of irrigable area and annual or seasonal volumes of take from each river.

The hearing on this matter

1.17 The purpose of the hearing on 11 May was to hear submissions as to:

Whether we should close the CPW part of the hearing and proceed to issue a final decision? or

Whether we should leave the hearing open so as to receive further evidence from CPW later in the year?

1.18 The key question we asked of parties is:

Whether if (as signalled) we recommend that the dam, upper intake and tunnel not be confirmed, and decline associated consents, we could still potentially grant some or all of the consents for the taking and use of water and the distribution network and recommend confirmation of the headrace canal, the lower Waimakariri and Rakaia intakes (if we are satisfied that some or all of those other components are in accordance with purpose and principles of the Act).

1.19 In essence, the question of whether we continue relates firstly to a legal question as to whether we **could** issue a negative decision on the dam and a positive decision on other aspects and in particular the water takes, water use, remaining intakes and headrace canal. Secondly, there is a question of whether we **should** continue. The issue there is whether this course would be fair to submitters.

The key issues

1.20 After hearing submissions we concluded that there are four key issues:

- *If after hearing further evidence, we decided to grant consent for a scheme without the reservoir, would this be an impermissible amendment to the proposal which would go beyond the scope of the original applications?*
- *Would such a decision be contrary to case law which suggests a holistic/integrated approach to decision making?*
- *Would continuance be "appropriate and fair in the circumstances"? (section 39)*
- *Would this be contrary to our duty to avoid undue delay?*

1.21 If we reach the conclusion that such a decision would most likely be beyond jurisdiction or be contrary to other case law, then clearly we should not continue since that would be a waste of time and resources. Similarly, we should not continue if that would be an unfair procedure in the circumstances or would cause undue delay.

The position of Central Plains Water Trust

1.22 In summary, Mr Casey QC submitted for CPW that:

- There is no jurisdictional barrier to us continuing because any amendments to the applications as a result of the dam, upper intake and tunnel being declined would not increase the scale and intensity of adverse effects on the environment.
- The character of the applications and proposal would not be substantially different.
- The application to use water was and remains an application to use water for irrigation and the absence of large scale storage does not alter this character.
- The overall proposal has always been for an irrigation scheme. Whilst the reliability of water supply and perhaps the area to be irrigated will reduce without large scale storage, this is not a change of character.
- The dam though critical to reliability, is ancillary to the overall proposal.
- No party would be prejudiced because it is implausible that other persons will be affected by the change and may have submitted had they been aware of the amended scheme.
- It has always been open to the applicant to withdraw components of the scheme, either during the first instance hearing or before any appeals are heard.
- The circumstances here are different from those which pertained in other cases where the Environment Court has declined consent rather than issue scaled back consents.
- There is no principle that prevents an applicant from scaling back its proposal.
- Whilst submitters will be inconvenienced by having to deal with further evidence, there is no unfairness to them provided that a fair procedure is followed for the resumed hearing.
- The continuance of the hearing will not result in any undue delay, in the context of the time involved in the hearing and the preparations for it to date.
- The uncertainty and restrictions (planning blight) which apply to those landowners or occupiers subject to the parts of the Notice of Requirement relating to the upper Waimakariri intake and the dam and reservoir can potentially be eliminated by CPW withdrawing those parts of the Notices of Requirement.
- Alternatively, those uncertainties and restrictions would apply in any event if CPW rejects our recommendation and other persons appeal.

1.23 For the reasons set out later we largely agree with these submissions.

Submissions on behalf of Selwyn District Council and Environment Canterbury

- 1.24** Mr Rogers presented submissions on behalf of the officers of both consent authorities. He emphasised that he would concentrate on the issue of whether we **could** legally proceed with the hearing and potentially grant consents and recommend in favour of some or all of the balance of the scheme notwithstanding that we declined the Waianiwaniwa dam and associated components. In summary he submitted that we could do so, but whether we should do so was a matter for our discretion and not one which the Councils wished to comment on. He made similar submissions to Mr Casey on the legal issues. Both he and Mr Casey agreed that there was no legal principle that we must adopt an all or nothing approach.

Ashburton Community Water Trust

- 1.25** Ms Appleyard for ACWT submitted in support of continuance. She was in agreement with Mr Casey and Mr Rogers on the law. In addition, she advanced some potential practical advantages of continuing. She suggested that this would provide a good opportunity for CPW to bring its proposal into closer alignment with the Canterbury Strategic Water Study and to investigate other storage options.

Synlait

- 1.26** A letter was tabled on behalf of Synlait offering cautious support for continuance. It pointed out that a proposal without large scale storage would result in a scheme with much less reliability.

Opposing submitters

- 1.27** Malvern Hills Protection Society, The Department of Conservation, Forest and Bird, TRONT (Te Runanga o Ngai Tahu), Fish and Game and the Bull family, (affected by the lower intake and headrace) all submitted that we should not hear further evidence and that we could not grant some of the applications and/or recommend in favour of part of the Notice of Requirement if (as we have signalled) we decide to recommend against the dam, reservoir, tunnel, and upper Waimakariri intake and decline the relevant consents.

- 1.28** The arguments in opposition can be summarised as follows.

- The change from a storage based scheme to a run of the river scheme would be a substantial change to the nature of the application for use of water and to the character of the overall proposal.
- A run of the river scheme is less likely to be a community scheme (as promoted by CPW) than would a storage scheme.
- There would be potential for greater adverse effects.
- There would be less beneficial effects. In particular there would be less reduction in groundwater take than was postulated in evidence and less recharge and therefore less benefit in terms of replenished flows to the Selwyn River and lowland streams.

- The fact that new evidence would be required on the take regime, ground water mounding and nutrient contamination suggests that the scheme without storage would be a fundamental change to the proposal.
- It is plausible that there are other persons who may have submitted on the application had they known that it was to be a run of the river scheme rather than a storage based scheme. (For example anglers who thought that the Selwyn River would benefit from higher flows, which with a run of the river scheme would not be so high.)
- There may be shareholders including those affected by the headrace or distribution network, who have submitted in support or who have not submitted because they thought that they would get reliable water. With a run of the river scheme they would not obtain the same, or perhaps any benefit and may have submitted in opposition.
- There would be prejudice to submitters who made a limited submission because of the benefits of a storage scheme and whose appeal rights in relation to a run of the river scheme will be constrained by that.
- If we granted approvals which did not include the reservoir, this would be contrary to a holistic approach.
- There is case law which suggests that where a proposal has been presented on an all or nothing basis, the consent authority should not grant consent for less than what was applied for.
- Rather than focussing on a comparison between the amended applications and the original applications we should focus on the change in character of the overall proposal.
- Consultation with other parties and in particular Ngai Tahu has been on the basis of a storage scheme not a run of the river scheme.
- The applicant's promotional material touts the benefits of a storage scheme and its evidence was focussed on a storage scheme.
- Its evidence suggested that the reservoir was critical, how can it now say it still has a scheme without a reservoir?
- It would be unfair to submitters to continue because it would extend the period of uncertainty.
- There is "planning blight" on those affected by the NoR in relation to the reservoir and dam and this would be extended if we do not issue a decision as soon as possible.
- Those affected by other components of the scheme would face additional delay in obtaining certainty.
- The scheme would still have adverse effects on some persons and the environment and the sooner it is declined the better.

- The removal of these components would be an impermissible modification to the Notice of Requirement. Our only option is to recommend the cancellation of the NoR. (Ms Crawford for Fish and Game and the Bull family)
- There were also submissions from the District Health Board and the Arawa Canoe Club. These submissions were directed at ongoing concerns regarding the proposal rather than changes which might result from the amendments to the proposal. Accordingly neither submission is relevant to our present inquiry.

1.29 We apologise if we have not captured every aspect of the supporting or opposing arguments.

2. REASONING

2.1 As outlined above we have decided that we can and should request further information from the applicant and consider that information along with responses from the submitters and officers in October this year. We now outline our reasoning by reference to the key issues identified earlier.

Context

2.2 The current issue is slightly unusual and is distinguishable from much of the case law. CPW is not seeking to amend its proposal between our decision and the determination of any appeals. Rather, it is responding to our indication that it is unlikely that we will approve certain components of its scheme.

2.3 Its response has been that it considers that it still has a case for taking and use of the water and related components of the scheme. It has requested that we consider that case.

2.4 If instead of signalling our likely decision, we had declined all consents and recommended against all aspects of the proposal, then it would have been open for CPW to either accept or appeal our whole decision, or to accept our recommendation in relation to the dam, reservoir, upper intake and tunnel and appeal the remainder. (i.e. it could have withdrawn the reservoir and related components.)

2.5 It would also have been open to CPW to have voluntarily withdrawn those components before or (in our view) during the current hearing.

2.6 It has always indicated that the final design of the scheme would depend upon the outcome of the RMA process and upon economics. Thus for example, the upper intake and the tunnel were presented as being uncertain options.

2.7 Similarly the final height of the dam and storage volume of the reservoir was presented as being open to amendment.

2.8 We heard evidence from Mr Tipler, on 4 July 2008, in which he stated that the scheme might operate as a run of the river scheme in the early years of the project. This was set out in his paragraph 39:

“It may eventuate that during construction, run of river water is made available at an earlier time than water from the reservoir. As I have previously shown, run of river water is not very reliable, and therefore existing consent holders may choose to maintain their existing groundwater irrigation infrastructure and rights to take, such that when scheme water is not available, groundwater could be used. It would therefore not be practicable to require as a condition of supply, that existing water permits to take groundwater for irrigation be surrendered. As a mechanism to prevent the inefficient use of water for irrigation, I suggest a condition that limits the volume of water applied to any land that receives scheme water and groundwater. I suggest this annual limit should be set at 625mm/yr. This is the maximum seasonal demand assumed in the Aqualinc groundwater modelling as described in the application documents. This would therefore prevent the inefficient use of water for irrigation. ...”

- 2.9 We also heard from Dr (now Justice) Wylie in the Applicant’s opening address that:

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The scheme will operate as a "run of river" scheme when water is available from either or both of the Rakaia and/or Wairakariri Rivers. When water is not available from the rivers, the scheme will operate as a "storage" scheme with water being supplied from the reservoir in the Waianiwaniwa Valley.

Para 48

Ultimately reliability will be affected by the maximum rates of take available from time to time from each river and by the volume of storage provided in the reservoir. The maximum rates of take available will depend on the terms of any consents granted, and on climatic and other factors. Final decisions have yet to be made on the size of the reservoir. There is a trade off between storage, economics and the highest levels of reliability which are ideal. This fine detail can be left to the design stage. The applications which have been made allow the applicant a degree of flexibility.

- 2.10 Not surprisingly, CPW did not suggest that the reservoir was sacrificial. To the contrary, it presents water storage as the key to "water enhancement" and to reliability. Its economic evidence suggested that high reliability as a result of the reservoir was critical to the economic benefits to be obtained from the scheme.
- 2.11 Since that evidence was given two things have changed. Firstly the international and national economic situation has severely deteriorated and secondly we have indicated that we do not consider the reservoir proposal to be sustainable. CPW has reassessed its position in the light of the second and perhaps the first of those factors and has decided that it still has a viable scheme provided that it can

access the water from both rivers. It may also apply for other consents to enhance the reliability of the scheme.

2.12 CPW and/or Ms Appleyard for ACWT have indicated that there are a number of options available to CPW including:

- On farm storage perhaps supplemented by a small scale storage facility such as has recently been consented for Rangitata South Irrigation Limited.
- Using the scheme to supplement ground water takes.
- Reducing the command area.
- The shareholders accepting lower reliability in exchange for a less costly scheme.
- Using winter water to recharge ground water so as allow for greater or sustained ground water takes during the irrigation season.
- Water sharing arrangements with others such as Synlait and Ngai Tahu which may provide it with more water.
- The development of alternative large scale storage utilising Lake Coleridge or Lees Valley or some other location.

2.13 The key argument by CPW is that it will be able to demonstrate a "*reasonable need*" for as much water as it can sustainably take, notwithstanding that it may not have a large scale storage facility. We say "may not" because it is open to CPW to come back later with alternative storage options.

Jurisdictional issues

Scope to modify the Notice of Requirement

2.14 We will deal first with the submission by Ms Crawford that we have no power to recommend modification of the notice of requirement by deletion of the dam and reservoir. She says that since CPW has lodged a single notice of requirement for all components apart from the tunnel, it cannot withdraw those parts relating to the dam and reservoir.

2.15 Section 168 provides that a requiring authority may at any time withdraw a requirement. It is debatable whether this power extends to withdrawal of part of a notice of requirement. However that is not a matter we need to determine.

2.16 Section 171 provides that we may recommend to CPW that it confirm the requirements, modify them, impose conditions or withdraw them.

2.17 Section 172 then provides the requiring authority with the power to accept or reject our recommendation in whole or in part. It may only modify a requirement if the modification is recommended by us, or if other modifications are not inconsistent with what was notified.

2.18 In our view section 171 allows us to recommend the modification of a requirement by recommending a reduction in the area and scope of the requirement. We note that the power to recommend modification is separate from the power to recommend conditions. Accordingly it seems to us that the power of modification relates to the geographic scope of the requirement and to the matters which it seeks to authorise.

2.19 Ms Crawford relies upon the decision of Ronald Young J in the High Court in *Takamore Trustees v Kapiti Coast District Council*. That decision related to an appeal by the Trustees against a decision of the Environment Court confirming a NoR for a link road in Kapiti. The Court made the following comments:

[34] The second part of the Takamore Trustees appeal in ground 2 was the claim that the Court could have confirmed the majority of the intended NOR route but could have modified or withdrawn that part between the Waikanae River and Te Moana Road being the part objected to by the Trustees. In particular this was the area the Trustee claimed a confirmation of the NOR would have the greatest effect on their ancestral lands. The Appellant says that it skews the s5 assessment when the comparison is between the need to build the whole of the link road against the environmental effects of the small section of road objected to by Maori.

[35] The first and most obvious point in relation to this ground is that it goes to weight and is therefore not a point of law. In this case the majority concluded that there were no grounds to set aside the designation over the total route. In those circumstances there could hardly be a need to consider the NOR section by section. And if a section of the NOR was not to be confirmed (if there was power to do so) the immediate consequence was whether the link road was any longer a link road at all performing the functions intended.....

*[37] On the face of it the Court had no power to cancel part of the requirement. For good reasons it will be all or nothing. Nor could it be suggested that a cancellation of part of the NOR was simply a modification of the overall scheme. **The cancellation of a significant piece of the NOR is well beyond modifying a proposal. The words used in s174(4) are "cancel" not "cancel in whole or in part". I do not consider the Court had power to cancel part of the requirement in the way proposed.***

[38] Finally, a redirection of the Waikanae/Te Moana Road route could not be undertaken by the Court. If it was not satisfied that part of the route met the RMA requirements, then its task was to refuse to confirm the NOR. The Court had no power to substitute its own alternative route.

2.20 Given that the Court had concluded that this ground was not a matter of law, its comments are obiter (non binding) but are of course authoritative. However, the Court was considering a very different situation from here. In that instance, a submitter was endeavouring to suggest that the Court (in the face of opposition from the requiring authority) could have modified the designation by deleting a critical part of it. With a chunk taken out of the route, it would no longer have been a link road, which is what the designation was for.

2.21 In the present instance the question is whether we can *recommend* to CPW that it modify part of the NoR to delete some components. It will be up to CPW whether

it regards those components as being so critical, that it sees such a recommendation as being in effect a recommendation to cancel the NoR. If instead, it decides that the deleted components are not critical (as it has already signalled in its Memorandum and submissions) then that is a decision for it, not us.

2.22 We do not see the *Takamore* decision as providing a barrier to our recommending that CPW modify the requirement to remove the offending components provided that it has not presented those components to us as being essential to its scheme.

2.23 It is up to the Courts, not us, to interpret section 171. However, in our respectful view, the High Court's finding on this matter needs to be considered in the circumstances it was dealing with. If there is a legal principle then in our view it is:

The cancellation of a significant piece of the NOR [where the component in question is presented by the requiring authority as being indispensable to its proposal] is well beyond modifying a proposal. If [the consent authority or Court] was not satisfied that [an essential] part of the route met the RMA requirements, then its task was to refuse to confirm the NOR.

2.24 Whilst CPW has until now signalled that the reservoir is a very important component it has not presented that as indispensable. In any event, even if that was the case, it has now signalled that it is no longer its position that the reservoir is essential. We do not see section 171 as being a barrier to our considering this revised position since it is the Requiring Authority which is now saying that this component though highly desirable is dispensable.

2.25 In passing we note that section 172 may prevent CPW from modifying the principal NoR before it receives our formal recommendation. However, there is nothing to prevent it withdrawing the NoR for the tunnel and all of the related applications for consents at any time. Nor is there anything to prevent it indicating in the next month or so, whether it will be accepting our recommendation on the upper intake, dam and reservoir, once it has received our formal recommendation. It has already signalled in its March Memorandum that it is likely to accept our recommendation but that it wants to see our reasoning first. (CPW has in fact already withdrawn part of the NoR for the Headrace through Sheffield.)

Is it within our jurisdiction to amend the proposal by deleting the reservoir?

2.26 In *Haslam v Selwyn District Council*, the Environment Court noted that:

"In practice, the lodging of submissions and the presentation of opponents' cases frequently leads to applicants or consent authorities modifying proposals to meet objections that are found to be sound. That must surely be part of the statutory intent on providing for making submissions."

2.27 That is what has happened here. Having heard submissions and evidence on the dam, reservoir and upper intake we have reached a preliminary conclusion that these components are unsustainable. As a consequence we are likely to require the deletion of these components, but we are not suggesting that anything be

added to the proposal. (However CPW is at liberty to apply for other approvals for additional components at a later date.)

- 2.28 A useful starting point is the Court of Appeal's decision in *Shell NZ Ltd v Porirua City Council*. The Court of Appeal declined special leave, on the ground that there was no question of law apt for consideration on a second appeal. In doing so, the Court took the opportunity to confirm:

*"... that jurisdiction to consider an amendment to an application is reasonably constrained by the ambit of an application in the sense that there will be permissible amendments to detail which are reasonably and fairly contemplatable as being within the ambit, but there may be proposed amendments which go beyond such scope. **Whether details of an amendment fall within the ambit or outside it will depend on the facts of any particular case, including such environmental impacts as may be rationally perceived by an authority.**"*

- 2.29 This suggests to us that this is a matter we must decide once we have heard all of the evidence and assessed the environmental impacts of the amended proposal. That is, we can not finally determine this jurisdictional issue, until we have heard by way of evidence, what CPW's amended proposal is. In view of this, Mr Wallace for Ngai Tahu wondered what the purpose of our current inquiry is. The short answer is that if it is inevitable that we will not have jurisdiction to do anything except decline the proposal, then we should get on and do that now. If on the other hand there is a reasonable prospect that CPW can persuade us that it still has a reasonable need for the water which it seeks, then we should hear its evidence on that matter. Only then can we decide whether the proposal is both within jurisdiction and sustainable.

- 2.30 In *Waitakere CC v Estate Homes Limited* [2007] 2 NZLR 149 (SC) the Supreme Court considered the scope of the Environment Court's jurisdiction in relation to varied conditions of a subdivision consent. The Supreme Court cited with approval the decision of the Court of Appeal in *Shell* and clarified the position at law as follows (emphasis added):

"[29] We accept that in the course of its hearing the Environment Court may permit the party which applied for planning permission to amend its application, but we do not accept that it may do so to an extent that the matter before it becomes in substance a different application....

...

[35] When, on appeal to the Environment Court, an applicant seeks to have an application granted on a materially different basis from that put forward to the Council, considerable care is required before the Environment Court permits the matter to proceed on that different basis. Not every alteration in approach would require an applicant to make a fresh application to the Council, rather than to proceed by way of appeal. It is a question of degree. Furthermore, as the majority of the Court of Appeal recognised, the question of any prejudice to other parties, and the general public, is always relevant. Where, as in the present case, the Environment Court came to be considering the matter on a materially different basis

from that to which the Council exposed itself, the matter could proceed on the wider basis only with the Council's consent and then only if the Court was satisfied that other persons and the public were not prejudiced. In the present case, the Council had good reason to oppose the wider basis for the appeal and the matter should not have proceeded in those terms at all. In consequence, the decision of the Environment Court was on a materially different basis which prejudiced the Council and cannot stand."

- 2.31** The High Court in *Atkins v Napier City Council* CIV 2008-441-000564, (Wild J) has very recently reviewed the case law on the jurisdiction to make amendments to a proposal from what was notified:

"[19] Ms Blomfield submitted that misapplied the appropriate test. She submitted that the correct legal test is whether there are potential submitters who might have been concerned about aspects of the application but who were not alerted to the full scale of the application by virtue of the omissions in the AEE and/or the application.

[20] ... whether the activity for which resource consent is sought, as ultimately proposed to the consent authority, is significantly different in its scope or ambit from that originally applied for and notified (if notification was required) in terms of:

- The scale or intensity of the proposed activity, or*
- The altered character or effects/impacts of the proposal.*

[21] Whether there might have been other submitters, had the activity as ultimately proposed to the consent authority been that applied for and notified, is a means of applying or answering the test. But it is not the test itself.

[50] When such 'modification' is sought by an applicant and/or proposed by a consent authority, the test remains as I outlined it in [20]. ..."

- 2.32** We now apply the test from *Atkins*.

- 2.33** There was some debate as to whether the test is to be applied to each application before us or to the proposal overall. We think that the answer is probably that it needs to be applied to both. However, in determining the scope of the original application, the starting point is the wording of the particular applications and Notices of Requirement and the AEE supporting those. The applicant's evidence at the hearing to date is not determinative of jurisdiction, since that does not define the extent of the applications.

Would a scheme without the reservoir be significantly different in terms of scale or intensity of the proposed activity or adverse effects from what was originally notified?

- 2.34** In our view it is likely that the scale and intensity of the overall proposed activity (the proposal) will be significantly less than what was applied for.

- 2.35** We agree with Ms Rutledge for the Department of Conservation, that the focus should be on the sustainability of the proposal. A run of the river scheme may not be as efficient or as productive as a storage scheme, but on the other hand it may well have significantly less adverse effects on the environment. However these are not matters we can determine now. We think that it is improbable that we will find that a scaled back proposal achieves the purpose and principles of the Act any less than the original proposal. Indeed we think that it is almost inevitable that the converse will be the case. Efficiency is but one Part 2 matter and ranks behind section 5 and 6 matters. We have no doubt that a scheme without the dam will better achieve section 6 of the Act and may also be more sustainable overall than a scheme with the dam. Certainly we are not in a position without hearing further evidence of being able to conclude that the amended proposal (whatever it may be) will inevitably be less sustainable.
- 2.36** We are also of the view that the scale and intensity of each of the proposed activities is likely to be less than what was applied for. However, a final decision on that can not be made until we have heard the evidence and determined possible conditions if we were to grant consent.
- 2.37** For our present purposes, we think that it is inevitable that the amended proposal will have **less adverse effects** than what was applied for, on the following and other matters:
- Social, economic and amenity impacts on the Coalgate and Waianiwaniwa Valley communities.
 - Protection of significant habitats of indigenous fauna (in particular mud fish habitat).
 - Protection of areas of significant indigenous vegetation in the Valley.
 - Natural character and landscape values of the Waimakariri river around the proposed upper intake.
 - The rates, volumes and durations of take from the Waimakariri and Rakaia river (particularly in winter).
 - The discharge of nutrients and contaminants to ground water, and surface water.
 - Ground water mounding and associated lowland drainage issues.
- 2.38** It is difficult to envisage which of the activities applied for might have greater adverse effects with an amended proposal. We can not think of any activities where the overall effect of the activity would **inevitably** be greater (even if some discrete effects would be greater). However, we will need to determine that after hearing the further evidence from CPW and from submitters and officers in response.
- 2.39** Counsel for submitters opposed to us continuing gave various examples of activities which might have greater effects. It was suggested that a run of the river scheme would require greater rates and volumes of take during the irrigation season than would a storage scheme. However the applicant is proposing to

reduce the maximum rate of take from 40 cumecs to 25 cumecs for at least the Waimakariri river and it is likely to need significantly less winter water from both rivers if it has no storage dam.

- 2.40** Even if CPW sought to take at greater rates during some days of irrigation water demand, it is open to us to limit those rates through conditions. Given that, we think it highly unlikely that the overall impacts on the instream values of either river will be greater with a run of the river scheme than a storage scheme. They are likely to be less and that is one of the reasons why we have rejected the Waianiwiwa storage option.
- 2.41** Arawa Canoe Club submitted that it was possible that the amended take regime for the Waimakariri with a run of the river scheme would be less generous to kayakers than what has been proposed to date. However, the comparison is with what was originally proposed, not what was proposed during the hearing.
- 2.42** In any event, **if** we decide to grant consent, a key determinant of the take regime will be instream needs. We must ensure that the take is sustainable. We must also ensure that the takes have no greater effects than what was originally proposed and will do so **if** we get to that point.
- 2.43** Another example that was given is that a scaled down scheme will have less benefit for flows in the Selwyn River. Even if this is so, we regard that as a reduced positive effect rather than a greater adverse effect. This was a positive effect promoted by CPW as offsetting the negative impacts of increased nutrients. Our focus should be on the *overall effects* of the proposed use of water. The scaled back proposal will also result in less pollution of these waterways. The overall adverse impact on the streams is unlikely to be more significant than the original proposal (and certainly will not inevitably be so).
- 2.44** It was also suggested that the benefits advanced by the applicant in terms of reduced demand for groundwater takes would be diminished. Again this is a reduced positive benefit rather than a greater adverse effect.
- 2.45** We do accept that it is possible that the efficiency of the scheme may be diminished by the loss of storage. That depends upon how efficiency is gauged and that can only be judged once we have the relevant evidence. Whilst the scheme may be less productive, it will also be considerably less expensive. We are not in a position to pre-judge the impact of the change. In any event we do not consider a reduction in economic benefit or in economic efficiency (if there is such) to be an increased adverse effect as compared to what was applied for.
- 2.46** There were concerns regarding other effects, however, these all seemed to be effects which will be no worse without the reservoir than with it. For example, the Bulls will be affected in no greater way by the lower intake and the headrace, than would be the case under the current proposal.
- 2.47** In summary, we have concluded that there is no activity which will inevitably have greater overall adverse effects under the modified proposal than the original proposal.

Would a scheme without the reservoir be significantly different in terms of the character of the proposed activity from what was originally notified?

- 2.48 This issue is potentially more problematic. CPW says that the character of the proposal will not change with the deletion of the reservoir. The opposing submitters say that the scheme will change from being a "water enhancement" or storage scheme to being a run of the river scheme.
- 2.49 Our starting point is the applications as notified. (We have not gone back to the AEE.) We set out the most relevant parts of the notification document.

*The following applications relate to activities associated with the construction and **operation of a proposed irrigation and water enhancement scheme** on the Central Canterbury Plains between the Rakaia River and Waimakariri River. **The proposal involves the abstraction of water from the Rakaia and Waimakariri Rivers, and the use of that water for irrigation of approximately 60,000 hectares of land.** Construction and maintenance activities will be required to install, use and maintain water intakes on the Rakaia River and Waimakariri River; to construct, use and maintain a dam and reservoir in the Waianiwaniwa Valley for water storage; and to construct, use and maintain a water race distribution network.*

The application to take water from the Rakaia River is jointly made by Central Plains Water Trust and Ashburton Community Water Trust.

*CRC061972 - To take and use water from the Waimakariri River at a maximum rate of 40 cubic metres per second via the upper Waimakariri water intake system and the lower Waimakariri water intake system, **for the purposes of irrigation of up to 60,000 hectares of land within the Scheme Area, for water storage, and for ancillary purposes associated with the operation of the Central Plains Water Enhancement Scheme.***

- 2.50 None of the proposed activities with the possible exception of the use of water will be any different in character from what was proposed. The applications for use of water were **for the purposes of irrigating up to 60,000 hectares of land within the Scheme Area, for water storage, and for ancillary purposes associated with the operation of the Central Plains Water Enhancement Scheme.**
- 2.51 Our interpretation of this was that the primary purpose was for irrigation of "up to" 60,000 hectares and that an additional purpose was for water storage. The amended proposal may well involve water storage whether by way of on farm storage, a new artificial storage facility elsewhere, or use of Lake Coleridge. The application itself did not specify that the use of water for irrigation was only to be in the context of a storage scheme. Nor did it specify that the storage must be at Waianiwaniwa. That was the location applied for, but the take and use applications were not tied to that location. There are other potential means of providing for storage.
- 2.52 We have not gone back to the wording of the AEE, but no submitter pointed us to any passage in the AEE which could be taken as limiting the taking or use of water to a storage scheme. Certainly the storage component was described and was heavily relied upon as providing the desired reliability, however we do not recall it being described in the AEE as an indispensable component. On our interpretation, this is a component of the take and use applications which could be abandoned by the applicant at any time. However, as noted above, the

amended scheme is likely to still have some storage component in it. Accordingly, we do not think that the character of these applications has changed. Storage can be achieved in a number of different ways.

- 2.53** Turning then to the character of the overall proposal. CPW has made much of the benefits of the proposed storage and has described its proposal as being for "water enhancement". *"The Central Plains Water Enhancement Scheme' refers to the entire infrastructure associated with the taking and distribution of water."*
- 2.54** We can see some merit in the submissions suggesting that a run of the river scheme is different in character from a storage scheme. However, on balance we have concluded that the amended proposal would not be *significantly different* from the character of the overall proposal.
- 2.55** We agree with Mr Casey that the key characteristic of this proposal is and remains to take water from the river and to "enhance" its value by making it available for irrigation. The loss of the reservoir (unless replaced by similar sized storage) would mean a loss in reliability for the scheme and/or a down scaling of the command area. Thus the degree of enhancement would be reduced but the character of the proposal would not be significantly different.

Prejudice to potential submitters

- 2.56** As the Court said in *Atkins*.... *Whether there might have been other submitters, had the activity as ultimately proposed to the consent authority been that applied for and notified, is a means of applying or answering the test. But it is not the test itself.*
- 2.57** There are thousands of submissions in opposition to the scheme and no stone has been left unturned by submitters. It is difficult to envisage that there are any persons who are affected by the scheme (as opposed to those who are interested in it) who would have submitted in opposition, had they appreciated that the scheme might not include the upper intake, tunnel, dam and reservoir.
- 2.58** In our view potential submitters would have or should have appreciated that it was possible that the applicant could withdraw components or that proposal components might not be approved.
- 2.59** In any event we think that the case law suggests that the key issue is not whether others may have submitted, but whether any person who has not submitted might have been more adversely affected by the reduced proposal than by the original proposal. We doubt that this is the case. In any event we will be considering all relevant impacts of the amended proposal as will the Environment Court if there are appeals. Any who are affected greater than the public generally are entitled to join any appeal.

All or nothing?

- 2.60** Some submitters suggested that case law suggests that we must decide the matter on an all or nothing basis, at least where the applicant has presented its evidence on that basis.

- 2.61 The argument is well summarised in the submissions on behalf of Forest and Bird.

The Environment Court in Outstanding Landscape Protection Society Incorporated v Hastings District Council (W024/047) considered the possibility of declining part of a 37-turbine windfarm application by Unison Networks Limited. The application had been stated as being for 'up to 37 turbines', but the Court held that it could not grant consent for a lesser number of turbines, as all the evidence related to the full 37:

*We considered the possibility of declining part of the proposal – those turbines within the equivalent length of the Waka (ie roughly 1.8km) south of the Waka sternpost (see para [49]). But the proposal is for the layout of 37 turbines and that is what the evidence related to. **We have no evidence as to the effects of a major change on the viability, layout and practicability of what would remain of the project, or whether a more extensive project extending to the south might be preferred by the applicants.** Nor do we have evidence about the acceptability of the different landscape, cultural and other effects from such an altered proposal. **While relocating some turbines or even eliminating a few might fall within the ambit of this hearing it is not open for us to embark on a major redesign of the project. Redesign of the project would need to be undertaken by Unison and fresh applications made.** (Emphasis added)*

Unison appealed this to the High Court, where in decision Unison Networks Limited v Hastings District Council CIV-2007-485-896 Potter J affirmed the Environment Court's decision:

[103] *Unison contends that the Environment Court erred in law in finding the Court was not able to approve a "reduced proposal" when such a finding was available on the evidence.*

[104] *The Court held at [117]: (see above)*

[105] ***The Court did not decide that it was not open to it to approve a reduced proposal. Rather it held that the proposal before it was for 37 turbines, which was the proposal addressed in evidence.** The Court did not consider it had before it the evidence to determine an altered or reduced proposal, and that it was not open for it to embark upon a major redesign of the project.*

[106] ***That conclusion was clearly open to the Court. The Court was not presented with a reduced proposal by Unison.** The proposal had focused on 37 turbines and that was the proposal the evidence addressed. The Court simply considered and rejected a modified proposal on the basis that there was insufficient evidence for it to determine a reduced proposal.*

Similarly in this case, as the evidence was presented for a comprehensive, integrated project, the Applicant should not now be allowed to 'embark on major redesign'. The evidence was presented, and the hearing was conducted, on the basis of a comprehensive project.

Two other cases on this issue are noted in the Applicant's Memorandum at paragraphs 20-21, namely *Motorimu Wind Farm Ltd v Palmerston North City Council (W067/08)* ('Motorimu') and *Te Maru o Ngati Rangiwewehi v Bay of Plenty Regional Council (A095/08)* ('Te Maru').

Motorimu

In Motorimu the Environment Court granted consent to a further 5 turbines, of the 38 that were in dispute in those appeal proceedings. Similarly the Council had granted consent to a lesser number of turbines than was originally applied for, in that some of the turbines were considered 'adversely prominent' (Council Decision paragraph 8.10, quoted at paragraph 25 of Motorimu).

*At the Environment Court, the applicants presented their landscape evidence on the basis of groupings of turbines, and the Court considered those groupings separately. Aside from the applicant's assertions that it would not go ahead with the proposal if all turbines were not consented, there was no logistical reason that made it difficult for the Court to decline some of those turbine groupings. The groupings were not dependent on each other in any material way, and could easily operate with a lesser total number of turbines. Similarly, the Council granted consent only to those turbines that would not have significant adverse landscape effects. This did not affect the operation of the consented turbines, and **the Hearings Commissioners clearly already had sufficient evidence before them to distinguish between the effects of unrelated parts of a proposal (as compared with the evidence before the Court in the Unison case, which was presented was on the basis of one complete set of turbines).***

*Here the Commissioners have been presented with a comprehensive project, with complex and inter-related components. Declining a major part of that project will necessitate further detailed evidence and analysis, involving significant expense and delay for all parties. This is not a simple case of taking out groupings of unrelated turbines from a windfarm. While the evidence in this case related to the component parts of the scheme, **the scheme was presented as an inter-related whole, the components of which would be quite different if core parts were removed from the scheme.***

Te Maru

In Te Maru the Court granted consent to the Rotorua District Council to take and use water from springs which were sacred to tangata whenua. The Court found that the continued taking of that water caused significant cultural adverse effects, and allowed the Council

a lesser amount and shorter consent term than what had been applied for.

*Like the removal of groupings of unrelated turbines in Motorimu, the reduction of water quantity allowed to be taken did not require any change to the Council's evidence, or mean that the subject of the consent application was materially altered. All it meant was that the Council could take less water than it wanted (which in any case was an increase from what had previously been taken). **A reduction in requested water take (especially where that is in fact an increase in water taken) cannot be said to be the same as removing a core part of a large-scale scheme such as CPW, changing it from a water storage scheme to a run-of-river one. This may have quite different effects, indeed the mere fact that the Applicant will have to produce further evidence as to the effects, suggests that this scheme is quite different from a simple reduction in water take as in Te Maru.***

Conclusions from case law

While Motorimu and Te Maru support the proposition that 'the greater includes the lesser', in this case there is no certainty that the effects of a major change in the project from one based principally on water storage to a run-of-river scheme will necessarily be lesser in all respects. In those cases, approving a reduced consent was a simple matter. In Motorimu this was because the turbines had been described in groupings - it was clear what the effects of each grouping would be, and the groupings did not relate to each other in any significant way. Similarly, in Te Maru the granting of a lesser amount of water for a shorter time did not make a material difference to the operation of that water take.

- 2.62** With respect, we do not think that this case law establishes any legal principle. As Justice Potter pointed out the Court in that case ... "*did not decide that it was not open to it to approve a reduced proposal. Rather it held that the proposal before it was for 37 turbines, which was the proposal addressed in evidence.*" In other words, there was no point of law involved. Each case must be decided on its own facts. If a matter has been presented in the Environment Court on an all or nothing basis and where the Court has *no evidence as to the effects of a major change on the viability, layout and practicability of what would remain of the project, or whether a more extensive project extending to the south might be preferred by the applicants*, then it is likely that the Court will find that it does not have sufficient evidence to approve a reduced proposal.
- 2.63** The issue in the present case is an entirely different issue. Here we are considering whether the applicant should be given the opportunity to provide the type of evidence that was not provided to the Court in the *Outstanding Landscape Protection Society* case.
- 2.64** We agree with Mr Casey and Mr Rogers that '*the greater includes the lesser*'. It must usually be open to an applicant to delete components of its proposal at any time before the close of a first instance hearing or between the issuing of a first instance decision and preparation for an Environment Court appeal.

- 2.65 The upper intake and the tunnel were always potentially sacrificial depending upon our, or the Environment Court's final decision. Whilst the applicant is unlikely to have deleted the reservoir of its own volition, we do not see anything in the applications which would prevent us doing so in response to the issues raised by submitters. Furthermore, it must always have been open for CPW to abandon this aspect of its scheme if we recommended that and if we declined the relevant consents. It would be strange indeed if CPW was forced into appealing our decision on an all or nothing basis. It must be open for it to decide which aspects of its proposal it wishes to pursue if it decides to appeal our final decision.

The holistic approach

- 2.66 This argument is also summarised in the submissions for Fish and Game.

*Section 103 requires you to hear the applications together unless you are of the opinion that the applications are "sufficiently unrelated". This provision links back into section 91, and reflects the underlying principle (established in AFFCO) that good resource management practice requires that in general, all resource consents required should be carefully identified from the outset **and applications made so they may be considered together or, at least, in circumstances where one application informs the others.***

The provisions of the RMA provide for public participation in the resource consent process as an integral aspect of the statutory scheme, and section 91 together with section 103 ensure that this participation is effective and meaningful.

*The underlying rationale is that related applications must be heard together. It must logically follow in terms of section 103 that **you cannot then issue a decision separately on some aspects of an application ahead of others.** This reflects the core principle of integrated management.*

The Applicant has also emphasised the majority judgment of the Court of Appeal in the Central Plains v Ngai Tahu litigation as providing support for its argument. That case concerns the procedural issue of priority. It is not authority for the proposition that you can make the substantive decision to grant consent to take water in isolation from other consents required for the CPW Scheme.

- 2.67 Section 103 provides that:

"(1) Where 2 or more applications for resource consents in relation to the same proposal have been made to a consent authority, and that consent authority has decided to hear the applications, the consent authority shall **hear and decide** those applications together **unless** –

- (a) **the consent authority is of the opinion that the applications are sufficiently unrelated so that it is unnecessary to hear and decide the applications together; and**

(b) the applicant agrees that a combined hearing need not be held."

- 2.68** In the present instance we do not consider that...the applications and notices of requirement in respect of the dam and reservoir *are sufficiently unrelated so that it is unnecessary to hear and **decide the applications together.***
- 2.69** Accordingly, we will not be issuing a final decision on the reservoir until we issue our decision on other components of the scheme. We do not however see any barrier to us indicating what our decision on the reservoir will be, prior to that. In our view this will be useful both for submitters and CPW. So far as affected landowners and the residents of Coalgate are concerned, this course will be most beneficial if CPW can provide them with an assurance that it will accept the recommendation. However, that is a matter for CPW once it receives our Minute with our reasoning for our conclusions on this matter.
- 2.70** Returning to the submissions, by hearing all related matters together and deciding at least the key components together, sections 91 and 103 are met, which is the good practice referred to in the *Affco* decision. We do not necessarily agree that we are barred from issuing a decision/recommendation on some components ahead of others, however since submitters are of that view we have decided that the safest course is that we do not split our decision.
- 2.71** We do not accept the implication in some submissions that the *Affco* principle requires us to either grant all approvals or decline all. There is no barrier to us approving some aspects of the project but declining others.
- 2.72** Ms Crawford submitted that....*Regardless of whether the Court of Appeal's judgment ultimately stands, you still need to decide on the entire package of applications required in relation to this scheme. It would be an artificial exercise, and inconsistent with integrated management, to do otherwise.*
- 2.73** We are not entirely convinced that we could not ultimately separate out some applications from the others and deal with them differently or perhaps "park" them pending further information. However that is a question for later not for now.
- 2.74** Finally we note that if it transpires that further application may be made by CPW for additional storage or other matters, that of itself is not a reason for us to decline to continue to hear further evidence on the existing scheme. (Section 91 does not apply unless further applications are "required".)

How can we be satisfied that the proposed takes are no more than what is reasonably required?

- 2.75** Ms Crawford for Fish and Game also submitted that:

Rule 5.1 of the WRRP includes a wide range of matters relevant to the exercise of your discretion. Importantly, this includes the reasonable need for the quantities of water sought. Similar terminology is found in the NRRP. That, in my submission, is determinative of whether it is possible to proceed to grant some, but not all, of the consents for this project. It is necessary for you to be satisfied that the water to be taken is no more than required. To do this, you need to consider the CPW Scheme as an integrated package, having regard to the suite of applications before you.

- 2.76** We agree that CPW will need to satisfy us that the take regimes it seeks for both rivers will take no more water at any time than it reasonably requires. Clearly the rates and volumes of takes will be less without a large scale storage facility. CPW has indicated that it wishes to present revised take regimes to us and to provide a revised justification for those proposed regimes. We can see no reason why it should not be provided with the opportunity to do.
- 2.77** We do not necessarily agree with Ms Crawford that this requires us to consider all aspects of the proposal together, however, clearly we do need to consider the take and use together. Whether we could grant the takes without the use is not a question which arises now. It may arise if we are not satisfied regarding the applicant's proposals to mitigate the effects of nutrient enrichment and ground water mounding.
- 2.78** We also asked how we could determine reasonable need if there is still uncertainty at the close of the hearing as to irrigable area and if there are other applications which may be made in the future. (In particular, applications for further storage and/or for winter groundwater recharge.) Mr Casey suggested that this could be dealt with by granting consents for winter take but subject to a section 128 review to bring them into line with whatever use consents are ultimately obtained. Another option may be to only grant consent for clearly established need, leaving CPW to come back with top up applications or variations later.
- 2.79** In any event this is not a matter which needs to be determined now. We have decided that CPW should be provided with the opportunity to provide further evidence regarding its proposed take regimes and "*the reasonable need for the quantities of water sought*", in the context of a scheme without large scale storage.
- 2.80** So far as CPW may eventually pursue other storage options (for example Lake Coleridge or groundwater storage) we can not consider those in the context of this hearing as consents have not yet been sought.

Would continuance be appropriate and fair in the circumstances?

- 2.81** We are required to establish a procedure which is appropriate and fair in the circumstances of this particular hearing. We are also required to avoid undue delay. Although we have spent much time on the legal issues discussed earlier, these associated requirements are the primary guide to the exercise of our discretion.
- 2.82** We have concluded that allowing CPW to present further evidence and submitters and officers to respond to that, is appropriate and fair in the circumstances. We are also satisfied that the 4 to 6 month delay that this will cause in relation to our final decision is not an "*undue delay*" in the context of a very complex scheme which has been years in the gestation and already over a year in hearing. We now briefly address each of the fairness/prejudice issues raised by CPW and submitters.

Efficiency of process and fairness to the applicant

- 2.83** In our view, it is appropriate and efficient in terms of the RMA and fair to CPW that it be provided with an opportunity to provide evidence regarding a scheme

without the reservoir component and the consequences of that in terms of changes to the nature of other components and their effects.

- 2.84** This matter has been years getting to this point. We have already sat for nearly 60 days and have heard from hundreds of witnesses. CPW says that it will still be able to establish a reasonable need for a lesser volume of water and wishes to present evidence on that and on a reduced take regime. It also wishes to present evidence on the sustainability and effects of a scaled down scheme. In our view it would be an inefficient use of public resources and unfair to the CPW and its shareholders to refuse to hear its further evidence.

Appropriate to continue the first instance process

- 2.85** If we adopt the course urged on us by submitters it is possible that CPW would appeal but may accept our recommendation to modify the Notices of Requirement. In that event, appellants would have to deal with a modified proposal on appeal which is different from what we have considered. In our view that is undesirable and would be unfair on submitters.

- 2.86** In that event there would have been no first instance review of the sustainability of a scheme without the reservoir. We believe that it is in the best interests of all parties that the panel who has heard the voluminous evidence to date, continues to hear and decide on the amended scheme. Whilst it is a slow process, the current hearing does provide submitters with a greater opportunity to be heard in an informal setting than does the Environment Court. We are also able to run the hearing more in the mode of an Inquiry and that has allowed us to absorb many days and gigabytes of information. It seems to us that it would run counter to the notion of local decision making for us to refuse to consider a reduced scale scheme.

- 2.87** The alternative scenario is that CPW may abandon its current scheme and reapply for a downsized scheme without large scale storage (and that is what some submitters suggest should happen.) If CPW or some other entity does that, it seems highly likely that the same or very similar issues would end up being debated again in a few years time that may well be by another panel, who would have to hear all of the evidence all over again. We do not think that that would be an efficient use of the RMA process, and would potentially put some of the current submitters through a full hearings process all over again. We think it unlikely that declining consent in full would mean the end of irrigation schemes being proposed for the central plains.

- 2.88** Having got this far, we consider that it is appropriate and fair that CPW be given the opportunity to try and persuade us that it should still be granted the approvals it seeks, other than the reservoir, upper intake and tunnel. It is up to it to make a call as to whether to appeal our recommendation on that point, withdraw entirely and start again, or ask us to continue. It has decided on the latter course and we have not been persuaded that there is any good reason to reject that request. It is well aware of the risk that we still may not be persuaded to approve the scheme.

Undue delay?

- 2.89** Whilst we are painfully aware that people want a decision on this proposal, we have concluded that another 4 to 6 months delay to our decision is not "undue" and will not greatly prejudice any person. This delay is relatively minor in terms of

the scale of the project, the time and money spent on it to date and the significant time and resources which have already gone into this hearing and preparation for it.

- 2.90** If we were to proceed to decline all aspects of the CPW scheme, we would not be able to get our decision out until August. (The decision on the Ashburton Community Water Trust applications has taken much more time and effort than we had envisaged. The current debate has also slowed progress on decision writing.)
- 2.91** As discussed below, we have decided to release a Minute in the next few weeks detailing our reasoning on the components which we have said we will not be approving. We will resume the hearing in early October for hopefully no more than a week. We would hope to get a decision out by the end of February 2010. Accordingly, the delay in our decision will be about 6 months from what it would have been if we do not resume. We can continue to make progress on writing up some aspects of our decision between now and October and that may allow us to issue at least an interim decision before Christmas. As previously signalled, we would need to resume the hearing (again) if we grant consents, so as to finalise conditions. If we reach that point, that process would take some further months.

Planning blight and uncertainty for affected persons

- 2.92** We accept that a further 6 months of uncertainty for those who are directly affected is undesirable. However, in the context of the length of time the Notices of Requirement have already been in place, the further delay will not cause any undue prejudice. We also note that appeals or further applications are likely in any event whatever our decision.
- 2.93** So far as those affected by the Headrace and lower intake are concerned, there will be little if any change to the project and those persons will have continued uncertainty. However, we note that there is a relatively small number of affected persons who have submitted in opposition to the headrace. There is at least one landowner (Ms McKenzie) who has been unable to sell her affected property. We urge CPW to address this matter rather than leave Ms McKenzie to pursue a remedy under section 185 of the Act.
- 2.94** So far as those who are affected by the dam, the reservoir, the upper intake and the associated components are concerned, there is a possibility that they will have certainty of outcome much sooner than would have otherwise been the case. CPW has indicated that once it receives our reasoning on these components, it will give consideration to withdrawing these or providing assurances that it will do so. If we simply decline the whole project, a possible outcome is that CPW would appeal all aspects of our decision and there would be continued uncertainty and restrictions for some years to come.
- 2.95** It is up to CPW as to how it responds to our indications on the reservoir and upper intake. However, we would urge it to inform affected landowners and the public as soon as possible whether it intends to accept our recommendation and decision on the reservoir, or whether it still wishes to keep this option open. As discussed earlier, it probably can not formally withdraw the dam and reservoir components until we issue our final recommendation/decision.
- 2.96** If CPW does not indicate that it accepts our recommendations on this matter then we will still proceed on the basis of a scheme without these components. We

would also need to put more effort into addressing our reasons in our final decision.

- 2.97** In passing, we note that CPW's rather belated undertaking not to use the compulsory acquisition provisions of the Public Works Act in relation to these components will not influence our views on these components. That is an offer which would have needed to have been put on the table before now. However, in any event, our conclusions on this matter are based on the totality of effects and this offer would not have swung the balance in favour of the dam and reservoir.

Unfairness to submitters

- 2.98** The requirement of the Act? is to establish a procedure which is fair in the circumstances. In our view, provided that all submitters have an opportunity to assess and respond to CPW's further evidence this is a fair and appropriate procedure. We have addressed the question of delay above.

- 2.99** A number of submitters were unhappy that CPW has already made significant modifications to its proposal during the course of the hearing and is now being provided with an opportunity to further modify it. It is correct to say that we have provided CPW with a reasonably wide degree of latitude to refine its proposal during the course of the hearing. Indeed we have encouraged some amendments including the current one. There is some room for criticism that some aspects of the initial proposal were not as well developed as might have been expected. (Indeed some would say that there are still aspects which fit into that category.) However we think that it is inevitable with a project of this scale that it will be modified during the consent, appeal and final design stages.

- 2.100** We will ultimately have to make a decision as to whether we are satisfied that we have sufficient information and sufficiently developed conditions to be able to grant consents. However, the current debate is somewhat different. It is us, not CPW, who have suggested that certain components should be abandoned. CPW can not be criticised for supporting its own applications to date, but now revising its position in light of our indications.

- 2.101** We also note that most, if not all, of the amendments made by CPW to date are amendments aimed at responding to issues raised by submitters and/or the panel. We believe that this sort of adaptation during the course of a first instance hearing is not necessarily to be discouraged.

- 2.102** Having said that, we do acknowledge that changes to the take regime in particular have given rise to additional cost and inconvenience to submitters such as the recreational users. Nevertheless, we are of the view that the evolving take regime on the Waimakariri will, if we grant consent, be rather more sustainable than what was originally proposed. The further amendments, which CPW has signalled it will propose in response to the reduction in storage, will move even closer to and **may possibly** achieve sustainable management of the water resource.

- 2.103** We note that if we were to grant consents, any submitter aggrieved with our decision has a right to appeal or to participate at an appeal hearing. Our continuance will not interfere with that.

- 2.104** It was suggested to us that there may be some submitters whose submission would have been wider, if they had appreciated that the proposal would not

include large scale storage and would be run of river. In our view, any submitters who were potentially affected by the proposal should have been aware that it was a possibility that we might approve some aspects and not others, or that CPW might abandon some components. If particular submitters consider that the proposal will have greater adverse effects on them then we will allow them to be heard on that.

- 2.105** We do not accept that this course of action will prejudice submitters. There have been a huge number of submissions and all issues have been covered by most submitters. Most submitters in opposition have sought that the scheme be rejected in its entirety. They will be able to pursue that relief on appeal if they wish. Any person who is affected in a manner greater than the public generally may join in whatever appeals may result. Accordingly, we do not believe that a decision which might potentially grant some components without others would limit appeal rights.

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

Philip Milne Chair
on behalf of the panel.

19 May 2009